

CCASE:

DAVID THOMAS V. AMPAK MINING, JOHNSON COAL, SOUTHERN HILLS

GEORGE ISSACS V. AMPAK MINING, JOHNSON COAL, SOUTHERN HILLS

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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

DAVID THOMAS,  
COMPLAINANT

v.

AMPAK MINING, INC.,  
JOHNSON COAL COMPANY, INC.,  
SOUTHERN HILLS MINING CO., INC  
RESPONDENTS

DISCRIMINATION PROCEEDING

Docket No. KENT 89-13-D

BARB CD 88-16

Mine No. 1

GEORGE ISSACS,  
COMPLAINANT

v.

AMPAK MIING, INC.,  
JOHNSON COAL COMPANY, INC.,  
SOUTHERN HILLS MINING CO., INC  
RESPONDENTS

DISCRIMINATION PROCEEDING

Docket No. KENT 89-14-D

BARB CD 88-34

Mine No. 1

DECISION

Appearances: Tony Oppegard, Esq., and Stephen A. Sanders, Esq.  
Appalachian Research and Defense Fund of  
Kentucky, Inc., Hazard, Kentucky for the  
Complainants;  
Geary Burns, Vice President, Ampak Mining, Inc.,  
Van Lear, Kentucky for Respondent Ampak Mining, Inc.,  
G. Graham Martin, Esq., Martin Law Offices, P.S.C.,  
Prestonsburg, Kentucky for Respondent Johnson Coal  
Company, Inc.

Before: Judge Melick

These cases are before me upon the Complaints of David  
Thomas and George Isaacs against Ampak Mining, Inc., (Ampak),  
Johnson Coal Company, Inc., (Johnson), and Southern Hills Mining  
Company, Inc., (Southern Hills), pursuant to Section 105(c)(3) of  
the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801  
et seq., the "Act," alleging separate acts

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of discrimination in violation of Section 105(c)(1) of the Act.(FOOTNOTE 1)

Mr. Thomas argues that Ampak violated Section 105(c)(1) of the Act by demoting him on December 21, 1987, in retaliation for his refusal to perform unsafe work and for his refusal to sign a training certificate for training he had not received. Thomas also alleges that had he not been discriminatorily demoted in December 1987 he would not have been laid off by Ampak on February 15, 1988, and that, therefore, his lay off likewise violated Section 105(c)(1) of the Act.

Mr. Isaacs argues that he was laid off by Ampak on April 22, 1988, because of his many protected activities, including repeated safety complaints, refusal to perform unsafe work, and by giving deposition testimony in a separate 105(c) discrimination proceeding involving Ampak.

In their post-hearing briefs the Complainants withdrew their Complaints against Southern Hills on the grounds that it is purportedly no longer in business, has no assets and could not in any event provide any relief. Under the circumstances the Complaints in case Docket Nos. KENT 89-13-D and KENT 89-14-D against Southern Hills Mining Company, Inc., are dismissed.

Complaint of David Thomas - KENT 89-13-D

On October 17, 1987, Ampak assumed operations at the former Johnson Coal Company No. 11 mine, located in Knott County,

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Kentucky, under contract with Johnson Coal. Before Ampak took over David Thomas had worked for Johnson Coal for almost a year as a continuous miner operator at the mine.

When Ampak took over, Thomas was assigned to the third shift as a continuous miner operator at a rate of \$12.90 per hour. He continued to work on the third shift until mid-December, 1987, when Johnny Pittman, Ampak's general mine foreman, transferred him to the second shift. When Thomas reported for his first day of work on the second shift, the section foreman, Alger Jent, told him to replace George Isaacs on the continuous mining machine and to tell Isaacs to operate the roof bolting machine. When Isaacs balked at operating the bolting machine, Jent assigned Thomas to help James Sexton on the roof bolter.(FOOTNOTE 2)

Thomas worked as the roof bolting machine helper for about 3 1/2 hours until Sexton injured his back and had to leave the mine. The other roof bolting machine operator on the second shift, Dennis Rucker, was off work due to an injury so Ampak was left without either of its regular bolting machine operators. Jent therefore asked Thomas to operate the roof bolting machine as best he could. When Thomas told the foreman that he was not a certified bolter and was afraid to operate the machine, Jent told Thomas to just do the best he could for the remainder of the shift.(FOOTNOTE 3) Jent also assured Thomas that he would not have to operate the bolting machine again. Thomas then agreed.

Thomas operated the roof bolting machine for the remaining 2 hours of the shift. According to Thomas he bolted slowly because of his unfamiliarity with and fear of the bolting machine. He was not given any training before bolting and he received no supervision while operating the bolter. He

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maintains that he did not then know of his right to refuse an unsafe job assignment, including a task for which he had not been trained.

At the end of the shift, Thomas maintains that he told Section Foreman Jent that he would not operate the bolting machine again because he was not certified to do so and because he was afraid of the machine due to its poor operating condition. Jent repeated his earlier promise that Thomas would not have to operate the bolting machine again, and stated that the crew would have another bolting machine operator for the next working shift.

Before the start of the 2nd shift the following day, Thomas was standing with other crew members in the mine shop. According to Thomas, Jent approached Thomas and told him he would have to bolt again that day. Thomas refused, telling Jent that he was not certified to operate the roof bolting machine that he was afraid of the bolter, and that he would not bolt double (40 foot) cuts.

The roof control plan for the Ampak No. 1 mine provided that continuous miner cuts could be no more than 20 feet in length. However, the evidence shows that since the end of November, 1987, Alger Jent had been ordering the continuous miner operators on the 2nd shift to take 40 foot cuts (also called "double" or "deep" cuts). It is not disputed that this practice was extremely dangerous for the bolting machine operator because a 40 foot cut exposed him to twice the area of unsupported top. A deep cut also created greater instability in the mine roof which also increased the chances of a roof fall. Double cutting saves time however because the crew does not have to move the mining equipment as frequently and could theoretically increase production.

When Thomas initially refused Jent's work assignment, Jent left the shop and went to the mine office located across the parking lot from the shop. When Jent returned, he handed Thomas a training certificate that had been filled out to indicate that Thomas had received task training as a roof bolting machine operator. Jent told Thomas to sign the certificate, but Thomas refused because, as he told Jent, he had not received the training. According to Thomas, Jent then told him that if he wanted to stay at Ampak he would have to bolt 40 foot cuts.

Jent left the mine shop again and when he returned told Thomas that Johnny Pittman, the general mine foreman, wanted to see him. The evidence shows that after Thomas left the shop, Jent stated that he did not need men like Thomas on his section and that he would get rid of Thomas. When Thomas arrived at the mine office, Pittman asked him "what the problem was". It is not disputed that Thomas told Pittman that he was not certified to operate the bolting machine, that he was afraid of it, and

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that he would not bolt double cuts. According to Thomas, Pittman replied that if he did not want to operate the bolting machine, "we don't need you".

Thomas testified that he was afraid he would be fired if he refused to operate the bolter, so he returned to the shop and told Jent that he would operate the bolting machine, but that he would not bolt double cuts.(FOOTNOTE 4) Thomas was waiting to enter the mine when Pittman called him on the paging phone and told him to go home and to report back for work on the 3rd shift on his regular job.

Thomas did report for work that night on the third shift and resumed his regular job as continuous miner operator. However, Thomas maintains that after his refusals to bolt the double cuts and to sign the false training certificate Pittman's attitude towards him changed. For the next few days, Pittman would not talk to Thomas. In contrast, before the safety disputes, Pittman had always joked around with him. Then, about three days after Thomas' refusal to bolt the deep cuts and his refusal to sign the false training certificate, Pittman informed Thomas that his job classification was being changed from continuous miner operator to belt man (or head drive operator) and that his pay rate was being cut by \$1.30 an hour. Pittman gave Thomas no reason for his demotion from a skilled to an unskilled job.

After Thomas' demotion, effective December 21, 1987, he worked at the head drive of the conveyor belt during the entire shift. Paul Hughes, who formerly had been the 3rd shift repairman, was assigned to operate the continuous miner. Hughes, had not previously run the miner on the 3rd shift and had to be trained by Thomas to operate it.

Shortly after Thomas was demoted, he called the Federal Mine safety and Health Administration (MSHA) and reported that Ampak was taking double cuts with the continuous miner on the 2nd shift. As a result of Thomas' call, MSHA Inspector Stanley "Bobo" Allen went to the Ampak No. 1 mine on December 22, 1987, to determine if double cuts were, in fact, being made. Although Allen did not issue any citations for illegal cuts, he did issue five citations to Ampak during this inspection - four for roof control violations, and one for Ampak's failure to provide a ventilation brattice at the working face.

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The MSHA inspector also told Pittman that the December 22nd inspection was made in response to a complaint about double-cutting. Ampak's management was thus aware that one of its employees had complained. According to George Isaacs and Dennis Rucker, Alger Jent suspected (correctly) that Thomas was the informer. In fact, Jent told Isaacs that Thomas was "going to be a short-timer" at Ampak because he had notified the inspector about the double cuts.

On or about January 20, 1988, approximately one month after he was demoted from 3rd shift continuous miner operator to 3rd shift belt man, Thomas was transferred to Ampak's day shift as a belt man (head drive operator) with a further pay reduction of \$.20 per hour. Thomas continued to work as a belt man on the day shift until he was laid off on February 15, 1988.

When Thomas was given his layoff notice on February 15th, Pittman told him that he had been chosen for layoff because, according to the Johnson Coal Company seniority list, Thomas was the least senior head drive operator at the mine. On March 1, 1988, Pittman likewise told the MSHA special investigator during MSHA's investigation of Thomas' discrimination complaint that "Thomas was selected for layoff because he was the youngest [least senior] head drive operator we [Ampak] had".

Ampak laid off a total of 14 miners on February 15, 1988. Of these 14 employees, 7 or 8 were belt men (head drive operators). None of the miners laid off on February 15th were continuous miner operators.

#### Evaluation of the Evidence

In order to establish a prima facie violation of Section 105(c)(1) of the Act, the Complainant must prove by a preponderance of the evidence that he engaged in protected activity and that the adverse action taken against him by the Respondent was motivated in any part by the protected activity. In order to rebut a prima facie case, the Respondent must show either that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. Secretary of Labor on behalf of Pasula v. Consolidation Coal Co., Inc., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). If the Respondent cannot rebut the prima facie case in this manner, it nevertheless can defend affirmatively by proving that it was also motivated by the miner's unprotected activities and it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to this affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982).

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In the instant case, it is undisputed that Thomas engaged in protected activities in mid-December, 1987, when he (1) refused to bolt double cuts which were being made in violation of Ampak's roof control plan and (2) refused to sign a certificate of training which falsely indicated that he had been given task training by Ampak as a roof bolting machine operator. Moreover it is not disputed that Thomas' refusal to bolt the double cuts was made in the good faith and reasonable belief in its hazardous nature.

Respondents failed to call Alger Jent or any other witness to dispute Thomas' testimony that Jent ordered him to bolt the double cuts and to sign the fraudulent training certificate and that when Thomas refused these orders, Jent threatened him with the loss of his job. Thomas' testimony, on the other hand, was corroborated, in whole or in part, by George Isaacs, Robert Slone, Everett Watkins, and Jackie Littrell. Moreover, even General Mine Foreman Johnny Pittman admitted that when Thomas reported to his office in the midst of the dispute with Jent, Thomas told him that he was afraid to operate the bolting machine and that he would not bolt 40 foot cuts. Pittman also admitted that he reassigned Thomas to the 3rd shift that same day after Thomas' dispute with the company over the roof bolting of double cuts.

It is also uncontroverted that Pittman demoted Thomas from the skilled continuous miner operator's position to the unskilled belt man job and cut his pay from \$12.90 to \$11.60 an hour only a few days after Thomas' refusals to bolt the double cuts and sign the false training certificate. It is likewise uncontroverted that Pittman's relationship with Thomas changed for the worse following Thomas' refusal to accede to Ampak's unsafe and unlawful directives and that Pittman gave Thomas no explanation for his demotion and pay reduction. Indeed, Ampak offered no explanation even at trial for demoting Thomas on December 21, 1987.

Within this framework of evidence it is clear that Thomas was demoted from continuous miner operator to belt man (head drive operator) by Ampak on December 21, 1987, because of his refusals a few days earlier to bolt double cuts and his refusal to sign the false training certificate. Indeed Thomas was demoted by Pittman only a few days after these protected activities. When a company's adverse action against an employee closely follows the employee's protected activity, that fact itself is evidence of an illicit motive. *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508 (1981), rev'd on other grounds sub nom., *Donovan v. Phelps Dodge Corporation*, 709 F.2d 86 (D.C. Cir. 1983). I find that to be the case herein.



The deterioration of the employee-employer relationship after Thomas' protected activity, is also strong evidence of a retaliatory motive. See Stafford supra. In the instant case the evidence shows that Pittman refused to talk to Thomas after his protected activities. Retaliatory intent is also shown in this case by Ampak's failure to explain the reason for its adverse action to Thomas. See Secretary of Labor on behalf of Brackner v. Jim Walter Resources, Inc., 9 FMSHRC 263, 268 (Judge Broderick, 1987), NLRB v. Senftner Volkswagen Corp., 681 F.2d 557 (8th Cir. 1982). Indeed Ampak gave Thomas no reason whatsoever for his abrupt demotion. It may reasonably be inferred from this evidence that Pittman was punishing Thomas for the assertion of his safety rights.

The operator has failed moreover to present any evidence to rebut Thomas' prima facie case. It has therefore failed to show that Thomas' demotion was not motivated by his protected activities. Ampak's demotion of Thomas' was therefore in clear violation of Section 105(c)(1) of the Act.

Following his discriminatory demotion December 21, 1987, Thomas remained in the belt man (head drive operator) position until his layoff on February 15, 1988. At the time of the layoff Mine Foreman Pittman told Thomas that he had been chosen for layoff based on seniority. Specifically, Pittman told Thomas that Ampak was following Johnson Coal Company's seniority list, and that Thomas was the least senior head drive operator at the mine.

Although Pittman testified at trial that he and Herb Wolford made the decision as to which employees to lay off and which to retain on February 15, 1988, based on who they thought "could operate the equipment the best and do the the best job", this proffered explanation clearly is not credible as it relates to Thomas. (FOOTNOTE 5) Indeed, the reason given by Pittman at the time of the layoff that Thomas was the least senior head drive operator) is precisely the reason that Pittman gave the MSHA special investigator who was investigating Thomas' discrimination complaint. In his sworn statement to MSHA on March 1, 1988, just 15 days after the layoff, Pittman stated that "Thomas was selected for layoff because he was the youngest head drive operator we had". Pittman also told the MSHA special investigator that "seniority based on the Johnson (Coal Company) hire list" was considered in choosing the miners for layoff.

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Significantly another miner laid off on February 15th, Dennis Rucker, was also told that he was chosen for layoff based on his seniority status.(FOOTNOTE 6)

In determining whether or not Thomas would have been laid off on February 15th had he not been discriminatorily demoted on December 21st, it is necessary to review the status of the miners who were laid off on February 15, 1988, and the positions they held at the time of the layoff. It is undisputed that 14 miners were laid off on February 15th. The positions of 12 of these miners have been stipulated. With regard to the two miners, Slone and Bentley, whose positions could not be agreed upon, I find that the Complainant has nevertheless established their positions by credible testimony.

The miners laid off by Ampak on February 15, 1988, and their positions are therefore established as follows:

PETE BENTLEY - tractor, scoop, and shuttle car operator  
DAVID BROWN - repairman  
DARRELL ESTEP - repairman  
KENNETH EVERAGE - belt man  
ROY JOHNSON - belt man  
ARCHIE KING - shuttle car operator or belt man  
JEWITT MULLINS - inside laborer  
BOBBY OWNES - shuttle car operator  
ELLIOTT ROWE, JR. - belt man  
DENNIS RUCKER - roof bolting machine operator  
LUTHER SEXTON - belt man  
DAVID THOMAS - head drive operator  
ROBERT SLONE - head drive operator; scoop operator  
CON BENTLEY - belt man

Among the miners laid off on February 15, 1988, were 7 or 8 belt men (head drive operators), 1 inside laborer, 2 repairmen, 3 shuttle car and/or scoop operators, and 1 roof bolting machine operator. No continuous miner operators were laid off however and indeed the evidence shows that Paul Hughes, the employee who took Thomas' place as 3rd shift continuous miner operator in December, was not laid off in February. It may reasonably be inferred therefore that had Thomas not been discriminatorily demoted from his continuous miner operator's position in December, he would not have been subject to layoff in February.

Ampak's discriminatory demotion of Thomas in December 1987, was thus "inextricably linked" to the company's decision to lay him off in February 1988. See Wiggins v. Eastern Associated

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Coal Corp., 7 FMSHRC 1766 (1985). Since Ampak did not lay off any continuous miner operators in February and since it may be inferred that Thomas would still have been a continuous miner operator had he not been discriminatorily demoted, it is apparent that Thomas would not have been laid off but for Ampak's prior discriminatory action. Therefore, Ampak's layoff of Thomas was in violation of the Act.

Pittman's testimony concerning Ampak's alleged reason for Thomas' layoff i.e., that Thomas was not among the miners that Ampak believed could do the "best job", is, as previously noted, simply not credible. Ampak therefore could not prove that Thomas would have been laid off for other reasons alone. Moreover although Pittman testified as to alleged complaints about Thomas' work, he never contended that these supposed complaints were the basis for Thomas' layoff. Therefore, it is clear that Thomas would not have been laid off solely for any unprotected activities.

Complaint of George Isaacs - KENT 89-14-D

The record shows that George Issacs worked for Johnson Coal for about 10 years before Ampak took over the former Johnson No. 11 mine on October 17, 1987. Issacs had worked as a continuous miner operator for Johnson Coal since the latter part of 1985 and he continued in that position after Ampak took over. Isaacs worked on the 2nd shift (3:00 - 11:00 p.m.) on the 003 section of Ampak's No. 1 mine. He worked in tandem with Jackie Littrell alternating with him as continuous miner operator and miner helper.

When Ampak took over the mine, Robert Slone was the section foreman on the 003 section and Alger Jent, the 2nd shift mine foreman, was Slone's immediate boss. As previously noted in the factual recitation in the Thomas' case, beginning in the latter part of November 1987, Jent regularly ordered the continuous miner operators on the 2nd shift to take illegal 40 foot double cuts with the miner. Jent gave the orders over the objection of Slone, who instructed his operators not to cut more than 20 feet deep. Indeed Slone testified that "Jent asked me to [order the miner operators to take deep cuts], and I told him that it was against the law, and I never would give no orders to do that. Whenever there was a deep cut took, he [Jent] was the man that give the orders."

In early December 1987, Jent reportedly told Slone directly that his crew had "to run coal and take double cuts." Jent also reportedly told Slone that "Johnny [Pittman] knows what I'm a doin' and [he] don't care". In mid-December 1987, Slone was reassigned as a scoop operator, and Jent took his place as section foreman on the 003 section. Pursuant to Jent's orders, the continuous miner operators on the 2nd shift regularly took double cuts until March 14, 1988, when Jent was suspended. All

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of the miners who testified (Jackie Littrell, Robert Slone, Dennis, Rucker, Gary Day, Everett, Watkins, and David Thomas) confirmed that double cuts were regularly made at Jent's direction.

Isaacs maintains that he complained to Jent nearly everyday about the taking of double cuts, but that Jent ignored him. Gary Day, a shuttle car driver also confirmed that Issacs told Jent it was unsafe to take 40 foot cuts. Littrell, the other continuous miner operator, likewise complained to Jent. Issacs also maintains that he complained to Johnny Pittman twice about the taking of double cuts. On the first occasion, on January 1988, Pittman ridiculed Isaacs for only taking "baby cuts" of 36-40 feet with the continuous miner and Pittman chided Isaacs that "he was going to have to get [another] miner man". On the second occasion, in February 1988, Isaacs told Pittman that they needed to start taking short cuts because of hazardous roof conditions. Pittman replied that "there's no way he could afford to take short cuts".

Isaacs maintains that he refused Jent's instructions to take double cuts on two occasions. The first refusal was immediately after the mine roof had fallen on his continuous miner while he was taking a deep cut. It took two hours to clean the rock off Isaacs' continuous miner and when he was then instructed to double cut the adjoining place, Isaacs told Jent that he would only cut 20 feet deep and that if Jent wanted it cut deeper, he would have to cut it himself. According to Isaacs Jent then became upset and did not talk to him for two or three days.

Isaacs maintains that he also refused to take double cuts during a shift on the 001 section because of unstable roof. This section was called the "bad section" or "scratchback" because of its bad top and low coal seam. When Isaacs refused Jent reportedly again "got upset and . . . cussed a little bit . . . and pouted" for a few days.

Isaacs maintains that during February and early March 1988, he also complained repeatedly to Ampak's management about the absence of lights on the continuous miner. Isaacs and Littrell both estimated that the miner had been without any lights for three weeks.

Issacs testified that to operate the miner without lights he would have to stick his head out of the operator's deck and use his cap light for illumination. Isaacs described this as "extremely dangerous". Littrell called it as "dangerous as a cocked pistol". Isaacs maintains that he complained to Jent and Pittman about this condition but to no avail. In fact, Pittman reportedly told Isaacs that in the event of an MSHA inspection he should pretend that he was repairing the lights, and then resume cutting the coal without lights when the inspector left.

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Isaacs reportedly also complained to Jent and to Pittman in February and March 1988, about the inoperative water sprays on the continuous miner. Pittman purportedly responded "Don't worry about the water, just worry about running coal". Isaacs maintains that he also complained to Pittman about Ampak's failure to hang ventilation curtains and about Ampak's practice of having the continuous miner remove pillars.

On February 16, 1988, the day after he was laid off, David Thomas filed his complaint of discrimination with MSHA in which he alleged that Jent had ordered him to roof bolt a 40 foot cut. As a part of its investigation of Thomas' complaint, the MSHA special investigators interviewed Pittman, Jent, and Herb Wolford, Ampak's superintendent, on March 1, 1988, at the Ampak mine office. After his interview with the investigators, Jent proceeded to go underground. As he began to enter the mantrip, Jent accused James Sexton, a roof bolting machine operator, of telling MSHA about the illegal 40 foot cuts. Sexton denied it but Jent responded that "somebody had to tell 'em . . . they knew too much what's going on." After telling Sexton that he did not know if the cuts had been 40 feet long because "you do not carry no forty foot tape measure", Jent warned the crew that they'd better watch what they said to MSHA or else they would be in trouble.

Two days after Jent accused James Sexton of telling the MSHA special investigators about the mining of double cuts, Jent approached Isaacs and Littrell while they were working at the mine face. Jent told them that he was not going to the "pen" for double-cutting. When Isaacs stated, in effect, that he and Littrell could also be in trouble for cutting the double cuts, Jent warned them to watch what they told the investigators. As he did so, Jent patted his pocket in which he carried a pistol. Isaacs considered this gesture to be a threat.

About a week later, on the morning of March 10, 1988, the entire Ampak No. 1 mine was shut down pursuant to a Section 104(d)(1) "unwarrantable failure" order issued by MSHA. The closure order was issued for Ampak's failure to comply with its ventilation plan. Ampak called Jackie Littrell's home that day to inform him not to report for work. When Littrell called back to the mine office to ask why they would not be working, Superintendent Wolford told Littrell that the mine had been shut down because of ventilation problems. Littrell then told Wolford that there were some problems at the mine that he needed to know about, and Wolford suggested that they meet at a gas station.

When Wolford and Littrell met, the superintendent asked Littrell if he knew who had been calling the MSHA inspectors. Littrell then told Wolford that Jent had been ordering the miner operators to take double cuts, and that Jent had threatened he

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and Isaacs. A day or so later, Wolford telephoned Isaacs and asked him if double cuts were being made on the 2nd shift. When Isaacs answered affirmatively Wolford asked who was ordering the double cuts to be taken. Isaacs reported it was Jent and Pittman. Isaacs also recounted to Wolford the incident in which Jent had threatened he and Littrell with a gun.

Wolford then notified Pittman that Littrell and Isaacs had complained about Jent ordering them to take double cuts and Wolford arranged a meeting at the Ampak mine office among Jent, Pittman, and himself. At that meeting, Wolford told Jent that Isaacs and Littrell had alleged that he was ordering them to take double cuts. As a result of the complaints made by Isaacs and Littrell, Jent was suspended for the work week of March 14-18, 1988. At the end of that week, Wolford and Pittman met with Jent again and told Jent that he was being reinstated. Jent was moved, however, to the 3rd shift (as section foreman) in order to separate him from Isaacs and Littrell, who remained on the 2nd shift.

In the midst of MSHA's investigation of David Thomas' discrimination complaint, MSHA's March 10th closure of the Ampak No. 1 mine, the complaints made by Littrell and Isaacs regarding double-cutting on the 2nd shift, and Jent's suspension of March 14-18, there also was another pending safety discrimination case - against Johnson Coal Company - which involved Johnny Pittman. On August 25, 1987, 5 former employees of Johnson Coal Company - Calvin Baker, Edsel Baker, Elliott Rowe, Agnel Amburgey and Everett Watkins - had filed complaints of discrimination against Johnson Coal, which alleged they had been laid off because they had made various safety complaints. All of the complaints named Pittman as one of the persons responsible for the discriminatory actions.

The Secretary of Labor filed a complaint on behalf of these 5 miners against Johnson Coal with the Federal Mine Safety & Health Review Commission. On April 21, 1988, at a Hazard, Kentucky law office, Isaacs gave his deposition on behalf of the 5 complaining miners. Pittman saw and spoke to Isaacs at the law office on April 21st and Pittman stated at trial that he assumed that Isaacs was testifying on behalf of the complaining miners. Significantly, Pittman also admitted that he assumed on April 21st that Isaacs was testifying about unsafe practices that he (Pittman) had taken part in.

On April 22, 1988, the day after Isaacs' deposition testimony, Isaacs was laid off (terminated) by Ampak. Pittman informed Isaacs of his layoff but gave him no reason for the action. Of the four full-time continuous miner operators employed by Ampak, the two employees who had complained to management about the taking of double cuts and had regularly voiced other safety complaints (i.e. George Isaacs and Jackie Littrell) were laid off. On the other hand, the evidence

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shows that the two full-time miner operators who were retained, Danny Hall and Eli Jent, had never complained about unsafe working conditions at Ampak. It is also apparent that Pittman, who was fully aware of Isaacs' safety complaints, was solely responsible for choosing the miners for layoff on April 22nd.

Although Pittman knew that Alger Jent had consistently ordered his crew to perform unsafe practices on the 2nd shift, Pittman did not lay off Jent on April 22nd. Rather, Pittman retained Jent and returned him to his previous job as 2nd shift section foreman.

#### Evaluation of the Evidence

Isaacs, like Thomas, does not challenge Ampak's assertion that its layoff of miners on April 22, 1988, was necessary because the No. 1 mine was losing money. He argues that whether or not layoffs were economically necessary, Ampak's (Pittman's) decision to choose him for layoff (while retaining other continuous miner operators) was discriminatory. For the reasons set forth below I agree.

The evidence shows that of the 10 miners laid off at that time two full-time continuous miners operators, George Isaacs and Jackie Littrell, were laid off while two other full-time miner operators, Danny Hall and Eli Jent, were retained. Therefore, of the four Ampak employees classified solely as continuous miner operators, Isaacs was one of the two chosen for layoff.

As noted by Isaacs in his post hearing brief, there were four strong indicia of discriminatory motivation on the part of Johnny Pittman in choosing him for layoff: (1) Pittman had knowledge of Isaacs' many protected activities; (2) Pittman had previously demonstrated hostility toward safety complaints by demoting Thomas for refusing to bolt double cuts; (3) the proximity in time between Isaacs' deposition testimony (on behalf of the 5 former Johnson Coal Company miners) and his layoff; and (4) Pittman's personal motivation for getting rid of Isaacs because of Isaacs' complaints to Wolford and his deposition testimony in the related Johnson Coal Company case, both of which implicated Pittman in unsafe mining practices.

It is clear that Isaacs engaged in numerous protected activities in the 3 months prior to his April 22nd layoff (termination). These protected activities were as follows: (1) regular complaints to Jent about the taking of double cuts; (2) two complaints to Pittman - in January and February 1988 - about the practice of double-cutting on the 2nd shift; (3) two refusals to perform unsafe work (i.e., to take double cuts); (4) frequent complaints to Jent and to Pittman about the lack of lights on the continuous miner; (5) complaints to Jent and Pittman about the inadequate water sprays on the continuous

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miner; (6) complaints to Jent and Pittman about Ampak's failure to provide or hang ventilation curtains; (7) complaints to Pittman about performing pillar removal work from the deck of the continuous miner (without remote control); (8) the complaint to Wolford in mid-March about the double-cutting on the 2nd shift; (9) two conversations with the MSHA special investigators in March 1988, concerning Thomas' allegations of double-cutting; and (10) his deposition testimony in the Johnson Coal Company case on April 21, 1988.

There is, moreover, no dispute concerning the good faith or reasonableness of the work refusals. It is also clear that Pittman knew directly of almost all of these protected activities, particularly those which occurred closest in proximity to Isaacs' layoff. Indeed, because of Pittman's position at the mine and his close personal relationship with Jent, it can reasonably be inferred that Pittman was also aware of the complaints that Isaacs made to Jent.

Pittman was also directly involved in some of Isaacs' protected activities, which gave him a personal reason to get rid of Isaacs. In addition to complaining personally to Pittman about the mining conditions on the 003 section, Isaacs had told Wolford, Pittman's immediate superior, about the illegal double-cutting on the 2nd shift and, moreover, he told Wolford that Pittman and Jent were responsible for the ordering of the illegal cuts.

Pittman, who was named as the person responsible for the discriminatory actions in the related Johnson Coal Company complaints also assumed that Isaacs' deposition testimony on April 21st was on behalf of the former Johnson Coal Company miners and that Isaacs had testified about Pittman's involvement in unsafe acts. Isaacs and Littrell had, in fact, also been responsible for Jent's 5 day suspension and subsequent transfer. It can reasonably be inferred from this evidence that Pittman was therefore antagonistic towards Isaacs (and Littrell) as a result.

The fact that adverse action closely follows an employee's protected activity is itself evidence of an unlawful motivation. *Donovan v. Stafford Construction Co.*, supra. Although the April 22nd layoff in the instant case may have been economically necessary; the fact that Isaacs was chosen for layoff while other continuous miner operators were not, and on the day after his deposition testimony, is therefore strong evidence of Pittman's discriminatory intent.

Hostility towards protected activity is another circumstantial factor pointing to discriminatory motivation. *Chacon*, supra. Such hostility towards safety complaints by Pittman is also present in this case. Not only did Pittman ridicule Isaacs' concerns over the taking of deep cuts with the



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miner, but as has been already determined, he discriminatorily retaliated against David Thomas after Thomas' refusal to bolt double cuts in December.

Although Jackie Littrell is not a party to this action, it is clear that Pittman selected both Isaacs and Littrell for layoff because they were the two continuous miner operators who objected to the unsafe practices required by Pittman and Jent. On the other hand, as Pittman admitted, the two continuous miner operators who were not laid off i.e. Danny Hall and Eli Jent, never made safety complaints.

Mr. Isaacs has therefore, within this framework of evidence, proven that his layoff was indeed motivated at least in part by his protected activities. The Respondents have failed to rebut this evidence and have failed to affirmatively defend.

Ampak's only apparent defense in this case was that it chose which miners to lay off by "look[ing] at the jobs we needed filled and the guys most capable of filling them". However, no evidence was presented as to the relative skills of George Isaacs vis-a-vis Ampak's other continuous miner operators. On the contrary, Pittman admitted that Isaacs had had no disciplinary problems while employed at Ampak and that when he chose Isaacs for layoff, he knew that Isaacs was a certified foreman and that he was capable of performing "quite a few jobs" in the mines.

Ampak's primary evidence in its defense was that the miners who were laid off on Friday, April 22nd, had actually been chosen for layoff on the preceding Wednesday night, April 20th. Pittman testified that J. L. Workman called he and Herb Wolford at the No. 1 mine on Wednesday afternoon, and told them to report to Ampak's "main office". when Pittman and Wolford reported to the office, Workman allegedly told them that Ampak was "losing money" and "needed to make some cuts". Therefore, Pittman and Wolford then allegedly compiled a list of the miners who would be laid off.

Pittman's testimony in this regard is, however, contradicted by his sworn statement to the MSHA special investigator on June 14, 1988, during the investigation of Isaacs' discrimination complaint. Pittman then stated that "I made the decision as to who would stay and who would be laid off". He also stated that "Herbert Wolford left this mine [Ampak No. 1] on April 15, 1988. He went to another operation of Ampak Mines, Inc., and I took over as superintendent". Thus Pittman had previously stated that Wolford had left the mine a week before the layoffs took place and that he (Pittman) was solely responsible for choosing which miners would be laid off. Pittman is therefore not a credible witness. In this regard his testimony of his lack of knowledge of the double-cutting at the

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Ampak mine and his denial that Isaacs ever made safety complaints to him in light of the overwhelming evidence to the contrary, are also incredible.

In sum, since Isaacs has proved a prima facie case of discrimination herein and since the Respondents have failed to prove that Ampak's adverse action was also motivated by unprotected activities (and that it would have laid Isaacs off in any event for the unprotected activities alone), Ampak's layoff of Isaacs on April 22, 1988, violated Section 105(c)(1) of the Act.

#### Liability for Damages

Ampak has been found in these cases to have discriminated against both Complainants Thomas and Isaacs in violation of Section 105(c)(1) of the Act. According to the Complaints Ampak is out of business, has no assets and can provide no relief. They concede however that Johnson Coal did not exercise "substantial control over the most significant aspects of the operation of the mine" so as to establish liability under the agency theory applied by the Commission in *Bryant v. Dingess Mine Service, et al.*, 10 FMSHRC 1173, 1178 (1988). The Complainants therefore seek legal remedies, on a strict liability theory, against Johnson Coal the owner of the mine in this case and with which Ampak contracted to operate the mine.

The cases cited in support of their argument are, however, inapposite. The cases essentially attach liability to mine owners for violations of the Act committed by their independent contractors based on the specific statutory liability of mine operators under Sections 3(d) and 111 of the Act.

Under the Act the Secretary of Labor could cite and propose a civil penalty against the mine operator, Johnson Coal, for the violations in this case of Section 105(c)(1). The question of strict liability by Johnson Coal to the individual miners is a different matter. Section 105(c)(1) limits liability to only those persons who discriminated against the Complainants. In addition, while the Commission has found in the Bryant case that liability may be extended to mine operators under agency theory, it has not extended responsibility under the principles of strict liability.

Absent evidence that would support liability under an agency theory such as in the Bryant case, there is no legal basis to find Johnson Coal liable in these cases. See also *Bryant v. Dingess Mine Service et al.*, 9 FMSHRC 336 (Judge Broderick, 1987) and *UMWA v. Algonquin Coal Co.*, 7 FMSHRC 906 (Judge Steffey, 1985).



training, prior to the performance of assigned work, to, among others, any roof control operator who has not performed the assigned task during the preceding 12 months. Thomas explained that he was afraid to operate the machine because he had never before used resin roof bolts and did not know how to properly install them, because the dust collector was not working, and because the defective head on the bolter posed a safety hazard.

~FOOTNOTE\_FOUR

4. Thomas maintains that he was still not aware of his right to refuse unsafe work. He stated that he learned of this right when he later called the MSHA field office in Hazard, Kentucky to report that Ampak was taking 40 foot cuts with the continuous miner and that he had been told to sign a training certificate for training he had not received.

~FOOTNOTE\_FIVE

5. Pittman's trial testimony concerning the circumstances surrounding the April 22nd layoff at Ampak also differs markedly from the sworn statement he gave the MSHA special investigator in the George Isaacs case. For this additional reason I do not find him to be a credible witness.

~FOOTNOTE\_SIX

6. The Complainant maintains in this case that he is not challenging Ampak's assertion that its layoff of miners on February 15th was necessary because the mine was losing money. Rather, he asserts that whether or not layoffs were economically necessary, Ampak's decision to choose him for layoff was inextricably linked to his earlier demotion and was, therefore, violative of the Act.