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R. NEAL, v. W. B COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RICHARD W. NEAL, JR., COMPLAINANT	Complaint of Discharge
v.	Docket No. LAKE 80-105-D
WAYNE BOICH, D.B.A., W. B. COAL COMPANY, RESPONDENT	C.D. 79-76

DECISION

Appearances: Stanley G. Burech, Esq., St. Clairsville, Ohio, for Complainant;
R. Henry Moore, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding commenced by Richard W. Neal, Jr. (hereinafter Complainant) against Wayne Boich, d.b.a. W. B. Coal Company (hereinafter W. B. Coal) alleging that Complainant was discharged from his employment at W. B. Coal on March 19, 1979, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (hereinafter the Act). On March 20, 1979, Complainant filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA). On November 16, 1979, MSHA notified Complainant that it determined that no violation of section 105(c) had occurred but that Complainant had 30 days to file his own action with the Commission. This action was filed on November 23, 1979. Upon completion of discovery and prehearing requirements, a hearing was held in Wheeling, West Virginia, on October 7 and 8, 1980. At the hearing, testimony was received from the following witnesses: Maxwell Sovell, Richard W. Neal, Jr., Melvin Schaney, D. Ray Marker, Willard F. Poe, Louis W. Erwin, Edwin E. Mercer, Richard H. Carter, Alfred Haverfield, George Pincola, Joseph Zalesky, Melvin Anderson, and Richard D. Lynch. After the hearing, both parties filed briefs in support of their positions.

ISSUES

Whether W. B. Coal violated section 105(c) of the Act in discharging Complainant and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. 815(c) provides in pertinent part as follows:

> (1) 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 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.
>
> (2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.
>
> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice

> of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

STIPULATION

The parties stipulated the following:

> On or about February 16, 1979, at 7:00 a.m., Complainant reported to work at his employer, the Respondent. He began to operate a dozer, also known as a "Push Cat," for the purpose of pushing 63I "Pans." A "pan" or scraper is a machine with a blade in approximately its center which scoops up dirt into itself. The purpose of the dozer is simply to push the pan along, giving it traction. The pan is a rubber tire vehicle unlike a dozer which is a track-type vehicle. The dozer pushes the pan with its blade.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

BACKGROUND

1. W. B. Coal is an operator of a strip coal mine in eastern Ohio, whose products enter interstate commerce.

2. Complainant was hired by W. B. Coal on May 5, 1978, as a blaster. Thereafter, he worked as a driller and bulldozer operator.

3. During the summer of 1978 and in December 1978, Complainant was assigned, at his request, to operate a Caterpillar 631-B pan scraper (hereinafter scraper). He operated the scraper in question for a total of approximately 130 hours prior to February 16, 1979. His operating experience on the scraper was limited to level terrain and hauling and spreading topsoil.

4. From the date of employment of Complainant on May 5, 1978, until the date of the accident on February 16, 1979, W. B. Coal's superintendent, Richard Lynch, conceded that Complainant was a "very good employee."

5. Superintendent Lynch had the primary authority at W. B. Coal to hire and fire employees.

6. At all times relevant herein, W. B. Coal had work rules and policies which included the following: (a) operators may not switch equipment without permission; (b) employees must report equipment in need of repairs; (c) scraper operators must carry the bowl in a low position; (d) seat belts must be worn by heavy equipment operators; and (e) employees would normally not be terminated without a history of past violations of company or safety policy.

Events of the February 16, 1979 Accident

7. The weather conditions on the morning of February 16, 1979 consisted of freezing rain which resulted in ice-covered roadways.

8. On February 16, 1979, Complainant's assigned job was to operate a bulldozer to push a scraper in order to load it.

9. On February 16, 1979, Complainant reported to work at approximately 7 a.m., and was instructed to operate a bulldozer. Approximately 1 hour after commencing work, the bulldozer assigned to Complainant developed a mechanical problem. He drove the bulldozer to the parking area for repairs. At that time, there were no mechanics or supervising personnel present at the parking area. He parked the bulldozer and began to operate one of two scrapers that were not in use. He did not inform a supervisor or mechanic of the problem with the bulldozer or request permission to operate the scraper.

10. There was only one other scraper operator present at this pit on the morning of February 16, 1979. W. B. Coal's foreman, Albert Haverfield, was traveling to another pit of W. B. Coal to pick up another equipment operator to operate the scraper taken by Complainant.

11. Complainant made two or three trips with the scraper over the haul road. At approximately 9 a.m., Complainant was operating the scraper down an ice-covered ramp with a full load. He operated the scraper with the bowl up due to a rise in the roadway. The scraper skidded, hit a spoil bank, and slid backwards over a berm and down an incline into a pit. At no time

during the course of this incident did Complainant drop the bowl of the scraper, which would have stopped the scraper instantaneously.

12. After the accident, Complainant walked up out of the pit where the scraper had come to rest and encountered Foreman Haverfield. Foreman Haverfield transported Complainant to St. John's Hospital in Steubenville, Ohio. On the way to the hospital, Complainant told Foreman Haverfield that he had been operating the scraper with the bowl in a high position and that he was not wearing a seat belt at the time of the accident.

13. When Foreman Haverfield returned to the mine site later that day, he advised Superintendent Lynch of the admissions made by Complainant on the way to the hospital.

14. Superintendent Lynch investigated the accident on February 16, 1979, and concluded that Complainant was not authorized to operate the scraper at the time of the accident and that Complainant operated the scraper negligently in that he carried the bowl too high and did not drop the bowl to prevent the scraper from skidding.

15. W. B. Coal sustained an insured loss of approximately $17,000 due to the damage to the scraper.

Events Surrounding MSHA's Investigation of Accident

16. On February 20, 1979, MSHA inspectors D. Ray Marker, and Willard F. Poe arrived at the mine to investigate the accident. On that date, two citations were issued to W.B. Coal: (1) for failure to notify MSHA of an accident and (2) for inadequate berms on roadways.

17. On February 21, 1979, MSHA inspectors Marker and Les Roller interviewed Complainant at St. John's Hospital where he was confined for two broken ribs and a punctured lung. In response to questions from the inspectors and after being advised that anything Complainant told them regarding safety violations would be protected under law, Complainant admitted that he was not wearing a seat belt at the time of the accident and asserted that the brakes of the scraper were inadequate at the time of the accident. Following the interview with Complainant, the MSHA inspectors returned to the mine and issued the following documents to W. B. Coal: a citation for failure to wear a seat belt and an order of withdrawal due to inadequate brakes on the scraper. The citation and order issued on February 21, 1979, were served on Superintendent Lynch. Superintendent Lynch asked the inspectors how they knew that Complainant was not wearing a seat belt at the time of the accident and they respondent that this information had been received from Complainant.

18. After receipt of the citation issued on February 21, 1979, Superintendent Lynch called Complainant by telephone and inquired whether Complainant had discussed his failure to wear a seat belt with the MSHA inspectors. Complainant stated that he had done so.

Discharge of Complainant

19. On February 19 and 20, 1979, Superintendent Lynch and W. B. Coal's General Manager, Max Sovell, conferred concerning the possibility of

discharging Complainant. Superintendent Lynch's authority to make that determination was reaffirmed by General Manager Sovell. Superintendent Lynch did not come to a conclusion on the issue of the discharge of Complainant on February 19 or February 20, 1979.

20. Superintendent Lynch was surprised that Complainant told the MSHA inspectors that he was not wearing a seat belt and Superintendent Lynch later told General Manager Sovell that he did not know why Complainant would tell the MSHA inspectors that he was not wearing a seat belt.

21. Superintendent Lynch decided to discharge Complainant after the issuance of the seat belt citation, the issuance of the order of withdrawal due to the scraper's allegedly defective brakes, and his telephone conversation with Complainant of February 21 concerning Complainant's statement to the MSHA inspectors regarding his failure to wear a seat belt. Superintendent Lynch is unable to pinpoint the precise time or date on which he decided to discharge Complainant or drafted the letter to Complainant notifying him of his discharge.

22. No employee of W. B. Coal, except Complainant, has been discharged for operating equipment without permission.

23. No employee of W. B. Coal, except Complainant, has been discharged by W. B. Coal for not wearing a seat belt although W. B. Coal received other citations for failure of its employees to wear seat belts.

24. W. B. Coal has discharged other employees for improper use of equipment.

25. On March 19, 1979, Complainant returned to work at W. B. Coal after convalescing from the injuries received in the accident. At that time, he was summoned to the office by Superintendent Lynch and thereupon discharged from employment by W. B. Coal. Complainant was presented with an undated letter which states as follows:

> You are hereby terminated as an employee with W. B. Coal Company for the following reasons:
>
> 1. Unauthorized use of equipment. (Operating equipment without consent of supervisor or mechanic).
>
> 2. Unsafe operation of said equipment. (Carrying scraper bowl too high off ground for safety).
>
> 3. Failure to utilize safety equipment on said equipment. (Did not fasten seat belts provided).
>
> Richard D. Lynch, Superintendent

Claim for Back Pay and Other Expenses

26. On March 19, 1979, Complainant's rate of pay was $7.55 per hour. Had he not been discharged, his rate of pay would have increased to $7.75 per hour on June 1, 1979, and to $8.25 per hour on June 1, 1980. An employee with the same rate of pay as Complainant earned $17,134.71 after the date of Complainant's discharge in calendar year 1979, and earned $18,244.43 through September 28 in calendar year 1980. If Complainant had worked a 40-hour week for the 21 weeks between September 28 1980, and February 28, 1981, his earnings at $8.25 per hour would have been $6,930 for that period of time. Complainant earned $6,106.56 from two additional employers between the date of his discharge and the date of this decision.

27. Complainant's claim for unemployment insurance benefits following his discharge by W. B. Coal was denied by the State of Ohio. Following the termination of Complainant's periods of employment subsequent to his discharge by W. B. Coal, he received unemployment insurance benefits in an unspecified amount. Since the date of his discharge by W. B. Coal, Complainant and his family have received an unspecified amount of public assistance benefits.

28. Complainant has incurred expenses for reasonable attorney's fees in the amount of $7,560 and reasonable costs in the amount of $692.43.

DISCUSSION

Violation of Section 105(c) of the Act

Recently, in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held as follows:

> We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected

activity; if the unprotected conduct did not originally concern the employer enough

> to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. Id. at 2799-2800.

Complainant contends that he was discharged by W. B. Coal for truthfully answering the questions of MSHA inspectors concerning alleged safety violations, including his own failure to wear a seat belt while operating heavy equipment. Complainant asserts that his statements to the inspectors constitute protected activity pursuant to section 105(c) of the Act and that his discharge was the result of this activity. W. B. Coal contends that:

> Complainant was not discharged by W. B. Coal Company for engaging in protected activity, i.e. talking to the MSHA inspectors, but rather his employment was terminated as a result of a chain of events which stemmed directly from his own lack of judgment, rash and irresponsible behavior, and failure to abide by the safety rules and work policies of [W. B. Coal].

The parties agree that Complainant's conversation of February 21, 1979, with MSHA inspectors concerning the facts of his accident constitutes protected activity under section 105(c) of the Act. I agree. Hence, under the Commission's guidelines as set forth in Pasula, supra, Complainant established that he engaged in protected activity. To establish a prima facie case, Complainant must also show "that the adverse action was motivated in any part by the protected activity." Pasula, supra at 2799.

The evidence shows that Complainant was discharged from W. B. Coal by Superintendent Richard Lynch. Although Superintendent Lynch was unsure of the precise time at which he decided to discharge Complainant, he testified that no decision had been made prior to his telephone conversation with Complainant on February 21, 1979. Shortly before making this call, Lynch had been issued a citation for a seat belt violation. The MSHA inspector informed Lynch that Complainant had supplied the information leading to the citation. Lynch, thereupon, called Complainant who confirmed that he had told the MSHA inspectors that he had not worn a seat belt. On direct examination, Superintendent Lynch was asked to give his reasons for discharging Complainant. In his narrative answer to this question, Superintendent Lynch cited Complainant's unauthorized use of the scraper, negligent operation of the scraper, and concluded by stating:

> They [MSHA inspectors] started writing out the violations, and one of them said the seat belt wasn't fastened.
>
> I said, how do you know the seat belt wasn't fastened? It was after the fact. They said, Mr. Neal told us that the seat belt was not fastened.

> That was another citation.
>
> I took all of these actions of Mr. Neal and put them together, and it amounted in my mind to cause for his dismmissal. (R. 557)

In this case, the time at which W. B. Coal, through its superintendent, decided to discharge Complainant is of critical importance. Complainant's accident occurred on February 16, 1979, but he did not engage in any protected activity until February 21, 1979. Therefore, if the evidence established that W. B. Coal had decided to discharge Complainant prior to February 21, 1979, Complainant would fail to establish a prima facie case under Pasula, supra. However, the evidence is clear that the decision to discharge Complainant was not made until after the protected activity occurred. While Superintendent Lynch and General Manager Sovell discussed the possibility of discharging Complainant on February 19 and 20, Superintendent Lynch stated that he did not make the decision to discharge Complainant until sometime after he talked with him on February 21, 1979. Moreover, the evidence establishes that all of the reasons cited by W. B. Coal in its letter of discharge, were known to W. B. Coal on February 16, 1979. When Superintendent Lynch went to the scene of the accident, he knew that Complainant was not authorized to use the scraper and that the bowl of the scraper had been carried too high. When Foreman Haverfield returned from the hospital on the day of the accident, he reported to Superintendent Lynch that Complainant stated that he was not wearing a seat belt at the time of the accident. Although Superintendent Lynch denies the fact that Complainant's statements to the MSHA inspectors played any part in his decision to discharge Complainant, his other testimony on direct examination establishes that he did consider Complainant's admission which led to a citation, as a factor in the discharge. W. B. Coal contends that it delayed its determination to discharge Complainant because of his prior record as a good employee and to determine whether there were extenuating circumstances surrounding this accident. This assertion is unconvincing in light of the fact that it was not until after the seat belt citation was issued, some 5 days after the accident, that Superintendent Lynch contacted the Complainant. Therefore, under the guidelines set forth in Pasula, supra, I find that Complainant has established a prima facie case of violation of section 105(c) of the Act, because his discharge was motivated in part by the protected activity.

Since Complainant established a prima facie case of violation of section 105(c) of the Act, we come now to W. B. Coal's affirmative defense. Here, W. B. Coal must prove, by a preponderance of the evidence, that it was also motivated by Complainant's unprotected activities and that it would have taken adverse action against him in any event by reason of the unprotected activities alone. I find that W. B. Coal's decision to discharge Complainant was also motivated by the unprotected activity set forth in its letter terminating Complainant's employment. However, W. B. Coal has failed to establish that it

would have taken adverse action against Complainant for the unprotected activities alone. Superintendent Lynch was the person with the authority to discharge Complainant. He had discussed a possible discharge with General

Manager Sovell on February 19 and 20. Although General Manager Sovell testified that he believed that Superintendent Lynch decided to discharge Complainant following those meetings, Superintendent Lynch denied this and testified that he made no such decision until after the seat belt citation was served by MSHA and after he called Complainant to confirm the fact of Complainant's admission to the inspectors. I have considered W. B. Coal's prior practices in connection with its stated reasons for discharging Complainant. No employee had ever been discharged for the unauthorized use of equipment. Normally employees would not be discharged by W. B. Coal for negligent or unsafe use of equipment without a history of prior violations. No employee had ever been disciplined by W. B. Coal for failure to wear a seat belt. This is not to say that W. B. Coal could not have discharged Complainant for the reasons given. However, in this case, W. B. Coal failed to establish that it would have discharged Complainant for the unprotected activities alone. As the Commission said in Pasula, supra, "it is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activities; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it." Id. at 2800. The passage of 5 days from the date of the accident, during which time W. B. Coal made no decision to discharge Complainant, although possessing all the information it subsequently cited to justify his termination, established that Complainant would not have been discharged by W. B. Coal but for his protected activity of disclosing a safety violation to the MSHA inspectors. Since W. B. Coal failed to establish its affirmative defense, Complainant has sustained his complaint of discharge in violation of section 105(c) of the Act.

Award to Complainant

Section 105(c)(3) of the Act provides in pertinent part that if the charges are sustained, Complainant shall be granted such relief as is appropriate "including but not limited to an order requiring rehiring or reinstatement of the miner to his former position with backpay and interest or such remedy as may be appropriate." Therefore, based upon my finding that Complainant was discharged in violation of section 105(c) of the Act, W. B. Coal is ordered to rehire Complainant and reinstate him to his former position with full seniority rights.

The evidence of record establishes that another miner employed by W. B. Coal at the same rate of pay as Complainant on March 16, 1979, earned total wages of $17,134.71 in the period beginning with the date of Complainant's discharge through the end of 1979. That other employee of W. B. Coal earned wages of $18,244.43 from January 1, 1980, through September 28, 1980. In the 21 weeks from September 28, 1980, through February 28, 1981, if Complainant had worked 40 hours a week at his $8.25 per hour rate of pay, he would have earned an additional sum of $6,930. Both parties agree that Complainant's wages from other employers during this period are to be deducted from any award herein. In this case, Complainant earned a total of $6,106.56 since the time

he was discharged. Therefore, W. B. Coal is ordered to pay Complainant a sum of $36,202.58 as back wages and interest at the rate of 6 percent

per annum from the dates such payments were due. I find that Complainant's claim for back wages in a lesser amount is based upon an erroneous calculation using net wages paid to the other employee at W. B. Coal rather than gross wages. Since this award is subject to the withholding of Federal and state income taxes, social security, and union dues, I find that gross wages, as opposed to net wages, is the proper standard.

W. B. Coal also asserts that any sums received in public assistance benefits must also be deducted from any award herein because such sums would not have been received if Complainant had been employed. W. B. Coal cites EEOC v. Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977). W. B. Coal also suggests that "if Complainant was not required to return the unemployment compensation he had received from the State of Ohio as a result of termination of other employment, it too would be deducted from an award of backpay." Complainant argues that neither public assistant benefits nor unemployment insurance benefits may be deducted from a back pay award.

The Second Circuit Court of Appeals in EEOC, supra, conceded that "the weight of common law authority is that collateral sources are not deductible from a tort damage award." Id. at 591. It also noted that the U.S. Supreme Court held that the NLRB "has the power to enter an order refusing to deduct unemployment compensation benefits from back pay." Ibid. See NLRB v. Gullett Gin Co., 340 U.S. 361 (1951). However, the Second Circuit went on to hold that it was not an abuse of discretion for the district court to deduct sums received from collateral sources such as unemployment compensation. Id. at 592. In Wilson v. Laurel Shaft Construction Co., 2 FMSHRC 1047 (September 12, 1980), Judge William Fauver followed NLRB v. Gullett Gin Co., supra, and held that unemployment compensation benefits are not earnings to be deducted from an award of back pay under the Federal Coal Mine Health and Safety Act of 1969.

I am persuaded that the better view is that payments received by Complainant from collateral sources such as public assistance and unemployment compensation should not be deducted from a back pay award pursuant to section 105(c) of the Act. Moreover, it appears that Complainant may be obligated to reimburse the State of Ohio for such unemployment insurance benefits. Ohio Rev. Code section 4141.35(B)(1). I agree with the judicially approved NLRB policy which holds that in cases similar to those brought pursuant to section 105(c) of the Act, back pay awards will be reduced only by interim earnings.

Award of Attorney's Fees and Costs

Counsel for Complainant has submitted an itemized invoice for services and costs. W. B. Coal has not challenged any aspect of this claim. I have reviewed the invoice and find that Stanley G. Burech, Esq., is entitled to a reasonable attorney fee in the amount of $7,560 and reimbursement for reasonable costs in the amount of $692.43 for a total award of $8,252.43.

Other Relief

Although Complainant has not requested any other specific form of relief in this case, the legislative history of section 105(c) of the Act provides additional guidelines as follows:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full senority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for posting of notices by the operator.

LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 625.

Consistent with the legislative history of section 105(c), W. B. Coal shall expunge all references to Complainant's discharge from his employment records, post a copy of this decision and order on a bulletin board at the mine for a consecutive period of 60 days, and shall cease and desist from discriminating against or interfering with Complainant because of activities protected under section 105(c) of the Act.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant and W. B. Coal were subject to the provisions of the Act.

2. This Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. On February 16, 1979, Complainant engaged in the following activities which do not constitute protected activities under section 105(c) of the Act: (a) unauthorized use of equipment; (b) unsafe and negligent operation of equipment; and (c) failure to wear a seat belt.

4. On February 21, 1979, Complainant engaged in the following activity which is protected under section 105(c) of the Act: conversation with MSHA inspectors concerning his accident, including the alleged danger of the equipment he was operating and his failure to wear a seat belt in violation of the safety provisions of the Act.

5. On February 16, 1979, W. B. Coal was aware of all three areas of Complainant's unprotected activity, supra, but did not determine to discharge Complainant until after he engaged in protective activity on February 21, 1979.

6. Complainant has established that he was discharged by W. B. Coal on March 19, 1979, because of his protected activities, supra, and he would not have been discharged but for such protected activity.

7. W. B. Coal has established that its determination to discharge Complainant was also motivated by Complainant's unprotected activities, supra.

8. W. B. Coal has failed to establish that it would have taken adverse action against Complainant for the unprotected activities, supra, alone.

9. Complainant Richard W. Neal, Jr. was discharged by W. B. Coal in violation of section 105(c) of the Act.

10. Complainant shall be rehired and reinstated to his former position at W. B. Coal with full senority rights.

11. During the period beginning on March 19, 1979, and ending on February 28, 1981, Complainant would have earned $42,309.14 as an employee of W. B. Coal if his employment had not been terminated. During the aforementioned period, Complainant earned $6,106.56 from other employment and this amount shall be deducted from the sum of $42,309.14. Complainant is entitled to an award of $36,202.58 as backpay plus interest at the rate of 6 percent per annum from the dates such payments were due to the date payment is made.

12. The sums of money previously awarded to Complainant as unemployment insurance benefits and public assistance payments may not be offset against the award of back pay.

13. Complainant's counsel, Stanley G. Burech, Esq., is entitled to an award of $8,252.43 for his reasonable costs, expenses, and attorney's fee in connection with the prosecution of this action.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's complaint of discharge is SUSTAINED and Complainant shall be rehired and reinstated to his prior position at W. B. Coal with full senority rights.

IT IS FURTHER ORDERED that W. B. Coal shall pay to the Complainant the sum of $36,202.58 for back wages plus interest at the rate of 6 percent per annum from the dates such payments were due to the date payment is made.

IT IS FURTHER ORDERED that W. B. Coal shall pay to Stanley G. Burech, Esq., the sum of $8,252.43 for reasonable costs, expenses, and attorney's fee.

IT IS FURTHER ORDERED that W. B. Coal shall:

1. Expunge all references to Complainant's discharge from his employment records;

2. Within 15 days from the date of this order, post a copy of this Decision and Order on a bulletin board at the mine where notices to miners are normally placed and shall keep it posted there, unobstructed and protected from the weather, for a consecutive period of 60 days;

3. Cease and desist from discriminating against or interfering with Complainant because of activities protected under section 105(c) of the Act.

James A. Laurenson Judge