FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6230

JUN 19 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Complaint of Discrimination
	:	Docket No. VA 79-81-D
On behalf of:	:	Virginia Pocahontas No. 5 and No. 6 Mines
LARRY D. LONG, Applicant	:	
v.	:	
ISLAND CREEK COAL COMPANY,	:	
and	:	
LANGLEY AND MORGAN CORPORATION, Respondents	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Applicant;
Marshall S. Peace, Esq., Lexington, Kentucky, for Respondent Island Creek Coal Company;
James Green, Jr., Esq., Harlan, Kentucky, for Respondent Langley and Morgan Corporation.

Before: Judge William Fauver

This proceeding was brought by the Secretary of Labor on behalf of Larry D. Long (Applicant), under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for review of alleged acts of discrimination.

The case was heard at Bluefield, West Virginia. All sides were represented by counsel, who have submitted their proposed findings, conclusions, and briefs following receipt of the transcript.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times:

(a) Applicant, Larry Long, was employed by Respondent, Langley and Morgan Corporation, as a Grade B classified carpenter.

(b) Respondent Island Creek Coal Company was the operator of the Virginia Pocahontas No. 5 ("V.P.-5") and No. 6 ("V.P.-6") Mines in Buchanan County, Virginia. Both mines produced coal for sales in or substantially affecting interstate commerce.

(c) Respondent Langley & Morgan was an independent contractor engaged by Island Creek to construct buildings and other structures at the V.P.-5 and V.P-6 Mines. Langley 6 Morgan worked primarily for the coal industry building coalhandling facilities. In the fall of 1978, Langley & Morgan employed about 15 people at the Virginia Pocahontas Mines and about 130 people in all.

2. The contract between the Respondents required Langley 6 Morgan to furnish labor and supervision for the construction at the Virginia Pocahontas Mines, including road construction, erection of small buildings, excavation work and miscellaneous construction work. Work assignments would vary from day to day and could last anywhere from a couple of hours to a few weeks, or longer, Overall construction of the mines was under the control of Island Creek because Langley & Morgan was only one of several contractors engaged by Island Creek, the others being larger than Langley 6 Morgan and performing mostly foundation and concrete work.

3. Langley & Morgan employed one general superintendent with authority over all of its employees.

4. Normally, Island Creek's superintendent would contact Langley & Morgan's superintendent in the latter part of the day to inform him what needed to be done the next day. The contract also provided in part:

> The Contractor [Langley & Morgan] recognizes that the requirements of the Company [Island Creek] may necessitate assignment of jobs from time to time. It is, therefore, agreed that the Company may designate the jobs to be performed and the order of performance. The Contractor, however, shall have full control of the methods employed to complete said jobs and will supervise the work force. The Company will not direct the work force.

5. During the fall of 1978, Langley & Morgan was a signatory to the National Coal Mine Construction Agreement (Agreement). Article 111 of the Agreement provided:

> This agreement is not intended to interfere with, abridge or limit the employer's right to manage its construction operations. It is agreed that the management of said operations, including the direction and scheduling of the work force, the right to hire and discharge, the right to make reasonable rules of conduct, the direction, management and control of business, and other functions and responsibilities which heretofore been vested in the management, are and shall remain vested exclusively in the employer provided these rights are not in conflict with any provisions of this agreement.

6. Langley & Morgan imposed no limitation on its superintendent's discretionary authority to reassign employees from one job to another, except that he could not assign a man to a job in which he had no experience or to one with a classification requiring more pay. However, management generally permitted him to assign employees to a lower classified job without loss of pay.

7. Further restrictions on assignments of employees outside of their classifications were governed by Article XVIII of the Agreement. Section (c) provided:

> Every reasonable effort shall be made to keep an employee at work on the job duties normally and customarily a part of his regular job, and to minimize, to the extent practicable, the amount of temporary assignments of particular individuals to other, jobs out of the employee's classification. However, where a senior employee has expressed a desire to improve his ability to perform a job to which he wishes to be promoted, to the extent practicable, he shall be given a preference in filling temporary assignments in regard to that job.

Section (d) provided: "In no case may the Employer make temporary assignment of work outside the employee's classification for the purpose of disciplining or discriminating against an employee."

8. In mid-October, 1978, Ray Harris temporarily replaced Nathan Meade as Langley & Morgan's superintendent at the Virginia Pocahantas Mines. Ray Harris had worked for Langley 6 Morgan in a supervisory capacity for about 2 years. He did not inquire of management as to the full scope of his authority with respect to job assignments of the employees. He was told the duties of each man but there was no discussion with respect to the location or assignment rights of the employees and there was no understanding that employees had a right or choice to work at one mine rather than another.

9. In late October, Island Creek was preparing to construct a parking lot at V.P.-6. Trucks used to haul away fill material were borrowed either from V.P.-5, which was 8 to 15 miles away depending on the route, or from other mines operated by Island Creek. No trucks were needed at V.P.-6 on a

permanent basis because the main highway that went through this project was in the process of being relocated. All the trucks used by Langley & Morgan were owned by Island Creek.

10. Cline trucks and Dart trucks were generally used to haul fill and muck. They were almost identical except for the manufacturer.

11. A Grade B Cline or a Dart truck operator would receive the same pay as a Grade B carpenter; however, the employees generally considered operating such equipment to be cleaner and more desirable than general carpentry work.

12. An employee would normally work in his classification and would be kept there if practical. If assigned to operate a piece of equipment outside his classification on a temporary basis, e.g., vacancy or illness, he could be removed from the equipment and reassigned to work in his regular classification when needed. On a seniority basis, he would be entitled to return to the equipment, if there were a vacancy, when he was no longer needed for his classification of work.

13. Beginning in October 1978, Applicant was assigned to drive a Cline truck as a result of a grievance he filed on September 1, 1978. The grievance was settled during the third step of the arbitration process on September 19, 1978. The settlement provided: "Mr. Meade will consider Larry for temporary assignments on equipment. Larry's seniority will be considered in such assignments when practical."

14. On Monday, October 30, 1978, Applicant was assigned temporarily to drive a Cline truck at V.P.-6, hauling muck from the B shaft area to the land area near the A shaft. There were no Langley 6 Morgan supervisors at V.P.-6. Activities and employees at that mine were under the active supervision of Island Creek's project manager, Bill Turley, his assistant Bill Hall, and the field manager, Ed Fletcher.

15. On that date, as Applicant approached the A shaft in the Cline truck, at about 2:30 p.m., he observed Ed Fletcher hauling four boxes of powder and one box of blasting caps in a small pickup truck not equipped to handle explosives. Applicant stopped his truck and complained to Ed Fletcher about the danger of using the pickup to carry explosives and of hauling explosives on a public road.

16. About a half-hour before the end of his shift on that date, Applicant complained to Bill Turley about the incident and said, "Bill, if you don't do something about the explosives around here you are going to get everybody on the job site killed." Applicant then dumped his load and proceeded to refuel for the next morning.

17. At the fuel tank, Applicant told Donnie Philips, a lead dozer operator for Langley & Morgan, that he was going to request a 103(g) inspection at the local UMW office. Section 103(g) of the Act provides in part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

18. At the end of his shift on October 30, 1978, Applicant went to the UMW Office and filed a grievance with his father, Edward Long, Jr., the international union's safety coordinator, and requested a government safety inspection. The grievance stated that Ed Fletcher was carrying powder and caps in a truck not equipped to haul explosives, that he did not have any signs on the truck, that he was hauling it across the highway, and that he was endangering his fellow workers.

19. An inspection was subsequently conducted by MSHA. The company admitted that the truck was being used to transport powder and caps; however, no violation was charged.

20. The next day, October 31, Applicant went to an arbitration meeting and did not report for work. At home that evening, he prepared a written grievance under the Agreement. It read:

> I'm asking for one shift's pay under Art. II, Section (c) (classified work), because on October 30, 1978, Ed Fletcher went to #5 and brought back (powder and caps) to #6 in a truck that is not equipped to transport explosives. Ed Fletcher is an engineer on the job and is exempt from doing classified work.

21. On the morning of November 1, 1978, Applicant filed the grievance with Ray Harris and continued operating the Cline truck.

22. The grievance was ultimately settled on December 19, 1978. The settlement provided: "The Company [Langley & Morgan] agrees to pay Local Union 6843 *one* (1) shift of pay to settle the above. This payment in no way indicates that the company is guilty of any contract violations and the payment does not set a precedent for settlement in future cases of this nature."

23. Following Applicant's complaint about the explosives truck, Bill Turley told Ray Harris to have a truck outfitted in compliance with federal regulations for hauling explosives. Bill Turley did not request anyone in particular to perform the work. About 15 minutes before the end of the shift on November 1, Ray Harris told Applicant to refuel the truck and to report to V.P.-5 in the morning with his carpenter tools to outfit a truck in compliance with federal regulations for hauling explosives and to build a powder box according to state and federal laws. Applicant had not completed

hauling muck in the Cline when the instructions were given to him. When Ray Harris instructed applicant to outfit an explosives truck, he appeared angered at Applicant and his tone of voice became harsh. He told Applicant: "You know enough [about explosives trucks] to make a complaint." Other carpenters in Applicant's classification were available to perform the reassignment given to Applicant on November 1.

24. Although the assignment was within Applicant's carpenter classification, he had no experience outfitting trucks to carry explosives. Andy Keene, a lead carpenter, and Ray Harris instructed Applicant as to the procedure for carrying out the assignment. Applicant began working on the truck and powder box on November 2, 1978, and continued working on the truck on November 3 and on Monday, November 6.

25. When Ray Harris assigned Applicant to V.P.-5 on November 1, he knew that Applicant had a history of filing grievances and he knew of Applicant's safety complaint involving Ed Fletcher.

26. On November 2, 1978, most of the Langley & Morgan crew was at V.P.-5 except for a few equipment operators who were at V.P.-6. Donald Church, a cement finisher, and two Grade A carpenters, Glen Dawson and Andy Keene, who usually performed more specialized jobs, were helping to lay asphalt, which included cutting trees and leveling the land.

27. After his reassignment to outfit the explosives truck, Applicant did not file a written grievance under the Agreement.

28. On Monday, November 6, 1978, Terry Gabbert replaced Ray Harris as superintendent for Langley & Morgan until N. C. Meade returned. During orientation, Ray Harris mentioned to Gabbert that Applicant had a history of filing grievances against the company.

29. That morning, the crew was waiting outside the office for Ray Harris to unlock the door and begin the weekly safety meeting, known as a "tool box" meeting. Applicant said, "Good morning," to Terry Gabbert, his new supervisor. Ray Harris looked over to the new supervisor and said, "Do you know that punk?".

30. About 9 a.m., Ray Harris apologized to Applicant, saying that he did not mean to call him a "punk" earlier that morning. However, Harris did not seek to correct the adverse impression he had conveyed to Applicant's new supervisor, Terry Gabbert.

31. After Applicant finished working on the explosives truck that morning, Ray Harris assigned him to cleaning rope clamps and painting the hoist house floor. He continued cleaning rope clamps and painting on November 7 and November 8. Cleaning rope clamps was essential to the safe operation of man hoists and keeping them clean was a difficult job.

32. On Thursday, November 9, Applicant worked on an asphalt assignment. On Friday, November 10, Applicant piloted a Cline truck to V.P.-6, and on Monday, November 13, Applicant was assigned to V.P.-6 to operate a Dart truck.

33. On November 2, 3, and 6, when Applicant was outfitting the pickup truck to carry explosives, he was working within his job classification. On November 7, 8, and 9, when Applicant was assigned to cleaning rope clamps, painting and working in asphalt, he was working outside his work classification; however, cleaning rope clamps was not a classified job. At no time did Applicant suffer a loss in pay.

34. On November 13, Applicant reported to V.P.-6 to operate the Dart truck. The cab on the Dart truck was positioned on the lefthand side and had room for one person. It had windows on three sides--in the front, on the left, and to the right; however it had no mirrors, the horn did not work, and the brakes were soft.

35. As Applicant prepared to dump a load over an embankment, which was about 25 feet above another level, he saw Bill Turley and Ed Fletcher below. He told Bill Turley: "Bill, this truck's unsafe. It's got soft brakes on it. It don't have any mirrors on it. It don't have a horn.on it. You couldn't warn nobody if you was going down there and somebody walked out in front of you." Applicant was then told by Bill Turley to park the truck. This occurred near the start of the morning shift.

36. At about 8 a.m., Applicant parked the truck and waited for another assignment. Ed Fletcher and Bill Turley drove past him several times that day while he was standing next to the truck but not until about 20 minutes to 3, near the end of his shift, did Ed Fletcher tell him to report back to V.P.-5 the next day. There was no Langley & Morgan supervisor at V.P.-6 that day.

37. On November 14, Applicant worked at V.P.-5 and was assigned to paint floors and a pipeline, and to perform other miscellaneous work under the supervision of Terry Gabbert. Applicant also worked at V.P.-5 on November 15, 16 and 17. From November 14 through November 17, the work assignments given to Applicant were outside his classification. Applicant did not file a grievance under the Agreement, and suffered no loss of pay. He did not work the week of November 20 through November 24, when he was on vacation. On November 27, Applicant reported to V.P.-6 to drive a coal truck.

38. Beginning in 1974, and through July 6, 1979, Applicant filed 17 of the 42 grievances filed with Langley & Morgan under Article IV(p) of the Agreement.

39. After Applicant's complaints on October 30 and November 1, 1978, a number of hostile statements were made to him and about him, including the following: Bill Turley, Island Creek's project manager, threatened Applicant

that if Applicant did not stop calling in federal inspectors the job would have to be shut down; N. C. Meade told the rest of the crew that no overtime work was being provided because of the complaints filed by Applicant; Danny Johnson, a co-worker, told him that he was mentally retarded; Bill Harman, another member of the crew accused Applicant of taking food from his family's table; as found above (Finding 29), his outgoing supervisor, Ray Harris, told his new supervisor, Terry Gabbert, on November 6, 1978, that he was a "punk;" and on several occasions Ed Fletcher and Bill Turley asked Donald Philips, a dozer operator for Langley & Morgan, to tell Applicant that if he continued to call in federal inspectors the job would have to be shut down.

40. In December, 1978, Applicant complained to MSHA about the hostility that had been directed at him. Al Goode, a special investigator for MSHA, arranged a meeting, at Applicant's request, between Applicant's union representatives and management on January 10, 1979. The following were present: Floyd T. Mullins, district safety coordinator for the UMWA; Lee James, president of Local 6843; Charlie Van Dyke, Danny Johnson, Bill Harman, employees for Langley & Morgan; N. C. Meade, superintendent for Langley & Morgan; Doug Cottrell, public relations man for Langley 6 Morgan; Dewey Rife and Donnie Stallard, special investigators for MSHA. There were no representatives from Island Creek.

41. At the above meeting, Meade said that he believed Applicant was (mentally) sick and in need of help, and that Applicant had caused overtime work to stop because of his grievances. Meade also told the group that Applicant had placed a call to Langley & Morgan's president, Jack Langley, and complained that overtime should be cut out because everyone else was receiving overtime work but him. Applicant had placed a call to Langley but had not asked to stop overtime work.

42. Hostile statements made by some of Respondents' supervisors, as found above (Finding 39), generated hostility in fellow workers against Applicant and could reasonably be foreseen to cause such hostility and to cause considerable distress and fear in the Applicant. Employee meetings in November, including some attended by Fletcher or Turley, became so tense that Applicant could reasonably fear for his safety.

DISCUSSION WITH FURTHER FINDINGS

The basic issues in this case are (1) whether Applicant's complaints on October 30 and November 1, 1978 (oral complaint to Ed Fletcher, followed by a section 103(g) complaint to MSHA through UMW, and by written grievance), and on November 13, 1978 (oral complaint to Bill Turley in the presence of Ed Fletcher), were protected activities under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1977 Act), and, if so, (2) whether the job reassignments following the complaints, were discriminatory within the meaning of section 105(c) of the Act.

Section 105(c)(1) of the Act provides in part:

> 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 * * * has instituted or caused to be instituted any proceeding under or related to this Act * * *.

One of the purposes of the legislation is to ensure that a miner will not be inhibited in exercising his rights afforded by the Act, in particular, making safety complaints. The Report of the Senate Committee on Human Resources stated:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. S. Rpt. No, 95-181, 95th Cong., 1st Sess. 31 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 623 (1978) (hereinafter "Senate Report").

The drafters of section 105(c) intended that "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." Senate Report at 36, reprinted at 624. The Report also stated:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal. It should be emphasieed that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved. Senate Report at 36, reprinted at 624. [Emphasis added.]

Section 105(c) is intended to provide full protection to a miner who files or makes a complaint "under or related to this Act," including notifying his foreman or union representative of an alleged danger or safety violation. See Phillips v. Interior Board of Mine Operation Appeals, 500 F.2d

772 (D.C. Cir. 1974), cert. denied sub nom. Kentucky Carbon Coal Corp. v. Interior Board of Mine Operation Appeals, 420 U.S. 938 (1975) (interpreting section 110(b) of the 1969 Act), approved in Senate Report at 36, reprinted at 624.

The Act also affords the miner the right to obtain an immediate safety inspection by notifying the Secretary or his authorized representative of an alleged safety violation. Section 103(g) provides in part:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

The scope of protected activities under section 105(c) includes the exercise of complaint rights under section 103(g). Senate Report at 35, reprinted at 623.

I. Whether Applicant's safety complaints were protected activities

This question is answered in the affirmative.

In the Phillips case, supra, the Court of Appeals stated that a miner brings "himself within the penumbra of the [1969] Act by notifying his foreman of defective equipment creating dangerous working conditions." 500 F.2d at 774. The court reasoned that "[s]uch safety violations, followed by worker notification to management and an ensuing disagreement, are not to be equated with a simple labor dispute; safety violations'bring Section 110(b) [the predecessor to section 105(c)] of the [1969] Act into operation." Id.

Congress adopted and expanded the holding in Phillips in the 1977 Act. Section 105(c). I therefore conclude that Applicant's safety complaints to management, the union, and the Government were protected activities under the Act.

II. Whether the job reassignments following the safety complaints violated section 105(c)

On November 1, 1978, and on November 14, 1978, Applicant received work reassignments while he was operating a piece of equipment, a Cline truck in the first instance and a Dart truck in the second. The first reassignment followed his safety complaints of October 30 and November 1, 1978. The second followed his safety complaints of October 30, November 1, and November 13, 1978. The first reassignment, to outfit a pickup truck to carry explosives, was within Applicant's Grade B carpenter classification. Following completion of this job, Applicant was not reassigned to the Cline

but, instead, was assigned to perform miscellaneous work both within and outside his classification as a carpenter. He suffered no loss in pay. The second reassignment, involving painting and asphalt work, was not within Applicant's carpenter classification. It involved no loss in pay.

The Secretary of Labor argues that the two reassignments violated section 105(c) because they were motivated by a retaliatory intent by both Respondents to penalize Applicant for his prior safety complaints and to deter future safety complaints. The Secretary argues that Respondents' animus towards Applicant was manifested in threats and the use of abusive language by Applicant's supervisors and his co-workers who were told by management that overtime was discontinued because of Applicant's complaints and that the job would be shut down unless Applicant ceased making complaints. Such direct and indirect pressure by Respondents, the Secretary contends, created a tense atmosphere at the safety meetings, which caused Applicant (and other employees) to fear for his safety and was intended to deter him from making safety complaints in the future. The Secretary argues that the evidence of animus towards Applicant affirmatively shows that the reassignments were motivated by Applicant's participation in protected activities.

The Secretary of Labor asserts that proof of tangible injury or damages is not an element of proving discrimination within the meaning of section 105(c). The gravamen of the violation, the Secretary argues, is not a tangible injury; rather, it is the character of the motivation of the persons committing the acts and the discriminatory or interfering nature of such acts. The Secretary argues that once interference with safety complaint rights is found, injury to both the individual and to the public interest is presumed.

The Secretary asserts that Island Creek as much as Langley & Morgan discriminated against Applicant. The Secretary points to evidence that establishes that Island Creek's management was aware of safety complaints by Applicant, that Island Creek supervised activities at V.P.-6 and, on occasion, at V.P.-5 and that its supervisory personnel threatened employees with closing down the job because of Applicant's filing of safety complaints.

Respondents argue that Applicant frequently filed written grievances under the collective bargaining agreement, but none were directed primarily to safety violations. They contend that under the Agreement an employee could be assigned to perform duties below his work classification without a change in the rate of pay, and if an employee were exercising his right of seniority to obtain temporary work assignments to upgrade his experience, he could be taken off the temporary job to perform needed work within his job classification, They argue that an employee dissatisfied with work assignments outside the scope of his work classification must avail himself of the procedures in Article III of the Agreement.

Respondents assert that Applicant was treated no differently than other employees, some of whom had Grade A capenter classifications. They contend

that the two work reassignments were based on legitimate employment needs and that everyone was required, from time to time, to work at various jobs both within and outside his job classification.

They argue that the two reassignments did not violate the Agreement, but even assuming they did, Applicant neither protested the reassignments nor filed a grievance as he had done on other occasions when dissatisfied with an assignment.

Island Creek also argues that once Respondents have shown that the reassignments were within the framework of the Agreement, the burden should shift to Applicant to show that he suffered more than a perceived injury or perceived interference flowing from otherwise lawful acts. Island Creek argues that to prove a violation of section 105(c), there must be a tangible injury, loss or interference, judged by objective standards, that would reasonably inhibit future exercise of rights afforded by the Act,

Finally, Island Creek argues that the two reassignments were made solely by Langley 6 Morgan supervisors with no participation by Island Creek's supervisors. Island Creek asserts that even if its supervisors had on occasion requested Langley & Morgan employees to perform certain jobs, that fact is immaterial to the present case.

To prove a violation of section 105(c), Applicant must show that the work reassignments or either of them "disciminate[d] against [him] * * * or otherwise interfere[d] with the exercise of [his] statutory rights." Whether or not the reassignments violated the Act ultimately turns on whether they were motivated by an intention to penalize Applicant for a prior safety complaint or to inhibit Applicant from making future safety complaints.

Respondents' arguments that the question of job reassignments should have been left for arbitration under the Agreement begs the question of whether the reassignments were discriminatory. If it is found that Applicant was engaged in protected activity and that the reassignments were discriminatory, then Applicant is properly before this Commission and the grievance-remedy argument falls. If no discrimination is found, there is neither jurisdiction nor need to consider the grievance-remedy argument.

I find that a preponderance of the evidence establishes that the first reassignment, on November 1, 1978, was discriminatory and motivated by an intent to penalize Applicant for prior safety complaints and to discourage Applicant from making safety complaints in the future. I find that both Respondents engaged in this discrimination.

In Shapiro v. Bishop Coal Company, 6 IBMA 28 (March 2, 1976), a discharge case, the Interior Board of Mine Operations Appeals considered a factual aspect of the case similar to the instant case. The Board found that two incidents involving safety complaints led to management animus towards the complaining miner. In one of the incidents, the miner complained to MESA (the predecessor to MSHA) that the company was not properly maintaining

sanding devices on mantrip buses. Following an inspection by MESA, the miner was assigned to clean the sanding devices, which was within his work classification. The Board found significant that at the time of the assignment, the foreman told the miner that since he was the one who made the complaint, he would be the one to clean the devices. Accepting the miner's testimony over that of the foreman, the administrative law judge found, and the Board agreed, that there was sufficient evidence to support a finding of a discriminatory intent in making such assignments. 6 IBMA at 52.

In the instance case, Harris knew Applicant had filed a complaint about the pick-up truck used to haul explosives and Donald Phillips testified that Harris appeared angry with Applicant when he assigned him to build a truck in compliance with federal regulations, There was also testimony, which I also credit, that Harris said to Applicant: "You know enough [about explosives trucks] to make a complaint." As noted, the Interior Board was of the opinion that the retaliatory bad faith of a work assignment was established when the foreman told the complaining miner that since he was the one to make the complaint he would be the one to abate the safety hazard-.

The hostile statements by Respondents' supervisors made to and about the Applicant after his complaints on October 30 and November 1 (see Findings 39-42), confirm a retaliatory and discriminatory intent by Respondents toward Applicant because of such safety complaints. A preponderance of the evidence establishes a reasonable inference that supervisors of both Respondents acted in concert in showing retaliatory and discriminatory intent toward Applicant and that the November 1 reassignment was a product and manifestation of their animus towards him.

I find that, regardless of the legitimate nature of the November 1 work reassignment, the motivating cause was the safety complaints on October 30 and November 1, and this establishes a violation of section 105(c).

I also find that the second reassignment, on November 14, 1978, was discriminatory and intended to penalize Applicant for prior safety complaints and to discourage Applicant and others from making future safety complaints. Applicant was removed from the Dart truck on November 13 after he complained that it was unsafe; however, instead of reassigning him to another job at V.P.-6 or to V.P.-5, Bill Turley (in the presence of Ed Fletcher) told him to park the truck, with no other directions. On several occasions that day, both men observed Applicant standing idly by the truck with nothing to do. I find this treatment of Applicant by Island Creek was contrary to and inconsistent with the normal procedures at the mine and exhibited a retaliatory and discriminatory intent towards Applicant because of the safety complaint. The testimony of witnesses establishes that Island Creek actively supervised and controlled all work assignments carried out at V.P.-6. Letting Applicant stand around for nearly one shift before giving him an assignment, clearly in disregard of the established practice at the mine, exhibited an intent to punish Applicant for having made a safety complaint earlier that morning and to discourage him from making safety complaints in the future. I find that this "Coventry" treatment of Applicant on November 13 was an integral Part of

Applicant's reassignment on November 14, 1978, to perform miscellaneous work outside his work classification, and that the November 14 reassignment was discriminatory and intended to penalize Applicant and to discourage him from making future safety complaints. A preponderance of the evidence establishes a reasonable inference that Terry Gabbert was aware that Applicant had voiced a safety complaint about the Dart truck and that he purposely assigned him to less desirable work to penalize him and to discourage future safety complaints.

Congress "emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved," Senate Report at 36, reprinted at 624. I find that supervision of construction activities at the Virginia Pocahontas Mines was not exclusively under the control of Langley 6 Morgan but was under the joint control of both Respondents. The construction agreement between the Respondents was in the nature of a service contract in which Island Creek requisitioned men and materials for a particular job on a day-to-day basis. Under this arrangement, men were used interchangeably at both mines, sometimes moving back and forth in a single day, and the jobs lasted from a few hours to a few weeks, or longer. Fletcher and Turley, or another Island Creek superintendent, generally directed work activities at V.P.-6 and one of the Langley & Morgan superintendents (Meade, Harris or Gabbert) generally directed work activities at V.P.-5 so that whether Island Creek or Langley & Morgan exercised control over a particular employee depended on whether he was working at one mine or the other. I find unconvincing Island Creek's argument that it was far removed from the day-to-day activities at the mines. I find that the procedure used by Island Creek was to notify Langley & Morgan's management, usually at the end of the day, as to what needed to be done the following day. When necessary, Island Creek would specify the details of the job and, if it involved hauling dirt or other material, would supply the trucks. The procedure was informal and not intended to preclude Island Creek from exercising control.

When Applicant was working at V.P.-6 on November 13, he was under the control of Island Creek so that if a problem arose, such as the condition of the Dart truck, Applicant was expected to notify Turley or Fletcher. If the truck were not safe to operate, they would be expected to reassign Applicant to another truck or to another job. Instead, they let Applicant languish next to the parked truck for nearly an entire shift as punishment for making the safety complaint and to discourage Applicant from making complaints in the future.

Given the joint nature of supervision of work activities at the mines, I find that Applicant's assignment to miscellaneous work outside his classification by Superintendent Gabbert on November 14 was discriminatory and integrally related to the "Coventry" treatment on November 13. In this instance, as with the reassignment on November 1 following the safety complaints about the explosives truck, a preponderance of the evidence establishes a cause and effect relationship between the complaint about the Dart truck and the

reassignment to miscellaneous work. Congress intended a broad sweep of section 105(c)'s protection against discrimination so that "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." Senate Report at 36, reprinted at 624 (emphasis added).

The drafters of the 1977 Act explicitly rejected limiting the reach of section 105(c) to "common forms of discrimination," and intended its prohibition against retaliatory conduct to include "more subtle forms of discrimination." Senate Report at 36, reprinted at 624. I find that Respondents' treatment of Applicant following both safety complaints was a sustained form of psychological interference intending to punish Applicant and deter him and others from making future safety complaints. The effect and intent of their harassing techniques were evidenced in the weekly safety meetings, which Donald Phillips described as becoming increasingly hostile and dangerous to Applicant, as well as in specific demeaning remarks made by Respondents' supervisors to and about Applicant. When supervisors direct intentionally demeaning statements to an employee, incite hostility against him, and give him assignments to do less desirable work, all with a retaliatory intent (punishing Applicant for filing safety complaints and discouraging future safety complaints), a violation of the Act is proved.

The record is replete with evidence of management animus toward Applicant because of his safety complaints. Island Creek Coal supervisors frequently told Applicant's co-workers that Applicant's safety complaints to management, the union, and the federal government threatened them with a loss of work and overtime. Langley & Morgan supervisors were similarly angered by Applicant's safety complaints and threatened to close down the job if Applicant continued to make safety complaints and called in the federal government again. They subjected him to abusive language and held him up to public ridicule and contempt before his co-workers. The hostility they directed at him and generated in his co-workers resulted in such tension in Applicant's relations with such supervisors and co-workers that he could reasonably fear for his safety. I find that the underlying motive behind the reassignments was a retaliatory intent that violated the Act.

I find unconvincing Island Creek's argument that even if Applicant was discriminated against, he suffered no injury in fact. Although Applicant suffered no loss in pay and was not discharged, both reassignments were to do less desirable work; the operation of heavy equipment was generally preferred as better, cleaner work than normal carpenter work. This was especially true as to Applicant, who had filed and won a grievance to exercise his seniority right to operate heavy equipment when available and he was not needed for his Classification.

In summary, with further specific findings, while Applicant and other Langley and Morgan employees were working at the V.P.-6 Mine, they were actively supervised by Island Creek supervisors, including Ed Fletcher and Bill Turley. Each reassignment in issue occurred while Applicant was working at the V.P.-6 Mine. In each case he made a safety complaint to Fletcher

or Turley and Langley 6 Morgan.management had actual or clearly implied knowledge of it. In each case he was shortly reassigned from heavy equipment work to do less desirable work. After the first safety complaint, on October 30, 1978, and extending beyond the complaint on November 13, 1978, supervisory personnel of both Respondents showed increasingly harsh and retaliatory animus toward Applicant because of such complaints. Taken as a whole, I find that the preponderance of the evidence shows that the Respondents acted as joint supervisors of Applicant in connection with the two reassignments in issue, that the reassignments were discriminatory, retaliatory, and intended to penalize Applicant for prior safety complaints and to deter him and others from making safety complaints in the future, and that the retaliatory acts of Respondents' supervisors combined to cause and resulted in such reassignments. The Respondents are jointly and equally responsible for these discriminatory reassignments, which constitute violations of section 105(c) of the Act.

As relief, Applicant requests the following:

1. An order directing Respondents to cease and desist in discriminatory harassment of Applicant.

2. An order directing Respondents to pay, in accordance with section 105(c)(3) of the Act, all costs and expenses reasonably incurred by Applicant for and in connection with the institution of this proceeding.

3. A civil penalty assessed against Langley & Morgan for $5,000.

4. A civil penalty assessed against Island Creek for $7,000.

The authority for assessing a civil penalty against an operator for a violation of section 105(c) of the Act is found in sections 105(c)(3) and 110(a). Section 105(c)(3) provides in part: "Violations by any person of [section 105(c)(1)] shall be subject to the provisions of sections 108 and 110(a)." Section 110(a) provides in part: "The operator of a coal or other mine in which a violation of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary * * *."

CONCLUSIONS OF LAW

1. The undersigned Judge has jurisdiction over the parties and subject matter of the above proceeding.

2. At all pertinent times, each Respondent was an "operator" of the V.P.-5 Mine and of the V.P.-6 Mine within the meaning of section 3(d) of the Act.

3. Respondents, Langley & Morgan Corporation and Island Creek Coal Company, as joint supervisors of Applicant, violated section 105(c) of the

Act (1) by reassigning Applicant to outfit an explosives truck on November 1, 1978, and (2) by reassigning Applicant to miscellaneous work outside his work classification on November 14, 1978.

ORDER

PENDING FINAL ORDER, Applicant shall have 7 days to submit a proposed order for relief, with service on Respondents. Respondents shall have 7 days from such service to file any response to the proposed order.

William Fauver

WILLIAM FAUVER, JUDGE

Distribution:

James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway' Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

James Green, Esq., Counsel for Langley & Morgan Corporation, P.O. Box 995, Harlan, KY 40831 (Certified Mail)

Marshall S. Peace, Counsel for Island Creek Coal Company, P.O. Box 11430, Lexington, KY 40575 (Certified Mail)