FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 15, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of SAMUEL KNOTTS,	:	
	:	Docket No. WEVA 94-357-D
v.	:	
TANGLEWOOD ENERGY, INC., FERN COVE, INC., RANDY BURKE and RANDALL KEY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves challenges to decisions by Administrative Law Judge Roy J. Maurer. After an evidentiary hearing, the judge issued his decision on liability in favor of complainant Samuel Knotts. 17 FMSHRC 1044 (June 1995) (ALJ). Subsequently, the judge issued his decision on damages. 17 FMSHRC 1667 (September 1995) (ALJ). Tanglewood Energy, Inc. ("Tanglewood") filed a petition for discretionary review of the judge's finding that Tanglewood[2] violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c), and his holding that both the corporate and individual respondents are jointly and severally liable. The Secretary of Labor filed a petition for discretionary review of the remedy and the civil penalty assessed. The Commission granted both petitions. For the reasons that follow, we affirm the liability ruling, reverse the judge's deduction of unemployment compensation from the backpay award, and vacate and remand the penalty determination.

---

[1] Commissioner Verheggen assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.

[2] The Secretary also charged Fern Cove, Inc. ("Fern Cove"), a successor in interest to Tanglewood, Randy Burke (President of Fern Cove and Tanglewood) and Randall Key (part owner and officer of Fern Cove and Vice President of Tanglewood). We refer to all of these respondents as "Tanglewood."

I.

Factual and Procedural Background

At the time of his discharge on January 28, 1994, Samuel Knotts had been employed by Tanglewood for approximately three years as an "outside man." Tr. I 137.[3] Knotts' duties as an outside man included loading trucks, stockpiling coal, sweeping the men's dressing rooms, ordering supplies, watching the belts to ensure they were running, checking the mantrips, answering questions from visitors to the mine and performing mechanical work on equipment. 17 FMSHRC at 1053; Tr. I 138.

During the time he worked at the mine, Knotts communicated information about safety violations at the site to state and local inspectors. 17 FMSHRC at 1046-1048. Mine management was aware of Knotts' actions. *Id.* at 1048; Tr. I 41.

On September 1, 1993, Knotts testified on behalf of the Secretary in the case of *Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.,* 15 FMSHRC 2401, 2411 (November 1993) (ALJ). 17 FMSHRC at 1048. Knotts' testimony was specifically cited by the administrative law judge in that case to support his finding of discrimination. 15 FMSHRC at 2411. On January 25, 1994, the administrative law judge in the *Poddey* case issued his decision on damages. 17 FMSHRC at 1048.

On January 27, 1994, Randy Campbell, a representative of the mine landowner, arrived at the mine office to investigate conditions in order to submit a productivity report to the landowner. *Id.* at 1049. Knotts attempted to secure Campbell a ride underground but was told there was no transportation available for this purpose. Tr. I 102, 103, 105. Campbell then spoke by telephone with Randall Key, vice president of Tanglewood, who at the time was working underground. Tr. I 106. After his telephone conversation with Key, Campbell remained in the mine office and asked Knotts questions about the mine. Tr. I 106-07. Key was able to listen to this conversation from underground, via the telephone. Tr. II 130.

During the conversation, Campbell and Knotts discussed the general condition of the belts, problems with production, the amount of downtime, equipment problems and morale at the mine. Tr. I 111. They also discussed the ram cars, the mine vacation policy, bypassed components on mantrips, previous safety violations at the mine, and the purchase of a new truck by Randy Burke, Tanglewood's president. 17 FMSHRC at 1049. The judge found that the conversation could have lasted as long as 1 hour and 30 minutes. *Id.* at 1050.

[3] References to "Tr. I" are to the January 19, 1995 transcript; references to "Tr. II" are to the January 20, 1995 transcript.

The next morning, Key called Knotts into the mine office and discharged him. Tr. I 164-167, 260. Knotts testified that, prior to discharging him, Key stated, "[w]e have suspected for a long time that you've been telling them what is going on." Tr. 164. Key maintains he fired Knotts because he sat in the office for two hours and talked to Campbell, instead of doing his work. Tr. II 140. Key's testimony indicates that he was also upset about Knotts' statements criticizing mine management. Tr. II 131, 133, 138.

Knotts filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"), which determined that Knotts had been discriminated against in violation of section 105(c) of the Mine Act. The Secretary then filed a complaint of discrimination with the Commission.

The judge determined that Tanglewood violated section 105(c) by discharging Knotts. 17 FMSHRC at 1054. He concluded that Knotts had engaged in protected activity and that his discharge was motivated at least in part by his protected activity. *Id.* at 1051-54. He found that Tanglewood did not meet its burden of proving its affirmative defense by showing that it would have taken the adverse action in any event. *Id.* at 1054. He rejected Tanglewood's argument that it fired Knotts for talking to Campbell for a long period of time instead of doing his job, concluding that Knotts was "essentially doing his job" during the conversation. *Id.* at 1053. He did not accept Tanglewood's contention that Knotts was fired due to the critical nature of his comments because, according to the judge, "in the context of the coal mining industry this was pretty mild stuff." *Id.*

With respect to the remedy, the judge found Tanglewood, Fern Cove, Burke and Key jointly and severally liable. 17 FMSHRC at 1667. He awarded Knotts $20,760 in backpay, and ordered that $3,640 Knotts received in state unemployment benefits be deducted from that amount. *Id.* He assessed a civil penalty of $1,000 against the respondents, although the Secretary had sought a penalty of $25,000. *Id.* at 1668. The judge based his penalty assessment in part on his conclusion that this was "a relatively close 'mixed-motives' case." *Id.* He also noted that the mine was experiencing serious financial difficulties including several hundred thousand dollars in civil penalties that it had not paid. *Id.* He suggested that the backpay award to Knotts would serve as a disincentive against future discrimination violations. *Id.*

II.

Disposition

Tanglewood argues that it took no adverse action against Knotts for cooperating with mine inspectors, or for being a witness in the *Poddey* case, noting that these events occurred well before the discharge. T. Reply Br. at 2. Tanglewood asserts that it had perceived Knotts' testimony as neutral, not adverse to the company. *Id.* It argues that Knotts' conversation with Campbell was not protected activity, because the discussion was either "production related, or of a gossiping nature." T. Br. at 7. Tanglewood insists that it would have taken the adverse action in any event for Knotts' unprotected activity alone, and that the duration and content of the conversation warranted his termination. *Id.* at 12. Tanglewood contends that Knotts was not doing his job during the lengthy conversation with Campbell. T. Reply Br. at 4.

As to the penalty issues, Tanglewood contends that individual liability may only be based on section 110(c) of the Mine Act, 30 U.S.C. § 820(c), which provides for civil penalties against certain directors, officers or agents of a corporate operator for knowing violations. T. Br. at 13. Tanglewood argues that, since Burke and Key acted in good faith, they could not have knowingly violated the law. *Id.* With respect to the penalty against Tanglewood, it claims that the judge did not ignore the penalty criteria of section 110(i), 30 U.S.C. § 820(i), and that the penalty was appropriate because of large financial losses experienced by Tanglewood in the last two years of its existence. T. Reply Br. at 7-8. It supports the judge's deduction of unemployment compensation. *Id.* at 8.

The Secretary contends that Knotts made safety complaints to Campbell during their conversation, which suffices to establish that Knotts engaged in protected activity under the Mine Act. S. Br. at 10. He relies on the judge's holding that parts of the conversation containing mildly "inflammatory language" were "an inextricable part of the safety discussion," and did not motivate Knotts' discharge. *Id.* at 14. The Secretary argues that the operator failed to prove its affirmative defense that it would have taken the adverse action in any event for the unprotected activity alone. *Id.* at 11-14.

The Secretary claims that the question of individual liability is not before the Commission because the operator did not raise it before the judge. S. Br. at 14. In the alternative, the Secretary relies on prior Commission cases where joint and several liability for 105(c) violations has been imposed on individual respondents. *Id.* at 15. He argues that it is appropriate to impose liability on Burke and Key because they are president and vice president of the corporate respondents and because they personally made and carried out the decision to fire Knotts. *Id.* at 15-16. The Secretary also contends that the judge failed to consider and properly apply the six statutory penalty criteria of section 110(i) of the Mine Act when he assessed a civil penalty of $1,000 for the violation, and that he improperly reduced Knotts' backpay award by the amount of unemployment compensation he received. *Id.* at 22-29.

A. General principles

A miner alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds,* 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The 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. *Pasula*, 2 FMSHRC at 2799-800. 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 and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp.* v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

B. Liability

1. Protected Activity

The judge's finding that Knotts engaged in protected activity is supported by substantial evidence.[4] Although remote in time from the discharge, it is undisputed that Knotts had previously engaged in protected activity by testifying in *Poddey* and assisting inspectors. His conversation with Campbell was also protected, as it included complaints about unsafe equipment at the mine. Knotts testified that his purpose in telling Campbell about violations at the mine was to make conditions there safer. Tr. I 179-80. The judge found that Knotts was motivated by his belief that Campbell's report to the landowner could positively influence safety at the mine.[5] 17 FMSHRC at 1051. The operator's claim that the discussion was either "production related, or of a gossiping nature," T. Br. at 7, is not supported by the record. Substantial evidence supports the judge's finding that the conversation included the mine's violation history, the condition of the batteries on the ram cars, and the condition of the mantrips. Tr. I 112-113, 179.

Moreover, Knotts met his burden of proving that the discharge was motivated at least in part by his protected activity. Because direct evidence of discriminatory motive is rare, it may be established by circumstantial evidence. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds,* 709 F.2d 86 (D.C. Cir. 1983). Here, Knotts proved discriminatory intent by showing that the operator had full knowledge of his protected activities and that only a short period of time elapsed between the final protected activity (his conversation with Campbell) and the discharge.

[4] The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[5] By making this finding, the judge implicitly held that Knotts met the requirement that a complaint be made "under or related to this Act" in order to come under the protection of section 105(c)(1). That section defines "under or related to this Act" as "*including* a complaint notifying the operator or the operator's agent, or the representative of the miners . . . of an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1) (emphasis supplied). Congress' use of the term "including" indicates that this list of persons to whom complaints may be made is not exclusive. Because we conclude that Campbell, as the representative of the mine owner, was in a position to affect mining operations (Tr. I 97; P. Ex. 7) and, hence, safety, we need not specify here all the different categories of individuals to whom protected complaints may be made. Accordingly, we find that Knotts safety complaints to Campbell were "under or related to" the Act.

2. Affirmative Defense

The intermediate burdens of producing evidence and of persuasion shift to the operator to prove the elements of the affirmative defense that it would have taken the adverse action in any event based on the miner's unprotected activity. *Robinette*, 3 FMSHRC at 818 n.20. The Commission has cautioned that this affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co*., 4 FMSHRC 1935, 1938 (November 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Id.* (citation omitted).

The Commission has articulated ways in which an operator may prove its affirmative defense. These include showing "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." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

Substantial evidence supports the judge's finding that Tanglewood failed to prove its affirmative defense. It offered no evidence of past discipline, prior work record, or personnel practices showing that it would have terminated Knotts regardless of his protected activity. In fact, it admitted that Knotts was "one of the best employees." Tr. II 144. Instead of addressing the *Bradley* criteria, Tanglewood's affirmative defense relies on two other asserted reasons why it would have fired Knotts in any event. First, it contends it would have fired Knotts despite his protected activity because he was neglecting his work during his lengthy conversation with Campbell. We conclude, however, that the judge's finding that Knotts was essentially doing his job during the time he spoke with Campbell is supported by substantial evidence. Knotts' foreman admitted that miners were permitted to answer questions posed by engineers and inspectors. Tr. I 265. At the hearing, Key affirmed his deposition testimony that he wouldn't have fired Knotts for answering questions for 30 minutes. Tr. II 161-164.[6] Moreover, Knotts' job duties included answering questions of visitors such as Campbell, 17 FMSHRC at 1053, and substantial evidence supports the judge's finding that most of Knotts' conversation consisted of "embellished responses to questions put to him by Campbell." *Id.*

Campbell's testimony that he initiated questions to Knotts because Knotts was knowledgeable, Tr. I 107, further supports the judge's finding that Knotts was performing his job duties by speaking with Campbell. The purpose of Campbell's visit was to represent the mineral owners, inspect the mine and to ask questions concerning the production and the manner in which coal was mined. Tr. I 123. His inspection report included information he learned during his conversation with Knotts. Tr. I 117-19. Campbell's testimony indicates that the conversation was business-oriented, and that during the discussion Knotts provided relevant information to the

[6] The operator's contention that Campbell had not posed safety-related questions to Knotts during the conversation is simply not dispositive, as Key testified that Knotts' job duties included answering questions "on things that pertained to the mines," Tr. II 162, not solely those that were safety-related.

landowners' agent, who, according to Burke's testimony, had the right to be at the mine gathering data for his report. Tr. II 80-81.

Tanglewood also asserts that, notwithstanding Knotts' protected activity, it would have fired Knotts in any event for expressing disparaging views about mine management during his conversation with Campbell.[7] PDR at 12-13; Tr. II 135, 138-39. The conversation between Knotts and Campbell contained both protected and unprotected elements. The parts of the conversation that were protected included a discussion of the origin, condition and batteries on the ram cars; the mantrips and the fact that a lot of them were junked or needed substantial repairs; bypassed components on mantrips; and the history of violations at the mine. 17 FMSHRC at 1049. On the other hand, the discussion regarding morale at the mine, the prior foreman, problems with management, vacation pay issues, problems with the bucket count, the purchase of a new company truck, and a statement allegedly made by Knotts that the mine manager "sets outside with his feet on the desk and acts like a bigshot coal operator,"[8] Tr. I 253, was unprotected.

In effect, the judge made a credibility determination that Key would not have fired Knotts based on these unprotected statements alone. *See Bradley*, 4 FMSHRC at 993 (judge must assess credibility of justification offered as affirmative defense). The Commission does not lightly overturn credibility determinations, which are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (November 1995) (citations omitted). Generally, we will uphold a judge's credibility determination unless compelling evidence supporting reversal is offered. *See, e.g., S&H Mining, Inc.*, 15 FMSHRC 956, 960 (June 1993); *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1418 (June 1984). When a judge's finding rests upon a credibility determination, we will not substitute our judgment for that of the judge absent a clear indication of error. *Metric Constructors, Inc.* 6 FMSHRC 226, 232 (February 1984), *aff'd* 766 F.2d 469 (11th Cir. 1985).

Here, although the record is silent regarding the judge's assertion that "in the context of the coal mining industry this was pretty mild stuff compared to many other cases which come before the trial judges of this Commission," 17 FMSHRC at 1053, we find no compelling reason to overturn the judge's credibility finding. Key's testimony that "it wasn't a very good feeling" listening to Knotts "hammer . . . [him and his] partner . . . criticizing everything we done [,]" Tr. II 138-39, appears to refer to protected as well as unprotected activity. Moreover, a significant portion of the conversation between Campbell and Knotts concerned safety issues.

---

[7] The operator's reliance on Knotts' statement during the conversation that he could be fired if management could hear his comments is misplaced. T. Br. at 9-10. Tanglewood's construction of this comment as an admission of wrongdoing is not the only possible reading. It is equally plausible that Knotts was making a prediction about his manager's unlawful reaction to Knotts' safety complaints.

[8] This is arguably the most "inflammatory" remark attributed to Knotts, but both he and Campbell deny that he said it. Tr. I. 115, 160. The judge did not make a finding regarding this disputed fact.

We think these protected safety concerns expressed by Knotts were inextricably linked with the unprotected statements made during the conversation. As the Supreme Court has stated, "[i]t is fair that . . . [the employer] bear the risk that the influence of legal and illegal motives cannot be separated." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983). *See also Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2214 (November 1994).

Because Tanglewood failed to produce any other evidence (such as prior discipline of Knotts or others for similar conduct) that Knotts' statements warranted discharge, the judge correctly determined that Tanglewood did not meet its burden of establishing its affirmative defense that Knotts' unprotected statements, by themselves, led to his dismissal. Consequently, he correctly found that both the corporate and individual respondents discriminated against Knotts in violation of section 105(c)(2).[9]

C. Penalty Assessment

The judge erred in his assessment of the civil penalty. He considered only one of the six statutory penalty criteria of section 110(i), the operator's ability to stay in business. 17 FMSHRC at 1668. We remand the case for consideration of the other five criteria. *See Dolese Bros. Co.*, 16 FMSHRC 689, 696 (April 1994). On remand, the judge should make findings of fact regarding the criteria that provide the respondents with the required notice as to the basis upon which they are being assessed a particular penalty, and "also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). *See also Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997).

In concluding that a $1,000 penalty was appropriate the judge considered that "[t]his was a relatively close 'mixed-motives' case where the complainant prevailed by the thinnest of margins." 17 FMSHRC at 1668. Commission precedent makes clear that the judge must confine himself to the statutory penalty criteria. *See Dolese*, 16 FMSHRC at 695. Nonetheless, the Commission has recently held that a judge is permitted to determine whether mitigating factors exist that would reduce the level of negligence, one of the statutory factors to be considered. *Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1319-20 (August 1996). Similarly, when the judge evaluates the degree of operator negligence in this case, he may take mitigating circumstances into account, including the unprotected part of Knotts' conversation with Campbell.

---

[9] Tanglewood's contention that the individual respondents could only be found liable in this case if they had been charged under section 110(c) is not before the Commission because Tanglewood failed to raise this question before the judge. 30 U.S.C. § 113(d)(2)(A)(iii); *see United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 36 (1952); *U. S. Steel Mining Co.*, 8 FMSHRC 314, 318 n.4 (March 1986); *Jones & Laughlin Steel Corp.*, 5 FMSHRC 1209, 1211-12 (July 1983).

However, the judge mistakenly concluded that the $25,000 penalty proposed by the Secretary was not appropriate because the backpay award to Knotts would serve as a deterrent. The legislative history of the Mine Act makes clear that "[t]he relief provided under section [105(c)] is in addition to that provided . . . for violation of standards." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978) (emphasis added). The judge also erred when he reduced the civil penalty on the basis that the operator had failed to pay large civil penalties in the past. "An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties." *Secretary of Labor on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 841, 850 (June 1996).

Finally, we reverse the judge's order deducting Knotts' unemployment compensation from his backpay award. *Poddey,* 18 FMSHRC at 1323-25.

III.

Conclusion

For the foregoing reasons, we affirm the judge's finding that the corporate and individual respondents discriminated against the complainant in violation of section 105(c). We vacate the judge's penalty assessment and remand to the Chief Administrative Law Judge for reassignment[10] and for proper consideration. We reverse the judge's order deducting unemployment compensation from the backpay award.

_____
Mary Lu Jordan, Chairman

_____
Marc Lincoln Marks, Commissioner

_____
James C. Riley, Commissioner

[10] Judge Maurer has transferred to another agency.