FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
721 19th St., Suite 443
Denver, CO 80202-2500
Office: (303) 844-5266/Fax: (303) 844-5268

June 15, 2012

SECRETARY OF LABOR, o/b/o CHARLES SCOTT HOWARD, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. KENT 2011-1379-D
v.	:	
CUMBERLAND RIVER COAL COMPANY, Respondent.	:	Mine: Band Mill No. 2 Mine ID 15-18705

DECISION

Appearances: Mary Sue Taylor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Tony Oppegard, Wes Addington, on behalf of Complainant;
Willa Perlmutter, Glen Grant, Crowell & Moring, Washington D.C., on behalf of Respondent.

Before: Judge Miller

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, on behalf of Charles Scott Howard against Cumberland River Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the "Mine Act" or "Act"). The parties presented testimony and evidence at a hearing in Pikeville, Kentucky commencing on March 14, 2012.

I. BACKGROUND

Cumberland River Coal Company ("CRCC"), Respondent, operates the Band Mill No 2 mine (the "mine") near Eolia, Letcher County, Kentucky. (Tr. 167-168). CRCC hired Complainant, Charles Scott Howard ("Howard"), on March 21, 2005. Howard has held various positions at the mine and his most recent position was as a face worker in the belt corridor. [1] (Tr. 82). Howard worked in that position until July, 2010, when he was injured on the job. CRCC discharged Howard from his employment on May 16, 2011 after receiving a note from Dr. Robert Granacher, amending his first report, and explaining that Howard could not return to work as a coal miner due to the nature of his injury. However, Howard had seen a number of physicians, including two neurosurgeons, and all agreed that Howard could return to work without restriction.

[1] Howard was classified as face worker, but he did not work at the face or in an area producing coal. At the time of his injury, Howard's job duties primarily involved working on a track-load, picking up coal and dumping it on the belt.

Howard filed a complaint of discrimination with MSHA shortly after being terminated from his employment on May 16, 2011. Howard alleged that he was terminated for engaging in activity protected under section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), on numerous occasions from April 2007 until shortly before his termination. The Secretary of Labor ("Secretary") seeks a $20,000.00 civil penalty for CRCC's violation of the Act.

The parties entered into a number of stipulations, including that Howard engaged in a number of protected activities beginning in April, 2007 and continuing until May, 2011. (Tr. 8). The parties further agree that Howard was the subject of an adverse action by CRCC when he was terminated in May, 2011. The parties stipulated that CRCC is a mine operator subject to the provisions of the Mine Act and that the Commission has jurisdiction to hear this case. Additional stipulations include that CRCC is a large operator, that Howard is a miner as defined by the Act, and that the payment of the penalty will not affect CRCC's ability to continue in business. (Tr.10).

II. STATEMENT OF LAW

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a prima facie case of discrimination under section 105(c)(1), a complaining miner must show: (1) that he engaged in protected activity; and (2) that the adverse action he complains of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). Factors to be considered in assessing whether a prima facie case exists include the operator's knowledge of the protected activity, hostility or "animus" towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it, nevertheless, may defend affirmatively 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. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The findings of fact that follow are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or lack thereof, and consistencies or inconsistencies in each witness' testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied on his or her demeanor. Any failure to provide detail on each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

III. FINDING OF FACT AND ANALYSIS

a. Protected Activities

In order to sustain his discrimination complaint, Howard must first demonstrate that he engaged in an activity or activities that are protected by Section 105(c) of the Mine Act. The record before me clearly establishes that Howard engaged in protected activities and the parties have agreed and stipulated that Howard engaged in a number of protected activities. As an initial matter, Howard engaged in protected activity when he filed 105(c) complaints with MSHA over the course of four years. *See Secretary on behalf of Strattis v. ICG Beckley, LLC*, 32 FMSHRC 614, 616 (June 2010) (ALJ) (holding that filing a 105(c) discrimination complaint is a protected activity for which operators are barred from retaliating against).

In the months, and even years, before CRCC terminated the employment of Howard, he engaged in numerous protected activities. As early as March, 2007, Howard testified before a Congressional committee about safety issues. In April, 2007 he made a video tape of leaking mine seals. The video was the subject of an email from Valerie Lee to a number of CCRC and Arch Coal[2] management personnel, and an email from Mike Kafoury, counsel for Arch, to a number of others with a link to the video. Sec'y Ex. 120; (Tr. 140). After being reprimanded, Howard filed his first discrimination case with MSHA. Howard eventually filed four separate discrimination complaints with MSHA, raised safety issues with his supervisors on many, many occasions, filed civil lawsuits based upon discriminatory actions, called MSHA to make safety complaints, asked MSHA to conduct certain safety inspections, filed grievances naming specific managers for failing to protect miners, and engaged in other safety-related activity from 2007 until May, 2011 when the present case was filed. Sec'y Exs. 84 and 110; Howard Ex. 3. In May, 2011, just before he was terminated, Howard filed a civil lawsuit against CRCC as a result of alleged safety issues. All of these actions clearly qualify as activities protected under Section 105(c)(1) as exercising a statutory right afforded by the Act. There is no doubt that every person involved in this case and, indeed, every person at the CRCC mines was aware of all, or some, of Howard's protected activity, either through the media or through discussions at work and in the community.

[2] Arch Coal is the parent company of CRCC.

b. Adverse Action

While it appears that the mine has taken a number of adverse actions against Howard over the years of his employment, the action at issue here is the mine's refusal to allow Howard to return to his job after being released to return to work by his treating physician. Instead, CRCC sought the supplemental opinion of a doctor who, after changing his mind from his earlier diagnosis, determined that Howard could not return to work. I find that the failure of the mine to allow Howard to return to work was an adverse action and, again, the parties agree that the actions taken by the mine satisfy the criteria for an adverse action. (Tr. 7-8).

c. Discriminatory Motive

Having found that Howard engaged in protected activity, it is then necessary to determine whether CRCC was motivated, at least in part, by those protected activities when it refused to allow Howard to return to work after being released to return by his treating physicians. The Commission has determined that direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–11 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C.Cir.1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398–99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir.1965):

> It would indeed be the unusual case in which the link between the discharge and the . . . [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner or miners includes hostility towards the miner because of his protected activity and disparate treatment of the complaining miner by the operator. *Chacon* at 2510.

I find that Howard has shown, by substantial evidence that there is a causal connection between the adverse action and the protected activities. First, the protected activity was extensive and known to each person who was involved with Howard's work-related injury and subsequent termination. (Tr.55, 99). Second, Howard was known as a hard worker, and no complaints about his ability to perform his job were made. (Tr. 55-56). Hence there is no suggestion that Howard was terminated due to poor work performance and there was no incident that would have justified his termination. The only difficulty that CRCC had with Howard was the fact that he continued to make safety complaints and continued to contact MSHA. Finally, not only was there open hostility against Howard, he was treated differently than other miners who had suffered a work-related injury. Specifically, Denise Hartling, a member of Arch management,

authored an email to Underwriters, the workers compensation insurer (owned by Arch), and their employee, Penny Carter stating, from the beginning, that CRCC did not want Howard to return to work. This occurred in spite of the fact that the standard goal of an employer is to see that injured miners return to work as soon as practicable, thereby negating the need for workers compensation and medical payments. In her deposition,[3] Hartling indicates that she was told by Arch that the mine did not want Howard back, but instead was looking to have him resign his position and not return to CRCC. Howard Ex. 1 p. 106. On December 17, 2010 Hartling sent an email to Denise Davidson, a worker's compensation attorney, and Underwriters, with copies to Valarie Lee and a number of CRCC Human Resources personnel, in which she stated the following:

> In any event, Dr. Granacher's report from that 2002 injury is not favorable to the claimant so I am wondering whether we stand a chance of getting Granacher to give him an impairment rating. I still cannot get over the similarities of these two incidents that are 8 years apart.....
>
> The hope is that we will get restrictions as we need to settle with a resignation. I think that both Sherry and Howard feel that they won't get any restrictions and he will be back in the driver[']s seat (not what we want).

Sec'y Exs. 42, 66. Hartling, also in December 2010, emailed Sue McReynolds of Underwriters to see if McReynolds had sent the file to the Arch Workers Compensation attorney and stated, "this will be her biggest challenge yet." Sec'y Ex 32. The attitude demonstrated by Hartling is evidenced throughout the entire case. There can be no doubt that the mine sought to prevent Howard's return to work under any circumstance, and the evidence demonstrates that the only reason for such action was his protected activity.

Howard was injured while working alone in June, 2010 and, as a result, was treated by a number of physicians, including Dr. Krishnaswamy, M.D., a neurologist, Sec'y Ex 10, Dr. Knox, Ph.D, a therapist who saw Howard several times, Sec'y Exs. 19 and 36, Dr. Reddy, M.D., an ophthalmologist, Sec'y Ex. 31, Dr. Burt, M.D., a neurosurgeon, Sec'y Exs. 28 and 54, Dr. Breeding, M.D., a board certified neurosurgeon and Howard's primary care physician, Sec'y Ex. 88, Dr. Hartman, M.D., a board certified neurosurgeon, Sec'y Ex. 88; (Tr. 15 and 339), and Dr. Kedar, M.D., a neuro-ophthalmologist, Sec'y Exs. 29 and 118. Howard also, at the request of CCRC, saw Dr. Granacher, a neuropsychiatrist. Each doctor, in turn, saw no reason why Howard could not return to work. Granacher was the first to release Howard to return to work in March, 2010. Dr. Breeding and Dr. Hartman released Howard to return to "full duty at work." Sec'y Exs 89 and 99. Dr. Kedar, who was given a letter by Penny Carter, Underwriter's nurse, along with a copy of Howard's job description and Granacher's report, released Howard to return to work on April 12, 2011. Sec'y Exs. 29, 70, 72 and 118. By mid-April, 2011, each physician,

[3] Hartling was not able to attend the hearing. The parties agreed that her deposition would be entered into evidence.

including Granacher, agreed that Howard had reached his maximum medical improvement and that he could return to work.

Granacher initially restricted Howard from working at heights, but no other doctor who had seen Howard recommended any work restriction. In fact, Dr. Burt, a neurosurgeon, believed that Howard had no injury whatsoever. When Granacher's first report was received by CRCC, the mine manager at CRCC, Gaither Frazier, explained to Valerie Lee of Human Resources that the mine could accommodate the height restriction and put Howard back to work. (Tr. 64). Instead, Lee, who was Frazier's subordinate, decided that she would further clarify what the height restriction required.[4] (Tr. 65). From this point forward, CRCC and Arch worked to keep Howard from returning to work. Lee testified that she explained to Sue McReynolds, at Underwriters, the need for clarification regarding Granacher's restriction, but at no time did Lee inform any other person involved in Howard's case that her superior, Frazier, had agreed that Howard could be accommodated and return to work. Moreover, at no time did anyone from CRCC, Arch, or Underwriters ask Granacher what he intended when he advised that Howard could not work at heights. Instead, at a meeting in March, it was decided that further information from Granacher was needed and that a job analysis would be provided. (Tr.356).

In an email from Penny Carter two days after she first met with Granacher in March, sent to Hartling (Arch), Lee (CCRC HR), McReynolds (Underwriters) and Davidson (workers comp attorney) she writes that "if the height restriction alone does not exclude [Howard] from returning to work, we may need to clarify further with the job analysis . . . This is certainly not one of the 'usual' cases." Sec'y Ex. 62; (Tr. 348). After Howard saw Dr. Kedar for the last time and was released to return to work on April 12, 2011, Penny Carter asked Hartling if she should next provide Granacher with the same job analysis given to Kedar, or simply clarify the height restriction. Sec'y Exs. 70, 72, and 118. It was determined that a job analysis would be provided to Granacher.

When Howard asked to return to work in May, 2011, after receiving the releases from his various physicians, but before Granacher's modified report, Frazier spoke to Mike Kafoury, counsel for Arch, along with Lee's subordinate in HR, and confirmed that Howard could return and, if necessary, accommodations could be made. Kafoury had already learned that Howard's physicians had released him to return to work and, after receiving a call on May 11, 2011, said that "[w]e should discuss how to handle Howard's call today." Sec'y Ex. 90. Frazier was not included in the email. Howard returned to work, for part of one day, to begin his training, but was told by McReynolds, and a few minutes later by Lee, that he could not return to work based upon a new determination made by Granacher. Sec'y Ex. 12; (Tr. 269).

Ample evidence of the disparate treatment of Howard can be found in the many conversations discussing Howard's work-related injury and subsequent treatment. The record is replete with emails detailing every step that Howard took, every doctor, every diagnosis, every word said. The emails include Kafoury, the Arch attorney, Underwriters, Valerie Lee from CCRC Human Resources, and the contracted nurses. Most do not include Frazier, the only

[4] In an earlier discrimination case involving Howard, Lee was found to have been involved in the discriminatory actions taken against Howard.

person who suggested Howard could be accommodated. Both in a conversation with Lee and with Kafoury, Frazier expressed his opinion that Howard could be accommodated. Frazier agreed that it was unusual to speak with Kafoury, the Arch attorney, before allowing a worker to return and that it often happened that an injured worker returned to work with some restriction. As Frazier and Lee explained, the general goal was to get miners back to work as quickly as possible after an injury. (Tr.57, 61). Lee further explained that, prior to Howard's injury; she had not heard Hartling express the desire to see a miner be restricted from returning to work. In fact, witnesses for both sides agreed that the case of Howard was different in many ways from the normal worker injury case. (Tr.100). Penny Carter, the nurse who was employed by Underwriters to follow Howard's case, did not normally deal with Denise Hartling or Mike Kafoury, both from Arch, when she was assigned a case, yet the record contains a plethora of emails going back and forth that include both of these high level Arch managers. Carter admits that this is the only case in which she sent emails to Hartling and faxed reports to her. Carter says she also spoke with both Hartling and Kafoury by telephone a number of times. Carter further testified that she only meets with worker's doctors in the event she has questions but, in this case, Carter asked to meet with Granacher before he even conducted his evaluation of Howard. In addition, while Valerie Lee did not believe it unusual for Kafoury to be involved if a miner is returned to work with restrictions, when she was asked how many times that occurred in the past, Lee said "I don't think he has. . . . I don't remember any." (Tr. 178).

Arch Coal held quarterly meetings to discuss the status of employees off of work due to work related injuries. (Tr. 72-73). Although Arch personnel do not discuss every worker, a summary is prepared that contains each worker who is currently off of work due to a work-related injury. (Tr. 164). The meetings, beginning primarily in December, 2010, included discussions about Howard and were attended by personnel from Arch and CRCC, and included Valerie Lee from HR for CRCC, Denise Hartling of Arch management, Sue McReynolds from Underwriters, the insurer for Arch, Penny Carter, the nurse engaged by Underwriters to work on Howard's case, Denise Davidson, a workers compensation attorney, Mike Kafoury, Arch attorney, and others. (Tr.73). The purpose of the meeting was to plan expenditures for workers compensation cases, and to discuss what treatments workers were receiving and what could be done to get the employee back to work. At the December, 2010 quarterly meeting, it was decided that Howard should see Dr. Granacher, who was not a member of the normal panel of doctors who see CRCC patients. Shortly after that meeting, on December 17, 2010, Hartling sent an email to Penny Carter, Valerie Lee and Sue McReynolds, see *supra*, in which she discussed Howard's claim and explained that her "hope is that we will get restrictions, as we need to settle with a resignation." Sec'y Ex. 66. Granacher eventually issued a report setting Howard's impairment rating at 7%, and recommended a return to work with the restriction of not working "at height." Sec'y Ex. 55. Granacher's initial report contains a photo of Howard and specifies that it took ten and one-half hours, over two days, to complete the examination. The examination included a consultation with Dr. Joseph, a neurologist. The report is dated March 7, 2011 and is 27 pages in length with an additional three-page attachment that includes a summary of test results. Granacher's lengthy initial report is full of information, some of it "canned" but, certainly, the report gives the appearance of being thorough. I note that Dr. Burt examined Howard after Granacher, conducted even more tests, and found that Howard did not suffer from any impairment.

Carter, the Underwriters nurse assigned to Howard's case, notes that on March 7, 2011 she had a meeting with Granacher. He explained that Howard had a very mild brain injury and he had diagnosed a cognitive disorder with a 7% impairment rating. Granacher explained in his testimony that the impairment rating means that the brain impairment affects seven percent of the whole body. (Tr. 216). In his initial report, Granacher explained that the use of Zoloft should be enough to control Howard's disorder and that his prognosis was reasonably good. Sec'y Ex. 55 p. 26. "In regards to work, advised that with any brain injury, it is recommended that no work is done at heights." Sec'y Ex. 117. However, Granacher also testified that it is not his job to say whether someone can return to work, but rather to simply supply the employer and insurer with an impairment rating. (Tr. 241-242).

Shortly after Granacher's initial report, Carter noted that, in a meeting on March 15, 2011, she received a job analysis from Valerie Lee that related to Howard. Carter subsequently provided a copy to Dr. Kedar and on April 11, 2011, after a final examination and review of the job analysis, Kedar released Howard to return to work. On April 15th Carter was advised to send the job description to Granacher for further evaluation. Carter, along with Arch management and CRCC, anxiously awaited Granacher's further report leading Carter to contact his office almost daily, and eventually provide a second letter that was hand delivered to Granacher just days before the report was signed on May 16, 2011. Sec'y Ex. 117. Granacher did not ask to see Howard a second time or conduct further examination prior to rendering a supplemental report. Instead, he relied on the information and questions provided to him by Penny Carter.

Although both McReynolds and Lee insist that a supplemental report was sought from Granacher for the purpose of explaining the meaning of his restriction, Granacher was not asked that question. In the second report, issued in May, Granacher said instead, that Howard could not return to work as a coal miner. Sec'y Ex. 79. When questioned about his change of heart, Granacher had no real explanation, except to say that, even though he is intimately familiar with the work of a coal miner, he excluded Howard from work after reviewing the job analysis that was provided when the supplemental opinion was sought. (Tr. 227, 234). The job analysis was prepared by Lee, with some input from a supervisor in the area where Howard worked and, although CRCC argues that the job description was appropriate and accurate, I find, relying on Howard's testimony, that it did not describe Howard's actual duties. Instead it described the general duties of that classification of worker. Sec'y Ex. 79; (Tr.112). Lee testified that Gilliam, Howard's supervisor, did not tell her that Howard works at heights. However, she included working at heights in the analysis as Gilliam told her it was a requirement for a face worker in general. (Tr.148 and 163). Lee put together the job analysis based upon a general underground face worker, even though Howard works on the belt line, which is not underground and not at a face. (Tr.171). Lee did not contact Howard to inquire about his specific job duties. (Tr. 255).

I note that, while the parties discussed the possibility of preparing a job description after reviewing Granacher's first report, they held off seeking any further information from Granacher until all doctors had submitted their final reports. None of those reports contained work restrictions for Howard if he chose to return to his job at CRCC. It was only at this point that Penny Carter, at the direction of the mine operator, eagerly sought a second opinion from Granacher.

CRCC suggests that the various doctors who released Howard to return to work did not directly address his head injury. For example, according to CRCC, Burt released Howard to go to work but only for purposes of his back and neck injury. It argues that each doctor addressed a discrete part of the injury, and each release related only to that part of the overall injury. While I understand that some doctors may not have addressed the injury that Granacher addressed, that does not explain why CRCC needed a further evaluation from Granacher and not from any other doctor or specifically from one of the neurosurgeons who would have addressed the specific head injury.

At hearing, the parties generally relied upon the testimony of the same witnesses. Gaither Frazier, the mine manager, credibly testified that the mine could accommodate the restriction of working at height originally recommended by Granacher. (Tr. 64). Valerie Lee was not as credible and did not pass on the information about the possibility of an accommodation to others involved in the case. (Tr. 115). Penny Carter, while credible, could not adequately explain her actions in dealing with Arch and Granacher. Sue McReynolds did not recall much, but it is obvious that she knew that her employer, Arch, and, in turn, CRCC, did not want Howard to return to work. Finally, Denise Hartling, who appeared through her deposition, unsuccessfully attempted to explain her emails that directly and clearly demonstrate that Respondent would settle only for a resignation from Howard and the mine would do whatever necessary to achieve that end. There is ample testimony and much detail that I have considered in reaching my conclusions. I find that there is a significant amount of both direct and circumstantial evidence that demonstrates CRCC terminated Howard because of his protected activities. Howard was not only terminated the same day that CCRC received the one paragraph supplemental report from Granacher indicating that Howard could not return to work, but within hours. (Tr. 272). Therefore, I find that the Secretary and Howard have met the burden of demonstrating a prima facie case of discrimination. I find no credible evidence to rebut the prima facie case.

d. Affirmative Defense of Operator

Having found that Howard has established a prima facie case of discrimination, I must still consider evidence that may indicate that CRCC terminated Howard based upon a legitimate business purpose and "would have taken the adverse action for the unprotected activity alone." *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (1981). *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980).

The Commission has enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline, and personnel rules or practices forbidding the conduct in question. *Id.* The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Here, CRCC asserts that it would have taken the action against Howard based upon the fact that it received information from a reliable doctor that Howard could not return to work as a coal miner. According to CRCC, based upon that information, it could not take the risk of endangering the safety of Howard or other miners. While any number of doctors released Howard to return to work, CRCC takes the position that the finding by Granacher that Howard could not return to work is a legitimate, non-discriminatory reason for it to terminate his employment. I agree that CRCC has a reasonable concern about the safety of returning any injured miner to work, but the circumstances in this case do not lead to the conclusion that terminating Howard was justified.

It is obvious that CRCC worked diligently to end Howard's employment. The mine waited until every doctor, including two neurosurgeons, two eye doctors, a psychiatrist and others found no impairment and agreed Howard could return to work. Then it asked Granacher to further review his first finding of a 7% impairment and a restriction against working at height. It is interesting to note that Granacher did not see Howard prior to making his second determination, did not change his impairment rating the second time, and did little more than answer a paragraph submitted to his office by Penny Carter. (Tr. 225). Yet Granacher in his testimony recalled that his supplemental view that Howard could never work in coal mining was based upon "this catwalk issue, working in heights of five to twenty feet." (Tr. 227). As discussed above, CRCC did not seek to clarify the earlier restriction of working at heights, but instead submitted a job analysis that, while applicable to the general pay rate of Howard, did not accurately reflect Howard's duties.

Frazier testified after receiving the Granacher report in March that the mine could accommodate Howard. If the height meant not climbing ladders or working in high or confined space, Howard could still be accommodated by the mine. Willie Gilliam, Howard's supervisor, agreed that he would assign work to Howard according to any restrictions he may have. The mine fired Howard with little consideration once Granacher's amended report was received. No one thought to discuss possible accommodation, to question Granacher further, or to seek another opinion given the disparity of the many reports received about Howard's injury and his ability to return to work

I find that the mine sought out and received the opinion they were seeking and immediately upon receipt of that single opinion, terminated Howard's employment. The mine attempted to achieve its goal first by providing the job analysis to Kedar to have a restriction imposed and, when that failed, they went to Granacher for a further opinion. At hearing, Granacher made it clear that he works for "lawyers representing virtually every major coal company in Kentucky[.]" (Tr. 208). Granacher's actions are questionable and while he angrily defended his decision, Granacher did not explain why the conclusions were so drastically different, but the impairment rating had not changed. (Tr. 234-235). Finally, if Howard's injury was so severe, as Granacher indicated in his testimony, why wasn't that discovered prior to the issuance of the first 27-page report. No further tests or examination of Howard were conducted in reaching the second conclusion.

CRCC argues that they chose to rely on Granacher's second opinion because his specialty is different from that of the other doctors. Specifically, the mine argues that, since Howard had complaints about vision, his eye doctors signed off on only a part of the injury, as did the examining neurosurgeons. Moreover, the mine avers that Granacher dealt in a different way with the head injury and, therefore, a different opinion would not be out of the ordinary. I do not find these arguments persuasive. Given the many physicians who examined Howard, including several neurosurgeons whose specialties are integrally related to Granacher's, something should have come up to demonstrate that Howard's injury had resulted in some type of impairment. If the other doctors had given any kind of impairment rating, it may have been different, but they found none at all. In this circumstance, it certainly required more review and consideration before relying on the changed opinion of Granacher. *See* Sec'y Ex. 108.

I find that CRCC did little if anything to reconcile the many differences of medical opinion before quickly terminating Howard without any substantive basis for the termination. After carefully considering the credibility of all witness, I find that CRCC did not have a legitimate business reason to terminate Howard and that the affirmative defense is without merit.

e. Penalty

The Secretary has proposed a penalty of $20,000 in this case. There is some evidence in the record as to the penalty criteria but more importantly, there is ample evidence of blatant discrimination against Howard to support a high penalty. The discrimination against Howard ran through CRCC and its parent, Arch, at the highest management levels. The evidence supports a finding that Respondent acted willfully and used any means available to terminate Howard. CRCC, together with its parent company, is a large operator. CRCC has been found guilty of discrimination against Howard in the past and in that case a penalty of $10,000 was assessed. Therefore, I find it appropriate to assess a penalty of $30,000 against CRCC in this instance.

IV. ORDER

Cumberland River Coal Company is **ORDERED** to immediately reinstate Charles Scott Howard to his previous position as a permanent full time employee with an equal or greater rate of pay, along with all benefits that relate to that position. CRCC shall, within ten days of this order, post this decision along with a visible notice on a bulletin board that is accessible to each and every employee, explaining that the company has been found to have discriminated against an employee, that such discrimination will be remedied and that it will not occur in the future. The notice shall inform all employees of their rights in the event they believe they have been discriminated against. All reference to the termination of Howard, and the reasons therefore, shall be removed from his personnel file. Since Howard has been temporarily reinstated to his former position, he seeks no back wages or other monetary relief.

Within 30 days of the date of this order, CRCC is **ORDERED TO PAY** a penalty in the amount of $30,000 for the violation of section 105(c) of the Mine Act.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Mary Sue Taylor, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

Tony Oppegard, P.O. Box 22446, Lexington, KY 40522

Wes Addington, Appalachian Citizens Law Center, 317 Main Street, Whiteburg, KY 48158

Willa Perlmutter and Glenn Grant, Crowell & Moring LLP, 1001 Pennsylvania Ave. N.W., Washington, D.C. 20004-2595