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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

RAYMOND OTIS STIEFEL, III, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. SE 94-128-DM  
: SE MD 93-06  
: LANG SAND & GRAVEL COMPANY, : Lang Pit  
INCORPORATED, : I.D. No. 01-02959  
Respondent :

DECISION

Appearances: Raymond Otis Stiefel, III, Albertville,  
Alabama, pro se;  
David Lee Jones, Esq., Jones and Milwee,  
Guntersville, Alabama, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

This case involves a discrimination complaint filed by Raymond Otis Stiefel, III, against Lang Sand & Gravel Company, Inc. (Lang Sand and Gravel or the company) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. 815(c)(3). Stiefel alleges that on July 1, 1993, he was demoted because he called the Secretary of Labor's Mine Safety and Health Administration (MSHA) to report safety violations. Stiefel further alleges that after he was demoted, he was, in effect, forced to quit. Stiefel requests back pay and expenses.

Lang Sand & Gravel responds that Stiefel had to return to his previous job with the company and rather than return, he gave his two week notice. The company adds that Stiefel had to return to his previous job because the company eliminated the shift on which he worked for economic reasons.

Stiefel filed an initial discrimination complaint with MSHA. Following an investigation of the complaint, MSHA determined that a violation of section 105(c) had not occurred and Stiefel then filed a complaint with the Commission. Pursuant to notice, a hearing was conducted in Huntsville, Alabama. Prior to the hearing Stiefel amplified the remedies he was seeking to include certain medical bills and restitution for a truck that he allegedly lost while unemployed.

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The fundamental issues are whether Stiefel engaged in any activities protected under the Mine Act and, if so, whether his demotion and subsequent loss of employment were motivated in any part by those activities.

#### THE TESTIMONY

##### The Complainant's Witnesses

Raymond Otis Stiefel, III.

Stiefel testified on his own behalf. He stated that on July 1, 1993, Greg Johnson, supervisor of Lang Sand & Gravel's Lang Pit, came to his home. According to Stiefel, Johnson was there pursuant to the instructions of Leon "Pete" Lang, owner and president of Lang Sand & Gravel (Tr. 18-19). In the presence of Mark Bouska, a co-worker of Stiefel's, who was also Stiefel's neighbor and friend, Johnson informed Stiefel that he was demoted from a night shift supervisor to a day-shift front-end loader operator. According to Stiefel, Johnson stated that the action was taken because Stiefel had informed MSHA about an accident at the company's pit. Stiefel stated, "Lang ... directed ... Johnson to remove me from the night shift to day shift as a loader operator where he could keep an eye on me because I could no longer be trusted since I had called MSHA" (Tr. 19).

Stiefel further stated that on July 2, he met with Lang and Johnson and Lang reiterated what Johnson had said on July 1 (Tr. 19-20). Stiefel characterized his response as follows: "Because of the unsafe conditions existing at Lang Sand & Gravel during the period of time and being wholly concerned with my safety and the safety of others, I was forced to tender my resignation" (Tr. 20).

Stiefel stated that he began working for the company as a laborer in approximately July 1992. Prior to that he had worked as a heavy equipment operator, but he never before had worked in the sand and gravel industry (Tr. 28). He worked approximately three months as a laborer and in the Fall of 1992 transferred to the job of front-end loader operator.

As Stiefel recalled, the pit was operating on two 12-hour shifts at that time. However, some time during April 1993, the company began working three eight hour shifts (Tr. 30).

Stiefel believed that he was making \$5.00 an hour when he began working as a front-end loader operator. Three or four months later Stiefel transferred to a position loading sand products into dump trucks for transportation (Tr. 25-26). In this position Stiefel earned \$5.50 an hour. Subsequently, his pay was raised to \$6.00 an hour, and when he left the company he was making \$6.50 an hour (Tr. 26-27).

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Stiefel testified that around June 22, 1993, the job of plant operator on the night shift became available. He and Lang discussed it and decided that he was the right person for the job (Tr. 33, 35). The job consisted of supervising two workers and operating the plant -- i.e, operating the machinery that processed sand and gravel (Tr. 34-35). According to Stiefel, the supervisory responsibilities consisted solely of authority to shut down the plant if something happened or if the equipment broke down. Once he had shut down the plant he was supposed to call Lang or Johnson and to do nothing until he checked with them (Tr. 92).

Stiefel began the job on June 23, at a rate of \$6.50 an hour (Tr. 36). He claimed he usually worked six days a week and averaged between 45 and 50 hours a week when he worked on the third shift (Tr. 70). Thus, he worked five to ten hours of overtime a week spread out over a six day period (Tr. 71).

Stiefel also claimed he was supposed to receive a pay raise, but Lang never told him how much it would be and he never got one. Id. Stiefel stated that whenever he asked about a raise Lang told him that he, Lang, was "hard up for money" (Tr. 89).

In Stiefel's view, things went "rather smoothly," during the first three or four days after he became night supervisor, although there were problems with some of the equipment that caused the company to be short of sand (Tr. 37).

There were four front-end loaders at the pit. On June 28, two were running and two were out of service. On June 30, Stiefel came to work around 10:00 p.m (Tr. 66). A miner named Outher Stampfer was running one of the front-end loaders. At some point Bouska took over. Bouska was going to use the front-end loader to load the processing plant (Tr. 117). According to Stiefel, Johnson and a miner named Albert Pridmore told Bouska to get off the front-end loader so that Pridmore could use it to load trucks (Tr. 40).

Stiefel claimed that he had operated the same front-end loader on June 30, and had noted that the brakes did not work properly. He stated that he had complained about the brakes (Tr. 48).

Pridmore loaded trucks the night of June 30 - July 1. Stiefel testified that around 1:10 a.m. on July 1, he heard the engine of the front-end loader stall. Stiefel was working in the electric room. He looked out and saw the front-end loader going backward down the hopper loading ramp. The equipment went off of the ramp and overturned. Stiefel ran to help Pridmore. Pridmore, who had hurt his back, slowly removed himself from the equipment (Tr. 41-42).

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Johnson told Stiefel to take Pridmore to the hospital, which Stiefel did. Around 6:00 a.m., Pridmore was released from the emergency room (his back injury was not severe) and Stiefel returned to the pit (Tr. 42).

Back at the pit Stiefel spoke with Johnson for approximately an hour about what had happened. Around 7:00 a.m. or 7:30 a.m., Lang appeared (Tr. 74). The front-end loader had been righted and the company's mechanic, Billy Chambers, was inspecting it. Lang, Johnson, Bouska and Stiefel were there while Chambers checked the equipment's condition (Tr. 43). Stiefel believed that Chambers did not check the brakes (Tr. 42, 74). Around 7:30 a.m., Stampler got back on the front-end loader and started loading trucks.

Stiefel went home around 8:45 a.m. However, prior to going home, Stiefel had words with Lang concerning "why [Lang] couldn't fix his equipment properly" (Tr. 43). Lang told Stiefel it was none of his business and, as Stiefel explained, "I peeled out of there. I was extremely hot" (Tr. 43). Stiefel maintained that everyone who worked at the pit knew that the brakes on the front-end loader did not work, but that Lang's attitude was that if a miner did not want to operate the equipment Lang would find someone who did (Tr. 50).

Stiefel claimed that when he asked Lang why equipment could not be fixed at the pit and when Lang told him it was none of his business, Stiefel responded, "if we can't get stuff [fixed] around here I guess I'll give my two-week notice" (Tr. 55). Stiefel maintained that in so doing he was not really giving Lang his two-week notice, rather he was making clear he was not going to be responsible for hurting anyone or for telling someone to operate the front-end loader out of fear that he would lose his job. Id.

Once home Stiefel called MSHA to advise the agency what had happened and to ask for an inspector to be sent to "check the plant" (Tr. 43). He placed the call around 9:00 a.m. (Tr. 83). Stiefel was not certain but believed he might have spoken with Terry Phelps in MSHA's Birmingham, Alabama office (Tr. 52, 83). Stiefel testified he also reported that the front-end loader did not have brakes and that it was a practice at the pit for the equipment to be used in an unsafe condition (Tr. 127-128).

Stiefel believed that in response to his call MSHA came to the pit, but the company, by a ruse, prevented a meaningful inspection of the equipment. Stiefel speculated that the company might have "hosed down" the front-end loader so it would not be hot and the MSHA inspector would not recognize that the equipment had been used. Or, the company might have placed a "red tag" on the front-end loader to indicate it had not been operated the day of the accident (Tr. 54, 110).

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Stiefel acknowledged he was not present when the inspector came to the pit, but stated he was told by someone that this is what had happened. He asserted that previously he had been ordered to park a front-end loader he had been using in order to make it appear to a visiting inspector that the equipment had been removed from service (Tr. 112-113, 124-125). Stiefel did not report this to MSHA "because of fear of losing [his] job" (Tr. 126).

Later that day, as Stiefel was preparing to go to work, Johnson came to Stiefel's home and told Stiefel, at Lang's direction, that because he had been the one who called MSHA he was going to be returning to the second shift and was going to drive a front-end loader. In addition, he was not going to get a pay raise and would no longer be a supervisor (Tr. 84).

Stiefel maintained he responded that he would not operate another piece of equipment at the pit. Stiefel did not go to work that night because Johnson told him to report the following morning (Tr. 86). Johnson did not tell Stiefel that the third shift had been terminated (Tr. 86).

Stiefel stated that the next day, July 2, he called MSHA again and asked if Lang or Johnson could demote him because he had contacted MSHA. The MSHA representative stated he could not be demoted for that reason (Tr. 86).

Around noon, he returned to the pit. Johnson and Lang were there. In Johnson's presence Stiefel asked Lang why he was "demoted" and Lang replied, "You're demoted because you called MSHA, and I can't trust you no more" (Tr. 44). Stiefel considered it a "demotion" because he was not going to be a supervisor, he was not going get the raise he had been promised and he was going to have to operate unsafe equipment (Tr. 45-46). Stiefel responded by telling Lang he could not be demoted for calling MSHA and that to do so was a violation of federal law (Tr. 44-45). Lang replied, "I can do whatever I want" (Tr. 45).

After Stiefel left the mine on July 2, he did not return to seek re-employment (Tr. 57). Had he returned he would have been making the same amount of money as when he left -- \$6.50 an hour (Tr. 90). Subsequently, Stiefel filed for state unemployment compensation, which was denied. Stiefel maintained he failed to get the compensation because he could not attend the hearing (Tr. 119).

Mark Bouska

Bouska testified that he initially worked for the company as a truck driver and later worked as a laborer. In the latter position, he operated front-end loaders from time to time (Tr. 130-131).

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On June 29, Bouska was loading sand with the front-end loader that was involved in the July 1 accident (Tr. 132). He was working on the day shift and operated the equipment for about 45 minutes (Tr. 137). On June 30, he operated it again. The front end loader was not "red tagged" on either day (Tr. 138).

On July 1, he arrived at the pit around 6:00 a.m. He checked in and found Johnson who asked him to shovel underneath some of the conveyor belts. Bouska shoveled until around 7:30 a.m, when Johnson asked him to do other tasks (Tr. 152).

When Bouska checked in, some of the other employees were talking about the accident that had occurred earlier that morning. Bouska spoke with Stiefel who described the accident to Bouska (Tr. 153).

Around 11:00 a.m., Bouska maintained that Stampler, who had been operating the front-end loader that morning, parked it by the break room shed. Johnson came over and told Bouska to hose it down in order to cool the engine.

Bouska stated that he left the company that morning. He walked off the job because of "[f]ear for my safety" and because of an apparent dispute with Lang about who was Bouska's boss, Johnson or Lang (Tr. 146). Bouska did not complain to MSHA about his safety concerns.

After he quit, Bouska went to Stiefel's home to ask what Stiefel was going to be doing over the July 4 weekend (Tr. 155).

Leon "Pete" Lang

Stiefel also called Lang as a witness. Lang denied he ever told Stiefel that he was demoted for calling MSHA (Tr. 161).

Brenda Crist

Finally, Stiefel called his fiancée, Brenda Crist, to testify concerning a June 13, 1994, conversation involving her, Stiefel and Johnson. Crist stated that Johnson told Stiefel, "You called MSHA on Mr. Lang, therefore, you were demoted because you could no longer be trusted, and he needed to keep you within his sights" (Tr. 168).

In addition, Johnson stated that Lang told him Stiefel was supposed to get a raise after he started his job on the third shift. Johnson wondered why Stiefel never got the raise (Tr. 169). Crist believed Johnson was not employed by the company when the conversation took place (Tr. 172).

The Company's Witnesses

Leon "Pete" Lang

Lang is the president of the company and owns a controlling interest in it. Lang stated he also owns and operators Lang Construction, a company involved in site preparation (Tr. 174-175).

Lang Sand & Gravel was formed in 1990. The property on which the pit and plant are located is leased. The first day of operations was January 16, 1991 (Tr. 176). In July 1993, Lang was dividing his time by spending half of it with the construction company and half of it at the sand and gravel operation. Lang described Johnson as the person responsible for the day-to-day operations of the sand and gravel company (Tr. 178). Lang said of Johnson, "[H]e operated the plant, did quality control, and supervised people, and he could even hire them and fire them. I guess you'd call him just a general superintendent" (Tr. 179).

Turning to the accident of July 1, Lang stated that fines had been imposed on the company because the front-end loader had overturned -- "\$5,000 for the company and \$5,000 personal" (Tr. 180). Although he was not sure, Lang believed the fines had to do with the brakes on the equipment (Tr. 181). He added that within a week of the accident the company obtained a new front-end loader.

Lang stated that when he arrived at the pit between 7:00 and 7:30 a.m. on the morning of July 1, he was informed of the accident. Shortly thereafter he and Stiefel went to the accident site and Lang asked Stiefel why Stiefel had allowed the use of the front-end loader that night. (Lang observed that while Stiefel, whom he described as a good worker, did not have hiring and firing authority, he had the responsibility not to use a piece of equipment if it was in unsafe condition (Tr. 183, 210).

Lang maintained that Stiefel tried to change the subject by asking Lang why Pridmore was allowed to operate a front-end loader when Pridmore "couldn't see" (Tr. 184). (Lang explained that Pridmore had hurt his eyes before he started working for the company, but that when he was hired his vision was not a problem (Tr. 185). "I have a doctor's excuse his eyes [were] okay," he stated. Id.) According to Lang, he told Stiefel it was none of his business, that when he hired someone he was sure they were fit to work. Lang testified that as he and Stiefel turned and started to walk back to the electric shed, Stiefel said that he was turning in his two-week notice. Lang did not make any response to Stiefel's announcement. As Lang stated, "[H]e just turned his notice in and I just let him leave" (Tr. 212).

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Lang stated that to the best of his knowledge, the front-end loader was righted and transported to an area near the plant office and was not put back into service again (Tr. 186).

Lang also explained that at first the plant operated on one shift. However, when new equipment was installed, Lang decided to add a second shift and, ultimately, a third shift to try to keep up with the demand for sand and gravel (Tr. 187). Lang was not certain how long the plant had been operating on three shifts when the accident occurred. However, on July 1 he decided to terminate the third shift and it has not been reinstated.

Lang maintained the reason for terminating the third shift was "mainly economic," but he also decided to end it because he did not have control over what went on at the operation in the middle of the night (Tr. 188). Once the third shift was eliminated the company went to two nine-hour shifts. Had Stiefel stayed Lang believed he would have been able to work as many hours as he wanted, given the fact that there would have been plenty of overtime work available (Tr. 189). Lang did not recall making any representations to Stiefel about when he would receive a raise (Tr. 189, 214).

Lang stated that at the time of his discussion with Stiefel, he was unaware Stiefel had called MSHA. It was not until MSHA personnel arrived on the morning of July 1 that he learned someone had contacted the agency. Although he subsequently found out it was Stiefel, he could not remember when (Tr. 190, 210). Lang observed that because he would have been required to report the accident to MSHA in any event, there was no particular detriment to the company based on Stiefel's report since MSHA would have known about the accident whether or not Stiefel called (Tr. 200).

Lang also testified that he never authorized Johnson to tell Stiefel he was being demoted and that the reason he was moved back to the job he had before he went to the third shift was because of the termination of the third shift. In that position he was not going to suffer any reduction in salary or reduction in benefits or in the number of hours he had the opportunity to work (Tr. 191).

Kay Derek

Kay Derek is the office manager and bookkeeper. She works at the office trailer located near the plant entrance. She testified that on July 1, after Stiefel spoke with Lang, Stiefel came by the office and told her he had quit. At this time no one from MSHA had come to the property (Tr. 221). She described his mood as "so-so" and she added, "I've seen him more upset" (Tr. 216). However, he was upset enough that she did not inquire why he had quit. Id.

Derek acknowledged that she had previously advised personnel at the plant that MSHA inspectors or investigators were on the property just to let the company personnel know the federal personnel were present. However, she never gave any instructions to company personnel to hide or to shut down anything and she had no knowledge of such a thing ever happening (Tr. 218).

#### THE LAW

Section 105(c)(1) of the Act protects miners from retaliation for exercising rights protected under the Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S.Rep. No. 95-181, 95th Cong. 1st Sess., at 35 (1977), reprinted in 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (1978).

A miner alleging discrimination under the Act establishes a prima facie case by proving that he or she engaged in protected activity and 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 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-2800. If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-818; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Const. Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F. 2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

#### STIEFEL'S PRIMA FACIE CASE

Under this case law, Stiefel must first establish that he engaged in protected activity and as a result suffered discrimination.

PROTECTED ACTIVITY

I conclude that Stiefel has established he twice engaged in protected activity. First, I accept his testimony that on July 1, following his return to the mine from the hospital, he had a discussion with Lang in which he complained about the safety of equipment at the mine and specifically about the brakes on the front-end loaders (Tr. 43, 55, 75). Stiefel and Lang agreed that a conversation took place. In Stiefel's version, Stiefel asked Lang why equipment, including the brakes on the front-end loaders, could not be fixed at the mine (Tr. 43, 55). In Lang's version, Lang challenged Stiefel as to why Stiefel let miners use the brakeless front-end loader and Stiefel challenged Lang as to why Lang let Pridmore operate the front-end loader when he knew Pridmore had vision problems (Tr. 185).

I do not discount entirely Lang's description of the discussion, in that I believe the exchange involved Pridmore and his use of the front-end loader. Because the conversation came close upon the heels of the accident, it is logical that at least part of it would have related to what Pridmore was doing and why he was operating the equipment. Indeed, Stiefel's initial discrimination complaint suggests that some of the discussion involved who was responsible for Pridmore using the front-end loader. (In the complaint Stiefel wrote: "I told them it was not my fault that the loader don't have brakes on it and that the loader man was on that loader when I started by shift" (Complaint, Exhibit 1, p. 3).)

It strikes me as likely that in such a discussion Stiefel would have tried to dilute his own responsibility, whatever it may have been, by complaining about safety and the brakes. His testimony that he complained about the brakes is also essentially consistent with what he is reported to have told MSHA Investigator Steve Kirkland, who interviewed Stiefel 13 days after the accident and who memorialized the interview on July 27, 1993 (Complaint, Exh. 5 at 2). I therefore credit Stiefel's account of the discussion to the extent of finding it included a complaint by Stiefel about the safety of the brakes.

It has long been settled that a miner has a right under the Act to make safety complaints about equipment to his or her employers and that such complaints are protected activity. See Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc., 14 FMSHRC 1858, 1884 (November 1992) (ALJ Koutras) and cases cited therein.

Second, I accept Stiefel's contention that on July 1 he called MSHA to report the accident and the brake problem. Indeed, the company does not disagree. Lang stated that sometime after MSHA inspectors arrived at the mine on the morning

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of July 1, he found out that Stiefel had called the agency (Tr. 190, 210).

As with safety complaints to employers, the right of a miner to make safety complaints to MSHA has long been recognized. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 13, 1981).

Thus, I conclude that Stiefel has established the first part of his prima facie case.

#### ADVERSE ACTION AND MOTIVATION

Having established that he engaged in protected activities, the question is whether Stiefel also has established he suffered adverse action because of them. Here, I conclude the answer is no.

With regard to his safety complaint to Lang, and as the following exchanges make clear, Stiefel was adamant that he was not forced to quit work and in fact did not quit work because of Lang's response:

JUDGE: Did you advise the company on [July] 1st that you were going to be leaving in two weeks?

MR. STIEFEL: I did not tell him that I was leaving in two weeks. . . . I didn't give my two-week notice. I did not state to the man that I was quitting in two weeks. I told him I wasn't gong to be responsible for hurting another person or ... telling another [p]erson to get on this piece of equipment for fear of my job.

Tr. 55.

MR. JONES: [W]hat was it you told ... Lang about two weeks?

MR. STIEFEL: I said if he could not get his equipment running right and safe that I would have to give my two-week notice. I did not state in fact that I was giving my two-week notice. I said if.

\* \* \*

I said that I'm not giving my two-week notice, but we have to get something done. I said exactly we have to get something done to this equipment because I can't stand here and watch people get hurt.

Tr. 74-75.

I take Stiefel at his word and conclude that he did not choose to leave work or was not forced to leave work because of his safety complaints to Lang on the morning of the accident. Rather, he adopted what was essentially a "wait and see" attitude.

That leaves the question of whether Stiefel suffered any adverse action because he reported the accident and the condition of the brakes to MSHA. Stiefel's initial contention was that he was demoted because he called MSHA (Complaint, Exh. 1, p. 3). This bare-bones assertion was fleshed-out in Stiefel's interview with Kirkland. Kirkland describes Stiefel as stating that he reported safety violations to MSHA around 10:00 a.m. on July 1, that Johnson arrived at his home around 5:00 p.m., that Johnson told him Lang said because he had called MSHA, Stiefel could not be trusted as a supervisor and that Lang and Johnson had decided to return him to his previous job as a front-end loader operator during a day shift. Kirkland also reports Stiefel as stating that Johnson told him to come to work the next day in that capacity, that Bouska was present during the conversation and that Stiefel did not go back to work anymore except to go to the mine on July 6 to pick up his pay check (Complaint, Exhibit 5 at 2-3).

At the hearing, Stiefel testified that the conversation with Johnson occurred essentially as described to Kirkland (Tr. 19, 84-86). In addition, he added an incident that Kirkland did not report. Stiefel asserted he returned to the mine on July 2 and there, in the presence of Johnson, asked Lang why Lang had demoted him. According to Stiefel, Lang replied it was because Stiefel had called MSHA and could not be trusted (Tr. 44-46).

I find that Stiefel was in fact advised he would have to return to his old position. Lang testified the change was based upon economic reasons and a desire for better control at the mine (Tr. 188-189). According to Lang, he was able to meet customer demand by working two shifts and overtime rather than three shifts. This assertion was not challenged, and I find it is true. Given the fact that he could meet customer demand if he eliminated the night shift, it is logical to me that he would have wanted to do so in order to have better control at the mine. After all, a presumably preventable, and potentially fatal, accident had just happened on Stiefel's "watch." Although Stiefel maintained he was essentially a supervisor in name only, I do not believe it (Tr. 92). It strikes me as highly unlikely Stiefel would have considered the loss of supervisory status part of a "demotion" if all he lost was a meaningless title. Rather, I accept Lang's description of Stiefel's responsibilities (Tr. 183, 210). Therefore, I do not infer any prohibited adverse action or retaliatory intent from the elimination of the night shift.

It is true that had Stiefel returned to work during the day he would have lost his supervisory responsibilities. However, Stiefel had switched to the night shift one week prior to the accident. Lang testified that Stiefel's job status was probationary, and this testimony was not challenged (Tr. 189). It is a common practice to place an employee on probationary status when the employee is switched to a new job. In such a situation I believe the company could terminate Stiefel's supervisory status and not run afoul of the Act, provided its motivation was not proscribed. Here, where Stiefel was on duty when a serious accident occurred, it was not unreasonable that Lang wanted to relieve him of his responsibilities.

Further, Stiefel did not establish that he suffered a loss of pay. Although one of Stiefel's contentions was that he was denied a promised pay raise, there was nothing in writing regarding the raise, nor was any testimony offered that such raises were customary. Lang could not recall promising Stiefel a raise and even if he had remembered such a promise, in the absence of a written agreement or evidence of a practice to award such raises, I would not find that reneging on the promise was discriminatory, especially when the employee held the position on a provisional basis (Tr. 189, 214). Moreover, had Stiefel returned to his old position he would have been paid at the same hourly rate, and Stiefel did not offer any testimony or evidence to counter Lang's contention that overtime work, which would have allowed Stiefel to earn as much or more than he had earned at night, was readily available (Tr. 189).

Nor did Stiefel establish that had he returned to day work to operate a front-end loader he would have been forced to work under unsafe conditions. Stiefel would have been returning to the mine after MSHA had conducted an inspection. Presumably, unsafe conditions would have been detected during the inspection and would have been corrected or have been in the process of being corrected. Stiefel did not appear to believe that the conditions were generally so unsafe that he was forced to refuse to work. On July 1, and before MSHA inspectors had even been called to the mine, he decided not to give his two week notice. (It also is important to note that if he had returned to the mine he would have retained the right to refuse to work if he believed in good faith that conditions were unsafe.)

Finally, and most important, I do not believe that Stiefel established that any of the allegedly adverse actions were motivated by his telephone call to MSHA. The record is inadequate to support a finding that on July 1 Johnson told Stiefel he was demoted because he had called MSHA. Although Stiefel testified Bouska was present during the July 1 conversation with Johnson, when Bouska was called to testify on Stiefel's behalf, Stiefel asked him not one question about the conversation or even about

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his whereabouts at the time, except to establish that he came to Stiefel's home on the afternoon of July 1 to inquire about Stiefel's plans for the July 4 weekend (Tr. 155).

Fundamental to Stiefel's failure of proof, is the fact that Stiefel did not call Johnson to testify. Stiefel stated that Johnson would not appear unless subpoenaed, but he neither subpoenaed Johnson nor offered any explanation why Johnson could not appear. Rather, Stiefel attempted to offer an "affidavit" from Johnson in lieu of testimony. Counsel for Lang Sand & Gravel objected, and I sustained the objection (Tr. 63-64). I agreed with counsel that it would prejudice the company to permit a statement to be entered when it could not be subjected to cross examination and when the best evidence -- the witness -- was apparently available but simply not called.

Stiefel also offered the testimony of his fiance concerning a conversation with Johnson in which she as involved approximately two weeks before the hearing (Tr. 168-172). She remembered Johnson as saying that Stiefel was demoted because he called MSHA and because Lang could no longer trust him. She was allowed to testify over the objection of counsel because she was recounting a conversation she had heard. Her testimony was admissible, but I accord it no weight. Once again the best evidence -- Johnson's -- was not presented. Moreover, I note that Stiefel made no reference to the substance of this supposed conversation during his testimony, even though he was said to have been present during it.

Thus, the essential portion of Stiefel's case for unlawful motivation rests solely upon his and Crist's uncorroborated testimony. They hardly were disinterested witnesses and the lack of corroboration, when it seemingly could have been obtained with ease, in my view fatally undermines their credibility.

Further, I do not credit Stiefel's testimony that on July 2 when Stiefel returned to the mine to pick up his pay check, Lang told him "You're demoted because you called MSHA, and I can't trust you no more" (Tr. 44). I find it highly significant that this purported conversation appears no where in Stiefel's initial complaint. Indeed, Kirkland reports Stiefel as stating that after July 1 he did not go back to the mine, except on July 6 to pick up his check (Complaint, Exhibit 5 at 2-3). Lang denied he ever made such a statement and Johnson, the only other person said to have been present during the conversation, did not testify.

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CONCLUSION

Accordingly, I conclude that while Stiefel has established he engaged in protected activity, he has failed to prove he suffered any adverse action because of it. Therefore, Stiefel has not established a prima facie case and his complaint must be and is DISMISSED.

David F. Barbour  
Administrative Law Judge

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