JUNE

Commission Decisions

Administrative Law Judge Decisions

JUNE

The following case was directed for review during the month of June:

Secretary of Labor, (MSHA) v. Bradford Coal Company, Docket No. PENN 82-91. (Judge Fauver, May 23, 1985)

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

Secretary of Labor, (MSHA) v. Oliver Coal Company, Docket No. VA 84-40. (Judge Broderick, May 7, 1985)

Secretary of Labor on behalf of George Logan v. Bright Coal Company & Jack Collins, Docket No. KENT 81-162-D. (Judge Moore, May 7, 1985)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 5, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 82-91
v.	:	
BRADFORD COAL COMPANY, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

Pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), the administrative law judge's order of dismissal issued May 23, 1985, is directed for review. The ground for review is that the judge's dismissal of this civil penalty proceeding on procedural grounds, rather than rendering a decision on the merits, is contrary to Commission policy. Id.

The hearing in this matter was held before the administrative law judge on June 15, 1982. The hearing transcript was filed on June 30, 1982. On April 22, 1985, the judge issued to the Secretary of Labor an order to show cause why the proceeding should not be dismissed in light of the Secretary's failure to file a post-hearing brief. The Secretary's response explained that the attorney originally assigned had resigned and that his file in this proceeding inadvertently had been closed. The Secretary stated that the evidence introduced at the hearing supported a finding of violation, that due to the passage of time he would waive his right to file a brief and that the proceeding should be decided on the merits rather than dismissed. The administrative law judge thereafter dismissed the proceeding for want of prosecution.

We vacate the judge's order and remand for further proceedings. Bradford Coal Company is alleged to have violated the Mine Act by failing to comply with a mandatory safety standard. The case has been fully tried. The Secretary's response to the judge's show cause order explains the reason for his failure to file a brief. It is not uncommon for parties appearing before the Commission, in appropriate circumstances, to waive the filing of briefs and submit cases for decision based on the record. The present case involves one alleged violation for which the Secretary sought a $16.00 penalty. The transcript of the hearing totals 97 pages. Only two witnesses testified and no exhibits were introduced.

In these circumstances the judge's need for further briefing by the Secretary is minimal. In these circumstances, we find that the Secretary's request to waive the filing of a brief and submit the case for a decision on the record was reasonable and should have been granted. We note that although the Secretary neglected to file a brief, the operator never protested and no further order was issued by the judge until almost three years after the hearing was held.

Accordingly, the judge's order of dismissal is vacated and the case is remanded for further proceedings including providing the operator an opportunity for argument and issuance of a decision on the merits.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 12, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 82-299
UNITED STATES STEEL MINING COMPANY, INC.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty case arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), presents the question of whether United States Steel Mining Company, Inc. ("U.S. Steel") violated 30 C.F.R. § 75.1003, a mandatory safety standard dealing with the guarding of trolley wires. 1/ A Commission administrative law judge concluded that U.S. Steel violated the standard and assessed a civil penalty.

1/ 30 C.F.R. § 75.1003 repeats the statutory standard at section 310(d) of the Mine Act, 30 U.S.C. § 870(d), and provides in part:

> Trolley wires, trolley feeder wires, and bare signal wires shall be insulated adequately where they pass through doors and stoppings, and where they cross other power wires and cables. Trolley wires and trolley feeder wires shall be guarded adequately:
>
> (a) At all points where men are required to work or pass regularly under the wires;
>
> (b) On both sides of all doors and stoppings; and
>
> (c) At man-trip stations.
>
> The Secretary or his authorized representatives shall specify other conditions where trolley wires and trolley feeder wires shall be adequately protected to prevent contact by any person, or shall require the use of improved methods to prevent such contact. Temporary guards shall be provided where trackmen and other persons work in proximity to trolley wires and trolley feeder wires.

(Emphasis supplied).

5 FMSHRC 1752 (October 1983)(ALJ). We granted U.S. Steel's petition for discretionary review. 2/ For the reasons set forth below, we affirm the judge's decision.

On June 3, 1982, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), William R. Brown, conducted a regular health and safety inspection at U.S. Steel's Maple Creek No. 1 underground coal mine. During the inspection, Inspector Brown, accompanied by U.S. Steel's assistant mine foreman, John Pacsko, rode the mantrip to the 8 Flat 56 Room section of the mine. Inspector Brown observed the mantrip (also referred to as a "trolley" or "portal bus") stop to discharge miners at a location which he believed to be approximately 100 feet beyond a designated mantrip station, which placed the mantrip under an energized and unguarded 550-volt trolley wire. 3/

The unguarded trolley wire at this location was approximately six and a half feet from the mine floor and directly over the mantrip operator's head. After the mantrip stopped, the inspector observed the mantrip operator stand up in the bus, remove the pole from the overhead wire and hook the pole to the end of the mantrip; this procedure is commonly referred to as "dogging" the pole. The inspector believed that while dogging the pole the operator was in danger of contacting the energized unguarded trolley wire. Based upon his observations, the inspector cited U.S. Steel for a violation of section 75.1003 in that "there was no guarding provided at the mantrip station in the 8 Flat 56 Room section."

At the hearing, Assistant Mine Foreman Pacsko testified initially that the mantrip "didn't go beyond the portal bus station [mantrip station]. It was the end of the wire." Tr. 91. In a follow-up question from U.S. Steel's counsel, however, Mr. Pacsko testified that the mantrip may have gone beyond the guarded area by "a foot or two, the length of the portal bus, but I don't think the operator himself went beyond the unguarded portion." Tr. 92. On cross-examination, Mr. Pacsko testified that there was guarding "[w]ithin a short distance after where he [the mantrip operator] parked the portal bus, the portal bus station that we always parked." Tr. 94-95. Mr. Pacsko further stated on cross-examination that the location where the citation was issued was the place where they "always" parked and left the mantrip until the end of the shift. Tr. 95.

2/ The hearing in this case before the administrative law judge also involved citations for alleged violations of other safety standards. However, we limited review to the issue of whether a violation of 30 C.F.R. § 75.1003 occurred.

3/ Guarding of trolley wires at the subject mine typically consists of six-inch wide wooden boards placed approximately eight inches apart on either side of the trolley wire.

The judge concluded that U.S. Steel violated section 75.1003. 5 FMSHRC at 1754. The judge credited Inspector Brown's testimony that the mantrip stopped approximately 100 feet beyond the designated mantrip station to discharge miners. In accepting the inspector's testimony, the judge noted Mr. Pacsko's testimony that the mantrip may have gone beyond the station by "a foot or two." The judge stated that the hazard posed by the violation was that the mantrip operator was likely to contact the energized, unguarded wire. The judge found, "The operator had to stand to dog the pole, and the wire was head high." Id.

The primary purpose of the guarding requirement in section 75.1003 is to prevent miners from contacting bare trolley wires. As noted above, this standard repeats section 310(d) of the Mine Act, 30 U.S.C. § 870(d), which, in turn, was carried over unchanged from section 310(d) of the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976)(amended 1977). The legislative history of the 1969 Coal Act relevant to section 75.1003 reveals a strong Congressional concern with the hazards associated with bare trolley wires:

> This section requires that trolley wires and trolley feeder wires be insulated and guarded adequately at doors, stoppings, at mantrip stations, and at all points where men are required to work or pass regularly.... Also, this section would require temporary guards where trackmen or other persons work in proximity to trolley wires and trolley feeder wires. The Secretary or the inspector may designate other lengths of trolley wires or trolley feeder wires that shall be protected.
>
> ... The guarding of trolley wires and feeder wires at doors, stoppings, and where men work or pass regularly is to prevent shock hazards.
>
> Because of the extreme hazards created by bare trolley wires and trolley feeder wires, the committee intends that the Secretary will make broad use of the authority to designate additional lengths of trolley wires and trolley feeder wires that shall be protected.

S. Rep. No. 411, 91st Cong., 1st Sess. 77 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part 1 Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 203 (1975).

As the language of section 75.1003 specifies, in order to effectuate the purpose of the standard, guarding is especially necessary at mantrip stations. Miners are discharged at such stations and pass under trolley wire in the process. Further, a common hazard presented by unguarded trolley wire at a mantrip station is the possible shock hazard to the mantrip operator when he stands to remove the trolley pole from the overhead wire.

Thus, the purpose of section 75.1003 and the hazards against which it guards are clear. In pertinent part, the standard provides, "trolley wires and trolley feeder wires shall be guarded adequately ... at mantrip stations." The judge found that the location where the mantrip stopped was under unguarded wire. Substantial evidence supports this finding. Therefore, the specific question presented on review is whether the location where the mantrip stopped was a "mantrip station," at which trolley wire must be guarded. We answer that question in the affirmative.

Crediting the inspector's testimony, the judge found the mantrip stopped at a point along the track 100 feet from the designated mantrip station and that miners disembarked from the mantrip and proceeded to their working places. The inspector also testified that the trolley bus operator "rode right to the spot." Tr. 80. Moreover, according to U.S. Steel's witness, Mr. Pacsko, the place where the mantrip stopped was not a random or one-time-only stopping place, but rather was the same location at which the mantrip "always did" stop. Tr. 95. Thus, we hold that a mantrip station can be established through routine or regular stopping practice, as well as by explicit designation. Such a construction of the standard is founded in the practicalities of daily mining operations and furthers the protective concerns of Congress cited above.

U.S. Steel argues that the effect of the judge's decision is to convert any location where a mantrip stops into a "mantrip station" requiring guarding of the trolley wire. Given the facts in this case, we need not resolve whether a random or one-time-only stop at a particular location would render that location a station within the meaning of section 75.1003. We hold only that where, as here, a location has become a stopping place for the disembarkment and embarkment of miners through regular usage, it is a "mantrip station" for purposes of the standard.

Accordingly, we conclude that substantial evidence supports the judge's conclusion that the standard was violated. Therefore, insofar as the judge's decision is consistent with this decision, we affirm. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 12, 1985

LOCAL UNION 1609, DISTRICT 2 UNITED MINE WORKERS OF AMERICA (UMWA)	:	
v.	:	Docket No. PENN 84-158-C
GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This compensation case arises under section 111 (30 U.S.C. § 821) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). A Commission administrative law judge dismissed a complaint for one week's compensation under section 111 filed by the United Mine Workers of America ("UMWA") following an explosion resulting in closure of a mine owned by respondent Greenwich Collieries, Division of Pennsylvania Mines Corporation ("Greenwich"). 6 FMSHRC 2465 (October 1984)(ALJ). The UMWA had based its compensation claim on its assertion that the mine was closed, for purposes of section 111 compensation, by an imminent danger order issued pursuant to section 107 of the Mine Act, 30 U.S.C. § 817, and that that order was issued because of Greenwich's violations of mandatory standards. On November 19, 1984, the Commission granted the petition for discretionary review filed by the UMWA.

In its petition the UMWA requested, inter alia, that the proceeding be remanded to the administrative law judge pending release of an accident investigation report concerning the mine explosion being conducted by the Department of Labor's Mine Safety and Health Administration ("MSHA"). By letter dated April 24, 1985, counsel for the UMWA provided the Commission with copies of withdrawal orders issued to Greenwich by MSHA on March 29, 1985, pursuant to section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). Counsel stated that the full MSHA accident report would be completed in May 1985, and requested that the matter be remanded to the

judge for consideration of MSHA's report. The essence of the UMWA's position is that the subsequently issued section 104(d) orders, when read in conjunction with the preceding imminent danger order, may serve as a basis for section 111 compensation. Greenwich has responded in opposition to the requested remand.

Treating the UMWA's request as a motion, we deny the motion.

The judge dismissed the UMWA's compensation complaint on two grounds: (1) that the mine was idled initially by an order issued under section 103 of the Mine Act, 30 U.S.C. § 813; and (2) that the subsequent section 107 imminent danger order did not contain allegations of a violation of mandatory safety or health standards, a precondition, in the judge's view, for entitlement to one week's compensation under section 111 of the Act. 6 FMSHRC at 2477-78. We read the judge's decision to have rejected the contention that subsequently issued section 104 orders may serve as a basis for an award of compensation under the circumstances presented in this case. See 6 FMSHRC 2476-78. Thus, a remand for his consideration of the recently issued withdrawal orders would therefore serve no practical purpose and would result in delay. 1/

Accordingly, the UMWA's motion for a remand is denied. In view of our ruling, the UMWA may file no later than Wednesday, July 3, 1985, a supplemental brief focusing on the asserted legal effect of the recently issued section 104 withdrawal orders. Any response by Greenwich to such supplemental brief is due within 20 days after the UMWA's brief is served. 2/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ We also have pending on review two other cases presenting very similar, or identical issues: Local Union 1889, District 17, United Mine Workers of America v. Westmoreland Coal Co., Docket No. WEVA 81-256-C (involving review of judge's decision following the Commission's remand to him in its Westmoreland decision, supra); and Local Union 2274, District 28, United Mine Workers of America v. Clinchfield Coal Co., Docket No. VA 83-55-C.

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 18, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of ROBERT A. RIBEL	:	
v.	:	Docket No. WEVA 84-33-D
EASTERN ASSOCIATED COAL CORP.	:	

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding was initiated by the Secretary of Labor, on behalf of miner Robert A. Ribel, against Eastern Associated Coal Corporation ("Eastern") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). 30 U.S.C. § 815(c)(2) (1982). Following a hearing, a Commission administrative law judge held that Ribel had been unlawfully discharged by Eastern in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), and ordered that Ribel be reinstated, with back pay. 6 FMSHRC 2203 (September 1984) (ALJ). In a subsequently issued order, the judge also awarded Ribel certain costs and expenses, but denied Ribel's request for an award of attorneys' fees for private counsel retained by Ribel in this section 105(c)(2) proceeding. 6 FMSHRC 2744 (December 1984)(ALJ). Thereafter, we granted cross-petitions for discretionary review filed by Eastern and Ribel. Eastern sought review of the judge's decision on the merits, while Ribel primarily sought review of the judge's denial of attorneys' fees.

On review, the parties have filed extensive briefs and the Commission has heard oral argument. One of the issues addressed both in the briefs and at oral argument is the apparent lack of findings of fact in support of the judge's conclusion that the Secretary established a prima facie case. Although the judge does reach such a conclusion, he immediately turns to the examination of the validity of Eastern's affirmative defense, leaving us without the necessary findings as to the elements of the prima facie case. While some of such findings may well be set forth in the entire opinion, which encompasses three dockets, the requisite findings are not set forth in the discussion of the case before us.

Accordingly, the merits portion of this case is remanded to the judge for the limited purpose of making specific findings of fact, along with any credibility determinations necessary to resolve key, conflicting testimony, and for an analysis of those findings consistent with established Commission precedent. 30 U.S.C. § 823(d)(2)(C). On remand, the judge is directed to analyze in detail whether a prima facie case of discrimination was established. In particular, the judge is to determine what actually occurred at the August 5, 1983 meeting between longwall coordinator Michael Toth and the miners of the midnight shift, and that meeting's relationship, if any, to the allegation that the decision to suspend Ribel with intent to discharge was a violation of section 105(c).

Finally, in view of the expedited status of this case, the judge is directed to supplement his decision on the merits within 30 days from the issuance of this order. In the meantime, the Commission will retain jurisdiction over this matter.

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 25, 1985

DISCIPLINARY PROCEEDING : Docket No. D-85-1

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This disciplinary proceeding arises under Commission Procedural Rule 80, 29 C.F.R. § 2700.80. 1/ On November 1, 1984, a Commission administrative law judge referred to the Commission circumstances which the judge believed warranted disciplinary proceedings. The substance of the referral concerned the conduct of counsel for the Secretary of Labor

1/ Rule 80 provides in pertinent part:

Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that he has engaged in unethical or unprofessional conduct, ... or that he has violated any provisions of the laws and regulations governing practice before the Commission....

(c) Procedure. [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, shall forward such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that the circumstances reported to it warrant disciplinary proceedings, the Commission shall either hold a hearing and issue a decision or refer the matter to a Judge for hearing and decision....

29 C.F.R. § 2700.80.

in resisting compliance with subpoenas issued by the judge to a federal mine inspector. By order dated November 7, 1984, we requested statements of position from counsel for the Secretary, the complainant, and the operator. On the grounds explained below, we conclude that disciplinary proceedings are not warranted and we vacate the judge's order of referral.

This matter arose in connection with a discrimination proceeding, Roger A. Hutchinson v. Ida Carbon Corporation, FMSHRC Docket No. KENT 84-120-D, brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). Mr. Hutchinson originally filed with the Secretary of Labor a complaint of discrimination against Ida Carbon Corporation ("Ida"). After investigation, the Secretary determined administratively that discrimination had not occurred and, in accordance with the relevant provisions of section 105(c)(2) of the Mine Act, declined to file a complaint on Mr. Hutchinson's behalf. 30 U.S.C. § 815(c)(2). Mr. Hutchinson then brought the underlying action against Ida pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3). On July 10, 1984, a subpoena ad testificandum, which was issued on behalf of the complainant by the Commission administrative law judge hearing the Hutchinson case, was served upon Butch Cure, an inspector employed by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The subpoena directed Inspector Cure to testify at the hearing set for July 19, 1984, in the Hutchinson case.

On July 18, 1984, the day before the scheduled hearing, counsel for the Secretary of Labor, Ralph D. York, Senior Trial Attorney, advised the judge's secretary by telephone that the Secretary would be entering a special appearance on Inspector Cure's behalf and also would be filing a motion to quash the subpoena. The judge proceeded with the scheduled hearing on July 19, 1984, but continued the case at the close of testimony and ordered the record held open for the possible receipt of depositions. The Secretary's notice of special appearance and motion to quash, dated July 19, 1984, were received on July 23, 1984. These papers were signed by Mr. York on behalf of Carl W. Gerig, Jr., Associate Regional Solicitor.

The Secretary's motion to quash asserted that the official policy of the Department of Labor, as set forth in the Department's regulations at 29 C.F.R. Part 2, Subpart C, prohibits employees from testifying under subpoena in cases where the Department is not a party unless a waiver is granted by the appropriate Deputy Solicitor of Labor pursuant to the provisions of 29 C.F.R. § 2.22. 2/ The motion further stated that

2/ Section 2.22 provides:

> Production or disclosure prohibited unless approved by the appropriate Deputy Solicitor of Labor.
>
> In terms of instructing an employee or former employee of the manner in which to respond to a demand, the Associate Solicitor, Regional Solicitor, or Associate Regional Solicitor, whichever is applicable, shall follow the instructions of the

(footnote 2 continued)

29 C.F.R. § 2.23 required counsel for the Secretary to request the body issuing the subpoena to stay its demand pending the employee's receipt of instructions from the appropriate Deputy Solicitor. The motion also recited an offer to make available to Mr. Hutchinson's counsel all non-privileged portions of MSHA's investigative file regarding Mr. Hutchinson's case.

By letter dated July 26, 1984, a representative of the Deputy Solicitor of Labor for Regional Operations informed Inspector Cure that he would not be permitted to testify in the Hutchinson discrimination proceeding. On August 22, 1984, the judge issued an order denying the Secretary's motion to quash and issued a new subpoena for the purpose of taking the deposition of Inspector Cure by September 21, 1984. Counsel for the Secretary responded by filing a motion requesting the judge to reconsider the motion to quash and his order of August 22, 1984. The motion stated that a certified copy of the Secretary's investigation file had been provided to counsel for the complainant and that any testimony regarding matters not addressed in the file would be irrelevant to the discrimination proceeding. The motion also asserted that if complainant's purpose was to obtain the history of the operator's non-compliance with the Mine Act's requirements, the appropriate source would be MSHA's official enforcement records.

The second subpoena was served on Inspector Cure on or about September 10, 1984, and directed him to appear for a deposition on September 18, 1984. On that date, counsel for Mr. Hutchinson, counsel for Ida, and a court reporter were present to take the deposition of Inspector Cure. Inspector Cure did not appear. On September 21, 1984, the judge entered an order denying the Secretary's motion for reconsideration, and ordered that the record be held open until October 31, 1984, for the purpose of receiving depositions.

On October 29, 1984, counsel for the complainant filed a motion to compel Frank A. White, the Deputy Solicitor of Labor for National Operations, and Carl W. Gerig, the Associate Regional Solicitor, to allow Inspector Cure to be deposed. On November 1, 1984, before the Secretary had adequate opportunity to respond to the motion to compel, the judge certified the

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Footnote 2 end.

> appropriate Deputy Solicitor of Labor. No employee or former employee of the Department of Labor shall, in response to a demand of a court or other authority, produce any material contained in the files of the Department or disclose any information relating to material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without approval of the appropriate Deputy Solicitor of Labor.

29 C.F.R. § 2.22.

record in the discrimination proceeding to the Commission with a request for the institution of disciplinary proceedings pursuant to Commission Procedural Rule 80. Specifically named in the judge's referral were Frank A. White, Deputy Solicitor of Labor, Carl W. Gerig, Associate Regional Solicitor, and Ralph D. York, Senior Trial Attorney. 3/ According to the judge, these attorneys had violated the standards of ethical conduct required of attorneys practicing before the Commission by ignoring his order denying the motion to quash and by counseling Inspector Cure to ignore the subpoenas.

We disagree. The judge's disciplinary referral calls into question the ethical conduct of government attorneys in failing to counsel compliance with the subpoenas the judge had issued on behalf of the complainant. The judge clearly was empowered to issue subpoenas authorized by law, and to rule on the merits of the Secretary's motions to quash. See 30 U.S.C. § 823(e); Commission Procedural Rules 54 & 58, 29 C.F.R. §§ 2700.54 & 2700.58. However, a lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a judicial ruling. See ABA, Code of Professional Responsibility, Canon 7 & EC 7-1, 7-2, 7-19 & 7-22 (1979). Cf. ABA, Model Rules of Professional Conduct, Rules 3.1, 3.3 & Comments (1983). 4/ In this instance, we cannot conclude that counsel for the Secretary acted unethically.

3/ Mr. White is the Deputy Solicitor of Labor for National Operations and, as such, was not involved in the Department's decision directing Inspector Cure not to testify. Rather, pursuant to the applicable Departmental regulations, that decision was made by the office of Ronald G. Whiting, the Deputy Solicitor of Labor for Regional Operations. See 29 C.F.R. §§ 2.20(c)(1), 2.22 & 2.23. Thus, Mr. White had no connection with the decision to resist the subpoenas and his name should not have been included in the judge's referral.

4/ Canon 7 states:

> A lawyer should represent a client zealously within the bounds of the law.

Ethical Consideration 7-22 provides:

> Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

Ethical Consideration 7-25 provides in relevant part:

> Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them.

The record in this case shows that counsel for the Secretary proceeded in good faith under a colorable legal prohibition against compliance with the subpoenas, and did not take any action outside the appropriate legal framework for testing the validity of a Commission subpoena. The regulations upon which the Secretary relied prohibit compulsory testimony by an employee of the Department of Labor, absent a waiver by appropriate departmental officials, in proceedings to which the Department is not a party. See 29 C.F.R. §§ 2.20 & 2.25. Although it is not our task in the present proceeding to resolve the merits of the Secretary's position in resisting compliance with the subject subpoenas, we note that similar positions taken by the Secretary based on the same regulations have been upheld by federal courts in analogous contexts. See, e.g., Smith v. C.R.C. Builders Co., Inc., etc., 11 BNA OSHC 1685, 1686-87 (D. Colo. 1983); Reynolds Metals Co. v. Crowther, 572 F. Supp. 288, 290-91 (D. Mass. 1982). This consideration supports the conclusion that counsel for the Secretary proceeded in good faith upon a plausible legal claim. In this regard, Mr. York entered a special appearance in the case and filed two motions and a legal memorandum supporting the Secretary's position. In making these filings, Mr. York acted on behalf of his superior, Mr. Gerig. The measures challenging the subpoenas were taken in support of the decision of Ronald G. Whiting, Deputy Solicitor of Labor for Regional Operations, not to waive application of the subject regulations in this instance. These steps were taken within the framework of 29 C.F.R. §§ 2.20-2.25 and, hence, of the law, as permitted by the Canons.

Further, the Secretary's counsel did not resist compliance with the subpoenas outside the appropriate legal framework established by the Mine Act and our procedural rules. Section 113(e) of the Mine Act, 30 U.S.C. § 823(e), empowers the Commission and its judges to issue subpoenas. If there is a refusal to obey the subpoena, that section of the Act states:

> In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

30 U.S.C. § 823(e). Our rules of procedure mirror this statutory scheme, while adding an additional caveat. Rule 58(e) provides:

> Failure to comply. Upon the failure of any person to comply with an order to testify or a subpoena directed or issued by the Commission or a Judge, the Commission or the Judge, respectively, may apply to the appropriate district court [for] enforcement of the order or subpoena. Neither the Commission nor the Judge shall be deemed thereby to have assumed responsibility for the effective prosecution of the failure to obey the subpoena or order.

29 C.F.R. § 2700.58(e). These provisions make clear that when a legal impasse is reached on the question of whether an individual must comply with a Commission subpoena, the issue becomes one for the federal courts to decide.

Accordingly, the underlying discrimination case is returned to the judge for disposition. The Secretary shall be afforded the opportunity to submit a reply, if any, to the complainant's motion to compel the deposition of Inspector Cure. In light of our decision, the judge should carefully weigh the relative positions and needs of the parties before seeking enforcement of the subpoena in court. In particular, consideration should be given to the fact that the Secretary has turned over to the complainant the investigative file in this matter. For the reasons set forth above, the judge's order requesting the institution of disciplinary proceedings against each of the individuals named therein was improper and must be vacated. This disciplinary proceeding is terminated. 5/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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Administrative Law Judge James A. Broderick
Federal Mine Safety & Health Review Commission
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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JUN [illegible]

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 85-15 A.C. No. 46-06449-03525
v.	:	No. 1 Mine
HALF WAY, INCORPORATED, Respondent	:	

DECISION

Appearances: Patricia Larkin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
William Stover, Esq., Beckley, West Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks a civil penalty for an alleged violation of Respondent's approved roof control plan, and therefore of 30 C.F.R. § 75.200. The violation was charged in a citation issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977. Respondent denies that the charged violation occurred, and contests the finding that the violation was significant and substantial. Pursuant to notice, the case was heard in Beckley, West Virginia, on April 18, 1985. James B. Ferguson, a Federal Mine Inspector, testified on behalf of the Secretary. Donald Hughes and Fred Ferguson testified on behalf of Respondent. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Respondent's mine was a drift mine. It extracted coal by conventional mining methods and utilized a conveyor belt

haulage. The coal seam averaged about 40 inches in height and from 36 inches to 40 inches in the area cited. Approximately 21 miners were employed at the mine.

On June 20, 1985, Federal Mine Inspector James Ferguson inspected the mine on the first day of a regular inspection. He checked the map at the mine office and noted that it indicated that mining was being done within 150 feet of the outcrop or end of the coal seam. Respondent's foreman told him that no additional supports were being used in the area in question.

Precaution No. 15 of the approved roof-control plan for the subject mine states that roof bolts shall not be used as the sole means of roof support when mining is being done within 150 feet of the outcrop. The plan requires that supplemental support shall consist of at least one row of posts on 4 foot spacing maintained up to the loading machine, limiting the roadway to 16 feet.

After examining the map, the inspector proceeded underground. The entries were being driven 20 feet wide. Room No. 9 had been driven a minimum of 150 feet and No. 8 approximately 100 feet while within 150 feet of the outcrop. No additional posts had been set. The roof had deteriorated in both rooms and mining had been discontinued. Mining was taking place in rooms 3 through 7 and they were approaching 150 feet from the outcrop. The roof consisted of sandy shale. The roof was generally firm.

The inspector issued a citation for a violation of 30 C.F.R. § 75.200. It was abated by dangering off rooms 8 and 9.

CONCLUSIONS OF LAW

The evidence clearly establishes that Respondent had performed mining within 150 feet of the outcrop as shown on the mine map. No supplemental supports had been provided. The location of the outcrop can only be determined on the basis of engineering projections. It is not possible to determine it by visual inspection underground. The condition found was proscribed by the approved roof-control plan. Therefore, a violation of 30 C.F.R. § 75.200 was established.

The violation was serious. Even a stable roof is liable to deteriorate as mining approaches the end of the coal seam. That this is so was clearly shown by the deterioration of the roof in rooms 8 and 9. A serious injury or fatality would

have been reasonably likely had mining continued. The violation was therefore of such nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard.

The condition or practice cited should have been obvious to the mine operator. The fact that mining was occurring within 150 feet of the outcrop could easily have been determined by reference to the mine map. The violation resulted from Respondent's negligence.

Respondent is not a large operator: 21 miners were employed and approximately 69,000 tons of coal are produced annually.

Respondent's history of prior violations is not such that a penalty otherwise appropriate should be increased because of it. The violation was promptly abated in good faith.

Considering the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for the violation found is $1,000.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that Citation No. 2126393 issued June 20, 1984, is AFFIRMED as issued; IT IS FURTHER ORDERED that Respondent shall within 30 days of the date of this decision pay the sum of $1,000 for the violation found herein.

James A Broderick
James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JUN 13 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 84-279
	:	A.C. No. 46-06547-03503
v.	:	
	:	Docket No. WEVA 84-342
NEIBERT COAL COMPANY, INC., Respondent	:	A.C. No. 46-06547-03505
	:	
	:	No. 2 Mine

SUMMARY DECISIONS AND ORDERS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for 16 alleged violations of certain mandatory safety and health standards found in Parts 70, 75, and 77, Title 30, Code of Federal Regulations.

These cases were scheduled for hearing in Logan, West Virginia, on February 26, 1985. The hearings were continued when the petitioner's counsel advised me that the parties would propose a settlement, and the parties were given until April 1, 1985, to file their settlement motion. As of this date, no settlement motion has been forthcoming.

By letter dated April 5, 1985, petitioner's counsel advised me that information he has received indicates that the respondent is no longer in operation and is insolvent. Counsel advised further that he was awaiting further confirmation of the financial status of the respondent, and that respondent's representative has advised him that the respondent will not actively defend or litigate these cases further.

In view of the foregoing, I issued an order on April 23, 1985, directing the parties to show cause as to why the respondent should not be defaulted, because of its failure to forward certain information to the petitioner, so as to enable the petitioner to file its responsive settlement motion with me for adjudication.

Discussion

The respondent has failed to respond to the petitioner's request to furnish information concerning its financial condition, and has also failed to respond to my previous orders concerning the proposed disposition of these cases. Under the circumstances, I conclude and find that the respondent is in default, and that these proceedings may be disposed of pursuant to the Commission's summary disposition procedures found in 29 C.F.R. § 2700.63.

ORDER

In view of the respondent's default, and pursuant to the provisions of 29 C.F.R. § 2700.63(b), the respondent is assessed civil penalties for the violations in question, as follows:

WEVA 84-279

Citation No.	Date	30 C.F.R. Section	Assessment
2143006	5/3/84	77.400(a)	$ 50.00
2143008	5/3/84	75.1103-1	$ 54.00
2143009	5/3/84	77.701-2	$ 50.00
2143010	5/4/84	77.200	$ 63.00
2143011	5/4/84	75.1722(b)	$ 68.00
2143012	5/4/84	75.400	$ 63.00
2143013	5/4/84	75.1100-2(b)	$ 74.00
2143014	5/4/84	75.1101	$ 68.00
2143015	5/4/84	75.400	$ 54.00
2143018	5/9/84	75.400	$ 85.00
2143019	5/9/84	75.200	$ 68.00
2274202	5/11/84	75.200	$225.00
2142744	5/15/84	75.1725(a)	$ 50.00
		Total	$972.00

WEVA 84-342

Citation No.	Date	30 C.F.R. Section	Assessment
2143007	5/3/84	77.205(e)	$ 68.00
9917153	6/12/84	70.208(a)	$ 20.00
9917154	6/12/84	70.208(a)	$ 20.00
		Total	$108.00

Respondent IS ORDERED to pay civil penalties in the amounts shown above for the violations in question, and payment is to be made to the petitioner within thirty (30) days of the date of this order.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 84-67 A.C. No. 01-01247-03586
v.	:	
	:	Mine No. 4
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Before: Judge Kennedy

The parties having failed to show cause why the tentative decision of May 8, 1985 should not be confirmed, it is ORDERED that said decision be, and hereby is, ADOPTED and CONFIRMED as the final disposition of this matter. It is FURTHER ORDERED that the operator pay the penalty assessed, $100, on or before Friday, June 21, 1985, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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LITTLE SANDY COAL SALES, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. KENT 83-178-R
v.	:	Order No. 2053590; 3/18/83
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 1 Tipple

DECISION

Appearances: Edgar B. Everman, Little Sandy Coal Sales, Inc., Grayson, Kentucky, for Contestant; Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Melick

This case is before me on remand from the Federal Mine Safety and Health Review Commission by decision dated March 28, 1985. De novo hearings were thereafter held on May 21, 1985 on the Contest filed by Little Sandy Coal Sales, Inc. (Little Sandy) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." Little Sandy challenges the issuance by the Federal Mine Safety and Health Administration (MSHA) of a withdrawal order on March 18, 1983, pursuant to § 104(b) of the Act.[1]

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[1]Section 104(b) of the Act reads as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such violation has been abated.

The general issues before me are whether Little Sandy's coal processing facility is a "mine" within the meaning of section 3(h)(1) of the Act, and if so whether the order at bar is valid.

The essential facts are not in dispute. During relevant times Little Sandy's operation consisted of a scale, scale house, parts and lubricant storage trailer and a raw coal processing apparatus. The processing apparatus consisted of a raw coal hopper, raw coal feeder and belt, a crusher with a load-out belt and a screening unit. The plant is located on approximately 1-1/4 acres and the coal stockpile area on approximately 3/4 of an acre. The processing apparatus is about 100 feet long and is powered by a 440 volt commercial power unit and a diesel motor.

During relevant times raw coal was purchased from several local mines and was custom processed into (1) crusher coal, (2) stoker coal, and (3) fine coal or carbon. The stoker coal was further sized depending on customer demands -- one size for household use in stoker stoves and another for commercial use. 25 to 30 percent of the processed coal was prepared for local residents for household use and 70 to 75 percent for commercial users such as the local county school systems and Morehead State University. The processing plant is depicted in photographs marked as government exhibits 1 a, b, and c, and 2 a, b, and c.

Included within the definition of the term "mine" under section 3(h)(1) of the Act, are facilities used in the "work of preparing coal."[2] The phrase "work of preparing coal" is defined in section 3(i) of the Act as: "[t]he breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite or anthracite and such other work of preparing such coal as is usually done by the operator of the coal mine."

This and other criteria for determining whether a coal handling operation is engaged in "work of preparing coal" were recently reviewed by the Commission in Secretary v. Mineral Coal Sales, Inc., 7 FMSHRC _____ (May 16, 1985):

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[2]Section 3(h)(1) of the Act states, in relevant part, as follows:

> "Coal or other mine" means . . . (C) lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in . . . or to be used in . . . the work of preparing coal or other minerals, and includes custom coal preparation facilities.

In Elam, [Oliver M. Elam, Jr., Co., 4 FMSHRC 5 (1982)], the Commission held that under the statutory definition the mere fact that some of the work activities listed in section 3(i) are performed at a facility is not solely determinative of whether the facility properly is classified as a "mine". Rather:

> [I]nherent in the determination of whether an operation properly is classified as "mining" is an inquiry not only into whether the operation performs one or more of the listed activities, but also into the nature of the operation performing such activities. . . .
>
> . . . [A]s used in section 3(h) and as defined in section 3(i), "work of preparing [the] coal" connotes a process, usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities, undertaken to make coal suitable for a particular use or to meet market specifications.

4 FMSHRC at 7, 8 (emphasis in original). In Elam the Commission held that a commercial loading dock that loaded coal, in addition to other materials, was not a "mine". The Commission concluded that Elam's handling of the coal, which included storing, breaking, crushing, and loading, was done solely to facilitate its loading, business and not to meet customer's specifications or to render the coal fit for any particular use.

The Commission followed Elam in Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), a case arising under the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976) (amended 1977). We concluded that an operation that extracted materials from a waste dump and separated coal from the refuse in order to market the coal was engaged in coal preparation. Accord: Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 591-92 (3rd Cir. 1979) (a facility that separated coal fuel from material dredged from a river bottom by another entity was engaged in coal preparation under the Mine Act). The Commission has also emphasized that a preparation or milling facility need not have a connection with the extractor of the mineral in order to

be subject to coverage of the Mine Act. Carolina Stalite Co., 6 FMSHRC 2518, 2519 (November 1984); Alexander Brothers, Inc., 4 FMSHRC at 544.

Applying these considerations to the case at bar it is clear that the business engaged in at Little Sandy constitutes "mining" under the Act. At this facility coal was stored, mixed, crushed, sized, and loaded -- all activities included within the statutory definition of coal preparation. In addition the nature of the Little Sandy operation was such that, unlike the commercial loading dock in Elam at which coal was crushed merely to facilitate loading and transportation on barges, all of the above listed work activities were performed to make it "suitable for a particular use or to meet market specifications." Thus, Little Sandy was a "mine" under the Act and MSHA properly asserted its inspection authority over the facility. Secretary v. Mineral Coal Sales Inc., supra.[3]

The evidence is also undisputed that when first cited on March 10, 1983, for having inadequate sanitary toilet facilities, Little Sandy in fact had no such facilities.[4] In addition it is undisputed that when the inspection team returned on March 18, 1983 to determine whether abatement had been completed, Edgar Everman, president of Little Sandy, indicated that not only did he not have an approved toilet facility but that he "did not intend to put one there". Citation Number 2053613 issued for failing to have an approved sanitary toilet under 30 C.F.R. § 71.500 was therefore valid

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[3]I have not ignored Little Sandy's contention that its coal processing operation is not considered to be a "mine" under various Kentucky laws and under the Federal Surface Mining and Reclaimation Act. However, disposition of this case is governed solely by the separate and distinct provisions of the Federal Mine Safety and Health Act of 1977. Little Sandy has also expressed concern that consideration had not been given to the fact that it is a small operator. As explained at hearing the size of the mine operator and the effect any monetary penalty would have on the operator's ability to stay in business are factors that must be considered by the Commission Judges in assessing civil penalties for violations under the Act. See section 110(i) of the Act.

[4]An MSHA inspector had also cited eleven other violations on this date but for purposes of litigating the jurisdictional issue discussed supra, MSHA selected this citation and the subsequent "no area affected" withdrawal order for failure to abate that citation.

and the subsequent section 104(b) withdrawal order (number 2053590) issued March 18, 1983, for failure to abate under the circumstances was properly issued. Accordingly that order is affirmed and the contest of that order is denied.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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HARRY L. WADDING, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. PENN 84-186-D
TUNNELTON MINING COMPANY Respondent	:	MSHA Case No. PITT CD 84-10
	:	Marion Mine

DECISION

Appearances: Samuel J. Pasquarelli, Esq., Jubelier, Pass & Intrieri, Pittsburgh, Pennsylvania, for Complainant;
R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania, and Joseph T. Kosek, Jr., Esq., Tunnelton Mining Company, Ebensburg, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Harry Wadding pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that he was discharged from the Tunnelton Mining Company (Tunnelton) in violation of section 105(c)(1) of the Act.[1]

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[1]Section 105(c)(1) of the Act provides in part as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this act because such miner . . . has filed or made an complaint under or related to this act, including a complaint notifing the operator or the operator's agent, or the representative of the miner at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this act . . . or because of the exercise of such miner . . . on behalf of himself or others of any statutory right afforded by this act.

Before his discharge on March 14, 1984, Mr. Wadding was employed at Tunnelton's Marion Mine as one of three mine examiners or firebosses responsible for mine safety inspections. Tunnelton maintains that the Complainant and the other two mine examiners, Michael Solarz and Ben Selapack, were all properly discharged on March 14, 1984, solely because they failed to perform their job duties in neglecting to inspect and place their initials and date at certain locations required to be inspected.[2] Additional discharge proceedings were subsequently brought against Mr. Wadding on the basis of an alleged trespass on mine property.[3] Wadding argues that the grounds cited by Tunnelton for his discharge were pretexts and that the true motivation for this action was his safety related activities protected under section 105(c)(1) of the Act.

In order for the Complainant to establish a prima facie violation of section 105(c)(1) he must prove by a preponderance of the evidence that he engaged in an activity (or activities) protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir., 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir. 1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Wadding alleges a number of protected activities purportedly giving rise to his discharge, namely: (1) that he reported in the fireboss books in February 1983, that notations he had been making on certain dateboards in areas he was required to inspect had been erased, and that there was "garbage" in the walkways (2) that during 1983 and 1984 he complained to mine foreman John Matty and to an inspector from the Federal Mine Safety and Health Administration (MSHA) about his inability to safely inspect various caved-in areas without the installation of tubes, (3) that in June 1983, he reported a safety violation to a Federal inspector, (4) that in October or November 1984 he "dangered off" a portion of the mine because of "bad roof", (5) that on February 24, 1984, he reported in the fireboss books that the mine needed rock dusting and that certain wooden rollers

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[2]The duties of mine examiners under applicable state law are set forth in 52 PA. CONS. STAT. § 701-228.

[3]At separate arbitration proceedings Selapack's discharge was reversed, Solarz' discharge was modified to a warning and Wadding's first discharge was modified to a 90-day suspension. Wadding's discharge based on the trespass charges was upheld in subsequent arbitration proceedings.

needed replacing, (6) that on March 12, 1984, he again reported in the fireboss books that those wooden rollers needed replacing, (7) that on March 12, 1984, he complained to state mine inspector Monaghan, to union safety committeeman Jim Gradwell and to foreman Harold Learn that dateboard notations were not being made by Michael Solarz, one of the other mine examiners, and (8) on March 13, 1984, the day before his discharge, he reported in the fireboss books that the mine needed rock dusting. It is not disputed that these reports and activities occurred as alleged and that they constituted complaints of "an alleged danger or safety or health violation" within the meaning of section 105(c)(1).

The second element of a prima facie case is a showing that the adverse action (discharge) was motivated in any part by the protected activity. Complainant alleges herein, as circumstantial evidence of such motivation, that Tunnelton management knew of his protected activities and that such activities elicited hostile responses toward him. See Secretary ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981). rev'd on other grounds, sub nom., Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). Tunnelton acknowledges that it knew of all but two of the protected activities but denies that it was motivated in any part by those activities.[4]

In support of his case Wadding cites an incident in June 1983 after he had reported a safety violation to a Federal inspector. In response to that complaint mine foreman John Matty purportedly warned him that if he continued to talk to Federal inspectors he would be fired. At hearing Matty denied any such threats and testified that after he received notice of the citation he merely asked Wadding why he had not reported the safety problems to him as mine foreman instead of to the Federal inspector. Matty was admittedly unhappy with what Wadding had done because it made him "look like I wasn't aware of what was going on at the mines." Whichever version is accepted, it is apparent that Matty was not pleased with Waddings protected activity. The relationship was further frayed when unfair labor practice charges were filed with the National Labor Relations Board (NLRB) by Wadding and others which included allegations of retaliation for filing safety complaints. The matter was at that time apparently resolved by a settlement agreement in

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[4]Indeed the Complainant produced no evidence to show that his complaint (about the failure of fireboss Solarz to have performed his inspections) on March 12, 1984, to state mine inspector Monaghan and to union safety committeeman Gradwell were known to Tunnelton officials. Without such evidence there is of course no basis to find that Tunnelton was motivated by those specific complaints. It is noted however that essentially the same complaint was also made on that date to Harold Learn, a Tunnelton foreman.

which Tunnelton agreed inter alia, not to "threaten employees because they have filed safety complaints."

Wadding also reports that in October 1983, he refused to inspect certain caved-in areas which had not been provided with tubes to permit methane testing from what he considered to be a safe area and reported this problem to a Federal inspector and in the fireboss books. Wadding alleges that the inspector in turn told Matty to get the tubes. Matty purportedly told Wadding that he "caused him a lot of trouble" over this. Matty does not deny the events and testified essentially that he did not remember talking to Wadding about the matter. Under the circumstances I accept the undenied allegations.

On February 24, 1984, Wadding reported in the mine examiner's books that certain wooden rollers were defective (Ex. CX-6).[5] Wadding claims that Matty told him not to make entries such as that and said that he did not have the men to repair the rollers. Wadding testified that he responded by telling Matty he should find the men to replace the rollers. A written entry also appears in the examiner's book on March 12, 1984, indicating that the rollers had still not been repaired (Ex. CX-7). Wadding's testimony is not disputed on this issue.

In addition Matty does not deny Wadding's testimony that in October or November 1983, after Wadding had dangered-off an area of the mine because of "bad roof", he said to Wadding "what the hell do you mean -- you take that danger off or I'll fire you."

While it is not specifically alleged that the entries by Wadding in the mine examiner's books concerning garbage in the walkways and erasures on dateboards in February 1983 and inadequate rock dusting on March 13, and March 14, 1984, evoked any specific hostile response it may reasonably be inferred from the evidence of specific hostile responses already noted that these protected activities were not looked upon with favor by Matty. Wadding's complaint on March 12, 1984, to Foreman Learn in which he alleged that Solarz was not doing his job of performing safety inspections may be placed in the same category.

In rebuttal to this circumstantial evidence suggesting that it was motivated by Wadding's protected activities, Tunnelton cites the unprotected circumstances which it asserts provided the sole basis for its discharge of Wadding. This evidence is also presented in the alternative as the operators affirmative defense that it would have discharged

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[5]It was one of the legally required duties of the mine examiners to report health and safety hazards in the mine examiner's (fireboss) books after their inspections.

Wadding in any event for his unprotected activities. Pasula, supra.

The First Discharge

As noted Harry Wadding had been employed as a mine examiner or fireboss at the Marion Mine until March 14, 1984. Wadding and the two other firebosses, Michael Solarz and Ellwood (Ben) Selapack, were primarily responsible for examining areas of the mine where the conveyor belts and track haulage were located. The three examiners were responsible for examining the same areas of the mine and worked on separate, rotating shifts -- Mr. Wadding's shift followed Mr. Selapack's and Mr. Solarz's shift followed Mr. Wadding's.

Before his midnight shift on March 14, 1984, Wadding requested that foreman Harold Learn have the Union Safety Committee investigate whether the slope had been properly examined by Solarz, the day shift examiner. Ben Selapack, the night shift examiner, had told Wadding that he had not seen any dates for Mr. Solarz in the area of the slope where a new dateboard had been installed.[6]

Foreman Learn relayed this information to Frank Scott, the assistant to the mine foreman, who thereafter conducted an investigation with two members of the Union Safety Committee. They examined the slope area as well as other areas of the belt conveyors near the slope, including the 1 North belt. They found what they called an absence of recent and consistent dates in these areas and apparently felt that all three examiners had not been properly performing their jobs. Their findings were reported to mine foreman John Matty at the end of the midnight shift on March 14 and Matty

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[6]Although the parties agree that "dateboards" as such were not required by state or Federal Law, the mine operator in this case had provided such "dateboards" (made from old pieces of conveyor belt) in places required to be inspected by the mine examiners. According to company policy the mine examiners were to sign the dateboards and "any other place also needed". Those "other places" were never specified and although both Federal and state authorites had inspected the mine there is no evidence that they required any areas, other than where dateboards were located, to be initialed. The required information was placed on the dateboards with chalk and unauthorized erasures had been a longstanding problem. Company officials admittedly had been unable to correct this problem. Indeed, acting superintendent John Matty conceded at one point that because of the possibility of erasures he could not prove that an examiner had not placed his initials and date on a particular dateboard. The Federal regulatory standard at 30 C.F.R. § 303(a) sets forth the areas to be so inspected and requires the mine examiner "to place his initials and the date and time at all places he examines."

in turn reported it to his supervisor, Superintendent William Weimer, and to General Manager Gene Jones. Matty and Weimer then conducted their own investigation of essentially the same areas and in later consultation with Jones and Don Marino (Manager of Labor Relations), purportedly concluded that proper examinations might not have been performed. They decided late on March 14, to suspend all three examiners pending a full investigation. The examiners were notified of the suspension later that day.

On Friday, March 16, 1984, a meeting attended by members of management, the Union, and the suspended mine examiners was held to review the matter. At that meeting each of the mine examiners identified particular locations along the belt conveyor in the 3 North area of the mine where they indicated their dates would be found. It was decided that Matty and the Chairman of the Union Safety Committee, James Gradwell, would reexamine this area beginning at 7:00 the next morning to determine whether the dates were in fact located as identified by the mine examiners.

Matty and Gradwell thereafter inspected the 3 North belt area on March 17, and purportedly found no dates in the areas identified by the mine examiners and purportedly found a pattern of dates and times from which they concluded that the area had not been properly examined by any of the three examiners. On Tuesday, March 20, 1984, each of the mine examiners was accordingly suspended with the intent to discharge. The discharge letters were prepared by Marino and signed by Weimer. The letter to Wadding reads as follows:

> In accordance with Article XXIV - "Discharge Procedure" of the 1981 National Bituminous Coal Wage Agreement you are hereby notified that your suspension on 3/15/84 is converted to a SUSPENSION WITH INTENT TO DISCHARGE for failure to make proper examinations as prescribed by Law and Company directives. You also failed to sign and date examinations for No. 1 North belt and No. 3 North belt, which is required as part of your daily job assignment.
>
> Failure to make proper examinations has resulted in a Federal citation being issued, but more importantly, has placed the well being of the mine and all mine employees in jeopardy.
>
> In accordance with Article XXIV, Section (b) "Procedure", you may request a meeting with Mine Management after 24 hours but within 48 hours of this notice.
>
> During this period you are not to be on or about Tunnelton Mining Company property without prior

approval by me, or you may be charged with unlawful trespassing.[7]

Within the framework of credible evidence presented I find that Mr. Wadding did not in fact properly perform his duties as a mine examiner on March 12, 1984 and that this proffered non-business justification for his discharge was not a pretext. While I find little substance to support Tunnelton's claim that Wadding was required by law or company policy to initial and date specific locations other than dateboards[8] I find that the credible evidence supports its claim that two of the dateboards had been notated by Wadding on March 12, 1985, with times too close to have physically permitted the required examination on that date.

It is not disputed that Wadding's examination route on March 12 would have taken him from 3 North drive dateboard to the 3 North tail, from the 3 North tail to the 3 North drive and from the 3 North drive along the track to 1 North. While most of this trip could have been made in a vehicle, there were several derails and a set of air lock doors which required dismounting from the vehicle to throw the derail or open the doors, mounting again to pull the vehicle ahead, dismounting again to rethrow the derail and remounting the vehicle again. 600 feet of the trip would also have been by foot in a low area of the mine. All this was to be done while conducting an examination.

Wadding's notations for March 12, indicate that he was at the 3 North Drive at 11:49 p.m. and at the #35 Dateboard

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[7]After the 24-48 hour meetings the suspensions with intent to discharge were converted to discharges. Grievances were filed in each case and arbitrated separately. As noted, Selapack's discharge was reversed, Solarz's discharge was modified to a warning and Wadding's was modified to a 90-day suspension. Arbitrator Marvin Feldman found that Wadding had not performed his examinations according to law and, based in part on Wadding's prior disciplinary record, warned that further "substandard activity" would result in a discharge.

[8]At hearing Tunnelton claimed in this regard that there were four locations that Wadding had failed to initial and date but none of those locations had dateboards. The evidence does not establish that company policy required that any specific area other than dateboards be initialed and dated by the mine examiners. There was, moreover, a recognized problem of unauthorized erasures and illegibility of the chalk notations made by the examiners and on one occasion Matty had acknolwedged that because of those problems he could not prove the examiners had not done their job. I also observe that the Pennsylvania Bureau of Deep Mine Safety investigated this precise claim and found no violations of state law in connection therewith (Ex CX-12).

near 1 North at 11:55 p.m., only six minutes later. The dateboards showed that on the next day Wadding performed the same examination in 15 minutes and the other examiners did it in 18 to 20 minutes. Matty also performed a test run at a "safe speed" over the same route but with another person to throw derails and open the doors and found that without performing any examinations it took 12 minutes. Wadding does not in this case seem to disagree that a proper examination could not be done in six minutes but defends by claiming that the times he noted on the dateboards i.e. 11:47 p.m., 11:49 p.m., and 11:55 p.m. were not the precise times of his examination but were only rough estimates. If the times had been rounded off to the nearest 5 or 10 minutes that argument might carry some weight. When, however, as in this case, the times are reported down to the precise minute, Wadding's proffered explanation does not ring true.[9] Mr. Wadding's credibility on this issue is further undermined by his overall loss of credibility in denying the trespass incident, discussed, infra, contrary to the testimony of three disinterested eyewitnesses who knew Wadding.

Tunnelton's rather harsh response to the three mine examiner's apparent deficiencies must also be considered in the context of several events that preceded the discharge action. Shortly before the discharges there had been a fatal explosion at Greenwich Collieries, another mine controlled by the same management as Tunnelton. Federal and state investigations were continuing at the time of the incident at bar and there were allegations that improper mine examinations had caused the explosion. In addition, a citation had been issued to Tunnelton on March 15 (by an inspector involved in the Greenwich investigation) for an inadequate mine examination. Tunnelton officials were apparently also then aware of another fatal explosion that occurred in July 1983 that was also caused by improper examinations. Accordingly, Tunnelton officials were clearly under immediate pressure, if not already obligated, to see that the mine examiners were properly performing their critical duties. Finally, shortly before Wadding's discharge Tunnelton had discharged a foreman for having failed to properly report a mine examination. It is understandable under these circumstances that management may have felt compelled to apply similar harsh treatment to the three mine examiners herein.

Three other factors are also persuasive indicators that the proffered non-business justification was not a pretext.

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[9]While the Pennsylvania Bureau of Deep Mine Safety found that no violations of state laws had been committed by the mine examiners it is not apparent from that determination that the Bureau considered the specific issue of the timing of Waddings dateboard notations in relation to the impossibility of performing the examinations within the noted times (Ex CX-12).

The first is that while mine foreman John Matty was the person alleged to have been motivated to retaliate against Wadding, the decision to discharge was also made by at least four other mine officials not shown to have had the same knowledge of Wadding's protected activities. The second factor is that the union safety committee, after having participated in the investigation of the incidents, agreed that Wadding had failed to properly perform his examinations. The third factor is that all three mine examiners were given the same punishment and there is insufficient evidence to suggest that there had been retaliation against the other two examiners for any protected activity. In other words there is no evidence that Wadding was singled out for disparate treatment. Under all the circumstances I find that Tunnelton did indeed have a plausible non-protected business justification for Wadding's discharge.

Within this framework of evidence I conclude that Tunnelton was indeed not motivated in any part in its first discharge action by any of Mr. Wadding's protected activities. Pasula, supra. While some evidence does exist that could support an inference of a nexus between Wadding's safety complaints and his discharge, I find that Tunnelton has affirmatively defended by proving that Wadding would have been fired in any event solely on the basis of his deficient mine examination. Pasula, supra.

The Second Discharge

A second discharge action was brought against Wadding on March 22, 1984 based on an alleged trespass on mine property. The alleged trespass occurred on the March 17, midnight shift, the night before Matty and Gradwell were to reinspect the mine to determine whether the examiners had been placing dates of inspection as required. Tunnelton contends that Wadding returned to the mine that night to fill in his initials and dates where he had previously failed to perform these tasks in the areas to be inspected the next day.

Foreman Learn and three union employees, Jerry Kelly, John Lupyan, and Delvin Bartlebaugh, were outside the mine portal during the night of March 17, when they encountered a trespasser. The trespasser was not caught that night but on March 19, officials of the local union approached Weimer on behalf of the three union employees indicating that the employees could identify the trespasser. They identified him as Wadding.

The factual analysis and conclusions of arbitrator Thomas Hewitt in his July 1984 decision (Ex R-18) upholding Wadding's discharge for trespass are entitled to significant weight. Pasula, supra, Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (1984). The same factual issue was specifically

addressed by the parties therein and was decided by a qualified arbitrator on the bases of an adequate record. Hollis, supra. In any event, based on my own de novo review of the record I find the positive eyewitnesses testimony of those three miners, who knew Wadding and who would clearly have preferred not to have testified against a co-worker and union brother, to be unimpeached. Considering this incident in the context of previous disciplinary action against Wadding, as did arbitrator Hewitt, I find that Tunnelton did indeed have adequate non-protected business justifications for this second discharge action.[10] I further find that under the circumstances, Tunnelton was not motivated by Wadding's protected activities in discharging him on this occasion. In any event I find that Tunnelton has affirmatively defended since I am convinced that it would have discharged him for this non-protected reason alone. Pasula, supra.

Accordingly, this complaint of discriminatory discharge is denied and this case is dismissed.

Gary Melick
Administrative Law Judge

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[10]Tunnelton conceded at hearing that Wadding's alleged theft of a miner's belt and hardhat could not be proven and accordingly is not considered herein as a basis for Wadding's discharge.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF JAMES W. GRIFFIN, WALTER LEE TRENT, RUFUS WORKMAN, GARY HARVEY, RONALD COLLINS, DONALD BELCHER, RONNY BLANKENSHIP, JIM EARLY, RONALD HARLEY, PAUL EPLIN, ROBERT D. WOODS, BARRY BROWN, JESSIE D. WHEELER, AND THURMAN GOODMAN, Complainants	:	DISCRIMINATION PROCEEDING Docket No. WEVA 84-148-D MSHA Case No. HOPE CD 84-4 Jane Ann No. 31 Mine
v.	:	
ALGONQUIN COAL COMPANY, CHICKASAW, INC., POWELLTON COMPANY, AND HOWARD CLINE, JR., Respondents	:	

DECISION

Appearances: Earl R. Pfeffer, Esq., United Mine Workers of America, Washington, D.C., for Complainants; Daniel D. Dahill, Esq., W. Logan, West Virginia, for Respondents Algonquin Coal Company, Chickasaw, Inc., and Howard Cline, Jr., Charles Q. Gage, Esq., and Larry W. Blalock, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Respondent Powellton Company.

Before: Judge Steffey

Pursuant to an order issued September 11, 1984, a hearing in the above-entitled proceeding was held on October 30, 1984, in Logan, West Virginia, under sections 105(c)(3) and 105(d), 30 U.S.C. §§ 815(c)(3) and 815(d), of the Federal Mine Safety and Health Act of 1977.

Counsel for complainants filed their initial brief on March 6, 1985, and counsel for respondent Powellton Company filed a reply brief on April 9, 1985. Counsel for respondents Algonquin Coal Company, Chickasaw, Inc., and Howard Cline, Jr., elected not to file a brief.

Issues

The parties' briefs raise the following issues:

(1) Did respondents Algonquin Coal Company, Chickasaw, Inc., and Howard Cline, Jr., (Cline) interfere with complainants' statutory rights, in violation of section 105(c)(1) of the Act, when Cline asked them to complain to the Mine Safety and Health Administration (MSHA) of the U.S. Department of Labor about the excessive number of inspections which were being conducted at the Jane Ann No. 31 Mine, considering that the request was associated with a statement that Cline could not continue to operate the mine unless there was a reduction in the number of inspections?

(2) Did Cline discriminate against complainants in violation of section 105(c)(1) of the Act when he laid complainants off on November 8, 1983, considering that all of the lay-off slips gave the reason for the lay-off to be "[c]an't make it due to so many mine inspections."

(3) Can the Powellton Company, as owner of the Jane Ann No. 31 Mine, be held liable for Cline's alleged discriminatory conduct?

Findings of Fact

The preponderance of the evidence and my evaluation of the witnesses' demeanor at the hearing support the following findings of fact.

1. The Jane Ann No. 31 Mine involved in this proceeding is owned by the Powellton Company which, in turn, is owned by a foreign corporation with offices in Lugano, Switzerland. Powellton's executive vice president, Burl Ellison Holbrook, testified on Powellton's behalf (Tr. 231-232). He stated that Powellton was actively engaged in producing coal until October 1981. Powellton ceased to produce coal because it had lost $2,500,000 in trying to operate its own mines. In October 1981, Powellton began to employ independent contractors to produce coal from Powellton's mines (Tr. 233-234).

2. Before Cline contracted to produce coal from the Jane Ann No. 31 Mine, three other companies had tried unsuccessfully to operate the mine. James Griffin, one of the complainants in this proceeding, testified that he had worked for all three of the unsuccessful operators. The first company, Ball Coal Company, started producing coal in February 1982 and quit in September 1982 because its operations were uneconomic (Tr. 49). The mine remained closed until November 15, 1982, when Miracle

Coal Company began operating it. Miracle also found it uneconomic to run the mine and discontinued producing coal in February 1983 (Tr. 51). The mine was reopened by Rite Way Coal Company in March 1983, but that company gave up for economic reasons in May 1983 (Tr. 52).

3. After three companies in a row had found it uneconomic to operate the No. 31 Mine, Powellton's top management gave Holbrook instructions to close the mine, but Cline had worked for Powellton as a mine foreman when Powellton itself was a coal producer (Tr. 176), and Holbrook urged his superior to permit Cline to reopen the mine under the name of Algonquin Coal Company because Cline had a good record when he was one of Powellton's foremen (Tr. 239). Cline had some apprehension about trying to operate the No. 31 Mine in light of the fact that three previous operators had found it uneconomic to do so. Cline, however, believed that he had an advantage over the other operators because he had supervised the panel of miners who had to be employed at the mine under the UMWA Wage Agreement and Cline believed that his previous successful relationship with the miners, who are the complainants in this proceeding, would enable him to produce a larger volume of coal than the other unsuccessful operators had been able to produce and that he would thereby succeed where the other operators had failed (Tr. 214).

4. Powellton is a signatory of the National Bituminous Coal Wage Agreement of 1981 (Exh. A) and requires all of the companies which operate its mines to employ miners from UMWA Local No. 8217. Since the same panel of miners must be used by any of the operators who try to mine coal from the No. 31 Mine, there was a change in top management when Ball, Miracle, and Rite Way, in turn, unsuccessfully tried to operate the mine, but the employees for all three operators were the same miners who constitute the complainants in this proceeding (Tr. 244). Since Powellton and all of its independent contractors are bound by the terms of the Wage Agreement, Powellton requires its operators to provide it with the number of hours worked by each miner so that Powellton can pay the proper amounts into UMWA's welfare funds. Powellton makes the payments and subtracts the payments from the price which it pays to its operators for clean coal. Powellton prefers to make the payments and then deduct the payments from the price it pays its operators for clean coal because UMWA charges 18 percent interest if the payments are late (Tr. 252). Powellton also requires all of its operators to maintain regular health and accident insurance for all their miners (Tr. 237). Powellton, however, stated that it does not interview applicants

for positions with its operators and does not control the operators' work force in any way as to hiring or discharging or disciplining them (Tr. 245).

5. Powellton provided Cline and its other operators with nearly all the mining equipment needed to produce coal, such as a continuous-mining machine, roof-bolting machine, ram cars, scoop, and conveyor belts and drives (Tr. 255). An amount of $1.50 per ton for rental of equipment was deducted from the price paid to the operators for clean coal delivered to its preparation plant. Cline, however, was required to pay for all spare parts and supplies, such as roof bolts, rock dust, and timbers. The operators had to pay for their own engineering, accounting, and respirable-dust services (Tr. 255-256). Cline additionally had to pay the cost of transporting coal from the No. 31 Mine to Powellton's preparation plant (Tr. 258). Cline bought liability insurance from Nationwide (Tr. 217) and stated that he paid a person named Larry Heatherman for taking respirable-dust samples (Tr. 218). As hereinafter explained in finding No. 16, Cline sold his interest in the No. 31 Mine to Chickasaw, Inc. That company also found it uneconomic to produce coal from the No. 31 Mine and ceased its operations while it still owed the complainants about 1 month's wages. All of the miners asked Powellton to pay the wages owed to them by Chickasaw. Powellton granted the request and paid the full amount owed by Chickasaw. Powellton is still carrying those payments on its books as receivables from Chickasaw. The reason Powellton paid complainants the wages owed by Chickasaw is that Powellton interprets Farley v. Zapata Coal Corp., 281 S.E.2d 238 (1981), to mean that the employees of an independent contractor, under Chapter 21, Article 5, Section 4, of the West Virginia Code, may obtain payment from the general contractor of any wages not paid by the independent contractor, including liquidated damages (Tr. 247-249). Powellton asserts, however, that its direct payment of wages to complainants for work performed for Chickasaw in the above-described circumstances should not be interpreted as an indication that it exercises any control over its independent contractors in the way they utilize their employees (Tr. 247).

6. Counsel for complainants presented five witnesses in support of their claim that Cline had discriminated against them in violation of section 105(c)(1) by asking them to complain to MSHA about the excessive number of inspections which were being conducted at the No. 31 Mine. Four of the witnesses were miners who had worked at the No. 31 Mine and the fifth witness was a UMWA international health and safety

representative who had recommended that the miners file with MSHA the complaint which is the subject of this proceeding (Tr. 137). The first witness was James Griffin who was unemployed at the time of the hearing, but who had worked for Cline as a ram-car operator from the time Cline began producing coal from the No. 31 Mine under the name of Algonquin Coal Company in June 1983 until November 8, 1983, when Cline ceased to operate the mine (Tr. 21-22; Exh. 9). Griffin was on the mine safety committee and generally accompanied the inspectors when they made their examinations of the mine (Tr. 22; 70; 207). Griffin stated that an MSHA inspector by the name of John Franco made an inspection at the last of October and the first of November during which he wrote about 25 citations (Tr. 23; Exh. 8). The miners came out of the mine on one occasion because of their concern that Cline had left them in the mine with no means of transportation out of the mine (Tr. 23). After the miners came out of the mine, Griffin stated that Cline told them to take the remainder of the day off with pay and go to the MSHA office and complain about Franco's writing an excessive number of citations. Griffin testified that he heard Cline say, "[i]f we can't get rid of this man, can't get rid of these inspectors, I'm going to have to shut down. I can't stand it" (Tr. 25). When it was subsequently pointed out to Griffin that his statement did not sound as if Cline had threatened him with discharge if he failed to complain about Franco's activities, he changed Cline's statement by testifying that Cline said "[i]f we can't get rid of this guy, we're going to have to shut down. You all have got to help us get rid of this fellow" (Tr. 90).

7. Griffin based his allegation of discrimination on the claim that Cline laid them off on November 8, 1983, then called nine of them back for 1 day's work on November 15, 1983, and called all of them back to work on December 5, 1983, at which time Cline introduced them to four men who operated the No. 31 Mine under the name of Chickasaw, Inc., up to May 2, 1984, when they were again laid off (Tr. 29). Although Griffin testified that Cline introduced them to four men named Aaron Bolan, Charles Halsey, Richard McDorman, and Dave Dickenson who operated the mine under the name of Chickasaw, Inc., he insisted that Cline was still the actual operator of the mine because he had signed job vacancy notices as Chickasaw's superintendent on December 5, 1983, calling them back to work in the No. 31 Mine (Tr. 27; Exh. 1). Griffin stated that Cline was there only on the first day the mine

began to operate under the name of Chickasaw, Inc., and that after the first day, the mine superintendent was Aaron Bolan (Tr. 65). Griffin began working on the night shift about 2 or 3 weeks after Chickasaw began operating the mine and Charles Halsey and Dave Dickenson were the supervisors on the night shift (Tr. 66-67). Griffin also stated that he was aware that Cline had tried to sell his rights to the No. 31 Mine to Homer Hopkins and Bud Smith (Tr. 46; 167). They were the two men who came to the mine with Cline on November 15, 1983, but they left soon after they came, and Cline did not operate the mine thereafter until he called the miners back to work on December 5, 1983, to work for Chicksaw, Inc. (Tr. 47).

8. The second witness presented by complainants' counsel was Ronald Blankenship who was unemployed at the time of the hearing, but who had worked for Cline as the operator of a roof-bolting machine until Cline laid him off on November 8, 1983, by giving him a lay-off slip that gave the reason for the lay-off to be that Cline could not "make it due to so many mine inspections" (Tr. 96; Exh. 9). Blankenship said that Cline had discriminated against them by telling them that they would either have to get rid of the inspectors or they would get laid off (Tr. 95). Blankenship believed that Cline was operating the mine after it resumed producing coal under the name of Chickasaw, Inc., because Cline was present at the mine on the first day and introduced them to three men named Dave Dickenson, Aaron Bolan, and Richard McDorman who said that they owned Chickasaw, Inc. (Tr. 98). Blankenship also stated that Cline offered him $50 to whip Inspector Franco, but he did not take the offer of $50 (Tr. 96). Blankenship additionally testified that he performed good work and that he had worked double shifts "about every day" (Tr. 94). He did not think he would have been asked to work double shifts unless he had been performing good work (Tr. 95). Blankenship's claim that he worked double shifts about every day is not supported by Exhibit 7 which shows that he worked 130 hours in July, 153 in August, 185.5 in September and 161 in October 1983. Each month has at least 20 single shifts, or 160 hours. In order for Blankenship to have worked double shifts "about every day," he would have had to have worked at least 250 or more hours per month. Blankenship conceded on cross-examination that Cline had told them that he "was going to have to shut down" if the miners did not produce more coal (Tr. 98).

9. The third witness presented by complainants' counsel was Paul Eplin who was unemployed at the time of the hearing but who had worked for Cline as a continuous-mining machine operator and roof bolter from July to November 1983 (Tr. 99-100). Eplin stated that he performed his job so well that Cline gave him a double-barreled shotgun as a reward (Tr. 101). After Inspector Franco began writing a lot of citations toward the end of October 1983, Eplin stated that Cline asked them to complain to MSHA about Franco's overzealous inspections (Tr. 102). Eplin called Congressman Rahall's office to complain about inspections and the person to whom he talked asked him if the violations cited by Franco existed. When Eplin replied in the affirmative, the congressman's representative stated that Franco was only doing his job. Eplin claims that he handed the telephone to Cline at that point in the conversation and left the office. Shortly afterwards, they were laid off and the lay-off slip gave as the reason "[c]an't make it due to so many mine inspections" (Tr. 103).

10. Eplin testified that coal production declined in September and October as compared with the tonnage produced in July and August, but he said that the decline in production was caused by break downs of the continuous-mining machines and ram cars (Tr. 103-104). Eplin's statement that the ram cars broke down frequently is contrary to Griffin's testimony which indicates that the ram cars were dependable and that they seldom were out of service except for the purpose of getting their batteries charged (Tr. 63). Eplin stated that they produced all the coal they could on good days when the equipment did not break down, but he agreed that Cline told them he was going to have to shut down if they did not produce more coal than they did (Tr. 107; 112).

11. The fourth witness called by complainants' counsel was Robert Woods who worked for Cline as an electrician from June to November 1983. He repaired equipment which he described as being subject to "continuous breakdowns" (Tr. 113). In his opinion, more production time was lost as a result of breakdowns with the equipment than was lost from inspections (Tr. 114), but he also stated that "[u]sually when an inspector is there, you didn't get to do very much work" (Tr. 117). Woods had worked in coal mines for 20 years and he stated that there were more inspections at Cline's mine than at other mines where he has worked (Tr. 118). Woods said that Cline had complained about lack of production

from the first month he operated the mine until the day he ceased to operate it and that Cline additionally complained about a lot of inspections (Tr. 116). Woods stated that Cline did not ask him personally to complain about the large number of inspections being made at the mine, but that he was present on one occasion when Cline asked a group of the miners to complain. At that time he advised Cline not to make complaints to MSHA because it would do no good and might cause MSHA to order even more inspections than were already being conducted (Tr. 120).

12. Woods had a practice of marking on a calendar each day (1) the hours he worked, (2) the cuts of coal made by the continuous-mining machine, and (3) the breakdowns of equipment if 2 hours or more were required for repairs to be made (Tr. 118). A copy of Woods' calendar for the months of September, October, and November 1983 was introduced as Exhibit 12 (Tr. 151). Woods stated that a cut of coal amounted roughly to 40 tons and that he had compared his figures with the actual production information kept by Cline and that his cuts of coal were close to actual production (Tr. 149). Examination of Woods' calendar shows that he either exaggerated the number of times that the equipment broke down or failed to write on the calendar the times when breakdowns occurred, because his calendar shows only one breakdown of the continuous-mining machine for the entire month of September and that breakdown occurred on a Saturday when no coal was produced (Exh. 12). During the month of October, Woods showed one breakdown of the continuous-mining machine on October 4 and another one on October 12. Despite the breakdowns on those days, Woods indicated that five cuts or 200 tons of coal were produced on October 4 and 6 cuts or 240 tons of coal were produced on October 12. Woods shows one breakdown of the continuous-mining machine during the month of November, but the mine produced very little coal that month and was closed on November 8, 1983. One or two breakdowns of equipment each month does not support Woods' claim that constant breakdowns of equipment were responsible for the miners' failure to produce enough coal to make it profitable to operate the No. 31 Mine.

13. On the other hand, Woods' calendar is remarkably close in indicating the actual raw coal production of the mine. If one multiplies the number of cuts of coal shown on the calendar for each day's production by 40 tons, the result totals 3,820 tons of raw coal for the month of September and 3,938 tons of coal for the month of October. The actual tons of raw coal shown in Exhibit 14 for the

months of September and October are 3,685 and 3,887, respectively. Therefore, Woods' estimates of the raw coal produced for the months of September and October were only 135 and 51 tons, respectively, larger than the actual production for those two months. The fact that Woods was as accurate as he was in estimating production leads me to conclude that his calendar was also accurate in indicating the number of major breakdowns of equipment. In any event, the entries in his calendar do not support his claim that equipment breakdowns were primarily responsible for the No. 31 Mine's history of low coal production.

14. The fifth and final witness presented by counsel for complainants was Richard Cooper who is employed by UMWA as an international health and safety representative whose main duties are prevention of mine accidents and illnesses and assisting miners in exercising their rights under the Act (Tr. 135-136). Cooper testified that two of the complainants in this proceeding (Griffin and Trent) came to his office in December 1983 and told him that they had been discharged because they refused "to get rid of a federal inspector at the mine" (Tr. 137). Cooper was convinced that they had grounds for filing a complaint under section 105(c) of the Act and suggested that they do so. They filed a complaint that same day with MSHA (Tr. 137). The complaint is signed by the same 14 miners who brought the complaint involved in this proceeding (Exh. 5).

15. Finding Nos. 2 through 5 above provide some of the facts pertaining to Cline's operation of the Jane Ann No. 31 Mine, but Cline supplied additional facts when he testified in support of his defense to the complainants' charge that he violated section 105(c)(1) of the Act when he allegedly laid them off on November 8, 1983, for their failure to complain to MSHA about the excessive number of inspections which were being made at the No. 31 Mine. It was not apparent from the questions asked by Cline's attorney that any effort had been made to provide Cline with a defense in terms of the Commission's discrimination decisions. Therefore, Cline's defense rests on his claim that he laid the complainants off on November 8, 1983, solely for the economic reason that he had already lost $71,000 from trying to operate the No. 31 Mine at the time he laid the complainants off and that he simply could not continue to operate at a loss (Tr. 174). Cline stated that his loss of $71,000 had been reduced to $41,000 by virtue of the fact that two men named Homer Hopkins and Bud Smith offered him $50,000 for transferring his interest in the No. 31 Mine to them (Tr. 167). They paid him $30,000

down and left after trying to operate the mine for 2 hours. Cline stated that they preferred to lose the $30,000 down payment rather than try to operate the mine with the "radical" crew of miners who had to be used under Cline's contract with Powellton (Tr. 210). Cline defined the word "radical" to be that the miners are strictly union in their attitude and want to be "the head honcho. If it don't go their way, it don't go. Management don't have no control" (Tr. 211). Witness Griffin disagreed with Cline's explanation as to the reason Hopkins and Smith left the mine. In his opinion, they refused to take over the mine because it was in poor condition (Tr. 27).

16. After Cline had failed to sell his interest in the No. 31 Mine to Hopkins and Smith, the four men previously referred to in finding No. 7 (Aaron Bolan, Richard McDorman, Dave Dickenson, and Charles Halsey) offered Cline $15,000 for his interest in the mine provided he would (1) form a new corporation, (2) obtain a new contract with Powellton providing for them to operate the mine in the name of the newly formed corporation, (3) introduce them to the complainants in this proceeding who would necessarily be the miners they would have to use in operating the mine, (4) provide the necessary notification to MSHA of the change in operators, and (5) transfer all the stock in the newly formed corporation to them (Tr. 169-172). An agreement signed on December 2, 1983, by Cline, Bolan, and McDorman, provides for Cline to be paid $5,000 in cash at the time the agreement was executed and for Boland and McDorman to pay Cline $1.75 for each ton of clean coal sold to Powellton. The stated purpose of the payment of $15,000 was to purchase Cline's interest in a continuous-mining machine which Cline had obtained with his own funds for use at the No. 31 Mine (Exh. 13). Under the agreement, if Bolan and McDorman failed to pay the remaining amount of $10,000, the continuous-mining machine would continue to belong to Cline.

17. Cline's testimony shows that some aspects of the agreement were subsequently changed. The payment of $1.75 per ton was assigned to Bolan and McDorman in return for their paying off some funds advanced to Cline by Powellton (Tr. 171). Cline claimed that Bolan and McDorman never did pay the remaining $10,000 which they owed him and that he did not know their whereabouts but would like to find them in order to collect the $10,000 which they still owe him (Tr. 173). Unless the terms of the agreement described above were changed in a way not explained by Cline, he is not entitled to the remaining $10,000 because the agreement

clearly specified that if they failed to pay the remaining amount of $10,000, all interest in the continuous-mining machine on which Cline had made a down payment would revert to Cline (Exh. 13). Since Cline testified that he gave the continuous-mining machine back "to the guy" he bought it from (Tr. 193), he received full title in the continuous-mining machine when Boland and McDorman failed to pay the remaining $10,000, and Bolan and McDorman do not owe Cline anything under the terms of the agreement which is Exhibit 13 in this proceeding.

18. Cline attributed 80 percent of his inability to operate the No. 31 Mine economically to the work force he was required to use under his contract with Powellton and 20 percent to interruption in production caused by MSHA inspections (Tr. 177; 192). Cline said that MSHA inspectors normally talk to all the miners for 30 minutes and then they ask for the safety committeeman to accompany them on their inspections. They may thereafter spend 2 hours in the mine office before they go underground and Cline has to allow the mine committeeman to spend that same amount of time doing nothing (Tr. 178-179). Cline said that Griffin accompanied the inspectors 95 percent of the time and that meant that Griffin's ram car was idle all the time the inspector was present at the mine (Tr. 180). Cline conceded that there were three ram cars and three ram car operators, but he said that he did not hire the third ram-car operator purely as a replacement for persons who were absent on a given day. Cline claimed that he could use three ram cars 90 percent of the time and that production necessarily suffered when Griffin was with an inspector instead of operating his ram car (Tr. 207). Cline's statement that he was able to use three ram cars 90 percent of the time might be somewhat inconsistent with his claim that the miners did not produce much coal, if it were not for the fact that when a continuous-mining machine is operating, it is efficient to have enough rams cars also operating to enable coal to be taken without delay from the continuous-mining machine. Since long hauling distances were involved, use of three ram cars reduced the intervals between round trips from the face to the dumping point (Tr. 147). Of course, the miners' testimony was inconsistent about the availability of ram cars because Eplin stated that the ram cars broke down frequently, while Griffin said that the ram cars were dependable and seldom were out of service except for the purpose of getting their batteries charged (Tr. 63; 103-104).

19. Cline's statement that production of coal suffered when MSHA inspectors were at the mine is supported by the

record. Exhibits 7 and 8 show the days on which inspectors were at the mine and Exhibit 14 shows the number of tons of clean coal delivered to the preparation plant on those days, as follows:

Inspections	Inspector's Name	Clean Coal (Tons)
June 15	Hinchman	The first 3 weeks of Cline's
June 15	Oliver	operations were devoted to
June 20	Hinchman	cleaning up a roof fall and
June 22	Uhl	preparing the mine for produc-
June 23	Uhl	tion; therefore, no coal was
June 28	Uhl	produced (Tr. 56).
July 11	Franco	184
July 26	Oliver	226
September 20	Oliver	65
September 21	Oliver	63
September 21	Summers	
September 22	Oliver	109
September 22	Summers	
September 23	Summers	121
October 4	Franco	154
October 7	Toler	90
October 12	Toler	121
October 13	Toler	66
October 14	Toler	253
October 20	Summers	143
October 24	Summers	103
October 26	Franco	189
October 27	Franco	2
October 28	Franco	102
November 1	Franco	62
November 2	Franco	9
November 3	Franco	30
November 4	Summers	0
		2,092

2,092 tons ÷ 20 inspection days = 104.6 tons per inspection day.

Exhibit 7 shows the actual number of hours for which Cline paid the 14 complainants during the months of July, August, September, and October. He paid them for 1,851.5 hours in July, 2,201.75 hours in August, 2,640.25 hours in September, and 2,397.50 hours in October. If one divides the hours worked by 14 and then by 8, the result will be the number of days on which Cline paid the miners for producing the tons of clean coal delivered at Powellton's preparation plant, as indicated in Exhibit 14. The average daily production is shown in the tabulation below:

July: 3,133.34 tons ÷ 16.5 days = 189.9 tons average daily production.
Aug.: 3,424.60 tons ÷ 19.5 days = 175.6 tons average daily production.
Sep.: 2,872.89 tons ÷ 23.5 days = 122.3 tons average daily production.
Oct.: 3,023.95 tons ÷ 21.4 days = 141.3 tons average daily production.

Total for 4 months: 629.1 ÷ 4 = 157.3 tons average daily production.

The above calculations show that Cline produced a daily average of 157 tons of clean coal, but his average daily production when inspectors were at the mine amounted to only 105 tons per day.

20. The preponderance of the evidence also supports Cline's statement that he lost in the neighborhood of $71,000 as a result of operating the No. 31 Mine from July to November 8, 1983 (Tr. 174). The loss was reduced to $41,000, of course, by the payment of $30,000 to Cline by Hopkins and Smith when those two men undertook to take over the mine on November 15, 1983, and then changed their mind after operating the mine for only 2 hours (Tr. 167-168; 213; 227). There is attached to the end of this decision an Appendix A in which I show by use of uncontroverted facts in the record that Cline lost a total of at least $62,235 for the period from July to November 1983 as a result of his unsuccessful operation of the No. 31 Mine. Cline made no effort whatsoever to prove his losses and if counsel for complainants had not introduced Exhibit 7 containing the number of hours worked by the miners at the No. 31 Mine and the amounts charged by Powellton for services rendered to Cline, it would not have been possible to find in the record any corroborating support for Cline's claim that he lost $71,000. While my calculations in Appendix A do not prove losses greater than $62,235, I am confident that his losses were greater than the amount shown in Appendix A because the record does not reflect for certain the salaries Cline paid to his foremen or all of the fees he paid for engineering, respirable-dust, and accounting services, or the premiums he paid for $1,000,000 of liability insurance, or the amount he paid for having coal transported to the preparation plant, among other things.

21. The statement (Tr. 29) by witness Griffin that, so far as he knew, Cline had not abated any of the 24 violations cited by Inspector Franco when the miners were recalled to work for

Chickasaw, is not supported by the record. Exhibit 8 in this proceeding was introduced by complainants' attorney and that exhibit shows that 17 of the alleged violations were abated by Cline by November 3, 1983, or within 1 or 2 days after they were cited. The remaining seven violations were abated by Chickasaw after the inspector had granted extensions of time within which to abate the alleged violations. The extensions stated that "The operating officials of this mine have recently changed, therefore additional time is needed." Moreover, the extensions of time were served on Aaron Bolan as superintendent of Chickasaw. Consequently, the inspector knew that Cline was not acting as Chickasaw's superintendent at the time he issued extensions of time on December 15, 1983, with respect to Citation Nos. 2145371, 2273564, 2273571, and 2273570. It should also be noted that Inspector Franco issued Safeguard Notices 2145372 and 2273508 on October 27 and November 1, 1983, respectively. Therefore, Cline was cited during Franco's quarterly (or AAA) inspection for 24 actual violations and was advised that his mine would henceforth be required to comply with sections 75.1403-6(b)(3) and 75.1403-10(i). Neither of the safeguard notices was considered by the inspector to be "significant and substantial." 1/ Ten of the 24 citations were not considered to be significant and substantial (Exh. 8).

CONSIDERATION OF PARTIES' ARGUMENTS

Complainants' Procedural Contentions

Refusal of Cline's Counsel To Answer Complainants' Interrogatories

Complainants' brief (pp. 20-21) notes that Cline's defense in this proceeding is that the miners were nonproductive, that he was losing money, and that Federal inspections made it unprofitable for him to stay in business. As my finding Nos. 19

1/ In Consolidation Coal Co., 6 FMSHRC 189 (1984), the Commission held that an inspector may properly designate a violation cited pursuant to section 104(a) of the Act as being "significant and substantial" as that term is used in section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard.

and 20 above indicate, Cline's defense is supported by the preponderance of the evidence. Complainants, however, argue that I should not give consideration to any of Cline's testimony because his counsel failed to respond to complainants' interrogatories and, for that reason, complainants were subject to an element of surprise at the hearing and were deprived of an opportunity to prepare rebuttal to Cline's testimony.

I must, at the outset of my consideration of complainants' arguments, reject any claim by complainants that "they were deprived of an opportunity to prepare rebuttal to Cline's testimony" (Br., p. 21). The following excerpt from the transcript shows that I did not deprive complainants of any opportunity to present rebuttal evidence (Tr. 267):

MR. GAGE: The Powellton Company has no further witnesses.

JUDGE STEFFEY: Have you any rebuttal, Mr. Pfeffer?

MR. PFEFFER: No, I do not. We'll rest on the testimony.

Complainants did not advise me at the hearing that they were going to "rest on the testimony" of all the witnesses except Cline and they did not file a motion after the hearing requesting that they be given an opportunity to present rebuttal testimony. It is manifestly improper for them to file a brief more than 4 months after the hearing was held and argue that they "were deprived of an opportunity to prepare rebuttal to Cline's testimony."

Complainants' brief (p. 22) further argues that "it would have been proper for the ALJ to preclude the offending parties from offering proof at the hearing" because of the failure of Cline's counsel to answer complainants' interrogatories. They also argue that it would be appropriate for the judge to grant them relief pursuant to Rule 37 of the Federal Rules of Civil Procedure. While Rule 37 provides for imposition of various sanctions when a party fails to reply to interrogatories, those sanctions have to be applied in light of the factual situation which exists in any given case. I gave consideration to holding Cline in default in this proceeding, but complainants rendered that course of action unproductive by joining Powellton as a party respondent. If I had held Cline in default for failure to answer complainants' interrogatories, I would still

have had to deal with the fact that complainants have at no time receded from their claim that Powellton, as the owner of the No. 31 Mine, is liable for Cline's acts as an independent contractor who operated the No. 31 Mine.

Since Powellton's counsel have acted in an exemplary fashion in this proceeding by replying to complainants' interrogatories and by answering all of their many motions, there is no way that Powellton could be defaulted. If I had defaulted Cline, complainants would still have had to proceed against Powellton, and their burden of proof would in no way have been diminished if I had held Cline to be in default. Moreover, Powellton would have had a right to a hearing and would have had a right to call Cline as a witness in its own defense. If Powellton had called Cline as a witness, I would have had to have allowed him to testify and Powellton would have had a right to have relied upon his testimony in exercising its own defense.

An additional reason for denying complainants' request that I either default Cline or ignore his testimony, is that complainants inadvertently proved the validity of Cline's defense by introducing as a part of their direct case some materials obtained from MSHA under the Freedom of Information Act (Tr. 120-134). I am aware of no procedural rule which requires a judge to ignore evidence presented by one party in support of its case if that same evidence also happens to prove the other party's case, particularly if the party introducing the damaging evidence states in support of its admission that it is being offered because it "can help in the determination of the merits of the parties" (Tr. 125). The point is that even if I were to ignore all of Cline's testimony, as complainants request, the evidence they obtained from MSHA pertaining to MSHA's investigation of complainants' allegations in this proceeding would, nevertheless, prove all of Cline's defenses, that is, that he could not produce enough coal to make it profitable to operate the No. 31 Mine and that MSHA's inspections, irrespective of any salutary benefits they may have had, did have the effect of reducing the amount of coal produced at his mine (Finding Nos. 19 and 20 above).

For the reasons given above, there is no merit whatsoever to complainants' arguments that I should decline to give any weight to Cline's testimony in this proceeding.

The Quality of Cline's Legal Representation

There is merit to complainants' contentions about the unresponsive way that Mr. Dahill represented Cline in this proceeding. My procedural orders in this case show that Mr. Dahill initially refused to accept certified mail until I finally had him served by a United States Marshal. Thereafter, he did sign return receipts showing that he had received orders, but, aside from the answer originally filed in this proceeding, Mr. Dahill neved did submit any subsequent pleadings showing that he had even read the orders which I mailed to him.

Mr. Dahill's failure to respond to any of my orders caused me to be somewhat surprised when he actually appeared at the hearing. The reason he gave at the hearing for failing to reply to complainants' interrogatories was that he believes the complaint in this case is "ludicrous" because it was filed by men who would not work hard enough to make the mine profitable and who were paid for every minute of work they did do (Tr. 15;18). Mr. Dahill also described an emotional problem associated with the death of his mother (Tr. 18) and also explained that he was representing a client in Austria which has required him to travel extensively (Tr. 19).

The reasons given by Mr. Dahill for his inaction do not justify his failure to fulfill his obligations as an attorney. As I pointed out at the hearing, we have to take all complaints very seriously (Tr. 20) and he should not have let his personal opinion as to the merits of the complaint or his obligations to another client, cause him to neglect Cline's interest in this proceeding by failing to reply to complainants' interrogatories and by failing to state a position with respect to complainants' motion to add Cline as an individual respondent. In the future, I hope that Mr. Dahill will decline to represent clients in our proceedings unless he is certain that he will have the time to perform all of the duties which are associated with signing his name as an attorney at the bottom of an answer or other pleading.

Complainants' Brief Misstates the Facts

The "Facts" given on pages one through five of complainants' brief are not supported by the preponderance of the evidence. The first egregious errors are on pages 2 and 16 of complainants' brief where it is stated that Cline's average daily production of clean coal for the months of July and August amounted to

208.89 and 214.04 tons, respectively. The figure of 208.89 was derived by dividing the total clean coal tonnage of 3,133.34 for July, as given in Exhibit 14, by 15 producing days. Complainants used "15" producing days despite the fact that counsel for both Powellton and Cline had pointed out during the hearing that the days shown on Exhibit 14 for deliveries of coal to Powellton's preparation plant may not be equated with actual working days at Cline's No. 31 Mine (Tr. 202-205).

The only reason that complainants refer to Cline's average daily production is for the purpose of arguing that his operation of the No. 31 Mine was profitable. Cline had to pay the miners for each hour worked, but only received reimbursement for each ton of clean coal delivered to the preparation plant. Therefore, it is manifestly misleading to compute average daily production by dividing the total clean coal production by days of deliveries of coal at the plant, rather than by the number of days on which Cline paid his miners to produce that coal.

As shown in finding No. 19 above, Cline's average daily production of clean coal was 189.9 tons for July and 175.6 tons for August. Cline averaged 157 tons of clean coal for the four months of July, August, September, and October. At no time did he produce a daily average of 208.89 tons of clean coal as alleged by complainants on page 2 of their brief. Powellton's brief (p. 5) appropriately calls attention to the errors in complainants' calculation of Cline's average daily production of clean coal and also arrives at an average daily production of 157 tons of clean coal for the months of July through October. Powellton's calculations for the individual months are different from the ones I have given in finding No. 19 because Powellton did not use the actual hours the miners worked for the 4 months involved.

The second paragraph on page 2 of complainants' brief claims that Cline was pleased with the miners' work despite the fact that Cline testified that the primary reason that he could not operate the No. 31 Mine profitably was the failure of the miners to perform their jobs as they should have (Tr. 175-177; 183). Cline specifically stated that he could not consider opening another coal mine in West Virginia, but that he might try to open one in Virginia or Kentucky. When it was pointed out to Cline that mines in Virginia and Kentucky would be subject to MSHA inspections, about which he also complained, just as they are in West Virginia, he stated, "I know, but they don't have the labor. They have non-union. The men [in Virginia and Kentucky] will go out and work, put in a day's work for a day's pay" (Tr. 122).

The third paragraph on page 2 of complainants' brief claims that Cline's production demands could not be met by the miners because of equipment breakdowns. As I have shown in finding No. 12 above, the miners' reliance on equipment breakdowns to explain Cline's low production is not supported by the record to the extent that there is any specific information available to show the days on which equipment was actually broken down. As also noted in finding No. 10 above, the miners themselves were not consistent in stating which types of equipment were breaking down.

It is true, as complainants state on page 3 of their brief, that Cline complained about the large number of inspections being conducted at the No. 31 Mine, but it is also true, as shown in finding No. 19 above, that MSHA did conduct a lot of inspections at Cline's mine and it is a fact that Cline's average daily production did decline considerably on the days when the mine was being inspected. Complainants allege on page 3 of their brief that Cline did not want to spend time and resources abating violations, but it is a fact, as shown in finding No. 21 above, that Cline did abate the vast majority of the alleged violations within 1 or 2 days after they were cited and within the time given by the inspector for abatement.

Complainants allege facts on page 4 of their brief about Cline's being the owner of Chickasaw, Inc., just as if the record does not contain testimony and exhibits which show the facts to be exactly to the contrary, as I have pointed out in finding Nos. 7, 16, 17, and 21 above.

Powellton's Counterstatement of Facts

Powellton's brief (pp. 3-8) contains a relatively full statement of the facts which is slightly biased in Cline's favor, as one might expect, but which is accurate in that the counterstatement is supported by the references given to the record and which acknowledges the inconsistencies between some of Cline's statements and those of complainants.

Howard Cline, Jr., Is Properly Named as a Respondent

When the complaint in this proceeding was first filed, it did not name Howard Cline, Jr., as a respondent. Thereafter, I permitted complainants to amend the complaint to name Howard Cline, Jr., as a respondent because section 105(c)(1) of the Act provides that "[n]o person shall discharge or in any manner discriminate against or cause to be

discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner" and section 3(f) of the Act states that a "'person' means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." Cline admittedly formed both Algonquin Coal Company and Chickasaw, Inc., and acted as president of both companies when they were initially formed. Although Cline transferred all the stock in Chickasaw, Inc., to four men immediately after that corporation was formed, he still owns the admittedly defunct Algonquin Coal Company. Additionally, he personally made all the discriminatory statements and took all the discriminatory action which is alleged by complainants in this proceeding.

Section 105(c)(3) provides that "[v]iolations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(c)." In other words, if a person is found to have violated section 105(c)(1) of the Act, he is subject to the civil penalty provisions of the Act. Section 110(a) provides that "[t]he operator of a coal or other mine * * * shall be assessed a civil penalty" for any violation of the Act. Section 3(d) states that "'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

Since Cline was operating, leasing, and controlling a coal mine and was, according to Powellton, an independent contractor, he is clearly a "person" within the meaning of section 105(c)(1) who may be held accountable for his actions with respect to the complainants who were the miners employed by him at the No. 31 Mine.

I declined to make Cline an individual respondent in this proceeding until after his counsel had signed a return receipt showing that he had received an order indicating that there was a motion before me to name Cline as an individual respondent. As I have previously indicated above, Cline's attorney did not oppose the grant of that motion or object in any way to the naming of Cline as an individual respondent in this proceeding.

According to Cline, Algonquin has no assets and Cline stated that he would pay anyone $500 just to assume the liabilities still owed by Algonquin (Tr. 196). Cline, of course, never acted as the apparent owner of Chickasaw, Inc.,

for more than a few days (Tr. 170). Consequently, for all practical purposes, the discrimination complaint in this proceeding is against Howard Cline. For that reason, I have referred only to Cline in most instances throughout this decision because, if my decision is reversed by the Commission, complainants' only hope of receiving an award of back pay will be dependent upon the ability of Cline to pay the amount they seek. Cline testified that he has no money and could not even pay a civil penalty of $1,000 if that much were to be assessed (Tr. 228). On the other hand, Powellton's witness stated that Cline owned a supply company (Tr. 238). I have rarely found a respondent in a civil penalty case to be unable to pay civil penalties in the absence of presentation of documentary proof in the form of Federal tax returns and other evidence, such as, profit and loss statements. Therefore, I cannot find on the basis of Cline's allegations of inability to pay penalties that he is personally unable to pay civil penalties or back pay if that should happen to be the ultimate result, on appeal, of the filing of the complaint in this proceeding.

Complainants' Contention that Howard Cline Violated Section 105(c)(1) by Asking Complainants To Complain to MSHA About Excessive Inspection Activity

Complainants argue in two steps that Cline violated section 105(c)(1) of the Act. Their brief (pp. 7-11) first contends that Cline violated section 105(c)(1) by interfering with the miners' right to have the No. 31 Mine inspected when Cline asked them to complain to MSHA about the excessive number of inspections which Cline believed MSHA was making at his mine. Their brief (pp. 11-15) then argues that Cline violated section 105(c)(1) by laying the miners off for 1 month because they did not comply with Cline's request that they complain to MSHA about the excessive number of inspections which Cline believed were being made at his mine. I shall first consider whether merely asking miners to complain to MSHA about what is believed to be excessive inspection activity is a violation of section 105(c)(1). 2/

2/ Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or

The Commission has routinely set forth in each of its discrimination decisions the principles which should be used in determining whether a discrimination complaint should be granted. In Jack E. Gravely v. Ranger Fuel Corp., 6 FMSHRC 799, 802 (1984), the Commission stated those principles as follows:

> Under the analytical guidelines we established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L.Ed 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

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fn. 2 (continued)

> other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Complainants' first argument (Br. 7-11) is that when Cline asked the miners to make an effort to stop MSHA's enforcement action by stating that "[i]f we can't get rid of this man, can't get rid of these inspectors, I'm going to have to shut down. I can't stand it" (Tr. 25), he necessarily violated section 105(c)(1) because he was asking the miners to give up their right to have the mine inspected on a regular basis and he was giving them a message that if they failed to stop the inspections, they would be out of a job. Complainants conclude their first argument in the following words (Br. 11):

> If the Commission does not declare that this "subtle" threat is a violation of the Act, it will be an invitation to all coal operators, especially the small subcontractors, to let their employees know that their insistence upon MSHA inspections may result in layoffs. The chilling effect of this message, particularly with respect to section 103(g) actions, could have a devastating impact on the ability of the Agency to enforce the Act. Thus, even if an operator has a legitimate business reason for shutting down operations, he may not, in any fashion, suggest to his employees that MSHA leniency and non-enforcement could preserve their jobs. In these unfortunate economic times, such threats could frequently lead to an abandonment of the principles and objectives of the Act. Consequently, the Commission should not tolerate them.

Complainants' counsel conceded at the hearing that he had brought "a novel action" (Tr. 160) and his brief shows that to be the case because he does not refer to a single Commission decision in support of his claim that Cline violated section 105(c)(1) of the Act when he asked his employees to complain to MSHA about the excessive number of inspections which Cline believed were being made at his mine. The first requirement of the two-pronged discriminatory test which I have quoted above from the Commission's Gravely case is that a finding must be made that miners have "engaged in protected activity." The only protected activity in which complainants claim to have engaged is their refusal to complain to MSHA about the excessive inspection activity which Cline believed was being conducted at his mine. Since section 105(c)(1) prohibits any "person" from interfering with a miner's "exercise of * * * statutory rights * * * afforded by" the

:t, complainants contend that Cline interfered with the :ercise of their statutory rights in violation of section)5(c)(1) by asking them to complain about the inspections ıich are guaranteed to them by section 103(a) of the Act.

While section 103(a) provides a statutory right to frequent inspections" of coal mines, Cline believed that SHA's inspection activity at his mine far exceeded the ımber of inspections which are guaranteed by section 103(a). inding No. 19 above shows the dates on which MSHA inspectors ere present at Cline's mine. The inspectors were there for days in June, 2 days in July, no days in August, 6 days in eptember, 10 days in October, and the first 4 days of ovember prior to the closing of the mine on November 8, 983.

Exhibit 8 shows that Inspector Franco wrote a total of 1 citations and two safeguard notices on October 26, 27, ıd 28 and November 1, 2, and 3, 1983, during a quarterly, : "AAA," inspection. Those citations alleged that Cline ad failed to: (1) provide an operative panic bar on a ractor, (2) anchor in a proper manner a railroad switch on ıe surface, (3) place a lifting jack on a personnel carrier, 4) make the miners wear the self-rescuers which Cline had ovided for them, (5) insulate a splice in a telephone wire ı the surface, (6) provide a derail device at the end of ıe track on the surface, (7) repair a hole in the fence ırrounding a transformer located on the surface, (8) show ıat he had the mine rescue capability required by section 9.1, (9) provide a fitting where a cable entered the frame f a welding machine on the surface, (10) guard an opening ı the deck of a scoop, (11) countersign the preshift books, 12) provide an adequate check-in and -out system, (13) provide ı operative brake for the roof-bolting machine, (14) correct sloughing condition around some previously installed roof olts, (15) hang a trailing cable where it could not be run ver by mobile equipment, (16) correct a defective parking rake on a tractor, (17) maintain a guard on the conveyor elt drive in proper position, (18) keep the doors on the ower center closed and in good repair, (19) provide proper ount of first-aid equipment, (20) store first-aid equipment ı proper containers, (21) remove grease and coal which had ccumulated on the continuous-mining machine up to 3/4 of inch in depth, (22) show on the mine map the most recent laces mined, (23) show on mine map the places which Cline xpected to mine in the future, and (24) mark the intake irway properly.

Cline abated 17 of the above-described violations on or before November 3, 1983, and the inspector did not return to the mine until November 8, 1983, at which time he found that Cline had closed the mine. The inspector extended the time for correcting the remaining alleged violations and those were necessarily abated by the four men who owned Chickasaw (Exh. 8). Therefore, the allegation in complainants' brief (p. 13) that Cline resumed operating the mine under the name of Chickasaw, Inc., "without correcting any of the violations which had been cited by Mr. Franco" [Emphasis in original], is not supported by Exhibit 8 which clearly shows that Cline had abated 17 of the 24 alleged violations by November 3, 1983, which was 1 month prior to the time when the mine was reopened under the name of Chickasaw, Inc. Complainants introduced Exhibit 8 and it is disturbing to have a brief filed before me which makes allegations which their own exhibit shows to be untrue.

Examination of the above-described violations cited by Inspector Franco in October and November shows that they range from nonserious to moderately serious and, as indicated in finding No. 21 above, the inspector rated 10 of the alleged violations as not being significant and substantial. Although Inspector Franco did not inspect the mine on November 4, another inspector was at the mine on that day. The only day when Cline's mine was not inspected between October 26 and November 4 was October 31. During those 7 working days, Cline's average daily production of clean coal averaged only 56.2 tons of coal (Finding No. 19 above). It was during that period of time that Cline requested the complainants to complain to MSHA about the excessive inspections which he believed were occurring at his mine (Tr. 102). Cline had been working in mines as a section foreman prior to the time that he opened his own mine and was familiar with the types of inspections which are normally made by MSHA (Tr. 176; 238).

His testimony shows that he believed that Inspector Franco was jealous of the fact that Cline, who is a relatively young man, was operating a mine because Inspector Franco had told Cline that he had tried to operate a mine before becoming an inspector and had failed to be successful at it. Cline, therefore, sincerely believed that Inspector Franco was "harassing" him by writing the 24 citations which are described

above. I have had many civil penalty cases assigned to me in which relatively nonserious violations were alleged of the same types which were cited by Inspector Franco in October and November and I cannot find on the basis of the record in this proceeding that Inspector Franco was harassing Cline or deliberately trying to force him out of business, but the record does show that Cline's mine was subjected to a large number of inspections during October and the first week of November and the evidence certainly shows why Cline believed that MSHA was deliberately harassing him by sending as many inspectors to his mine as it did during the months of October and November (Finding No. 19 above).

The discussion above of the facts in the record show that if complainants engaged in any protected activity, it would have to be a refusal by them to complain about the excessive inspections which Cline believed were being made at his mine. Two of the four complainants who testified in this case, however, do not claim to have engaged in that protected activity because Eplin stated that he had called Congressman Rahall's office to find out "why we're getting so many inspectors" (Tr. 102). Therefore, Eplin can hardly claim that he exercised his right to have the mine inspected frequently because he made a call to his congressman to protest the inspections. Witness Woods stated that Cline had not directly asked him to run off the inspectors, but that he had been present one day when Cline said to a group of miners "[b]oys, why don't you take the rest of the day off and go down and complain about the mine inspector?" Woods testified that he told Cline "[i]t wouldn't do any good * * * if you did that, they'd just bring more up" (Tr. 119-120).

Woods also testified that he had worked as a miner for 20 years and that there were more inspections at Cline's mine than there were at other mines where he has worked (Tr. 118). Consequently, it appears that both Woods and Eplin agreed with Cline that there had been a greater than normal number of inspections at Cline's mine. While it is undoubtedly correct, as complainants allege, that they are entitled to have frequent inspections of the mine made by MSHA, there is nothing in the record to show that Cline objected to normal MSHA inspection activity. His request that the miners help him obtain some relief to the inspections was made only after the frequency of the inspections had reached what he termed to be deliberate harassment (Tr. 220).

It is also difficult to find that an operator is precluded by section 105(c)(1) of the Act from complaining about what he sincerely believes to be excessive inspections and harassment by MSHA inspectors. As indicated in finding No. 18 above, Cline believed that his inability to operate the mine economically was 80 percent the result of complainants' failure to put in a day's work for a day's pay (Tr. 221) and 20 percent the result of excessive inspections by MSHA. Section 105(d) of the Act gives an operator the right "to contest" the issuance of citations and orders and the proposed assessment of civil penalties. Clearly, Cline could have stated to the miners that he was going to file notices of contest to the citations issued by Inspector Franco and that if his protests did not bring about a decrease in the frequency of inspections, he was going to close the mine because he could not have production interrupted to the extent that the inspector's mine examinations were causing. Yet there would be a clear implication in such a statement that the miners would lose their jobs if MSHA continued to inspect the mine as frequently as it was being inspected in October and November 1983.

It appears to me that Cline's request of the miners to complain to MSHA about the excessive inspections was little more than understandable griping about conditions over which he had no control. Cline's attorney stated that he had personally gone to MSHA, in Cline's behalf, to complain about the excessive inspections and that he had asked MSHA if it was that agency's intention to force Cline out of business (Tr. 10). Although MSHA's reply was in the negative, the record shows that there was no reduction in the number of inspections made at Cline's mine.

The record shows that the primary reason Cline believed he could operate the No. 31 Mine profitably, despite the fact that three previous operators had been unable to do so, was that he had previously worked with complainants in the capacity of both a union miner and as their section foreman and had what he thought was a good working relationship with them and he thought that they would "pull" for him and produce coal in sufficient quantities to make his operation profitable (Finding No. 2 above; Tr. 176; 214). In such circumstances, Cline's working relationship with complainants was on a much more informal level than would normally exist

between a mine owner and his employees. I have had numerous hearings involving testimony by whole crews of miners and I have noted that they have a tendency to banter their supervisors in a fashion which is often described as camaraderie and which is often associated with the existence of high morale. Witness Woods stated that Cline told them from the time the mine opened to the time it closed that they were not producing enough coal to make the operation profitable (Tr. 116), but Cline testified that he simply could not get the miners to realize that he had to have increased production in order to continue operating. Cline stated that the miners just believed that if he went out of business, someone else would take over the mine and operate it or Powellton would resume direct operation of the mine (Tr. 183).

In the circumstances described above, Cline believed that he could frankly discuss his problems with the miners. Therefore, it is not surprising that he would have enlisted their cooperation in an attempt to have them assist him in obtaining a reduction in the excessive inspection activity which even some of the complainants agreed was being conducted. In the kind of exchange which I have observed between miners and their supervisors, it is entirely possible that Cline may have jokingly told Blankenship that he would give him $50 to whip Inspector Franco, although Cline denies that he made such a suggestion (Tr. 96; 180). I believe that Cline is too intelligent and knowledgeable to have seriously made such a suggestion and I believe that Blankenship knew that Cline was kidding if the matter was ever discussed.

In fact, I believe that this entire complaint arose after the miners finally realized that no one could operate the No. 31 Mine profitably. After being out of work for a period of time, they then went to their UMWA representative and told him that they were discharged because they refused "to get rid of a federal inspector at the mine" (Tr. 137). When Griffin testified at the hearing, however, his testimony clearly shows that all Cline really said to them was that if they could not help him get Inspector Franco to stop making so many inspections, that he was going to have to close down because he could not operate the mine economically with the frequent inspections which Franco was conducting (Tr. 88-90). That is entirely different from the statement made to Cooper to the effect that Cline discharged them because they would not get rid of an MSHA inspector.

As I have previously indicated above, Inspector Franco wrote 24 citations between October 26 and November 3, 1983, and during that time, Cline's average production declined to a mere trickle of 56.2 average daily tons of clean coal, whereas his contract with Powellton provided for him to produce a minimum quantity of 250 tons of clean coal per day (Exh. C, p. 8). It is clear that Cline was stating nothing but the truth when he told his miners that if Inspector Franco's frequent inspections could not be reduced, he would have to close down (Finding Nos. 19 and 20 above).

The extended discussion above brings me back to the place I started, namely, that the only protected activity in which complainants could possibly have been engaged was declining to complain to MSHA about the frequency of the inspections which were being conducted at the No. 31 Mine. While that is hardly the type of protected activity which comes within the plain language of section 105(c)(1), such as making a safety complaint, it must still be considered to be contrary to the spirit of section 105(c)(1) for an operator to ask his miners to complain to MSHA about the very kind of activity which the Act was intended to accomplish. A miner should not, as complainants argue, be asked to request a curtailment in inspection activity even if there is evidence showing that the frequency of inspections is greater than would normally be expected at a small mine like the one here involved.

The finding above, that complainants engaged in a protected activity when they declined to complain to MSHA about what Cline believed to be excessive inspections, is only one part of the two-step discrimination test which must be met under the Commission's guidelines hereinbefore quoted from the Gravely case. The other part of the test is that a complainant must also show by a preponderance of the evidence "that some adverse action against him was motivated in any part by that protected activity." The complainants have clearly failed to establish by a preponderance of the evidence that any adverse action was taken against them because they refused to complain to MSHA about Inspector Franco's frequent examinations of the mine.

The strongest evidence which complainants were able to adduce in support of their claim that they were laid off because of their refusal to complain to MSHA is that in each of the lay-off slips given to each of the complainants, Cline gave as the reason for the lay-off "[c]an't make it

due to so many mine inspections" (Exh. 9; Finding No. 8 above). Complainants argue that Cline's use of mine inspections as the sole reason given for laying them off shows that he wanted to make it clear to them that their refusal to complain to MSHA was causing them to be laid off. As I have already discussed at length above, the preponderance of the evidence does show that Cline needed more than an average of the 157 tons of clean coal per day which the mine had been producing during its 4 months of operation to be profitable (Finding Nos. 19 and 20 above). Cline's contract with Powellton required him to produce a minimum quantity of 250 tons of clean coal per day (Exh. C, p. 8). Powellton's witness testified that he knew just from looking at Cline's production records that he could not remain in business and that Cline did not need to tell him that he was going to have to close the mine (Tr. 260).

The record provides ample facts to support Cline's claim that he had lost $71,000 in operating the mine prior to the time when he closed it on November 8, 1983 (Finding No. 20 above). Despite Cline's need to produce more than 157 tons of clean coal to make it economic to operate the No. 31 Mine, Cline's average daily production dropped to only 56.2 tons of clean coal per day during the period from October 26 to November 3, 1983, when Inspector Franco was making his quarterly, or "AAA," inspection of Cline's mine (Finding No. 19 above). Regardless of the safety and health benefits which may have been associated with the inspector's protracted examination of Cline's mine, the fact remains that his poorest production had occurred during the 2 weeks preceding his closing of the mine and that poor production had occurred while Inspector Franco was making his inspection. In such circumstances, Cline simply stated the truth in his lay-off slips when he said that he was laying the miners off because he could not "make it due to so many mine inspections" (Exh. 9).

Complainants state in their brief (p. 8):

> The Union concedes that an operator may go out of business if he does not want to invest the capital and resources necessary to run the mine safely. Thus it is not a violation of the Act if an operator says to his employees that he has gone out of business because he cannot afford to comply with the provisions of the Act.

The preponderance of the evidence, as indicated above, does show that Cline was forced to discontinue operations because of low coal production, but the evidence also shows that Cline did not close the mine because of any unwillingness to invest in necessary equipment or correct violations cited by MSHA. Cline rented one continuous-mining machine from Powellton, but he purchased a second machine with his own funds in an effort to stay in business (Tr. 183; 193). Cline also invested in the spare parts and other materials which were required to correct the violations cited by MSHA (Finding No. 21 above). Cline stated that he offered to pay the miners 2 hours overtime if they would produce eight cuts, or 320 tons of raw coal each day, but he said that the miners only produced that much coal two or three times (Tr. 175). Woods' Exhibit 12 shows that the miners produced eight cuts of coal three times in September and once in October. The miners even produced 10 cuts of coal on October 5, 1983. Therefore, as Cline stated, it was possible to produce eight cuts of coal during a single working shift, but the miners failed to do so. As finding No. 12 indicates, complainants' Exhibit 12 fails to support complainants' argument that the low production in the mine was caused by constant breakdowns of the equipment.

Regardless of the reason, the preponderance of the evidence shows that Cline was unable to produce enough coal in the No. 31 Mine to make his operation profitable and he was forced to close the mine for the sole reason that he was unable to sell enough clean coal to Powellton to make it economic for him to continue to produce coal at the No. 31 Mine. Therefore, complainants failed to prove a prima facie case of discrimination because they were unable to establish that Cline took any adverse action against them because of their protected activity of refusing to complain to MSHA about the numerous inspections which MSHA was conducting at Cline's No. 31 Mine.

Complainants' Contention that Howard Cline Violated Section 105(c)(1) of the Act When He Laid Them Off because they Refused To Complain to MSHA about the Frequency of Inspections at the No. 31 Mine

Complainants' brief (pp. 11-15) makes essentially the same arguments in support of its claim that Cline violated section 105(c)(1) when he laid the complainants off on November 8, 1983, which were made in the previous portion of their brief which claims that Cline violated section 105(c)(1) when he asked the complainants to complain to MSHA about the numerous

inspections which were being conducted at the mine. The only difference between the first argument and the one now under consideration is that complainants now argue that Cline had made it unmistakably clear to them by writing on their lay-off slips that he could not "make it due to so many mine inspections" that they had been laid off for refusing to complain about MSHA inspections, rather than for economic reasons.

The gist of complainants' argument is contained in the following paragraph from page 14 of their brief:

> No operator should be permitted to idle his employees because they want their mine inspected. While the law cannot compel an operator to stay in business, in cases such as this, where the operator reopens the same mine, with the same equipment, the same employees, the same superintendent, and the same, unabated violations, it is clear that he never really went out of business. Rather, he shut down his operations as a signal to his employees that enforcement of the Act could have a detrimental effect on their livelihood.

In order for me to agree that the record supports the contentions made in the paragraph quoted above, I would have to ignore most of the exhibits presented by both parties and about half of the testimony because the preponderance of the evidence simply does not support complainants' argument that they were laid off because of their refusal to complain to MSHA about inspections being made at the No. 31 Mine.

I have already demonstrated from the record in the preceding portion of this decision that complainants were laid off solely for economic reasons. Additionally, Cline testified that he called some of the miners back on November 15, 1983, because he thought he had sold the mine to two men named Hopkins and Smith, but that they left after trying to operate the mine for only 2 hours and sacrified a $30,000 down payment rather than try to operate the mine with the crew of miners who necessarily had to be used at the mine under any contract which a new operator had to sign with Powellton (Finding No. 15 above). Complainants' witness Griffin knew that Cline was trying to sell the mine to Hopkins and Smith and agreed that they had come to the mine on November 15, 1983, and tried to operate the mine for just one morning (Tr. 46). While Griffin claimed that they refused to take over the mine because they found it in poor condition, rather than because complainants were

"radical" miners as Cline claimed, it is certain that the preponderance of the evidence shows that Cline was trying to sell the mine to another operator prior to the time that he called complainants back to work on December 5, 1983 (Finding No. 15 above).

The above incident is entirely ignored by complainants and it greatly erodes their argument that Cline laid the miners off for a month solely to discipline them for refusing to complain to MSHA about frequent inspections. The incident with Hopkins and Smith shows that Cline was trying to sell the mine at the time he laid complainants off. If he had been successful in selling it to Hopkins and Smith, complainants would have been rehired by Hopkins and Smith on November 15, or just 1 week after they had been laid off on November 8, 1983.

Another fact which complainants ignore in arguing that Cline laid them off for a month and then rehired them with no changes in the operation is that their Exhibit 13 shows that Cline was trying to sell his personally owned continuous-mining machine to the four men who began operating the mine in the name of Chickasaw, Inc. They did not pay Cline the full amount of $15,000 required under their contract with Cline and Cline gave the continuous-mining machine back to the man from whom he had purchased it in the first place (Tr. 193). Therefore, Chickasaw was not, as complainants contend, operating with all the same equipment which Cline had been using when he laid them off.

The complainants' contention that Cline operated under the name of Chickasaw, Inc., is not supported by complainants' own Exhibit 8 because that exhibit contains at least four subsequent action sheets written by Inspector Franco on December 15, 1983, showing that he recognized that the "[t]he operating officials of this mine have recently changed." The inspector's subsequent action sheets also reflect that Inspector Franco recognized Aaron Bolan to be the superintendent of the No. 31 Mine--not Howard Cline, as contended by complainants.

As I have pointed out several times, complainants also misrepresent the facts when they argue that Cline reopened the No. 31 Mine in the name of Chickasaw, Inc., with the same unabated violations which had been cited by Inspector Franco (Finding No. 21 above). Finally, complainants have been

unable to rebut Cline's contention that he formed Chickasaw, Inc., for the sole purpose of being able to sell his interest in the No. 31 Mine to the four men named Aaron Bolan, Charles Halsey, Richard McDorman, and Dave Dickenson. Complainants themselves admitted that those four individuals owned Chickasaw, Inc., and operated the mine after it reopened under the name of Chickasaw, Inc. (Tr. 47; 65; 67; 98).

Counsel for complainants stated at the hearing that "to a large extent, our case rests upon establishing that Algonquin and Chickasaw were basically alter egos, that it was the same man operating the mine" (Tr. 123-124). The preponderance of the evidence shows that complainants failed to establish that Cline operated and owned Chickasaw, Inc., after complainants were recalled on December 5, 1983 (Finding Nos. 16 and 21 above).

I find that complainants' second contention to the effect that Cline laid them off on November 8, 1983, and rehired them on December 5, 1983, to discipline them for refusing to complain to MSHA about the frequency of inspections at the No. 31 Mine must be rejected for the reasons given in this portion of my decision and also for the reasons given in the previous portion of my decision which demonstrated from the preponderance of the evidence in this proceeding that complainants were laid off solely for economic reasons, rather than for their refusal to complain to MSHA about the frequency of inspections at the No. 31 Mine.

The discussion above of complainants' arguments shows that they have failed to prove a prima facie case of discrimination under the two-pronged test which I quoted from the Commission's Gravely decision at the outset of my consideration of complainants' arguments. They did establish the first part of the test by showing that they were engaged in a protected activity when they refused to complain to MSHA about the excessive number of inspections which Cline believed were being conducted at his mine, but they failed to establish the second part of the test by proving that Cline laid them off or took any adverse action against them solely because of their refusal to complain to MSHA as he had requested them to do.

Complainants' Contention that Howard Cline Failed To Present Credible Testimony that Complainants Were Discharged for Legitimate Business Reasons

Since I have found that complainants failed to establish a prima facie case of discrimination, it is technically unnecessary for me to consider their arguments to the effect that Cline failed to present credible testimony in support of his claim that he had laid complainants off for legitimate business reasons. In this instance, however, it is essential that I discuss their challenges to Cline's credibility because I have based some of my findings as to Cline's inability to operate the No. 31 Mine economically on Cline's testimony. Moreover, complainants, on pages 15 through 20 of their brief, have made arguments which are either incorrect or which misstate the facts. It is essential that those erroneous statements be corrected.

Complainants begin their arguments against Cline's credibility by conceding that Cline was always seeking to have them produce more coal than they were mining, but they claim that Cline never threatened to close the mine because of low production. They then argue that if Cline had laid complainants off because of their low production, he would have included that as a reason for laying them off when he wrote the lay-off slips which only say that he could not "make it due to so many mine inspections" (Br. 15-16).

I have already considered the above contentions and have shown in finding Nos. 19 and 20 that Cline produced only 157 tons of clean coal on an average daily basis and produced only 105 tons of clean coal on an average daily basis when inspectors were present at the mine. Cline produced only 56 tons of coal on an average daily basis during the 6 days when Inspector Franco wrote 24 citations and two safeguard notices (Finding No. 19 above). Since Inspector Franco's inspection ended just 4 days before Cline laid complainants off and closed his mine, there was no way for him to separate low production in his mind from his belief that his mine was being subjected to so many inspections that he had concluded that MSHA was out to drive him out of business through harassment (Tr. 220-221). Consequently, if Cline's mental condition is properly understood at the time he wrote the lay-off slips, his statement that he could not "make it due to so many mine inspections" means that he could not operate the mine economically because the inspections had reduced his average daily output of clean coal to 56 tons.

Although some of complainants testified that Cline had commended them for their work on a few occasions, his testimony in this proceeding about the poor quality of their work is supported by the preponderance of the evidence. Witness Woods' Exhibit 12 fails to support complainants' contention that breakdowns in equipment caused the mine's low production (Finding No. 12 above). Finding No. 20 above shows that Cline was losing a great deal of money every month because of low production. Powellton's contract with Cline shows that he was required to produce a daily minimum quantity of 250 tons of clean coal, but he produced an average of only 157 tons during the 4 full months that he was able to operate the mine (Finding No. 19 above). Powellton's witness stated that he knew from looking at the production records that Cline could not continue in business with the low production he was getting from the mine (Tr. 260).

Complainants' brief (p. 16) begins its direct attack on Cline's credibility by asserting that the record does not support Cline's statement that his production from the No. 31 Mine averaged only 150 tons of clean coal per day. Complainants contend, instead, that his average daily production for the months of July and August show an average of 208.89 and 214.04 tons, respectively. I have already shown in finding No. 19 above and in my discussion on page 18 of this decision that complainants have totally misstated and misused Exhibit 14 in arriving at the erroneous average daily production figures relied upon in their brief. As shown in finding No. 19 above, Cline's average daily production for the 4 months during which he operated the No. 31 Mine was 157 tons of clean coal. Therefore, Cline's testimony to the effect that his average production was "about" 150 tons (Tr. 174) is only 7 tons less than the actual calculations show the production to be. I do not believe that his use of a figure which is off by 7 tons is so far from the facts as to support a conclusion that his testimony must be dismissed for lack of credibility as contended by complainants.

Complainants' brief (p. 17, n. 9) claims that Cline "became entangled in his own forest of lies" when he stated at one point in the hearing that he needed 225 to 250 tons of clean coal to break even (Tr. 175) and later testified that he needed only 200 to 240 tons of clean coal (Tr. 182). While Cline did use a slightly different range of production tonnage at page 182 from the tonnage given at page 174, Cline was answering a different question on page 182 because his counsel had asked him how much coal he could expect the

No. 31 Mine to produce and Cline had stated that it should produce between 250 and 300 tons of raw coal per day. His counsel then asked him what that amounted to in clean coal and Cline correctly reduced the figures by 20 percent to allow for "rejects" and stated that the figures would be 200 and 240 on a clean-coal basis. At a still later point in his testimony, Cline was again asked about the tonnage of clean coal which would be required for him to remain in business and he again stated the figures which he had first given in his direct testimony, that is, from 225 to 250 (Tr. 219). Cline's slight inconsistency in clean coal tonnage, when considered in light of the questions asked, can hardly support a finding that Cline "became entangled in his own forest of lies," as contended by complainants.

Complainants' brief (p. 17) contends that Cline "was probably making a sizeable profit" during the months of September and October 1983. They base that claim on assumptions that Cline was selling Powellton 150 tons of clean coal per day for which Powellton was paying him $25.20 per ton and a belief that Cline's labor costs could be calculated by multiplying 8 hours by the miners' hourly rate of $26.14, including all fringe benefits for hospitalization, pensions, etc. Using the above figures, complainants' brief states that Cline was being paid $3,780.00 per day (150 tons x $25.20 = $3,780.00) for the coal he delivered to Powellton's preparation plant. Complainants then allege that Cline's cost of wages for 14 miners was $2,593.92 ($26.14 x 8 hours = $209.12 x 14 miners = $2,927.68) per day. [NOTE: The correct amount is $2,927.68, but complainants' brief uses an incorrect figure of $2,593.92 which is $333.76 less than the actual cost of labor even if one uses complainants' assumptions and basic hourly rate.] Complainants then subtract the erroneous wage amount of $2,593.92 from the amount Cline is getting paid for clean coal of $3,780.00 and arrive at a result of $1,186.08 as an amount which complainants say was mostly "pure profit" (Br. 18).

When complainants' alleged "pure profit" of $1,186.08 is reduced by an additional $333.76 to correct complainants' error in calculating the daily wage costs, Cline's alleged daily profit is reduced to $852.32. The alleged profit of $852.32, even after correction, is still greatly overstated because it fails to allow any amount for cost of such items as roof bolts, rock dust, timbers, ventilation curtains,

spare parts, engineering services, respirable-dust services, accounting services, telephone, liability insurance premiums, the cost to Cline of having his coal transported from the mine to Powellton's preparation plant, and the cost to Cline of hiring three foremen which Cline used to supervise the 14 miners whose total wage cost has been computed to be $2,927.68 per day.

If the miners were getting the equivalent of $209.12 per day in wages and fringe benefits, three foremen ought to be paid at least $200 per day or $600 in total salaries. The investigator's report in Exhibit 7 states that Cline was employing three foremen.

The accounting sheets in Exhibit 7 show that Cline incurred $15,515 in September and $15,791 in October for materials, supplies, spare parts, and telephone services. Cline incurred $475 in September and $1,230 in October for respirable-dust sampling and other professional services, and had to pay an unknown amount for the 135 and 144 truck-loads of coal in September and October, respectively, involved in transporting his coal from the mine to the plant. No amount needs to be added for the cost of equipment rental ($1.50 per ton) or electricity (30 cents per ton) because complainants deducted those charges by subtracting $1.80 per ton from Powellton's payment of $27.00 per ton for clean coal. Although Cline had to pay wages and salaries for more days in September and October than the 19 and 20 days, respectively, assumed by complainants in determining the quantity of clean coal which Cline sold to Powellton during those months, I shall use a 20-day month for the purpose of estimating a daily cost for the items complainants ignored in claiming that Cline was making about $1,186.08 each day in "pure profit."

A calculation of Cline's minimum daily loss from operating the No. 31 Mine can be computed as follows, using complainants' clean coal production of 150 tons per day and their daily hourly wage rate of $26.14:

$3,780.00 - Daily clean coal receipts ($25.20 per ton x 150 = $3,780)

-2,927.68 - Daily wages paid to 14 miners ($26.14 x 8 hours x 14 = $2,927.68)

- 600.00 - Daily salaries for three foremen ($200 x 3 = $600)

- 750.00 - Daily cost for materials, supplies, spare parts, telephone ($15,000 ÷ 20 = $750)

- 42.00 - Daily cost of engineering and respirable-dust services ($475 + $1,230 = $1,705 ÷ 2 = $853 ÷ 20 = $42)

- 150.00 - Daily cost for $1,000,000 of liability insurance $3,000 ÷ 20 = $150)

- 0.00 - Unknown amount for transporting coal from mine to preparation plant

$ (689.68)- LOSS per day incurred by Cline as a result of operating the No. 31 Mine

Complainants' brief (pp. 18-19) lists nine items which are relied upon as support for their claim that Cline's testimony is not credible. The first contention is that Cline claimed to have sold all his interest in Chickasaw, but they say that the agreement (Exh. 13) which he signed with the purchasers retained for Cline a reversionary interest in the company. They say that Cline's explanation (Tr. 195) that he had that provision inserted into the agreement to make the sale appear to be more attractive to the purchasers is nonsensical. The provision to which complainants refer states that "[i]n the event the parties of the second part wish to quit mining as a further consideration to Howard W. Cline agree to transfer to the said Howard W. Cline all the stock in Chickasaw, Inc., if the said Howard W. Cline so requests" (Exh. 13, p.2).

When complainants' counsel asked Cline about the meaning of the so-called reversionary clause, he stated that "[t]here's no way" he would have taken back Chickasaw, Inc. (Tr. 191) and he explained subsequently that when a person is trying to sell something, "you've got to make it sound interesting and attractive" and he said he had that provision inserted in the contract so that the purchasers would think that he was selling something that he would like to reacquire if the purchasers failed to go through with their part of the bargain (Tr. 195). He further stated unequivocally that he had not asked for the stock to be returned and that if he had regained Chickasaw, Inc., he would only have received "a lot of debts."

I disagree with complainants' contention that Cline's explanation of the reason for having the aforesaid provision inserted in his contract with the purchasers is "nonsensical." Cline received only a down payment of $5,000 with another $10,000 to be paid subsequently, along with payment by purchasers of $1.75 per ton of clean coal to be produced from the mine. I doubt if any of the complainants would transfer his title to an auto valued at $5,000 upon my giving

him a down payment of $1,000, without providing that he has a right to have the title and auto returned to him if I should fail to pay the remaining $4,000. Failure of a seller to indicate an interest in regaining an object sold with only a down payment having been made would be interpreted by the purchaser as an indication that the object is not worth any more than the down payment. In this instance, Cline's interest in the mine was not worth more than the down payment. Actually the down payment was made in order for the purchasers to acquire a continuous-mining machine owned by Cline, but Cline made it appear that he was still interested in the mine by inserting a provision that he could request a return of the stock in Chickasaw, Inc., if the purchasers failed to perform their part of the agreement. That can hardly be considered to be a "nonsensical" provision.

The circumstances which complainants give in support of their second attack on Cline's credibility begin with an assertion that Cline claims to have retained no interest in Chickasaw's operations after December 2, 1983, but thereafter Cline filed a Legal Identity Report with MSHA dated December 5, 1983, showing that Chickasaw was the operator of the No. 31 Mine and that Cline was its president (Exh. 11). It is also claimed that Cline signed job-posting slips on December 5, 1983, showing the jobs open at the No. 31 Mine and indicating that Cline was Chickasaw's superintendent (Exh. 1).

There is nothing inconsistent about the occurrence of the above-described transactions. First, there is no basis for complainants' contention that Cline claimed to have retained no interest in Chickasaw after December 2, 1983. What clearly happened was that Cline signed an agreement on December 2, 1983, in which he agreed to transfer all stock in Chickasaw to the men who subsequently operated the No. 31 Mine in the name of Chickasaw, Inc. That agreement required Cline to obtain a new operating agreement with Powellton and provided that, once signed, the new agreement would be attached to the agreement signed on December 2, 1983. The agreement between Powellton and Chickasaw was subsequently signed on December 5, 1983 (Exh. D), and the Legal Identity Report was also submitted to MSHA on December 5, 1983 (Exh. 11). It should be noted that December 2, 1983, was a Friday and that the next working day was Monday, December 5, 1983. Therefore, it is understandable that Cline would not have been able to perform all the requirements in the contract on December 2, 1983, when the contract was signed. Cline testified that, as a condition of the sale

to the new prospective operators of the No. 31 Mine, he had to form a new corporation, obtain a new operating contract with Powellton, and perform some other routine functions so as to put them in a position of being able to operate the mine (Finding No. 16 above).

There is nothing in the record to show that Cline failed, as claimed, to transfer all the stock in Chickasaw, Inc., to the purchasers named in the agreement signed on December 2, 1983. At least four of the subsequent action sheets written by Inspector Franco on December 15, 1983, show that the inspector recognized that new persons had taken over the operation of the No. 31 Mine and that Aaron Bolan, one of the purchasers named in the agreement of December 2, 1983, was then superintendent of the No. 31 Mine (Exh. 8). The above discussion shows that there is no merit to complainants' contentions that Cline continued to hold an interest in Chickasaw after he had transferred the stock to the men who purchased Cline's interest in the No. 31 Mine.

The third incident used by complainants to attack Cline's credibility is their contention that Cline claims to have purchased a Lee Norse continuous-mining machine for $175,000 (Tr. 182), but that he never did pay for it and returned it to the seller (Tr. 193). Cline did not say, as complainants contend, that he paid $175,000 for a Lee Norse. He said that they cost $175,000 (Tr. 183) and that he made a down payment on it and "gave it back to the guy" he bought it from (Tr. 193).

No one asked any additional questions about the Lee Norse which Cline obtained for use at the No. 31 Mine, but it is fairly safe to conclude from his statement that he gave it back to the "guy" he bought it from, that it was a used machine which was not worth nearly as much as the $175,000 price which was elicited from Cline by his counsel (Tr. 183). Moreover, as I have already explained in finding No. 16 above, Cline tried to sell the Lee Norse for $15,000 to the men who began operating the mine in the name of Chickasaw, Inc., but was unable to do so because they never did pay him anything after making the required $5,000 down payment at the time they began to operate the mine. If Cline had not actually brought a Lee Norse on to mine property, there would have been no reason for him to provide for its sale to the men who began operating the mine in the name of Chickasaw. Additionally, it should be noted that complainants' witness Eplin testified that Cline brought another continuous-mining machine into the mine and that he tried to mine coal

with the substitute machine at any time the one rented from Powellton was out of order, but that the substitute machine never did perform well and that Cline eventually took it out of the mine (Tr. 104). Thus, complainants' own witness' testimony corroborates my conclusion that Cline had purchased a used machine which was probably not worth more than the $15,000 which he tried to get for it from the men who began operating the mine under the name of Chickasaw. In any event, I find nothing in the record which shows that Cline's credibility was greatly damaged because of his statement that he made a down payment on a Lee Norse continuous-mining machine and than gave it back to the person from whom he had obtained it.

The fourth incident which complainants list as a factor in attacking Cline's credibility is that he claims that some potential buyers failed to follow through on an intended purchase of Cline's interest in the No. 31 Mine when they encountered the "radical" work force at the mine. They had offered Cline $50,000 for his interest and had made a down payment of $30,000. They forfeited the $30,000 down payment and left the mine rather than operate it with complainants as the required work force (Tr. 168; 210). I have already provided a summarization of this incident in finding No. 15 above. Complainants' own witness Griffin testified that he was aware of the fact that Cline had tried to sell the mine to two men named Hopkins and Smith and that they left after trying to operate the mine for only a half day. About the only difference between Griffin's testimony and Cline's as to the aborted operation of the mine by Hopkins and Smith is that Griffin said they gave up because of the condition in which they found the mine, whereas Cline said they left because of the caliber of the work force.

It should be noted that Cline would not have had to mention the $30,000 down payment which he received from Hopkins and Smith or their forfeiture of the down payment. The fact that he did mention the down payment and the fact that he voluntarily stated that their payment had offset his $71,000 loss in operating the No. 31 Mine all tend to support his claim that the incident occurred. Just because complainants say that Hopkins and Smith acted "mysteriously" is not a sound basis for finding that Cline's testimony should be discounted for lack of credibility.

The fifth reason given by complainants in support of their argument that Cline's testimony is incredible is a repetition of their contention that Cline gave inconsistent quantities of clean coal when asked about the amount of coal which had to be produced in order for the mine to be profitable. I have already shown the lack of merit in that contention on pages 36 and 37 above and no further comments are required to support a rejection of that argument as a basis for finding Cline's testimony to be lacking in credibility.

The sixth contention made by complainants in support of their attack on Cline's credibility is that Cline testified that there were inspectors at the mine for 3 days each week (Tr. 180), but that Woods' Exhibit 12 shows that production declined because of inspections on only 2 days in September and 2 days in October. Finding Nos. 11 and 19 show beyond any doubt that Cline's mine was the subject of numerous inspections by MSHA. Finding No. 19 shows that there were inspectors at Cline's mine on 3 days in the week of June 20, for 4 days in the week of September 19, for 3 days in the week of October 10, for 4 days during the week of October 24, and for 4 days during the week of November 1. That finding also shows that Cline's average production declined to an average of 105 tons of clean coal for the days on which inspectors were at the mine and declined to an average of only 56 tons of coal per day during the 6 days when Inspector Franco made his inspection at the end of October and beginning of November. There is certainly nothing about Cline's statement as to there having been inspectors at his mine for 3 days each week which requires that I make a finding that his credibility is to be doubted.

The seventh reason given by complainants for doubting Cline's credibility is that he testified he is out of money, unable to pay any kind of civil penalty, and yet is contemplating a return to mining coal in Kentucky or Virginia (Tr. 221; 228-230). As I have already indicated on page 21 of this decision, Cline failed to prove with documentary evidence that he is unable to pay civil penalties, but failure of a witness to present documentary proof is not a sufficient shortcoming to support a finding that his credibility has been destroyed. As I have previously indicated, Powellton's witness stated that Cline, at one time owned a supply company (Tr. 238) and Cline himself stated that he would pay $500 to anyone who would take the defunct Algonquin Coal Company off his hands (Tr. 196). Cline also stated

that just a few days before the hearing, he had paid Powellton $900 which Algonquin still owed Powellton (Tr. 196). Those statements are obviously inconsistent with Cline's claim that he is unable to pay a civil penalty and that if I were to order him to pay a civil penalty of $1,000, the effort to pay that much would force him into bankruptcy (Tr. 229). A further indication of Cline's inconsistency about his financial condition is that Cline stated that he had bought the Lee Norse mining machine with his own funds rather than with Algonquin's funds (Tr. 193). Therefore, complainants have a meritorious point when they argue that Cline was less than convincing about his actual financial condition.

On the other hand, the record shows that Cline is sophisticated in the area of forming corporate enterprises for the purpose of achieving his various goals. It is entirely possible that Cline has no personal funds and that the money he does advance for various purposes comes from a corporate enterprise through which he operates his supply business, assuming he still owns that sort of business. Also, as complainants have correctly noted, Cline invested very little of his own capital in operating the No. 31 Mine under the name of Algonquin Coal Company. Powellton even agreed to pay Cline $12,000 to enable him to prepare the mine for active coal production (Exh. B). Therefore, it would appear to be possible for Cline to find a mine owner, like Powellton, who would finance an undertaking by Cline to open a mine in Kentucky or Virginia. If he could find such a firm, he could open a mine without having any funds, as an individual, to invest in opening the new mine.

I did not personally press Cline to produce documentary evidence at the hearing to support his claim that he cannot pay civil penalties because it is the operator's burden to prove that he cannot pay civil penalties if he takes that position (Tr. 228). As I have pointed out above, Cline may be truthfully stating that he has no funds, as an individual, to pay civil penalties and may, despite that fact, still be able to acquire funds through some corporate enterprise which he controls. If the aforesaid mental reservations were employed to justify the inconsistent statements he made about having no money, I would have to find that he was disingenuous in dealing with questions regarding his financial condition.

The eighth point made by complainants in support of their attack on Cline's credibility is that Cline testified that he generally ran all three ram cars when coal was being produced (Tr. 207-208). Complainants then point out that when one considers the production levels at the mine and the fact that each ram car could deliver 100 to 120 tons per day to the tailpiece, there would rarely be a time when all three cars would be required (Tr. 60). Complainants' eighth point is either made without a clear understanding of the way a mine is operated or with the hope that the judge does not know how a mine is operated. All discussions about the use of ram cars have to begin with the assumption that the continuous-mining machine is operating. When that machine is operating, the goal is to move coal away from it as fast as it is produced. Therefore, even if the continuous-mining machine does not operate but 1 hour in a single day, Cline would prefer to have the three ram cars taking the coal away from the machine so that there is little delay between the time one car is filled with coal and the next one moves up to be filled. The testimony also shows that long haulage distances existed between the location of the face equipment and the tailpiece (Tr. 147). Thus, three ram cars would easily be needed in order to keep the continuous-mining machine operating at an efficient rate of production. Consequently, the mere fact that a single ram car may be able to deliver 120 tons to the tailpiece in an entire day is not the same as having the ability to take coal from the continuous-mining machine as fast as it is cut at the face. Witness Griffin was a ram-car operator and was also the miner who most frequently accompanied inspectors pursuant to section 103(f) of the Act (Tr. 70; 207). He testified that only two ram cars were used at times even if no inspectors were at the mine, but he was unable to say how much his acting as the person to accompany inspectors interfered with production by reducing the ram-car operators to two instead of three (Tr. 72).

Cline rather convincingly proved his point with respect to his use of three ram cars by pointing out that he would not hire a third ram car operator (at a cost of $26.14 per hour, according to complainants' brief, p. 17) if he did not have a need to operate three ram cars 90 percent of the time (Tr. 207). The evidence, therefore, does not support complainants' argument that Cline's testimony about use of three ram cars served to erode his credibility.

The ninth and final point which complainants use as a basis to attack Cline's credibility is that while Cline primarily attributed his failure to be able to operate the mine profitably to his having to use an unsatisfactory labor force, he gave as his only reason for laying off complainants that he could not "make it due to so many mine inspections" (Exh. 9; Tr. 177). I have repeatedly dealt with this same argument by pointing out that in Cline's mind, the production which he lost when the miners failed to produce coal because of the presence of inspectors made him feel that inspections and low production were such simultaneous occurrences, that stating the existence of inspectors was the same as stating that he could not operate because of low production (Finding No. 19 above).

I have reviewed above in some detail the nine reasons given by complainants for their allegation that Cline's inconsistent statements require that a finding be made to the effect that his testimony cannot be accepted as credible. My discussion shows that the preponderance of the evidence supports Cline's statements in all areas except his failure to be fully candid about his financial condition. I can appreciate a person's unwillingness to produce his tax returns and provide other documents which show his exact financial condition. Cline failed to prove that he cannot pay civil penalties, but his failure in that limited area of evidence is not a sufficient defect in his overall performance as a witness to support a finding that his entire testimony must be discounted for lack of credibility.

The last paragraph of complainants' brief (p. 20) under their argument to the effect that Cline failed to give legitimate business reasons for laying complainants off on November 8, 1983, consists of a continuous, uninterrupted misstatement of the evidence in this proceeding. My decision has already taken each of the allegations made in that paragraph and has shown that not a single statement made in that paragraph is supported by the preponderance of the evidence. Lest complainants think for a moment that those statements are acceptable to me, I shall repeat that the evidence does not support their claim that Cline resumed operating the No. 31 Mine on December 5, 1983, under the name of Chickasaw, Inc. The record shows unequivocally that Chickasaw was operated by four men and that all Cline did was form that corporation as one of the conditions for his

being able to extricate himself from having to continue operating an uneconomic enterprise which had already cost him a considerable amount of money (Finding Nos. 7, 8, 12, 15-20 above).

It is contrary to the entire record for complainants to assert that there was no shortage of persons waiting for the chance to operate the No. 31 Mine at the time Chickasaw, Inc., went out of business owing the miners back wages which were paid by Powellton (Finding No. 5 above). Complainants' own witness Griffin testified that prior to Cline's failure to be able to operate the No. 31 Mine profitably, three other companies had failed for economic reasons (Finding No. 2 above). Powellton's witness testified that his superior had even told him not to sign a contract with any more companies allowing them to operate the No. 31 Mine, but that he made an exception in Cline's case because of Cline's previous good record for being able to get along with the miners who would have to be used to operate the mine under the UMWA Wage Agreement (Finding No. 3 above).

The fact that the complainants who testified in this proceeding were unemployed at the time the hearing was held shows that the No. 31 Mine is no longer "an ideal setting," as complainants contend, for an individual to open a coal mine (Tr. 21; 93; 99). The preponderance of the evidence shows beyond any doubt that Cline could not economically operate the No. 31 Mine and would have had to lay off all the complainants for that reason even if complainants had not refused to complain to MSHA about the numerous inspections which were being made at the mine (Finding Nos. 1-3, 5, 12, 15-20).

It should be noted that I have not made many references to the brief filed by Powellton's attorneys in this proceeding. My lack of references to Powellton's brief results from my having found that most of Powellton's arguments are supported by the record. It is unnecessary for me to extend this lengthy decision by discussing arguments with which I am in general agreement. Powellton's brief (p. 13, n. 9) does, however, raise one objection which requires some consideration. Powellton's brief there refers to Attachment A in complainants' brief. Attachment A consists of a tabulation showing the overall cost of employing a miner under the UMWA Wage Agreement if one includes all fringe benefits.

Powellton objects to my giving any consideration to Attachment A because it was not offered in evidence at the hearing. While it is true, as Powellton argues, that Attachment A was not offered in evidence at the hearing, the calculations in Attachment A were based on the Wage Agreement which is Exhibit A in this proceeding. Powellton's witness demonstrated a thorough understanding of Exhibit A and I am confident that if complainants had misapplied the Wage Agreement in calculating the cost of hiring UMWA miners, Powellton's attorneys would have been able to show in a rebuttal exhibit of their own that the factors used by complainants in their Attachment A are incorrect.

I have examined Attachment A in some detail and I have shown in Appendix A to this decision that complainants used a higher basic hourly rate than is supported by the testimony or Exhibit A and I made that change in calculating the losses incurred by Cline in operating the No. 31 Mine. As a matter of fact, it appears that Cline benefits from my use of the information given by complainants in Attachment A more than complainants do. I believe it is preferable to consider all contentions of the parties on the merits rather than to reject them on technical grounds. Since my consideration of Attachment A on its merits has had results which support all of Powellton's arguments, Powellton can hardly claim that my consideration of Attachment A has been prejudicial to it in any way. Therefore, Powellton's objection to my consideration of Attachment A is overruled.

Complainants' Argument that Powellton, as Owner of the No. 31 Mine, Is Strictly Liable for All Violations of the Act Committed by Powellton's Independent Contractors

Complainants rely upon a line of Commission and court decisions 3/ pertaining to the liability of mine owners for

3/ Republic Steel Corp., 1 FMSHRC 5 (1979); Kaiser Coal Corp., 1 FMSHRC 343 (1979); Consolidation Coal Co., 1 FMSHRC 347 (1979); Old Ben Coal Co., 1 FMSHRC 1480 (1979); Monterey Coal Co., 1 FMSHRC 1781 (1979); Republic Steel Corp. v. Interior Bd. of Mine Op. App., 581 F.2d 868 (D.C. Cir. 1978) Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981); Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981); and Phillips Uranium Corp., 4 FMSHRC 549 (1982).

violations committed by their independent contractors to assert in their brief (pp. 22-23) that Powellton is liable for any violation of section 105(c)(1) which may have been committed by Cline, Algonquin, or Chickasaw. In my prehearing order issued April 19, 1984, in this proceeding, I noted that it might be possible to hold Powellton liable for violations of section 105(c) by its independent contractors and I tentatively denied Powellton's motion to dismiss at that time pending my giving complainants an opportunity to prove that the relationship between Powellton and its independent contractors warranted application of the cases on which complainants rely.

Powellton renewed its motion to dismiss after I issued the prehearing order and complainants filed a reply in opposition to the grant of Powellton's motion. Copies of the contracts between Powellton and Chickasaw were submitted by the parties in support of their opposing positions. I issued an order on August 7, 1984, in which I reviewed in detail the contracts between Powellton and its independent contractors and concluded that Algonquin and Chickasaw were acting as mere agents for Powellton and that Powellton should be held to be liable for any violation of section 105(c)(1) pending the receipt of evidence by the parties at the hearing which was scheduled by the order denying Powellton's motion to dismiss it as a party to this proceeding. Therefore, Powellton correctly points out in its brief (p. 16) that I have never held in this proceeding that Powellton is liable for violations of section 105(c)(1) which may be committed by its independent contractors.

The remainder of Powellton's brief (pp. 17-20) demonstrates by references to the testimony of witnesses Holbrook and Cline that its contracts with Algonquin and Chickasaw, when properly understood, do not create an agency relationship between Powellton and Algonquin or Chickasaw.

It is true, as complainants contend, that the court in the Cyprus case held that mine owners are strictly liable for the actions of independent contractors and further stated that:

> The Secretary [of Labor] presents sound policy reasons for holding owners liable for violations committed by independent contractors. For one thing, the owner is generally in continuous control of conditions at the entire mine. The owner is more likely to know the federal safety and health requirements. If the Secretary could not cite the

> owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work. The Secretary should be able to cite either the independent contractor or the owner depending on the circumstances. [Emphasis in original.]

644 F.2d at 1119.

At the outset of this discussion of complainants' contentions that Powellton be held liable for any violation of section 105(c)(1) which might be committed by its independent contractors, it should be noted that the Commission and the courts, in the cases relied upon by complainants, were not dealing with the type of violation which is here involved. The owners of the mines in those cases were the actual operators of the mines in terms of extracting materials from the earth and they had hired independent contractors to do isolated construction acts, such as digging a tunnel to assess talc deposits, or constructing a ventilation shaft. The violations involved were failures to comply with specific mandatory health and safety standards cited by Federal mine inspectors.

The violation at issue in this case involves a mine owner (Powellton) which no longer actively produces coal (Finding No. 1 above). Powellton, therefore, is outside the normal factual conditions which have existed in the cases which have come before the Commission and the courts, in that no Federal inspector has issued a citation charging that Powellton violated a mandatory safety standard while operating a mine at which an independent contractor has been hired for the limited purpose of performing a specific construction project.

Therefore, in the instant proceeding, complainants are performing the function which would ordinarily be carried out by a Federal mine inspector in that they are alleging the violation of the Act which is being used as a basis for claiming that Powellton, as well as its independent contractor, is liable for the violation of section 105(c)(1) here involved. Moreover, complainants introduced evidence showing that Federal mine inspectors have conducted numerous inspections of the No. 31 Mine here involved and have issued many citations which name the independent contractor as the "operator" of the No. 31 Mine. Consequently, it is somewhat

difficult to fit a discrimination case into the framework of existing law which holds that mine operators are liable for the acts of their independent contractors because, under the Secretary's regulations, the independent contractors in this case (Cline, Algonquin, and Chickasaw) are the actual production-operators of the No. 31 Mine.

A further complication which arises when one tries to apply the existing case law governing citation of production-operators for violations committed by independent contractors is that the 1977 Act extended the definition of an operator to include independent contractors and the Secretary has developed regulations (30 C.F.R. §§ 45-1-45.6) which control to a large extent the question of whether a mine owner should be cited for violations by independent contractors. Section 45.2(c) of those regulations defines an independent contractor as "any person, partnership, corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine." Section 57.2(d) defines a production-operator as "any owner, lessee, or other person who operates, controls or supervises a coal or other mine."

While it is true that Algonquin and Chickasaw necessarily performed services and construction at Powellton's No. 31 Mine, the contracts show that Powellton wanted its coal "mined" and that Algonquin and Chickasaw desired "to mine such coal" and deliver it to Powellton's preparation plant (Exhs. C and D, p. 1). On the other hand, Powellton, Algonquin, Chickasaw, and Cline all fit into the definition of production-operator in section 45.2(d) because each of them can be considered to be an "owner, lessee, or other person who operates, controls or supervises a coal or other mine."

The primary reason that complainants included Powellton as a respondent in their action is that they feared that Cline might not be financially able to pay the back wages they seek if a violation of section 105(c)(1) should be proven.

Although the above discussion shows that a discrimination case is not really adaptable to the law and regulations pertaining to citing operators for independent contractors' violations, I shall try to evaluate complainants' arguments in light of the Secretary's regulations and the most recent Commission decision on the subject. In its decision in Cathedral Bluffs Shale Oil Co., 6 FMSHRC 1871 (1984), the

Commission held that the Secretary improperly cited a production-operator for a violation committed by the independent contractor. The Commission referred to the criteria which the Secretary had established to govern the citing of operators for independent contractors' violations. The Secretary expressed those criteria as follows:

> as a general rule, a production-operator may be cited for a violation involving an independent contractor: (1) when the production-operator has contributed by either an act or omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement.

6 FMSHRC at 1873.

The violation alleged in this proceeding is that Cline laid complainants off in violation of section 105(c)(1) because complainants had refused to comply with his request that they complain to MSHA about the excessive number of inspections which Cline believed were being conducted at the No. 31 Mine. Assuming, arguendo, that complainants had been able to prove that a violation occurred, it is clear that Powellton did nothing by way of omission or commission which could justify Powellton's being cited for the violation under the Secretary's guidelines quoted above. The contracts (Exhs. C and D) show that Powellton requires its independent contractors to hire complainants as the work force in the No. 31 Mine and requires them to comply with all safe mining procedures. Powellton requires its independent contractors to report the hours worked by its employees so that Powellton can submit payments to UMWA's pension funds at the proper times and thereafter bill its independent contractors for those payments. Powellton agreed to pay Cline $12,000 so that he could prepare the mine for safe operation. Powellton requires its independent contractors to procure accident and health insurance from a carrier approved by Powellton. It is difficult to imagine any act which Powellton could take to assure that the miners

are provided with safe and healthful working conditions which Powellton did not provide for in its contracts with Algonquin and Chickasaw.

Powellton does not come within the second criterion quoted above because Powellton could not have contributed to the continued existence of the alleged violation inasmuch as Powellton agreed to sign a new contract so that another operator could have taken over the No. 31 Mine on November 15, 1983, just 1 week after Cline had laid off complainants, if Cline's prospective successor had not left the mine after trying to operate the mine for only a half day (Finding No. 15 above). Powellton did sign a new contract with Chickasaw so that the miners could be called back to work on December 5, 1983. Therefore, Powellton did all that it could have done to assure that the miners would be given jobs as soon as any operator could be found by Cline to take over operation of the No. 31 Mine.

Powellton cannot be held to be liable as a production-operator under the fourth criterion quoted above because Powellton did not hire any of the miners who worked for Cline, Algonquin, or Chickasaw and did not in any way supervise them, discipline them, or have anything to do with their having been laid off (Finding No. 5 above).

The above analysis of the facts in this proceeding under the criteria expressed by the Secretary for determining when a production-operator should be cited for violations committed by its independent contractor show that a Federal inspector would not be able to establish a basis for citing Powellton for the violation of section 105(c)(1) alleged by complainants in this proceeding.

It should also be noted that Powellton does not come within the purview of the factors quoted above from the court's decision in the Cyprus case. The court referred to the fact that an owner or production-operator has "continuous control" of conditions at the "entire" mine and is the entity best able to maintain healthful and safe conditions at its mine. Powellton specified in its contracts that its independent contractors were required to comply with all safety and health standards. Powellton did not inspect the mine (Tr. 218) and therefore did not exercise "continuous control" over the "entire" mine as would be the case if Powellton could properly be categorized as a

"production-operator" as that term is used when a Federal inspector is trying to determine whether a production-operator should be cited for an independent contractor's violations.

Complainants also seek to make Powellton liable for the alleged violation of section 105(c)(1) alleged in this case by citing Judge Broderick's decision in UMWA v. Pine Tree Coal Co., 7 FMSHRC 236, 240 (1985), in which Judge Broderick stated that "[b]y analogy [to some of the cases cited on page 48 above] the owner may be held strictly liable to pay compensation to miners idled by a withdrawal order, even though the owner is not the employer of the miners." Complainants' reliance on Judge Broderick's decision is misplaced because in the Pine Tree case, the owner of the mine supervised the independent contractor's activities with respect to mining projections and mine mapping and the owner specifically advised the independent contractor to continue mining into a questionable area which turned out to be a gas well. Judge Broderick believed that the owner could be cited as well as the independent contractor because the conditions giving rise to issuance of the withdrawal order in that case "were the responsibility of the owner" (7 FMSHRC at 240).

As I have already noted in this decision, Powellton required Cline and its other independent contractors to hire an engineer, but it was the independent contractors' responsibility to prepare their own mine maps and perform their own mining projections (Exh. C, p. 5; Tr. 265). The fact that Inspector Franco issued Citation Nos. 2273570 and 2273571 on November 2, 1983, alleging that Algonquin had failed to show mining projections and the date of recent mining activity on the mine map shows that the inspector did not believe that Powellton, as the production-operator, was liable for such violations. Of course, as I have already noted above, Cline, Algonquin, and Chickasaw are production-operators and the contracts between Powellton and its independent contractors do not create the type of relationship which is normally subject to the law governing the citing of production-operators for violations by their independent contractors.

The concluding argument which complainants' brief (p. 25) makes in support of their contention that Powellton should be held strictly liable for Cline's alleged violation of section 105(c)(1) is that:

> justice would be well served by a Commission ruling which signals to Powellton and other large lessors of coal mines that they have an obligation to ensure that the parties to whom they sub-lease exhibit a genuine concern for safety and have sufficient capital to make a diligent effort to comply with the Act.

I agree that "justice" would be served by holding Powellton liable for Cline's alleged violation if the facts in this case did show that Cline was running his mine without making any effort to comply with the health and safety standards, if Powellton's contracts with its independent contractors did show Powellton to be in actual control of its independent contractors' work force, and if the violation of section 105(c)(1) alleged in this case could be shown to be an action over which Powellton had any control. Not one of the aforesaid conditions, however, exists in this case.

As I have already indicated on page 24 of this decision, Inspector Franco's 24 citations issued during the last quarterly inspection do not reveal the types of highly serious violations which would have endangered complainants' safety and health to a significant degree. They were mostly routine violations which are normally cited by Federal inspectors during quarterly inspections. The violations were cited between October 26 and November 3, 1983. Although Cline closed his mine on November 8, 1983, he had abated 17 of the 24 alleged violations by November 3 before closing the mine. Therefore, his prompt action in abating the alleged violations is not the type of response to the citing of violations which would be expected of an operator who is completely indifferent about safety and who strives to operate by failing to purchase the necessary supplies and equipment. Moreover, the accounting sheets in Exhibit 7 show that Cline paid Powellton about $15,000 per month for supplies, parts, and professional services for the 4 full months of July through October before the mine was closed on November 8, 1983. Those amounts do not indicate that Cline was failing to expend enough money to keep the mine operating in a safe condition.

Finding Nos. 3 through 5 above show that Powellton expects its independent contractors to comply with all safety and health regulations and takes the initiative to see that all payments are made to UMWA's pension funds in a timely manner. Nothing in this record would support a finding that

Powellton has fallen short of its obligations to see that its independent contractors produce coal in a manner which will provide the miners with safe and healthful working conditions.

A final point should be made about holding Powellton liable for Cline's alleged violation. The uncontroverted evidence shows that Powellton did not at any time ever take any kind of action to hire, discipline, or discharge any of the miners employed by Cline. The violation alleged by complainants is not one which is susceptible to a routine claim that a production-operator is liable for its independent contractors' violations because it consists of a claim that Cline laid off complainants because they refused to complain to MSHA about the excessive inspections which Cline believed were being made at the No. 31 Mine. That is a violation which is unique and which would not occur simply as a direct result of a production-operator's failure to assure that a mine is operated under safe and healthful conditions. A production-operator would have to be intimately aware of an independent contractor's personal relationship with its employees before it could be established that the production-operator knew that an independent contractor was asking its employees to complain to MSHA about the numerous inspections which were being made at the independent contractor's mine. No complainant has charged that Powellton had anything to do with Cline's alleged violation or that Powellton had any reason to know that Cline had ever requested the miners to complain to MSHA about an excessive number of inspections.

It is possible that a discrimination case could be filed which would justify a finding that a production-operator ought to be held liable for an independent contractor's violation of section 105(c)(1), but I do not believe that the record in this proceeding can be interpreted to warrant a finding that Powellton should be held liable for the violation of section 105(c)(1) alleged by complainants in this proceeding.

As I understand Powellton's request in the concluding paragraph of its brief (p. 20), it does not request that it be dismissed as a party if I find that no respondent committed any acts sufficient to establish a violation of section 105(c)(1). Since my decision shows that no violation of section 105(c)(1) was proven by complainants, the entire complaint will hereinafter be dismissed.

WHEREFORE, it is ordered:

The complaint filed on March 19, 1984, in Docket No. WEVA 84-148-D is dismissed for failure to prove that a violation of section 105(c)(1) of the Act occurred.

Richard C. Steffey
Administrative Law Judge

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/ejp

LOSSES INCURRED BY CLINE AS A RESULT OF OPERATING JANE ANN NO. 31 MINE FROM JULY TO NOVEMBER 1983

1 Operating Month	2 Total Payments Received by Cline	3 Equipment Rental, Power, Telephone, Parts, and Supplies	4 Total Cost of Hiring UMWA Miners ($25.69/Hr.)	5 Salaries Paid to 3 Foremen (Estimated)	6 $1,000,000 Liability Insurance (Estimated)	7 Engineering, Respirable-Dust Sampling, Etc. (To Extent Known)	8 Cline's Gain or (Loss)
July	$84,601	$21,320	$47,552	$9,000	$3,000	$ 0	$3,729
August	$92,464	$26,106	$56,569	$9,000	$3,000	$1,200	($3,411)
September	$77,568	$22,060	$67,719	$9,000	$3,000	$ 475	($24,686)
October	$81,647	$22,077	$61,810	$9,000	$3,000	$1,230	($15,470)
November	$ 6,187	$ 7,289	$16,595	$3,000	$1,500	$ 200	($22,397)
Total	$342,467	$98,852	$250,245	$39,000	$13,500	$3,105	($62,235)

GJG

Explanation of Calculations

Figures in Column 2 are the actual amounts which Powellton paid Cline for clean coal before deducting for equipment rental, electrical power, etc., as shown in Exhibit 7.

Figures in Column 3 are the amounts deducted by Powellton for the items listed. Powellton also deducted for amounts paid to UMWA for welfare funds, but I have deleted those deductions because they have been transferred to the amount charged for wages and other fringe benefits as shown in Column 4.

Figures in Column 4 are based on a per-hour cost of $25.69 for each hour worked by the UMWA miners hired by Cline. The hourly rate from Exhibit A, page 178, of $13.715 is used instead of the hourly rate of $14.165 shown in Attachment A of complainants' brief. I have used a base rate of $13.715 because that amounts to $109.72 per 8-hour shift, whereas the figure of $14.165 used in complainants' brief is $113.32 per 8-hour shift. None of the miners claimed to be making more than $110 per day (Exh. 7, Investigator's Report, p. 5; Tr. 79). The hours worked by the miners each month are given in Exhibit 7. Therefore, the figures in Column 4 were obtained as follows: 1,851 hours for July x $25.69 = $47,552; 2,202 hours for August x $25.69 = $56,569; 2,636 hours for September x $25.69 = $67,719; 2,406 hours for October x $25.69 = $61,810; and 646 hours for November x $25.69 = $16,595.

(Explanation continued on page 2.)

Explanation of Calculations (Contd.)

Figures in Column 5 are estimated salaries for three foremen. The estimate is based on an annual salary of $36,000, or $3,000 per month for each foreman. It is my understanding that section foremen are generally paid about $45,000 per year, but I have used $36,000 to be conservative. The Investigator's Report, page 5, in Exhibit 7 states that Cline used three foremen.

The amounts shown in Column 6 provide for Cline's purchase of $1,000,000 in liability insurance which Cline is required to provide under the contract between him and Powellton (Exh. C, p. 13; Tr. 217).

The figures in Column 7 are the amounts charged Cline for such services as engineering, respirable-dust sampling, and accounting services. Cline stated that he paid Larry Heatherman for doing the respirable-dust sampling and Powellton deducted for work done by Larry Heatherman and for work done by Dale Porter. I assume that Dale Porter was an engineer, but he might have been an accountant. In any event, Cline paid the amounts shown for their services as indicated in Column 7.

The amounts shown in Column 8 are the results obtained when the gross income in Column 2 is reduced by the costs reflected in all of the other columns.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WILLIAM J. BUDA, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No: WEVA 85-147-D
v.	:	MORG CD 85-11
DeCONDOR COAL COMPANY, Respondent	:	

DECISION

Before: Judge Maurer

On February 11, 1985, the Complainant, William J. Buda, filed a complaint of discrimination under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (hereinafter referred to as the "Act"), with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against DeCondor Coal Company, Inc. That complaint was denied by MSHA and Mr. Buda thereafter filed a complaint of discrimination with the Commission on his own behalf under section 105(c)(3) of the Act. Mr. Buda alleges that he was discriminated against in violation of section 105(c) of the Act because he was laid off on October 2, 1984 by DeCondor Coal Company and has not been called back to work although two men with less seniority have been recalled. He goes on to state that he has more experience and more seniority than these two men and therefor should have been called back to work before them.

The undersigned administrative law judge's review of the initial pleadings in this case raised the legal issue of whether the Complaint states a claim for which relief can be granted under section 105(c)(1) of the Act. On May 28, 1985, an ORDER TO SHOW CAUSE was issued by the undersigned wherein the Complainant was ordered to show cause within fifteen (15) days as to why this proceeding should not be dismissed for "failure to state a claim for which relief can be granted under section 105(c)(1) of the Act." The only response received to date was a May 31, 1985 telephone call from the Complainant essentially reiterating his original complaint.

The issuance of the aforementioned ORDER TO SHOW CAUSE was akin to the administrative law judge raising, sua sponte, a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil procedure. For the purposes of such a motion, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice ¶12.08. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the complainant is entitled to no relief under any state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. Id.

Section 105(c)(1) of the Act provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 633 F 2d. 1211 (3rd Cir., 1981). In this case, Mr. Buda asserts that he was not recalled to work in accordance with his seniority with the company. More particularly, two men with less

seniority than he, have already been recalled whereas he is still laid off. Even assuming that this allegation is true, it is clearly not sufficient to create a claim under section 105(c)(1) of the Act. That section does not provide a remedy for what the Complainant perceives to be "discrimination" if that conduct on the part of the Company was not caused in any part by an activity protected by the Act. Accordingly I find that the Complaint herein fails to state a claim for which relief can be granted under section 105(c)(1) of the Act, and the case is therefore dismissed.

Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BILLY DALE WISE, and LEO E. CONNER, Complainants,	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. WEVA 85-148-D
	:	MSHA Case No. MORG CD 84-16
	:	
	:	Docket No. WEVA 85-149-D
	:	MSHA Case No. MORG CD 84-19
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

APPEARANCES: Covette Rooney, Esq., and Linda M. Henry, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Complainants;
Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent

Before: Judge Melick

These consolidated proceedings are before me upon the complaints of discrimination by the Secretary of Labor on behalf of Billy Dale Wise and Leo E. Conner under the provisions of section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 810 et seq., the "Act." The individual Complainants allege that they suffered discrimination when the Consolidation Coal Company (Consol) failed to pay them overtime for a 30 minute "lunch period" during the time they participated as section 103(f) representatives of miners with inspectors for the Federal Mine Safety and Health Administration (MSHA).[1] Motions to dismiss filed by Consol on the grounds that the complaints had been untimely

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[1]Section 103(f) of the Act provides in part that "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in any pre- or post-inspection conferences held at the mine."

filed were denied by an interlocutory decision dated May 17, 1985 (Appendix A).

The essential facts in these cases are not in dispute. The individual Complainants, Billy Wise and Leo Conner, were hourly employees at Consol's Ireland Mine regularly employed as a "Longwall Shear Operator" and as a "Longwall Mechanic", respectively. Both jobs were classified at grade 5 and paid $14.165 an hour in accordance with the National Bituminous Coal Wage Agreement of 1981 (Wage Agreement).

On Monday, July 16, 1984, Mr. Wise participated as a section 103(f) representative of miners in a close-out conference with an MSHA inspector for 5-1/2 hours. At the completion of this conference Mr. Wise chose not to return to work for Consol (though such work was available) but elected to go on "union business" for the remaining 2-1/2 hours of his shift. While on "union business" the individual is not under the direction or control of the mine operator and, in accordance with the Wage Agreement, is not paid by the operator for such business.

On Thursday, July 19, 1984, Mr. Conner similarly participated as a section 103(f) representative of miners during an inspection with an MSHA inspector for 5-1/2 hours. At the completion of this inspection Mr. Conner similarly chose not to return to work but "went home" for the remaining 2-1/2 hours of his shift.

The Complainants herein were paid for the 5-1/2 hours during which they acted as representatives of miners but claim that they are also entitled to an additional $10.62 corresponding to the overtime pay given to those employees who, during a particular shift, work through their 30 minute lunch period. They claim that the failure of Consol to pay this amount constitutes an unlawful loss of pay under section 103(f) of the Act and accordingly claim that this was discriminatory under section 105(c)(1) of the Act.

Section 103(f) provides in part that: "such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." The specific issue before me then is whether the Complainants suffered a loss of pay during the stated periods of their participation as representatives of miners.

Under the Wage Agreement each miner is entitled to a paid 30 minute lunch period during the normal 8 hour "collar

to collar" workday. More often than not however, the individual Complainants and other miners elect to work through their 30 minute lunch period for time-and-one-half pay of $10.624. Since it is not disputed that lunch periods under the Wage Agreement may be staggered however, it is apparent that the Complainants could have had their lunch periods scheduled at a time subsequent to the 5-1/2 hours they acted as representatives of miners.

Moreover, since the Complainants chose not to return to work to complete their shifts it cannot be said that they were deprived of either their lunch period or the alternative overtime pay for work through their lunch period. The Complainants therefore cannot prove that they suffered any loss of pay during the period of their participation as section 103(f) representatives of miners even if they chose not to take their 30 minute lunch period during that time.

Accordingly, the charges of discrimination are denied and the cases dismissed.

Gary Melick
Administrative Law Judge

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APPENDIX A

May 17, 1985

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF BILLY DALE WISE, and LEO E. CONNER, Complainants	:	DISCRIMINATION PROCEEDINGS Docket No. WEVA 85-148-D MSHA Case No. MORG CD 84-16 Docket No. WEVA 85-149-D MSHA Case No. MORG CD 84-19
v.	:	
	:	Ireland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	
	:	DISCRIMINATION PROCEEDINGS
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMININSTRATION (MSHA), ON BEHALF OF RICHARD N. TRUEX, Complainant	:	Docket No. WEVA 85-151-D MSHA Case No. MORG CD 85-2 McElroy Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION DENYING MOTION TO DISMISS

APPEARANCES: Covette Rooney, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Complainants; Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These proceedings are before me upon Motions to Dismiss filed by the Consolidation Coal Company (Consol) in which it is alleged that the complaints in these cases were filed untimely with this Commission. Preliminary hearings were held in accordance with Rule 12(d) of the Federal Rules or Civil Procedure upon the request by Consol for disposition of the motions before trial on the merits. At hearing Consol

amended its motion to request summary decisions under Commission Rule 64. 29 C.F.R. § 2700.64. The facts underlying the issues before me are not in dispute.

DOCKET NO. WEVA 85-148-D

The individual Complainant in this case, Billy D. Wise, filed a timely complaint of discrimination with the Secretary of Labor on July 30, 1984, based upon his allegation of a discriminatory loss of pay on July 16, 1984. The Secretary did not however file his complaint with this Commission on behalf of Mr. Wise until March 26, 1985, nearly 8 months later. The Secretary informed Mr. Wise of that filing by letter dated April 24, 1985.

The Secretary acknowledges that he did not file the complaint in a timely manner but sets forth circumstances to explain that untimeliness. Counsel for the Secretary proffered without contradiction that the Philadelphia Regional Solicitor's Office (which represents the Secretary in this matter) did not receive the case file from the Mine Safety and Health Administration (MSHA) for its legal determination until September 28, 1984. Inasmuch as the case purportedly involved an issue of "first impression" the Regional Solicitor requested an opinion from the National Solicitor's Office on November 28, 1984. That opinion, to proceed with the case before this Commission, was issued on December 10, 1984 and was received by the Regional Solicitor's Office on December 20, 1984.

The designated trial attorney in the Regional Solicitor's Office thereafter, on December 26, 1984, forwarded the case file to the Office of Assessments within the Department of Labor for a civil penalty evaluation needed to comply with Commission Rule 42(b), 29 C.F.R. § 2700.42(b). The requested evaluation was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 15, 1985 and the complaint at bar was filed with this Commission on March 26, 1985. There was an admitted breakdown in procedures within the Department of Labor in failing to give written notice to Mr. Wise upon the Secretary's final determination (on December 10, 1984) that discrimination had occurred.

DOCKET NO. WEVA 85-149-D

The individual Complainant in this case, Leo E. Conner, filed a timely complaint of discrimination with the Secretary of Labor on August 16, 1984, based upon his allegation of a discriminatory loss of pay on July 19, 1984. The

Secretary did not file his complaint with this Commission on behalf of Mr. Conner until March 28, 1985, more than 7 months later. The Secretary informed Mr. Conner of that filing by letter dated April 24, 1985.

The Secretary again acknowledges that he did not file the complaint in a timely manner and sets forth similar circumstances to explain that untimeliness. Counsel for the Secretary proferred that the Philadelphia Solicitor's Office did not receive the case file from the MSHA for its legal determination until September 25, 1984. Since this also purportedly involved an issue of "first impression" the Regional Solicitor requested an opinion from the National Solicitor's Office on November 28, 1984. A response was obtained from that office on December 20, 1984 in which final authorization was received to proceed with the case before this Commission.

The designated trial attorney in the Philadelphia Solicitor's Office thereafter, on December 26, 1984, forwarded the case file to the Office of Assessments within the Department of Labor for a civil penalty evaluation needed to comply with Commission Rule 42(b). The file was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 15, 1985 and the complaint at bar was filed with this Commission on March 28, 1985. There was again an admitted breakdown in procedures within the Department of Labor in failing to notify Mr. Conner by letter upon the final determination by the Secretary's representative (on December 10, 1984) that discrimination had occurred.

DOCKET NO. WEVA 85-151-D

The individual Complainant in this case, Richard Truex, filed a timely complaint of discrimination with the Secretary of Labor on October 10, 1984, based upon his allegation of a discriminatory loss of pay on August 28, 1984. The Secretary did not however file his complaint on behalf of Mr. Truex with this Commission until April 2, 1985, nearly 6 months later. The Secretary informed Mr. Truex of that filing by letter dated April 11, 1985.

The Secretary again acknowledges that he did not file the complaint in a timely manner and sets forth similar circumstances to explain that untimeliness. Counsel for the Secretary proferred that the Philadelphia Solicitor's Office did not receive the case file from MSHA for its legal determination until December 20, 1984. That office decided on

January 8, 1985 to proceed with this case before this Commission and forwarded the case file to the Office of Assessments for a civil penalty evaluation needed to comply with Commission Rule 42(b). The file was returned from the Office of Assessments to the Philadelphia Solicitor's Office on March 18, 1985 and the complaint at bar was filed with this Commission on April 2, 1985. There was again an admitted breakdown in procedures within the Department of Labor in failing to notify Mr. Truex by letter upon the final determination by the Secretary (on January 8, 1985) that discrimination had occurred.

Analysis

Consol argues that the Secretary's delays in filing these complaints with this Commission violates the provisions of section 105(c) of the Act. Section 105(c)(3) provides in part that "within 90 days of the receipt of a complaint filed [under section 105(c)(2)] the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred." Section 105(c)(2) provides that upon the Secretary's determination that section 105(c) has been violated "he shall immediately file a complaint with the Commission, with service upon the alleged violator, and the miner, applicant for employment, or representative of miners alleging such discrimination [emphasis added]." Consol also alleges that these filing delays were in violation of Commission Rule 41(a), 29 C.F.R. § 2700.41(a), which requires that a complaint of discrimination "shall be filed by the Secretary within 30 days after his written determination that a violation has occurred." Consol concedes that it did not suffer any legal prejudice as a result of the cited delays but nevertheless asserts that the cases should be dismissed for untimely filing.

The Secretary admits the filing delays but suggests that these delays were attributable to the heavy caseload in his office and a manpower shortage. He also claims that some of the delays were attributable to the procedures now required by amended Commission Rule 42, 29 C.F.R. §2700.42. Commission Rule 42 as amended on February 2, 1984 requires the Secretary to include in his complaint filed with the Commission a specific proposed civil penalty and the reasons in support thereof. The Secretary represents that he is now studying various methods for shortening his procedures for proposing civil penalties in discrimination cases. The Secretary argues that for the above reasons the delays in these cases were excusable.

The Secretary further argues that his tardiness should be excused because dismissal of these cases would only hurt the individual complainants he represents -- contrary to the congressional intent. The legislative history relevant to section 105(c) reads as follows:

> "The Secretary must initiate his investigation within 15 days of receipt of the complaint, and immediately file a complaint with the Commission, if he determines that a violation has occurred. The Secretary is also required under [section 105(c)(3)] to notify the complainant within 90 days whether a violation has occurred. It should be emphasized, however, that these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in a dismissal of the discrimination proceeding; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations."

S. Rep. No. 181, 95th Cong., 1st Session 36 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News, at 3436.

Within this framework I am compelled to find that the Secretary's delays in filing these complaints do not warrant dismissal of these cases. I do not find any evidence that the delays were caused by bad faith and it appears that the Secretary's tardiness was caused in part by his limited staff and heavy caseload. In addition it would be totally inappropriate to prejudice the individual complainants in these cases (who have not caused the delays) because of the Secretary's tardiness. Finally, since Consol concedes herein that it did not suffer any legal prejudice by the delays those delays are accordingly harmless.[1] Under the circumstances the motions to dismiss (and/or motions for summary decision) are denied.

Gary Melick
Administrative Law Judge

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[1]No request has been made for sanctions solely against the Secretary for his acknowledged tardiness. However consideration could be given in any civil penalty assessment for any additional costs to Consol attributable to the delays.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAMES W. MACKEY, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-84-D
v.	:	MSHA Case No. MORG CD 85-6
CONSOLIDATION COAL COMPANY, Respondent	:	Ireland Mine
JEFFREY L. CLEGG, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 85-86-D
v.	:	MSHA Case No. MORG CD 85-8
CONSOLIDATION COAL COMPANY, Respondent	:	Ireland Mine

DECISION

Appearances: Thomas Myers, Esq., Shadyside, Ohio, for Complainants; Brann Altmeyer, Esq., Wheeling, West Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Each of the Complainants filed a complaint with the Commission alleging that he was discharged by Respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). Respondent filed answers and motions to dismiss on the ground that the Respondent was not served with copies of the complaints. The motions were denied. On motion of Respondent, the two cases were consolidated by order issued April 4, 1985, because they grew out of the same facts, and involved the same witnesses and the same legal issues. Pursuant to notice, the case was heard in Wheeling, West Virginia on April 22 and 23, 1985. James W. Mackey, Sr., James W. Mackey, Jr., Jeffrey L. Clegg, Gerald L. Stevens and Paul Haines testified on behalf of complainants; Glen Curfmon, Richard W. Fleming, John H. Snyder and George Carter testified on behalf of Respondent. Complainants and Respondent have filed posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

MOTION TO DISMISS

At the commencement of the hearing, Respondent moved to dismiss on the ground that neither of the complaints stated a cause of action under section 105(c) of the Act. For the purposes of my ruling on the motions, the parties agreed that complainants are alleging that they were discharged in retaliation for a disagreement between Federal Inspector James Mackey, Sr., father of one of the complainants, and Respondent's management, over a proposed noise reduction program. The issue therefore is whether a miner is protected under 105(c) from retaliation by a mine operator because a Federal Inspector was carrying out his duties. Respondent argues that the miners here were not engaged in any "protected activity," nor were they exercising any "statutory right afforded by the Act." But surely one of the most basic rights a miner has under the Act is the right to have federal mine inspectors conduct their inspections free from any threat or fear of retaliation or coercion. This is a case of first impression, and the unique facts alleged are unlikely to be duplicated in other cases: a mine operator attempts to show his displeasure over the official actions of an inspector by discharging the inspector's son, a miner at the subject facility. I conclude that this states a cause of action under section 105(c), which protects the rights of miners to have federal inspections free from fear or concern that the mine operator may retaliate against miners for actions of inspectors. The motion to dismiss is DENIED.

FINDINGS OF FACT

1. On October 1, 1984, and prior thereto, Respondent was the owner and operator of an underground coal mine in Marshall County, West Virginia, known as the Ireland Mine.

2. On October 1, 1984, and prior thereto complainants James W. Mackey, Jr. and Jeffrey L. Clegg were employed as miners at the Ireland Mine.

3. On July 31, 1984, and prior and subsequent thereto, James W. Mackey, Sr. was employed by the Mine Safety and Health Administration (MSHA) as a Federal Mine Inspector. He is the father of complainant James W. Mackey, Jr. During the year 1984, Mr. Mackey, Sr. was assigned to perform a health inspection, including a consideration of a noise Reduction Plan at the subject mine.

4. On July 31, 1984, Inspector Mackey met with John Snyder, Superintendent of the Ireland Mine, to go over a proposed Noise Conservation Plan drawn up by the company for the longwall section of the mine.

5. The Plan proposed that a noise barrier be erected on top of the longwall to reduce the noise to 90 decibels or less. The plan further stated that if the mine noise barrier became damaged, or if the coal height was so low that it could not be used, it would be removed.

6. Inspector Mackey told Mr. Snyder that he could not recommend approval of the plan unless it stipulated that the longwall operator stay 3 or 4 "chocks" above the longwall plow when cutting. This would keep the noise level down to about 90 decibels even if the barrier was damaged or destroyed.

7. Snyder objected to the suggested revision and said: "Well, I spent $6000 dollars and six months work, working on that . . . . I am not going to do it." (Tr. 23) The inspector believed that Snyder was very upset.

8. Inspector Mackey recommended that the Plan be disapproved, and it was disapproved by the MSHA District Manager.

9. A new plan was proposed reflecting the changes suggested by Inspector Mackey. This plan was presented to Inspector Mackey by Respondent's General Superintendent Becker. Snyder was not present at the meeting. The plan was approved, and has remained in effect at the mine.

10. On October 1, 1984, James W. Mackey, Jr. was employed at the mine as a bolter helper, on the midnight shift. He had worked at the Ireland Mine for 16 years and 8 months. He was a member of Local 1110, United Mine Workers of America.

11. On October 1, 1984, Jeffrey L. Clegg was employed at the mine as a roof bolter, on the midnight shift. He had worked for Respondent 14 years and 8 months. He was a member of Local 1110, United Mine Workers of America. Clegg was a certified electrician, and had worked for Respondent as a mechanic before he was laid off. He was called back as an unskilled laborer some time prior to October 1, 1984.

12. On October 1, 1984, Mackey and Clegg worked under section foreman Glenn Curfmon and were assigned to shovel a walkway, build a crib in front of the No. 2 air shaft, and

perform pumping duties. The first two tasks were performed in the area of the No. 2 air shaft and were completed at about 2:30 or 2:45 a.m. The two men then proceeded in a jeep driven by Clegg to check and make minor repairs to the pumps along the main line. Curfmon went to a different area of the mine on other duties.

13. Mackey and Clegg split up at about 2:55 a.m., Mackey to do pumping in the 1 South area, and Clegg to do pumping in the dump area.

14. The area where Mackey proceeded on foot was substantially flooded. He set and primed the pumps while standing in water to his knees. He was not wearing rubber boots and his trousers became very wet. After he pumped out the area, he proceeded toward the portal at about 5:30 a.m. and met Clegg who was on the jeep at the pumphouse.

15. Clegg had gone to the Dump area and had substantial difficulty in priming the pump there. After priming it, he proceeded to two other pumps, got them pumping, checked some others, and proceeded to the portal switch. At about 5:55 he called the dispatcher and told hm he was "in the clear" at the portal switch. He met Mackey and they checked the pumps in the portal area. They decided to wait for Curfmon there because they heard on the jeep radio that he was going to the head of 3 North on his fire boss run.

16. Mackey sat in the portal bus which had a heater in an attempt to dry his clothes. Clegg sat in the jeep, and ate a sandwich and drank coffee.

17. Richard Fleming was the day shift foreman at the River Portal of the subject mine on October 1, 1984. He had held that portion for almost nine years. He arrived at the mine on October 1, 1984 at about 5:00 a.m. in order to make a preshift examination in the 2 South Seals area where his crew was expected to work that morning.

18. Fleming entered the mine and arrived at the top of the supply slope at 5:35 a.m. He preshifted the area along the slope as he proceeded toward 2 South Seals. He decided to get a jeep and walked to the portal switch. At about 6:07 a.m. he arrived at the area where Mackey and Clegg were in the parked vehicles.

19. As he approached the jeep, Fleming said he heard the occupant snoring. He found Clegg lying on the jeep with his feet crossed. He tapped the bottom of Clegg's foot, but there was no response. Fleming said he then heard a noise

coming from the portal bus. He walked to the bus and found Mackey asleep inside the bus. He returned to the jeep, tapped Clegg's foot and Clegg woke up and began talking about a defective pump. Mackey emerged from the bus and said he was not asleep.

DISCUSSION

Both Mackey and Clegg denied that they were sleeping. Both assert that they saw Fleming approaching their vehicles shortly after 6:00 a.m. and that Fleming was startled when Clegg spoke to him. Complainants also argue that it would not have been possible for them to be sleeping when Fleming arrived, since Clegg was seen by Foreman Curfmon at 5:39 a.m. and called the dispatcher at about 5:55 a.m. Were the complainants sleeping at work? An answer to this question depends in large part on an assessment of the witnesses' credibility. The testimony of Mackey and Clegg was not inherently incredible, but they have an obvious motive to deny that they were sleeping. I reject the argument that it would have been impossible, given the time factor, for Clegg and Mackey to have been asleep when Fleming came upon them. Between 5 and 10 minutes elapsed between the time complainants completed their pumping duties and sat in the vehicles, and the time that Fleming came upon them. In view of the clear and detailed testimony of Fleming, I conclude that he could not have been mistaken, nor could his testimony be explained by the fact that his senses were dulled by medication. The only remaining explanations for his testimony are (1) complainants were asleep as he testified, or, (2) Fleming was lying. No reasonable motive has been suggested for Fleming to have fabricated his testimony. The testimony of Paul Haines on rebuttal that Fleming told him in a conversation following the arbitration hearing that "he [Fleming] never caught Jim Mackey sleeping. He said that he went up and he said something to Clegg and Clegg yelled real loud at Jim and Jim Mackey came scurrying out of the portal bus in front of them" (Tr. 574), reflects on the credibility of Fleming's testimony to some extent, but I am convinced that he was basically telling the truth. I conclude on the basis of all the testimony that in fact Fleming saw both Clegg and Mackey asleep in or on the vehicles at about 6:05 a.m. October 1, 1984.

20. Fleming told Mackey and Clegg that they were relieved of their duties for sleeping on company time. He led them from the mine at 6:18 a.m. and told them they would have to report to the superintendent before returning to work.

21. At about 8:30 or 9:00 a.m. on October 1, 1984, Superintendent Snyder talked to Mackey and Clegg. He later talked to Fleming and George Carter of the Industrial Relations Department. Carter and Snyder went underground and walked the area Fleming had travelled on the morning of October 1. At 9:00 a.m. on October 2, 1984, Snyder gave each of the complainants a letter notifying them that they were relieved of their duties and that the company intended to discharge them.

22. Complainants filed grievances under the collective bargaining contract. The grievances went to arbitration and the arbitrator denied the grievances and upheld the discharges in a written decision issued October 23, 1984.

23. Fleming was not aware of the dispute between Snyder and Inspector Mackey at the time he relieved complainants of their duties for sleeping.

24. A notice was posted on the mine Bulletin Board on January 7, 1980, following an arbitrator's decision regarding company rules. The notice reads as follows:

> Employees are hereby placed on notice that neglect in performance of assigned duties or sleeping on company time are dischargeable offenses. Any employee found neglecting to perform assigned duties or sleeping on company time will be subject to suspension with intent to discharge.

25. There had been incidents prior to the posting of the above notice in which Respondent's employees were charged with sleeping on company time and were not discharged.

26. Clegg and Mackey had generally good work records prior to the October 1, 1984 incident.

ISSUE

Whether complainants were discharged in violation of rights protected under the Act?

CONCLUSIONS OF LAW

I. Complainants and Respondent are protected by and subject to the provisions of the Act, complainants as miners, and Respondent as the operator of the Ireland Mine.

II. PROTECTED ACTIVITY

I have already concluded, in denying the motion to dismiss, that Complainants are protected under the Act from retaliation against them for actions of Federal Mine Inspectors in carrying out their inspection duties.

III. ADVERSE ACTION - RESPONDENT'S MOTIVATION

Complainants were discharged ostensibly for sleeping in the mine during working hours. They claim that the discharge was in fact related to the disagreement between Respondent's Superintendent and an MSHA Inspector, who happened to be the father of one of the claimants. If the adverse action was motivated in any party by the protected activity, a prima facie case of discrimination is made out. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Here, there is no direct evidence that Respondent's discharge of complainants was motivated in any part by the disagreement between Superintendent Snyder and Inspector Mackey. The two incidents are relatively remote in time (more than 2 months apart), and the alleged motivation seems to me inherently unlikely under the circumstances disclosed in this record. I accept the testimony of Mr. Fleming that he was completely unaware of the dispute between Snyder and Mackey, Sr. which took place two months previously, when he took complainants from the mine and accused them of sleeping on company time. Although the actual decision to discharge was made by Snyder, it was based on Fleming's statements. I conclude that complainants have failed to establish that their discharges were motivated in any part by the activity protected under the Act. Therefore, they have failed to establish a prima facie case of discrimination under section 105(c).

IV. UNPROTECTED ACTIVITY

An operator may rebut a prima facie case of discrimination if it proves that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action for the unprotected activities alone. The operator bears the burden of proof with respect to these matters which are affirmative defenses. See NLRB v Transportation Management Corp., 76 L. Ed. 2d 667 (1983); Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). Since I have found (Finding of Fact No. 19) that complainants were found

sleeping on company time, I would conclude that even if complainants had established a prima facie case of discrimination, Respondent has rebutted it by showing that it would have discharged them for the unprotected activity of sleeping at work.

Whether the penalty exacted by the company (discharge) was justified under the collective bargaining contract, or whether it was too harsh, are matters which were decided by the arbitrator adversely to the complainants, and are not matters for Commission review. I conclude on the basis of the entire record that Complainants have failed to establish that they were discharged in violation of section 105(c) of the Act.

ORDER

Based upon the above findings of fact and conclusions of law, the complaints of James W. Mackey, Jr. and of Jeffrey L. Clegg and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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KEYSTONE COAL MINING CORP., Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 84-196-R
v.	:	Order No. 2252764; 7/9/84
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Urling No. 3 Mine

ORDER OF DISMISSAL

Appearances: William M. Darr, Esq., Indiana, Pennsylvania for Contestant; James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Broderick

When the above case was called for hearing in Indiana, Pennsylvania, on June 4, 1985, Contestant moved to withdraw its notice of contest in this proceeding. The parties agreed on the record to a settlement of the civil penalty proceeding, insofar as a penalty was sought for the violation charged in the contested order, by the payment of the amount originally assessed. I stated on the record that I approved the settlemen and granted the motion to withdraw.

Therefore, IT IS ORDERED that this proceeding is DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

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