FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF	:	DISCRIMINATION PROCEEDINGS
I. B. ACTON	:	Docket No. SE 84-31-D
GRADY ADERHOLT	:	SE 84-32-D
FREEMAN BUTLER	:	SE 84-33-D
JAMES L. CAMPBELL	:	SE 84-34-D
J. D. ELLENBERG	:	SE 84-35-D
W. D. FRANKLIN	:	SE 84-36-D
BILLY R. GLOVER	:	SE 84-37-D
TERRY PEOPLES	:	SE 84-39-D
WILLIAM REID	:	SE 84-40-D
CHARLES W. RICKER	:	SE 84-41-D
TERRY SHUBERT	:	SE 84-42-D
THEODORE TAYLOR	:	SE 84-43-D
MARVIN WISE	:	SE 84-44-D
	:	MSHA Case No. BARB CD 83-18
	:	Nebo Mine
CHARLES BLACKWELL	:	Docket No. SE 84-45-D
	:	MSHA Case No. BARB CD 83-27
ROBERT BURLESON	:	Docket No. SE 84-46-D
	:	MSHA Case No. BARB CD 83-28
HOUSTON EVANS	:	Docket No. SE 84-47-D
	:	MSHA Case No. BARB CD 83-31
	:	No. 7 Mine
KENNETH RANDALL COEER, Complainants	:	Docket No. SE 84-52-D
	:	MSHA Case No. BARB CD 83-18
	:	Flat Top Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	
v.	:	
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Complainants;
Mary Lu Jordan, Esq., Washington, DC, for Intervenor;
David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., Birmingham, Alabama, and Robert W. Pollard, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the complaints of discrimination by the Secretary of Labor on behalf of 17 miners under the provisions of Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The individual complainants, former surface miners who had been laid off during a reduction in force, allege that Jim Walter Resources, Inc. (Jim Walter) discriminated against them in violation of Section 105(c)(1) of the Act[1] because they had not been provided the underground safety training required by section

[1] Section 105(c)(1) of the Act provides 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 has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or 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 or because such miner, representative of miners or applicant for employment 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 proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

115 of the Act.[2] The alleged discrimination occurred when Jim Walter recalled other miners from the panel lists who had terms of company service shorter than those of Complainants but who had completed that training. Most of the Complainants also allege that Jim Walter is obligated to reimburse them for the time and expense involved in subsequently obtaining the underground safety training during the time when each was laid off.

Jim Walter does not deny that the Complainants were thus bypassed for underground positions at least in part because they had not completed the 32 hour required safety training for underground miners at an MSHA-approved course but maintains that these decisions were mandated by the terms of the applicable collective bargaining agreement (the "Agreement") and in particular by the seniority provisions contained in Article XVII of the Agreement. Those provisions require as an element of seniority that the miner have the ability to perform the work of the job at the time the job is awarded. It is Respondent's position that a miner requiring the safety training is not able to perform the work of the job at the time the job is awarded.

The Commission held in Secretary ex rel Bennett, Cox, et al. v. Emerald Mining Corporation, 5 FMSHRC 1391 (1983), that in enacting section 115, Congress did not restrict the prerogative of the mine operators in setting pre-employment qualifications based on

[2] Section 115 states in part:

> (a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. . . . Each training program approved by the Secretary shall provide as a minimum that -
>
> (1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground.
>
> (b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

experience or training and that the operator's Policy in that case of requiring applicants for employment to obtain the 32 hours of MSHA-approved training prior to being hired did not violate the Act.

Within this legal framework it is therefore immaterial whether the affected applicants for employment are "strangers" to the industry and the employer, as in the Emery case, or are former employees awaiting the possibility of reemployment from a recall list, as in the instant case. In either case, pre-employment training and experience criteria may be used by the mine operator, including the requirement that prospective underground miners have completed their MSHA-approved safety training, without running afoul of the Act.

It follows then that the mine operator is also free to contract with its employee bargaining unit to require consideration of such pre-employment training as an element of seniority. In neither case is such criteria discriminatory under the Act. Accord UMWA o.b.o. Shepard v. Peabody Mining Co., 4 FMSHRC 1338 (1982); but see UMWA o.b.o. Rowe et.al. v. Peabody Coal Co., 6 FMSHRC 1634 (1984). There is accordingly no need to decide in this case whether or not requiring such pre-employment training as an element of seniority violates the provisions of Article XVII of the collective bargaining agreement. I note however that the Respondent's position (that it was obligated under that part of the Agreement to give priority in its recall decisions to those paneled miners who then had completed the MSHA approved safety training because only they had "the ability to step into and perform the'work of the job at the time the job is awarded') was upheld in Arbitration (Joint Exhibit No. 18).

The second allegation of discrimination before me concerns Respondent's failure to pay those miners it recalled for underground positions for the expenses of the training they received and for comparable wages during that training period.[3] The Emery decision is again controlling on that decision that since the employer has been made responsible under the Act for the costs of such training, it is unlawful under section 105(c)(1) if, after hiring the Complainants as underground miners, it fails to compensate them for their 32 hours of classroom training but relies on that training to satisfy its training obligations under section 115. The Commission concluded in the Emery decision that under section 115(b) the mine operator was required to reimburse the Complainants for the cost of their training and

[3] Complainants Acton, Aderholt, Burleson, Butler, Campbell, Franklin, Glover, Peoples, Reid, Ricker, Shubert, Taylor, and Wise come within this category.

the equivalent of wages at their starting pay rate for the time spent in training.

Respondent argues that the Emery decision is distinguishable in two respects. It first argues that the training required by the Emery Mining Corporation was a mandatory hiring prerequisite for all applicants whereas in the instant case, new miner training was not an absolute, uniform qualification for hiring or recall by Respondent. Respondent argues, secondly, that the Emery case involved job applicants who had no previous opportunity to obtain new miner training from the operator, whereas, in the instant case, the Complainants' lack of experienced miner status was due to previous decisions by the miners to move out of underground positions.

The thrust of the Emery decision was, however, that the mine operator cannot discharge its statutory obligations by obtaining the benefit of the requisite safety training without reimbursing the miners for the cost of that training. As the Commission pointed out, this action circumvented the statutory mandate that the mine operators must pay for such training and that this interfered with the miners' rights under section 115. Similarly in the case at bar, Respondent relied on the safety training obtained by the individual miners to satisfy its statutory obligations to provide training for those miners. Accordingly, Respondent too should compensate the recalled miners for that training. Emery is not at all distinguishable in this regard.

I agree, however, with Respondent's position that it was not required to reimburse the underground safety training expenses of Complainant Cofer who did not return to underground work. In keeping with the rationale of the Emery decision that the employer took advantage of unreimbursed training to attempt to comply with the training requirements of section 115, it is clear that Respondent is not required to reimburse a miner who returns to surface work where the underground safety training was not required. Respondent did not take advantage of the unreimbursed training for underground positions in regard to this employee. Mr. Cofer is accordingly not entitled to any reimbursement for training which had not been taken advantage of by the Respondent in fulfilling its statutory obligations.

Timeliness of Filing

As noted, I have found that Respondent did violate section 105(c)(1) when, after recalling certain Complainants to positions as underground miners, it refused to compensate those miners for their 32 hours of training but relied on that training to satisfy

its training obligations under section 115. Respondent maintains, however, that ten of the Complainants in this category, namely, Acton, Campbell, Franklin, Glover, Peoples, Reid, Ricker, Shubert, Taylor, and Wise filed their complaints beyond the sixty day time limit set forth in section 105(c)(2) of the Act and therefore those complaints should be barred.

If a miner believes that he has suffered discrimination in violation of the Act, and wishes to invoke his remedies under the Act, he is indeed required under section 105(c)(2), to file his initial discrimination complaint with the Secretary of Labor within sixty days after the alleged violation. A miner's late filing may be excused however where "justifiable circumstances" exist. Herman v. Imco Services, 4 FMSHRC 2135 (1982), Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984).

In the case at bar, it is apparent that the act of discrimination occurred only after the miners were recalled for underground positions and only after Respondent refused to pay the training expenses and comparable wages upon demand or upon the failure of Respondent to pay such expenses and wages after a reasonable period of time following recall, considering the time needed to perform necessary bookkeeping functions for such payments. In the latter case, I conclude that a date 30 days from the date of recall constitutes the discriminatory event.

Within this framework it appears that no more than three Complainants may have filed untimely, i.e., Mssrs. Peoples, Shubert, and/or Wise. These miners were all recalled by Respondent on November 14, 1983, and therefore should have been reimbursed for their training expenses and comparable wages by December 14, 1983. Since Respondent failed to make such payments by December 14, 1983, that date became the date of the discriminatory event. The miners accordingly should have filed their complaints with the Secretary within sixty days thereafter, or by February 12, 1984. Since the Secretary filed his complaint with the Commission on February 24, 1984, and incorporated therein a complaint that the miners had not been reimbursed for their training expenses and comparable wages, it may reasonably be presumed that the complaints now at issue had been brought to the Secretary's attention at least two weeks before that date. Accordingly, I find that the complaints had been timely filed with the Secretary. I note in any event that Respondent does not dispute that the issue of nonpayment for training was raised in a timely manner by other Complainants and Respondent accordingly cannot deny that it had timely notice of the nature of the claim raised. Respondent has, moreover, cited no legal prejudice by any filing delay. Under the circumstances, I find that all of the Complainants met the filing requirements set forth in section 105(c)(2).

Disposition of Discrimination Proceedings and Damages

A. Dockets No. SE 84-35-D, SE 84-45-D, SE 84-47-D, and SE 84-52-D

Inasmuch as Complainants Blackwell, Ellenberg, and Evans did not attend any training program for underground miners, they incurred no expenses relating thereto. Consistent with my decision herein, they suffered no discrimination and their cases are therefore dismissed. For the reasons stated in this decision, the complaint of Mr. Cofer is also dismissed. Wherefore case Dockets No. SE 84-35-D, SE 84-45-D, SE 84-47-D, and SE 84-52-D are hereby dismissed.

B. Dockets No. SE 84-31-D, SE 84-32-D, SE 84-33-D, SE 84-34-D, SE 84-36-D, SE 84-37-D, SE 84-39-D, SE 84-40-D, SE 84-41-D, SE 84-42-D, SE 84-43-D, SE 84-44-D, and SE 84-46-D

The complaints of discrimination in the remaining cases before me are denied in part and granted in part in accordance with my decision herein. To the extent that the complaints are granted, and based upon the uncontested evidence of expenses and relevant wages, I award the following costs and damaages:

Names of Miners	Training Expenses	Comparable Wages	Total
I.B. Acton	$ 84.60	$438.88	$523.48
Grady Aderholt	80.80	404.74	485.54
R. Burleson	128.80	399.94	528.74
F. Butler	18.46	399.94	418.40
J.L. Campbell	55.00	438.88	493.88
W.D. Franklin	32.80	404.74	437.54
B.R. Glover	25.12	404.74	429.86
T. Peoples	36.60	399.94	436.54
W.C. Reid	21.12	404.74	425.86
C.W. Ricker	61.12	438.88	500.00
T. Shubert	20.20	399.94	420.14
T. Taylor	35.00	404.74	439.74
M. Wise	4.92	399.94	404.86

Interest is to be computed on the above amounts based upon my finding that those amounts were due on the 30th day following the recall of each miner and such interest is to be calculated by Complainant in accordance with the formula set forth in Secretary of Labor o.b.o. Bailey v. Arkansas-Carbona Company and Michael Walker, 5 FMSHRC 2042 (1983). Agreement should be reached among the parties as to such calculations and such calculations must be submitted to the undersigned along with any petition for attorney

fees within 20 days of the date of this decision. This decision is not a final disposition of the cases and no final disposition of these cases will be made until such time as the issues of interest and attorneys' fees, if any, are resolved.

Disposition of Civil Penalty Proceedings

A. Dockets No. SE 84-35-D, SE 84-45-D, SE 84-47-D, and SE 84-52-D

Inasmuch as I have found no discrimination in the Complaints of Mssrs. Blackwell, Cofer, Ellenberg, and Evans, the corresponding civil penalty proceedings are dismissed. Wherefore Civil Penalty Proceedings in Dockets No. SE 84-45-D, SE 84-52-D, SE 84-35-D, and SE 84-47-D are dismissed.

B. Dockets No. SE 84-31-D, SE 84-32-D, SE 84-33-D, SE 84-34-D, SE 84-36-D, SE 84-37-D, SE 84-39-D, SE 84-40-D, SE 84-41-D, SE 84-42-D, SE 84-43-D, SE 84-44-D, and SE 84-46-D

The Secretary's representations in the amended complaint for civil penalty are not disputed in these cases. In light of the clear mandates set forth in the Emery decision (issued August 8, 1983) that new underground miners must be reimbursed for their statutorily required safety training which is taken advantage of by the mine operator, I find that Respondent herein should have promptly paid those training expenses for the Complainants herein who were recalled for underground work. The failure of Respondent to do so in a timely manner warrants not only repayment of those expenses and comparable wages plus interest, but also a civil penalty appropriate to the relevant criteria under section 110(i) of the Act.

In this regard, I observe that no evidence of prior violations has been presented. The mine operator is large in size. The mine operator has not paid for the training expenses or comparable wages noted-herein and accordingly has not yet abated the violations. In light of the clarity of the Emery decision on this point, it should have done so. Accordingly, Jim Walter

Resources will be directed to pay a civil penalty of $50.00 in each of the cases in this category at the time of final disposition of these proceedings.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

Frederick W. Moncrief, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Mary Lu Jordan, Esq., United Mine Workers of America, 900 - 15th Street, NW, Washington, DC 20005 (Certified Mail)

David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., 1200 Watts Building, Birmingham, AL 35202 (Certified Mail)

Robert W. Pollard, Esq., Jim Walter Resources, Inc., P. 0. Box C-79, Birmingham, AL 35283 (Certified Mail)

/nw