

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 18, 2004

LESLIE O. GLEASON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2003-265-D
	:	DENV CD 2003-03
v.	:	
	:	Mine I.D. 05-02962
COLOWYO COAL COMPANY,	:	Colowyo Mine
Respondent	:	

**DECISION**

Appearances: Leslie O. Gleason, Bagdad, Arizona, pro se;  
Laura E. Beverage, Esq., Jackson Kelly, Denver, Colorado,  
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Leslie O. “Jack” Gleason against Colowyo Coal Company (“Colowyo”), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). Mr. Gleason alleges that Colowyo terminated him from his employment with the company because of protected activities he engaged in while an employee of Colowyo. An evidentiary hearing was held in Steamboat Springs, Colorado.

**I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT**

Colowyo operates the Colowyo Mine, an open pit coal mine, near Meeker, Colorado. Mr. Gleason contends that he was forced to leave Colowyo, by taking long term disability benefits, because he complained about safety conditions at the mine starting in January 2001. After Gleason presented his case in chief at the hearing, I granted Colowyo’s motion to dismiss Gleason’s discrimination complaint for failure to present a *prima facie* case. My reasons for granting Colowyo’s motion are set forth below. Prior to the hearing, the parties entered into detailed stipulations, as follows:

1. Mr. Gleason was employed at the Colowyo site from March 6, 1978, until October 11, 2002.
2. Kennecott Energy acquired the Colowyo site in December 1994.

3. Mr. Gleason was an electrical planner at the time of a reorganization in June 1999 and was offered a buyout, along with other personnel.
4. Mr. Gleason declined the buyout option and instead opted to become an electrician.
5. Mr. Gleason was the lead electrician until approximately August 2000, when Tim Buller was moved into the role of electrical supervisor.
6. Mr. Gleason commenced having knee problems in approximately 1997, which problems were later diagnosed as the result of misaligned kneecaps.
7. Mr. Gleason took Family and Medical Leave to have surgery on his left knee commencing September 29, 2000, through October 25, 2000.
8. Mr. Gleason returned to work with medical restrictions on October 26, 2000, following his knee surgery and remained on restricted duty until December 21, 2000. The restrictions included the following: no climbing; no kneeling; no squatting; and no lifting greater than ten (10) pounds.
9. Mr. Gleason took Family and Medical Leave on January 20, 2001, to undergo urology surgery and remained off work until March 1, 2001. He returned to work on restricted duty until March 12, 2001. The restrictions included the following: no climbing and no lifting greater than ten (10) pounds.
10. Mr. Gleason's knee problems continued to deteriorate after his surgery . . . and he was placed on work restrictions on September 27, 2001. The restrictions included the following: no climbing; no lifting objects greater than 20 pounds; no carrying of objects greater than 20 pounds; no pushing of objects greater than 20 pounds; and no pulling of objects greater than 20 pounds.
11. Mr. Gleason remained on restricted duty for his knee problems until he took Family and Medical Leave on February 14, 2002, for additional surgery on both knees.
12. Mr. Gleason remained off work as a result of this February 14, 2002, knee surgery until May 24, 2002, when he returned to work with restrictions. These restrictions included the following: no carrying of objects greater than 20 pounds; no pushing of objects greater than 20 pounds; no pulling of objects greater than 20 pounds; no crawling, kneeling, or squatting; no climbing of stairs or ladders; and the avoidance of uneven ground.
13. On May 15, 2002, while Mr. Gleason was recovering from his surgery, Colowyo requested an opinion of Mr. Gleason's ability to return to work, based on the physical

demands analysis of the electrician position, from his physician to ascertain his fitness for work.

14. On May 23, 2002, Dr. Sisk issued a release to work with restrictions of carrying less than ten (10) pounds; pushing or pulling less than ten (10) pounds; no crawling, kneeling or squatting, no climbing of stairs or ladders; and a notation that Mr. Gleason should be able to return to full duties within three (3) months.
15. On July 21, 2002, Mr. Gleason underwent eye surgery for a detached retina and remained off work until July 26, 2002, when he returned to work with restrictions. The restrictions included the following: no heavy lifting, jumping or jarring activity; and no lifting greater than 50 pounds.
16. Mr. Gleason remained on restricted duty for his eye and knee problems until October 11, 2002, when he left Colowyo and applied for long term disability.
17. On September 13, 2002, Colowyo requested a functional capacity evaluation from Mr. Gleason's physician, Dr. Sisk, to determine his physical fitness for duty.
18. The functional capacity evaluation limited Mr. Gleason from crouching, kneeling, ladder climbing, crawling, or lifting. The functional capacity evaluation noted the following specific weight limits: from floor to waist a weight limit to 40 pounds throughout the day, 50 pounds occasionally, and no more than 70 pounds infrequently. The evaluation also limited Mr. Gleason lifting from waist level to overhead heights as follows: 30 pounds on a consistent basis, 50 pounds occasionally, and no more than 70 pounds infrequently. [The evaluation also included restrictions on lifting, specific carrying restrictions, and other restrictions.]
19. On September 30, 2002, his physician requested that Mr. Gleason be placed in a position meeting his physical limitations.
20. Mr. Gleason's restrictions identified in Nos. 8-12 and 14-18 of these stipulations precluded him from performing the duties of an electrician at Colowyo.
21. While on restricted duty identified in Nos. 8-12 and 14-18 of these stipulations, Mr. Gleason was assigned tasks other than those of an electrician, including the provision of assistance to the safety department. However, he continued to be paid his hourly rate as an electrician while on restricted duty, and Colowyo did not fill his position as an electrician during his performance of restricted duty.
22. On October 11, 2002, Mr. Gleason worked his last day at the Colowyo site.

23. For a six (6) month period beginning on October 12, 2002 and ending on April 11, 2003, Kennecott Energy paid Mr. Gleason salary continuation benefits at his full pay rate of \$23.63 per hour.
24. On October 29, 2002, Colowyo requested that Mr. Gleason be evaluated for Long Term Disability benefits which he qualified for and which were initiated in April 2003 after his salary continuation benefits expired. This request was not motivated by any protected activity under the Mine Act.
25. Mr. Gleason's Long Term Disability benefit was one half of his hourly rate as an electrician.
26. Mr. Gleason commenced work as an electrician at Phelps Dodge Corporation's Bagdad Mine in Arizona on July 28, 2003. That position does not require that he work on a dragline and in that position he can access equipment that is equipped with hydraulic lifts, rather than stairs and ladders. His pay rate in this position is \$18.30 an hour.

(See Tr. 114).

In his complaint of discrimination and at the hearing, Mr. Gleason presented facts to show that he engaged in protected activity. His evidence can be summarized as follows:

On or about January 23, 2001, Colowyo posted a position opening for a maintenance supervisor. (Tr. 74; Ex. G-1B). Gleason raised objections about this posting to Gene Bryant, the director of the human resources department. Gleason did not apply for the position but raised questions about the wording in the job description. He believed that, because the position supervised electrical repairs, only people with an electrical qualification card would be able to apply for the position. He believed that this requirement was too restrictive and that employees who were not certified electricians should be able to qualify. (Tr. 76). Bryant and Joe Vaccari, the manager of operations and maintenance, believed that the language in the job posting was acceptable and that the position was open to anyone, not just qualified electricians. Paradoxically, although Gleason testified that he thought that the position should be open to non-electricians, he was also concerned about non-electricians supervising electricians. (Tr. 77). The position was filled with a non-electrician.

On March 14, 2001, Tim Buller, the electrical supervisor at the time, assigned Gleason the responsibility to conduct a thorough electrical inspection of the mine. Gleason was chosen to perform this work, in part, because of his extensive knowledge of 30 C.F.R. Part 77 and the National Electrical Code ("NEC"). Part of Gleason's responsibility was to look for violations of MSHA's electrical standards in Part 77. Gleason tagged a number of items in the water filtration plant that he believed violated the NEC. During the course of this inspection, Gleason became concerned about electric panels in the filtration plant. He observed standing water on the deck of this plant and he knew that water was used to wash down the walls of the plant. (Tr. 78-80). The

electric distribution panels in the plant were panels that are typically used in dry environments. The panels showed some signs of corrosion from the moisture or the chlorine. He believed that because the plant was a “wet/damp” environment a different type of electric distribution panels should be installed. Gleason wrote a “red tag” for the condition, but he did not hang it. (Tr. 79). Instead, Gleason went to the mine office and got Tim Buller out of a cost meeting to discuss the situation with him. Buller and Kimberly Wolf, an environmental engineer, went to the filtration plant with Gleason to observe the conditions. *Id.*

The filtration plant had been in this condition for about ten years. (Tr. 36). After looking at the electrical system in the plant, they realized that they could not cut the power to the plant because the mine-wide radio system obtains its power from the same distribution panel. Gleason suggested that notice be given to electricians through a notation in the electrical inspection book. (Tr. 80; G-1C). The notation, written by Buller, states as follows:

Filtration plant. Many of the electrical enclosures are only classified as dry location equipment. This area is washed down occasionally so it will need to be wired for wet location. I have spoken to engineering about replacing this plant later this year. I don't believe that there are any safety hazards, but it should be fixed.

(Ex. G-1C). Employees working in the filtration plant were also warned. (Tr. 123). Colowyo had ongoing plans to replace the filtration plant, but as of January 2004, it appears that the existing plant was still being used with the same electric distribution panels.

Gleason testified that about two weeks later, Buller told him that Bryant and Vaccari wanted to meet with him. Gleason met with the two managers in the human resources department office. The managers asked him if there had been any problems when he moved from an electrical planner to an electrician. As set forth in the stipulations, during a company reorganization in June 1999, Gleason was demoted from the position of electrical planner to an electrician position. Vaccari complained that Gleason did not know how to “take care of the boss.” (Tr. 82). Both managers told him that he was too aggressive and confrontational. *Id.* Gleason believed that management was asking him to “work more cooperatively with my supervisors.” (Tr. 106). Gleason testified that Bryant asked him whether he raised the issues about the filtration plant to get back at the company for demoting him from electrical planner to electrician. (Tr. 82, 148-49). They also discussed Gleason's objections to the language in the January 2001 job posting. According to Gleason, Bryant told him not to get so emotional and aggressive about minor things. Gleason testified that he was also advised that just because he believes something is unsafe does not mean that it actually is unsafe. (Tr. 83). Gleason believed that Bryant was telling him that he did not have the final say on whether a condition violates 30 C.F.R. § 77.502. That provision provides, in part, that electric equipment shall be frequently examined and, when a potentially dangerous condition is found, such equipment shall be removed from service. Gleason apparently took that statement personally as an insult to his

professional judgment. (Tr. 85). Bryant also indicated that, by taking Buller out of a meeting to look at the conditions at the filtration plant, Gleason had blown the matter out of proportion. *Id.*

Colowyo posts job announcements from other Kennecott Energy properties on the bulletin board at the mine. Two announcements were of interest to Gleason: an opening for an electrical planner at the Cordero Rojo mine and a similar opening at the Spring Creek mine. Gleason testified that he applied for these positions by giving his application to Mr. Bryant, the human resources manager at Colowyo. (Tr. 86). Gleason believes that either his application was not forwarded to these mines or he was not given serious consideration for the positions as a result of his protected activities. (Tr. 87-88).

On June 25, 2001, Gleason was conducting a monthly electrical inspection at the tank farm at the mine. He understood that the building at the tank farm was considered to be non-classified, meaning that hazardous or flammable materials would not be stored there. (Tr. 90). During this inspection, Gleason found barrels of kerosene as well as a pump for the kerosene. Gleason went to the safety department to discuss the matter. In addition, he reviewed the NEC. (Tr. 91; Ex G-6). Gleason testified that kerosene was listed as a Class I Group 2A substance. He discussed the issue with the safety director.

On July 11, 2001, Buller assigned Gleason to be a walkaround representative during a regular MSHA inspection. Gleason believes that Vaccari told the inspectors that Gleason was a “disgruntled employee.” (Tr. 89). Gleason was a walkaround representative during the entire inspection except for one day, when he was told not to accompany the inspectors.

On August 7, 2001, Rick Scherer, an electrical engineer with Kennecott Energy, was at Colowyo. Gleason showed him the conditions at the filtration plant and the tank farm. (Tr. 93). At the filtration plant, Scherer and Gleason found other conditions that violated the NEC. (Tr. 94). Scherer and Gleason discussed the conditions they found with Steve Hinkemeyer, the engineering manager. Hinkemeyer told them that the filtration plant was scheduled to be replaced within a year. *Id.* Scherer told him that the conditions needed to be corrected in any event. Hinkemeyer then asked if it would be satisfactory if Colowyo took precautions to make sure that water was not sprayed on the walls, that the electric panels did not get wet, and that water would not be allowed to remain on the floor. Scherer and Gleason agreed that his suggestion was a reasonable approach to the problem. (Tr. 95, 124). It was agreed that the other electrical problems at the filtration plant would be fixed and that flammable material would be removed from the building at the tank farm. *Id.* The flammable material was removed about a month later, but the pump remains. (Tr. 95, 120-21).

In January 2002, Gleason accompanied Jim Andrews, the mine’s safety director, on a safety inspection of the mobile equipment shop. Gleason noted that an air hose reel was located directly under the 480-volt control panel in violation of the NEC. Gleason does not know if this condition was corrected.

On June 6, 2002, Buller announced that he was leaving Colowyo to take a position at another mine. Gleason applied for this job soon after it was posted on June 21, 2002. (Ex. R-1).<sup>1</sup> On August 16, 2002, Gleason saw an e-mail from Kennecott Energy which stated that MSHA inspectors are now considering diesel fuel to be a flammable liquid. (Tr. 99; Ex. G-1D). As a consequence, Gleason filed a written section 103(g) complaint with the MSHA office in Craig, Colorado, asking MSHA to come out to the mine to discuss this and the other issues he had previously raised, including the filtration plant and the tank farm. (Tr. 99). Two MSHA inspectors visited the mine on August 27, 2002. Although the inspectors issued some citations, they did not issue any citations related to the items that Gleason mentioned in his complaint. (Tr. 108). The inspectors were satisfied that if water was not sprayed on the electric panels in the filtration plant, the panels did not have to be replaced with panels suitable for a damp/wet environment. The inspectors also apparently did not believe that the conditions at the tank farm violated the safety standards since the kerosene had been removed. Although it appears that the MSHA inspectors told Colowyo management that the complaint had been phoned in, Gleason believes that management knew he had filed a written section 103(g) complaint.

On August 30, 2002, James Petty, the new maintenance coordinator, asked Gleason to meet with him. Petty advised Gleason that he would not be considered for the Electric Supervisor-Planner position. (Tr. 99). Gleason testified that Petty said that management had “their own ideas about the personality they wished to see in the job and that I wouldn’t fit.” (Tr. 100). Although Colowyo interviewed David Bird, an electrician at Colowyo, the position was filled by someone from outside Colowyo.

On September 3, 2002, Colowyo posted two open positions for Maintenance Supervisor. (Ex. R-2). Gleason applied for these positions. (Tr. 100).

On October 4, 2002, a meeting was held to discuss Gleason’s ability to perform his job as an electrician. As stated in the stipulations, Gleason had completed a functional capacity evaluation and his physician asked that Gleason be placed in a position meeting his physical limitations. (Stips. ¶¶ 18 & 19). Colowyo management told Gleason at the meeting that an employee can only work on restricted duty for a short time. (Tr. 54). Gleason was no longer physically able to perform his duties as an electrician at Colowyo. Gleason does not dispute that fact. (Stips. ¶ 20; Tr. 109, 129). Management stated that, because it had kept him in his position while he was on medical leave and on restricted duty, the company was short one electrician. Colowyo wanted to fill his slot with someone else. Management suggested that Gleason bid on a maintenance assistant position because it was not as strenuous. (Tr. 131). Gleason declined this offer because the pay was somewhat lower, he would be required to walk up and down stairs, and he would be required to do more typing than he had in the past. (Tr. 132-33). Gleason also raised the issue of who is qualified to supervise electricians.

---

<sup>1</sup> Exhibits R-1 and R-2 were introduced by Gleason, not Colowyo. Gleason agreed to use Colowyo’s copies of these premarked exhibits because they were in better condition than his own.

When Gleason declined to consider the maintenance assistant position, Bryant told him that the company would try to get him long term disability. When Gleason asked if this meant that he was fired, Bryant replied that he was being terminated because he could no longer do the job of an electrician. Gleason's last day at work was October 11, 2002.

As set forth in the stipulations, Gleason was on salary continuation benefits through April 11, 2003, at \$23.63 per hour. After that date, he started receiving disability benefits at one-half of his hourly rate. In July 2003, Gleason decided to see if he could work again on an experimental basis. (Tr. 153). He obtained a job as an electrician at a copper/molybdenum mine in Arizona that does not require as much physical exertion. (Tr. 154).

Gleason filed a complaint of discrimination with the Department of Labor on November 8, 2002. By letter dated April 9, 2003, MSHA notified Gleason that it determined that the facts disclosed during its investigation of his complaint did not constitute a violation of section 105(c) of the Mine Act. On May 5, 2003, Gleason filed the complaint in this proceeding.

## **II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW**

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("*Legis. Hist.*")

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987).

## **A. Protected Activity**

I find that Gleason engaged in protected activity while employed at Colowyo. Specifically, he raised questions about the conditions in the filtration plant and at the tank farm. He raised other issues concerning electrical safety. He also filed a written complaint with MSHA under section 103(g) of the Mine Act.

## **B. Adverse Action**

Gleason suffered an adverse action in that he was separated from his employment. The issue is whether Gleason was terminated from his job as a result of his protected activities. In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

It is clear that Colowyo management had knowledge of Gleason's protected activities. It is not entirely clear that management knew that Gleason filed the 103(g) complaint, but given the subject matter contained in the complaint, management likely had a good idea that Gleason filed it. (Tr. 108). Most of his protected activities occurred in 2001 long before he was terminated. His 103(g) complaint, however, was filed only a few months before his termination. There has not been a strong showing of animus or hostility towards Gleason's protected activities. Management appears to have been dissatisfied with the manner in which he raised electrical safety issues, but management addressed most of the issues although not as quickly as Gleason would have liked. Management's request that he be more cooperative demonstrated some degree of hostility. Nevertheless, he was supported in his efforts by some individuals in management, such as Buller and Scherer. Gleason's work performance appraisal given by Buller after he had raised the electrical safety issues in the filtration plant was quite positive. With respect to safety performance and philosophy, the appraisal states that "Jack has not only complied with all [safety requirements], he has been instrumental in setting the standards we follow." (Ex. G-1E). With respect to productivity performance, the appraisal states, "Jack's strict interpretation of standards has been a source of some conflict, but I truly believe that Jack's intentions are genuine and his ultimate desire is to do what is best for the company." *Id.* The appraisal also cites the fact that one of Gleason's productivity improvements will likely save the company hundreds of thousands of dollars. Gleason also had a clean disciplinary record. (Tr. 160).

Gleason was forthright in presenting his case in this matter. He admitted that he could not perform the job duties of an electrician due to his health problems. At Colowyo, an electrician is required to climb onto heavy equipment, such as draglines, to perform electrical work. An electrician must also perform other tasks that Gleason was not capable of performing in October 2002. Gleason testified that he “wasn’t ready to leave Colowyo” and he wanted to be considered for the Electrical Supervisor-Planner position or the Maintenance Supervisor positions. (Tr. 135-36, 159). He admitted, however, that his limitations would interfere with his ability to perform all the functions of those jobs as well. (Tr. 137-39, 145-46). He testified that he would have to “designate somebody to go be my legs. . . .” if he were in either of those positions. (Tr. 156). He testified that Colowyo has made accommodations for other employees in the past. Although Gleason touched on the disparate treatment issue, there is no credible evidence in the record to find that he was treated differently from other similarly situated employees because of his safety activities.

As stated above, at the conclusion of Gleason’s case in chief, Colowyo moved that the case be dismissed because he had not established a *prima facie* case. Colowyo argued that Gleason’s evidence shows that he was not terminated from his employment, but that he was placed on long term disability because he could no longer perform his job. Gleason admits that he was not capable of performing the work of an electrician in October of 2002. Although Gleason wanted to be considered for two supervisory positions, Colowyo would have been required to modify the scope of those jobs in order to accommodate Gleason’s limitations. Colowyo argues that the relief requested by Gleason is not within the scope of section 105(c).

I agree with Colowyo’s argument in this regard. As shown in the stipulations, Gleason did little electrical work after September 2000. During most of that period he was on medical leave or restricted duty that precluded him from doing the type of work that other electricians were performing. Colowyo did not bump him from his position, but gave him other assignments so that he could continue to receive his pay as an electrician. (Tr. 129). Many of his assignments involved inspecting the mine for safety violations. Colowyo continued giving him safety-related work despite the fact that he discovered many conditions that he believed did not meet MSHA and NEC standards. (Tr. 117-18, 126). Colowyo asked him to thoroughly inspect electrical installations at the mine to help reduce the number of citations it receives from MSHA.

In September 2002, Gleason’s physician requested that Gleason be placed in a position meeting his physical limitations. (Stips. ¶ 19). Because of these limitations, Colowyo management concluded that Gleason would not be able to perform the work of an electrician for the foreseeable future. Colowyo offered him a position that would fit his limitations. Although Gleason argues that they did not offer him the maintenance assistant position, but only offered to let him bid on the job, it is not disputed that he declined to discuss or consider the offer.

The Mine Act protects miners who make safety complaints or who refuse to work in the face of hazardous conditions. The Mine Act does not require a mine operator to continue to employ a miner in a position that he is no longer able to perform because of his own physical limitations. *See Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ).

There has been no credible evidence that Colowyo forced Gleason to go on long term disability as a pretext or subterfuge to hide its discriminatory motive. Colowyo offered Gleason another position at the mine or at the least encouraged him to bid on that position. This fact belies any discriminatory motive. It is true that Colowyo did not offer him one of the two supervisory positions that he applied for, but those positions were inconsistent with the limitations Gleason was under in October 2002.

Gleason is proud that he is a “carded electrician.” Gleason also took his responsibilities under section 77.502 with appropriate seriousness. Gleason believes that when Colowyo supervisors began questioning his concerns about electrical safety, they were questioning his judgment. He believes that management thought that he “couldn’t be trusted to determine if something was a danger or not.” (Tr. 160). Although the Mine Act protects miners who raise safety complaints, it does not prohibit a mine operator from questioning or probing the issues raised. It is clear from the evidence that Colowyo respected Gleason’s demonstrated expertise in electrical safety and the NEC. The fact that Colowyo’s supervisors did not immediately change or correct every alleged deficiency that Gleason tagged and the fact that these supervisors questioned Gleason about some of these items does not establish that Gleason was not a trusted employee or that he was discriminated against in violation of section 105(c).

For the reasons set forth above, I find that Mr. Gleason did not establish that his protected activities played a part in Colowyo’s decision to place him on long term disability. Colowyo placed Gleason on long term disability because of his physical limitations only after he declined to bid on or discuss the maintenance assistant position.

### III. ORDER

For the reasons set forth above, the discrimination complaint filed by Leslie O. Gleason against Colowyo Coal Company under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning  
Administrative Law Judge

Distribution:

Leslie O. Gleason, 805 Exmoor Road, Craig, CO 81625-3828 (Certified Mail)

Leslie O. Gleason, P.O. Box 125, Bagdad, AZ 86321 (Certified Mail)

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18<sup>th</sup> Street, Suite 2150, Denver, CO 80202-1958 (Certified Mail)

RWM