

CCASE:
JOHN HATTER V. FRANKLIN COAL
DDATE:
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JOHN HATTER, JR.,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. PENN 85-290-D
MSHA Case No. WILK CD 85-1

FRANKLIN COAL COMPANY,
RESPONDENT

Franklin Breaker Mine

DECISION

Appearances: Cyrus Palmer Dolbin, Esq., Pottsville,
Pennsylvania, for the Complainant;
Franklin I. Miller, President, Franklin Coal
Company, Pinegrove, Pennsylvania, pro se.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The complainant alleges that he was discharged by the respondent because he filed a claim for black lung benefits, and the respondent maintains that the complainant was laid off for certain economic reasons. The initial complaint was filed with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and following an investigation of the complaint, MSHA advised the complainant that its investigation failed to disclose any violation of section 105(c). The complainant then filed his complaint with this Commission.

A hearing was held in this matter in Pottsville, Pennsylvania, and the parties appeared and participated fully in the hearing. The parties waived the filing of any post-hearing arguments, but I have considered the oral arguments made on the record during the hearing in the course of this decision.

Issue

The critical issue in this case is whether Mr. Hatter's termination by the respondent was prompted in any way by his filing for black lung benefits, or whether it was the result of certain economic conditions or financial losses as claimed by the respondent.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Discussion

Complainant's Testimony and Evidence

John Hatter, Jr., testified that he is presently working for the Sherman Coal Company, and that he previously worked for the respondent from April 10, 1970, to January 30, 1985. His duties included the loading of trucks, taking care of the fine coal plant, and loading trailers with a front-end loader.

Mr. Hatter stated that he filed for black lung benefits on November 28, 1984. On January 30, 1985, Company President Franklin Miller summoned him to his office and advised him that he had to be laid off "because he said coal sales were down and he was being audited" (Tr. 12). Mr. Hatter stated that he asked Mr. Miller why he couldn't lay someone else off, and Mr. Miller said "they could weld and I couldn't" (Tr. 12). Mr. Hatter confirmed that he left work that same day.

Mr. Hatter stated that during his employment with the respondent he had no disputes over his work, was always on time, had no arguments with management, and he considered himself to be a good employee (Tr. 13). He stated that Mr. Miller never complained about his work (Tr. 24). He identified employee Robert Hoffman as the only person with more seniority, and he identified five other employees who had less seniority with the company (Tr. 16-17). Mr. Hatter stated that after he was laid off, Mr. Hoffman was injured on the job and was in the hospital. The respondent hired no one to fill his vacancy, and Mr. Hoffman has since returned to

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work. However, Mr. Miller hired Claire Zimmerman, his brother-in-law, after Mr. Hoffman was injured, even though he (Hatter) was second in seniority to Mr. Hoffman, and was available for work. Mr. Hatter stated that he received no further calls or communications from Mr. Miller to go back to work (Tr. 19). He confirmed that he was receiving unemployment benefits from the State of Pennsylvania, and that in order to receive those benefits he had to be ready, willing, and able to work (Tr. 20). He also confirmed that he could have done welding work (Tr. 20).

Mr. Hatter's counsel produced copies of payroll slips from July 6 to December 28, 1984, reflecting that Mr. Hatter earned an average of \$221.69 a week while employed with the respondent during this time period (Tr. 21, exhibit CÄ2). Mr. Hatter confirmed that he was unemployed from January 30, 1985 to September 14, 1985, the date that he went to work for the Sherman Coal Company, and that his unemployment benefits stopped in July, 1985 (Tr. 23). He stated that he received unemployment benefits from January 30 through July, 1985, and that they amounted to \$122 a week (Tr. 24).

Mr. Hatter's counsel produced a copy of a letter dated February 25, 1985, after Mr. Hatter's termination, from Mr. Miller to the Office of Coal Mine Workers' Compensation Programs, Wilkes-Barre, Pennsylvania, stating that Mr. Hatter was never absent from work due to illness and never complained that he was short of breath or wanted other work because of shortness of breath (exhibit CÄ3, Tr. 24Ä25). The letter also states: "Before we are liable and John Hatter is found eligible that he received Black Lung benefits, I want proof that he does have pneumoconiosis by a second opinion from doctors' examinations, x-rays, etc."

In response to further questions, Mr. Hatter confirmed that he did not inform Miller that he was going to file his black lung claim before he filed it and that he never discussed it with him (Tr. 26). Mr. Hatter stated that he filed the claim because "I was getting up in age. It takes 6 or 7 years to get it" (Tr. 26). He filed it to establish his eligibility and to protect whatever rights he had under any applicable law. Mr. Hatter also confirmed that he never contacted anyone from MSHA regarding his claim (Tr. 27).

Mr. Hatter stated that Mr. Miller employs seven people, and he described Mr. Miller's operation as a preparation plant which processes and cleans coal received from different sources. The coal is resold to different truckers and jobbers, and at one time it was shipped by rail. There is no

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underground facility on the property, and no coal is actually mined there. Mr. Hatter could not state the volume of coal processed by the plant (Tr. 28-29).

Mr. Hatter confirmed that Mr. Miller's operation is non-union, and that when he was terminated, Mr. Miller told him that his coal sales were down and they did not discuss his black lung claim. Mr. Hatter reiterated that at no time prior to his termination did he ever discuss any black lung condition or claim with Mr. Miller, and he conceded that Mr. Miller had no reason to know about it, and never said anything to Mr. Hatter which would lead him to believe that he knew about the claim (Tr. 42-46). When asked why he believes he was terminated by Mr. Miller because he filed for black lung, Mr. Hatter responded "Well, it seems to figure. He got notice the 29th, and the 30th I got laid off" (Tr. 46).

Mr. Hatter's counsel confirmed that Mr. Hatter is waiting for a hearing date on his black lung claim, and that it usually takes 5 to 7 years for a hearing to determine his eligibility for benefits (Tr. 29). Counsel conceded that the black lung claim is different from any Part 90 Miner status under MSHA's regulations, and he stated that he was not familiar with those regulations and has not read them thoroughly (Tr. 30). He conceded that Mr. Hatter has never filed for Part 90 status under MSHA's regulations, and Mr. Hatter himself confirmed that he never filed for such status (Tr. 31-32, 38).

Mr. Hatter stated that he sought treatment or medical advice for his alleged black lung condition on one occasion, and his counsel confirmed that this was done in connection with the filing of his black lung eligibility claim, and that this was done after his termination by the respondent (Tr. 33). Copies of certain medical records introduced by Mr. Hatter's counsel include a chest radiographic diagnosis of "Pneumoconiosis with probable emphysema." Mr. Hatter's counsel conceded that prior to his termination by the respondent, he was not examined for black lung nor was that fact made known to Mr. Miller prior to the filing of his claim, but that it was made known immediately after the filing of the claim (Tr. 35).

Mr. Hatter's counsel pointed out that Mr. Hatter worked in a "watered down work area," and since he was in a dust-free environment, he probably would not have qualified for Part 90 miner status. Counsel proffered that Mr. Hatter did work

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inside mines prior to 1970 before going to work for the respondent, and may have contracted black lung then (Tr. 39).

Mr. Hatter's counsel submitted that on January 29, 1985, the day before he was laid off, Mr. Hatter received notice from the U.S. Department of Labor that his black lung claim had been filed, and that the respondent also received a copy of that notice, (exhibit CÄ1, Tr. 14). Counsel asserted that this was the first notice that the respondent would have received of the filing of Mr. Hatter's claim, and that it was probably received by January 29Ä30, 1985, the date on which he was dismissed (Tr. 15).

Respondent's Testimony and Evidence

Franklin I. Miller, confirmed that he is the owner and operator of the Franklin Coal Company. He described his operation as a coal preparation plant, and he stated that he purchases coal from different suppliers and sells it to brokers or other domestic users. The average number of employees is four to five, and the number of days the plant is in operation varies. At the present time, the plant operates less than 5 days a week, and on some weeks it only operates for 2 days depending on the amount of coal processed. For the year 1985, the plant processed 10,884 tons of coal, and handled an additional 40 percent which is simply bought and resold without processing (Tr. 50Ä53).

Mr. Miller stated that his coal tonnages and sales for the past 10 years have diminished roughly 20 percent a year, and that at the time he laid off Mr. Hatter he had to employ less people because his sales did not warrant the number of people he employed. The December 1984 audit from his accountant reflected a loss of \$31,419.39 for that month (Exhibit RÄ2, Tr. 54). A statement of profit and losses for the entire year of 1984 reflect a net loss of \$70,563.88 (exhibit RÄ1, Tr. 54).

Mr. Miller stated that at the time he terminated Mr. Hatter he was still waiting for his final 1984 yearly audit of his financial position as reflected in exhibit RÄ1, but he knew that his financial position was such as to require some changes in his structure and operation. In any decision to lay off employees, he considers which employees are more important to his operation. In this case, Robert Hoffman was a welder and a supervisory foreman, and everyone else except Mr. Hatter were welders. Mr. Miller stated that he explained to Mr. Hatter that it was important for him to retain welders because he was rebuilding his steel coal

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storage bins and needed them. Mr. Miller stated that any of these employees could do Mr. Hatter's work, including the man he had working in the office (Tr. 55).

On cross-examination, Mr. Miller stated that during past business slumps he did not lay off employees. Although he did not actually receive his final 1984 audit until after Mr. Hatter was terminated, he did receive monthly reports and "had an inkling" that he was operating at a loss. He stated that he explained this to Mr. Hatter when he laid him off (Tr. 57).

Mr. Miller confirmed that he received the notice dated January 28, 1985, concerning Mr. Hatter's black lung claim in the mail, and conceded that he may have received it on the 29th or 30th, but was not sure as to the exact date he received it (Tr. 57-59). He also stated that "I might have gotten this before, yes" (Tr. 59). He explained that he laid Mr. Hatter off on January 30, because it was the end of a weekly pay period, and the day following began a new pay period (Tr. 59). Although January 30 was a Wednesday, Thursday was the end of the pay period, and Mr. Hatter would have picked up his check on Friday, and it was decided to terminate him at the end of the week so as not to establish a new account for him (Tr. 60-61).

Mr. Miller stated that at the present time he has only three employees, including himself, on his payroll. He denied that Mr. Claire Zimmerman, his brother-in-law, is on his payroll, and he explained that he sold a car to Mr. Zimmerman and that he helped out to pay for the car. Mr. Miller also stated that he operates another business installing satellite dishes and that Mr. Zimmerman helps load them on the trucks to pay off the car, and that he is available as needed. Mr. Miller confirmed that Mr. Zimmerman at one time worked for his (Miller's) father as a loader, welder, and plant operator, and that he is married to his sister, who works as his part-time secretary (Tr. 64).

Mr. Miller stated that subsequent to Mr. Hatter's termination, Mr. Hatter's son was on his payroll, but was laid off in May, 1985. He also laid off employee Edward Wolfe at the same time he laid off Mr. Hatter, but did not advise Mr. Hatter of this fact because their discussion was very brief (Tr. 66). Although Mr. Hatter first came to work in 1970 when his (Miller's) father owned the business, Mr. Miller stated he took over the business from his father in 1975 (Tr. 66).

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Mr. Miller stated that the losses reflected on his "unaudited financial reports" for 1984 are actual losses, and he reiterated that he retained the employees with welding skills because he needed them, and Mr. Hatter was not a welder (Tr. 66-67). Mr. Miller stated that his company has no formal seniority program, and since he is the boss "I pick and choose" (Tr. 68).

Mr. Miller stated that he has never discussed Mr. Hatter's discrimination complaint with him. He confirmed that his company provided Mr. Hatter with hospitalization benefits and that Mr. Hatter has received \$11,000 to \$12,000 as the beneficiary of a company retirement plan funded totally by the company (Tr. 69-70). When asked why he believed Mr. Hatter filed the complaint against him, Mr. Miller responded "to get out of the boss what you're going to get out of him" (Tr. 69).

Mr. Miller disagreed with Mr. Hatter's assessment of himself as an employee. Mr. Miller stated that his lay-off decision concerning Mr. Hatter did not come about "on the spur of the moment." He stated that for the past 5 years he has been dissatisfied with Mr. Hatter's work, and he gave several examples of what he considered to be poor performance, including complaints from customers and instances when Mr. Hatter put in for time worked when he actually did not work. On those occasions, Mr. Miller would deduct the time from Mr. Hatter's pay, without objection (Tr. 70-72).

Mr. Miller asserted that he probably should have fired Mr. Hatter earlier, but instead laid him off so that he could collect his unemployment for 26 weeks (Tr. 72). Mr. Miller conceded that he did not tell Mr. Hatter this, nor did he discuss his work with him at the time he laid him off, and he denied that Mr. Hatter was fired (Tr. 72). He further explained that he did not bring these matters up with Mr. Hatter when he laid him off because he did not wish to be subjected to any abuse from Mr. Hatter (Tr. 74). Mr. Miller also indicated that he was reluctant to bring up Mr. Hatter's work performance "for his sake" (Tr. 74). When asked why he did not fire Mr. Hatter earlier, Mr. Miller responded "Did you ever hear the expression that they say: Give a guy enough rope, he'll hang himself? Well, that's exactly what he did" (Tr. 75). Mr. Miller explained further at (Tr. 102):

JUDGE KOUTRAS: Well, you keep talking about the rope now. But, why didn't you put on the rope 4 years or 3 years? Why did you wait until this?

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MR. MILLER: I made up my mind then that he was going to have to go at that time. The right occasion had to occur. And, my financial situation is what decided this. His black lung, I have no control over whether he gets black lung or he doesn't have any black lung. That's not my decision to make; that's the doctor's decision. We paid into the funds for him to get black lung, if he has it.

When asked why he did not bring up Mr. Hatter's poor work performance when he was contacted by an MSHA investigator during the investigation of his discrimination complaint, Mr. Miller responded "I didn't want to bring that up for his own benefit, and, I didn't want to bring it up here today. I don't like to treat men like that" (Tr. 103-104). In response to further questions, Mr. Miller stated as follows (Tr. 104-105):

JUDGE KOUTRAS: Why did you feel compelled to bring it up today?

MR. MILLER: Because you were asking me about my brother-in-law and about the car that he worked for. And, well, naturally I'd bring everything out. I mean, I don't like - I'm not an individual who would go down there and rub mud in anybody's face, because I don't expect that of myself either.

JUDGE KOUTRAS: When he received unemployment compensation benefits what did you tell the state people your reason for terminating him; do you recall?

MR. MILLER: I laid him off because I needed welders and I had to cut down on the payroll. I had to make up some seven thousand dollars there some place. That's the first place. Besides taxes and - you see, when you have five people on the payroll - four instead of five, you're paying twenty percent less into Black Lung funds, twenty percent less hospitalization.

I had to get rid of men because of costs. I was the boss of the place. I worked out there like everybody else. So, I was in a

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position to get rid of some of the people and do the work myself. That's only surviving.

JUDGE KOUTRAS: Do you pay your portion or share of Black Lung to this insurance carrier for all your employees?

MR. MILLER: Yes.

JUDGE KOUTRAS: Across the board?

MR. MILLER: Everyone, yes.

Mr. Miller confirmed that while he was familiar with MSHA, he was not familiar with the black lung program because he was never involved with it. He denied any knowledge of MSHA's "Part 90" program, and he stated that none of his employees have ever made application for that program, nor has MSHA ever advised him that any employee had to be reassigned to get them out of dusty environments. He stated that he has always been in compliance with MSHA's dust standards (Tr. 76).

Mr. Miller stated that he never discussed Mr. Hatter's black lung claim with him, and that he first learned about it through the notice letter of January 28. Mr. Miller stated that he had no basic familiarity with the claim and was not concerned that it might cost him money or cause problems (Tr. 77). He insisted that he laid Mr. Hatter off because of economic conditions, and that he has been patient with him for the past 5 years. He confirmed that Mr. Hatter's attendance record was good and that he was "always there on time" (Tr. 78). He also confirmed that he did not document Mr. Hatter's past poor work performance.

Mr. Miller stated that he has no control over Mr. Hatter's asserted black lung condition, and that he has paid into the Federal and state black lung fund for as long as he has been in business. He explained that the funds are paid into an insurance fund, and that the insurance company pays for black lung benefits and that he is not personally liable for any claim. If he were, it would be impossible for him to stay in business (Tr. 102-103).

Mr. Hatter was called in rebuttal, and denied that he ever threatened a strike or slowdown if he did not get a raise. He stated that he got along well with Mr. Miller, and denied that he caused any problems. With regard to the employment of Mr. Zimmerman, Mr. Hatter confirmed that he

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simply assumed that he was on Mr. Miller's payroll and that he never discussed the matter with Mr. Zimmerman. Mr. Hatter confirmed that he received company paid hospitalization and retirement benefits, and that he never had any trouble or problems with Mr. Miller (Tr. 80-84). He confirmed that Mr. Miller did not discuss company finances with him at the time he was laid off, and that Mr. Miller simply told him that coal sales were down and he was being audited (Tr. 84).

Mr. Hatter stated that he filed his discrimination complaint with MSHA after a contact by someone from MSHA's Wilkes-Barre office. Someone from MSHA called him at home, and one of its representatives came to his house and took his complaint statement of May 12, 1985. Mr. Hatter's wife, who was present in the hearing room, confirmed that someone from MSHA contacted Mr. Hatter as a result of his black lung claim, and when that individual inquired as to whether Mr. Hatter was still employed, Mr. Hatter advised that he was laid off the day following the receipt of the notice of his black lung claim and that the MSHA person stated "no way" (Tr. 90). Someone from MSHA subsequently came to their home and had Mr. Hatter fill out the complaint papers (Tr. 91).

Mr. Miller stated that he was contacted by an MSHA representative during the investigation of Mr. Hatter's complaint. Mr. Miller stated that he informed the representative that he had also laid off Mr. Wolfe at the same time, and that the representative spoke with Mr. Wolfe. Mr. Miller was later notified that MSHA found no discrimination in this case (Tr. 92).

Mr. Hatter denied that Mr. Miller ever told him that he would take him back if economic conditions got better, and Mr. Hatter did not ask him about this. Mr. Hatter believed that Mr. Miller should have laid someone else off with less seniority (Tr. 96).

Findings and Conclusions

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 (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981); and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Secretary on

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behalf of *Jenkins v. Hecla Day Mines Cororation*, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this matter it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Company*, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. *Robinette*, supra. See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir.1983); and *Donovan v. Stafford Construction Company*, No. 83-1566, D.C.Cir. (April 20, 1984) (specifically-approving the Commission's *Pasula-Robinette* test). See also *NLRB v. Transportation Management Corporation*, 468 U.S. 1288, 76 L.Ed.2d 667 (1983).

Section 105(c)(1) of the Mine Act provides in pertinent part as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act * * * because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 * * * . (Emphasis added.)

Section 101(a)(7), of the Mine Act provides in pertinent part as follows:

* * * [W]here appropriate, any such mandatory standards shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard,

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that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.

The mandatory health standards authorized by section 101(a)(7) of the Mine Act, are found at 30 C.F.R. Part 90. Pursuant to those regulations a miner employed at an underground coal mine or at a surface area of an underground coal mine may be eligible to work in a low dust area of the mine where there has been a determination that he has evidence of pneumoconiosis. If there is evidence of pneumoconiosis, a miner may exercise his option to work in a mine area where the dust levels are below 1.0 milligrams per cubic meter of air.

In *Gary Goff v. Youghiogheny & Ohio Coal Company*, 7 FMSHRC 1776 (Nov. 1985), the Commission held that a miner may state a cause of action under section 105(c)(1) of the Act by alleging discrimination based on the miner's being "the subject of medical evaluations and potential transfer" under 30 C.F.R. Part 90. In this case, Mr. Hatter makes no such claim. He simply alleges that he was terminated one day after the respondent was advised that he had filed a claim for black lung benefits. Thus, the issue presented is whether Mr. Hatter's termination was in any way prompted by his filing of this claim.

The record in this case establishes that Mr. Hatter filed his black lung eligibility claim on November 28, 1984, and that Mr. Miller had no knowledge of that filing. Mr. Hatter concedes that at no time prior to the filing of his claim, did he discuss his claim or any asserted black lung condition with Mr. Miller, and there is no evidence that Mr. Miller knew about it. Further, there is no evidence in this case that Mr. Miller knew about Mr. Hatter's claim until the Department of Labor's Notice of Claim dated January 28, 1985. Mr. Hatter asserted that he received the notice on January 29, 1985, and he assumed that Mr. Miller also received it in that day (Tr. 47). Mr. Hatter further conceded that he and Mr. Miller have never discussed his claim or his asserted black lung condition. The only direct evidence of Mr. Miller's knowledge of

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Mr. Hatter's claim is the letter of February 25, 1985, exhibit CÄ3, which Mr. Miller sent to the Labor Department's claims examiner after Mr. Hatter was terminated. Since the claim examiner is the same individual who signed the January 28, 1985, Notice of Claim sent to Mr. Miller, I assume that Mr. Miller's letter of February 25, 1985, was in response to that notice.

Mr. Hatter conceded that on the day of his termination, Mr. Miller said nothing which would lead him to believe that Mr. Miller had any knowledge that he had filed a claim for black lung benefits. Mr. Hatter's counsel conceded that he cannot establish that on the day of the termination Mr. Miller had already received notice of the claim. Since Mr. Hatter received his notification on January 29, the day before his termination, Mr. Hatter assumed that Mr. Miller also received his copy that day, and that on the day of the termination, January 30, Mr. Miller had knowledge that he filed his claim. Mr. Hatter's counsel asserted that since Mr. Miller and Mr. Hatter lived within the same 5Ämile radius, there is a presumption that Mr. Miller received notice of the claim on January 29, the same day that Mr. Hatter received his. Counsel candidly conceded that the basis for the discrimination claim is an inference that Mr. Miller believed there was some legal ramification flowing from Mr. Hatter's black lung claim, and that Mr. Miller terminated him for that reason (Tr. 36).

I take note of the fact that Mr. Miller's response to the notification that Mr. Hatter had filed a black lung claim came almost a month later when he sent his response of February 25, 1985, to the Labor Department. It seems to me that had Mr. Miller been really concerned about his liability for any black lung benefits to Mr. Hatter, he would have responded earlier. Further, Mr. Miller explained that he has always contributed to the black lung benefits fund for as long as he has been in business, that any benefits are paid by the appropriate insurance carrier, and that he is not personally liable for these payments. Given these circumstances, I cannot conclude that at the time of the termination the respondent was in any way concerned or motivated by the fact that Mr. Hatter had filed a claim for black lung benefits.

On the facts of this case, it seems clear to me that Mr. Hatter has not established that he ever applied to MSHA for classification as a Part 90 Miner, and at no time prior to his termination was he ever "the subject of medical evaluation and potential transfer" within the meaning of section 105(c)(1) of the Act. As a matter of fact, the evidence

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establishes that the only time Mr. Hatter sought treatment or medical advice for his alleged black lung condition was in connection with his filing of a black lung eligibility claim, and this was done after his termination by the respondent. Mr. Hatter filed his claim in order to preserve any future rights to black lung benefits and in recognition of the fact that any administrative determination of his claim may take years to adjudicate. Mr. Hatter's counsel conceded that his black lung claim is different from any Part 90 Miner status under MSHA's regulations, and he questioned Mr. Hatter's eligibility under those regulations because his work with the respondent was in a watered down dust-free environment. Under the circumstances presented in this case, I conclude and find that Mr. Hatter has failed to establish a prima facie claim that he was terminated because he was "the subject of medical evaluation and potential transfer" under Part 90, or because he had filed a claim for black lung benefits. Accordingly, his complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge