

CCASE:
JOE ARNOLDI V. ASARCO INC.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JOE ARNOLDI,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 85-161-DM

v.

Coeur Mine

ASARCO, INCORPORATED,
RESPONDENT

DECISION

Appearances: Nathan S. Bergerbest, Esq., Cotten, Day, Doyle,
Washington, D.C.,
for Complainant; Fred M. Gibler, Esq., Evans, Keane,
Koontz, Boyd, & Ripley, Kellogg, Idaho, for
Respondent.

Before: Judge Morris

Complainant Joe Arnoldi brings this action on his own behalf alleging he was discriminated against by his employer, ASARCO, Incorporated, in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C.A. 815(c)(1), in its pertinent portion provides as follows:

No person shall discharge or in any other manner discriminate against or otherwise interfere with the exercise of the statutory rights of any miner because such miner has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners of an alleged danger or safety or health violation or because such miner 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 because of the exercise by such miner on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits was held in Spokane, Washington commencing on December 2, 1986.

The parties filed post-trial briefs.

Applicable Case Law

In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) 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 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) 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 the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir.1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C.Cir.1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

Summary of the Evidence

Complainant's Evidence

Wendell Kunst, William Arthur, MSHA Inspector James Arnoldi, Joe Arnoldi and Kim Bradshaw testified for complainant.

On March 18, 1985 WENDELL KUNST had been assigned to stope 277 at level 3100. His co-worker, also a production miner, was Bob Chavez. Complainant Joe Arnoldi (sometimes hereafter referred to as Joe, or Mr. Arnoldi) served as the nipper. Joe gets supplies for the miners and operates the hoist in the raise (Tr. 14-16, 33, 336). A nipper's performance is important to the efficiency of the mining operation (Tr. 16). Joe had done a good job for the miners on other occasions (Tr. 16). They never found him "goofing off" and his work never adversely affected their production (Tr. 17).

On March 18 the miners left Joe at the tigger, about 60 feet above the stope, with instructions to await their call for the skip (Tr. 18, 19, 21). They didn't call for it. Kunst didn't see Joe sleeping that morning nor did he know one way or another if he was sleeping (Tr. 18-20).

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Kunst saw Michael Lee (mine manager) and William Arthur (shift boss) that morning. Lee and Arthur didn't ask if Joe was sleeping or unresponsive to their needs (Tr. 19, 30, 31).

It is important for the nipper to stay alert at all times (Tr. 20). Kunst thought the tugger was safe. But it was in close proximity to the haulage train (Tr. 21, 22). A miner can tell when a train approaches (Tr. 23).

WILLIAM ARTHUR, shift foreman at the Coeur Mine, didn't see Arnoldi sleeping on March 18 (Tr. 25). Arthur further identified a document filed with the Idaho Industrial Commission. The document stated that the shift boss and mine superintendent both observed Joe Arnoldi asleep at the top of 277 (Tr. 25-28). In fact, Arthur indicated that Arnoldi's eyes were open when he saw him (Tr. 28).

Arthur had been walking about six or seven feet behind Lee as they approached the 277 stope. They were checking to see if the miners were doing the work safely and if they needed material (Tr. 29). When Arthur first saw him Arnoldi was six feet from the tugger sitting down or leaning against a rock or some burlap.

He then heard Lee tell Arnoldi that he wasn't supposed to be sleeping on the job (Tr. 30, 35, 55). Lee had no conversation with Arthur before he took Arnoldi out of the mine except to ask if such action was justified (Tr. 31). To take a miner to the top usually means he's going to be fired (Tr. 32). Arthur didn't recommend to Lee that Arnoldi be fired or suspended (Tr. 32, 33).

Arthur had been interviewed by MSHA special investigator Lopez. He kept one copy of the interview and turned one over to Andre Douchene, the mine manager (Tr. 37, 40). Arthur did not indicate to the company attorney, Fred Gibler, that he did not want to verify the accuracy of the MSHA statement. However, Mr. Gibler represented such was Arthur's position (Tr. 38, 56). Lopez did not followup with Arthur (Tr. 57).

In February 1985 MSHA inspector Jim Arnoldi and Don Downs issued ASARCO a loose ground citation. The cited area was under Arthur's jurisdiction (Tr. 39, 57). Mine manager Douchene attempted to fire miners Ernie Myles and Bob Magoon because of the citation (Tr. 40). Douchene wanted them fired because they had disregarded his directions to bar down the slab. Joe Arnoldi was the nipper for Magoon and Myles (Tr. 40, 58). Douchene cooled down when he learned Arthur had told them not to further bar down the loose ground (Tr. 41, 58). Jim Arnoldi and Downs also inspected the 277 raise, on the 3100 level (Tr. 59).

The tugger at the 277 raise, 3100 level is mounted on a 10 x 10 and it hoists timber and supplies in the raise. It has 700 feet of cable (Tr. 42, 43). When the tugger is raising the skip the operator would be watching either the wire drum or the skip (Tr. 44, 45). Arthur has observed Joe Arnoldi operating the

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tugger while standing on the 10 x 10 cap (Tr. 45). Arthur has seen other miners operate the tugger in a similar fashion (Tr. 45). The cap is behind the timber and the haulage train track (Tr. 46). Some tuggers were mounted on the other side of the timber. This particular tugger was mounted between the haulage train track and the timber because there was already a tugger bench mounted there (Tr. 46). The clearance between the train track and the tugger measures 30 to 32 inches (Tr. 46). When a miner is operating the tugger it would be 20 inches from the back of his foot to the train track. The train itself extends about 10 inches so the clearance is about 7 to 10 inches when the train passes (Tr. 47, 48).

Arthur didn't consider this a safety hazard because the operator probably didn't stand there when the train went by. By moving one step either direction the tugger operator would be out of the way (Tr. 47, 48).

The slusher, weighing 400 to 500 pounds, is the heaviest item hoisted by the tugger (Tr. 48). If a train were to come through while lifting the slusher the nipper would be expected to set the brake and move aside (Tr. 49). The nipper could see lights on the five car train for 100 feet or more (Tr. 49). However, a curve obstructs the motorman's visibility of Arnoldi's location (Tr. 49, 50). If the engine was pushing the train the motorman would be 40 to 50 feet back towards the rear of the train (Tr. 50). Usually there is a miner, called a swamper, who rides on the second car of the train (Tr. 51).

A nipper can usually see the train with his side vision (Tr. 54). There are no special safety rules directing the motorman to stop and be certain that the nipper is busy at the 34th level (Arnoldi's work station) (Tr. 54).

When the train is in motion it rings a bell. But the exhaust fan near Arnoldi's work station might drown out such noise (Tr. 54). Neither Joe Arnoldi nor any other miner ever complained to Arthur about the height of the tugger or its distance from the track (Tr. 59). During a work shift a nipper would operate the tugger, at the most, an hour and a half (Tr. 60). An exception would arise when the operator was raising a crib. That operation might take all day (Tr. 60).

Arthur has never had any problems with nippers getting out of the way of trains (Tr. 61).

On March 18 the train motor was not running. The train was sitting at the top of 277, right at the tugger (Tr. 61).

Witness Arthur identified his handwritten statement from his notebook (Exhibit E). Arthur didn't talk to Lee or Andre Douchene before writing his notes (Tr. 64).

On the morning of March 18th the temperature at Arnoldi's work station was 75 to 80 degrees (Tr. 66). Arnoldi's position was a good place to sit (Tr. 66). Arnoldi's area was reasonably

clean that day.

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Other than for Lee's statement Arthur does not have any reason to believe that Joe Arnoldi was sleeping that morning (Tr. 68).

MSHA INSPECTOR JAMES ARNOLDI has been assigned to the Spokane Coeur d'Alene, Idaho field office for ten years. He is well respected by a large majority of his fellow inspectors (Tr. 70-72).

MSHA's lead inspector is normally permanently assigned to a mine and he normally issues the citations arising during any inspections (Tr. 73). The "second" inspector could also write citations. If they both observed a violation the lead inspector would write the citation (Tr. 73). Inspector Arnoldi was not the lead inspector for ASARCO's Coeur unit (Tr. 74). Don Downs had that position (Tr. 75). Most of the time Inspector Downs was alone when he inspected the Coeur mine (Tr. 75).

In 1984 Inspector Arnoldi had conducted hoist inspections at the mine (Tr. 76). In February 1985 Inspector Arnoldi's supervisor assigned him to the Coeur mine as the second inspector (Tr. 75, 76). The next MSHA inspection commenced February 5 and concluded February 21 (Tr. 76).

Inspector Arnoldi's status was questioned at the mine and, in front of shift bosses and manager Carole Ward, Downs stated that Arnoldi was just his XXXX secretary and he was there to take notes (Tr. 77, 116, 117). Inspector Arnoldi complained to his supervisor about Inspector Downs' comments (Tr. 78).

During the inspection in February 1985 Inspector Downs issued three citations. Inspector Arnoldi participated and concurred with Downs that the citations should have been issued (Tr. 79, 80). An S & S citation was issued for loose ground on a hanging wall (Tr. 80). Bradshaw and Bill Arthur were also present (Tr. 80). The two miners involved in this incident were initially fired for this willful violation. Joe Arnoldi was, in effect, an MSHA informant concerning this event (Tr. 81). Inspector Arnoldi advised Downs that the loose ground violation was more serious than they had initially anticipated (Tr. 82). There was a second loose ground citation (Tr. 82). ASARCO did not dispute the S & S loose ground citation but the company disputed the non S & S loose ground citation (Tr. 86).

Inspectors Downs and Arnoldi attended the closeout conference with company representatives Andre Douchene and Kim Bradshaw (Tr. 83). Douchene was also the elected miner's representative (Tr. 83, 84). Inspector Arnoldi had told some of the miners that they could elect their own miner's representative from within the ranks of the miners (Tr. 85). In discussing the non S & S citation Inspector Arnoldi pointed out that the ground fractures had no oxidization around them. Douchene then got redfaced and puffed up he said that "you may be the law but I'll show you who the law is around here". He then stormed out the door (Tr. 87). In two or three minutes he returned and stated

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"All I need is one letter to get rid of you around here."
Inspector Arnoldi told him to write the letter (Tr. 87). He also stated he was there under supervisory orders and he didn't care to be at the mine (Tr. 87). Douchene then stated that the inspector was involved in a conflict of interest with his family working there. In addition, Douchene stated "You have too much [family] here to XXXX around too much" (Tr. 87, 88).

MSHA's conflict of interest policy, set for in Exhibit C3, does not prohibit an inspector from inspecting a mine where a relative works (Tr. 89, 91). Joe Arnoldi was his only blood relative at the mine. However, by marriage there are two stepsons, two brothers-in-law, nephews and an uncle. There were enough relatives to be concerned about retaliation (Tr. 92, 123). Joe is the only relative working at the Coeur unit with the last name of Arnoldi (Tr. 92).

The inspector told his supervisor about Douchene's remarks (Tr. 92, 93).

On March 19, 1985, the following day, MSHA was intending to inspect ASARCO's hoist at the Galena mine three miles from the Coeur mine (Tr. 93, 94). In arranging this inspection Inspector Arnoldi called Douchene and told him they would inspect the hoist. Then ASARCO's schedule would be "straightened out for the year" (Tr. 95). The inspector denied there was anything to straighten out on the hoist inspection (Tr. 95). In that conversation Douchene didn't tell Inspector Arnoldi that Joe was suspended, [or was about to be suspended]. Inspector Arnoldi hadn't seen his son for a week (Tr. 95).

Later that afternoon Mike Lee called Inspector Arnoldi and said he wanted Joe to come to the mine as soon as possible (Tr. 97). The next night Inspector Arnoldi learned that Joe had been fired (Tr. 97). Inspector Arnoldi did not immediately connect his son's discharge with his official inspection activities (Tr. 97).

The hoist inspection at the Coeur unit was cancelled due to a hoist malfunction at a different mine (Tr. 98).

Joe advised his father that Douchene had told him to "rustle" every day and keep rustling and he'd get his job back (Tr. 99).

Sometime in May Inspector Arnoldi wrote a statement (Exhibit C4). At that point he believed ASARCO was discriminating against another relative, Steven White (Tr. 100). This particular incident involved an injury to White coupled with Douchene's directive that White return to work or be terminated (Tr. 100, 101, 135).

Inspector Arnoldi claimed that Andre Douchene intimidated him in violation of the U.S. Criminal Code (Tr. 103). If the inspector had inspected the tigger at the 34Ä277 raise 3100 level he would have issued a citation due to the fact that there was

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only ten inches between the tugger and the railroad car (Tr. 104, 138). Joe told his father about this unsafe condition (Tr. 139). The inspector probably didn't tell Joe to put the complaint in writing. The inspector did not inspect it himself (Tr. 139, 140).

Inspector Arnoldi has inspected the Coeur mine a dozen times in a three year period (Tr. 104, 105). Except for the February 1985 inspection, Carole Ward was the unit manager. Joe Arnoldi was originally hired by ASARCO after his father had a discussion with the manager (Tr. 105-108). Inspector Arnoldi did not solicit Ward for a job for his son (Tr. 144). Ward knew Mr. Arnoldi was an MSHA inspector because he had been there several times (Tr. 108). In 1982 or 1983 other MSHA inspectors conducted the regular inspections at the mine (Tr. 108).

Inspector Arnoldi has reviewed MSHA's conflict of interest policy at least annually (Tr. 124). He had not told his supervisor that he had seven or eight family members at the Coeur mine (Tr. 125). But he told his supervisor that he didn't feel comfortable going there. The MSHA supervisor knew he had many relatives working at the mine (Tr. 125, 126, 142). Inspector Arnoldi didn't feel there was a conflict of interest to investigate a mine where relatives work (Tr. 141, 142).

About noon on March 19, 1985 Inspector Arnoldi called Mr. Douchene and advised him of a hoist inspection. At that time prior notice of such an inspection was an accepted practice. The prior notice permitted the operator to have its ropemen and electricians available (Tr. 126, 127).

On May 15th, when he wrote his explanation seeking criminal penalties against Andre Douchene, Inspector Arnoldi knew the company claimed Joe had been caught sleeping. But nothing appears in the statement to that effect (Tr. 128-130; Ex. C4). The inspector's son claimed he had not been sleeping and the operator took a contrary view (Tr. 131). In his statement Inspector Arnoldi also wrote that he thought Douchene's statements at the closing conference were made in jest. But he meant he hoped he was only jesting. Since Douchene was "immediately" angry Inspector Arnoldi didn't believe he was merely jesting (Tr. 131, 132; Ex. C4).

Inspector Arnoldi agrees that it is not a safe practice to sleep in the raise (Tr. 138).

The witness believed that Andre Douchene carried out his threats by terminating his son (Tr. 143).

In 1981 MSHA inspectors were passing out miner's rights booklets at the mine (Tr. 85). The MSHA manual instructs the inspector to notify miners of their rights and the booklet serves that purpose (Tr. 86).

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It was Andre Douchene who ran the inspectors off the site for distributing the rights booklet (Tr. 85, 110-112). No citations were written as a result of that incident (Tr. 113). When he was recalled as a witness Inspector Arnoldi changed his testimony and indicated that Dave Lewis, and not Andre Douchene, was the ASARCO manager at the time of the pamphlet incident (Tr. 365-366, 371).

Larry Nelson, the supervisor of the local MSHA office, in a written memorandum, stated the MSHA pamphlets could be distributed (Tr. 366, 367; Ex. C23).

JOE ARNOLDI is now employed as a downhole driller and he resides in Michigan (Tr. 147, 148). In his current employment he has received no warning slips or complaints about his job performance. He also works overtime at his present job (Tr. 148).

The witness was employed by ASARCO from April 19, 1981 to March 20, 1985. In the instant case he seeks reinstatement (Tr. 149). Before moving to Michigan he worked for the U.S. Forest Service for a month and for an asphalt company for a few weeks (Tr. 150).

In high school Joe's highest grade in English was a "D". He also failed the course on one occasion. After quitting high school he worked in the oil fields and elsewhere. He eventually received a general education diploma (Tr. 151).

At ASARCO his entry level job was that of a mucker. He was later promoted to nipper motorman (Tr. 152). He also filled in stopes and worked with the repair crew (Tr. 152). His pay was based on production (Tr. 153).

ASARCO maintains a warning slip procedure. A miner is terminated if he receives three such slips in a 90 day period. Joe has received nine warning slips (Tr. 153, 190).

On August 7, 1981 he received, deservedly, a warning slip for carrying explosives on a battery locomotive (Tr. 154, 191).

On April 18, 1983 he received a slip for failing to follow orders and for unsatisfactory work. He stated why he didn't deserve this warning (Tr. 154, 230).

On April 27, 1983 he was injured on the job when struck in the left wrist by rocks falling down the raise (Tr. 154, 155, 214, 215; Ex. C5). Joe told his supervisor, Charlie Castelli, he wasn't going to get under the raise in these circumstances. His supervisor then issued a warning slip for poor work (Tr. 155, 156, 191). This incident was discussed at a safety meeting on May 25, 1983 (Tr. 157; Ex. C6).

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Mr. Arnoldi suffers from allergies. His condition was diagnosed at age 7 (Tr. 158, 159; Ex. C7). He has continued to receive treatment while employed by ASARCO (Tr. 160, 194). He always presented a doctor's release when he returned to work. A failure to present a doctor's release will result in an unexcused absence. ASARCO's health fund paid the medical bills (Tr. 161, 195, 196). When the allergies are really severe Joe did not go to work. He believes the concern about his allergies renders it unsafe for him to be on the job (Tr. 161, 162).

Mr. Arnoldi received two unexcused absences in the 30 day period before August 11, 1983. At that time he was visiting his doctor for his allergy condition (Tr. 162). The ASARCO health plan also paid for those visits (Tr. 163). Because he had a doctor's excuse he didn't think he should have received the absences (Tr. 163, 226).

On October 14, 1983 he received a warning slip and a five day suspension for allegedly sleeping on the job. Joe denied he was sleeping. He protested to Andre Douchene on the third day. Douchene put him back on the job the following day (Tr. 169, 170, 200). Ron Maehl's diary entry of October 14, 1983 explains the reason for the layoff (Tr. 170; Ex. C12). This warning slip was not deserved (Tr. 227).

Mr. Arnoldi couldn't recall if he deserved the warning slip of May 22, 1984. But he thought it was "okay" because Andre Douchene had said they were allowed to miss two days a month (Tr. 198, 199).

On May 22, 1984 a warning notice for hauling a chain and motor was not deserved because he was a passenger on the motor. However, he did not protest the notice; it only makes things worse to complain (Tr. 199, 200).

On July 27, 1984 the witness received a warning slip for two unexcused days off in a 30 day period. The absence was because of allergies. He believed that warning notice was deserved (Tr. 164, 197, 227, 229).

On August 16, 1984 he received a slip for three days unexcused absences which was partially duplicative of the prior warning slip (Tr. 164, 197). The diary of Michael Lee explains the August 16th warning (Tr. 164; Ex. C9). The diary indicates that Mr. Arnoldi did not show up for work on July 20, July 27 and August 15th (Tr. 166). He had a justifiable excuse since he was under a doctor's care and suffering from, and being treated for, allergies on these dates (Tr. 166, 167, 221, 229; Ex. C10).

On December 4, 1984 he received a warning notice for failing to report for work on November 16 and December 3 but he thought he might have been on vacation (Tr. 168, 169; Ex. C11).

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Joe's father is MSHA Inspector Jim Arnoldi, who inspected the Coeur unit in February 1985 (Tr. 171, 172). As a result of that inspection co-workers Magoon and Myles told Joe Arnoldi they had been fired. Also Douchene was mad because ASARCO had been cited for loose ground (Tr. 172, 173). Joe related this information to his father (Tr. 173, 206). Joe was aware of his miner's rights but Magoon and Myles were not (Tr. 205, 206).

On March 18, 1985 Joe arrived at work about 6:35 a.m. (Tr. 173). The shift starts at 7 o'clock (Tr. 174). He was nipping at the 277 raise for Chavez and Kurst. The miners instructed him to await their signals (Tr. 174, 175). After some preliminary work he sat down behind the tugger. The temperature was 90 to 95 degrees and he felt a little faint. The fan had been turned off (Tr. 175, 207).

While sitting five or six feet from the tugger Bill Arthur and Mike Lee walked up. Lee said "caught you sleeping". Joe didn't tell Lee that this was the second time he'd been caught sleeping. Lee asked Joe what I had done for the weekend. [Joe had attended a St. Patrick's Day party in Butte, Montana] (Tr. 176, 207). After talking about the weekend, Lee and Arthur went down the raise. Lee subsequently reappeared and said he was going to bring Joe out for sleeping (Tr. 177). Lee also indicated he was going to talk to Douchene. Joe didn't see Douchene that morning. About ten minutes later Lee told Joe he was temporarily suspended. Lee also asked Joe of an address where he could contact him (Tr. 177, 178). Two days later, on March 19th, Lee requested that Joe come to the mine (Tr. 178). Lee then fired him. He was given his paycheck but no vacation check. Joe believed he was fired in retaliation for his father's MSHA activities (Tr. 179). His termination notice read "absolutely no rehire" (Tr. 375).

The following day Joe contacted Douchene and was told to keep on rustling and he'd hire him back like he did Bob Elisoff.

Joe didn't tell Douchene or Lee that he wasn't sleeping on the morning of March 18th. He believed that being aggressive would not get his job back.

He rustled by asking Lee or Douchene every morning at the main office for 55 or 60 days if they were hiring. He was not reoffered a job at the Coeur unit (Tr. 180, 181, 375, 377). He was treated fairly except towards the end (Tr. 182).

After being fired Joe filed for unemployment benefits with the State of Idaho. In filling out the state forms he couldn't write well and he couldn't write the reason why ASARCO discriminated against him. The reason he wanted to put down was that he was discriminated against because of his dad's MSHA inspections. He also wanted to state he was not sleeping. The papers he filed are accurate (Tr. 205; Ex. RAA). Instead of putting down his reasons why he was fired he put down ASARCO's reasons, i.e., that

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he had been caught sleeping at the 277 raise (Tr. 183, 200-203, 230, 231; Ex. RAA). The State of Idaho held he was ineligible for unemployment benefits and he later told that his appeal time had lapsed (Tr. 213, 218).

In his complaint filed with MSHA he alleged that his complaints about the tugger caused him to be fired. The complaint was that he couldn't operate the tugger comfortably and he could not see over the drum to observe the skip (Tr. 184, 185). Joe had been instructed not to operate the tugger when the train was in the area. But he could not hear the train or see its trip lights (Tr. 85, 186). Ninety percent of the time the swamper stayed back at the raise to pull down the muck (Tr. 186). There was no means of communicating with the train motorman who is 50 to 60 feet back from the front when he is pushing the train. Joe complained about the height of the tugger as well as its proximity to the haulage train track. His complaints were directed to Bill Arthur and also discussed in a safety meeting. He also told his father that the tugger was too high and too close to the tracks. His father said he wasn't inspecting in that area and he recommended that Joe talk to Bill Arthur.

Arthur thought the tugger was fine. To compensate for the height of the tugger Joe stood on a piece of timber set between the tugger and the track. He thought this was dangerous since the fifth wheel could hang up and derail the train (Tr. 186-188, 207-209). There were a few times when Joe was busy with the tugger and had to jump out of the way of the train (Tr. 188).

When he was a motorman Joe complained about the condition of the brakes and the controllers on the locomotive. He wrote up this condition on December 21, 1982 and the following days (Tr. 189). The motors were fixed on December 28, 1982 (Tr. 189). Joe does not claim that the 1982 incident caused him to be fired (Tr. 190).

Joe did not know what happened at the February 21, 1985 close out conference but his father told him about it and said he should "watch his back" (Tr. 212). He learned about the conference about the time he filed his report with MSHA's special investigator Lopez (Tr. 212).

KIM BRADSHAW, the company's safety engineer, works with the Coeur and Galena units. He is in charge of training and safety (Tr. 244, 322). The unit manager and mine superintendent set safety policy for the Coeur unit (Tr. 245).

Bradshaw attended a closeout conference on February 21, 1985. MSHA Inspectors Jim Arnoldi, Don Downs, and Emmett Sullivan were present. Andre Douchene, the Coeur manager, was also present (Tr. 247). The conference had concluded and Arnoldi said he would be inspecting the mine; further, he said to Andre that if they had better management they wouldn't have a problem. Andre took it in jest, laughing and smiling. He replied "You may be

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the law but we will see who the law is around here (Tr. 248-252). The further thrust of the statement was that a letter would prevent Jim Arnoldi from inspecting the mine (Tr. 253). The comment about the letter followed after Jim Arnoldi stated that Downs was going to be moved and that he would be the next inspector (Tr. 254). Bradshaw was not involved when Joe Arnoldi was fired 26 days later (Tr. 254, 255, 331-336).

Bradshaw conducts and keeps minutes of his safety meetings (Tr. 255, 325, 326). His notes would summarize any problems (Tr. 256). On October 25, 1983 miner Chavez commented that the boss was sleeping. Bradshaw didn't distinctly remember taking the complaint to management (Tr. 258). Nor did Bradshaw know if the comment was investigated (Tr. 258, 259). The company policy concerning sleeping on the job was discussed at safety meetings (Tr. 259; 263, 264; Ex. C17). The company policy prohibits sleeping in the mine. Punishment for sleeping could include warning slips, time out, or being brought out of the mine (Tr. 261, 265). Bradshaw has probably told miners they would be suspended if they were caught sleeping (Tr. 262).

Joe Arnoldi expressed concerns about safety. Particularly, he thought a swamper should ride in the second to last car (Tr. 265). Swampers are not assigned to every haulage train in the Coeur unit (Tr. 266).

Joe also complained about the incident in which he was injured. The miners were instructed at the next meeting to watch out for nippers below (Tr. 267). Joe also complained about trip lights. The lights are on the trains at the mine (Tr. 269). At a safety meeting on February 15, 1983 the interaction of miners and haulage trains was discussed (Tr. 270, 271; Ex. C19).

Bradshaw has received MSHA training and he was familiar with 30 C.F.R. 57.905 concerning train movements (Tr. 272, 273).

Neither on March 18, 1985 nor at any other time did Joe Arnoldi express any concern about the proximity of the tugger to the train track, or about its height (Tr. 273, 328). Bradshaw measured the distance from the back of his foot to the train track at 19 inches. It was 30 inches from the track to the tugger. The train extends out on both sides of the track some 8 to 12 inches (Tr. 275-277). Arnoldi's work station was situated between the tugger and the train track. The tugger could only be operated from this position. In sum, the distance between the back of the nipper's foot and the moving train would be seven inches (Tr. 277). Trip lights, warning bells, miners' cap lamps are designed to warn people of the train's movements. Trains that pass the 34-277 raise at the 3100 level are pushed (Tr. 278). There were two curves, one 30 degrees and the other 40 degrees. On the 40 degree curve Bradshaw hadn't tested it but he believed the motorman, 47 or 48 feet back, could not see Arnoldi at his work station (Tr. 279-281). A nipper at this location, if he was looking, could see the trip light when the train was rounding the

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40 degree curve (Tr. 282, 286). If people were engaged in normal activity they probably would not hear the train (Tr. 282, 283). The noise level at this location, excluding the train, was measured at 70 dBA. A nearby auxiliary fan, which operated continually, was measured at 85 dBA. The tugger exhaust runs about 100 dBA (Tr. 284). The noise from the tugger would override the train noise. The bell on the train is 75 dBA (Tr. 285). In sum, the noise from the tugger and the fan would prevent a miner from hearing the train. Accordingly, neither the bell nor the light were effective in warning people with certainty that the train was coming at the 34Å277 raise, 3100 level (Tr. 286). The company has never been cited for the tugger nor for a train coming close to a nipper (Tr. 329, 341).

Joe should be able to see the illumination of a cap light. While the motorman wears the same cap light as any other miner Joe would probably not be able to tell if it was a train or another miner approaching (Tr. 286Å289). The motorman should be able to see the illumination from Joe's light (Tr. 289). The intense part of the head light is directed ahead but there is also illumination to the side (Tr. 291).

ASARCO has safety procedures for haulage trains but no specific rules relating to Joe's work station (Tr. 291, 292). The safety manual states that the motorman must stop until everyone is in the clear (Tr. 292). Bradshaw had not heard any complaints concerning the train at Joe's work station (Tr. 292, 293). There are "slow down" signs at air doors but no such signs on the curves at 34Å277 raise, 3100 level (Tr. 293). The safety meetings never discussed the hazards at 34Å277 raise, 3100 level (Tr. 294, 295). The safety manual does not discuss any hazards at that location nor is there any company policy or speed restriction relating to the location (Tr. 295, 299). Bradshaw had never instructed any motormen to get out and be sure that no miner was operating the tugger at the 34Å277/3100 location before moving a train past that area (Tr. 297). Nor was that discussed at the safety meetings. There are some areas in the mine where you would not want to operate the train at full speed. The safety manual stresses that the motor must be under control at all times (Tr. 298). The motorman knows where to slow down (Tr. 299).

Trains infrequently derail at the Coeur unit. Such derailments are usually caused by loose track or muck (Tr. 300).

ASARCO does not have its own heat standards in the mine. The ventilation system, generated by fans, automatically runs at all times (Tr. 302).

In 1984 the Coeur mine accident/incident rate was about 1.4 (Tr. 304). MSHA usually investigates any nonfatal accidents at the mine (Tr. 306, 307).

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When Joe started in 1981 he was instructed of his rights under the Mine Act (Tr. 308, 309). But he was not given a copy of the MSHA booklet because there is no such legal requirement (Tr. 309). Management did not want the Miner's Rights booklet distributed for that reason (Tr. 309, 310). After 1981 Bradshaw did not distribute the booklets as part of the miners' orientation (Tr. 310). In teaching the newly hired miners Bradshaw reviews a typed copy of the booklet (Tr. 311).

On March 18, 1985 Andre Douchene had been elected as the miners' representative by two ballots. There are 150 miners at the mine (Tr. 314).

On December 8, 1981 MSHA inspectors Alvin Fischer and Donald L. Myers handed out MSHA booklets (Tr. 317, 318). One of the booklets were turned over to the then unit manager, David L. Lewis (Tr. 318). After an investigation it was concluded that it was not MSHA's responsibility to distribute the pamphlets. Lewis then wrote to Russell, the MSHA subdistrict manager for the Coeur mines (Tr. 318, 319). A conversation followed with the inspectors and Lewis directed them to stop such distribution (Tr. 319; Ex. 21). On February 24, 1982 the then Assistant Secretary of Labor for Mine Safety and Health confirmed that the practice of distributing such pamphlets was "not representative of any official MSHA policy" (Tr. 347, 348; Ex. U).

Respondent's Evidence

MSHA Inspector Donald F. Downs, Mike Lee and Andre Douchene testified for respondent.

DONALD F. DOWNS, an MSHA inspector for over 12 years, is assigned to the Coeur d'Alene office (Tr. 383).

He first began inspecting ASARCO in 1984. There have been 12 quarterly inspections (Tr. 385). He couldn't recall definitely if he inspected the tugger at the 277 raise, 3100 level (Tr. 386, 413). Downs has talked to Joe at his worksite but Joe has never expressed any concerns about the tugger (Tr. 387, 388). No citation was ever issued regarding the tugger (Tr. 388, 412; Ex. C27). Inspector Jim Arnoldi, who accompanied the witness in February 1985, never suggested a citation should be issued concerning the tugger (Tr. 388). Generally, at a close out conference, the parties review the just concluded inspection. At this conference, on February 21, 1985 Jim Arnoldi announced that he would be the next inspector. Downs denied that. Douchene said he wasn't going to have him (Arnoldi) there because he had too many relatives and he had a conflict of interest (Tr. 390). He'd just write a letter and get rid of him (Tr. 391, 391). As they walked out the door Arnoldi said to Douchene that "If you was a good manager, you wouldn't have this problem". Douchene also stated to both inspectors that "You may be the law but we'll see who the law is around here". Downs replied that they were

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"both the law" (Tr. 390, 414). There could have been some profanity but that is quite common at a close-out conference (Tr. 392).

Downs did not consider the statements made by either man at the close-out conference to be threats (Tr. 394). Jim Arnoldi never took it as a threat (Tr. 394).

Hecla Mining Company had at one time written to Downs' subdistrict manager complaining he was "coming down too hard" (Tr. 393, 394, 440).

Downs denies ridiculing Jim Arnoldi in front of ASARCO employees; nor had he ever done anything to hurt his feelings (Tr. 394, 395).

In the inspector's opinion it is not a safe practice for a nipper to be asleep on the job (Tr. 96). Inspector Downs observed Joe Arnoldi on one occasion when he thought he was asleep (Tr. 396, 397). He never reported this incident to his supervisors, or anyone, nor did he enter it in his notes.

Don Myers, another MSHA inspector, told Downs that he had observed Joe sleeping during working hours (Tr. 397, 432, 433}. He learned this before Joe was fired (Tr. 398).

In cross examination, Downs agreed he had refused to answer interrogatories filed by complainant in the case (Tr. 399). But complainant's counsel never sought to talk to him (Tr. 437). The Solicitor advised Downs that he could talk to ASARCO's attorney and testify as to any factual matters (Tr. 400, 432; Ex. C25).

Downs considered Andre Douchene a business type friend rather than a personal friend (Tr. 434). Around May 1985 Downs gave a written statement to MSHA's special investigator Lopez (Tr. 405).

In February 1985 Downs was the lead inspector at the ASARCO mine. The second inspector, as compared with the lead inspector, could write a citation if he saw a violative condition. Downs could not recall inspecting a mine with Jim Arnoldi before February 1985 (Tr. 410). At that inspection the two inspectors were together for only one week of the 12 week inspection (Tr. 412).

Andre Douchene may have turned red and gotten angry with Jim Arnoldi when he said the citation was deserved (Tr. 418). Downs didn't put Douchene's statements in his official report. He didn't think either party meant them (Tr. 418).

Downs didn't know if Douchene ever wrote a letter about Jim Arnoldi. Downs believed that mine managers can influence the assignment of mine inspectors (Tr. 420). Downs has no family working at the Coeur unit (Tr. 421).

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Jim Arnoldi told Downs that Joe had been fired (Tr. 422). He didn't suggest at that time that Douchene was carrying out his threats although it occurred 26 days later (Tr. 422}.

In March 1985 the MSHA hoist inspection team consisted of Jim Arnoldi, Moose Guttramsen and Arnold Peterson (Tr. 423, 424). Downs was aware that Jim Arnoldi called Andre Douchene to schedule a hoist inspection on March 19, 1985 (Tr. 425, 462). Downs was also aware that Joe got a phone call to come up to the mine (Tr. 426).

Witness Downs didn't believe that MSHA's manual suggested that it would be a conflict of interest to inspect a mine where an inspector's relatives worked. Nor was there a conflict to inspect a mine owned by a company by whom the inspector had been formerly employed (Tr. 430).

The Coeur unit has had two fatalities: one occurred when the mine was under construction (Tr. 439). The witness discussed the unit in relation to the national average (Tr. 439, 440).

MIKE LEE, 30 years of age and experienced in mining, served as ASARCO's mine superintendent (Tr. 442, 443, 499, 500). His duties include safety and production (Tr. 444). He usually averages five hours underground each day. There are approximately 150 employees at the Coeur unit (Tr. 445). The mine has 17 stopes plus three development crews and 40 contract miners.

When Lee came to the Coeur mine Joe Arnoldi was swamping, motoring and nipping. Occasionally he did some fill-in mining. Lee would see Joe about once a week when inspecting the work areas (Tr. 446). A nipper would probably run the tigger all day long (Tr. 448). If the nipper is sleeping the stope miners are not getting the service they need (Tr. 448, 449).

Employees at ASARCO receive warning slips for absenteeism, breaking safety rules underground, and unsatisfactory work (Tr. 449). The first such warning is usually verbal; warning slips follow. Whether a worker is terminated depends on his offense (Tr. 450).

Lee has personally disciplined Joe with warnings and notices about his job performance (Tr. 451).

On August 16, 1984 Joe was given a warning slip and two days off for excessive absenteeism (Tr. 451, Ex. F, G, H). He was warned to straighten up his absenteeism problem (Tr. 452). Joe's work performance was "pretty poor" (Tr. 453, 454). Fellow employees also complained and stated they didn't want to work with him.

Joe did not bring his allergy condition to Lee's attention (Tr. 454). Company policy requires a worker to report that he will be off prior to the start of any shift. When returning he

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should have a doctor's release (Tr. 454, 455). Lee doesn't look through employees' medical records (Tr. 456). The absenteeism policy is posted as well as discussed with the employees (Tr. 456). If the worker misses two shifts within 30 days he would receive a warning notice (Tr. 457).

On March 18, 1985, in the course of their regular inspection, Lee and Bill Arthur went to the top of the 277 raise on the 3100 level (Tr. 458, 459). Lee was in the lead and he had to walk around a motor parked on the station side. As he moved past the drift post he observed Joe Arnoldi leaning back on holey boards stalked in the form of a chair. His closed eyes, deep breathing, open mouth and perfectly still position caused Lee to conclude that Joe was sleeping. Lee went within a couple of feet and he woke him up by flashing his light in his eyes. Joe sat up with a start (Tr. 459, 460, 501, 502). Lee said something like "It's a long time from lunch time to be sleeping." Joe replied "Yeah, I know that" (Tr. 460). Lee then told Joe not to do anything while he checked the crew below. He would then return to talk. Lee didn't tell the miners about Joe because he didn't think it was their concern. At the time they were pulling a sand line and that didn't require any materials (Tr. 462).

When they climbed back out Lee told Arthur he had caught Joe sleeping. He asked Arthur if he was justified in "taking him out." Arthur concurred; Joe would not necessarily be fired but he could be in very serious trouble (Tr. 463, 464). As Lee and Joe discussed the matter Joe acknowledged that he wasn't supposed to be sleeping. Further, he had been caught sleeping before. Lee then told Joe he had no choice except to take him out of the mine.

Lee then escorted Joe to his office (Tr. 464, 465, 467). Lee had Joe sit in his office while he talked to Andre Douchene (Tr. 465). Lee and Douchene discussed Joe's work record, discipline, efforts at rehabilitation, etc. Lee strongly recommended that Joe be terminated. Douchene disagreed; he thought it best to put him on indefinite suspension and mull it over to make sure they were making the right decision (Tr. 465). Lee then told Joe he was suspended. He was also told he may or may not get his job back. Lee also indicated he'd contact him so he wouldn't have to come to the mine every day. Joe said to contact him through his father (Tr. 466-467).

Lee's notes reflect that he didn't care if Joe slept on his lunch break (11:00 a.m. to 11:30 a.m.) but he was sleeping at 7:45 a.m. (Tr. 466, 467). A lot of miners had complained that Joe was always sleeping (Tr. 557, 558).

At the end of the shift Lee and Douchene again discussed the situation and decided they'd sleep on it (Tr. 468, 470).

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On October 14, 1983 Ron Maehl was the Coeur mine superintendent. His diary on that date reflects that Joe was suspended five days for sleeping underground (Tr. 468, 469, 582, 583; Ex. I). The diary also indicated that on August 11, 1983 Joe was advised that all of his grace periods were over (Tr. 469, 470; Ex. J).

The following day, March 19 at mid-morning, Lee and Douchene discussed Joe's past record and related matters. Douchene decided he should be terminated (Tr. 470, 471). The decision to fire him had nothing to do with the fact that his father was an MSHA inspector (Tr. 472).

Lee was not aware of Joe's contention that some of the warning slips he had received were not deserved (Tr. 471). On Tuesday afternoon Lee contacted Inspector Arnoldi and asked him to have Joe come into the office. Inspector Arnoldi replied "I'm going to inspect your XXXX hoist today" (Tr. 472). The inspection did not come about. Joe appeared at the mine on the morning of the 20th (Tr. 473). At that time Lee and Joe reviewed the situation. Lee then advised him he was terminated immediately. At the conference Joe did not claim any of the work notices were not justified. Three or four times after that he came up rustling (Tr. 474). Several times he talked to Lee and other times with Douchene (Tr. 475). Lee filled out a termination statement for Joe writing on it "absolutely no rehire" (Tr. 476; Ex. C24). The notation was Lee's personal feelings because Joe was such a poor worker. Lee didn't tell Joe to rustle but what he wrote is not inconsistent with a suggestion to rustle because they are obliged to state that the same opportunities exist for everyone (Tr. 477). Lee has made similar notations on five to ten termination notices (Tr. 477). The company has not rehired anyone when such a notation was made.

Lee knew the company contested Joe's claim for unemployment compensation benefits filed with the State of Idaho (Tr. 478). Lee didn't think the company would rehire Joe in view of that claim (Tr. 479).

With his memory refreshed by hearing prior witnesses Lee restated the events at the close-out conference of February 21st (Tr. 479, 480, 491, 492-494, 498). [The witness, in his deposition, stated he did not remember the details at the conference (Tr. 491-496)]. However, he testified that at the conference Inspector Arnoldi said he was going to inspect the plant and shut it down. Douchene said Arnoldi had too much family working there. Lee considered this a typical close-out conference. He thought the statements were made in jest; neither man was threatening the other (Tr. 482).

The inspection in February 1985 and the close-out conference of February 21 were not factors in the decision to terminate Joe Arnoldi (Tr. 482).

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Lee had never discussed with Joe the height of the tugger or its proximity to the tracks. He could not remember Joe making any complaint at the safety meetings (Tr. 483).

It is unsafe for a nipper to sleep on the job (Tr. 484, 485).

At ASARCO the shift boss has authority to give a worker two days off (Tr. 486). Any leave in excess of two days had to be approved by Lee or Douchene (Tr. 486).

Joe would not necessarily be advised when the trains were to operate past his work station (Tr. 504).

The Coeur policy guide states the company absenteeism policy (Tr. 508; Ex. C29). The policy requires that an absence be excused (Tr. 509-513).

Lee's diary entry of December 13, 1984 reflects an incident involving safety. The individuals involved were Arthur Lee and Buss Lomas (Tr. 523, 524; Ex. C30).

In the absence of Douchene, Lee could probably fire someone at the mine. If Douchene was gone he would check with Fred Owsley (Tr. 536).

On March 22, 1985 Lee wrote a draft of ASARCO's response to Joe's application for unemployment benefits (Tr. 538, 539; Ex. C32). The report states that Bill Arthur as well as Lee observed Joe sleeping at the top of the 277 raise (Tr. 539). Apparently Arthur had not observed Joe sleeping (Tr. 540). Lee had not checked the records of other employees to see how previous sleeping incidents had been handled (Tr. 541).

On October 9, 1983 Coeur employee Paul Stull was given a warning slip for sleeping (Tr. 541; Ex. C33). R.J. Maehl was the superintendent at that time (Tr. 542). The slip said he had already been warned once (Tr. 543; Ex. C34). Stull had been warned verbally by Maehl, Douchene, Korst (general mine foreman) and Charlie Castell (shift boss) on separate occasions previously (Tr. 543, 544). It was explained to Stull that the next warning would mean termination (Tr. 544).

Lee carefully tracks absenteeism at the Coeur unit (Tr. 545). Stull worked 21 weeks at the mine but his record does not indicate any disciplinary action (Tr. 547). In 21 weeks the area supervisors found it necessary to warn Stull about sleeping four times and Ron Maehl caught him sleeping a fifth time (Tr. 547). The termination slip for Stull says Maehl would want him re-employed. The reason he left was to attend school (Tr. 548); Ex. C36). Ron Maehl may have just suspected Stull was sleeping (Tr. 549). It is not fair to compare Paul Stull's record with Joe Arnoldi's record. Arnoldi's record is worse (Tr. 587).

Joe was given a warning slip on April 18, 1983 for failing to follow orders and unsatisfactory work (Tr. 551). This was

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given to Joe for his failure to follow an order to work in an unsafe place (Tr. 551). An additional warning slip was issued for carrying explosives on top of a battery locomotive (Tr. 551). The hauling of a chain saw and motor was also a safety rule violation (Tr. 552).

Joe was issued only one unsatisfactory work and failure to follow orders during this time at the Coeur. However, Lee had general knowledge that Joe was not a good worker (Tr. 552, 553). Joe Arnoldi was treated differently than other employees because he was given a second chance (Tr. 587).

Corey Weikel has not been fired by ASARCO although he had a number of warning slips from January 1983 to the end of March 1985 (Tr. 558, 559). On August 11, 1983 Corey, who eventually turned into a good hand, was suspended for five days. He was also told that if he abused the company policy he would be terminated (Tr. 559, 560, 571). Two weeks later he was back on the job. Maehl again talked to him about his overall work attitude, attendance record and other matters.

Corey received a warning slip and two days off on June 22, 1983 for absenteeism (Tr. 561; Ex. C38).

On August 11, 1983 Corey received a warning slip for tearing out an air door (Tr. 589, 652).

It is not valid to compare Corey's work record with Joe Arnoldi's record. Corey was a good hard worker (Tr. 589).

On June 22, 1983 Ron Maehl's diary reflects he came on Randy Arthur on a bedboard and in a bewildered state. When asked what he was doing he replied he was "just sitting". Maehl said Randy Arthur had no "gippo" attitude, suggesting that he lacked get up and go (Tr. 563, 564). The diary entry further states that he cannot or will not work unless prompted (Tr. 564).

On August 10, 1983 Randy Arthur received a warning slip for failing to follow orders (Tr. 564).

On December 23, 1983 another warning slip was issued to Randy Arthur for riding a timber truck (Tr. 564, 565). Arthur was not terminated (Tr. 565). At one point Ron Maehl removed Arthur from his contract job. This move would reduce his wages from \$150 to \$250 a day to \$95 to \$100 a day. Somewhere in 1984 he bid back into the stope job (Tr. 566). If Lee had caught Randy Arthur sleeping, coupled with everything else, he would have fired him (Tr. 566). Arthur had a serious diabetic problem (Tr. 567). It is not valid to compare Joe Arnoldi's record to Randy Arthur (Tr. 590).

Tom Benson received a warning slip for being absent on July 22, 1983. On August 31, 1983, Maehl's diary states that Benson had a "sluggish attitude" at work. On October 31, 1983 Maehl

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told Benson he would be fired if his work performance didn't improve (Tr. 568). On November 22, 1983 Lee issued a verbal warning to Benson for tardiness (Tr. 568, 569). A discussion about tardiness followed on December 27, 1983 because Benson's conduct of arriving "at the whistle" was barely acceptable. On February 8, 1984 Lee gave him an unexcused absence. He had not called in (Tr. 569). On September 26, 1984 Benson was promoted to stope miner (Tr. 569, 570). Benson eventually became a pretty good worker (Tr. 570, 590).

Ron Maehl threatened employees a lot (Tr. 570). In Lee's view sleeping is a complete and blatant disregard of the employer. It further shows a total lack of responsibility on the part of the employee (Tr. 571).

When Ron Maehl caught an employee sleeping he would sign off on a termination slip indicating that the man could be a rehired (Tr. 573).

James Leischner received four warning slips in one year. On January 19, 1983 he also received a two day suspension for absenteeism. On March 21, 1983 a warning slip was issued for leaving powder and primers in a raise. On July 14, 1983 he received a warning slip for hauling explosives on a motor (Tr. 574). Following this, on December 30, 1983 there was a warning slip for hoisting powder and primers (Tr. 574, 575). Leischner is still working there. The company does not have a set policy that a certain number of warning slips mandates termination (Tr. 575).

Lee's diary of May 30, 1985 mentions Joy Neal and L. Lyle (Tr. 576). Lee had observed Joy sitting on the station smoking a cigarette. She was told she was paid to work, not sit (Tr. 576). She later quit working at the mine (Tr. 577).

For the period Commission Judge Kennedy ruled as relevant (January 1, 1983 to March 31, 1985) ASARCO issued 94 warning slips (Tr. 578). During the same period Delmar Howard, Larry Nellsch, Earl Crabtree and Bob Elisoff, were fired by ASARCO. Elisoff was later rehired (Tr. 578, 579).

Delmar Howard and Larry Nellsch were in jail and unavailable for work (Tr. 580; Ex. P, Q). Both of these men received fewer warning notices than Arnoldi. Both were terminated for absenteeism. Lee would rehire them (Tr. 593-596). The witness discussed Larry Nellsch's warning slips (Tr. 594, 595).

Earl Crabtree was fired for absenteeism. Bob Elisoff was fired for various reasons (Tr. 580). Elisoff rustled for a long period of time and was rehired (Tr. 581).

Exhibit CÄ38 is a fair representation of the warning slips that are generally issued for the reasons stated (Tr. 582).

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It is important, for various reasons, for the company to know ahead of time whether a worker will be absent from work (Tr. 583).

Occasionally a warning slip is not signed by the issuing supervisor; nor is it necessary for the employee to sign the slip (Tr. 583, 584).

In 1981, at the Galena mine, Lee fired Jim Reed for sleeping; in addition, he fired two workers in July 1986 for the same offense. None of the three workers had prior warning notices (Tr. 587).

Even though an "absolutely no rehire" notation is written on a termination slip a man can be rehired if he can show the company that he has changed (Tr. 591).

Workers were hired at the Coeur unit after Joe Arnoldi was terminated (Tr. 599).

ANDRE DOUCHENE is currently employed by Round Mountain Gold Corporation. Previously he worked for ASARCO starting as an engineer and attaining the position of manager of the Coeur unit (Tr. 602). As the unit manager he is responsible for the entire mine. He reported to Fred Owsley, general manager for the division (Tr. 603). Douchene has the final authority in hiring and firing employees (Tr. 603, 604). He did not normally become involved in disciplining unless an employee claimed he was treated unfairly (Tr. 604).

Joe Arnoldi was employed at the Coeur before Douchene arrived. At some point Douchene learned that Joe's father was an MSHA inspector (Tr. 604, 605). Inspector Arnoldi abated some citations but he was principally the hoist inspector until February 1985. At that time he became as part of the inspection team (Tr. 605).

Inspector Arnoldi had not written a citation while Douchene was at the Coeur. MSHA inspected the mine on a quarterly basis. Douchene would see Joe about three days out of each week. Joe's duties as a nipper included supplying the miners in the stope with materials. Nippers are there for efficiency as well as safety (Tr. 606, 607, 642). Joe and Douchene never discussed the tigger nor did Joe make any safety complaints about the tigger. Other workers also operated the tigger at the 277 raise, 3100 level (Tr. 607, 609). However, Joe did complain and he was upset about an incident when he was hit on the wrist when a rock came down the raise. The incident was brought up at a safety meeting and workers were warned about letting material fall down the shaft (Tr. 608). Douchene attends about half of the six separate monthly safety meetings. Except for the one instance at no time did he hear Joe express any safety concerns (Tr. 609). Joe was not a member of the safety committee.

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Douchene was the elected miners' representative at the Coeur unit. He was concerned this could be a conflict of interest but no conflict ever arose. If a conflict had occurred Douchene would have stepped down as the miners' representative (Tr. 610, 641, 642). The miners could always vote him out of the position (Tr. 611). He was never really comfortable with such an appearance of impropriety (Tr. 652, 656). On one occasion as the miner's representative Douchene signed a variance document concerning a manway opening and raise (Tr. 652, 653).

Douchene recalled that Lee came into the office and said he'd caught Joe sleeping underground (Tr. 611). This was within an hour after the crew had gone underground (Tr. 612). Douchene didn't talk to Joe that morning (in his deposition he stated otherwise).

Lee and Douchene discussed Joe's past record for a minute or two (Tr. 612, 668). Both men knew Joe had received a lot of warning slips and had been disciplined for sleeping. Joe was then suspended without pay pending further investigation. Lee and Douchene discussed Joe later that day, after Douchene had obtained his file folder (Tr. 613, 673, 674). No decision was made at that time. The following day Lee and Douchene went over Joe's record. They decided they had done all they could to try to get Joe to become a good employee. He was discharged (Tr. 615). Specifically they considered the fact that he'd been caught sleeping twice, his past record, and his absenteeism. Apparently their talks had not "sunk in" (Tr. 615).

Concerning the first sleeping incident Ron Maehl had wanted to discharge Joe but Douchene refused because he hadn't brought Joe out from underground. Ron gave him five days off. Later that week Joe returned and stated he'd learned his lesson. He also objected to the way they woke him up. Apparently Ron had pitched a small pebble at his chest. Douchene agreed the five day suspension was too severe so he let him come back the following day. But the three days of discipline stood (Tr. 616).

About four or five days after he was fired in March 1985 Joe came back and said he thought he'd learned his lesson. Douchene disagreed. He further denied that they had blackballed him (Tr. 617, 618). Joe asked if he could rustle and Douchene replied affirmatively. There were three or four meetings. Joe would ask if a job was available and Douchene would state there was none. If Joe had convinced Douchene that he had in fact changed then he would have rehired him despite the "no rehire" notation on the termination notice (Tr. 618, 619). There was no further conversation with Joe as to why he was terminated (Tr. 619).

Joe never advised Douchene that his prior warning notices were not justified (Tr. 619).

Douchene participated in the close-out conference in February 1985 but not the inspection. Three citations were dis

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cussed at the conference. One loose ground citation was designed as S & S (Tr. 620). The citation involved Magoon and Myles (Tr. 621). The previous day Douchene had observed the slab and he told the two men to bar it down. When the citation followed Douchene called the men into Lee's office and asked them if they knew the nature of insubordination. Discussion followed and Myles explained that Bill Arthur had told them that it wasn't necessary to further bar down the slab (Tr. 621). Subsequently, Douchene told Arthur that he (Arthur) was wrong about the slab.

Douchene frequently argued about citations at the close-out conferences (Tr. 622). After the February 1985 conference was over Douchene asked Downs who was to be the new inspector. Jim Arnoldi said he was to be the new inspector. Douchene didn't take him seriously. Douchene replied, with profanity, that he had a lot of family up there and would be a conflict of interest for him to be there (Tr. 623, 624). It's possible Douchene could have said something like "You may be the law, but we'll see who the law is around here" (Tr. 659). Douchene mentioned writing a letter. If Arnoldi had become inspector he would have talked to Larry Weberg (Arnoldi's supervisor) about it (Tr. 624, 659). He didn't remember the exact sentence but he agreed the gist was "You've got too much family working here to XXXX around too much" (Tr. 659, 660). By writing a letter Douchene meant that the company could file an official complaint. He did not then intend to do that.

As they were going out the door Inspector Arnoldi made a statement about poor management and the company wouldn't have to worry about safety inspectors if it had better management. Douchene did not take anything Arnoldi said as a threat (Tr. 625).

Douchene was probably grinning when he made the statements. Jim Arnoldi was also grinning; this was his typical badgering and the give and take at a close-out conference (Tr. 627).

Inspector Arnoldi has eight to ten relatives at the Coeur, about ten percent of the work force (Tr. 626). None of the Arnoldi relatives at the Coeur unit are on the management level (Tr. 709).

When the decision to terminate Joe was made a month later, the close-out conference was not a factor. Douchene and Lee, in deciding to terminate Joe, did not discuss the fact that his father was an MSHA inspector (Tr. 627).

On March 19, 1985, Inspector Arnoldi was the only MSHA hoist inspector. On that day he told Douchene that he was coming to inspect the hoist and "straighten him out". The decision had already been made to terminate Joe but his father was not told about it (Tr. 628, 667). In deciding to terminate Joe, Douchene did not look at anyone else's record and such a comparison would not be valid (Tr. 629). Joe was the only one caught sleeping twice. Douchene and Lee had talked to Joe and tried to get him to become a good employee (Tr. 630).

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Paul Stull was a temporary employee hired by Fred Owsley (Tr. 631). Douchene didn't catch him sleeping nor did he specifically warn him about sleeping (Tr. 632, 633; Ex. C34).

It is not valid to compare Joe Arnoldi with Paul Stull because Joe was a permanent employee. Stull didn't make a bed, lay down and go to sleep (Tr. 633).

Exhibit C3 sets forth MSHA's conflict of interest standards. In Douchene's opinion there was a conflict of interest because of Inspector Jim Arnoldi's family at the mine (Tr. 634, 639, 644). He could be influenced in either direction, either too harsh or overlooking matters. Joe Arnoldi was hired by Carole Ward at his father's request (Tr. 635, 644, 645, 648). Jim Arnoldi came to the Coeur unit quite a bit unofficially. At times he asked about Joe and inquired why he hadn't been put to mining (Tr. 635). Douchene indicated Joe didn't have a good enough work record (Tr. 635, 636).

Douchene was familiar with the contest procedures. A lot of Inspector Downs' citations were justified (Tr. 643).

About two weeks after the February 1985 inspection Larry Weberg, Jim Arnoldi's supervisor, came to the Coeur. When asked if he had a problem with Jim Arnoldi inspecting the mine Douchene indicated he had a lot of family there (Tr. 650, 657). Douchene did not write a letter to MSHA (Tr. 658).

In 1984 the Coeur unit reached a high of 11 citations (Tr. 664).

Douchene has never fired anyone "on the spot" without due consideration (Tr. 678).

When he spoke to Inspector Arnoldi on March 19 he did not mention that they were considering terminating Joe (Tr. 678, 679).

The decision to terminate Joe was made before Inspector Arnoldi called to schedule the hoist inspection (Tr. 679). The decision had been made the morning of the 19th and the paper work was already in process (Tr. 680). It is not company policy to notify relatives of an employee's position with the company (Tr. 680).

There were four additional hourly employees terminated between January 1, 1983 and March 31, 1985 (Tr. 683, 684). Larry Nellsch and Delmar Howard were terminated because they were absent from work (Tr. 684). Bob Elisoff and Earl Crabtree were terminated for excessive absenteeism (Tr. 685; Ex. C42). During the relevant period no employee was fired except for absenteeism. Each individual is handled as an individual (Tr. 686). Crabtree started with ASARCO in 1967. He was fired. He was again employed at the Galena mine from April 23, 1969 to August 21,

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1973 (Tr. 689, 690). He was again fired. Subsequently, he was hired at the Coeur on August 7, 1984 and fired in October 1984. Crabtree received ten slips for absenteeism (Tr. 690). Joe Arnoldi did not have as many slips for absences as did Crabtree (Tr. 691). The company has a printed policy concerning absences (Tr. 692; Ex. C29). Crabtree was discharged for four unexcused absences in a 60 day period (Tr. 694). The last sleeping incident involving Joe Arnoldi was "the straw that broke the camel's back" so far as Joe's discharge was concerned (Tr. 695).

Elisoff was fired on April 7, 1983 by Ron Maehl and Buss Lomas (Tr. 697). He was rehired when he convinced Douchene that he had changed. He rustled every day for maybe two months (Tr. 698, 699). After he was rehired Elisoff received some warning slips, including one for unsatisfactory work and one for excessive absenteeism (Tr. 702, 703).

Elisoff is still working at the Coeur (Tr. 703).

The decision to terminate Joe was based on his work record and the whole business (Tr. 704). During the relevant period 22 employees other than Joe received warning slips for unsatisfactory work, failure to follow orders, and non-safety related conduct. The 22 remain employed by ASARCO (Tr. 704). Paul Stull, the other employee allegedly caught sleeping, did not receive disciplinary days off and was not terminated (Tr. 705). Douchene wasn't sure if Stull was sleeping or not but he warned him for sitting down on the job (Tr. 705).

The disciplinary system at Coeur includes verbal and written warnings (Tr. 706). The lowest level is a verbal warning and the highest level is termination (Tr. 707). Douchene didn't know if Joe rustled every day (Tr. 700). After March 20, 1985 Joe told Douchene that he wanted his job back (Tr. 701). Douchene was never convinced that Joe was serious about getting his job back (Tr. 702).

Evaluation of the Evidence

In view of the Commission's rulings concerning section 105(c) it is necessary to initially determine whether complainant was engaged in a protected activity and whether respondent took adverse action against him for such activity.

It is clear that certain activities in which complainant engaged were protected under the Act. He complained about the positioning of the tugger and its proximity to the train track. However, there is no evidence that respondent took any adverse action for such complaints. MSHA Inspector Jim Arnoldi never inspected the tugger. He merely told Joe to discuss it with Bill Arthur. In turn, Arthur did not think it was a problem. MSHA Inspector Downs inspected complainant's work place but no complaints were made to him about the tugger.

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The complaints about the position of the swamper on the train and the trip lights were protected activities but again no adverse action was taken by the company. His safety complaints when he was struck by rocks falling down the raise were protected. But this occurred April 27, 1983, almost two years before he was discharged. No adverse action resulted from that incident and, in fact, it was discussed at a safety meeting and the miners were instructed to avoid such hazards.

The pivotal issue focuses on whether complainant was sleeping on March 18, 1985. A conflict in the evidence exists on this point.

On that particular date Lee and Arthur were on their rounds. Lee, who was in the lead, approached complainant and saw him leaning on a stack of boards. His eyes were closed and he was breathing deeply with his mouth open. He was perfectly still. Lee woke him. Complainant did not deny that he was sleeping. In fact, complainant himself concedes that he didn't tell Lee or Douchene that he wasn't sleeping.

Subsequently, on March 21, complainant filed for unemployment benefits with the State of Idaho. In his printing on the form he related the events of March 18 stating in part that he was "waiting fore (sic) my crew to start work I fell asleep olny (sic) for five min (sic) and . . . Mike Lee woke me up" (Exhibit RA).

At the hearing complainant seeks to explain the State of Idaho statement. He states he couldn't write well. He wanted to state on the form that he was not sleeping. He also wanted to put down that he was discriminated against because of his father's MSHA inspections. Instead, he put down respondent's reasons why he was fired (Tr. 183, 200-203; Ex. RA).

Contrary to complainant's assertions I conclude that the statements he made to the State of Idaho were accurate and not false, as he himself conceded at the hearing (Tr. 231, 233).

His claim that he lacks writing skills is not persuasive. A review of the hand printed exhibit (Ex. RA), in my view, accurately set forth complainant's position. Although there are some spelling errors in the text the expression is clear and reasonably articulate.

Sleeping is not a protected activity; accordingly, it follows that respondent did not discriminate against complainant.

If complainant had established that he was terminated in part because of protected activity, I would nevertheless conclude that respondent was motivated by complainant's unprotected activity and would have taken the adverse action for such unprotected activities alone, i.e., for twice falling asleep on the job. Therefore, I conclude that complainant has not established that respondent discharged or otherwise discriminated against him in violation of section 105(c) of the Act.

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Arnoldi's post-trial brief asserts that he has established his prima facie case. He particularly relies on the fact that a miner is entitled to have federal mine inspectors conduct their inspection free of any retaliation, citing Mackey v. Consolidation Coal Company, 7 FMSHRC 977, 978 (1985). Specifically complainant refers to the close-out conference of February 21, 1985. At the conference it is essentially uncontroverted that Andre Douchene, the unit manager, made the statements set forth in the evidence. However, I find from the credible evidence that some profanity as well as "give and take" regularly occurs at the close-out conferences at respondent's mine. Further, Douchene didn't take Jim Arnoldi's statements as a threat (Tr. 625, 627). Inspector Downs did not consider any of the statements to be threats (Tr. 394). Inspector Arnoldi's written statement of May 15th indicates that he also thought Douchene's statements were made in jest (Tr. 131, 132; Ex. C4). Mike Lee likewise thought the statements were made in jest (Tr. 482). Kim Bradshaw likewise concurs in this view (Tr. 254).

The evaluation made by these four principals contemporaneously with the event constitutes persuasive evidence that respondent did not intend to discriminate against complainant.

Complainant further argues that the evidence supports an inference that he was fired in retaliation for safety complaints or based on the belief that he was an MSHA informant.

I disagree. Such a view of the evidence is speculative. Even assuming that complainant was an informant there is no evidence that respondent took any adverse action for such activity.

Complainant also argues that Douchene felt MSHA Inspector Arnoldi should not be assigned to the Coeur unit because of the number of relatives at the mine; further, it is plausible to believe that Douchene feared the quality of information that could flow from relatives to an MSHA inspector.

I reject this argument. Plausibility cannot establish a violation of the discrimination section. I agree that Commission precedent holds that adverse action against a miner making safety complaints to MSHA violates the Act. This is so even though management is wrong in its belief that the miner made such complaints as in Moses v. Whitley Development Company, 4 FMSHRC 1475 (1982). In the instant case it is true that complainant claims to have been an MSHA informant.

This view arises from the incident when Joe Arnoldi spoke to his father about the two miners, Magoon and Myles. The two miners had been threatened with termination for failing to bar down a loose slab.

I do not see how this incident establishes discrimination, or an intent to discriminate, against Joe Arnoldi. Even if one

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assumes ASARCO knew of complainant's statement there is no persuasive evidence that the company took any adverse action against him. The Magoon/Myles incident started the day before the MSHA inspection. On that day Douchene directed the two men to bar down a loose slab. They apparently began to do so and their supervisor (William Arthur) told them to terminate their activity. The following day an MSHA citation was issued for the same slab. Douchene then called Magoon and Myles into his office. He asked them if they knew the nature of insubordination.

All of these events had occurred before complainant made any statements to his father. Complainant relates that "after the shift was over I talked to Bob Magoon and Bob told him that they were fired and he [Andre Douchene] was mad because he got wrote up for something that he thought he shouldn't have gotten wrote up for" (Tr. 172).

In sum, the Magoon/Myles incident does not establish that respondent discriminated against complainant.

Complainant further contends that the company admits it was motivated to terminate him by virtue of his work record as a whole, citing the transcript at 614. Complainant then argues that his work record includes a refusal to work in an unsafe place. Further, his severe allergy condition rendered it unsafe for him to work.

Complainant has overemphasized a portion of the evidence. The person who made the ultimate decision to fire complainant was Andre Douchene with Mike Lee's strong recommendation. Douchene testified that he and Lee discussed complainant's warning slips and they both knew he had been disciplined for sleeping. The following day Lee and Douchene went over complainant's record. They decided they had done all they could to try to get complainant to become a good employee. Specifically, they considered his adverse work record which was documented. He'd been caught sleeping twice, and he had received numerous warning slips (Tr. 615).

Complainant's additional contention is that his allergies caused him to believe, in good faith, that it would be hazardous to his health for him to work in the mine. In support of his position complainant *Atkins v. Cyprus Mines Corporation*, 8 FMSHRC 460, 474 (1986).

These arguments are misdirected. As a threshold matter complainant did not refuse to work because of his allergy problems. The cited case is not controlling.

Complainant also argues that respondent refused to rehire complainant in retaliation for his protected activities and for the filing of his discrimination complaint.

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The evidence shows that Douchene and Lee told complainant that he could rustle in an effort to get his job back. He did so. Complainant testified he was treated fairly well, except towards the end of the rustling period.

I reject complainant's argument. He was discharged because he was sleeping on the job, an unprotected activity. On this record the filing of his discrimination complaint played no part in the refusal to rehire him. The reference to the hiring and firing of Robert A. Elisoff fails to establish that respondent discriminated against complainant. This is so because complainant was discharged for an unprotected activity. Respondent is not obliged to rehire him. But it can permit him to rustle in an effort to be re-employed.

Complainant's post-trial brief also attacks the credibility of Lee, Downs and Douchene. While there are some discrepancies in respondent's evidence (as well as complainant's evidence) I generally find respondent's evidence to be credible.

Complainant argues his overall work record did not merit his discharge and he was treated less favorably than others.

The function of the Commission is to determine whether discrimination occurred in violation of section 105(c). Disparities in discipline can be strong evidence of discriminatory motives. But it is not the function of the Commission to generally weigh a miner's work record if no protected activity is established.

For the foregoing reasons the complaint filed herein should be dismissed.

Briefs

The parties have filed detailed briefs which have been most helpful in analyzing the record and defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Conclusions of Law

Based on the entire record and the factual findings made in this decision the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Complainant did not prove that he was discriminated against in violation of Section 105(c).
3. Respondent did not discriminate against complainant in violation of the Act.

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Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

The complaint herein is dismissed.

John J. Morris
Administrative Law Judge