

**THERE WERE NO COMMISSION DECISIONS OR ORDERS**

**ADMINISTRATIVE LAW JUDGE DECISIONS**

05-12-2003	James Womack v. Graymont Western US Inc. (This is not a final decision)	WEST 2002-138-DM	Pg. 235
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**ADMINISTRATIVE LAW JUDGE ORDERS**

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**MAY 2003**

No cases were filed in which Review was granted during the month of May

Review was denied in the following cases during the month of April:

Arnold J. Jistel v. Trinity Materials, Inc., Docket No. CENT 2002-150-DM. (Judge Zielinski, March 27, 2003)

Thomas P. Dye, II v. Mineral Recovery Specialists, Inc., Docket No. WEST 2002-408-DM. (Judge Manning, April 22, 2003)



ADMINISTRATIVE LAW JUDGE DECISIONS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

May 12, 2003

JAMES WOMACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 2002-138-DM
	:	WE MD 01-17
GRAYMONT WESTERN US INC.,	:	
Respondent	:	Tacoma Plant
	:	Mine ID 45-03290

## DECISION ON LIABILITY

Appearances: James Womack, *pro se*, Tacoma, Washington, for the Complainant;  
Robert Leinwand, Esq., Stole Rives, LLP, Portland, Oregon, for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on December 14, 2001, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(3) (1994). The complaint was filed by James Womack against Graymont Western US Inc. ("Graymont") previously known as Continental Lime.<sup>1</sup> (Rep. Br. at p.5, n.4). Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides, in pertinent part:

No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . *has filed or made a complaint under or related to this Act*, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . *or because such miner . . . instituted any proceeding under or related to this Act . . . .*

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<sup>1</sup> Womack's complaint which serves as the jurisdictional basis for this matter was filed with the Secretary of Labor (the "Secretary") on August 29, 2001, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Womack's complaint was investigated by the Mine Safety and Health Administration (MSHA). On November 30, 2001, MSHA advised Womack that its investigation did not disclose any section 105(c) violations. On December 14, 2001, Womack filed his discrimination complaint with this Commission which is the subject of this proceeding.

(Emphasis added). Section 105(c) of the Act seeks to protect miners from not only common forms of discrimination, such as discharge or demotion, but also subtle forms of retribution. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (August 1982).

The hearing in this matter was conducted in Seattle, Washington on October 2 and October 3, 2002. At the time of the hearing, Womack had been suspended without pay for over one year, although he had not been terminated. (Tr. 524). Womack had been seeking reinstatement since July 18, 2002. The record was left open to permit Graymont to respond to Womack's reinstatement request. Graymont terminated Womack on October 22, 2002. The record was closed on January 17, 2003. The parties filed post-hearing briefs and Womack filed a reply brief.

Womack asserts that he is the victim of a series of adverse actions motivated by his protected activity: two reprimand letters, a five day suspension following his union grievance of the reprimands, and a suspension without pay beginning September 21, 2001. These disciplinary actions were investigated by MSHA during the course of its consideration of Womack's discrimination complaint.

Womack now contends that Graymont's post-hearing decision to terminate his employment is in retaliation for his protected activity. Womack's October 22, 2002, termination occurred after MSHA completed its discrimination investigation, and after Womack filed his December 14, 2001, complaint with this Commission. However, as discussed herein, Womack may amend his discrimination complaint to include his termination. As such, his termination is a proper subject of this section 105(c)(3) proceeding.

### **I. Statement of the Case**

Womack sustained a back injury while working as a kiln operator in July and August 1999. Graymont accommodated Womack by permitting him to perform light duty until September 21, 2001, when it concluded Womack's medication precluded him from safely performing his job. At that time, Graymont placed Womack on extended leave without pay. Womack was awarded workers compensation from the State of Washington Department of Labor and Industries (L&I) as of September 21, 2001.

Womack's eligibility for L&I compensation ended on July 8, 2002, after L&I learned Womack was no longer taking medication. At the hearing, Graymont stated that it was unable to determine if Womack was capable of returning to his job because it had not received adequate information from Womack's physician. (Tr. 524-25). The record was left open for Womack to provide Graymont with additional information. Graymont received a statement from Womack's physician on October 7, 2002. (Memorandum of Gary Henriksen, M.D., Oct. 7, 2002).<sup>2</sup>

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<sup>2</sup> Both parties are in possession of the post-hearing documentation concerning Womack's termination that was proffered before the record was closed. Consequently, these documents will be identified by author and date but not as exhibits of either party.

On October 18, 2002, Graymont concluded that Womack could not perform the essential elements of his kiln operator job with or without a reasonable accommodation. Consequently, Womack's employment was terminated effective October 22, 2002. (Letter from Dennis Wakin to James Womack, Oct. 18, 2002). The record was closed on January 17, 2003, after Womack and Graymont furnished additional medical and L&I records in response to a November 21, 2002, Order the parties to submit additional documentation.<sup>3</sup> Prior to closing the record, during a January 15, 2003, telephone conference, the parties stated they did not desire to present additional testimony.

For the reasons discussed below, Womack's discrimination complaint with respect to his disciplinary letters, his five day suspension and his extended leave is denied. However, the evidence reflect's Graymont's decision to terminate Womack, rather than provide him with a reasonable accommodation, as it had done in the past, was motivated, at least in part, by Womack's protected activity. Accordingly, Womack's discrimination complaint with respect to Graymont's refusal to reinstate him shall be granted.

## **II. Preliminary Findings Of Fact**

### **a. Background**

Graymont's Tacoma, Washington facility produces quick lime, also known as calcium oxide. Limestone is transported to the plant on a barge from Canada where it is off-loaded onto conveyor belts and separated. The stone is then screened and stockpiled. The material ultimately is conveyed into a coal-fired rotary kiln that reaches approximately 1,840 degrees Fahrenheit. At that temperature, lime loses its calcium dioxide and becomes calcium oxide. The finished lime falls through bars onto a plate below called the "grizzly" where it is cooled and then conveyed to product silos. It is later removed from the silos, screened, and prepared to customer's specifications. Quick lime is used in both the pulp and paper, and steel industries.

Graymont's facility is operated 24 hours per day, seven days per week. The work day is divided into three eight hour shifts: 6:00 a.m.-2:00 p.m.; 2:00 p.m.-10:00 p.m.; and 10:00 p.m.-6:00 a.m. Personnel work on rotating shifts each week. There are approximately 35 employees assigned to the Tacoma plant, nine of which are assigned to work in the kiln department. These nine employees consist of four kiln operators, four stonemen, and one bagman. There is a kiln operator and stoneman on each of the three shifts. The extra kiln operator and stoneman fill in for the teams of kiln operators and stonemen on their days off. There is one bagman who works only the 6:00 a.m.-2:00 p.m. shift. The remaining employees work in and around the crushing and screening plant.

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<sup>3</sup> The parties agreed that the documentation furnished in response to the November 21, 2002, Order shall be admitted in evidence. Consequently, these documents will only be identified by author and date as both parties possess these documents.

The kiln operator is responsible for monitoring the kiln from a control room. The kiln operator is seated during a portion of each shift, depending on the frequency of problems arising in the kiln. Monitoring consists of ensuring the coal is properly burned to maintain the correct kiln temperature, and periodically testing the lime product. Working around the outside of the kiln exposes the kiln operator to extreme temperatures reaching as high as 800 degrees Fahrenheit.

The kiln operator's job duties include raking out (pushing or pulling) large chunks of unburned coal ash, called "clinkers" or "ash balls," that can weigh more than 200 pounds. The ash balls are removed by pushing or pulling them with long rods, or pokers, that are passed through an opening in the hot furnace. Clearing the kiln of ash balls requires crouching, pulling, pushing and bending. The job also occasionally requires reaching above the head to loosen lumps of coal from the silo which feeds the coal to the kiln. Finally, the kiln operator is required to lift approximately 80 pounds or more occasionally, 40 pounds frequently, and 20 pounds continuously.<sup>4</sup> (Job Analysis by Catherine Parker, CRC, Oct. 9, 2002).

The stoneman, also known as the kiln operator's assistant, feeds limestone into the kiln, and assists the kiln operator in cleaning and maintaining the kiln. The bagman works at the baghouse Monday through Friday packaging the finished product.

Medical records reflect James Womack is "a very strongly-built" 54 year old. He is 6 feet 2 inches tall and he weighs approximately 270 pounds. (Letter from William J. Morris, M.D., to Gary Henriksen, M.D., at p.2, Mar. 12, 2001). Womack began working for Graymont at the stacker conveyor in 1987. Thereafter, he worked in the baghouse for approximately three years before becoming a stoneman. In 1995, Womack replaced Mike Moats as a kiln operator after Moats left to accept other employment.

**b. Womack's August 1999 MSHA Complaint**

Womack sustained a lower back sprain on Monday, July 26, 1999, as a consequence of "... pulling large chunks of ash over a week period ... ." (Comp. Ex. 1). Womack's back injury was reported to MSHA on August 8, 1999, on an Accident, Injury and Illness Report

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<sup>4</sup> The degree of exertion required of a kiln operator varies from day to day. Estimations regarding the maximum weight a kiln operator was required to lift, pull, or push on a given day varied greatly throughout this proceeding. For example, there was testimony that ash balls can weigh as much as 200 to 500 pounds. (Tr. 386). The exact weight is not material as it is undisputed that Womack's back condition precludes him from performing the full exertional range of activities. Nevertheless, Graymont accommodated Womack from July 1999 until September 2001, during which time Womack worked as a kiln operator despite being on light duty.

Form 7000-1 completed by Dan Hudson, a Graymont foreman. *Id.* Immediately following his back injury, Womack's regular days off were July 27 and July 28, 1999. Womack was on vacation from July 29 through August 1, 1999.

Womack returned to work on August 2, 1999. At 3:00 p.m. on August 4, 1999, Womack suffered burns to his neck, face, back and arms from exposure to heat and dust while attempting to remove a chunk of hot ash from the side kiln door. This incident also was the subject of an MSHA accident report completed by Hudson on August 8, 1999. (Comp. Ex. 2). At the time of Womack's August 4, 1999, burns, Womack also reported his back condition had been exacerbated. On April 12, 2000, L&I assigned Womack a monetary award for his burns consisting of a residual 9% permanent skin impairment. (Letter from Dorie Laubsher, L&I Claims Manager, to James Womack, April 12, 2000). This L&I determination denied Womack's claim for a monetary award for his back condition. *Id.*

Shortly after sustaining his burns, Womack contacted the local MSHA office to complain that Graymont was not providing adequate protective clothing. MSHA responded by inspecting Graymont's kiln facility on August 17, 1999. As a result of its inspection, MSHA issued 104(d)(1) Citation No. 7979030 citing a violation of the mandatory standard in section 56.15006, 30 C.F.R. § 56.15006. This safety standard requires protective clothing and equipment to be worn to prevent exposure to chemical hazards or irritants. (Comp. Ex. 3). While not identifying Womack by name, Citation No. 7979030 noted it was issued because of the burn injuries that occurred over a two day period on August 3 and August 4, 1999. The violation was attributed to Graymont's unwarrantable failure because Plant Manager Ron Eccles and Hudson allegedly "allowed the employee to be placed in harm's way" despite awareness of the potential burn hazard.<sup>5</sup> (Comp. Ex. 3).

In addition to the citation concerning Womack's injuries, 104(d)(1) Order No. 7979031 was issued citing an additional violation of section 56.15006, because Roy Tucker, Womack's stoneman, was observed working near the kiln without wearing protective clothing despite Graymont's knowledge of Womack's recent burns. The violation also was attributed to Graymont's unwarrantable failure. (Comp. Ex. 4). Womack testified that Graymont provided kiln workers with long blue coats, protective gloves and face shields as a consequence of his August 1999 complaint. (Tr. 90-91).

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<sup>5</sup> The term "unwarrantable failure" is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emory Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence.

### **c. The July 2001 Reprimands**

On June 2, 2000, Womack wrote "I am gay" on the hard hat of a fellow employee. Womack testified that Tucker also participated in this "prank." Womack described his behavior as a joke that was not intended to offend. However, Womack conceded it was a "bad joke" and that he would never do it again. (Tr.110). Womack admitted to Hudson and Scott Mork, who was Graymont's production supervisor, that he had written on the hard hat. Womack apologized to the subject employee. Although Womack was admonished by Mork, Womack was not given a written warning at that time.

On July 20, 2000, L&I denied Womack's reconsideration of its April 12, 2000, decision denying a monetary award for Womack's back. (Resp. Ex. 1). Womack sought to reopen his claim by relying on an exacerbation he reportedly suffered on August 1, 2000. (Tr. 132; Resp. Ex. 1). An L&I claim form signed by Womack noted he suffered a sore back on August 1, 2000, although no accident was reported. (L&I Claim # X445116, received Sept. 11, 2000). Womack did not report to work from August 1 through August 3, 2000, on the advice of his doctor. (Henriksen workability report, Aug. 1, 2000). Womack was cleared to return to full duty effective August 21, 2000. (Henriksen workability report, Aug. 11, 2000). Womack's attempt to reopen his claim for a job-related permanent partial disability rating for his back was opposed by Graymont, and it ultimately was denied by L&I.

Womack testified that "everything went pretty much smoothly along" until he received two letters of reprimand in July 2001. (Tr. 95-96). Since hurting his back in July 1999, Womack had been taking Naproxin, Daypro or Flexeril, as needed, for pain, and Hytrin for high blood pressure. Womack asserted his medicine did not interfere with the performance of his job. In this regard, Womack stated he did not experience any fatigue or dizziness. (Tr. 99-100, 104-05). Mork indicated Womack was performing his regular job within his 40 pound exertional restrictions. (Tr. 498-99).

Womack began his regular weekly shift on June 28, 2001. He worked six consecutive days from June 28 through July 3, 2001, working 12 hour shifts the first three days, and 8 hour shifts the next three days. Womack was scheduled to work on July 4, 2001. However, he failed to report to work on the fourth of July holiday. Womack stated that on July 3, 2001, he told kiln operators Howard Smith and Duane Givens that "[he] didn't think [he] would be in on the fourth of July." (Tr. 122). Womack testified he did not tell Smith or Givens why he decided he was not coming to work. (Tr. 122).

Womack explained, unconvincingly, "[b]ecause my back was flared up and it was kind of sore, so I figured, you know, what the heck, I'll just take the fourth of July off." (Tr. 122). Womack felt it was not necessary for him to go to work because the kiln had been dismantled for repairs. Mork testified that on July 4, 2001, a new burner management system was being installed by outside contractors. Mork stated it was particularly important for kiln operators to be present during this installation so the kiln could be monitored as it was turned on and off. (Tr. 454).

Womack stated that he asked his wife to call Graymont on July 4, 2001, to notify it that he was taking sick leave. Womack stated his wife telephoned but the call was not answered. Mork testified Womack told him his wife forgot to call in. (Tr. 454, 456). The kiln is staffed 24 hours per day. It is company policy for employees to telephone the main office number when no one answers the telephone in the kiln operator's control room. If the main office telephone is not answered, the call is transferred to a paging service where a message can be left. (Tr. 451-52). It is important for kiln operators to call in sick prior to their shift so their shift can be covered by another kiln operator. (Tr. 461).

Womack had a scheduled day off on July 5, 2001. Womack returned to work on July 6 and worked through July 9, 2001, without incident. After completing his shift on July 9, 2001, Womack was directed to Hudson's office where he met Mork, and union shop steward Steve Charest. Mork informed Womack that he was going to receive two letters of reprimand. However, since Plant Manager Ron Eccles was on vacation, the two reprimand letters were not given to Womack formally until July 23, 2001. (Tr. 139-40).

The first reprimand was dated June 9, 2000. (Comp. Ex. 7). It concerned the June 2, 2000, "I am gay" hard hat incident. It cautioned Womack against any further incidents of graffiti or harassment of fellow employees. Graymont asserts the reprimand was placed in Womack's file on June 9, 2000, although it was not given to Womack until one year later due to an oversight.

The second reprimand, dated July 5, 2001, concerned Womack's July 4, 2001, absence. (Comp. Ex. 6). It noted Womack did not notify plant supervision that he would not be working on the fourth of July although Womack admitted he had decided in advance not to work on the fourth of July holiday.<sup>6</sup>

At the hearing, in support of his discrimination complaint, Womack contended the reprimand letters were motivated by his August 1999 hazard complaints. Womack also asserted his reported aggravation of his back condition in August 2000 was an additional motivating factor because Graymont opposed Womack's L&I claim for a permanent partial disability rating. (Tr. 130-138). However, Womack failed to identify any protected activity that occurred within a reasonable time period of the July 2001 reprimand letters.

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<sup>6</sup> The July 5, 2001, reprimand also noted Womack was absent from work on March 21 and March 22, 2001, without approval. (Comp. Ex. 6). At the hearing, Graymont stipulated that it would expunge all reference to Womack's March 2001 absences from Womack's personnel records. (Tr. 113-16, 400).

**d. Womack's August 3, 2001, Grievance**

On August 3, 2001, Womack filed a grievance with Local No. 599 of the Teamsters Union challenging his two reprimand letters. (Resp. Ex. 2). In his grievance, Womack alleged his wife attempted to call the kiln department on the fourth of July, but no one answered the telephone. At the hearing, Womack conceded it was his responsibility to contact Graymont if he was not reporting to work, and that Graymont was not contacted. (Tr. 281).

Despite admitting at trial that he told co-workers he did not intend to work on the fourth of July, in his written grievance Womack alleged:

. . . On the 4<sup>th</sup> of July 2001 my neck and back [were] flared-up from working four twelve hour shifts. I took my medic[ine] as p[re]scribed by my doctor for pain. ( Darvocet, Musc[le] Relaxers, Darpro) *The medication made me drows (sic), and unable to perform[ ] my duties. . . .*

(Emphasis added). (Tr. 122; Resp. Ex. 2). Although Womack complained during medical examinations that his physical limitations interfered with his job performance, the written grievance was the first time Womack specifically alleged experiencing side effects that prevented him from reporting to work.

Womack's attempt to mitigate his unauthorized absence by claiming he was drowsy is notable for its transparency. Mork, who has worked with Womack since May 1999, testified there was no evidence that medication had impaired Womack's ability to perform his job. (Tr. 475, 498). Womack never received written warnings for his job performance and, with the exception of Womack's absence for several weeks for job-related injuries in 1999, Womack's attendance in 1999, 2000 and 2001 was very good. (Tr. 53; Comp. Exs. 5, 8, 22). In this regard, Graymont's Counsel represented ". . . there was nothing that indicated [to Graymont officials] that [Womack's] drugs had any effect . . . ." (Tr. 490).

Moreover, the company knew Womack's excuse was not credible. In its July 5, 2001, reprimand, the company stated, "[y]ou also said you knew in advance you would not come [to work] and did not request leave on that day." (Comp. Ex. 6). Mork testified that Womack had admitted during the July 9, 2001, meeting that ". . . Womack knew a year before that [he] wasn't going to be working on the fourth of July." (Tr. 456). Several other kiln operators also told Mork that Womack had told them he was not planning on working on July 4<sup>th</sup>. (Tr. 458; Comp. Ex 17). Fellow kiln operator, Harold Givens, testified Womack told him "two or three days" before the fourth of July that he was not planning on working that day. (Tr. 409).

Succinctly put, Mork testified, “[we] just didn’t believe him.” (Tr.458). Yet, this transparent excuse, that medication made Womack drowsy *only* on the fourth of July holiday when Womack was required to work, has set in motion a series of events that has “spun out of control.”<sup>7</sup>

### **III. Further Findings Of Fact - Womack’s Suspension and Termination**

#### **a. The Five Day Suspension**

Despite having received L&I reports identifying Womack’s medicine, Graymont contends that it initially became aware that Womack was on medication on August 3, 2001, after it received his grievance. On August 7, 2001, Dennis Wakin, Graymont’s Assistant Plant Manager, requested Womack to identify his medicine. Womack did not comply.

Wakin repeated his request on August 8, 2001. Womack again was unresponsive. On August 29, 2001, Eccles, citing the company’s workplace safety drug policy,<sup>8</sup> informed Womack that he would be suspended without pay effective August 31, 2001, if he did not identify his medication. On August 31, 2001, Womack refused to comply until he could obtain “the correct information” from his doctor. (Tr. 144; Letter from Womack to Eccles, Aug. 31, 2001). As a result of his failure to comply, Womack was suspended without pay for five days from August 31 through September 4, 2001.

On September 5, 2001, Womack provided a statement from Gary Henriksen, his treating physician. Henriksen stated Womack was taking Flexeril Tabs, 10 mg., throughout the day, and Darvocet-N 100 Tabs at night for neck and back pain. Henriksen opined:

The Flexeril may cause some drowsiness if he requires them frequently. The Darvocet may also cause drowsiness, but this should not persist past his usual sleep period.

(Comp. Ex. 9).

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<sup>7</sup> At the outset of his opening statement, Graymont’s counsel insightfully stated:

I want to give an outline of the time lines and things that went on in this case. We’re here because two warnings, deservedly given, were presented to Mr. Womack, and since then this thing has spun out of control.

(Tr. 37).

<sup>8</sup> Section 4.1 of the company’s workplace safety guidelines provides that employees who are adversely affected by their use of legal prescription or non-prescription drugs are prohibited from performing their jobs. (Resp. Ex. 10).

Having received Henriksen's statement, Eccles advised Womack that he could temporarily return to work at 10:00 p.m. on September 5, 2001. Womack's return was "subject to the [medication] list being reviewed by a qualified doctor assigned by the company." (Resp. Ex. 12). Significantly, Womack's return was conditioned solely on a review of his medication, rather than on an evaluation of his physical condition.

**b. Womack's August 7, 2001 MSHA Complaint**

Section 103(g)(1) of the Act, 30 U.S.C. § 813(g)(1), enables a miner to request an immediate MSHA inspection if he believes that a violation of a mandatory health or safety standard has occurred. Section 103(g)(1) further provides that the mine operator shall be notified that a hazard complaint has been filed no later than at the time of the inspection.

On August 7, 2001, Romona Womack, James Womack's wife, filed a section 103(g) hazard complaint on behalf of her husband.<sup>9</sup> Mrs. Womack indicated that her husband received second degree burns from lime, and she wanted to know if limestone exposed him to chemical hazards or carcinogens. (Comp. Exs. 13, 14, 19). The complaint was filed approximately two weeks after Womack was reprimanded. It is not clear whether the complaint was communicated before Graymont first insisted that Womack identify his medication.

In response to Womack's complaint, MSHA conducted a hazard investigation from August 21 through August 30, 2001, during which time 21 health samples were taken and two citations were issued. (Comp. Ex. 19). As a consequence of the investigation, Citation No. 7999440 was issued on August 28, 2001, citing a non-significant and substantial (non-S&S) violation of the provisions of section 56.20011, 30 C.F.R. § 56.20011, because hazard signs were not posted to warn of asbestos materials on the baghouse piping in the mill area. (Comp. Ex. 11). A violation is designated as non-S&S if it is unlikely that the violation will contribute to an illness or injury. *Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In addition, Citation No. 7999442 was issued for an alleged violation of section 103(a) of the Act, 30 U.S.C. § 813(a), after MSHA inspectors learned Mork had reassigned a worker from his normal duties to prevent an adverse dust sampling result during the investigation. (Tr. 509; Comp. Ex. 12). Section 103(a) prohibits mine operators from interfering with an MSHA inspection or investigation.

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<sup>9</sup> Graymont asserts Romona Womack's August 7, 2001, hazard complaint is not protected activity because it was not communicated directly to MSHA by James Womack. (Resp. Br. at p.25, fn.25). Section 105(c)(1) prohibits a mine operator from discriminating against a miner because "... such miner, [or] representative ... has filed or made a complaint under or related to this Act ... ." Obviously, Mrs. Womack was acting in a representative capacity when she complained to MSHA on behalf of her husband. Consequently, her complaint is deemed to be the protected activity of James Womack. Hereinafter, Mrs. Womack's complaint also will be referred to as "Womack's complaint."

**c. Womack's September 21, 2001 Suspension**

After providing his list of medications, Graymont permitted Womack to work from September 5 through September 20, 2001. On September 21, 2001, Womack attended a meeting with Wakin, Tom Wakefield, who was Wakin's superior, and Charest. Womack was advised that he was suspended immediately because his medication prevented him from safely performing his job duties. Womack was told that the suspension was for an indefinite period until Womack changed his drug regimen. (Tr. 144).

In a letter dated September 21, 2001, Eccles formally advised Womack that he was suspended without pay because Dr. William Carr, a physician selected by the company, had evaluated the medication list furnished by Henriksen and determined it was "not appropriate" for Womack to perform four work activities required by his job. Carr concluded it was inappropriate for Womack to: (1) work around rotating equipment in a high temperature environment; (2) work with acids; (3) walk up a spiral staircase; and (4) pull ash balls from the kiln grizzly using an 8 to 10 foot poker. (Comp. Ex. 10). Eccles noted the suspension would remain in effect "until this situation can be resolved." *Id.*

On September 24, 2001, Womack advised Eccles that Henriksen refused to take him off his prescribed medication. (Resp. Ex. 13). Rather than use sick leave, Womack filed for L&I compensation that was awarded effective September 21, 2001. (Tr. 145).

**d. Womack's October 22, 2002, Termination**

Womack received L&I compensation for the period September 21, 2001, through July 8, 2002, when L&I terminated his benefits after it learned he was no longer taking medication. (Resp. Ex. 9). On July 18, 2002, Womack informed Graymont that he had been released from Henriksen's care and that he was no longer taking muscle relaxants. (Resp. Ex. 18, p.1). Womack attached a July 16, 2002, statement from Henriksen that Womack was last prescribed a muscle relaxant on April 9, 2002. Womack also provided a medical release clearing him for light duty. (Resp. Ex. 18, p.2). However, it is not clear whether the medical release was current because it was undated and referenced a previous workability report dated July 12, 2001. (Resp. Ex. 18, p.3).

On July 29, 2002, Wayne J. Wagner, Graymont's Vice President and General Manager, acknowledged receipt of Womack's July 18, 2002, request for reinstatement. However, Wagner noted Womack had failed to provide a current workability report. To determine if the company could offer Womack an accommodation, Wagner requested Womack to provide Wakin with a detailed physician's description of Womack's current work restrictions. (Resp. Ex. 19).

On August 13, 2002, Womack's union representative provided Wakin with Henriksen's August 9, 2002, workability report. The report provided diagnoses of lumbosacral spondylosis, and cervical, thoracic, and lumbosacral disc degeneration. These diagnoses were consistent with

the diagnoses provided to the company since Womack initially injured his back in July 1999. Henriksen's report stated that Womack "... is on NO medications that will impair his balance, judgement, or reaction time." The report also indicated that Womack was restricted from frequent changes of position as well as kneeling, squatting or crawling. Finally, Henriksen indicated Womack was limited to lifting, pulling or pushing no more than 35 pounds. (Comp. Ex. 20).

Wakin responded to the August 9, 2002, workability report on September 4, 2002. Wakin stated he needed "more specificity about the nature and possibility of modifications that may be required to allow [Womack] to perform the essential functions of [his] position." (Comp. Ex. 21, p.1). Wakin attached a description of the essential functions of the kiln operator job for Womack's physician to consider. The essential functions included pulling or pushing "ash balls" weighing up to 150 pounds from the kiln using 8 to 10 foot pokers weighing 20 pounds, and lifting upwards of 80 pounds. (Comp. Ex. 21, p.3).

Upon completion of the hearing on October 3, 2002, Womack had not responded to the company's September 4, 2002, request for a more detailed physical assessment. Despite having Henriksen's July 16, 2002, statement and his August 9, 2002, workability report, Graymont continued to maintain that the information provided by Henriksen was insufficient. The record was left open for Womack to provide Graymont with additional information.

Womack provided an additional statement from Henriksen dated October 7, 2002. (Henriksen memorandum, Oct. 7, 2002). Henriksen opined that Womack was capable of performing moderate exertional activity. Consistent with the medical reports Henriksen previously had provided to Graymont, he recommended that Womack should not lift, pull or push more than 35 pounds. Henriksen expressed concern if Womack were required to push or pull a 150 pound ash ball with a 10 foot poker weighing 20 pounds, an activity Graymont described as an essential function of the kiln operator job. Henriksen opined that using a poker for such an activity would make Womack's cervical and thoracic spine the "pivot point," "dramatically exceed[ing] the 'Moderate' activity level." *Id.*

Graymont asserts that, to assist it in determining whether to reinstate Womack, it contracted with a certified rehabilitation counselor to analyze and identify the essential functions of the kiln operator position. The required exertional activities identified in the job analysis included removing ash balls from the kiln weighing up to 200 pounds and lifting 80 pounds or more occasionally, 40 pounds frequently and 20 pounds continuously. (Job Analysis by Catherine Parker, CRC, Oct. 9, 2002).

Based on the job analysis, Graymont concluded that Womack could not perform the essential functions of his job "with or without a reasonable accommodation." Consequently, Womack was advised that he was administratively separated from his employment effective October 22, 2002. (Letter from Wakin to Womack, Oct.18, 2002).

## **IV. Further Findings and Conclusions**

### **a. The Jurisdictional Issue**

Section 105(c) of the Act provides that a discrimination complaint can be prosecuted before this Commission by the Secretary on behalf of the complaining miner under section 105(c)(2), or it can be brought directly by the miner under section 105(c)(3). A condition precedent to a miner's right to prosecute his complaint on his own under section 105(c)(3) is that the Secretary must determine, upon her investigation, that the provisions of section 105(c) have not been violated.

MSHA's November 8, 2001, investigation report reflects the Secretary considered adverse actions complained of by Womack during the period July 2001, when his disciplinary letters were received, through September 21, 2001, when he was placed on extended leave without pay. (Comp. Ex. 19). However, MSHA's investigation did not address Womack's October 22, 2002, termination as it occurred almost one year after its investigation was completed. Womack's termination also occurred ten months after Womack filed his December 14, 2001, complaint with this Commission.

Although a jurisdictional objection has not been raised, jurisdiction is always in issue. The question arises whether the statutory prerequisites in section 105(c)(3) have been met to permit Womack to amend his discrimination complaint to include his termination, even though his termination was not investigated by the Secretary.

The Commission has noted that Congress intended section 105(c) to be broadly construed to provide maximum protection for miners exercising their rights under the Act. *Sec'y of Labor on behalf of Dixon v. Ponticki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997), citing *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (February 1994) ("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.'") (quoting S. Rep. No. 95-181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)). Thus, discrimination complaints must be allowed to encompass all related aggrieved actions in an efficient, rather than piecemeal, fashion. In this regard, the Commission has concluded that "it is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit" of the Commission's jurisdiction. *Ponticki*, 19 FMSHRC at 1017.

In the instant case, Womack's five day suspension and his September 21, 2001, indefinite suspension were considered during the Secretary's investigation although they occurred *after Womack filed his initial discrimination complaint* on August 29, 2001. These adverse actions were proper subjects of the Secretary's investigation since they allegedly were motivated by Womack's August 7, 2001, hazard complaint, the principal protected activity underlying Womack's discrimination complaint.

Womack alleges his October 22, 2002, termination also was motivated by his August 7, 2001, MSHA complaint. (Tr. 559). A continuing series of post-complaint adverse actions alleged to have been motivated by protected activity previously investigated by the Secretary is a proper subject in a 105(c)(3) proceeding. 19 FMSHRC at 1017. Any other interpretation would result in endless litigation, not to mention interminable MSHA investigations. Because Womack's protected activity was investigated by the Secretary pursuant to section 105(c), any adverse actions allegedly stemming from that protected activity come within "the permissible ambit" of the Commission's jurisdiction. *Id.*

Finally, Womack's termination cannot be disassociated from his September 21, 2001, suspension that was a subject of the Secretary's discrimination investigation. Accordingly, Womack's December 14, 2001, Commission complaint may be amended to include his October 22, 2002, termination.

#### **b. Analytical Framework**

Section 105(c) of the Act prohibits discriminating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted* in Senate Subcomm. on Labor, Committee on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). It is Congress' intent that, "[w]henver protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

Womack, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Womack must establish that he engaged in protected activity, and the aggrieved action was motivated, in some part, by that protected activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Graymont may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Graymont may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

In determining whether a mine operator's disciplinary actions run afoul of the statutory protection accorded to miners, the scope of a discrimination proceeding is limited to whether the operator's reported rationale for the adverse action is a pretext to mask prohibited retaliation for protected activity. In this regard, the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification.

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

*Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (November 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission subsequently further explained its analysis as follows:

[T]he reference in Chacon to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgement or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed."

*Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

### **c. Graymont's Knowledge of Womack's Protected Activity**

The relevant protected activities are Womack's August 1999 and August 2001 hazard complaints and the filing and prosecution of Womack's discrimination complaint. Graymont denies any knowledge of Womack's protected activities until September 4, 2001, when MSHA advised Graymont that Womack's discrimination complaint had been filed.

Shortly after sustaining significant burns to his neck, back and arms on August 4, 1999, Womack complained to MSHA that Graymont was not providing protective clothing to employees working near the kiln. As a consequence of Womack's complaint, MSHA investigated Graymont's kiln procedures. On August 17, 1999, MSHA issued Citation No. 7979030 and Order No. 7979031 charging Graymont for its failure to provide protective clothing to Womack and Tucker, respectively. (Comp. Exs. 3, 4). Both citations made reference to Womack's August 4, 1999, burn injuries. Citation No. 7979030 noted the foreman "was aware of the potential burn hazard on August 4, 1999, and allowed the victim [Womack] to be placed in harm's way." (Comp. Ex. 3). Both citations charged Eccles and Hudson with unwarrantable conduct because of their reported longstanding failure to take remedial action despite "previous similar experiences over many years." *Id.*

There are nine employees assigned to the kiln department. The Commission has held that the small size of a mine supports an inference that an operator was aware of a miner's protected activity. *Morgan v. Arch of Ill.*, 21 FMSHRC 1381, 1391 (December 1999) (citations omitted). Moreover, the information in the citations about a history of exposure to burn hazards, and that the burn victim was allowed to remain in harm's way in the days preceding his injuries, obviously was provided by Womack. (Comp. Ex. 3).

Nevertheless, Mork testified he was unaware that Womack had complained to MSHA. Mork asserted he believed the inspection occurred as a result of the accident report the company filed with MSHA. (Tr. 448). Accident reports involving injuries only result in inspections if there is a fatality, or, if there is a reasonable likelihood that the victim will succumb to his injuries. 30 C.F.R. §§ 50.2(h), 50.10. Consequently, Mork's assertion that he was unaware that Womack had complained simply is not credible. Graymont is thus charged with knowledge of Womack's August 1999 complaint.

On August 3, 2001, Graymont received Womack's union grievance. Womack claimed Graymont had violated MSHA rules. Womack's grievance contained the vague assertion that, "I have been discriminated and retaliated and harnessed (sic) for being a WHISEL (sic) BLOWER!" (Resp. Ex. 2, p.3).

On August 7, 2001, Mrs. Womack communicated her safety concerns about her husband's work environment to MSHA. Her complaint resulted in a hazard investigation that began on August 21, 2001. The investigation was conducted under section 103 (g)(1) of the Act. Section 103(g)(1) requires MSHA to notify the mine operator, no later than the beginning of the inspection, that a complaint has been filed. Moreover Citation No. 7999442, issued

on August 30, 2001, explicitly stated that MSHA was “conducting a hazard complaint investigation.” (Tr. 157-58; Comp. Ex. 12). Despite Wakin’s assertion that Graymont did not know the inspection was generated by a complaint, the evidence demonstrates Graymont knew that a complaint had been filed as early as August 21, 2001. (Tr. 527-28).

Like Womack’s August 1999 complaint, the August 2001 complaint resulted in serious charges against management. Mork was charged with interfering with MSHA’s investigation because he allegedly reassigned an employee to avoid adverse dust samples. While Graymont had reason to suspect Womack was the informant in view of Womack’s recent admission of whistle blowing in his grievance, the evidence suggests Graymont was uncertain. (Tr. 450, 525-26). On August 29, 2001, Mork asked MSHA inspector Gary Tallman to identify the complainant, but he refused. On September 4, 2001, during the close-out conference, Mork again sought to ascertain the name of the informant. (Tr. 478-80; Comp. Ex. 15). Once again, MSHA explained that the complainant’s identity was confidential. (Tr. 450).

Wakin admitted Graymont ultimately learned Womack was the informant on September 4, 2001, shortly after the close-out conference, when MSHA advised Graymont that Womack had filed a discrimination complaint. (Tr. 526-28; Comp. Ex. 17). Thus, on balance, the evidence reflects Graymont is charged with knowledge of Mrs. Womack’s hazard complaint, as well as Womack’s discrimination complaint, as of September 4, 2001.

#### **d. The Disciplinary Letters**

Womack alleges his July 2001 reprimands were motivated by his August 1999 MSHA complaints. The Commission has stated that an indicia of discriminatory intent is a coincidence in time between the alleged protected activity and the adverse action. *Chacon*, 3 FMSHRC at 2510. Womack’s 1999 MSHA complaints are too remote in time to have motivated Graymont’s discipline almost two years later.

Moreover, participation in protected activity, and management’s knowledge of such activity, does not insulate a miner from the consequences of his own misconduct. Womack’s July 4<sup>th</sup> absence was unauthorized and his conduct was inexcusable. Womack knew in advance that he intended to take the fourth of July holiday off, yet he did not seek the company’s approval. It is reasonable to infer that Womack believed Graymont would deny leave because it would be unable to cover his shift with other personnel on the holiday.

Womack’s litany of excuses - that he thought he wasn’t needed because the kiln was being repaired, that his wife was supposed to call but she forgot, that his wife did call but no one answered the telephone, and, finally, the belated excuse that he was too drowsy to come to work because of his medicine - are lacking in credibility. Womack was absent without leave on July 4, 2001. The business justification for enforcing the company’s policy against unauthorized absence is self-evident. Under such circumstances, Womack has failed to demonstrate that his reprimand for his unauthorized leave was, in any part, motivated by his protected activity. Therefore, **Womack’s discrimination complaint concerning the July 5, 2001, reprimand letter is denied.**

Similarly, the hard hat incident that resulted in the embarrassment, if not the harassment, of a fellow employee was likewise inexcusable. The disparate treatment charged by Womack because a co-conspirator was not disciplined by Graymont, even if true, does not absolve or otherwise mitigate Womack's conduct.

Graymont's failure to provide Womack with a written disciplinary letter for more than one year after the incident also does not excuse Womack's conduct. A company has a legitimate interest in ensuring that its employees are not harassed by fellow workers. While the one year delay may raise procedural issues for resolution in a union grievance, such issues are beyond the scope of this proceeding. Accordingly, Womack's has failed to demonstrate that the reprimand dated July 9, 2000, belatedly given to him on July 23, 2001, was motivated, in any part, by his protected activity. Accordingly, **Womack's discrimination complaint regarding the reprimand letter dated July 9, 2000, is denied.**

**e. The Five Day Suspension -  
Womack's Medication**

Graymont's contention that Womack's "revelation" that he was taking pain medication raised serious safety concerns is suspect. (Resp. Br. at p.10). It is difficult to imagine that Graymont did not realize Womack was taking pain medication or muscle relaxers until August 2001. Graymont knew Womack was on "restricted duty" that limited him to lifting no more than 40 pounds. (Tr. 499). Graymont also knew Womack was entitled to L&I benefits for reimbursement of medical expenses. It is undisputed that Graymont routinely received L&I notices identifying Womack's medication. In this regard, Mork testified that after Womack filed his grievance, ". . . we went back and looked through the L&I records to find out what kind of medication he was on." (Tr. 486-87). Moreover, Eccles provided a list of prescribed medications obtained from Womack's personnel records for review by a company physician. (Chart Review from William Carr, M.D., Sept. 14, 2001, at p.1).<sup>10</sup>

The sincerity of Graymont's alleged serious safety concerns is further eroded by its own admissions and conduct. Graymont had never known Womack to have been dizzy or otherwise adversely affected by medication while at work. (Tr. 483, 490, 498-500). Graymont did not believe Womack had been adversely affected by medication on the fourth of July. (Tr. 458). Most perplexing, Graymont allowed Womack to work three consecutive 12 hour shifts, from August 23 through August 25, 2001, during a period when it reportedly had serious concerns regarding the potential hazard posed by Womack's medication. (Comp. Ex. 8).

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<sup>10</sup> Dr. Carr's September 14, 2001, Chart Review was proffered by Graymont and marked for identification as Resp. Ex. 21. Womack objected to its admission because of Carr's references to medications other than Flexeril and Darvocet, the only medicine identified by Henriksen. Counsel for Graymont withdrew the exhibit. (Tr. 541-46). Both Womack and Graymont submitted Carr's Chart Review in response to the post-hearing November 21, 2002, Order. Therefore, it is part of the evidentiary record. *See* fn.3 *infra*.

Despite its disbelief that Womack had suffered from drowsiness on the fourth of July, an absence of any known history of side effects, and Womack's 12 hour shifts, Graymont continued to press Womack for full disclosure. Womack continued to refuse to identify his medication because he feared Graymont's motives. On September 4, 2001, Womack sought Henriksen's advice. Henriksen noted:

Told Patient that it was up to him whether or not the medication he was taking were known to his supervisor, but that the law requires his claims manager to have access to this data in any event, that there was nothing particularly embarrassing (sic) or immoral or anything in his use of these medications, and *I really didn't see any harm in the release of that info*, but the choice of course was his.

(Emphasis added). (Henriksen encounter notes, September 4, 2001). At that time, Henriksen also noted Womack was "cleared for light duty." *Id.*

Having failed to respond to Graymont's repeated requests, Womack was suspended without pay from August 31 through September 4, 2001. After furnishing the requested information from his physician, Womack was reinstated on September 5, 2001, subject to further review of Womack's medication by a company doctor. (Comp. Ex. 9).

In resolving whether the five day suspension was motivated by protected activity, it is significant that the medication list was initially requested on August 7, 2001, *before* any knowledge of relevant protected activity can be attributed to Graymont. Womack's 1999 MSHA complaints were too remote in time to have motivated Graymont. Given the totality of circumstances, it is likely that Graymont's suspension was influenced more by the lack of candor and other accusations lodged against the company in Womack's union grievance, than by a concern for his safety.<sup>11</sup> Although retaliation in response to Womack's union grievance is not actionable under the Act, a history of retaliatory conduct is relevant when adverse actions, such as Womack's long term suspension and termination, closely follow protected activities.

Regardless of whether Graymont was motivated by a desire to retaliate, or a sincere concern for Womack's well being, it was Womack who raised the issue of side effects. The company's workplace safety guidelines prohibit employees who are adversely affected by their medication from performing their jobs. (Resp. Ex. 10). In the final analysis, Womack was suspended for refusing to respond to the company's request that he identify his medication, not because of the effects of his medication. While Graymont's subsequent actions validate Womack's reluctance to cooperate, his failure to accede to the company's repeated requests, at that time, provided an independent business justification for the company's disciplinary action. Consequently, in the absence of any temporal protected activity, **Womack's discrimination complaint with respect to his five day suspension shall be denied.**

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<sup>11</sup> Womack's grievance included charges of harassment, defamation of character and civil rights violations. (Resp. Ex. 2).

f. The September 21, 2001, Suspension -  
Potential vs. Actual Side Effects

As noted above, the evidence reflects this litigation was spawned by Womack's August 3, 2001, union grievance and the repercussions that followed. As suggested by Graymont, Mrs. Womack's MSHA complaint may have been in retaliation for her husband's disciplinary letters. (Resp. Br. at p.8). However, the focus in this proceeding is on whether Graymont's adverse actions were in response to Mrs. Womack's complaint. Retaliatory conduct by a mine operator is relevant in determining whether the mine operator's asserted motivation for the challenged actions is as claimed. Womack was suspended only two weeks after Graymont admittedly learned of Womack's recent protected activity. Womack was terminated only two weeks after the hearing.

Thus, Womack's September 21, 2001, suspension must be analyzed to determine if it was, in any part, in retaliation for Womack's protected activity. If the protected activity was a contributing factor, Graymont can affirmatively defend by demonstrating that it was also motivated by considerations unrelated to protected activity, and, that it would have taken the adverse action for these independent considerations alone. *Robinette*, 3 FMSHRC at 818 n.20.

Womack was temporarily reinstated on September 5, 2001, after he provided his physician's statement concerning Flexeril and Darvocet. In assessing the potential side effects, Henriksen stated, "[t]he Flexeril *may* cause *some* drowsiness *if* he requires them frequently (emphasis added)." Henriksen also stated, "[t]he Darvocet *may* also cause drowsiness, *but* this *should not persist* past his usual sleep period (emphasis added)." (Comp. Ex. 9).

Henriksen's reference to potential side effects, regardless of their likelihood, reportedly concerned Graymont. On September 5, 2001, Eccles advised Womack that he could return to work "subject to [Womack's medication] list being reviewed by a qualified doctor assigned by the company." (Resp. Ex. 12). Significantly, Eccles concerns were limited to the effects of Womack's medication. By allowing Womack to return to work pending review of his medication, without regard to his physical condition, Graymont implicitly admitted that Womack's back condition did not preclude him from performing his duties. In fact, Graymont did not assert Womack's exertional limitations precluded him from performing his duties until his October 22, 2002, termination.

On September 14, 2001, Henriksen's information was reviewed by William Carr, an orthopedic surgeon selected by Graymont. (Carr Chart Review). Carr noted that pain medication "can affect different people in different manners but definitely has been known to cause mild to moderate dizziness in patients." (Carr Chart Review, at p.2). As an illustration, Carr explained that the *Physician's Desk Reference* (PDR) notes that Hytrin can cause fainting. Hytrin commonly is prescribed for high blood pressure and prostate conditions. According to Carr, the PDR notes that, "21% of the patients [on Hytrin] experienced one or more of the following: dizziness, hypotension, postural hypotension, syncope and vertigo." *Id.* On September 14, 2001, Womack was not taking Hytrin, although it previously had been prescribed.

On September 21, 2001, Eccles advised Womack that Carr had evaluated Womack's medication and determined it was "not appropriate" for Womack to work around a hot kiln. (Comp. Ex. 10). Apparently, Carr's opinion was based on Womack's use of Flexeril, as Henriksen opined Darvocet would not affect Womack "past his usual sleep period." (Comp. Ex. 9). Although Flexeril can cause drowsiness, no medical evidence has been presented regarding the nature, extent or frequency of the side effects caused by Flexeril. Womack was advised that his suspension would remain in effect "until this situation can be resolved." (Comp. Ex. 10). Despite this representation, Womack has been terminated although he is no longer on medication.

Obviously, precautions should be taken when employees who operate hazardous equipment are prescribed medication. However, in suspending Womack, Graymont, in effect, *presumes* that *all employees* who operate machinery while taking medication with *potential* side effects are incapable of safely performing their jobs. The implausible nature of Graymont's presumption is illustrated by Carr's Hytrin example from which it can be deduced that 79% of people taking Hytrin do not experience dizziness or other serious side effects. (See Carr Chart Review, at p.2).

Moreover, the workplace safety rule Graymont relies on only prohibits "*employees adversely affected* in their use of any legally obtained drug" from performing their regular job. (Emphasis added). (Resp Ex. 10). Even this workplace rule recognizes that employment decisions involving potential side effects should be made individually, based on whether the employee *actually is* experiencing adverse side effects.

As previously emphasized, Graymont was unaware of any relevant history of adverse side effects. Graymont did not believe Womack experienced adverse side effects on July 4, 2001. Finally, Graymont did not seek to determine whether Womack was currently experiencing adverse side effects. It even allowed Womack to work overtime while it was "reviewing" his medications. In this context, in the absence of evidence of actual side effects, Graymont is left with Carr's report that Flexeril "certainly affects different people in different manners" as its justification for Womack's suspension. (See Carr Chart Review, at p.1). It is highly unlikely that Graymont heavily relied on Carr's Chart Review of Womack's medication as claimed.

It is noteworthy that while Graymont was considering the impact of Womack's medication on his ability to work, it learned that Womack was charging the company with discrimination under the Act. Womack's discrimination complaint noted that he was responsible for MSHA's unwarrantable failure charges against Eccles and Hudson in August 1999, and MSHA's interference charges against Mork in August 2001. In view of Womack's recent discrimination complaint, it is unreasonable to conclude that the company was compelled to suspend Womack based solely on the superficial information provided by Carr. Rather, the credible evidence strongly suggests that Womack's September 21, 2001, suspension was at least partially in retaliation for the numerous charges Womack had brought against the company that by now included Womack's protected discrimination complaint.

However, the analysis does not stop there. The company maintains that even if it was motivated by Womack's protected activity, there was a medical basis for the suspension. It is not surprising that after Womack was suspended, he was awarded L&I compensation based on Graymont's decision that the treatment of Womack's job-related back injury prevented him from working. Despite Graymont's questionable rationale, a medical finding that Womack was incapable of performing his job duties provides an independent business justification for Womack's September 21, 2001, suspension, regardless of his protected activity. Accordingly, **Womack's discrimination complaint with respect to his September 21, 2001, indefinite suspension shall be denied.**

**g. Womack's Back Condition**

Womack initially sprained his back after pulling large chunks of ash during the week ending on July 26, 1999. Womack suffered burn injuries at work on August 4, 1999. At that time, Womack complained of exacerbating his back sprain. Following the August 4, 1999, incident, Womack was absent from work and eligible for L&I benefits for approximately seven weeks from August 4 through September 11, 1999. (Tr. 92; Comp. Ex 5). L&I ultimately rated Womack's burns as a 9% permanent skin impairment. Unlike his burn injuries, L&I has declined to rate Womack's back condition as a job-related permanent partial disability. (Tr. 132; Resp. Ex. 1).

Womack was initially seen by Dr. Arthur Moritz on July 26, 1999, with complaints of progressive right upper back pain of one month's duration. Womack attributed the pain to a poor grade of coal that caused him to rake ash from the kiln more frequently with greater exertion. Womack denied any history of a lower back injury, although he reported a prior cervical strain. (Moritz examination notes, July 26, 1999). A follow-up examination on August 5, 1999, noted mild degenerative back disease. However, there was no evidence of superimposed acute bony changes as current X-rays were consistent with past films. The examination findings were consistent with a lumbago/lumbar ligamentous strain. (Moritz memorandum, Aug. 5, 1999). At that time, Womack reported Naprosyn and Flexeril had provided some relief. (Moritz examination notes, Aug. 5, 1999). Moritz noted, although Womack stated he was feeling better, Womack's "wife is worried about the wear and tear he has received and the fact that he still has pain on lifting." *Id.* Womack was subsequently seen on August 12, 1999, at which time Moritz expressed optimism that Womack would make a full recovery within two to four weeks. (Moritz memorandum, Aug. 12, 1999). The diagnosis was lumbosacral sprain. *Id.*

On August 26, 1999, Moritz noted Womack had suffered a set back with a recurrence of pain during physical therapy. Moritz ordered a CT scan and diagnostic work up. (Moritz memorandum, Aug. 26, 1999). The diagnostic radiographic studies "failed to show serious lumbosacral disc disease . . ." although underlying degenerative joint disease was identified. (Moritz memorandum, Sept. 2, 1999). Moritz released Womack for light duty with restrictions including lifting no more than 30 pounds. Moritz anticipated the restrictions would last for two months. *Id.* Womack was prescribed Hytrin for a mildly elevated PSA. (Moritz progress notes,

Sept. 24, 1999). On October 8, 1999, Plant Manager Ron Eccles advised L&I that benefits should cease because Womack returned to “full duty” on September 13, 1999. (Letter from Eccles to L&I, Oct. 8, 1999).

X-rays of the lumbar spine obtained during a March 17, 2000, orthopedic and neurological examination were negative with the exception of borderline narrowing at L4-L5. X-rays of the thoracic spine showed hypertrophic spurring without significant changes from films taken on November 20, 1998. The diagnosis was history of lumbosacral sprain related to an industrial injury of July 26, 1999. It was noted that “no further treatment measures are necessary to resolve the residual effects of this injury.” (Examination report of Robert Chambers, M.D., and J. Michael Eggin, M.D., Mar. 17, 2000). A subsequent orthopedic and neurological examination on July 8, 2000, was unremarkable in that it disclosed no significant muscle atrophy, limitation of motion or sensory loss. (Examination report of John Lipon, D.O., and Eugene Wong, M.D., July 8, 2000). At that time, it was noted that Womack was not taking medication for his back condition. The diagnosis again was lumbar strain. The physicians concluded Womack’s condition was medically fixed and stable and that no further curative measures were necessary. *Id.*

Womack first visited Dr. Gary Henriksen on August 1, 2000, complaining of an exacerbation of his back condition. Henriksen recommended that Womack should not return to work until August 4, 2000. Womack was returned to light duty with a 40 pound lifting restriction. (Letter from H.R. Johnson, M.D. to Nate D Mannakee, Esq., Oct. 12, 2001).

A January 31, 2001, cervical MRI revealed mild cervical degenerative changes consisting of mild narrowing at the C5-C6 and C6-C7 levels and neuroforaminal narrowing to a mild degree at the C4-C5 level bilaterally. There was no evidence of focal unilateral disc herniation. (MRI report of Robert R. Livingston, M.D., Jan. 31, 2001).

The 40 pound weight lifting restriction remained in effect from August 2000 until Womack’s September 21, 2001, suspension. *Id.* In this regard, Henriksen’s workability reports furnished to Graymont on December 12, 2000, July 12, 2001, September 4, 2001, September 24, 2001, and October 9, 2001, all reflect restrictions for lifting, pulling and pushing of no more than 40 pounds.

Mork testified that, “of course” he was aware of Womack’s physical limitations. (Tr.483). Mork understood that Womack’s work releases restricted him from pushing or bending. (Tr. 485). However, he noted that the company was “working with [Womack] on . . . [his] work restrictions.” (Tr. 483). Despite Womack’s restrictions, Mork opined that Womack’s impairment did not prevent him from performing his job duties. (Tr.498-500). Wakin testified that he assumed Womack was off all medication that would hinder him from performing his job after he “. . . was released to come back to work for light duty . . .” (Tr. 529-30).

Mork explained that whenever it was necessary to remove heavy material from the kiln, the company accommodated Womack by providing him with an assistant. (Tr. 507). The company similarly accommodated Harold Givens, a Graymont kiln operator for over 15 years. Unlike Womack who has a large build, Givens is thin and considerably shorter than Womack. Givens testified that the older he gets, the more trouble he has pulling ash balls and lifting over 80 pounds. Givens indicated that the stoneman assists him when the exertional demands of the job are too extreme. (Tr. 387, 398).

In support of Womack's termination, Graymont relies on Henriksen's advice that Womack should consider seeking alternative non-physical work that will not, over the long term, adversely affect his back condition. In this regard, during an August 1, 2000, examination, Henriksen opined:

Manipulating heavy objects at the end of a 6-8 foot [rod] places rather enormous torque on the cervical, thoracic, and lumbar spine. While Mr. Womack is an exceptionally strong individual (if a little overweight) the CT from a year ago and c-spine from today clearly indicated the effects of this repeated heavy work with poor ergonomics. While I realize that this is rather good paying work compared to other jobs he may qualify for, I doubt seriously that he will be able to do this for another 15 years, and I think eventual vocational change will have to be made.

(Henriksen encounter notes, Aug. 1, 2000). In October 2001, when Womack was 52 years old, Henriksen noted Womack could return to his JOI (job of injury) on light duty, but Henriksen repeated he ". . . doubt[ed] that [Womack] can continue his current (very heavy work) job to age 65." (Henriksen encounter notes, Oct. 9, 2001). On May 31, 2002, Henriksen recommended that Womack return to "permanent modified duty." Henriksen imposed lifting restrictions of 50 pounds, and pushing/pulling restrictions of 50 pounds with no more than 100 foot-pounds of torque. Henriksen noted that maximum medical improvement had been attained and that further follow-up was not required. (Henriksen workability report, May 31, 2002).

Womack returned to Henriksen on August 9, 2002. Henriksen noted:

SUBJECTIVE: Patient indicates that he MAY be able to go back to light duty if he gets a WorkAbility form that defines restrictions. This would be under the preferred worker program. He states his clinical symptoms are no different, and he still has 6/10 right sided neck pain.

ASSESSMENT: *I have always indicated that he could return to work.* I provided him with copies of the two IMEs suggested work restrictions, one specifying “medium” work, one limiting him to 25#. The reality is that he has multilevel cervical, thoracic, and lumbar DDD, and the greater the lifting he does the greater the chance of further degeneration.

PLAN: Will provide letter *clearing for light to medium duty* as per IME.

(Emphasis added). (Henriksen encounter notes, Aug. 9, 2002).

Obviously, physical labor becomes more difficult with advancing age. As Givens responded when asked if he has problems performing his kiln operator job - - “I do, yeah. The older I get.” (Tr. 387). Henriksen’s speculation that Womack may not be physically able to do his job until age 65 is not medical evidence that Womack currently is unable to return to his former position within the limits of his exertional limitations.

In sum, the evidence reflects Womack sustained a job-related back sprain with periods of exacerbation. The discomfort from Womack’s back sprain is secondary to his underlying mild to moderate degenerative back impairment. There is no objective clinical CT scan or MRI evidence of a superimposed traumatic injury that requires surgical intervention.

Significantly, Graymont asserts its decision to place Womack on extended leave in September 2001 was based solely on the hazards posed by Womack’s medication. (See Resp. Ex. 12). Prior to its October 18, 2002, decision to terminate Womack, Graymont *did not* contend the severity of Womack’s back condition prevented him from performing his job. On the contrary, Graymont admits Womack was capable of performing his job with a reasonable accommodation. (Tr. 483, 498-500).

Finally, I am cognizant of Graymont’s reliance on various statements in Womack’s L&I records concerning Womack’s reported physical limitations and his reported difficulties in performing his job. Such statements must be viewed in context. They were made in furtherance of Womack’s claim for L&I benefits. For example, in a July 17, 2001, appeal of L&I’s decision denying his claim for a monetary award, filed during a period when Womack was working without incident, Womack stated:

I have received the order to closed (sic) my claim with a permanent skin impairment of 9%. But my back has been rated a category 1 which does not contain a monetary award. I am appealing the back claim . . . Many times I have to take the medications for pain even though I have to work, and drive. The medications: Daypro 600mg 2xper day for swelling; Naproxen 500mg 1 to 2 times per

day for PAIN; Flexeril for muscle 10mg 1 pill 3 times per day. I have suffered two (neck and back) permanent unresolved injuries that the Department of Labor and Industries want (sic) to bring to a close. The pain and burden falls on me, and eventually my productivity, and ability to work . . . . My claim is being closed based on information given by YOUR doctors who examined me in about an hours time.

(Resp. Ex. 1). Womack is no longer qualified for L&I compensation. He is no longer taking medication. Womack now maintains he is capable of returning to work.<sup>12</sup> His physician states he can perform moderate activity.

#### **h. Womack's Termination**

After losing his L&I eligibility, Womack sought reinstatement on July 18, 2002. Womack attached a July 16, 2002, statement from Henriksen that Womack was last prescribed a muscle relaxant on April 9, 2002.

On July 29, 2002, Graymont requested Womack to provide more detailed medical information. On August 13, 2002, Womack provided Henriksen's August 9, 2002, workability report. Consistent with Womack's 30 pound exertional restriction first imposed by Dr. Moritz in September 1999, that essentially remained in effect until Womack's September 21, 2001, suspension, Henriksen restricted lifting, pulling and pushing to no more than 35 pounds.<sup>13</sup> Most importantly, Henriksen stated Womack was "on NO medications that will impair [Womack's] balance, judgement, or reaction time." (Comp. Ex 20).

On September 4, 2002, Graymont sought an additional opinion from Henriksen concerning Womack's ability to perform the essential functions of the kiln operator job. It is instructive that Graymont did not seek to determine if Henriksen believed Womack was capable of returning to the light duty he had performed prior to his suspension. (Tr. 483, 498-500).

The hearing was conducted on October 2 and October 3, 2002, at which time Womack had not responded to Graymont's September 4, 2002, request. At the end of the hearing, Graymont continued to assert that it had not received sufficient medical information. Graymont continued to insist that Henriksen evaluate whether Womack could perform the essential

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<sup>12</sup> Womack now represents his L&I claim for his back condition is closed. (Womack Reply Br. at p.15). Any further significant exacerbations reported by Womack after he returns to work may reflect that he is unable to perform his job.

<sup>13</sup> Womack had a 40 pound exertional limitation during a substantial part of his two year accommodation. (Tr. 483). The company does not allege that Womack's current 35 pound limitation is materially less than his prior restrictions.

elements (the full exertional range) of his job, including lifting upwards of 80 pounds and pushing “ash balls” weighing up to 150 pounds with an 8 to 10 foot poker weighing 20 pounds. (Comp. Ex. 21, p.3). Graymont’s request is odd given Womack’s exertional limitation of 35 pounds.

Henriksen responded to Graymont On October 7, 2002. Stating the obvious, Henriksen opined that, pulling or pushing a 150 pound ball with a long poker “dramatically exceed[s]” Womack’s ability to perform no more than moderate activity. (Letter from Henriksen concerning Womack’s restricted duties, Oct. 7, 2002).

Armed with this information, Graymont contracted the services of a certified rehabilitation counselor to perform a job analysis to determine the essential elements of the kiln operator job. The rehabilitation counselor concluded the kiln operator job required lifting as much as 80 pounds. The analysis also noted the job required pushing, pulling and dragging ash balls weighing over 200 pounds with the assistance of another person. (Job Analysis by Catherine Parker, CRC, Oct. 9, 2002).

On October 18, 2002, Graymont, purportedly relying on the job analysis, concluded that “[Womack] cannot perform the essential functions of [his] position with or without a reasonable accommodation . . . .” (Letter from Wakin to Womack, Oct.18, 2002). Graymont did not explain why Womack’s previous accommodation was not possible. Consequently, Womack was administratively separated effective October 22, 2002.

In analyzing whether the motivation for Womack’s termination is as claimed, the Commission has emphasized that:

. . . direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . ‘Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.’

*Chacon*, 3 FMSHRC at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8<sup>th</sup> Cir. 1965)). Some of the more common circumstantial indicia of discriminatory intent are knowledge of the protected activity, hostility or animus towards it, coincidence in time between the adverse action and the protected activity, and disparate treatment of the complainant. *Id.*

*Graymont admits knowledge* of Womack’s protected activity. Graymont suspended Womack approximately two weeks after it learned of his protected activity on September 4, 2001. Womack’s termination occurred approximately two weeks after Womack’s participation in this hearing. Thus, *there is a coincidence in time* between Womack’s protected activities and the adverse actions that evidences a pattern of retaliatory conduct.

The record provides *ample evidence of hostility or animus* towards Womack's protected activities. Surely Graymont did not appreciate the unwarrantable failure and interference charges resulting from Womack's complaints. In this regard, Mork repeatedly attempted to determine the identity of MSHA's informant, requesting MSHA to name its informant on August 29, 2001, and again during the MSHA close-out conference on September 4, 2001. (Tr. 478-79; Comp. Ex. 8). Attempts to determine the identity of a complainant constitute evidence of retaliatory intent.

Although not asserted as a justification for Womack's termination, Graymont objects to "a barrage of litigation and baseless complaints from Womack in every conceivable forum" that followed Womack's disciplinary letters. (Resp. Br. at p.2). In this regard, in addition to the claims filed against the company with the union, L&I, MSHA and this Commission, Womack has brought charges before the Equal Employment Opportunity Commission (EEOC), and the Tacoma Human Rights and Services Department.<sup>14</sup> Graymont's general hostility towards Womack's numerous regulatory complaints includes hostility directed toward Womack's protected activity as well.

In addition, Graymont's conduct reveals a pattern of behavior undertaken to mask its retaliatory intent. With respect to the suspension, Graymont conceded it had no reason to believe Womack suffered from any adverse side effects at work. Although Graymont received L&I reports since September 1999 identifying Womack's medication, it denies having read them. While Womack was on light duty and Graymont knew L&I was reimbursing Womack for his medical treatment, Graymont asserts it was surprised to learn Womack was taking medication. Assuming Graymont was unaware of Womack's medicine, Graymont's reported surprise that Womack was treated with medication is a further reflection of an absence of side effects at work. (Tr. 532). Finally, although Womack relied on alleged side effects in his grievance, Graymont concedes it did not believe him. *Thus, in suspending Womack, Graymont insisted on obtaining a list of medications that was already in its possession because of reported side effects that it did not believe occurred.*

To support Womack's termination, Graymont enlisted the services of a rehabilitation counselor in an attempt to justify its "determination" that Womack's 35 pound exertional restriction precludes him from performing the essential elements of his job. This pretext further evidences a hidden retaliatory agenda as it is clear that Womack cannot work as a kiln operator without an accommodation.

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<sup>14</sup> Womack also has filed an ergonomics complaint and an asbestos complaint with L&I. (Letter from Don Lofgren, Industrial Hygiene Regional Supervisor to Womack, January 2, 2003; Womack Reply Br. at p.15). The asbestos complaint apparently followed a citation that identified a confined area of asbestos in the company's mill area which was unlikely to cause illness. As these complaints were filed after the hearing, the merits of these actions have not been considered in this proceeding. I note parenthetically, however, that abuse of process, as evidenced by a continuing stream of non-meritorious claims, may provide an independent justification for adverse action.

Graymont relied on Womack's prescription regimen as the sole basis for imposition of the leave of absence. Nevertheless, Graymont concluded the cessation of Womack's medication cleared the way for his termination rather than for his reinstatement.<sup>15</sup> Such an implausible decision is further evidence of a discriminatory motive.

Finally, with respect to *disparate treatment*, Givens continues to be employed as kiln operator although it is apparent that he cannot perform the full range of the essential elements identified in the job analysis. Yet Womack's inability to perform these same essential functions purportedly justify Womack's termination.

Simply put, the record reflects:

Q. (By Mr. Womack) Mr. Wakin, from 1999 to 2001, did you ever have any problem with me as an employee?

A. (By Mr. Wakin) No.

(Tr. 539).

Participation in a discrimination hearing before this Commission is sacrosanct. When Graymont elects to terminate Womack immediately following this hearing, reportedly because Womack is not able to work with a reasonable accommodation, despite previously accommodating Womack for two years, it does so at its own risk. Accordingly, **the evidence reflects Graymont's decision to terminate Womack effective October 22, 2002, is motivated, at least in part, by Womack's protected activity.**

In rejecting Graymont's asserted justification as a pretext, I stress I am not substituting my business judgement to resolve whether Womack's impairment is amenable to a reasonable accommodation. On the contrary, it was Graymont who determined Womack could perform his job with an accommodation. There are no objective diagnostic findings demonstrating that Womack's back condition has deteriorated since he last worked in September 2001. Nor has Graymont alleged any material change in Womack's impairment or exertional limitations. It was only after Womack's intervening discrimination complaint and his participation in this proceeding, that Graymont concluded Womack could no longer be accommodated.

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<sup>15</sup> On September 21, 2001, Womack was advised the company was "temporarily curtailing [his] work activities" because he "cannot be allowed to perform [his job] while taking [his] drugs." Womack was informed he would "remain suspended without pay until this situation can be resolved." (*See Comp. Ex. 10*).

## **I. Entitlement Date to Back Pay**

The remaining issue concerns the appropriate effective date of back pay for computational purposes. Although Womack's initial July 18, 2002, request for reinstatement informed Graymont that he was no longer on medication, it did not include an acceptable current physician's statement outlining his exertional limitations. On August 13, 2002, Womack provided Graymont with Henriksen's August 9, 2002, workability report.

Graymont's subsequent requests for additional information, when viewed in context, were insincere. These requests sought Henriksen's opinion as to whether Womack could perform the essential functions of his job although Graymont knew Womack's physical activities were significantly restricted. Performance of an independent job analysis, and Graymont's request for additional medical information after August 13, 2002, only served to postpone disclosure of the inevitable, *i.e.*, that Graymont long ago decided to terminate Womack's employment. Accordingly, **Womack is entitled to relief as of August 13, 2002**, when Graymont received adequate relevant information concerning Womack's current exertional limitations.

## **ORDER**

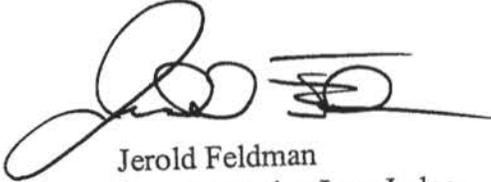
In view of the above **IT IS ORDERED** that James Womack's discrimination complaint concerning his reprimands, his five day suspension, and his suspension from September 21, 2001 through August 12, 2002, **IS DENIED**. Womack's discrimination complaint with respect to the termination of his employment **IS GRANTED** with appropriate relief to be awarded as of August 13, 2002.

This Decision on Liability is an interim decision. It does not become final until a Decision on Relief is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer **before May 28, 2003**, in an attempt to reach an agreement on the specific relief to be awarded. The relief may consist of back pay as off August 13, 2002, and reinstatement to the job position and duties Womack last performed on September 20, 2001, with equivalent pay and benefits. Alternatively, the parties may agree to back pay as of August 13, 2002, plus monetary damages representing economic reinstatement in lieu of re-employment. If the parties agree to stipulate to the appropriate relief to be awarded they shall file a Joint Stipulation on Relief **on or before June 18, 2003**. An agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on the relief to be awarded, the parties **ARE FURTHER ORDERED** to file, **on or before June 18, 2003**, Proposals for Relief specifying the appropriate relief to be awarded. For the purposes of calculating back pay, the parties are encouraged to stipulate to an average weekly salary, including overtime. If the parties cannot reach a joint

stipulation, the parties should furnish documentation such as payroll records, pay subs or tax returns to support their average weekly back pay calculation. **IT IS FURTHER ORDERED** that each party should propose an appropriate lump sum monetary economic reinstatement in lieu of re-employment in this matter. After Petitions for Relief are filed, I will confer with the parties to determine if there are disputed factual issues that require an evidentiary hearing.

Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act. Consequently, the Secretary shall be provided with a copy of this decision so that she may file a petition for assessment of civil penalty with this Commission.



Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

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Mine Safety and Health Administration, Office of Assessments, 1100 Wilson Boulevard,  
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/hs

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

May 28, 2003

LAFARGE BUILDING	:	CONTEST PROCEEDING
CHEMICAL CORPORATION,	:	
Contestant	:	Docket No. CENT 2003-173-RM
	:	Citation No. 6222293-03; 1/08/2003
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, MSHA,	:	Tulsa Plant
Respondent	:	Mine ID 34-00026

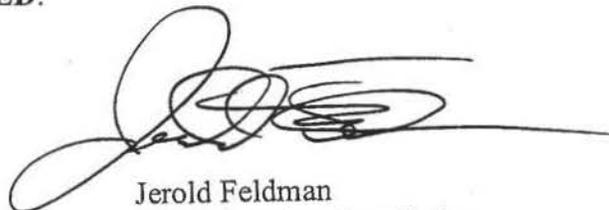
**ORDER OF DISMISSAL**

Before: Judge Feldman

This contest case concerns Citation No. 6222293 issued on January 18, 2003, for an alleged violation of the mandatory safety standard in section 56.14105, 30 C.F.R. § 56.14105, governing the procedures for repair or maintenance of machinery or equipment. Citation No. 6222293 was issued because the mine operator's personnel are required to obtain dust samples from a rotary kiln that rotates approximately 90 times per hour. In essence, the provisions of section 56.14105 require machinery or equipment to be turned off and blocked against hazardous motion prior to repair or maintenance unless motion or activation is necessary for adjustments or testing. In such instances, personnel must be protected from hazardous motion.

On May 2, 2003, the Secretary filed a Motion to Dismiss this contest matter because the Mine Safety and Health Administration (MSHA) vacated Citation No. 6222293 on February 3, 2003, because the "standard [in section 56.14105] is not applicable." (*Addendum* vacating Citation No. 6222293, February 3, 2003). Gary Burch, the miners' representative for Boilermakers Local D-421, opposes the Secretary's decision to vacate the citation.

Without addressing the issue of Burch's standing to challenge the Secretary's action vacating the citation, this Commission has concluded the Secretary has unreviewable discretion to withdraw a citation charging a mine operator with a violation of her mandatory safety regulations. *RBK Construction, Inc.*, 15 FMSHRC 2099 (October 1993). Accordingly, the Secretary's Motion to Dismiss the contest in Docket No. CENT 2003-173-RM **IS GRANTED** and this proceeding **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

Gary Burch, Miners Representative, LaFarge Building Materials, 908 W. Memphis,  
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Susan M. Williams, Esq., Office of the Solicitor, U.S. Department of Labor,  
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/hs

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

May 30, 2003

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-230-DM
on behalf of JOHN G. MUEHLENBECK,	:	
Complainant	:	Eureka Materials Quarry
	:	
v.	:	Mine I.D. 23-01840
	:	
CONCRETE AGGREGATES, LLC,	:	
Respondent	:	

**DECISION**

Appearances: Jennifer A. Casey, Esq., and Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;  
Gregory P. White, Esq., Clayton, Missouri, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of John G. Muehlenbeck against Concrete Aggregates, LLC, ("Concrete Aggregates") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Mine Act"). A hearing in this case was held in Clayton, Missouri. The parties presented testimony and documentary evidence and filed post-hearing briefs.

**I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT**

Muehlenbeck was hired by Concrete Aggregates in May 1999 to be the superintendent at its Eureka Materials Quarry (the "quarry"). As superintendent, Muehlenbeck was the number two man at the quarry and he reported directly to William ("Willie") Kopp, the managing member of Concrete Aggregates. The quarry is a very small sand and gravel operation on the edge of the St. Louis metropolitan area. Concrete Aggregates dredges material from the bottom of a 35 acre, man-made pond using a barge; it cleans, sizes, and prepares the dredged material, and sells the gravel and sand produced. Muehlenbeck supervised four hourly employees. Because Muehlenbeck had previously been a union carpenter, Concrete Aggregates paid him the prevailing carpenter's wage, making him the highest paid employee at the quarry, even though he was a management employee.

Muehlenbeck was terminated from his employment with Concrete Aggregates on October 1, 2001. Muehlenbeck and the Secretary contend that he was terminated for engaging in protected activities, but Concrete Aggregates argues that he was terminated for leaving the quarry two hours early on Friday, September 28, 2001, without notice or permission.

William Kopp and his brother, Richard Kopp, own a number of related businesses in the area. Richard Kopp is the managing member of Kirkwood Materials ("Kirkwood"), which sells construction and landscaping material. Kopp-Ko is the holding company for both operations. Kirkwood Materials has a sales outlet at the quarry. Although Kirkwood and Concrete Aggregates are two separate corporations, the Kopp brothers coordinate the human resource functions for both companies. Because both operations are small, they used Varsity Group, a payroll provider, to handle payroll and other human resource functions. In May 2001, Gail Holden, a sales representative for Strategic Outsourcing, Incorporated ("SOI"), approached the Kopp brothers about switching payroll providers. (Tr. 380-81). SOI could provide better service for Concrete Aggregates and Kirkwood and also provide more generous benefits to their employees, including workers' compensation benefits and an improved 401(k) plan. (Tr. 378-79). Richard Kopp took the lead in negotiating the terms of service for both Concrete Aggregates and Kirkwood employees.

Scott Frank, an area manager with SOI, testified that when a company uses SOI's services, it acts as a co-employer with the host company. SOI provides employee benefits and manages the payroll while the host company sets the terms and conditions of employment. Concrete Aggregates describes SOI as an "employee leasing company" that enables "smaller companies to come together and pool their resources and create 'buying power' in order to take advantage of greater benefits for employees." (CA Brief 4; Tr. 379-80). On September 19, 2001, William Kopp notified employees that Concrete Aggregates would be changing its payroll and benefit provider to SOI. Employees of Concrete Aggregates were combined with employees of Kirkwood in order to secure one comprehensive benefit package. Concrete Aggregates was the smaller of the two companies. SOI was to begin providing these services in mid-October 2001.

Concrete Aggregates and Kirkwood scheduled a voluntary meeting on the evening of September 20, 2001, at a nearby hotel to inform employees of the change. Representatives of SOI were present to answer questions. No employees of Concrete Aggregates attended this informational meeting. The next day William Kopp gave the employees of Concrete Aggregates the pamphlets and paperwork that had been handed out at the meeting. This packet of material included forms that employees had to sign. Some of the forms were routine forms such as IRS W-2 forms. The form at issue in this case was entitled "Assigned Employee Acknowledgments" ("employee acknowledgment form"). As the employees were looking at this information packet, Jerry Rauscher, the mechanic on Muehlenbeck's crew, showed Muehlenbeck language that concerned him. After they discussed the language, Muehlenbeck became concerned with the form as well. A number of provisions in the employee acknowledgment form concerned Rauscher, Muehlenbeck, and Bill Shumacher,

who operated the plant and ran the loader on Muehlenbeck's crew. The most significant provision that concerned them states, in part, as follows:

I agree that any legal complaint or dispute involving SOI, Client, or any employee, officer, or director of SOI or Client (the Arbitrating Parties), under whatever law, regarding my employment, my application for employment, or any termination from employment, will be submitted exclusively to binding arbitration by a panel of either one or three neutral arbitrators, which may be held in Charlotte, North Carolina, or the capitol of the state in which I work, at the option of the party demanding arbitration (or another mutually agreed location). This means that any complaint or dispute will not be heard by a court, a jury, or an administrative agency. I also agree that having an administrative agency proceed purportedly on my behalf would circumvent this agreement, therefore, I assign any relief or recovery an administrative agency obtains purportedly on my behalf from an Arbitrating Party to that Party.

(Exs. C-4, R-3). Concrete Aggregates' employees were concerned about the fact that they could not use the Missouri court system, request a jury trial if they were severely injured, or have Missouri government agencies intercede on their behalf. They were also concerned about the provision requiring arbitration in North Carolina. Muehlenbeck was especially concerned that, by signing the employee acknowledgment form, he would be waiving his rights under the Mine Act and waiving his right to have MSHA or its inspectors offer him any kind of assistance. An MSHA inspector had recently been at the quarry and discussed miners' rights with employees so it was fresh in Muehlenbeck's mind. Muehlenbeck, Rauscher, and Shumacher decided that they would not sign the employee acknowledgment form for the above reasons.<sup>1</sup> (Tr. 85, 133, 213-14, 273). They signed all of the other forms and returned them to William Kopp.

When Kopp discovered the next day that the employee acknowledgment form had not been signed by these employees, he reminded them that the form needed to be signed before SOI could begin providing payroll services. (Tr. 147-48, 213-14). Muehlenbeck advised Kopp that the employee acknowledgment form violated provisions of the Mine Act and the employees would not sign it. (Tr. 148-49, 215). Concrete Aggregates had copies of a booklet at the quarry published by the Department of Labor entitled "A Guide to Miners' Rights and Responsibilities under the Federal Mine Safety and Health Act of 1977" ("miners' rights guide"). (Ex. C-5). When he left work that day, Muehlenbeck took a copy home to review

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<sup>1</sup> They had concerns about other provisions in the employee acknowledgment form including a provision that stated that employees would get paid at the minimum wage if Concrete Aggregates fails to pay SOI all moneys due under the contract between them.

and he highlighted those provisions in the booklet that he believed would be invalidated by the employee acknowledgment form. Muehlenbeck presented the highlighted miners' rights guide to William Kopp to show him the conflict between the employee acknowledgment form and the rights afforded miners under the Mine Act. (Tr. 86-87, 216, 295, 440). Kopp subsequently faxed portions of the guide to SOI. (Tr. 295-96, 485).

On Thursday, September 27, 2001, near the end of the shift, Kopp advised Concrete Aggregates' employees that two representatives of SOI were at the quarry to answer any questions they had about SOI and the employee acknowledgment form. Gail Holden and Scott Frank of SOI, William Kopp, Muehlenbeck, Rauscher, and Shumacher attended this meeting. The representatives of SOI downplayed the importance of the employee acknowledgment form but, at the same time, stated that it had to be signed by everyone. Mr. Frank called it a standard form agreement. (Tr. 91, 278). Mr. Frank stated that employees could make changes to the wording, if they felt it was necessary. (Tr. 92-93, 332). Muehlenbeck noted that the employee acknowledgment form includes language stating that no modifications could be made to the agreement "unless signed by an authorized officer of SOI." (Ex. C-4). There is no dispute that neither Mr. Frank nor Ms. Holden were authorized officers of SOI.

The testimony concerning the discussions at this meeting varies significantly. Muehlenbeck testified that the employees were pressured to sign the employee acknowledgment form at the meeting and that when employees raised a question about it, Frank tried to "brush it off" on the basis that the language "didn't mean what it said." (Tr. 91-92). Muehlenbeck believed that Frank wanted to leave the meeting with signatures from all three employees. Muehlenbeck stated that he raised issues about the rights of miners under the Mine Act but that the SOI representatives never responded to these questions. Muehlenbeck testified that the meeting got heated at times because he made clear that he was not going to sign the employee acknowledgment form until all his concerns were addressed. Muehlenbeck also testified that Frank told the employees that if they did not sign the employee acknowledgment form, they might not get paid. (Tr. 95-97, 128). Muehlenbeck understood this to mean that they could be fired for not signing. (Tr. 98). William Kopp did not say much at the meeting. (Tr. 151). Muehlenbeck testified that near the end of the meeting Kopp suggested that Muehlenbeck get an attorney to review the employee acknowledgment form and Kopp offered to pay the fees of this attorney. (Tr. 96, 135-36, 141, 151). Muehlenbeck did not take Kopp up on this offer.

Rauscher testified that the meeting became heated when the arbitration provision was discussed. (Tr. 221). The SOI representatives kept asking "who are you going to sue?" (Tr. 221). One of Concrete Aggregates' employees responded "if I can't bring in MSHA, OSHA, or anyone on my behalf, why would I leave an arbitrating party [to] say my arm's worth only \$2,000 to you guys, but to a lawyer and jury it could be worth a bunch?" (Tr. 222). Rauscher testified that the SOI representatives seemed to avoid answering any questions about MSHA. He also testified that the SOI people indicated that any employee who did not sign the

employee acknowledgment form could not be guaranteed a paycheck. (Tr. 223-24). William Kopp offered to hire an attorney to answer any questions, but Rauscher did not think an attorney was necessary. Frank told the assembled employees to “scratch out the parts you don’t like” in the paragraph, but the employees kept asking who had the authority to approve changes to the form. (Tr. 225). Rauscher testified that he felt pressure to sign the form at the meeting because it was a condition of his employment. (Tr. 227-28).

Shumacher testified that he decided to sign the employee acknowledgment form during the meeting and that after he signed it, he left the meeting. (Tr. 276). He signed the form because Ms. Holden assured him that he had probably signed a similar form with the Varsity Group. Shumacher also had a private conversation with Kopp during the meeting that satisfied him. (Tr. 278-79). He could not specifically remember any discussions about MSHA but he is sure that it came up. *Id.*

Frank testified that he never heard anyone talk about “miners’ rights” or “MSHA” at this meeting. (Tr. 330, 339). The issues raised by the employees centered around their concerns that any arbitration would be held in North Carolina. (Tr. 330-31). Frank also testified that, because he had dealt primarily with Kirkwood, he did not know at the time of the meeting that Concrete Aggregates engaged in mining. He stated that SOI does not generally work with companies engaged in mining because of higher workers’ compensation costs.<sup>2</sup> (Tr. 335). He admitted that he has no knowledge of the rights of miners under the Mine Act. (Tr. 331). He also testified that he told the assembled employees that they could make changes to the employee acknowledgment form and he would “run them up the flagpole” to the corporate offices in Charlotte. (Tr. 332-33) When Muehlenbeck crossed off the entire arbitration paragraph, quoted above, Frank advised him that such a major change would probably not fly. Frank denied that anyone from SOI threatened to withhold an employee’s paycheck if there was a delay in signing the forms or that he pressured anyone to sign the form during the meeting. (Tr. 337, 341).

William Kopp testified that he did not believe that the employee acknowledgment form would infringe on the rights of miners. (Tr. 395-96). He further testified that he would not do anything to go against the Mine Act and that, if SOI attempted to prevent a miner from

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<sup>2</sup> It is clear that SOI was aware that some of the employees at Kirkwood/Concrete Aggregates engaged in mining. Several SOI employees visited the quarry prior to October 1, 2001. Concrete Aggregates faxed several pages of the miners’ rights guide to SOI prior to the meeting on September 27. (Tr. 295-96). In addition, SOI’s director of loss control visited the facility in January 2002 to perform a safety survey for SOI and his report mentions the quarry and MSHA compliance. (Ex. R-4). In a letter to counsel for the Secretary dated February 15, 2002, the general counsel for SOI stated that SOI never agreed to provide services to those employees at the quarry engaged in mining. (Ex. R-1). Although it appears that SOI does not generally accept business from high risk operations such as mining, SOI knew or should have known that some of the employees at the quarry were miners. (Tr. 383-84).

asserting his rights under the Mine Act, he would cancel the contract with SOI. *Id.* Kopp testified that he did not understand exactly what Muehlenbeck was getting at during this meeting and that Muehlenbeck seemed to be concerned that he wanted to retain his right to a jury trial in St. Louis if he was injured on the job. (Tr. 397-98). He admits that Muehlenbeck raised Mine Act issues at the meeting. (Tr. 485). Kopp stated that, near the end of the meeting, he suggested that anyone who had any concern could hire an attorney to review the employee acknowledgment form at his cost. (Tr. 398-99). He testified that there was some urgency in getting the signed employee acknowledgment forms to SOI but he did not believe that the forms had to be signed the day of the meeting. (Tr. 411).

On the morning of Friday, September 28, 2001, Muehlenbeck reported to work as usual. During his lunch break, he was sitting near the Concrete Aggregates office at the quarry with other employees when Brandy Lauer, the secretary for Concrete Aggregates, approached the men holding a fax she had received from the main office of Kirkwood. She read the fax out loud to the men. The fax was a reminder that the employee acknowledgment form had to be signed and returned to Kirkwood's main office. The fax stated that employees could put the words "under protest" under their signature. (Tr. 104, 228-29).

Muehlenbeck became distraught and angry that he was again being asked to sign the employee acknowledgment form. (Tr. 105-06, 229-31, 253, 298). Frustrated that his concerns were not being addressed, Muehlenbeck went into the Concrete Aggregates office, put his two-way radio on the desk, and left the quarry to go home. He left at about 1:30 p.m., two hours before his normal quitting time of 3:30 p.m. Lauer saw him leave, but Muehlenbeck did not tell Kopp or anyone else at the quarry that he was leaving. (Tr. 156-58, 427). Shortly thereafter, Rauscher also left the quarry.

The operator of the dredge on September 28, 2001, was Bob White, who had been working at the quarry for six weeks.<sup>3</sup> (Tr. 413). The pond covers about 35 acres as illustrated in exhibit R-10. (Tr. 418). Shortly after Muehlenbeck left the quarry, a hydraulic hose on the dredge ruptured spewing hydraulic oil over the dredge which caused the hose used to vacuum up material from the bottom of the pond to become clogged with material. (Tr. 414-17). Mr. White attempted to get Muehlenbeck on the two-way radio so that he could provide assistance. (Tr. 421). Muehlenbeck did not respond to his call. Muehlenbeck and Rauscher are the only mechanics at the quarry. William Kopp heard the call and he tried to find Muehlenbeck and Rauscher. (Tr. 424). Kopp believes that, by leaving the quarry without permission or notice, Muehlenbeck put White in jeopardy. (Tr. 419, 426).

Although hoses rupture on the dredge with some frequency, Kopp testified that the matter must be attended to quickly, especially when the vacuum line is clogged. (Tr. 422). Kopp stated that he prefers to have two dredge operators and a mechanic at the quarry

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<sup>3</sup> Bob White is the brother of Gregory White, counsel for Concrete Aggregates. Bob White signed the employee acknowledgment form.

whenever the dredge is being operated. (Tr. 418-19, 423). Kopp and other employees worked over the weekend cleaning out all of the product lines and getting the dredge in operating order. (Tr. 425-26). Kopp believes that if Muehlenbeck had not left the property, Muehlenbeck would have been able to tell White via the radio how to get the lines cleared before he lost all of the hydraulics. (Tr. 425-26). Muehlenbeck did not attempt to call or otherwise get hold of Kopp that day or over the weekend.

When Muehlenbeck came to work on Monday, October 1, 2001, William Kopp asked him, "Where did you go Friday?" (Tr. 108). Muehlenbeck did not say where he had gone but told Kopp about the fax that Ms. Lauer read to the employees. Muehlenbeck told Kopp that he "got pissed off and left." *Id.* Muehlenbeck also said, "I'm not going to sign that piece of paper, Willie." *Id.* Kopp responded, "Fine, get your tools, gather your tools, turn in your keys." *Id.* Kopp terminated the employment of Muehlenbeck and Rauscher that morning.<sup>4</sup> Kopp testified that he terminated Muehlenbeck because he left the quarry without permission. (Tr. 376-77; Ex. R-5). He stated that a supervisor walking off the job is a very serious offense. Muehlenbeck and the Secretary believe that Muehlenbeck was terminated for refusing to sign the employee acknowledgment form.

## II. DISCUSSION WITH FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("*Legis. Hist.*"). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April

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<sup>4</sup> The Secretary offered to file a discrimination complaint on behalf of Rauscher but he declined to pursue the case because he had obtained employment elsewhere. Rauscher testified that Kopp told him that he would "eventually" have to sign the employee acknowledgment form. (Tr. 235).

1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case in this manner by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987).

In her brief, the Secretary states that the "refusal to sign a document that conflicts with statutorily protected rights is not an issue that has been addressed by the Commission." (S. Br. 13). She argues that the facts giving rise to Muehlenbeck's termination and subsequent claim of discrimination "most closely resemble that of a work refusal - an activity protected under section 105(c) of the Mine Act." *Id.* She cites the legislative history of the Mine Act which states that the protections of section 105(c) should be interpreted to include "the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders that are violative of the Act. . . ." ("*Legis. Hist.* at 623"). The Secretary contends that Muehlenbeck's refusal to comply with Concrete Aggregates' order to sign the employee acknowledgment form was protected activity because the terms of the form violated section 105(c) of the Mine Act. She maintains that Complainant established that his termination was the direct result of Muehlenbeck's refusal to sign the form. The Secretary argues that Concrete Aggregates grossly exaggerates the problems created by Muehlenbeck's early departure from the quarry on September 28 and that this justification for terminating him is pretext to mask the unlawful reason for the termination. The Secretary contends that Muehlenbeck's departure from the quarry was "a direct, immediate, and reasonable response to the unlawful demands of his employer." (S. Br. 25). Consequently, Muehlenbeck should be granted "leeway" for his "impulsive behavior" because it was in response to Concrete Aggregates' "wrongful provocation." (S. Br. 26) (citation omitted).

Concrete Aggregates argues that there is no evidence that the arbitration clause in the employee acknowledgment form was enforceable as to the Mine Safety and Health Administration or this Commission. There is no evidence that signing the form would have interfered with or abrogated Muehlenbeck's Mine Act rights. Complainant merely established that Muehlenbeck was bothered by the form, that he had difficulty explaining to William Kopp why this form concerned him, and that he walked off the job as a result of a fax received in the office without discussing his concerns with Kopp. Concrete Aggregates contends that the Secretary failed to establish a *prima facie* case.

### A. Protected Activity

I agree with the Complainant that the facts in this case most closely resemble a work refusal. The Commission and the courts have recognized the right of a miner to refuse to work in the face of perceived hazards. See *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). A miner refusing work is not required to prove that a hazard actually existed. See *Robinette*, 3 FMSHRC at 810-12. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.* at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. See *Robinette*, 3 FMSHRC at 809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.

In this case, Muehlenbeck is not required to prove that the employee acknowledgment form would actually interfere with his Mine Act rights; he just has to show a good faith reasonable belief that the arbitration clause on the form would interfere with these rights. I find that Muehlenbeck met his burden of proof on this issue. The language in the arbitration clause is rather broad in its scope. A layman, unfamiliar with the law as it has developed under the Mine Act, could reasonably believe that a miner could no longer seek the protections afforded by the Mine Act. I find that Mr. Muehlenbeck's belief was reasonable and that he held that belief in good faith. He was genuinely concerned that by signing the form he could be waiving his rights under the Mine Act. Consequently, I find that he engaged in protected activity when he raised questions about the effect of the arbitration clause on his rights under the Mine Act.

When "a miner expresses a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to address the perceived danger." *Gilbert v. FMSHRC*, 866 F. 2d 1433, 1440 (D.C. Cir 1989). If an operator adequately addresses a miner's concerns so that "his fears reasonably should have been quelled," an otherwise reasonable work refusal can become unreasonable. *Id.* at 1441. The Secretary argues that Concrete Aggregates "wholly failed to address Muehlenbeck's concerns regarding the arbitration" provision. (S. Br. 17). She points to the fact that Kopp failed to sit down with the employees and explain the terms of the provision. When Muehlenbeck gave Kopp a highlighted copy of the miners' rights guide, Kopp failed to respond. Instead, Kopp arranged a meeting with SOI representatives who had no knowledge of an employee's rights and responsibilities under the Mine Act. These representatives were not empowered by SOI to authorize any changes to the employee acknowledgment form. The SOI representatives simply tried to appease Muehlenbeck by saying that it was a "standard form" that he should not be concerned about. Muehlenbeck left the meeting with no greater understanding of the impact of the arbitration language on his Mine Act rights than before. The Secretary contends that Kopp did nothing after the meeting

to allay employee concerns. She characterizes Kopp's offer to pay for an attorney to review the employee acknowledgment form as an effort to shift responsibility to the employees to make sure that the form would not impinge on their rights.

I believe that Mr. Kopp simply wanted this dispute to go away. I credit his testimony that he would not let SOI trample the rights of miners. I conclude that, because SOI would not have a continuing presence at the mine, Kopp believed that once the forms were signed, with or without changes in the language, SOI would not have any dealings with MSHA and would not be in a position to quash the rights of miners.<sup>5</sup> Nevertheless, Kopp never sat down with Muehlenbeck and the other employees to tell them that Concrete Aggregates would continue to allow them to exercise their rights under the Mine Act as before. Instead, he relied on SOI to address the concerns. When it appeared during the meeting that SOI was not being successful, he suggested that they find an attorney who could provide legal advice and he agreed to pay the costs for the attorney. It is quite obvious that this gesture did not allay the concerns of Muehlenbeck or Rauscher. I find that Concrete Aggregates did not adequately address Muehlenbeck's concerns so that they "reasonably should have been quelled."

#### **B. Adverse Action**

The primary issue to be resolved is whether Muehlenbeck was terminated, at least in part, because he engaged in this protected activity. If his termination was motivated in any part by his protected activities, then Concrete Aggregates must show its termination of Muehlenbeck was also motivated by unprotected activities and that it would have taken these actions for the unprotected activity alone.

I find that the preponderance of the evidence demonstrates that Concrete Aggregates terminated Muehlenbeck because he left the quarry on September 28 without permission or telling Kopp that he was doing so. I reach this conclusion for the reasons discussed below.

Mr. White operates a rotating cutting head at the end of a long boom on the dredge that extends under the water to the bottom of the pond. (Ex. R-8). The cutting head breaks up the rock on the bottom and this broken material is vacuumed up through the boom. The material is transported across the surface of the pond to the plant through piping that extends along floating buoys. (Ex. R-10). The dredge was the sole means of production at the quarry at the time of this incident. If the cutting head remains under water for a long time without rotating

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<sup>5</sup> In a letter to counsel for the Secretary, the General Counsel of SOI stated that the service agreement between SOI and its clients makes clear that the agreement does not relieve the client "of its duties and legal obligations with respect to worksite safety and compliance with legal obligations regulating worksite safety and labor." (Ex. R-1, p.2). The agreement further provides that the "client will comply with all federal, state, and local laws and regulations applicable to its operations." *Id.*

it can become stuck in the material at the bottom of the pond. (Tr. 422-23). Thus, repairing hydraulic lines on the dredge must be attended to quickly.

I credit Kopp's testimony that he tries to have two dredge operators present at the quarry whenever it is operating. (Tr. 418-19, 423, 480). In September 2001, Bob White was still an inexperienced dredge operator and Muehlenbeck was the only experienced dredge operator. Whenever White had a problem, Muehlenbeck would provide assistance over the two-way radio or by going on board the dredge. Kopp testified that if a dredge operator called in sick, he usually did not operate the dredge that day. (Tr. 481-82). Muehlenbeck and Rauscher were the only two mechanics qualified to repair equipment at the quarry.

After Muehlenbeck and Rauscher left the quarry, the dredge broke down. Kopp discovered that his superintendent, who is also his experienced dredge operator and a qualified mechanic, had walked off the job without notice and that the other mechanic had also left without notice. An inexperienced operator was on the dredge asking for help. The actions of Muehlenbeck and Rauscher placed Kopp in a difficult position and could have endangered Mr. White.

When Muehlenbeck returned to work on Monday, Kopp asked, "Where did you go Friday?" Muehlenbeck did not provide a rational explanation but simply mentioned the fax and said that he was "pissed off" about it. (Tr. 108). Kopp could not fathom why Muehlenbeck would leave his post two hours early without permission because of the dispute over the form. He was "shocked" that Muehlenbeck left the property without permission. (Tr. 429). Muehlenbeck was in a trusted and vital position at the quarry and Kopp depended on him to oversee operations at the quarry. (Tr. 427-29). Concrete Aggregates only employed Muehlenbeck, Rauscher, Shumacher, White, and Brandy Lauer. By leaving the quarry, Muehlenbeck and Rauscher created a significant problem for Kopp. Muehlenbeck's departure was particularly troublesome for Kopp because he supervised the operations at the quarry.

In determining whether a mine operator's adverse action is motivated in any part by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

In this case, I find that Kopp had knowledge of Muehlenbeck's protected activity. Kopp was somewhat confused as to why Muehlenbeck was so concerned because Kopp did

not intend to reduce the rights of miners at the quarry after the SOI contract was put into place. Nevertheless, Muehlenbeck gave Kopp a copy of the miners' rights guide so he knew or should have known that Muehlenbeck was concerned that the employee acknowledgment form would indeed infringe upon his rights as a miner. There is also a very close coincidence in time between the protected activity and the adverse action. Kopp did little to address Muehlenbeck's concerns.

Whether Concrete Aggregates demonstrated animus or hostility toward the protected activity is a closer issue. On one hand, Kopp believed that the employee acknowledgment form would not change anything with respect to miners' rights. There is absolutely no proof that Kopp is hostile toward the rights of miners or that he would become hostile under the SOI agreement. In addition, Kopp offered to pay for an attorney to look into the matter for Muehlenbeck. On the other hand, it is evident that Kopp was perplexed and troubled by Muehlenbeck's refusal to sign the employee acknowledgment form. I agree with Concrete Aggregates that Kopp did not try to force Muehlenbeck to sign the form right away. Kopp knew that, if Muehlenbeck retained an attorney to review the form, there would be a considerable delay before the matter was resolved. Kopp never told Muehlenbeck that if he did not sign by a particular date he would be terminated, he would not be paid, or he would be disciplined. (Tr. 409-10). Nevertheless, there was some urgency inasmuch as the services of the Varsity Group were set to expire in mid-October and the contract with SOI was set to take effect that date. Concrete Aggregates and SOI put pressure on the employees to sign the employee acknowledgment form. Workers compensation coverage is mandatory in Missouri and the SOI service agreement would not become effective until all of the paper work was completed. The fax set to the quarry by the office manager for Kirkwood suggested that the employees sign the form "under protest." Although there is no evidence in the record as to who made that suggestion, it must have been made by Richard Kopp, perhaps after consultation with William Kopp. I find that there was some hostility toward Muehlenbeck's continuing objection to signing the employee acknowledgment form.

Disparate treatment does not really come into play because this case presents a unique set of circumstances. The fact that Muehlenbeck had not been disciplined before and that he had a good record of performance reviews is irrelevant. The only person in similar circumstances was Rauscher who was terminated along with Muehlenbeck.

Resentment had been building at the quarry as a result of the dispute over the employee acknowledgment form. For the reasons set forth above and because Muehlenbeck discussed the fax with Kopp just before he was terminated, I find that Muehlenbeck's continuing refusal to sign the form may have played some part in Kopp's decision to terminate him. Because of the nature of the conversation on the morning of October 1, the record in this case makes it impossible to conclude that Muehlenbeck's refusal to sign the employee acknowledgment form was not considered by Kopp. Consequently, I find that Concrete Aggregates did not establish that the termination of Muehlenbeck was in no part motivated by the protected activity. As a result, I must analyze the case as a "mixed-motive" case.

As the Secretary states, in a mixed-motive case:

It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in unprotected activity and that he would have disciplined him in any event.

*Robinette*, 3 FMSHRC at 819-19. An operator can try to establish this defense “by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner’s unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question.” *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

I find that Muehlenbeck’s termination was precipitated by the fact that he left without notice or permission coupled with the fact that he could not explain his absence. If Muehlenbeck had provided Kopp with an explanation on the morning of October 1, he would not have been terminated. If, for example, Muehlenbeck had to rush to the hospital because a relative had been in a serious auto accident, Kopp would not have fired him. If there had been no dispute over the employee acknowledgment form and Muehlenbeck left the quarry two hours early because, for example, he was angry that Kopp would not let him take a vacation day on the following Friday, Kopp most certainly would have terminated Muehlenbeck. There is no evidence, or even a suggestion in the record, that Muehlenbeck would have been fired for refusing to sign the employee acknowledgment form if he had remained at work on September 28. The evidence makes clear that Kopp decided to terminate Muehlenbeck because he left the quarry in anger without explanation or permission.

There is no evidence of past discipline “consistent with that meted out” to Muehlenbeck because no employee had ever left the quarry two hours early in a fit of anger before. The Secretary contends that Muehlenbeck frequently left early to buy parts needed at the quarry. Such conduct does not help support the Secretary’s argument. When Muehlenbeck left early to get parts, he was performing work for his employer, he generally used his radio to notify others that he was going and to ask if anyone needed anything, and he did not leave two hours early. Muehlenbeck simply left early enough to run by a parts store on the way home to buy supplies or parts he would need the next day. That Kopp permitted Muehlenbeck to buy supplies in that manner is not inconsistent with his termination on October 1.

As discussed above, “unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question” is not relevant under the facts

of this case. Muehlenbeck was not terminated for a poor work record or infractions that would be subject to past discipline. He was terminated because he left work two hours early without notice or permission in a fit of anger. His behavior displayed a serious lack of judgment for a quarry superintendent. Based on the record in the case, I hold that Concrete Aggregates' termination of Mr. Muehlenbeck was primarily motivated by his unprotected activity and that it would have terminated him for the unprotected activity alone.

### **C. Provocation**

The Secretary contends that Muehlenbeck's "impulsive behavior" in leaving the quarry should be overlooked because he was wrongfully provoked by Concrete Aggregates. The Commission has "recognized the inequity of permitting an employer to discipline an employee for actions which the employer provoked." *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 992 (Sept. 2001). A Commission judge is "obligated to determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity. . . ." *Id.* "An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment." *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4<sup>th</sup> Cir. 1965). "The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression." *Id.*

"Whether an employee's indiscreet reaction upon being provoked is excusable is a question that depends on the particular facts and circumstances of each case." *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 306 (March 2000). Thus, I must determine whether the facts in this case, when viewed in their totality, place Muehlenbeck's conduct within the scope of the "leeway" the courts grant employees whose "behavior takes place in response to an employer's wrongful provocation." *Id.* at 307-08 (citation omitted). I find that Muehlenbeck should not be granted leeway in this instance. The incident that allegedly provoked Muehlenbeck was the reading of a fax by Ms. Lauer that had been sent by the office manager at Kirkwood. The fax reminded Muehlenbeck and Rauscher that they needed to get the form signed. (Tr. 293). The employees were told that they could sign the employee acknowledgment form "under protest." At this point, Muehlenbeck became enraged, threw the company radio on the desk, and left the mine. Muehlenbeck testified that he was "real upset." (Tr. 106). He did not attempt to find Kopp to discuss the matter, he just left the property in anger and disgust.

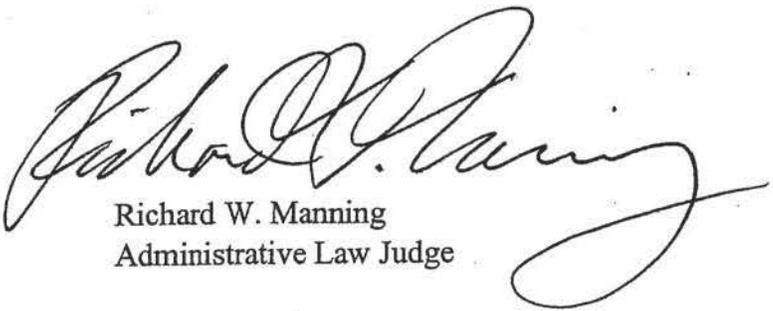
Although the employee acknowledgment form was a point of contention between Muehlenbeck and Concrete Aggregates, the reading of a fax about the form by the company secretary was not the kind of provocation that would justify Muehlenbeck abandoning his job for the day. Indeed, because the fax suggested that he sign the form "under protest," it is apparent that the company was still trying to reach an accommodation with him over the issue. There had been no indication made to Muehlenbeck from Kopp or anyone else at Concrete

Aggregates or Kirkwood that his job was on the line or that his rights as a miner would be curtailed upon the signing of the form. Complainant has not established that Muehlenbeck's "sense of indignation" was justified or that the "excessive expression" of his anger had been reasonably provoked.

The facts in this case can be contrasted with the facts in *Bernardyn*. In that case, Mr. Bernardyn had refused to drive a truck on a muddy and slippery road at a speed that he considered to be unsafe. When his supervisor ordered him to drive faster, Bernardyn radioed the union safety committeeman and, during this radio conversation, cursed out his supervisor. Bernardyn was fired for using profanity and threatening his supervisor over the radio. The Commission remanded the case to the administrative law judge to make findings on the provocation issue. 22 FMSHRC at 307. The Commission noted that "[h]ad Bernardyn complied with [his supervisor's] instruction to drive faster, it would have put him in harm's way." *Id.* In the present case, Muehlenbeck was not being asked to perform a task that was unsafe. There was no immediacy in the situation from Muehlenbeck's perspective. Muehlenbeck knew or should have known that the issue surrounding the employee acknowledgment form had not been resolved at the meeting on September 27 and that his employer would be bringing it up again. There is nothing to indicate that the suggestion contained in the fax that Muehlenbeck sign the employee acknowledgment form "under protest" was anything but a good faith response from the company to Muehlenbeck's concerns. The fax was not hostile or threatening. Simply put, the fax and the company's attempts to resolve the issues surrounding the employee acknowledgment form were not "wrongful provocations" and Muehlenbeck's response, abandoning his position at the quarry, was excessive and unreasonable.

### III. ORDER

For the reasons set forth above, the complaint of discrimination filed by the Secretary of Labor on behalf of John G. Muehlenbeck against Concrete Aggregates, LLC, under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

May 30, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-187-M
Petitioner	:	A.C. No. 41-03751-05516
	:	
	:	Docket No. CENT 2002-188-M
	:	A.C. No. 41-03751-05517
	:	
v.	:	Docket No. CENT 2002-249-M
	:	A.C. No. 41-03751-05518
	:	
	:	Docket No. CENT 2002-266-M
BIG BUCK ASPHALT,	:	A.C. No. 41-03751-05519
Respondent	:	
	:	Docket No. CENT 2003-18-M
	:	A.C. No. 41-03751-05520
	:	
	:	Docket No. CENT 2003-91-M
	:	A.C. No. 41-03751-05522
	:	
	:	Phelps Pit

**ORDER ON RECONSIDERATION**  
**APPROVING SETTLEMENT MOTION**

Before: Judge Feldman

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary has filed a motion to approve a settlement agreement and to dismiss these matters. A reduction in civil penalty from \$48,262.00 to \$12,065.00 is proposed. The parties have proposed that the agreed upon \$12,065.00 civil penalty will be paid in an initial installment of \$2,500.00, with the remaining \$9,565.00 to be paid in nineteen monthly installments. The proposed substantial reduction and extended payment schedule are based on Big Buck Asphalt's alleged financial condition that reportedly precludes its ability to pay a higher civil penalty.

In support of its assertion that payment of a higher penalty would impact on its ability to remain in business, the parties rely on a financial statement for the year ending February 28, 2002, for Four G. Asphalt, Inc., d/b/a Big Buck Asphalt, prepared by a certified public accountant. The financial statement furnished by the Secretary lacks the Accountant's Review Report designated as page 1 in the Table of Contents. Consequently, the financial statement does not reflect whether the information contained therein was audited. In this regard, the financial statement notes that the reported amounts of revenues and expenses are based on management "estimates and assumptions." Unaudited financial statements do not provide a basis for establishing payment of a civil penalty will adversely affect a mine operator's ability to continue in business. See *Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994).

The financial statement reflects gross income of \$1,276,154.00 and an unspecified "cost of revenue" of \$1,304,010.00 resulting in a reported loss of \$27,856.00. The financial statement reflects Pete Gallegos, Sr., is the President of Big Buck Asphalt. The financial statement further reflects that Pete Gallegos Paving, Inc., "is the parent owner" and "primary customer" of Big Buck Asphalt. Javalina Ready-Mix, Inc., also owned by Pete Gallegos Paving, Inc., also is a significant customer of Big Buck Asphalt.

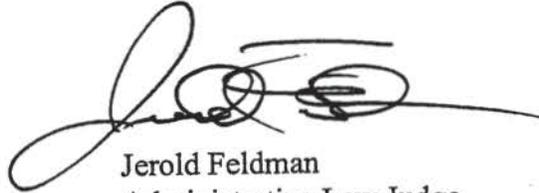
The parties' Motion to Approve Settlement was denied on February 26, 2003. 25 FMSHRC 101. The motion was denied because of outstanding questions concerning the relationship between Big Buck Asphalt and Pete Gallegos Paving, Inc., that may impact on whether there is a financial hardship that justifies the structured payment schedule and substantial reduction in the civil penalty proposed by the parties. Consequently, the February 26, 2003, Order denying the approval of the settlement terms requested the submission of more detailed financial information, including audited financial statements. 25 FMSHRC at 102.

On March 25, 2003, counsel for Big Buck Asphalt replied that, as a consequence of its dire financial condition, the company "cannot afford the luxury of having audited financial statements." (*Resp. To Feb. 26, 2003, Order*, at p.2). Big Buck provided additional assurances that its financial condition precluded payment of a higher civil penalty.

On May 30, 2003, the Secretary's counsel reiterated her support of the parties' proposed settlement terms. In support of the settlement agreement, the Secretary relies on the unaudited financial statement for the business year ending February 28, 2002. As additional support, the Secretary notes a letter from CitiCapital Commercial Corporation identifying a Big Buck Asphalt debt that is in default.

While I remain skeptical, given the additional assurances, I will not interfere with the parties' settlement in these matters. Accordingly, based on the representations and documentation submitted in these proceedings, I conclude that the proffered settlement is not inconsistent with the penalty criteria set forth in Section 110(I) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**. **Accordingly**, on reconsideration, **IT IS ORDERED** that the respondent pay a total civil penalty of \$12,065.00.

Pursuant to the parties' agreement, payment is to be made in twenty (20) monthly installments. The first installment shall be \$2,500.00 payable on July 1, 2003. The remaining nineteen (19) installments shall be paid at the rate of \$500.00 per month payable on the first of each month beginning on August 1, 2003, with the exception of the last payment which shall be in the amount of \$565.00. Failure to abide by this payment schedule will result in the remaining balance becoming immediately due and payable. Upon timely payment of the entire \$12,065.00 civil penalty, these cases **ARE DISMISSED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal flourish extending to the right.

Jerold Feldman  
Administrative Law Judge

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/hs

**ADMINISTRATIVE LAW JUDGE ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

May 30, 2003

CDK CONTRACTING COMPANY,  
Contestant

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent

CONTEST PROCEEDINGS

Docket No. WEST 2001-420-RM  
Citation No. 7935401; 4/23/2001

Docket No. WEST 2001-421-RM  
Order No. 7935402; 4/23/2001

Docket No. WEST 2001-422-RM  
Order No. 7935403; 4/23/01

Docket No. WEST 2001-423-RM  
Order No. 7935404; 4/23/2001

Docket No. WEST 2001-424-RM  
Order No. 7935406; 4/23/2001

Docket No. WEST 2001-425-RM  
Order No. 7935407; 4/23/2001

Docket No. WEST 2001-426-RM  
Citation No. 7935408; 4/23/2001

Docket No. WEST 2001-427-RM  
Citation No. 7935409; 4/23/2001

Docket No. WEST 2001-428-RM  
Citation No. 7942519; 4/23/2001

Mine ID 05-00037 L35  
Portland Plant/Quarry

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2002-461-M  
A.C. No. 05-00037-05506 L35

v.	:	Docket No. WEST 2002-464-M
	:	A.C. No. 05-00037-05509 L35
	:	Docket No. WEST 2003-5-M
CDK CONTRACTING COMPANY,	:	A.C. No. 05-00037-05511 L35
Respondent	:	Portland Plant & Quarry

**ORDER GRANTING, IN PART, MOTION TO COMPEL**

CDK Contracting Company filed a motion to compel the Secretary to produce (1) any Special Assessment Review Forms that were prepared with respect to the citations and orders contested in these cases; and (2) the Special Investigation file relating to Citation No. 7935401 and Order No. 7935402.

**I. Special Assessment Review Forms.**

CDK Contracting states that these forms may contain factual information that is relevant to the penalty criteria and that it is entitled to these forms in preparation of its defense. The Secretary contends that these forms are irrelevant to these proceedings because Commission judges assess penalties *de novo*. She also contends that the forms are protected by the deliberative process privilege. She maintains that they are subject to the deliberative process privilege because they contain predecisional, deliberative recommendations made by the MSHA inspector to his supervisors about whether a special assessment should be initiated.

The Secretary's special assessment process in 30 C.F.R. § 100.5 is totally irrelevant in these proceedings. Commission administrative law judges assess penalties taking into consideration the six penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), without regard to the Secretary's special assessment provisions. If I find that the Secretary has established violations in these cases, I will assess each penalty based only on the penalty criteria without taking into consideration how the Secretary assessed the violation.

The Special Assessment Review Forms contain facts that the MSHA inspector presents to his supervisor to support a special assessment. Thus, these forms may contain factual information that relates to the penalty criteria. The deliberative process privilege protects communications between subordinates and supervisors within the government that are "antecedent to the adoption of an agency policy." *Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) (citation omitted). The deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Documents that are protected by the privilege "are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet

only a personal position.” *Id.* Nevertheless, “even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealing with the public.”<sup>1</sup> *Id.*

I find that the Special Assessment Review Forms are not protected by the deliberative process privilege in this instance. The Secretary did not provide these forms for my *in camera* review, but such forms always set forth the inspector’s factual basis for recommending that a special assessment be considered by the Secretary. The Secretary accepted the inspector’s recommendations as the agency’s position when the subject citations and orders were specially assessed. Thus, even if the forms had once been protected by the privilege, they lost their protected status when the Secretary adopted his recommendations.

In addition, the Secretary’s position with respect to Special Assessment Review Forms is inconsistent at best. I take official notice of the fact that I have been assigned several cases in the past few years in which Special Assessment Review Forms have been attached to the Secretary’s petition for assessment of penalty as a part of Exhibit A. A good example is *Plateau Mining Corp.*, WEST 2002-207, which is currently pending before me. The special assessment review form for each citation in that fatality case was attached by the Secretary to the petition for assessment of penalty. In addition, the Secretary has introduced these forms into evidence at hearings to support her case. *See, e.g., Basin Resources, Inc.*, 19 FMSHRC 1565, 1570-71 (Sept. 1997) (ALJ); *S & M Construction, Inc.*, 18 FMSHRC 1018, 1051-52 (June 1996) (ALJ). The Secretary cannot make her Special Assessment Review Forms public in some cases and claim that it is privileged in others.

I find that the requested Special Assessment Review Forms may have some relevance to the Secretary’s negligence and unwarrantable failure determinations. For the reasons set forth above, CDK Contracting’s motion to compel production of the Special Assessment Review forms is **GRANTED** and Secretary is hereby **ORDERED** to provide counsel for CDK Contracting a copy of the requested Special Assessment Review Forms as soon as possible.

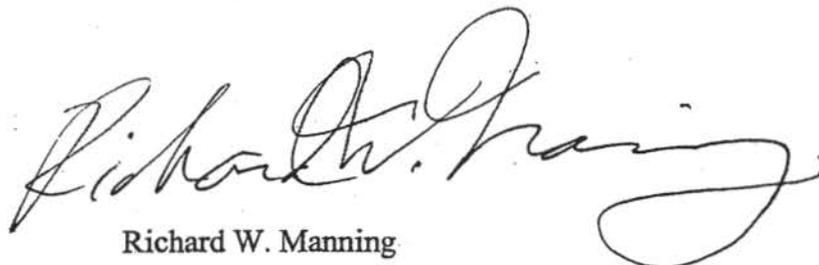
## II. Special Investigation File

CDK states that it believes that the Special Investigation file for Citation No. 7935401 and Order No. 7935402 contains factual information relevant to the citations and orders at issue in these proceedings. The Secretary objects to producing this file on the grounds that it is not relevant. She also objects to providing portions of the file that are protected by the deliberative process privilege, the informant’s privilege, or the attorney-client privilege. The Secretary states that, “[s]ubject to and without waiving these objections, the file is attached with the exception of redacted or withheld privileged information as detailed in a privilege log.” (S. Objection 2).

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<sup>1</sup> A more detailed discussion of the deliberative process privilege is contained in my order in *Newmont Gold Co.*, 18 FMSHRC 1532 (August 1996).

Because counsel for the Secretary represents that he has provided the requested Special Investigation file to counsel for CDK Contracting with privileged sections redacted, CDK Contracting's motion relating to the special investigation file is **DENIED**.

A handwritten signature in black ink, appearing to read "Richard W. Manning". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Richard W. Manning  
Administrative Law Judge

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RWM