FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 31, 2000

LOUIS W. DYKHOFF, JR.	:	
	:	
v.	:	Docket No. WEST 99-26-DM
	:	
U.S. BORAX, INCORPORATED	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Riley and Verheggen, Commissioners

In 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"), Administrative Law Judge Jerold Feldman concluded that Louis W. Dykhoff, Jr. failed to prove that U.S. Borax, Inc. ("Borax") discriminated against him under section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1),[1] when it issued a corrective notice to him for excessive absences. 21 FMSHRC 791, 792 (July 1999) (ALJ). The Commission granted Dykhoff's petition for discretionary review challenging the judge's dismissal of his discrimination complaint. For the following reasons, we affirm the judge's decision in result.

I.

Factual and Procedural Background

Borax operates a borax mine and processing facility in Boron, California. 21 FMSHRC at 792. Borax administers discipline for excessive absences on a case-by-case basis pursuant to

[1] Section 105(c)(1) provides in pertinent part:

> 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...because of the exercise by such miner...on behalf of himself or others of any statutory right afforded by this Act.

an unwritten absenteeism policy. *Id.* at 793. Borax examines an employee's attendance record at random, or when it notices that an employee has missed a lot of work, to determine whether he or she is excessively absent. Tr. 46, 132. Borax's general rule allows "an incident every other month . . . and [an] average [of] a day a month." Tr. 43. For example, examining an employee's attendance record for the preceding 12 months, more than 6 incidents or 12 days of absence will warrant discipline under Borax's policy. 21 FMSHRC at 793. An incident is any number of consecutive days of absence. *Id.* Borax's no-fault policy counts *bona fide* absences due to illness, even if certified by a physician, for disciplinary purposes, while excluding absences exempt under the collective bargaining agreement ("CBA"), such as vacation, jury duty, union business, funeral leave, or leave under the Federal and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. *Id.* Under the CBA, Borax is permitted to consider an employee's absences during the preceding two years. *Id.*; Tr. 43; Ex. R-1. Once it determines that an employee has been excessively absent, Borax administers discipline under a five-step progressive system. 21 FMSHRC at 793. The first step is verbal counseling, the second is a corrective notice, the third is a written warning, the fourth is disciplinary suspension, and the fifth is termination. *Id.* Between June 1987 and January 1998, Borax discharged eleven employees for excessive absences. *Id.*

Dykhoff began his employment at Borax on January 2, 1979. *Id.* During the time period at issue in this case, from early 1995 to March 6, 1998, Dykhoff was employed as a shipping operator in Plant 9. *Id.* His responsibilities included operating a fork lift for the purpose of loading packed product into rail cars and trucks, lifting heavy objects, and climbing stairs. *Id.* Following knee surgery in July 1994 due to a deteriorating bilateral knee condition, Dykhoff had trouble performing the duties of his position. *Id.* Pursuant to the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. (1994), upon his return to work in early 1995, Borax accommodated Dykhoff by modifying the duties of his position, based on his doctor's recommendations to reduce his amount of lifting and climbing. *Id.* Also at this time, according to his doctor's recommendation, Borax required Dykhoff to wear knee braces at all times while working. *Id.* at 794. The knee braces were custom-made for an exact fit and were provided by Borax's insurance company. *Id.* The braces had to be replaced periodically. *Id.* Because the braces had to be specially ordered, they could take up to a month to arrive. *Id.* Dykhoff did not work during these times since neither Borax nor the insurance company would pay for a spare brace, and Dykhoff asserted that he could not afford to pay for a back-up. *Id.* During these absences, Dykhoff informed Borax of his status and anticipated return to work. *Id.*

In December 1996, Dykhoff received a verbal warning for excessive absences from his supervisor, Chuck Amento, who requested that personnel manager Darryl Caillier get a copy of Dykhoff's attendance record. *Id.* Dykhoff's attendance record revealed that, as of December 6, 1996, he had been absent for 7 incidents totaling 21 days in the preceding 12 months. *Id.* On or about October 20, 1997, Mike King, Dykhoff's shipping foreman from January 1997 to January 1998, also gave Dykhoff a verbal warning for his excessive absences. *Id.* King was aware of Dykhoff's accommodations because of his knees, but was not aware of any special exception concerning leave. *Id.*

On March 3, 1998, because of a jaw infection resulting from major dental work, Dykhoff worked for only one hour and did not report to work on March 4 through March 6. *Id.* Dykhoff told David Leach, his shipping supervisor at the time, that he would be out, but Leach did not remember having a conversation with Dykhoff regarding the reason for his absence. *Id.* On March 6, Leach reviewed Dykhoff's attendance records, which revealed that in the previous 21 months, he had 10 incidents and missed 71 full and 13 partial days.[2] *Id.* at 794-95. Of these 10 incidents, two incidents involved absences related to Dykhoff's knee braces: one incident of 46 days from January 29 to April 4, 1997, and the second incident of nine days from July 2 to July 12, 1996. Tr. 61, 65-66, 230-31; Ex. R-5. Leach and Caillier signed a corrective notice on the same day and gave it to Dykhoff on March 12 at a step two meeting under the CBA's grievance procedure. 21 FMSHRC at 793, 794-95. On June 18, at a step three grievance meeting with the Human Resources Department, Dykhoff explained that he was unable to work from March 3 through 6 because he had taken Percodan as prescribed by his physician. *Id.* at 795. Percodan is a strong pain killer which made Dykhoff drowsy. *Id.* Dykhoff also stated that he was fatigued from lack of sleep. *Id.*

During his employment with Borax, Dykhoff was an active union member, serving in his local union as the secretary-treasurer and a shop steward for the shipping department. *Id.* From 1994 through January 1998, Dykhoff was involved in a variety of union related health and safety complaints. *Id.* at 796. The union's grievance regarding Dykhoff's corrective notice did not contend that the notice was related to his health and safety complaints. *Id.*

On July 20, 1998, Dykhoff filed a discrimination complaint with MSHA pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2),[3] requesting that the corrective notice be removed from his personnel record. *Id.* at 795. On September 9, after its investigation of

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[2] Borax explained at the hearing and in its pre-hearing statement that during this period, Dykhoff, in actuality, had 23 incidents because each partial day also counted as one incident. Tr. 12-14; B. Preliminary Statement at 7-8 & n.3. Borax also explained that it considered the preceding 21 months for full days missed, but only the preceding six months for partial days missed. Tr. 12-14; B. Preliminary Statement at 7-8 & n.3. Darryl Caillier, Borax's personnel manager, testified that he ran an absentee check on the partial absences for the preceding six months only because the data on his computer screen did not go further back and could not print out that information. Tr. 59-60; Ex. R-5. At the hearing, Borax claimed that, in fact, in the preceding 21 months from the time the corrective notice was issued in March 1998, Dykhoff had 55 incidents involving 71 full days and 46 partial days. Tr. 12-14; B. Preliminary Statement at 7-8 & n.3. The judge did not make an explicit finding on whether Borax's attendance policy treated partial absences as incidents, and the parties have not argued this issue to the Commission on review.

[3] Section 105(c)(2) provides in pertinent part: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against . . . may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

Dykhoff's claims, MSHA determined that there was no basis for discrimination. On October 19, Dykhoff filed a complaint with the Commission pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3).[4]

In his decision, the judge analyzed the case as a work refusal and concluded that Dykhoff's refusal was not protected because he did not communicate the reason for his refusal to Borax. 21 FMSHRC at 797. In the alternative, the judge reasoned that, even if the reason for Dykhoff's work refusal had been communicated, it would still have been unprotected because the basis of Dykhoff's refusal was his "idiosyncratic physical impairment," which the Mine Act does not protect, and not "hazardous mine practices or conditions over which the operator has control." *Id.* at 797-98. Analyzing Borax's defense, the judge found that the operator had a legitimate business justification for disciplining Dykhoff because of his excessive absences. *Id.* at 798. Finally, the judge concluded that the alleged adverse action, the corrective notice, was in no part motivated by Dykhoff's prior safety complaints as an active union member.[5] *Id.* at 799. Based on his conclusions, the judge dismissed Dykhoff's complaint. *Id.*

II.

Disposition

Dykhoff argues that he stayed home when he did not have his knee braces because he was unable to safely work, was a danger to himself and others, and that such conduct constituted a protected work refusal.[6] PDR at 1-2; D. Br. at 1-2, 7. He contends that there was no need to communicate to Borax the reason for his refusal to work because Borax already knew the reasons for Dykhoff's knee-related absences, as evidenced by the parties' agreement. D. Br. at 1-2, 7. He asserts that Borax required him to wear knee braces when working and agreed not to discipline him for absences due to the unavailability of the knee braces through no fault of his own. *Id.* Dykhoff also argues that the judge committed a procedural error by failing to enter default against the operator when it failed to comply with the judge's orders. Mot. for Relief from Default and/or Reconsideration at 2 ("Mot. for Relief") and attachs.; D. Br. at 5-6. Dykhoff requests that the Commission order Borax not to consider any absences based on his knee

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[4] Section 105(c)(3) provides in pertinent part: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

[5] Dykhoff does not challenge the judge's finding with regard to his prior safety complaints.

[6] Dykhoff does not challenge the judge's finding that his absences related to his use of Percodan from March 3 through 6 are unprotected.

condition for purposes of disciplinary action and to remove from his personnel file all record of such instances.

Borax responds that Dykhoff's work refusal was not protected because he failed to communicate the hazardous condition to the operator. B. Br. at 4-5. It also asserts that the Mine Act does not protect work refusals based on "idiosyncratic physical impairments." *Id.* at 8-9. Borax contends that it had a legitimate business justification for issuing the corrective notice to Dykhoff under its attendance policy and has the right to exclude from the workplace miners who are unsafe. *Id.* at 5-7. Furthermore, Borax argues that Dykhoff's claim of procedural error was not properly preserved for review because he did not raise the issue before the judge below. *Id.* at 10. Alternatively, Borax contends that the judge's error was harmless and cannot be a basis for reversal of the judge's decision. *Id.* Borax requests that the Commission affirm the judge's decision and dismiss Dykhoff's complaint.

A. Work Refusal

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 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. *See Robinette*, 3 FMSHRC at 818 n.20. 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. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 810-12. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.* at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *See Robinette*, 3 FMSHRC at

809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.

The underpinning of Dykhoff's argument that he engaged in a protected work refusal is that, by staying home from work when he did not have the knee braces, he was in essence refusing to work under unsafe conditions. The judge did not address whether Dykhoff's absences constituted refusals to work, and the parties on review also ignore this issue. However, we conclude this is the dispositive question in this case. The Commission has held that a miner's absence due to a medical condition exacerbated by the miner's job duties does not constitute a work refusal. *Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 494-95 (Apr. 1988). In *Perando*, an underground miner stayed at home on extended sick leave upon receiving a diagnosis of industrial bronchitis from her physicians, who recommended that she work in a less dusty environment.[7] *Id.* at 492-93. Examining the miner's actions, and the communications between her physicians and the operator, the Commission concluded that the miner had never actually refused to work underground. *Id.* at 495. Similarly, in *Sammons v. Mine Servs. Co.*, 6 FMSHRC 1391, 1397 (June 1984), the Commission held that, to establish that a work refusal had taken place, the miner must show "some form of conduct or communication manifesting an actual refusal to work."

Here, Dykhoff did not state that he was refusing to work nor did he exhibit conduct manifesting a refusal to work. Like the miner in *Perando*, neither Dykhoff nor his doctor communicated that he could not work, but only suggested that accommodations be made. Consistent with his doctor's prescription, Borax instructed Dykhoff to wear braces while working and not to come to work without them. Thus, Dykhoff's absences due to the unavailability of the braces were not refusals to work, but efforts to comply with Borax's policy. Dykhoff never refused to comply with Borax's order to wear the braces, and Borax did not order him to work when he did not have the braces.[8] Under the circumstances, we conclude that Dykhoff did not refuse to work by staying home.

We recognize that compliance with Borax's directive incorporating his doctor's prescription for braces made it difficult, if not impossible, for Dykhoff to comply with Borax's

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[7] The miner was ultimately given a surface job at much lower pay, but was frequently absent and finally discharged for failing to report to work for a substantial period of time. 10 FMSHRC at 493.

[8] At the June 18 step three grievance meeting, in response to Dykhoff's questions whether Borax would want him to come to work when he was physically unable, Kevin Long told Dykhoff that Borax wanted him at work. 21 FMSHRC at 795; Tr. 176-78, 195-96, 215-16. We do not understand Long's response to mean that Borax wanted Dykhoff to work when he was sick or otherwise unable to work. Rather, we read Long's testimony as a statement that, consistent with its attendance policy, Borax generally wanted to see Dykhoff at work.

general attendance policy. Whether Dykhoff's predicament could be successfully addressed in actions under the American with Disabilities Act or the collective bargaining agreement is beyond the scope of this proceeding. However, that Dykhoff was the subject of conflicting employer policies is not relevant to determining whether he refused to work. Indeed, under these facts, it is difficult to say that Dykhoff "refused" to comply with the attendance policy itself, much less an order to work. Rather, it was application of the braces directive, in the context of Dykhoff's not having temporary replacements, that caused him to run afoul of the attendance rules.

Even if Dykhoff's absences occasioned by his lack of knee braces could be considered work refusals, his argument that his medically-related absences were in fact work refusals in the face of unsafe conditions stretches the work refusal doctrine far beyond its contours as heretofore recognized by the Commission. If the Commission were to construe Dykhoff's decision to stay home as a work refusal, then it is difficult to see why every absence for medical reasons would not be a work refusal. Such an expansion of the work refusal doctrine would make enforcement of otherwise valid attendance policies difficult if not impossible. This result would be at odds with Commission precedent, which recognizes that operators may discipline employees who violate non-discriminatory time and attendance policies. *See Mooney v. Sohio Western Mining Co.*, 6 FMSHRC 510, 513-14 (Mar. 1984).[9]

Dykhoff's submissions may also be understood as challenging Borax's attendance policy as applied because, under the policy, absences related to Dykhoff's knee condition are counted for disciplinary purposes, in violation of his alleged agreement with Borax not to be penalized for these absences. PDR at 1-2; D. Br. at 1-2, 7. Assuming *arguendo* the existence of such an

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[9] Similarly, if Dykhoff's absences were protected activity, as Commissioner Beatty concludes in his dissent (slip op. at 15), every absence for an illness could also be considered protected activity. We are not prepared to stretch the meaning of protected activity to such a point that every time a miner calls in sick, he or she is engaging in protected activity — which is essentially what the dissent does. Such an approach would trivialize the concept of protected activity. It would also interfere with an operator's ability to administer non-discriminatory time and attendance policies, if any action taken by the operator to enforce its absenteeism policy against miners calling in sick was unlawful.

We do not find persuasive Commissioner Beatty's argument that Borax's choice of 21 months, instead of 12 months, to evaluate Dykhoff's attendance record is suspect. Slip op. at 16. The record shows that Borax has considered a variety of time periods, ranging from one month to 24 months, when evaluating a miner's attendance record for disciplinary purposes. Ex. R-3. Further, the terms of the collective bargaining agreement permit Borax to consider a miner's absences for up to the preceding two years. *See* Ex. R-1. In any case, even taking the preceding 12 months as the appropriate period for determining compliance with Borax's attendance policy, Dykhoff's absences, which included 30 full days, still exceed the threshold of no more than 12 days.

agreement,[10] its breach by Borax would not be *per se* a violation of section 105(c). Although we recognize, as Dykhoff asserts, the difficulty in complying with both Borax's attendance policy and its brace requirement, we do not find either policy, considered separately or together, discriminatory, because they do not interfere, on their face or as applied, with a protected right under the Act. *See Secretary of Labor on behalf of Price & Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1307 (Aug. 1987) ("the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of [the operator's] drug testing program apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act"); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981) ("The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity."), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Similarly, to the extent Dykhoff challenges Borax's non-discriminatory attendance policy, we find that challenge inconsistent with *Mooney*. *See also Secretary of Labor on behalf of Price & Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1532 (Aug. 1990) (holding that operator's facially-neutral drug policy did not violate section 105(c)).

Based on the foregoing, we find that Dykhoff's previous decisions to stay at home when his braces were unavailable, prior to the March 3-6 incident which triggered the disciplinary corrective notice, were not work refusals. Because the record cannot support a contrary conclusion, we conclude that a remand to the judge on the issue of whether a work refusal occurred is unnecessary. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand unnecessary where record supports only one conclusion). We therefore affirm in result the judge's determination that Borax did not discriminate against Dykhoff in violation of section 105(c) of the Act.

In upholding the judge's dismissal of Dykhoff's complaint, we decline to adopt the judge's rationale that a miner's physical condition alone cannot serve as the basis for asserted protected activity. See 21 FMSHRC at 797-98. The judge's conclusion is contrary to Commission precedent.[11] *See Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June

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[10] The judge did not directly address Dykhoff's argument that the application of Borax's attendance policy breached an agreement between Dykhoff and Borax not to count knee brace absences for attendance purposes. However, the judge's findings that Borax required Dykhoff to wear the braces, and that his supervisor was not aware of any exception to the attendance policy for absences related to the braces (21 FMSHRC at 794), implies that the judge rejected Dykhoff's contention that such an agreement existed. In addition, record evidence supports this conclusion since Dykhoff's witnesses, including at least one union official, could not corroborate Dykhoff's testimony regarding discussion of such an agreement with Borax.

[11] In support of his conclusion that "idiosyncratic physical impairments" cannot serve as the basis for a protected work refusal, the judge erroneously relied on a concurring opinion and an unreviewed judge's decision. *See* 21 FMSHRC at 798 (citing *Price*, 12 FMSHRC at 1519-20

1984) (holding that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations").[12]

B. Procedural Error

On December 10, 1998, Chief Administrative Law Judge Paul Merlin issued a show cause order to Borax for failure to file an answer to Dykhoff's complaint and ordered Borax to file an answer or show good reason for its failure to do so within 30 days. On February 12, 1999, Chief Judge Merlin assigned the case to Judge Feldman, and on February 17, Judge Feldman issued a hearing notice and pre-hearing order. On February 19, Borax filed an answer with Judge Feldman, more than one month after the deadline in the show cause order had passed. With its answer, Borax sent a letter explaining that its answer was originally drafted in response to the December 10 show cause order, but that it could not determine whether the Commission received it and, pursuant to a telephone conversation with Judge Feldman on February 19, Borax was sending its answer directly to Judge Feldman. Borax further stated that there was no prejudice to Dykhoff from this delay because he was still employed at Borax. On April 27, 1999, a hearing on the merits was held. On appeal, Dykhoff argues that the judge committed a procedural error by failing to enter default against Borax when it failed to comply with the judge's show cause order. Mot. for Relief at 2 and attachs.; D. Br. at 5-6.

We find persuasive Borax's argument that the issue of the judge's procedural error is not properly before the Commission because Dykhoff failed to raise it before the judge below. B. Br. at 10. Under the Mine Act, except for good cause shown, a party may not rely upon an assignment of error on any question of fact or law upon which the judge has not been afforded an opportunity to pass. 30 U.S.C. § 823(d)(2)(A)(iii). Dykhoff did not raise the issue of the judge's failure to enter default upon Borax at the hearing or in his post-hearing brief. Nor did he show cause for his failure to raise the issue below. Accordingly, we conclude that this issue was not properly raised and the Commission need not reach it.

Even if Dykhoff had preserved this question, however, we would reject Dykhoff's argument. The Commission has held that default is a harsh remedy which is not favored. *M.M. Sundt Construction Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986) *and Kelley Trucking Co.*, 8 FMSHRC 1867, 1869 (Dec. 1986). Also, the decision to enter default against a party is within the judge's discretion. *See* 10 Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 3d § 2693 ("An application . . . to set aside a default . . . is addressed to the sound discretion of the [judge]. The judge's determination normally will not be disturbed on appeal unless he has

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and *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ). Neither is binding precedent. 29 C.F.R. § 2700.72 ("an unreviewed decision of a judge is not a precedent binding upon the Commission").

[12] In light of our disposition of the work refusal issue, we do not address the issue of Borax's affirmative defense.

abused his discretion or the appellate court concludes that he was clearly wrong.") (footnotes and internal quotation marks omitted). An "abuse of discretion may be found only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) (quoting *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985)).

Based on the record evidence, we hold that Chief Judge Merlin's failure to enter default against Borax for its late filing does not amount to an abuse of discretion. While Judge Merlin's decision to assign the case before Borax responded to the show cause order is unexplained, ultimately, Borax filed an answer shortly after the deadline set in the show cause order. There is no indication that Dykhoff suffered any prejudice as a result of Borax's one-month delay in responding to the show cause order. Likewise, we conclude that Judge Feldman did not abuse his discretion when he accepted Borax's late-filed answer and allowed the case to proceed to a hearing on the merits. Dykhoff does not demonstrate any prejudice from Borax's failure to timely file an answer. By contrast, entry of default against Borax, thereby denying it an opportunity to defend itself against claims of discrimination, would have been highly prejudicial. Because the judges' decisions not to enter default against Borax are consistent with Commission precedent disfavoring defaults, and because no prejudice has been shown, we believe that there is no basis for reversal on the ground of procedural error.

III.

Conclusion

For the foregoing reasons, we affirm in result the judge's decision dismissing Dykhoff's complaint.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

Chairman Jordan, concurring:

Although I concur with my colleagues' decision to affirm the judge's dismissal of Dykhoff's complaint, I would characterize the issue somewhat differently, and so have chosen to write separately. This case requires us to consider whether Dykhoff's absences from work constituted protected activity under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). As my colleagues have pointed out, the first element a miner must establish in order to make out a case of prohibited discrimination under the Mine Act is to present evidence sufficient to support a conclusion that he or she engaged in some activity or conduct that Congress sought to protect from adverse consequences. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Dykhoff contends, essentially, that his absences from work equate to protected activity because the absences were necessary to ensure that he did not injure himself or others. However, the fact that the absences may have served to avoid potential injury does not transform them into protected activity, at least under the facts of this case.

It is important to bear in mind that Dykhoff's absences did not result from any decision or choice in his part. Dykhoff concedes that his employer imposed a safety requirement that he wear leg braces in order to work, PDR 2, and he does not disagree with the wisdom or necessity of this mandate. Tr. 24, 25. Dykhoff's absences occured because he was unable to comply with this safety rule.

Dykhoff was not choosing to be absent from work on the days his braces were unavailable. He was absent because he did not have the option of working on those occasions. An absence from work that does not result from any decision or choice on the part of the miner, but occurs solely because the miner is unable to comply with the employer's safety requirement, does not amount to protected activity by the miner. Indeed, I do not think one would normally characterize that situation as involving any particular type of conduct or activity (protected or otherwise) on the part of a miner at all.

By the same analysis, I agree with my colleagues' conclusion that Dykhoff's absences cannot be considered a refusal to work under unsafe conditions. It seems axiomatic that before a miner can refuse to work, the employer has to be at least willing to let the miner come to work. If a miner does not have the option of going to work, I do not see how that miner can be said to be engaged in a work refusal.

Like my colleagues in the majority, I also decline to adopt the judge's rationale that a miner's physical condition alone can never serve as the basis for asserted protected activity. As my colleagues have pointed out, the Commission has previously held that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations," slip op. at 8-9, quoting *Bjes v. Consolidation Coal Co.* 6 FMSHRC 1411, 1417 (June 1984).

I also concur in my colleagues' determination that there is no basis for reversal on the ground of procedural error, and I agree with the analysis they have set forth to support that conclusion.

Mary Lu Jordan, Chairman

Commissioner Beatty, dissenting:

Applying the Commission's standard discrimination analysis, I would find that Dykhoff established a prima facie case that Borax's issuance of a disciplinary corrective notice to him was discriminatorily motivated and that Borax failed to either rebut the prima facie case of unlawful discrimination or establish an affirmative defense that it would have taken the same action against Dykhoff for his nonprotected conduct, specifically his record of absences. In my view, substantial evidence[1] fails to support the administrative law judge's findings that Borax's issuance of the disciplinary corrective notice to Dykhoff was in no part motivated by Dykhoff's protected activities and that Borax had a legitimate business justification for issuing the corrective notice to Dykhoff because of his excessive absences. 21 FMSHRC at 798-99. I would instead find that Borax's claimed business justification for the adverse action taken against Dykhoff was pretextual. Accordingly, I would reverse the judge's decision to dismiss Dykhoff's complaint, and instead conclude that Dykhoff was disciplined in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 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. *See Robinette*, 3 FMSHRC at 818 n.20. 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. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

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[1] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "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 (Nov. 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. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Unlike the judge and my colleagues in the majority, I do not believe that this case is properly analyzed as one involving a protected work refusal.[2] Instead, I would apply the Commission's standard discrimination analysis to evaluate the issue of whether the adverse action taken by an operator against a miner — the issuance of a disciplinary corrective notice — was based on the miner's protected conduct. I begin by considering whether Dykhoff has made out a prima facie case sufficient to support a conclusion that he "engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Robinette*, 3 FMSHRC 817-18, and cases cited above. As noted above, the record demonstrates that Dykhoff was an active union member who served as secretary-treasurer and shop steward for the local union, and was involved in a variety of union-related health and safety complaints during the period from 1994 through January 1998. 21 FMSHRC at 795-96. In addition, as explained below, many of the work absences ostensibly relied upon by Borax in issuing a corrective notice to Dykhoff may be considered to be a form of protected conduct since they were designed to avoid the risk of injury to Dykhoff and other miners.

Dykhoff's extended absences during the period January-April 1997 and in July 1996, totaling 53 days, were directly attributable to the unavailability of knee braces while replacements were being made. Ex. R-5; Tr. 65-67, 230-31. As the result of his deteriorating bilateral knee condition, and on the recommendation of Dykhoff's physician, Borax required Dykhoff to wear bilateral knee braces as a condition of his employment, in order to avoid the possibility of an injury when he operated the forklift.[3] 21 FMSHRC at 794. Dykhoff's knee braces were custom made in order to generate an exact fit based on a cast of each leg. *Id*. A pair of braces cost approximately $1200, and they were paid for, and replaced when necessary, by Borax's insurance carrier. *Id.* When the braces had to be periodically replaced, it took approximately one month to obtain a new pair. *Id*. During such periods, Dykhoff was prevented

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[2] In this regard, I agree with the following reasoning set forth by Chairman Jordan in her concurring opinion:

> It seems axiomatic that before a miner can refuse to work, the employer has to be at least willing to let the miner come to work. If a miner does not have the option of going to work, I do not see how that miner can be said to be engaged in a work refusal.

Slip op. at 11.

[3] The record indicates that the requirement to wear knee braces at work was imposed by Borax as a condition of Dykhoff's continued employment following a request for an accommodation under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. (1994). Tr. 192, 194-95.

from working without the braces.[4] *Id*. Dykhoff testified that Borax specifically agreed not to discipline for absences taken on days when the knee braces were not available. Tr. 155. Contrary to the judge's finding,[5] the Commission has held that exposure to hazards because of a miner's idiosyncratic physical impairment may, at least under certain circumstances, give rise to protected conduct. *See Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984) (holding that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations").

Thus, the record clearly establishes that, in the period preceding the adverse action, Dykhoff engaged in protected conduct. Moreover, since Borax's discipline of Dykhoff was admittedly based on his record of absences, several of which were clearly protected in nature, it is reasonable to conclude that the adverse action was motivated at least in part by that conduct. Accordingly, I conclude that Dykhoff established a prima facie case that Borax's issuance of a corrective notice was discriminatorily motivated. To rebut this prima facie case, or establish an affirmative defense for the adverse action taken against Dykhoff, Borax was therefore required to establish that it was not motivated by Dykhoff's protected conduct or that it would have disciplined him in any event for legitimate business reasons — in this case, violation of its attendance policy. I conclude, on the basis of the present record, that Borax has failed to either rebut Dykhoff's prima facie case or establish, by a preponderance of evidence, an affirmative defense for the adverse action taken against him.

Because several of Dykhoff's absences were based upon protected conduct — that is, the desire to avoid creating a potentially unsafe situation for Dykhoff and other miners — it follows that those absences cannot be considered in determining whether Borax has established a legitimate basis for its issuance of a corrective notice. To do so would amount to an admission of unlawful motivation. Rather, to prevail, Borax must establish that it would have discharged Dykhoff for his other, unprotected absences alone. On basis of the present record, I find that Borax has not met this burden.

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[4] Dykhoff testified that he asked his supervisor to assign him to perform other, sedentary work during the period that his knee braces were being replaced, and was told there was no such work available. Tr. 243.

[5] The cases cited by the judge (21 FMSHRC at 798) to support his erroneous legal conclusion are inapposite. The judge's citation to *Paula Price v. Monterey Coal Co.*, 12 FMSHRC 1501, 1519-20 (Aug. 1990), refers to the concurring opinion of Commissioner Doyle in a case that is, in any event, factually distinguishable from the instant case. The other case cited, *Sam Collette v. Boart Longyear Co.*, 17 FMSHRC 1121 (July 1995) (ALJ), is a judge's decision that is not precedent binding on the Commission. 29 C.F.R. § 2700.72.

Although Borax has no written attendance policy, Personnel Manager Darryl Caillier testified that its general "rule of thumb" is that 6 incidents[6], or 12 days of absence, within a 12-month period is considered "excessive" for disciplinary purposes. 21 FMSHRC at 793; Tr. 43, 55. The corrective notice issued to Dykhoff was based on a 21 month review of his attendance, and stated that during this time period he had been absent for 71 days on 10 incidents. Ex. R-6. Further, it noted that Dykhoff had missed 13 "partial" days over the prior 6 months. *Id.* Curiously, neither of the time periods referenced in the corrective notice — 21 months for total absences, or 6 months for partial days off — corresponds to the 12-month period that Caillier indicated was normally used by Borax to evaluate a miner's attendance record. I find Borax's failure to follow its "rule of thumb" with respect to evaluating Dykhoff's attendance record troubling. By using a 21-month standard to review his attendance, Borax was able to paint a harsher picture of Dykhoff's record than would be the case under their 12-month "rule of thumb" policy. This decision calls into question the validity of the business justification offered by Borax for the discipline of Dykhoff, and requires a closer analysis of Dykhoff's attendance record.

The record reveals that when the absences based upon Dykhoff's protected activity are excluded from consideration, the remaining absences do not meet Borax's "rule of thumb" for excessive absences warranting disciplinary action. For example, in the 12 months preceding the issuance of the March 6, 1998 corrective notice, Dykhoff had been absent for a total of 30 days on 5 incidents. Ex. R-5. Excluding the fifth incident, which was based upon the unavailability of the knee braces (Tr. 65-67, 231-32), and the 21 days of absence attributable to the knee braces in the prior calendar year,[7] leaves a total of 4 incidents and 9 days of unexcused absence in the previous 12 months. Ex. R-5. These "unprotected" absences by Dykhoff during the applicable time period are well within Borax's self-proclaimed "rule of thumb" standard of 6 incidents, or 12 days of absence, within a 12- month period.[8]

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[6] An "incident" is comprised of any number of days of consecutive absences. 21 FMSHRC at 793.

[7] Although this incident resulted in 46 total days of absence by Dykhoff, during the period from January 29 through April 4, 1997, only 21 of these days of absence occurred in the 12-month period preceding the March 6, 1998 corrective notice. Ex. R-5. Dykhoff testified that the knee braces took twice as long as normal to replace on this occasion because they were constructed improperly and therefore had to be sent back to the manufacturer and rebuilt. Tr. 239-40.

[8] In the absence of any evidence that partial absences were considered the same as full absences, or treated as separate incidents, under Borax's informal attendance policy, I do not believe that the 13 "partials" referred to by Borax in the corrective notice would have been otherwise sufficient to render Dykhoff's record of absences over the previous 12 months excessive. Notably, Borax's own summary of prior discharges for excessive absenteeism indicates that all of the 13 corrective notices, and 9 of the 11 terminations listed, made no

Even if Dykhoff's record of absences is evaluated with respect to the 21-month period selected by Borax, rather than the 12-month "rule of thumb" period it normally used to evaluate employee absenteeism, his absences do not meet Borax's standard for taking disciplinary action if we exclude the protected absences during the periods that knee braces were not available to Dykhoff. Of the 10 incidents and 71 days of absenteeism referenced in the March 6, 1998 Corrective Notice, 2 incidents involving 53 days were attributable to two periods (January 29-April 4, 1997; July 2-10, 1996) when Dykhoff was unable to report to work due to the availability of the knee braces. Ex. R-5; Tr. 65-67, 230-31. Thus, excluding these protected absences, Dykhoff had a total of 8 incidents and 18 days of absences over a 21-month period, which projects to about 4 incidents and 8½ days over a 12-month period. Again, this is well within Borax's established "rule of thumb" standard for determining when an employee's absences are considered excessive for disciplinary purposes.

The majority attempts to construct a straw man by asserting that under my approach "every absence for an illness" could be considered protected activity. Slip op. at 7 n.9. My conclusion that Dykhoff's knee brace-related absences were protected is based on the particular circumstances of this case. Specifically, record evidence indicated that Dykhoff would pose a threat to the safety of other miners, as well as himself, if he operated a forklift without the required knee braces. Moreover, the fact that Borax prohibited Dykhoff from reporting to work when he did not have the knee braces indicates that it also recognized this potential safety hazard. Accordingly, my position herein is entirely consistent with our holding in *Bjes* that "under appropriate circumstances . . . a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations." 6 FMSHRC at 1417 (emphasis added). While the majority attempts to pay lip service to our holding in *Bjes*, their decision completely undermines the legal efficacy of that decision.

Based on the foregoing, I find that the record fails to support Borax's asserted explanation for the issuance of a disciplinary corrective notice to Dykhoff, and instead indicates that its claimed justification is pretextual. Accordingly, I would conclude that Borax has failed to either rebut Dykhoff's prima facie case that this disciplinary action was discriminatory, or to establish an affirmative defense that it would have taken the same action against Dykhoff for his nonprotected conduct, namely his record of absences. Based upon my determination that the record compels this conclusion, I would reverse the judge's dismissal of the discrimination complaint and find that Dykhoff was disciplined in violation of section 105(c) of the Mine Act. *See American Mine Svcs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993).

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reference to — and thus were presumably not based upon — partial absences. Ex. R-3. I also note that the majority of the partial absences attributed to Dykhoff were for periods of less than 2 hours, and that the total time lost by Dykhoff as a result of the 13 "partials" was 30 hours. Ex. R-5. One of these partial absences, on March 3, 1998, which accounted for 7 of the 30 total hours, was related to Dykhoff's absence on March 4-6, 1998, while he was under the influence of Percodan used to treat a jaw infection resulting from major dental work. 21 FMSHRC at 794; Ex. R-5; Tr. 232-33.

For the foregoing reasons, I would reverse the judge, and therefore I respectfully dissent.

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