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SOL (MSHA) V. METRIC CONSTRUCTORS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), COMPLAINANT	Complaint of Discrimination Docket No. SE 80-31-DM
v.	Florida Mining & Concrete Co.
METRIC CONSTRUCTORS, INC., RESPONDENT	

DECISION

Appearances: William H. Berger, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Complainant MSHA
Richard A. Vinroot, and J. Dickson Phillips, Esqs., Fleming, Robinson, Bradshaw & Hinson, Charlotte, North Carolina, for Respondent
Sidney L. Matthew, Esq., Tallahassee, Florida, for individual Complainants

Before: Judge Lasher

PROCEDURAL BACKGROUND AND STATEMENT OF THE CASE

This proceeding was initiated on November 19, 1979, by the filing of a discrimination complaint by Ray Marshall, Secretary of Labor on behalf of seven alleged discriminatees, Joe Brown, Johnny Denmark, Jerry McGuire, Van T. "Dago" McGuire, AKA "Terry" McGuire, David Mixon, John Parker, and Wesley Parker (herein collectively the Complainants). The Secretary's complaint, as amended, alleges that the seven individual Complainants were discharged in violation of section 105(c)(1), of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., Supp. III 1979) (herein the Act) and seeks as a remedy therefor reimbursement of all wages and benefits lost together "with interest from the time of their discharge" at the rate of 9 percent per annum, and expungement of pertinent personnel records. In addition, the Secretary prays that a civil penalty be assessed against Respondent pursuant to section 110 of the Act.

Respondent's motion to dismiss filed November 28, 1979, for the reason the complaint "was not based upon a written determination within 90 days of the (miner's) complaint, nor filed immediately thereafter, as required by the

Act, or within 30 days thereafter as required by the regulations" was denied at the hearing (I Tr. 34-59). (FOOTNOTE 1) The bench ruling that such rules of limitation are not jurisdictional is here affirmed. Local Union No. 5420, UMWA v. Consolidation Coal Company, 1 FMSHRC 1300 (September, 1979). Respondent neither established or contended that any prejudice resulted from any delay of the Secretary in processing the complaint of the seven alleged discriminatees.

Although Respondent initially challenged the jurisdiction of the Commission both over the subject matter and over the Respondent as a party, at the commencement of hearing the parties stipulated such jurisdiction (I Tr. 23, 28).

The Secretary asks that a penalty be assessed against Respondent should a violation be found to have occurred. Section 110(a) of the Act requires that, in addition to the remedies provided in section 105(c), a penalty be assessed if the mine operator is found to be in violation of section 105(c). The parties were notified on numerous occasions that all aspects of this matter, including penalty assessment if appropriate, would be heard and decided at the same time. While certain procedural regulations, 29 C.F.R. 2700.25 through 29 C.F.R. 2700.30, require initial administrative processing of proposed penalty assessments by the Secretary, such seem to apply only to violations of health and safety standards determined after issuance of orders and citations during inspections and investigations pursuant to section 104 of the Act. These regulations are the procedural implementations of sections 105(a) and (b) of the Act. It is thus found that such regulations are not applicable to discrimination proceedings arising under section 105(c) of the Act. Otherwise piecemeal litigation and resultant inconvenience and unnecessary costs to the parties will result. All facets of the cause of action pleaded in the Secretary's complaint were litigated and are decided herein.

To establish a prima facie case of discrimination under section 105(c) of the Act a complainant must establish by a preponderance of the evidence (1) that he engaged in a protective activity and (2) that the adverse action was motivated in part by the protected activity. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980); rev'd on other grounds, 663 F.2d 1211 (3rd Cir. 1981). Complainant must establish these elements by a preponderance of the evidence, Secretary of Labor v. Richardson, 3 FMSHRC 8 (January, 1981).

PRELIMINARY FINDINGS

The seven Complainants, journeyman welders, were hired as temporary employees to work the night shift at Respondent's repair project at a cement plant (mill) owned by Florida Mining and Materials Corporation, Cement Division, located 10 miles north of Brooksville, Florida. They were to work

12 hours a day, 7 days a week for a period of 4 weeks commencing February 27, 1979, on a "pre-heater" and a kiln located at the plant which had been shut down while the repairs were being made. Their shift commenced at 7:00 p.m. and ended at 7:00 a.m. The seven Complainants were hired, and did in fact work, as a crew.

The Respondent, Metric Constructors, Inc., is a subcontracting firm which performs work in several states. At the times and places material herein, its supervisory structure consisted of: Russ Jones, project superintendent; Thelbert Simpson, night superintendent; Fox Simpson, night foreman; Bob Davis, night foreman; Arnold Crotts, day foreman; Dan Buie, day foreman; and Norman Graham, day foreman.

During the first three nights of their employment (February 27, February 28, and March 1, 1979) the seven Complainants welded on and around the kiln (a large cylinder located about 30 feet off the ground). The first three nights were uneventful. On their fourth night, March 2, they and about 14 others were assigned to perform welding work on the pre-heater (a large vertical, silo-like structure) at locations known as "vortex ducts," which were 180-200 feet above the ground. Complainants were to weld on Vortex "A". Welding on the three other Vortexes, "B," "C," and "D" had been completed and was accomplished during the daytime.

After reporting to work prior to 7:00 p.m., the Complainants were told by Thelbert Simpson to report to Bob Davis, who was their foreman for that shift. (FOOTNOTE 2) Their duties were to weld on inlet feet shoots near the top of the pre-heater approximately 180 feet above the ground.

The seven Complainants proceeded with Night Foreman Davis to inspect their working area by climbing a set of stairs to it. Their working area was pointed out by Bob Davis from a platform. The Complainants could not reach it, however, because there was a gap of at least 6 to 8 feet between the platform where they were standing and the actual working area.

It was then determined that four of the Complainants (Joe Brown, Terry McGuire, Jerry McGuire and John Parker) would weld on the duct work, while the other three would pull leads (power supply for the welding machines) and act as relief when the welders got tired. Since there was no direct access to the duct work, the four welders were lifted to the work site in a basket by a crane. The other three Complainants pulled leads to within 6 to 8 feet of the duct work and stood on a platform handing supplies to the welders as needed. The platform had no fence or handrail around it. Once the four Complainants reached the duct work in the basket, they found there were no scaffolding or handrails around the work site nor were there any padeyes on

which to hook their safety belts. They were thus required to weld padeyes before they could attach their safety belts. Terry McGuire and Joe Brown went inside the inlet feet shoot that was being welded onto the pre-heater, while Jerry McGuire went on top of the duct, and John Parker worked from an unsecured one-board scaffold below the duct. (FOOTNOTE 3)

The four Complainants in question worked for approximately 2 hours under conditions which they considered unsafe. Jerry McGuire, who was on top of the duct, was being blown about by heavy winds (I Tr. 99, 234 315, 317, 334). John Parker, who was below the duct on the one-board scaffold, was being "burned" by the welding fire from above (I Tr. 91, 150-151, 155) as were Terry McGuire and Joe Brown inside the duct (I Tr. 90-91, 233-234, 314-315). The lighting at the work site was insufficient and by 7:30-8:00 p.m. on March 2, 1979, it was dark outside (I Tr. 92, 101-102, 231; II Tr. 118). The four welders working on the duct were able to reach the platform where the other three were standing only by walking around on a ring which encircled the pre-heater (I Tr. 318).

Shortly after 9:00 p.m., all seven Complainants went on break. They decided that because of what they believed to be unsafe and hazardous working

conditions Terry McGuire and Joe Brown would talk to Bob Davis about improving the conditions by getting additional lights, fire blankets, scaffolding, cables for handrails and jacks for scaffolding boards at the work site.

Once on the ground, and after their break, Joe Brown, Terry McGuire and Jerry McGuire, on behalf of all seven men (I Tr. 99, 137, 139, 153, 235, 336, 348-349), sought out Night Foreman Bob Davis and registered their complaints about the unsafe and hazardous working conditions, i.e., no handrails, no scaffolding, and no lights and to request angle irons, scaffold jacks, scaffold boards, fire blankets, cable for handrail and lighting (I Tr. 101-103, 315, 319, 325, 336, 348). While they were so engaged, the other four Complainants returned to the platform located 6 to 8 feet from the duct.

After receiving the safety complaints from the three Complainants Bob Davis found Night Superintendent Thelbert Simpson in the office trailer and advised him that the welders wanted a scaffold and handrails before they would weld Vortex "A." Simpson and Davis then agreed that Russ Jones, the project superintendent, should be called. Davis, in a written statement (Exhibit 17-B) gives this account of the telephone conversation:

> "I called Jones and told him that the welders wanted a scaffold and handrails before they welded vortex A. I told Jones that the welders didn't want to hang out on a safety rope because they didn't feel like it was safe. Jones said that it was safe on the other three vortexes and that we didn't have any scaffolding then. I asked Jones what if the welders didn't want to weld hanging on the ropes. Jones said that if I didn't have any other welding for them to do, to tell them to go home. I dialed the phone, talked to Jones, and hung up, while just Thelbert Simpson and I were in the office trailer. Thelbert Simpson never talked to Jones during my call to Jones." (FOOTNOTE 4)

With respect to this same conversation, Project Superintendent Russ Jones testified that he had the conversation with Simpson, not Davis:

> Q. Now I want to get to the statement that you had with Thelbert Simpson that you testified to. What time was it again that you got a call?
>
> A. It was somewhere around nine or just a little bit after nine. I don't recall what time it was.

Q. And as best as you can recall, what did Mr. Simpson say to you?

A. He told me that Terry -- I believe it was Terry -- and Joe Brown and refused -- they said they was not going to work on that pre-heater tower, and then I asked him, I said, "Thelbert, do you have anything else on the ground that they can do." He said, "I have nothing on the ground. No work at all. I have two men working on the downcomer duct and that's all I've got," and I said, "Well, explain to them that's all the work that we have for them to do."

* * * * * * *

Q. Well, is that what you were told, somebody wanted to quit?

A. Yeah, he said they had quit.

Q. Oh, he said they had quit?

A. Yeah, and he said if he quit, then he was going to take the rest of them with him.

Q. Who's that?

A. Terry and I believe -- I'm not saying whether Joe Brown was in there or not.

Q. I'm getting a little confused. Now go back and tell me what Thelbert Simpson said to you.

A. He told me the two men, Terry and Joe Brown, if it was -- I'm not sure -- said they were not going to work on that tower up there and they was going to quit.

Q. Let me ask you something. Did you ask why they didn't want to work?

A. No. Why should I ask my superintendent why he didn't want to work when he called and told me the man was going to quit?

(II Tr. 75-77).

Thelbert Simpson, the third management witness to testify for Respondent, gave this account of the pertinent events:

Q. Tell the Court in your own words what happened that night as between you and Mr. Terry McGuire and who ever approached you that night?

A. Well, after nine o'clock, the break, Bob Davis brought Joe Brown, Terry, and I believe Jerry was with him, too --

Q. Jerry McGuire?

A. Jerry McGuire.

Q. Yes, sir, go ahead and proceed.

A. Brought them right under the pre-heater, just right beside the pre-heater and said that they wasn't going back up there to do no more welding, and I said, "Why," and they complained about not enough light, and I said "I'll get you more lighting up there," and when I told them that, they said they weren't going back up there unless I build them a scaffold, and weld -- and I build it up as they weld it up, and I told them it would take me longer to build the scaffold then it would for them to do the welding.

Q. All right, sir. Then what happened?

A. They said they wasn't going back up there. Terry or Jerry one asked me were they fired, and I told them No, they wasn't fired, and Bob said, "We might as well call Russ." So I told Russ -- I told Bob if he would call Russ -- I don't know if it was long distance or not -- get through the operator, I would talk to Russ, so Bob dialed the phone and got Russ, and I talked to Russ.

Q. What did you say and what did Russ say?

A. I told Russ that Jerry and them refused to do the work and wouldn't go back up there to do the work on the pre-heater. And Russ asked him did he have anything to do on the ground for him to do. I told him I didn't have anything else on the ground to do, or nothing else, but just those two guys that were on the ground. And he said, "Let them go home and tell them to come back in the morning and I'll give them the checks."

Q. All right, sir. Did Russ say anything to you about firing them or terminating them?

A. No.

Q. What did you say to the men after talking to Russ Jones?

A. I told them Russ said to tell them to go home and come back and pick up their checks the next morning.

Q. Did you tell them they couldn't do the work or that you would not permit them to continue to do the work?

A. No, I did not tell them they couldn't do the work.

Q. Did you make it clear to them that they could go do that work as far as you were concerned?

A. Yeah.

Q. How did you tell them that?

A. Well, they asked me three times and I told them I didn't have anything else for them to do, and they asked me three times before I went to the office were they fired, and I told them no, but I didn't have any work for them to do on the ground.

Q. Were you willing for them to go back up and do the work where they had come from?

A. Yeah.

Q. Were they willing to do it?

A. No, they said they wasn't going back.

Q. Did they said anything to you about safety?

A. One of them I believe said it was unsafe.

* * * * * * * *

Q. Am I correct that you testified, Mr. Simpson, that you did not actually physically see the area where the seven men were supposed to work that night?

A. No, I did not.

* * * * * * * *

Q. Did you tell Russ why these men didn't want to work?

A. Yeah.

Q. Why? What did you tell them?

A. I told them that they asked me, and I said, "They refused to work," and Russ said, "Ask if they didn't have anything else to do on the ground, anything else for them to do."

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Q. Well, did you explain to him at any time why they didn't want to do the work?

A. No.

Q. Did you mention to him about the scaffolding?

A. No.

Q. Or about the lighting?

A. No.

* * * * * * * *

THE COURT: * * *

In the telephone conversation with Russ, why didn't you tell Russ the reason why these welders refused to work?
THE WITNESS: Well, actually I actually didn't exactly know why they refused to work. They just told me they wasn't going back out there on there to do it. The only thing they complained about to me was the lighting and for me to build them a scaffold.

(II Tr. 85-94).

Following the telephone conversation between Simpson and Jones, Davis told the Complainants that Russ Jones had said that "they would have to weld the vortex like the other three were welded by hanging off of the safety ropes." Davis also told the Complainants that if they refused to do the work as it was, they "would have to go home" and they "could come back in the morning and get their money.'

Jerry McGuire then returned to the platform to retrieve the four other Complainants who were waiting to find out what would be done about the working conditions and to tell them they had been fired or words to that effect. (I Tr. 109, 125, 154-155, 158, 188, 237). On the way from the platform to the stairs or elevator, Dave Mixon slipped on an unsecured plank that was being used as a walkway and nearly fell 180 feet to the ground (I Tr. 170-176, 189, 340).

While Jerry McGuire was retrieving the other four Complainants, Joe Brown and Terry McGuire requested that Bob Davis pay them immediately for the work they had done that week. Bob Davis could not find the timekeeper and Complainants were instructed to return the following morning.

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On the morning of March 3, 1979, the seven Complainants returned to the work site and received their checks. They were asked to sign a termination slip (Exhibits C-18A-G), on which "voluntary quit" had been checked. Each Complainant refused to sign the slip.

The Respondent had no other welding or alternate work available for Complainants on the night of March 2, 1979, and so informed them. On March 3, all of Respondent's temporary welders were assigned to work on the pre-heater and all remained there until the last three or four days of their four-week term when some were brought down to weld on the kiln. During that four-week term, there were no accidents, no other complaints, no investigations and no citations arising from the conditions that the complaining miners considered unsafe.

The temporary welders hired by Respondent completed their work during the four-week period for which they had been employed (II Tr. 66) and most were terminated at the end of that term [II Tr. 60]. Several, who were also "iron workers," were retained for one or two weeks thereafter to perform structural iron work which the Respondent performed for Florida Mining [II Tr. 66-69]. The Complainants were not hired for this work and would not have been retained for its performance under any circumstances [II Tr. 59-60].

The Complainants filed charges with MSHA on April 27, 1979, alleging that the events of March 2, 1979, constituted "discriminatory discharges" under the 1977 Act. MSHA conducted an investigation of the Complainants' charges which concluded on July 12, 1979. That investigation made no determination as to the merits of the Complainant's contentions or whether the conditions they complained of violated MSHA standards. MSHA notified Complainants of its determination by letter dated October 18, 1979.

DISCUSSION, ULTIMATE FINDINGS AND CONCLUSIONS

The Respondent, while conceding in its brief that the refusal of the seven Complainants to perform work was a protected activity because based on a reasonable and good faith belief that unsafe conditions existed, contends that Respondent's only duty to them was not to take adverse action or discriminate against them on account of that refusal. Respondent correctly argues that there was no automatic legal duty imposed on it to agree with the miners, to change work conditions to their satisfaction, or to continue to pay them where alternative work was not available while a safety dispute was in the process of being resolved. Respondent maintains that a "standoff" occurred on the night of March 2, 1979, in which both sides, in good faith disagreement, acted within their rights. (FOOTNOTE 5)

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While Respondent argues that a mine operator has no duty to an employee (1) to investigate allegedly dangerous conditions, or (2) to attempt to dispel the miner's fears through explanation or through changing job conditions to the miner's satisfaction, it also alleges that holding such view is unnecessary to the disposition of this case because the Respondent had a reasonable, good faith belief that the conditions were safe based on its prior knowledge of the working conditions. (FOOTNOTE 6)

The Respondent then urges the view be adopted that where the complaining miners exercised their rights in refusing to perform the work which they considered unsafe and the mine operator exercised its corresponding right in refusing to make the changes demanded by the miners, that each side had the option to act as it did, and the right of neither superseded that of the other. In such equipoise, according to Respondent, no liability should be imposed upon the mine operator unless it commits an "adverse action" or "discriminates" against the miners in that process. As Respondent points out, the Supreme Court, in Whirlpool Corp. v. Marshall, 100 S. Ct. 883, 894 (1980), in interpreting an antidiscrimination provision of the Occupational Safety and Health Act has held that "an employer discriminates against an employee only when he treats that employee less favorably than he treats others similarly situated." According to Respondent, there is no basis for finding that it took adverse action or discriminated against the seven Complainants since:

(1) The only welding work that was available on March 2, 1979, was that which the seven miners refused to perform;

(2) All but two of the other welders employed that night worked under similar conditions; and

(3) The seven Complainants were given the option and encouraged to continue to perform that work but refused to do so.

Nevertheless, the testimony of Complainants concerning the various hazards which existed on the evening of March 2, 1979, was consistent, credible and detailed, and I find it sufficient to establish that such hazards resulted in an unsafe working environment. As further noted below, the testimony of Respondent's witnesses was neither as plausible or reliable as that of Complainants. Although Respondent contends that others worked under simil ar conditions without complaint, the record among other things, (a) reflects no comparison between Complainants' working conditions and that of other welders on other vortexes, nor (b) does it indicate that other welders had been asked to work that night without adequate lighting and scaffolding. Respondent's rebuttal for the most part was oblique and did not directly meet Complainant's evidence which credibly established the hazardous nature of the conditions complained of. The five Complainants who testified all considered the conditions unsafe and Respondent presented no challenge to their good faith in entertaining such belief. Indeed, Project Superintendent Jones conceded that he did not perceive the seven Complainants "as individuals who wanted to go out and just get a couple of days' work and buy a bottle" as had been the case with others he had encountered (II Tr. 78).

Respondent's position is undermined considerably by its failure to investigate any of the specific complaints lodged. Respondent's position that its supervisors were already aware of the working conditions prior to the time the complaints were made and thus had no need to investigate was not sufficiently developed and was too general to account for this failure. Thus, the Complainants' testimony with respect to insufficient lighting, the need for fireblankets, etc., were not satisfactorily addressed by Respondent's witnesses-possibly because the complaints were not investigated and evaluated at the time. This failure may also explain why foreman Simpson, if his account of events is accepted, did not inform Project Superintendent Jones that such complaints had been made.

The belief of the Complainants that the various conditions previously described were unsafe and their consequent refusal to work is found to be reasonable and fully justified by the circumstances. Their refusal to work is found, independent of Superintendent Jones' concession as to their sincerity, to constitute an activity protected under the Act. Consolidation Coal Company (David Pasula), supra.

The means employed by Complainants to have three of their member communicate their safety complaints and refusal to work under unsafe working conditions to Respondent's management personnel at approximately 9 p.m. on March 2, 1979, was sufficient to invoke the protection of the Act. The communication by three of Complainants on behalf of the other four is sufficient to protect the rights of those who did not themselves speak directly to management. Not every miner involved in a work refusal need make or attempt to make such a complaint. A communication from one may be deemed to be on behalf of all concerned, even if not announced in such terms. Northern Coal Company, 4 FMSHRC 126 (1982); Local Union 1110, UMWA v. Consolidation Coal Company, 2 FMSHRC 2812 (1980).

There being substantial evidence in the record that Complainants' working conditions were unsafe, that Complainants were reasonable in their belief that such conditions were unsafe, that Complainants properly complained to Respondent about such conditions, and that Complainants refused to work because of such conditions, absent some affirmative defense, a prima facie case under Pasula, supra, is completed by a showing that Complainants were discharged or otherwise discriminated against because of such protected work refusal.

Respondent's defense is that a state-of-mind equilibrium existed and that both parties were reasonable and sincere in their conflicting views of the condition of the workplace. In the Commission's ongoing process of formulating rules to implement its holding in Pasula the rights and duties of a mine operator-whose belief that the complained-of conditions are safe is equally reasonable to that of the complaining miners-have as yet to be fleshed out. Where the evidence is substantial one way or the other that the working conditions are either safe or unsafe, such state of the record ordinarily would be dispositive as to which party is reasonable in their belief. To determine whether there is substantial, probative evidence in this record to support Respondent's contention it is first necessary to more precisely state the rule it urges as gleaned from its arguments: Where a mine operator reasonably believes working conditions are safe and a miner reasonably believes the conditions are unsafe, and no alternative work is available, the mine operator has no obligation (a) to change the conditions to the miner's satisfaction, or (b) to continue the employment of the complaining miner who refuses to work under existing conditions. Such a rule appears fair and sound where there are no contractual procedures to be followed and where the record is not sufficient to permit a determination whether the working conditions were safe or not. However, as previously noted, the preponderance of the reliable evidence in the record indicates that the conditions Complainants were asked to work under were unsafe. Respondent's efforts to be seen as reasonable in its view that the conditions were safe are undermined by its actions: it not only failed to investigate the complaints to determine their validity but its foreman, Simpson, failed to advise Project Superintendent Jones that safety complaints had been registered and were the reason for the work refusal. Jones, who made the ultimate decision to

inform Complainants to either return to work or pick up their paychecks, was unaware that safety complaints had been registered. Even by viewing the evidence in

the light most favorable to Respondent, it is clear that the Respondent, because of communications failure within its own supervisory structure, incorrectly concluded that Complainants were insincere in their concern for safety hazards and merely desired to quit. Acting on such erroneous assumption, and on the unjustified belief that the working conditions complained of were safe, Respondent gave Complainants the unacceptable alternative of working under unsafe conditions or being terminated. Although perhaps not in abject bad faith, Respondent's out-of-hand rejection of the complaints was also unreasonable. The option given Complainants to either work at considerable risk or be terminated was tantamount to discharging them for their engagement in a protected activity. See NLRB v. Ridgeway Trucking Company, 622 F.2d 1222 (5th Cir. 1980). The effect, not the particular form, of the language used by the employer determines whether an employee has been discharged. Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047 (2d Cir. 1980).

In short, Respondent's affirmative defense--based on theoretical rights not yet considered or delineated by the Commission-was not supported by the confused, sometimes implausible, sometimes contradictory evidence presented by its own supervisory personnel.

It is concluded that the Complainants engaged in a protected work refusal and that adverse action, in the form of termination of their employment, occurred as a result. In these circumstances, where the mine operator's belief that the working conditions are safe is unreasonable and the miners' belief that such conditions are unsafe is reasonable, the discharge of complaining miners for such work refusal is discriminatory and a violation of the Act.

BACK PAY

General Principles

Specific principles governing the determination of back pay in proceedings arising under section 105(c) of the Act and the allocation of burdens of proof are in the process of formulation. In Secretary v. Northern Coal Company, supra, the Federal Mine Safety and Health Review Commission noted that the Mine Act's provisions are modeled largely on section 10(c) of the National Labor Relations Act and adopted the National Labor Relations Board's definition of back pay as it has been developed over the years. The Commission also noted its prior rulings that so long as the remedial orders employed effectuate the purposes of the Act, both it and its judges possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances. Since both the pleadings and the evidentiary record, insofar as they relate to the remedies available to Complainants including back pay are imprecise, the necessity to exercise considerable discretion and make reference to NLRB burden of proof principles has arisen. (FOOTNOTE 7)

The amount of back pay properly awarded is ordinarily the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings. Northern, supra.

One of the fundamental principles of evidence having particular applicability in this proceeding is that the burden of going forward normally falls on the party having knowledge of the facts involved. See United States v. New York, N. H. & H. R. R. CO., 355 U.S. 253, 256, n. 5, 78 S.Ct. 212, 2 L.Ed.2d 247 (1957). In the context of this case the Complainants, who were temporary employees to begin with, after their discharge returned to the area where they resided some 120 miles distant from the site of the Brooksville project (II Tr. 137-138). Knowledge of their attempts to obtain employment in that area would be exclusive to them.

While the sole burden on the government is to show the gross back pay due the Complainants, J.H. Rutter Rex Mfg. Co. v. N.L.R.B., 473 F.2d 223 (5th Cir. 1973); Marine Welding & Repair Works v. N.L.R.B., 492 F.2d 526 (5th Cir. 1974), where an employer raises the affirmative defense, as here, that the discharged employees failed to mitigate their loss by refusing to search for other employment (FOOTNOTE 8) the discriminatees are required to establish that they engaged, as a minimum, in "reasonable exertions" to find interim employment. N.L.R.B. v. Arduini Mfg. Corp. 394 F.2d 420, 423 (1st Cir. 1968); O. C. & Atomic WRKS INT. UNION, AFL-CIO v. NLRB, 547 F.2d 575 (D.C. Cir., 1976).

Where the employer contends that several discriminatees did not all make the required effort to mitigate their damages, the willful idleness issue must be determined with respect to each employee separately considering the record as a whole. N.L.R.B. v. Rice Lake Creamery Co., 365 F.2d 888 (D.C. Cir. 1966). This individualized, rather than group, approach is dictated by the nature of the mitigation rule which is generally recognized today. N.L.R.B. v. Madison Courier, Inc., 472 F.2d 1307 (D.C. Cir. 1972). Once the gross amount of back pay has been established the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability. N.L.R.B. v. Brown & Root, Inc., 311 F.2d 447 (8th Cir. 1963). An employee who has been discriminated against is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason. N.L.R.B. v. Madison Courier, Inc., supra; N.L.R.B. v. Maestro Plastics Corp., 354 F.2d 170, 174 n. 3 (2d Cir. 1965), cert denied, 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966).

General Evidence Applicable to All Complainants

At the time of their discharge, Complainants were working a 12-hour day, 7 days a week, and were expected to work an additional 24 days and 9 hours. (FOOTNOTE 9) Van Terry McGuire was paid $11.25 per hour and the six remaining Complainants were paid $10.25 per hour (I Tr. 24, 144). Although the Secretary, in his brief, asks for an award of overtime pay, I find no evidentiary support in the record therefor and none is cited by the Secretary.

John Robinson, project manager at E. M. Watkins Company, Perry, Florida, testified that E. M. Watkins was the only company in the Perry, Florida, area (home of the seven Complainants) that engaged in industrial construction and had a need for this type of welder (II Tr. 133). He also testified that during March and April 1979, there were no jobs for welders in the Perry area and that the area was saturated with available welders.

JOE E. BROWN

This Complainant was unable to obtain work after being discharged (II Tr. 133, 144-145, 149) and after taking a second mortgage on his home on April 16, 1979, went into the crabbing business. I find that after his first week of unemployment he made reasonable efforts to obtain other employment but was unable to do so because of the negative employment situation in the area of his residence (II Tr. 133-134). Complainant Brown, however, testified that he did not look for work until one week after he returned home from the Brooksville (Metric Constructors) project. Since a discharged employee must make some reasonable, if not diligent, efforts to mitigate his backpay claim by seeking equivalent work, J.H. Rutter Rex Manufacturing Co., Inc., v. N.L.R.B., supra, I conclude that Brown did not sufficiently engage in such effort by waiting one week before looking for work. (FOOTNOTE 10) Accordingly, a period of 7 days is deducted from the maximum period (24 days and 9 hours) Brown would have continued to work at Respondent's Project had he not been discharged. Complainant Brown is therefore found entitled to back pay for 213 hours (17 12-hour days plus an additional 9 hours on March 2) at the rate of $10.25 per hour, or a total award of $2,183.25.

JOHN WALLY PARKER

This Complainant applied for work at E.M. Watkins Company, Perry, Florida, the day following his discharge (I Tr. 166). He went to work there commencing August 16, 1979, (II Tr. 136). Other than the foregoing, the

record is barren in connection with the back pay issue. While the Secretary has carried its burden of showing the back pay due this Complainant, i.e., his regular hourly wages for 24 12-hour days and 9 hours, Respondent has failed to carry its affirmative burden of establishing any facts which would either negative the existence of such liability or mitigate it. The only inference which can be drawn from the paucity of evidence available is that Complainant immediately sought work after being discharged. (FOOTNOTE 11)

Accordingly, he is found entitled to an award of $3,044.25 in back pay (297 hours at the rate of $10.25 per hour).

JAMES WESLEY PARKER

This Complainant, a resident of Perry, Florida, testified that he was drawing unemployment benefits when he went to work on the Metric job at Brooksville, Florida, that he "didn't work enough to drop it" and that he made no efforts to obtain other employment for a period of "a month, maybe three or four weeks" after he left the Metric job. He testified at another juncture in his testimony, however, that he did not apply for other work until July, 1979, (I Tr. 200-204). (FOOTNOTE 12) It is concluded that this Complainant failed to make sufficient efforts to obtain other employment after being discharged to qualify for an award of back pay. To be entitled to backpay, an employee must at least make "reasonable efforts to find new employment which is substantially equivalent to the position [which he was discriminatorily deprived of] and is suitable to a person of his background and experience." N.L.R.B. v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575 (5th Cir. 1966); Southern Silk Mills, Inc., 116 NLRB 769, 773 (1956), remanded, 242 F.2d 697 (6th Cir.), cert. denied, 355 U.S. 821, 78 S.Ct. 28, 2 L.Ed.2d 37 (1957).

"We do not * * * [believe] that it must appear that [the discriminatee] could have procured such a job (i.e., suitable interim employment) before he can be found to have incurred a willful loss by the failure to apply for it. It is incumbent on a claimant to seek a job for which he has extensive experience." Knickerbocker Plastic Co., 132 NLRB 1209, 1219 (1961).

Accordingly, an award of back pay for this Complainant is denied.

DAVID MIXON

This Complainant was killed in an accident in November, 1980 (II Tr. 152). The only evidence bearing on the back pay issue is that Mr. Mixon commenced employment at White Construction Company on or about April 9, 1979 (II Tr. 154). I infer therefrom, there being no showing to the contrary, that Mr. Mixon had no other employment prior to April 9, 1979, and is thus entitled to an award of back pay for the full period remaining on his original term, i.e., 3 weeks, 3 days, and 9 hours. See N.L.R.B. v. Pilot Freight Carriers, Inc., 604 F.2d 375, 378 (5th Cir. 1979), reaffirming the principle that ""when an employer's unlawful discrimination makes it impossible to determine whether a discharged employee would have earned backpay in the absence of discrimination, the uncertainty should be resolved against the employer."'

Although no challenge was made to Mixon's entitlement based on the theory that any back pay entitlement was extinguished by his death (I Tr. 28, 29), some consideration of this question appears in order. The Federal Mine Safety and Health Act contains no provision with respect to whether the claim of an employee for back pay survives his subsequent death. With some few exceptions the federal statutes contain no express provisions for survivability of causes of action in the federal courts, (1 Am.Jur. 2d, Abatement, Survival and Revival, 112, p. 128), and where no specific provision for survival is made by federal law the cause survives or not according to the common law. At common law the basic principle of survivability is that survivable actions are those in which the wrong complained of affects principally property and property rights, including monetary interests, and in which any injury to the person is incidental, whereas nonsurviveable actions are those in which the injury complained of is to the person and any effect on property or property rights is incidental. Pierce v. Allen B. Du Mont Laboratories, Inc., 297 F.2d 323 (3d Cir. 1961); 1 Am. Jur. 2d Abatement, Survival and Revival, S 51, p. 86.

It is axiomatic that the Act is remedial and clothed in the public interest. Since the remedy provided for a discriminatee represents reimbursement of a lost property right, i.e., back pay, it is found to survive his death and to be subject to an award in an action brought by the appropriate government agency on his behalf.

Accordingly, the deceased, David Mixon, is found entitled to an award of gross back pay of $3,044.25 (24 12-hour days and 9 hours, or 297 hours, at the rate of $10.25 per hour). Said amount with interest and other entitlements shall be paid to decedent's estate or heirs as determined by the Secretary.

JOHNNY DENMARK

The only evidence in the record, other than the general information applicable to all Complainants, is that he was hired by the E.M. Watkins Company of Perry, Florida, on September 4,

1979, and that this was the first

time he was employed after March 2, 1979 (II Tr. 136). As noted previously, Mr. Denmark was in military service on overseas duty and was unavailable to testify when the hearings were conducted. As to this Complainant, the Secretary carried his burden by showing the gross back pay due, but the Respondent failed to present evidence in mitigation.

Accordingly, Mr. Denmark is awarded the sum of $3,044.25 representing 297 hours at the rate of $10.25 per hour, the amount he would have earned during the remainder of his 4-week employment term had he not been discharged.

JAMES JERROLD McGUIRE

Mr. McGuire testified that he applied for work at E.M.Watkins the Monday or Tuesday following his discharge and was told work would be available for him in two or three weeks. During the interim he worked for his brother welding trailers and was earning sufficient money that he did not look for other work. Neither his actual earnings or hourly rate was shown but his hourly rate was less than $10.00 per hour for an unspecified number of hours. Thus, a precise interim earnings figure cannot be calculated, necessitating the exercise of the broad discretion approved in Northern Coal Company, supra. Accordingly, based on Mr. McGuire's entire testimony (I Tr. 243-248) it is concluded that he worked for a period of 3 weeks during the interim period at the rate of $5.00 per hour for 40 hours per week. (FOOTNOTE 13) These interim earnings totalling $600.00 will be deducted from the gross back pay ($3,044.25) he would have earned during the remainder of the four-week term for which he was employed.

Respondent contends that the Secretary is barred from recovery on Mr. McGuire's behalf because he refused a position with equal or higher pay in Louisiana during the interim period (II Tr. 247-249). When asked why he was unwilling to go to Louisiana for two or three weeks, McGuire replied that he saw no reason to expend the money "to go out there (and) to rent a place for two or three weeks" and "lose that much money." (I Tr. 248) A discharged employee is not necessarily obliged to accept employment which is located an unreasonable distance from his home. See N.L.R.B. v. Madison Courier, Inc., supra, and cases cited therein. McGuire's refusal to go to Louisiana is found to be reasonable in view of the distance involved, the fact that he had another, even though less-remunerative, job, and his belief that a job opening would occur at E.M. Watkins Company in the near future. McGuire's failure to accept employment in Louisiana is not found to be a wilfull refusal to mitigate his damages so as to extinguish his entitlement to back pay.

Accordingly, this Complainant is found entitled to an award of net back pay in the sum of $2,444.25.

This Complainant made reasonable effort to obtain employment after being discharged (I Tr. 342-343) and obtained a welding job at Shawls Welding in Perry, Florida, approximately 2 weeks after being discharged where he was paid $5.00 per hour. The number of hours he worked per week was not established. It is found that he worked 40 hours per week and that he received such interim earnings for the last week and 4 days of the 4-week employment period he was hired for by Respondent. Mr. McGuire's interim earnings are therefore calculated to be $360.00 which is to be deducted from the gross back pay ($3,341.25) he would have earned from Respondent at the rate of $11.25 per hour during the remainder of the 4-week term for which he was employed.

Accordingly, this Complainant is awarded net back pay in the sum of $2,981.25.

BACK PAY AWARD

Complainants are awarded back pay in the amount shown below with interest thereon at the rate of 12 percent per annum (FOOTNOTE 14) compounded annually from March 3, 1979, until paid.

JOE E. BROWN	$2,183.25
JOHN WALLY PARKER	$3,044.25
JAMES WESLEY PARKER	NONE
DAVID MIXON	$3,044.25
JOHNNY DENMARK	$3,044.25
JAMES JERROLD McGUIRE	$2,444.25
VAN TERRY McGUIRE	$2,981.25

EXPENSES OF HEARING

The Secretary has neither pleaded, argued, briefed, or presented evidence with respect to an award reimbursing Complainants for their expenses in attending the hearing. (FOOTNOTE 15) However, in Northern Coal Company, supra, which it should be noted was decided after the hearing and after briefs were filed, it was held that an award for hearing expenses is an appropriate, and I believe required, form of relief and that the failure to pray for such relief is no bar to an award therefor. Having considered the circumstances in which the hearings were held, after reviewing the award of the administrative law judge which was upheld in Northern, and in view of the past difficulty of obtaining precise information from the parties by stipulation or otherwise

during the hearing process, it is concluded (1) a reasonable approach is called for, (2) that further hearing would be unproductive and also counter-productive in view of the additional costs which would be incurred by all parties, and (3) an award of $125.00 for each day of hearing attended by a Complainant is fair and reasonable reimbursement.

Accordingly, hearing expenses are awarded to each of the following Complainants for the number of days and in the amounts indicated after their names:

Joe E. Brown (3 days)	$375.00
Van Terry McGuire (2 days) (FOOTNOTE 16)	$250.00
John Parker (3 days)	$375.00
James Wesley Parker (3 days)	$375.00
James Jerrold McGuire (3 days)	$375.00

ASSESSMENT OF PENALTY

Based on prior findings, the discharge of Complainants on March 2, 1979, is found to be a violation of section 105(c)(1) of the Act. The action of Respondent in discharging the seven Complainants is found to constitute one violation for which one penalty will be assessed.

The Respondent is a construction contractor which does business in several states. On the Florida Mining and Materials Corporation repair project involved in these proceedings, Respondent employed approximately 22 welders. Respondent which has no previous history of committing violations under the Act, has made no contention that payment of a penalty would jeopardize its ability to continue in business.

Based on my findings that Respondent failed to investigate the various safety complaints registered by Complainants, I conclude that under all the circumstances including the fact that working at high altitude at night is intrinsically hazardous to begin with, such failure constituted reckless disregard of the safety of the miners involved. The malfunction in Respondent's communications process at the management level which resulted in the safety complaints not being reported to the Project Superintendent resulted, in turn, in his decision to order Complainants to return to unsafe work or be discharged. This latter failure constituted the process by which Complainants were discharged in violation of the Act. In total, Respondent is found to have taken a negligent, unreasonable approach to the safety matters in question.

The violation is found to be serious since, in giving Complainants the option to return to unsafe working conditions or be discharged, an unusual exposure to hazard was created. The hazards posed included death or serious injury from falling 180 or more feet to the ground. The clarity of the choice given the Complainants, no wages or danger, is especially pernicious.

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From the Respondent's standpoint, its management personnel who testified left the distinct impression of a lack of sophistication and experience in safety matters. Their lack of diligence in pursuing the safety complaints-once raised to a clear-cut decision to force Complainants back to work or be discharged-resulted more from a focus on getting the job done than from a callous disregard for Complainants' safety or safety matters in general.

In further mitigation of the amount of penalty which should be assessed, is the considerable amount of back pay which has been awarded here. The D.C. Court of Appeals in Madison Courier, Inc. pointed out that one of the purposes of an award of back pay is the furtherance of the public interest by deterrence of illegal acts in the future. See also Northern Coal Company, supra. Since approximately $17,000.00 in back pay liability has been levied, the deterrent effects here of a larger penalty are rendered nugatory.

Balancing the above factors, a penalty of $1,000.00 seems appropriate and is assessed.

ORDER

1. All proposed findings of fact and conclusions of law not incorporated in this decision are rejected.

2. On or before 30 days from the date of this decision, Respondent is directed to pay to the Secretary of labor:

a. The sums of $16,740.40 with interest thereon after Federal and State withholding at the rate of 12 percent per annun from March 3, 1979 until paid, and $1,750.00, representing the total back pay and hearing expenses, respectively, due the individual Complainants, said sums to be disbursed by the Secretary in accordance with the instructions previously indicated.
b. The sum of $1,000.00 as a civil penalty for the violation found to have occurred.

3. Respondent shall expunge from its personnel records and files any and all reference to the discharge of Complainants and the circumstances attendent thereto.

Michael A. Lasher, Jr.
Judge

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~FOOTNOTE_ONE

1 A bifurcated hearing was held on December 15, 16, 1980, and May 5, 6, 1981. References to the December hearing transcript will be "I Tr. ___" and the May transcript "II Tr. ___."

~FOOTNOTE_TWO

2 Two of the Complainants did not testify. David Mixon was

killed in an automobile accident in November 1980 and Johnny Denmark was serving overseas in the United States Navy at the time of the hearings.

~FOOTNOTE_THREE
3 The lack of scaffolding and handrails were verified by Bob Davis, the crew foreman (Exhibit C-17B), Louis Shaw (II Tr. 117), Robert Porter (II Tr. 124), and Thelbert Simpson (II Tr. 91). Respondent attempted to establish the existence of scaffolding and handrails by introducing photographs of its 1980 project (II Tr. 65). No photographs of the 1979 project were introduced although they were available (II Tr. 65-66). Terry McGuire testified in this connection that:

"Joe and I had talked about it needing some more scaffolding, that we needed a lot more scaffolding. We needed a fire blanket in there and we were going to see if we could get some. . . I know that my brother had to come off of the duct work because the wind was blowing, and he almost got blown off of it. There was no scaffold on top of the duct work at all." (I Tr. 315).

Foreman Davis, in his written statement, described the situation as follows:

"I told them that the only way they could do the welding would be to hook up or hang out with their safety ropes. I think one of the welders mentioned something about there being no scaffold. I didn't know any of the seven welders by name but they are the seven men that left at one time, March 2, 1979. I told them that we didn't have a scaffold when we welded the other 3 (B, C, and D) vortexs. I personally supervised the welding in B, C, and D vortexs. However, the welding on B, C, and D vortexs was done during the day. The only scaffolding on the preheater was a ring about a foot from the top of vortex A. The other ring of scaffolding was only temporary and had been taken down prior to March 2, 1979."

Significantly, Davis also made this admission: "I told the welders before they left on the evening of March 2, that I wouldn't do the job now either because I'm too old, I am 53 years old. I also told them that I had done jobs that risky and even more risky over the years."

~FOOTNOTE_FOUR
4 A direct and material conflict appears in the record between Respondent's witnesses as to this conversation. Both Thelbert Simpson and Russell Jones testified that the conversation in question was between Simpson and Jones, not Davis and Jones. Davis did not testify. His version appears in an unsworn statement. This conversation is critical to the resolution of the ultimate issues in this matter because it was in the process of this conversation that Respondent decided what to do about the safety complaints.

~FOOTNOTE_FIVE
5 Which of Respondent's versions of the critical telephone

conversation is to be credited, the Davis version or the Jones-Simpson version is of considerable importance. Since both Jones and Simpson testified under oath and were subject to cross-examination their account of the conversation carries more weight than does that of Davis, which appears in an unsworn written statement. The numerical logic that two witnesses testifying under oath are less likely to be mistaken than one witness giving a written statement compels acceptance of the Jones-Simpson version.

From the testimony of both of Respondent's supervisory personnel who testified, Simpson and Jones, it appears that at the time that Jones made the decision to give Complainants the option of returning to work or being terminated he had only been told by Simpson that the men were quitting and he had not been advised that they had made safety complaints.

The implausibility of and conflict in the testimony of Respondent's witnesses is particularly damaging to its case. It was in this telephone conversation that Project Superintendent Jones decided on what action should be taken with respect to Complainants. According to both Jones and Simpson, the merits of Complainant's list of unsafe conditions was not discussed, nor was the subject even brought up. This detracts from Respondent's contention that its belief that the working conditions were safe was a reasonable one.

~FOOTNOTE_SIX
6 Respondent relies on the rather tenuous testimony of Project Superintendent Jones and Night Superintendent Simpson for this proposition (II Tr. 34-37; 93-95). This testimony, for the most part, is to the effect that prior to the "shutdown" for repairs Respondent prepared the areas where welding was to be performed by installing scaffolding. Due to its quality and generality, Respondent's evidence in this regard is not sufficient to overcome the more precise description of unsafe conditions existing on March 2 by Complainants.

~FOOTNOTE_SEVEN
7 From the beginning of this proceeding great emphasis was placed on developing the record with respect to all aspects of a discrimination proceeding including back pay issues. Further efforts to obtain additional evidence would appear to be futile.

~FOOTNOTE_EIGHT
8 Failure to mitigate damages by refusal to search for alternative work or by refusal to accept substantially equivalent employment is an affirmative defense. N.L.R.B. v. Mooney Aircraft, Inc., 366 F.2d 809 (5th Cir. 1966). What proof Respondent presented on this question was obtained through cross-examination of the Secretary's witnesses.

~FOOTNOTE_NINE
9 Complainants were temporary employees hired to work 4 weeks. They worked and were paid for 3 days and 3 hours.

~FOOTNOTE_TEN

10 The employer is not under the severe burden of establishing that a particular discriminatee would have located suitable interim employment had he only made the required effort, before the back pay liability may properly be reduced. "[W]ith such diligence lacking, the circumstances of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant." American Bottling Co., 116 NLRB 1303, 1307 (1956).

~FOOTNOTE_ELEVEN
11 While the liable employer may attempt to demonstrate that a particular employee failed to make the requisite "reasonable efforts to mitigate [his] loss of income * * * [the employee is] held * * * only to reasonable exertions in this regard, not the highest standard of diligence." N.L.R.B. v. Arduini Mfg. Co., supra. "[T]he principle of mitigation of damages does not require success; it only requires an honest good faith effort * * *." N.L.R.B. v. Cashman Auto Co., 223 F.2d 832, 836 (1st Cir. 1955).

~FOOTNOTE_TWELVE
12 After a recess, Mr. Parker changed his testimony and indicated that he had inquired about employment at one firm on the Monday morning following his discharge. After careful scrutiny of this portion of his testimony (I Tr. 211-221), I conclude that it is not sufficiently trustworthy to be credited.

~FOOTNOTE_THIRTEEN
13 The rate of $5.00 per hour was paid to another Complainant who obtained welding work in the area of Perry, Florida, after being discharged (I Tr. 342-343).

~FOOTNOTE_FOURTEEN
14 See 12 percent interest award of Judge James A. Broderick in Bradley v. Belva Coal Company, 3 FMSHRC 921 (April 10, 1981); North Cambria Fuel Co., Inc. v. N.L.R.B. 645 F.2d 177 (3rd Cir. 1981).

~FOOTNOTE_FIFTEEN
15 The Complaint does contain the standard catch-all prayer for "such other and further relief as may be appropriate."

~FOOTNOTE_SIXTEEN
16 Mr. McGuire did not attend the 1st day of hearing, December 15, 1980.