

CCASE:

ELMER DARRELL BURGAN V. HARLAN CUMBERLAND

ELMER DARRELL BURGAN, V. DIXIE FUEL

DDATE:

19930512

TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

ELMER DARRELL BURGAN,	:	DISCRIMINATION PROCEEDINGS
Complainant	:	
	:	Docket No. KENT 92-915-D
v.	:	BARB-CD-92-31
	:	
HARLAN CUMBERLAND COAL CO.,	:	Harlan Mine
Respondent	:	
	:	
	:	
ELMER DARRELL BURGAN,	:	Docket No. KENT 93-101-D
Complainant	:	
v.	:	No. 1 Mine
	:	
DIXIE FUEL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Phyllis Robinson, Esq., Hyden, Kentucky,  
for the Complainant  
H. Kent Hendrickson, Esq., Harlan,  
Kentucky, for the Respondents.

Before: Judge Feldman

These cases are before me based upon discrimination complaints filed pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3) (the Act) by complainant Elmer Darrell Burgan (Burgan) against corporate respondents Harlan Cumberland Coal Company (Harlan) and Dixie Fuel Company (Dixie).(Footnote 1) Clyde Bennett is the general manager of the respondents which are closed family corporations. Bennett's children are the corporate officers of these

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Burgan's complaints which serve as the jurisdictional basis for this matter were filed with the Secretary in accordance with Section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2). Burgan's complaints were investigated by the Mine Safety and Health Administration (MSHA) which concluded that there were no Section 105(c) violations with respect to Burgan's employment at Harlan Cumberland Coal Company or Dixie Fuel Company. Burgan subsequently filed complaints with this Commission which are the subject of this proceeding.

corporations. These cases were consolidated for hearing at the complainant's request by order dated January 6, 1993. The cases were heard in Richmond, Kentucky on March 9 and March 10, 1993. For the reasons discussed herein, Burgan's discrimination complaints against the corporate respondents are dismissed.

At trial, the parties stipulated that Harlan and Dixie are coal companies engaged in interstate commerce. Therefore, the parties agree that I have jurisdiction to hear these matters. The parties also stipulated to Burgan's employment history. The complainant's direct case consisted of his testimony as well as the testimony of six other individuals, including the complainant's brother, Robert Burgan, who was the Superintendent at Harlan. In defense of the charges filed by Burgan, the respondents provided the testimony of Clyde Bennett and two employees of Harlan and one individual employed by Dixie. The parties filed simultaneous proposed findings and conclusions which were received in my office on April 26 and April 27, 1993.

#### Burgan's Section 105(c) Complaints

The gravamen of Burgan's complaint against Harlan is that his three day suspension and subsequent transfer from Harlan's H2 Mine to its D3 and C3 Mines following a January 14, 1992, altercation with his brother Allen was, in fact, discriminatorily motivated because of Burgan's safety related complaints. Specifically, Burgan asserts that he complained about H2 Mine Foreman Matthew Coots' intentional blocking of shuttle car breakers which interfered with Burgan's short circuit protection during his shuttle car operation. Burgan contends that Coots' blocking of these breakers exposed him to electric shock and potential electrocution. Burgan alleges that his discriminatory suspension and transfer ultimately resulted in his unemployment when the C3 Mine was closed until Burgan was called back to work to open Dixie's No. 1 Mine. With respect to Dixie, Burgan argues that Clyde Bennett's June 11, 1992, denial of his request to transfer from the Dixie No. 1 Mine back to the H2 Mine, because the H2 mine was closer to Burgan's home, was also motivated by discrimination because of his past safety complaints.(Footnote 2)

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The complainant's theory of the case regarding Dixie is not well focused. For example, Burgan initially argued that he was afraid to return to the Dixie No. 1 Mine on June 10, 1992, because he believed the mine was unsafe after a smoke incident caused by a conveyor belt stoppage on June 4, 1992. (See Verified Complaint, Kent 93-101-D, Para. 9; Tr. 27, 81, 86, 89, 91, 96, 102-103). However, late in the first day of the trial counsel conceded that the evidence reflected that this belt condition was abated the next day and that Burgan did not experience any reoccurrence of smoke related problems when he returned to work at the Dixie No. 1 Mine on June 8, 1992. (See Tr. 288-292).

Respondents' Defense

The respondent counters by denying that blocking of breakers occurred and by denying that Burgan ever communicated any safety related complaints. In addition, the respondent maintains that Burgan's three day suspension and transfer were motivated solely by its desire to separate Burgan from his brother Allen Burgan after a serious altercation. The respondent states that Burgan's subsequent temporary layoff from March 14 through June 3, 1992, occurred because the D3 and C3 Mines were closed because they were not profitable. In this regard, the respondent contends that Burgan was laid off along with the rest of the crew that was assigned to these mines. Finally, the respondent asserts that Burgan quit his job at the Dixie No. 1 Mine in Cawood, located approximately 30 miles from Burgan's home, on June 11, 1992, after Clyde Bennett told him that he did not have any work for him at the H2 mine in Louellen, Kentucky.

PRELIMINARY FINDINGS OF FACT

The fundamental facts are not in dispute. Burgan resides in Closplint which is located within a few miles of Louellan, Kentucky. He has been employed by coal mines operated by Clyde Bennett since 1979. From 1979 until March of 1982, he was employed at the Dixie mine at Cawood, in Harlan County, Kentucky which is, as noted above, located approximately 30 miles from his home in Closplint. From March 1983 until January 14, 1992, he was employed at several Harlan mines located in Louellan, in close proximity to his home in Closplint. During this period, the complainant and his brother Allen Burgan worked together at Harlan's H2 Mine for approximately four years. Burgan's other brother, Robert Burgan, was the Superintendent of the H2 Mine since the latter part of 1987 until he terminated his employment on January 7, 1992, because of a reported back condition. During the period that the three Burgan brothers were employed by Harlan, Matthew Coots was the Foreman at the H2 Mine. Coots reported directly to Robert Burgan who in turn reported to Clyde Bennett.

fn. 2 (continued)

Counsel thereupon modified the alleged discriminatory action associated with Burgan's Dixie employment to Clyde Bennett's refusal to transfer Burgan to the H2 Mine closer to Burgan's home. (Tr. 275). In support of this new approach, Counsel now argues that Burgan needed to work close to home because of car problems and because Burgan's driver's license had been revoked for driving under the influence (DUI). (See Tr. 272-276). I am not unmindful of the contradiction associated with Burgan's car problems at a time when he had no driver's license. Nevertheless, it is the theory advanced on behalf of the complainant.

On January 14, 1992, the complainant had an altercation with his brother Allen Burgan after Allen backed a continuous miner into a bolting machine located behind a curtain where the complainant and James Skidmore were eating. An argument ensued during which there was cursing. During the argument the complainant grabbed a piece of roof bolting steel and drew it back and threatened to hit Allen. Allen walked away and no blows were exchanged. (Tr.375-376). As a result of this incident, the complainant was suspended without pay from Wednesday, January 15, through Friday, January 17, 1992. On Monday, January 20, 1992, the complainant was transferred to Harlan's D3 Mine in Louellan until it was closed on January 24, 1992. Burgan was then transferred to Harlan's C3 Mine at Louellan on January 25, 1992. His employment continued until March 13, 1992, when the C3 Mine was closed. Burgan was laid off and collecting unemployment insurance from March 14, 1992 through June 2, 1992.

On June 3, 1992, Burgan was called back to work at the Dixie Fuel Company No. 1 Mine in Cawood, Kentucky. Burgan worked at the Dixie No. 1 Mine on Wednesday, June 3rd, and Thursday, June 4th. At the end of the June 4th shift, at approximately 4:00 p.m., there was an incident wherein the belt slipped off the head drive. The roller continued to turn against the stationary belt scorching the belt causing smoke. Employee Elvis Saylor shut the belt down immediately. Burgan and three other mine personnel in the belt entry traveled through a door from the belt entry into a fresh air course to escape the smoke. Shortly thereafter, Foreman Ron Osborne received a call from the surface informing him that Burgan's wife was enroute to the hospital to deliver a baby. Osborne informed Burgan that he could take Friday, June 5th off in view of his wife's childbirth.

Burgan returned to work at the Dixie No. 1 Mine on the morning of Monday, June 8th. He also worked the following day on June 9th. On Wednesday, June 10th, he telephoned Clyde Bennett and stated that he could not come to work because his car broke down. On Thursday, June 11th, he called Bennett and stated that his car was still inoperable. Bennett inquired why it was taking so long to fix his car.(Footnote 3) Burgan asked Bennett for a transfer back to the H2 Mine in Louellan which was nearer to his home.

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Bennett testified that Burgan told him that his car needed its tie rod ends replaced. Bennett called several local auto supply stores and determined that the parts were readily available. Bennett estimated that it would take approximately 30 minutes to repair the vehicle. (Tr. 352).

Bennett replied that he did not need him at the H2 Mine. The respondent then told Bennett that he quit. He also told Bennett that the Dixie No. 1 Mine was unsafe.(Footnote 4)

#### FURTHER FINDINGS AND CONCLUSIONS

##### Applicable Case Law

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom., Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F. 2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing that either no protected activity occurred, or, that the adverse action was in no way motivated by the protected activity. Robinette, 3 FMSHRC at 810 n.20.

If the operator fails to rebut the complaint, it may nevertheless affirmatively defend against the prima facie case by proving that it was also motivated by unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. See also Donovan v. Stafford

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Bennett's account of these telephone conversations is consistent with Burgan's testimony during his unemployment case wherein he told the hearing officer, "Yeah, [I quit], I told [Bennett], I said if you have anywhere else for me to work where I can get to work close to home ... [Bennett] could have put me up there if he wanted to...." (Joint Ex. 1, pp. 26-27). Burgan's unemployment testimony is also consistent with his testimony in this proceeding where he testified that Bennett never told him that he was fired from the Dixie mine. (Tr. 146-147, 363). Burgan also opined that the Dixie mine was unsafe during a telephone conversation on June 11th. Bennett states that this statement was made during a subsequent telephone call on June 11th approximately one hour after Burgan told Bennett that he quit. Burgan cannot recall whether he made a second telephone call. (Tr. 146). However, resolution of whether a second telephone call was made by Burgan is not dispositive, particularly in view of the complainant's abandonment of the unsafe theory. (See fn. 2 supra; Tr. 333-336).

Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

#### The Complaint Against Harlan Cumberland Coal Company

##### The Complainant's Direct Case

As a threshold matter, in order to determine if Burgan engaged in a protected activity, it is first necessary to identify the alleged conduct which serves as the basis for the complaint. In this case, Burgan maintains that Foreman Matthew Coots who was under the direct supervision of Burgan's brother, Superintendent Robert Burgan, engaged in a course of conduct, i.e., blocking in breakers, presumably with the knowledge and acquiescence of electrician Wendell Griffin. It is alleged that this conduct negated the circuit breaker protection and exposed shuttle car operators, such as Burgan, to electric shock and possible electrocution. These are serious charges which, if established, would subject the offending individuals to personal liability for civil penalties under Section 110(c) of the Mine Act, 30 U.S.C. 820(c). (Footnote 5)

In support of his complaint, Burgan relies on the testimony of Gary Lee Couch who replaced Burgan as a shuttle car operator at the H2 Mine when Burgan was transferred to the D3 Mine on January 20, 1992. (Tr.172). Couch continued to work at the H2 Mine until April 8, 1992, when he reportedly sustained a job related back injury. Bennett subsequently rehired Couch for light duty work as a night watchman. Couch performed these duties for approximately six weeks until he was fired for repeatedly sleeping on the job. (Tr.184-185, 350). Couch is a litigant in his workman's compensation case against the Harlan Cumberland Coal Company. (Tr.186).

Couch testified that Coots blocked breakers and instructed Couch how to do it. Thereafter, Couch stated that he blocked breakers at Coots' request. (Tr.174-175, 178, 188). Couch testified that he subjected himself to electric shock as a result of blocking breakers. (Tr.175). Couch described an awkward maneuver by which he entered the shuttle car so as to avoid electric shock. Couch described this shuttle car entry procedure as follows:

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Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory safety standard, any agent of such corporation who knowingly authorized, ordered or carried out such violation, shall be subject to the same civil and criminal penalties that can be imposed upon the operator under the Act.

Well, after a while you kind of learned how to get in and off the car without getting shocked. You jumped with both feet at one time to get off or you jump on all at one time. If you're touching the ground when you lay your hand on the car you got shocked if it was hot (Tr.175).

Couch reportedly was so concerned about his personal safety that he told a friend to tell his wife about the breakers if "something stupid [happened] that got [him] killed." (Tr.176-178). Despite the fact that Couch testified that he feared for his life, he never reported the breaker problem to Bennett or the Mine Safety and Health Administration (MSHA).(Footnote 6) (Tr.186, 192).

Burgan also called James Edward Skidmore who was a fellow employee at the H2 Mine. Skidmore witnessed the January 14, 1992, altercation between Burgan and his brother Allen. Skidmore's recollection of the incident is consistent with Coots' testimony that Burgan threatened to hit Allen with a piece of roof bolting steel. (Tr.215-216, 376). Skidmore testified that neither Burgan nor Couch ever told him about blocked shuttle car breakers. (Tr.211-212). He stated that he never observed anyone routinely "jumping out of a shuttle car in a funny way so as to avoid shock or injury" (Tr.217). Although he is a roof bolt operator and does not use a shuttle car frequently, he stated that he had no fear or reluctance to ride in the H2 shuttle cars. (Tr.217).

Finally, the complainant called his brother Robert Burgan who was Superintendent at the H2 Mine and directly in charge of Coots. Robert Burgan last worked for the respondent Harlan Cumberland Coal Company on January 7, 1992, because of a job related back injury. He is receiving workman's compensation which is still pending final litigation. (Tr.306, 309). Robert Burgan testified that the complainant told him that Coots was

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The respondent Harlan Cumberland Coal Company stipulated that anonymous complaints about blocked breakers were apparently communicated to MSHA in April 1992. (Tr. 372). As a result of these complaints, on April 24, 1992, MSHA inspected the H2 Mine. This inspection resulted in several citations. The record was kept open for entry of copies of these citations into the record after trial. (Resp. Ex. 3). The MSHA inspection did not substantiate the complaints. (Tr. 369-372, 422). The failure of the Secretary to confirm the alleged misconduct accounts for the Secretary's disinclination to prosecute the subject complaints on behalf of Burgan. Moreover, these unsubstantiated complaints to MSHA lodged several months after Burgan's January 1992 transfer from the H2 Mine and contemporaneous with his April 30, 1992, discrimination complaint are self-serving and do not establish the protected activity alleged by Burgan. (See Comp. Ex 1).

blocking breakers and that he had a meeting with Coots and H2 electrician Wendell Griffin in November or December 1991 at which time they denied that blocking of breakers occurred. (Tr.300-302). In their testimony, Coots and Griffin deny that this meeting ever occurred. (Tr.382, 414). Significantly, Robert Burgan's testimony indicates that he could not confirm the complaints about blocking breakers in that he never fired or otherwise disciplined anyone for this activity. In fact, Robert Burgan testified that, "I never had proof" that Coots or anyone else was engaged in blocking breakers. (Tr.309). This accounts for Robert Burgan's failure to report this matter to his immediate boss, Clyde Bennett. (Tr.262).

With respect to the altercation, Robert Burgan testified that suspension, termination, or separation of employees who engage in fighting are appropriate sanctions. (Tr.311-312,315). He also testified that personnel actions should be based upon seniority. (Tr.315-316). Although Robert Burgan questioned the transfer of the complainant, it was consistent with seniority considerations in that Allen Burgan had 16 to 18 years experience which gave him more seniority than the complainant. (Tr.316).

#### The Respondent's Direct Case

The respondent called Coots who unequivocally denied the allegations of the complainant. In this regard, Coots stated that he never had a meeting about blocked breakers with Robert Burgan. He also testified that he did not know how to block in a breaker. (Tr.395). Coots conceded that supervision of the complainant was difficult because he (Coots) was supervised by the complainant's brother. Coots stated that the complainant would always run to Robert Burgan whenever he was told to do something he didn't like to do. (Tr.378-379). Coots described the altercation between the complainant and Allen Burgan. (Tr.384). After this incident Coots recommended to Bennett that the complainant and Allen Burgan be separated. (Tr.389).

Electrician Wendell Griffin also denied any pertinent meetings or discussions with Robert Burgan. (Tr.414,421). Griffin testified that he never blocked in breakers. He also testified that neither Coots nor Couch knew how to block in a breaker. (Tr.423-424). Griffin denied receiving any pertinent complaints from the complainant or Couch. (Tr.413).

Finally, Clyde Bennett testified that after talking to Coots about the January 14, 1992, fight between the Burgan brothers, he decided to transfer Burgan to the D3 Mine. The transfer was motivated solely by Burgan's fight (Tr.278). Bennett explained his decision as follows:

It was based on fighting in the mine. That's against the law, you know, it's very dangerous and I just won't have that in our mines and I made the decision to give him three days off and transfer him to another mine. If I'd made any other decision it would have been to fire him right then. I thought I give him a break (sic). (Tr. 293).

Bennett suspended Burgan for the three workdays following the fight and transferred him to the D3 Mine on Monday, January 20, 1992. The D3 Mine was closed on January 24, 1992, when the entire crew, including Burgan, was transferred to the C3 Mine. (Tr.279). The C3 Mine was closed on March 14, 1992, because the sulphur content in the coal was too high to satisfy the respondent's existing orders. (Tr.279). Two individuals at the C3 Mine were reassigned and the eight remaining crewmen were laid off. (Tr.314). At trial, and, in his unemployment hearing, Burgan testified that Danny Cochran was given preferential treatment because, unlike Burgan, Cochran continued to pump water at C3 and was not laid off. (See Joint Ex. 1. pp. 26-27). Bennett explained that Cochran has foreman's papers which allows him to go into a mine alone and that Cochran was obviously better qualified than Burgan. (Tr.347, 364). Most of the employees laid off from the C3 Mine were called back to the Dixie No. 1 Mine in May or June 1992.

#### The Complaint Against Dixie Fuel Company

##### The Complainant's Direct Case

Burgan was laid off from the C3 Mine in Louellen on March 14, 1992. He was subsequently called back to work on June 3, 1992, to open the Dixie No. 1 Mine in Cawood, Harlan County, Kentucky. At trial, the complainant presented considerable testimony concerning a June 4, 1992, conveyor belt incident that caused smoke and evacuation. Burgan testified at length regarding his alleged severe smoke inhalation suffered during this event as well as the fact that he feared returning to the Dixie mine although he conceded the belt problem was immediately remedied. In fact, there is no evidence that Burgan ever received treatment for smoke inhalation or that he ever experienced any problems when he returned to work at Dixie on June 8 and June 9, 1992. (Tr.88). Burgan's witnesses Monus Peace and Danny Cochran failed to support Burgan's claim that the Dixie mine was unsafe. In fact, Cochran rebutted Burgan's testimony that Cochran had requested a transfer from the Dixie mine because

he believed it to be unsafe.(Footnote 7) At the hearing, Burgan's counsel distanced herself from the safety issue as a basis for Burgan's discrimination complaint. (Tr.153-160, 272-278, 288-289, 337). Counsel now alleges that Bennett's denial of Burgan's transfer from Dixie to H2 was motivated by discrimination because of Burgan's earlier safety related complaints concerning Coots. (Tr.275, 277, 289).

#### The Respondent's Direct Case

The respondent called Ron Osborne, the Foreman at the Dixie mine who testified that he was with Burgan when they escaped from the smoke on June 4th by entering a fresh air course from the belt entry and that they were only exposed to smoke for a short period of time. Osborne also stated that Burgan never complained of smoke related injuries on that day or when he returned to work on June 8th. Bennett was called upon to testify regarding his telephone conversations wherein Burgan called on June 10 and stated he had car problems. In addition to his car problems, Burgan testified that his driver's license was revoked for DUI. (Tr.132-133). Bennett testified that he did not know that Burgan had lost his license. (Tr.270-271). Bennett recalled that Burgan telephoned on the following day and requested a transfer to the H2 Mine because it was closer to his home. Bennett told him that he did not need him there whereupon Burgan said he quit. Burgan called back an hour later and stated that he quit because the mine was unsafe rather than because of his car problems.

#### ULTIMATE FINDINGS AND CONCLUSIONS

As noted above, in order for Burgan to benefit from the protection afforded by Congress under Section 105(c) of the Mine Act, he must bear the burden of establishing that he was the victim of discriminatory adverse action as a result of his alleged protected activity. Specifically, Burgan must show that he complained about Coots' conduct concerning the blocking of breakers and that he had a good faith belief for such complaints. As Burgan's complaints are based on his alleged personal

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At the hearing it was obvious that Danny Cochran suffers from a significant hearing impairment. (Tr. 219-220). Burgan testified that Cochran told him that he requested Bennett to transfer him from the Dixie mine back to a Harlan mine in Louellen after the belt smoke incident "...because of (sic) he wasn't going to be scared like that." (Tr. 99). However, Cochran denied this statement when he was called upon to testify on behalf of the complainant. (Tr. 226, 231). In fact, Cochran explained that he requested a transfer on the advice of his physician who recommended that Cochran avoid the damp conditions in the Dixie mine which could exacerbate his hearing disorder. (Tr. 230-231).

knowledge of Coots' behavior, his good faith belief must be demonstrated by proving that this unsafe activity actually occurred. In addition, if Burgan can establish his protected activity as alleged, he must also show that the adverse action complained of, i.e., his transfer from the H2 Mine, was in part influenced by his protected activity. Burgan's principal witnesses supporting his allegations against Coots and Griffin are former employee Gary Couch and Burgan's brother, former Superintendent Robert Burgan.(Footnote 8) Their testimony should be evaluated in the context of whether it is credible and whether it is effectively rebutted by other witnesses. In addition, in determining the evidentiary value of their testimony, consideration must be given as to whether they are disinterested or biased.

Couch is currently litigating a workman's compensation claim filed against the Harlan Cumberland Coal Company. Moreover, it is uncontroverted that Couch was fired by Bennett for repeatedly sleeping on the job as a night watchman after he was placed on light duty following his reported job related back injury. Thus, Couch must be considered a biased witness.

Moreover, the credibility of Couch's testimony is suspect notwithstanding his apparent bias. It is difficult to imagine Couch's assertion that he knowingly and repeatedly exposed himself to electric shock or electrocution by personally blocking shuttle car breakers. It is equally incredible that he then proceeded to awkwardly jump in and out of the shuttle cars so as to avoid injury or electrocution. It is also difficult to understand how he could continue to engage in such activity, having testified that he feared for his life to such an extent that he told a friend to tell his wife what he was doing in the event he was killed because of "something stupid." Couch's testimony that he engaged in these activities because he was afraid of losing his job is also unconvincing. Finally, Couch's allegations were rebutted by the testimony of fellow employee James Skidmore, called as a witness by Burgan, as well as the testimony of Coots and Griffin.

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At trial complainant's counsel also sought to call Allen Burgan as a corroborating witness. Counsel stated that Allen Burgan is no longer employed by Harlan Cumberland Coal Company and that she thought that he also had a workman's compensation case pending. (Tr. 324, 439). At the conclusion of the hearing counsel moved to keep the record open to depose Allen Burgan. The motion was denied as Allen Burgan was not served with a subpoena and the information sought to be introduced through his testimony was already adequately reflected in the record. (Tr. 440-441).

Burgan's alleged protected activity was also not adequately supported by the testimony of his brother, Robert Burgan, who also has a back related workman's compensation case pending against the respondent. In this regard, Robert Burgan testified that he never took any disciplinary action against anyone; that he could not prove that Coots was engaging in the activity alleged by his brother; and that he never reported his brother's complaints to Bennett. Simply put, if the complainant's brother, the superintendent on the scene, could not confirm the validity of Burgan's alleged complaints, I am similarly unconvinced. It is noteworthy that Coots and Griffin both deny ever discussing blocked breakers with Robert Burgan. Moreover, Robert Burgan's failure to report these alleged meetings to Bennett further supports the denials of Coots and Griffin.

Thus, I conclude that Burgan has failed to demonstrate by a preponderance of the evidence that he engaged in the alleged protected activity. However, even if I were to find that Burgan did make generalized isolated safety related complaints that qualify as protected activity under Section 105(c) of the Mine Act, the evidence reflects that Burgan's three day suspension and transfer was motivated by Bennett's desire to separate Burgan from his brother Allen after their serious encounter. (Footnote 9) In this regard, Robert Burgan testified that suspension, transfer and termination are all appropriate sanctions for fighting in an underground mine. In addition, Robert Burgan stated that Allen Burgan had more seniority than the complainant further justifying the transfer of the complainant rather than Allen. The immediate suspension and transfer after the subject altercation is further evidence that the adverse action complained of was not influenced by any other considerations. Moreover, the record does not reflect that Burgan received any disparate treatment in that he was laid off from the C3 Mine and rehired at the Dixie mine with other individuals. (Tr.245-246).

Finally, turning to Burgan's complaint against the Dixie Fuel Company, it is clear that Burgan quit his job at Dixie on June 11, 1992, after Bennett refused to transfer Burgan to the H2 Mine which is closer to Burgan's home. (Tr.155). The complainant has not rebutted Bennett's testimony that Burgan was not needed at the H2 Mine. While mining is inherently dangerous, smoke

Although Burgan's alleged complaints concerning blocked breakers served as the basis for the discrimination complaints that are the subject of this proceeding, Burgan also testified about a variety of other alleged complaints. These included complaints about inoperable lights and poor brakes on shuttle cars, and unfair treatment he endured at the hands of Coots. (Tr. 38-45). Assuming that these complaints occurred, the evidence fails to demonstrate that Burgan's suspension and transfer were in any way motivated by such complaints.

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caused by a belt slippage does not establish that a mine is unsafe if the condition is corrected. In this case, the belt malfunction was immediately repaired and there is no evidence of reoccurrence. Under these circumstances, Burgan's assertion that he was afraid to go back to the Dixie No. 1 Mine because it was unsafe and not suitable for work is without merit. Moreover, this assertion is inconsistent with Burgan's own testimony and the testimony of his own witnesses Monus Peace and Danny Cochran. (Tr.154-158, 223, 226, 249-250). It is clear that Burgan's decision not to return to the Dixie mine was motivated by the commuting distance from his residence. Section 105(c) of the Mine Act protects a broad array of activities so as to encourage mine safety. However, car problems and the hardship associated with a driver's license revocation for driving under the influence (DUI) go beyond the scope of the protected activities contemplated by the Act.

ORDER

ACCORDINGLY, Elmer Darrell Burgan's Complaints against the Harlan Cumberland Coal Company in Docket No. KENT 92-915-D and the Dixie Fuel Company in Docket No. KENT 93-101-D ARE DISMISSED.

Jerold Feldman  
Administrative Law Judge

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