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January 20, 2011

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. KENT 2010-535-D
of CHAD ALEX GREEN,	:	Case No. BARB-CD-2010-01
Complainant	:	
	:	
v.	:	Mine ID: 15-18182
	:	
D & C MINING CORPORATION,	:	Mine: D & C Mining Corporation
Respondent	:	

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. KENT 2010-536-D
of WILLIAM DONNIE SMITH,	:	Case No. BARB-CD-2010-02
Complainant	:	
	:	
v.	:	Mine ID: 15-18182
	:	
D & C MINING CORPORATION,	:	Mine: D & C Mining Corporation
Respondent	:	

DECISION

Appearances: Schean G. Belton, Esquire, Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for the Petitioner

Wesley Addington, Esquire, of Whitesburg, Kentucky, and Tony Oppgard, Esquire,
of Lexington, Kentucky, for the Complainants, Chad Alex Green and William
Donnie Smith

Elsie A Harris III, Esquire, of Norton, Virginia, for the Respondent

Before: Judge Harner

Statement of the Case

These cases are before me based upon Complaints and Amended Complaints¹ of discrimination filed by the Secretary of Labor (“Secretary”), alleging that Complainants Chad Alex Green (“Green”) and William Donnie Smith (“Smith”) were discriminated against by D & C Mining Corporation (“Respondent”) in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. §801, et seq. (“the Act”). The Complaints and Amended Complaints specifically allege that employees Green and Smith were laid off on September 21, 2009, because they were engaged in protected activity under the Act. In its Answers, Respondent denies any unlawful discrimination and asserts that the two employees voluntarily quit work. Pursuant to notice, these cases were heard before me on November 3, 2010, in Big Stone Gap, Virginia.

In its Complaints and Amended Complaints, the Secretary seeks orders of reinstatement for Green and Smith to their former or substantially similar jobs. At the time of the hearing, both Green and Smith had been reinstated to their former jobs at Respondent. Smith was reinstated on November 16, 2009, and Green was reinstated on January 6, 2010, following a settlement reached at a temporary reinstatement hearing held before Judge Weisberger on January 5, 2010, under the provisions of Section 105(c)(2). At the hearing before me, the parties stipulated to the amount of backpay that is owed to the complainants if the Secretary’s discrimination complaints are upheld. It was agreed that Green’s backpay is \$13,303 and Smith’s is \$5,644, exclusive of any interest.

Legal Principles

Section 105(c) of the Act prohibits discrimination against miners for exercising any protected right under the Act. Section 105(c)(1) provides:

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

¹ The Complaints were filed with the Commission on January 28, 2010. On February 18, 2010, the Secretary filed Amended Complaints with the Commission seeking to add civil penalties of \$10,000 in each of the cases. Respondent filed its Answers to the Amended Complaints on February 23, 2010.

miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

A complainant alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by presenting evidence 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. *Secretary of Labor on behalf of Pasula v. Consolidation Coal, Co.*, 2 FMSHRC 2786, 2799 (1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 12112 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (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. *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. *Id.* At 817; *Pasula*, 2 FMSHRC at 2799-2800; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Where the operator is mistaken in his belief that the complainants engaged in protected activity, the complainant establishes a prima facie case of prohibited discrimination by proving that the operator suspected that the complainant engaged in protected activity and the adverse action was motivated in any part by such suspicion. *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480(1982); *Secretary of Labor on behalf of Michael L. Price and Joe John Vacha and United Mine Workers of America v. Jim Walter Resources*, 24 FMSHRC 589, 592-593 (2002)(ALJ). The operator may then rebut the prima facie case in the same manner as described above. *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480(1982).

Factors to be considered in assessing whether a prima facie case exists include the operator's knowledge of the protected activity, hostility or "animus" towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508 (1981).

Chronology of Events²

² The facts herein are based on the record as a whole, which includes the official transcript, and my careful observation of the witnesses throughout their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, the inherent probabilities in light of other events, corroboration or lack thereof, and consistencies or inconsistencies with each witness' testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied specifically on his or her demeanor and make my findings accordingly. I note that apart from considerations of demeanor, I have taken into account the above-noted credibility considerations in all cases and any failure by me to detail each of these is not to be deemed a failure on my part to have fully considered each witness' testimony.

The Respondent operates an underground coal mine (Mine ID No. 15-18182) in Harlan County, Kentucky, where Smith and Green were employed.³ The mine operates with a first and second shift producing coal and for approximately the last half of the second shift, maintenance activities at the mine are carried out. At relevant times up to September 18, 2009, Smith was employed as a belt man on the first shift by the Respondent, where he had worked since September 2007. Green was employed by the Respondent for about six years and worked on the second shift as a bridge operator and as an extra bolt man. Smith and Green are brothers-in-law, as Green's wife (Angela) is Smith's sister. Smith and Green are also next door neighbors.

On Friday, September 18, 2009⁴, the entire first shift (9-10 men), including Smith, reported to work as usual. Between 11 a.m. and 1 p.m., water started leaking from around a seal in the mine. This seal closed off an unused section of the mine where coal had been previously mined. As is common when seals are used in mining operations, water and methane gas accumulate behind the seal. A purpose of the seal is to protect miners from these hazards. When the water was detected, it began to rise quickly and the catch basin could not hold it.⁵ First shift foreman Darrell Middleton instructed everyone working to start pumping the water out. Smith was instructed to watch the pump at the seal. Middleton left the mine and went to the office to check the elevation on the mine maps as he was concerned that the water level would increase and run into the operating section of the mine, thereby trapping miners. Apparently he was concerned that the sealed off area was at a higher grade than the active working area and water could trap miners if that were the case.

Despite the employees' efforts, the water from behind the seal kept coming and the pumps were not making any progress in decreasing the water level.⁶ At end of the first shift, Smith and the other employees left the mine and when they got outside, Middleton was present with the first shift employees and some of the second shift employees and he discussed with them the seriousness of the water situation. During this discussion, Green was present as Smith told him to be careful before Smith left the site and went home. At the hearing, Middleton testified that Smith told him he was afraid of water and he would rather be laid off and that Middleton told Smith that he was afraid of water too.⁷ When Green reported for work on the second shift, Middleton told him there was a water issue and it was a "mess". When Green asked Middleton how much water was in the mine, Middleton replied that it was just about "roofed out". This conversation occurred in the office as

³ Although the Respondent also operates a surface mine at the same approximate location, none of the facts herein relate to that part of the Respondent's mining operations.

⁴ All dates hereinafter refer to 2009, unless otherwise indicated.

⁵ When noticed, water had risen to within only 8-10 inches from the mine roof. Smith testified that the height of the coal seam was 50-54 inches.

⁶ Mine Superintendent Barry Rogers attributed the water problem to the unusually heavy rainfall in the area in mid-2009.

⁷ Middleton also testified that the mining engineer told him at some point the active portion of the mine was safe because its elevation was higher than the leaking seal, but he never reported that to Smith or Green (TR 133-134).

Middleton was trying to reach Mine Superintendent Rogers to apprise him of the situation.⁸ Green stayed around until management decided its course of action and then elected to go home as his father was ill and he needed to help his mother. At the time Green left to go home, none of the second shift employees had gone to work yet. Mine superintendent Rogers testified that second shift foreman Richard Fair told him that Green had gone home because his father was sick.

On the evening of September 18, both Federal and Kentucky State Mine inspectors arrived at the mine to assess the situation. It is not entirely clear how these inspectors became aware of the water issue at Respondent, but it is clear that MSHA inspector William (Craig) Clark and two inspectors from the Kentucky Office of Mine Safety and Licensing arrived at the site in the evening.⁹ After inspecting the seal and mine, and noting that the water coming from the seal has almost roofed out, MSHA inspector Clark issued a “K” order shutting down the mine except for water removal operations.¹⁰ Foreman Middleton was still at work when the inspectors arrived at the mine, but Rogers did not arrive at the mine until after the “K” order was issued and the inspectors had apparently left the site. The effect of the “K” order was that the Respondent had to remedy the water problem before it could resume its normal operation of mining coal.

At the hearing there was various testimony regarding the Respondent’s knowledge of how the inspectors came to visit the mine site. Foreman Middleton testified that Superintendent Rogers told him on Friday, September 18, that a Federal inspector had told him that the inspectors “were there on a complaint”, but he did not indicate to Middleton who made the complaint (TR 136). Rogers testified that in the week following September 18, he ascertained from the State inspectors that Tony Oppgard had telephoned in a complaint about the water (TR 173-174). He further testified that although he did not initially know who Mr. Oppgard was, he began to ask questions and became aware that Mr. Oppgard was an attorney who represented miners.

The mine did not operate on Saturday and Sunday, and as a result the water continued to accumulate. Superintendent Rogers testified that because the pumps were not “doing too good of a job”, the “water gain[ed] on us more” over the weekend (TR 148).

On Monday, September 21, the entire first shift reported to work. Donnie Smith was told by Darrell Middleton, after talking to Rogers, that there was no work, and that he should go home as

⁸ Rogers was apparently not at the mine site when the water was first noticed and did not arrive there until the evening.

⁹ One of the State inspectors was Todd Middleton, who is a nephew of foreman Darrell Middleton.

¹⁰ Section 103(k) of the Act provides, in pertinent part:
In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to...return affected areas of such mine to normal.

the inspectors were not letting anyone beyond the seal. Middleton testified that on Monday, 6-7 men worked laying pipe a distance of 2000 feet from the seal area to outside the mine. Also bigger capacity pumps were installed and eventually larger diameter piping. Smith did not work (as he was sent home), but Middleton claimed he had no role in the selection process of who worked and who didn't (TR 124). Green also reported to work on the second shift on Monday, but he, too, was sent home.

In the next few days, both Smith and Green made repeated efforts, either by visiting the mine or by telephone, to ascertain when they were to return to work. They were repeatedly told that there was no work yet. Finally they were told that they may as well sign up for unemployment compensation benefits. Both of them did so on Wednesday, September 23 when they visited the unemployment office.¹¹ The next day, Thursday, both Smith and Green went separately to the mine site during the day shift to pick up their pay checks. According to their testimony, all the first shift employees' vehicles were in the parking lot and they concluded that "something was up".¹²

On October 19, Billie Smith, Donnie Smith's wife, telephoned Barry Rogers at the mine office. She knew Rogers socially and had talked to him on the phone 20 or more times. Rogers took the call and when Billie said she wanted to speak to him, he told her to come to the office and speak to him personally. She went to the office that same day and asked him why Donnie wasn't working. According to Billie Smith, Rogers replied, "Well what the fuck did Donnie and Chad call the fucking inspectors on me for?" According to Mrs. Smith, Rogers went on to say that the State inspectors had told him that Tony Opegard called the State inspectors after Donnie or Chad had called him and told Opegard that water was getting ready to flood the mine and the inspectors needed to get there before someone got hurt (TR 92-93). In his testimony, Rogers admitted to having a conversation with Billie Smith and his testimony did not really dispute Mrs. Smith's version of the conversation as he testified that he told Billie Smith that Tony Opegard had something to do with "it" and that Chad and Donnie were behind it. He also admitted using the word "fucking" at least once during his conversation with Mrs. Smith (TR 174-175). In his testimony about this conversation, Rogers explained that he asked Billie Smith "why they called the effin' inspectors, 'cause I mean, you have inspectors every two or three days anyway, and *when you get an inspectors* (sic), and you're already trying to take care of the job that's happening and what's happening, *it just interrupts you from doing ... your job*" (emphasis supplied) (TR 175).¹³

On October 27, Smith and Green filed discrimination complaints with MSHA against the Respondent alleging that they had not been recalled because of their protected activities. The case was assigned to Special Investigator Guy Fain. Mr. Fain took the complainants' statements that day and then he traveled to the mine site to interview Superintendent Rogers. When Fain arrived at the

¹¹ Unemployment records submitted into evidence by the Respondent indicated that both Smith and Green last worked on September 18 and the reason given for the claims were "Lay Off with Definite Recall".

¹² Two other employees, Mark Cain and Anthony Goins had signed up for unemployment, but they were recalled to work.

¹³ I fully credit Mrs. Smith's testimony as it was more complete as to the substance of the conversation.

site to talk to Rogers that day, he informed Rogers that he was investigating a 105(c) complaint on behalf of Smith and Green. According to Fain, Rogers replied, “Well, that doesn’t surprise me a D-A-M bit.” (TR 28) Fain asked Rogers what he meant by that and Rogers replied that they had called the “damn inspectors in on me.” (TR 28) When Fain asked him how he knew that, Rogers said that the State inspectors told him. At that point Rogers stated that he did not want to talk about the situation until he had his attorney present.¹⁴ On November 10, Fain again met with Rogers and Respondent’s attorney. During this meeting, Fain took a written statement, which is not part of the record herein, in which Rogers admitted hearing from the state inspectors that Tony Opegard had something to do with filing the complaint on September 18. At the hearing, Rogers testified that, although he did not know who Tony Opegard was on September 18, the State inspectors told him during the next week that the water complaint was made by Mr. Opegard; that he asked inspectors about him and found out he was representing Smith’s mother (TR 179)¹⁵; and that based on everything, he figured that Smith and Green were involved in the complaint.

Following this meeting with Mr. Fain, Respondent reinstated Smith to his job on November 16. In order to tell Smith to report to work, Superintendent Rogers called the home of Green and spoke with Angela Green, Chad’s wife. (Mrs. Green was Smith’s sister.)¹⁶ Mrs. Green also credibly testified that she is a stay at home mom because of small children, that she received no other calls from the Respondent before November 16 or after that date, and that she has had the same telephone number for about 3 years.¹⁷ The Respondent did not reinstate Green until January 6, 2010, following a settlement obtained at the hearing for temporary reinstatement under the Act held the previous day (See Exhibit 1).

After MSHA issued the “K” order on the evening of September 18, the Respondent was obligated to remedy the water problem before it could resume mining coal. To do so, the operator had to run additional pipe lines and install larger pumps, following additional visits by MSHA inspectors to modify the plans to abate the water problem (TR 145, 148). Eventually the water issue

¹⁴ Rogers did not testify as to this conversation with Fain.

¹⁵ Donnie’s father had been killed at the mine in June 2009 and Opegard was representing her in a suit against the mine.

¹⁶ The Respondent does not dispute this call and Rogers did not testify about it. The Respondent did present the testimony of Billy Jeffrey Copeland, its bookkeeper. Copeland, who does not work at the mine site but at a facility 45 minutes away, testified that he was asked by Barry Rogers to contact both Smith and Green for the purpose of telling them to report to the mine office to talk to Rogers. At first he testified that Rogers told him to call in mid-October but, on cross-examination, changed his testimony on the timing of the calls to shortly before Smith returned to work on November 16. He also testified that he probably called each of them 2 times but on each occasion, there was no answer, that there were no answering machines and that the phones just rang and rang. Neither Copeland nor Rogers attempted to contact Smith or Green by mail or in person.

¹⁷ I note that the telephone number that she testified to having is the same number as on the Respondent’s records for Smith and Green (See Exhibits A and B).

was taken care of to the point that coal production resumed.¹⁸ Rogers testified that coal production resumed in about two weeks following the September 18 incident (TR 144), which would have been early October. During that interim “clean-up” period, Rogers further testified that if any miner wanted to work, the mine let them work rather than be laid off (TR 153). Even after the “K” order was terminated, second shift production did not begin immediately and it was November before this shift began producing coal (TR 146). Nevertheless, between September 21 and November, Rogers testified that the second shift employees were performing “dead work” or maintenance work as “the equipment was getting old” and “*the inspectors were staying with us pretty heavy*, and we had to try to keep up the mines better” (emphasis supplied) (TR 146). Copeland, the Respondent’s bookkeeper, testified that the Respondent hired a new belt man on the first shift before Smith was recalled on November 16.

Legal Analysis

When considering the legal principles with the facts particular to this case, it is clear that the Respondent violated Section 105(c) of the Mine Act by discriminating against the Complainants for the mistaken belief that they had called the inspectors into the mine. Although the Complainants may not have engaged in protected activity, it cannot be denied that the Respondent believed they did so based on its belief that the inspectors came to the mine because of a complaint made by Opegard after the Complainants contacted Opegard. The fact that the Complainants were laid off in retaliation for their protected activities goes directly to the heart and purpose of the antidiscrimination provisions of the Act. In passing this legislation, Congress recognized the intent to protect miners against “*any possible discrimination which they might suffer as a result of their participation.*” S. Rep. No. 95-181, 95th Congr., 1st Sess. 36 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (emphasis added). This protection was recognized to extend to those situations where the employer only believed that the employee engaged in protected activity as this could have an even greater chilling effect than discrimination against those who had actually acted. *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (1982). The testimony at hearing demonstrated that the Respondent believed that the Complainants had “something to do with” the inspectors being called and laid them off and refused to timely recall them as a result of this belief. The testimony of the meetings between Rogers and Mrs. Billie Smith and between Rogers and Fain establishes this.

The Complainants here have also suffered adverse action. Both men were repeatedly told there was no work for them and then laid off from the mine. Further, even assuming that the Respondent had a legitimate reason to briefly lay them off due to the Respondent not being able to mine coal, an argument that I do not find persuasive, it failed to recall them in a timely manner. Although the Respondent initially argued in its Answer to the Amended Complaints that Smith and Green voluntarily left their jobs and it believed that they had quit, the facts show otherwise. There was un rebutted testimony that the Complainants continued to call for several days after the leak to

¹⁸ According to Rogers, production of coal did not resume on a full basis immediately, but gradually increased.

ask whether there was work to do. It is also significant that the Respondent did not raise the “quit” defense at hearing.¹⁹ Further, and most telling, when the Complainants filled out their applications for unemployment benefits, they characterized their unemployment as a “lay off with definite recall,” after being told by the Respondent to write this on the applications for benefits. Respondent’s assertion in its Answers that the Complainants had quit is not supported by its own evidence adduced at the hearing, including the testimony that Respondent did not contest the Complainant’s unemployment benefits.

The motivation for the Respondent’s actions appears to have been its belief, real or mistaken, that the Complainants engaged in protected activity. Knowledge of the protected activity is one of the most important factors in determining whether the Respondent was motivated by the protected activity. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC at 2510 (citing *NLRB v. Long Island Airport Limousine Serv.*, 468 F.2d 292, 295 (2nd Cir. 1972)). Because subjective factors are involved, knowledge can be proved by circumstantial evidence and reasonable inferences. *Id.* The evidences and inferences here tend to demonstrate that the Respondent had knowledge of the protected activity. First, Respondent agents knew that someone had engaged in protected activity by alerting MSHA and Kentucky State inspectors to the water in the mine, as the inspectors arrived at the mine site on the evening of September 18 despite the fact that the Respondent had reported the leak and the flooding around 11:30 that morning.²⁰ Further, one of the State inspectors who visited the mine that evening was the nephew of foreman Middleton. This inspector would have known who had made the call and it is reasonable to believe that he told Rogers that Opegard had reported the leak.²¹ The fact that Opegard was representing Smith’s mother in an unrelated law suit against Respondent would lead Rogers to believe that Smith and Green, who were brothers-in-law, had contacted Opegard. In his testimony, Rogers admitted that, although he initially did not know who Opegard was, he quickly ascertained from the State inspectors that Opegard was an attorney who represented miners and that Opegard had been responsible for filing the complaint that resulted in the inspectors coming to the mine on the evening of September 18.

Second, the Respondent’s behavior toward the Complainants shows blatant animus and hostility toward the protected actions. Rogers admittedly resorted to cursing when discussing the activity with Mrs. Smith and Inspector Fain. When speaking to Mrs. Smith on October 19, Rogers said “Well, what the fuck did Donnie and Chad call the fucking inspectors on me for?” Later, when approached by MSHA special investigator Fain, Rogers said that the discrimination complaint did not surprise him a “D-A-M” bit, and that it was the Complainants who called the “damn inspectors.” It cannot be stressed enough that Rogers testified to the truth of these conversations at hearing. He also testified that inspectors were basically an interruption to regular mining work being completed. Not only did Mr. Rogers use harsh and aggressive language, but his words more than implied that he

¹⁹ When consistent with the totality of the evidence, shifting defenses may be further evidence of a violation. See *Bay State Ambulance Rental*, 280 NLRB 122 (June 1986).

²⁰ Smith and Middleton both testified that the water leakage was noticed about halfway through the first shift shift, which ran from 7:00 a.m. to 3:00 p.m.

²¹ Middleton’s testimony supports this.

was disapproving of the protected activity. Further, it has been established that the more animus is directed specifically towards the protected activity, the more probative weight it carries. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC at 2511.

Third, the timing of the lay-off could not be any more suspicious. See *NLRB v. Long Island Airport Limousine Serv.*, 468 F.2d 292, 295 (2nd Cir. 1972)(When the employer received knowledge of protected activity and fired employee on the same day, the timing of the adverse action was “stunningly obvious.”) The water problem began on September 18, and that same day the MSHA inspector issued a “K” order shutting down the mine except for water remediation. The very next workday, Monday, September 21, both Complainants were told that there was no work for them to do, even though other miners were helping to lay pipe in the mine.²² This continued for two more days, before the men eventually were told to file for unemployment benefits. Further, all of the other first shift employees were working at the mine on Thursday, September 24, when the Complainants went to the mine to pick up their paychecks.²³ Given that the Complainants were told not to work the workday immediately following the inspection and subsequent “K” order, the timing of Respondent’s actions in telling Smith and Green there was no work is highly suspect.

Finally, disparate, or inconsistent, treatment is indicative of discrimination and there was definitely disparate treatment among the miners here. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC at 2512 (citing *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). Smith and Green were the only two miners who were not recalled to the mine when coal production resumed. Although two other employees also filed for unemployment, they were called back to work almost immediately. Further, while the Respondent testified that it let anyone work who wanted to work, the Complainants were told that there was no work for them and that they should go home.²⁴ No work-related or performance issues were raised by the Respondent to provide a nondiscriminatory explanation for the disparate treatment of the Complainants.

Based on the above, I find that that the Secretary and the Complainants have established a prima facie case of discrimination under Section 105(c) of the Act. Having established a prima facie case, the Respondent can rebut the prima facie case by showing that either no protected activity occurred or that it was in no way motivated by the protected activity. The Respondent has not argued that no protected activity occurred either in the pleadings or at hearing. To the contrary, as noted above, protected activity occurred in that a dangerous condition existed at the

²² Significantly, Rogers testified that he allowed whoever showed up for his shift to work. Clearly this was not the case for Smith and Green, both of whom reported for work on September 21 and on the next two days attempted to ascertain when work was available. Also Middleton testified that he had not “chosen” the employees who were to work on Monday; but Rogers had done so.

²³ Green testified that Jamie Hanes had not been called back to work either, but Rogers testified that Hanes did not want to work, creating the inference that he had been asked to return.

²⁴ The Complainants cited “lack of work” as the reason for the layoff. Copeland testified that the Respondent did not contradict this statement or contest for unemployment benefits.

mine and inspectors were alerted to this condition. Further, the Respondent believed that Smith and Green were behind the complaint to MSHA and/or the State over the condition.

The Respondent's defenses seem to be that, first, Smith and Green voluntarily chose to be laid off and collect unemployment benefits; second, Respondent tried to recall the Complainants but could not reach either of them; or, third, the Complainants should have kept in contact with the Respondent if they wanted their job back. None of these arguments are persuasive and none are supported by the credible evidence. In the case of the first defense, both Smith and Green visited the mine and then repeatedly called the Respondent to ascertain if work was available and were told that there was no work for them to do at that time. When Smith told Middleton that he needed money and would have to consider filing for unemployment, Middleton responded by telling him that it was a good idea to do so.²⁵ When Smith arrived at the mine to pick up his last paycheck on Thursday, he realized for the first time that everyone was back to work except for Green and himself. He confronted Middleton, but was told that he would have to "take it up with Barry [Rogers]." These actions are not indicative of men choosing to be laid off and collecting unemployment benefits. Continuing to call the mine throughout the first week, double-checking before signing up for unemployment, and confronting the foreman at the mine site would all indicate that the men wanted to return to work and were upset that the others had been called back when they had not.

The second defense claimed by the Respondent falls flat as well for several reasons. Although the Respondent claimed that it tried to call the Complainants but received no answer or answering machine, Mrs. Green testified, credibly, that their telephone number had been the same for approximately three years, that they had an answering machine, and that she was a stay at home mom. Moreover, the Greens' phone number is the same phone number found on paperwork kept by the Respondent.²⁶ In fact, Respondent telephoned Mrs. Green when it wanted to recall Smith to work on November 16. Although the Respondent presented the testimony of its bookkeeper to demonstrate that it attempted to contact both of them by telephone prior to Smith's recall, it admitted that no letters were sent to the Complainants to inform them that they could come back to work. Further, Foreman Middleton drove past the Complainants' houses everyday on his way to and from work. If the Respondent had wanted to reach the Complainants, Middleton could have easily taken a moment to stop by their houses.

The third defense claimed by the Respondent, viz, that employees on layoff must maintain contact with an employer if they want their job back, is a novel and unusual concept. Not only is this a ludicrous position, but it is even more so given the facts herein that Respondent repeatedly told the Complainants that there was no work for them and they should file for unemployment, while at

²⁵ Smith testified that when he told Middleton that he had to do something to keep money coming in, Middleton responded by saying, "Well, I, if I wasn't over here, I would have done been signed up on unemployment." Before actually signing up, Smith again asked Middleton who said, "Yeah, go ahead. Go on and sign up." Green was also encouraged to sign up by Rogers when he called to obtain the address of the mine.

²⁶ See Respondent Exhibits A and B. Smith's telephone number on Respondent's records is the same number as Green's.

the same time allowing all other employees to work. I note that it is customary for an employer to contact employees that it has laid off as work becomes available with any precondition that the employees keep in touch. It is not the responsibility of the employee to continue to contact the employer to establish if conditions for recall are present. (this information is in the purview of an employer). Second, the facts establish that the Complainants asked the Respondent whether they could return to work multiple times and were told each time that there was still no work available for them.

I reject all of the Respondent's defenses as each is without merit. Therefore, I find that the Respondent has not rebutted the Secretary's and Complainants' prima facie case.

In conclusion, the overwhelming weight of the evidence establishes that the Respondent violated Section 105(c) of the Act by discriminating against the Complainants based on its belief that they engaged in protected activity. All the evidence adduced at the hearing fully supports this, including significantly the testimony of Rogers wherein he essentially admitted to the discrimination in his conversations with Mrs. Billie Smith and MSHA special investigator Fain. Therefore, I conclude that Chad Alex Green and William Donnie Smith are entitled to backpay in the amounts of \$13,303.00 and \$5,644.00, respectively, plus interest calculated until the date of payment in the manner required by the Commission.²⁷

Civil Penalty Assessment

The Secretary has proposed a total penalty of \$20,000.00 for the Respondent's violations of the Act. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in Section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Secretary on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 555 (April 1996).

The Respondent has a long and significant history of violations. The Assessed Violation History Report for the two years preceding the Respondent's discriminatory action shows that the operator was cited for 418 violations, including ten citations under Section 104(d) of the Act.²⁸ From this, I find that the Respondent has a serious history of prior violations.

The Respondent's actions toward Smith and Green were at best highly negligent. Indeed, Respondent's actions were willful and evidenced a reckless disregard for the protections afforded

²⁷ The proper method of calculating interest on backpay is: **Amount of interest = The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x the short-term federal underpayment rate.** *Secretary on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

²⁸ As archived by the MSHA Mine Data Retrieval system. See also Complainants' Exhibit 2.

miners under the Act. Not only do the facts show that Smith and Green were laid off and refused timely recall because the Respondent believed that they engaged in protected activity, but the Respondent essentially admitted to both Smith's wife and the MSHA special investigator that it did not recall Smith and Green because Respondent believed that they had been responsible for the MSHA and State inspectors coming to the mine to investigate the water situation. Then, at hearing, it asserted that it believed that both men had chosen to quit and sign up for unemployment, even after the men called several times to ask if there was work for them to do.

It is a generally accepted principle that the penalty assessed should be appropriate to the size of the operator. *Douglas R. Rushford Trucking*, 22 FMSHRC 1127, 1127 (Sept 2000) (ALJ). The credible evidence shows that the operator employed approximately twenty (20) men, including the shift foremen and supervisor at the particular mine.²⁹ When combining this information with the other criteria, I conclude that \$10,000.00 per violation is appropriate for an operator of this size.

The Respondent made no argument either in the pleadings, at hearing or in its brief that it would be unable to pay the penalties as assessed.

The Secretary argues that the Respondent's action against the Complainants supports a finding of the highest gravity. I agree. The fact that the Respondent laid off and refused to timely recall the Complainants because it believed that they engaged in protected action goes directly to the heart and purpose of the anti-discrimination provisions of the Act. Moreover, this could reasonably create an even greater debilitating effect than discrimination based on overt actions because miners could fear even the appearance of being engaged in protected activities. *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480(1982).

Finally, I find that the Respondent did not demonstrate good faith in abating this violation. It only brought Smith back to work after speaking to the special investigator following the filing by Smith and Green of discrimination complaints with MSHA. Further, Green was not reinstated until the Respondent was forced to do so following a hearing for temporary reinstatement order. Finally, as stated above, the Respondent essentially admitted at hearing that it had refused to recall the Complainants because it believed that Smith and Green "had something to do" with the inspectors being called.

Taking all of the above factors into consideration, I conclude that the Secretary's assessed civil penalty of \$20,000.00 is more than warranted in this case. This, along with the stipulated \$18,947.00 in backpay, serves two main purposes. These are "to further the purposes of the Act by deterring retaliatory actions, and to put an employee into the financial position he would have been in but for the discrimination." *Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (Jan. 1982).

ORDER

²⁹ All of which are considered "miners" under Sections 3(g) and 3(h)(1) of the Act.

Accordingly, having previously found that D & C Mining Corporation discriminated against Chad Alex Green and William Donnie Smith by laying them off and refusing to timely recall them, it is **ORDERED** that:

1. The Respondent **PAY** Chad Alex Green **\$13,303.00** and William Donnie Smith **\$5,644.00** in backpay, as stipulated, within thirty (30) days of the date of this decision with interest using the *Arkansas-Carbona/Clinchfield Coal Co.* method.
2. The Respondent **EXPUNGE** any reference to the discriminatory actions from Green and Smith's personnel files or any other records maintained by the Respondent.
3. The Respondent **POST** this decision at all of its mining properties located in Harlan County, Kentucky, in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of sixty (60) days.³⁰
4. The Respondent **PAY** a civil penalty in the amount of **\$20,000.00**, for its violation of Section 105(c) of the Act, within thirty (30) days of the date of this decision.

It is also **ORDERED** that the Regional Solicitor has the responsibility to ensure full and complete compliance with this decision and to take the appropriate action should the Respondent fail to fully comply.

Janet G. Harner
Administrative Law Judge

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³⁰ This remedy is warranted because of the chilling effect Respondent's actions could have on other miners.

Chad Alex Green, P.O. Box 484, Cawood, KY 40815-0484

William Donnie Smith, 4089 S. Hwy. 3001, Cawood, KY 40815-5007