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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ISAAC FIELDS, COMPLAINANT	Complaint of Discharge, Discrimination, or Interference Docket No. VA 80-99-D
v.	No. 1 Mine
UNITED CASTLE COAL COMPANY, RESPONDENT	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Complainant
Michael L. Lowry, Esq., Ford, Harrison, Sullivan, Lowry & Sykes, Atlanta, Georgia, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to an order issued July 28, 1980, a hearing was held in the above-entitled proceeding on September 10, 1980, under sections 105(c)(2) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2) and 815(d).

At the conclusion of the hearing, the parties asked that they be permitted to file posthearing briefs prior to the rendering of a decision. Counsel for respondent filed a 44-page brief on November 12, 1980, and counsel for complainant filed a 10-page brief on November 12, 1980.

At the hearing, counsel for the Secretary and complainant stated that when the complaint had been filed, there was attached to it as Exhibit A a copy of a complaint submitted to the Mine Safety and Health Administration (MSHA) on the basis of facts which were different from the facts which support the complaint filed in this proceeding. Therefore, the Secretary's counsel requested that he be permitted to amend the complaint to substitute, as Exhibit B, the correct complaint (Tr. 5-6). Respondent's counsel did not object to having the complaint amended by attaching to it the proper complaint, but he objected to my allowing the erroneous complaint, or Exhibit A to the complaint, to remain as a part of the complaint (Tr. 5). Inasmuch as respondent has chosen to refer to both complaints in its brief (p. 11), I

believe that a copy of both Exhibit A and Exhibit B should remain attached to the complaint in order that the record will be complete. It is understood, of course, that Exhibit B constitutes the complaint which initiated the cause of action before MSHA which ultimately culminated in the filing of the complaint in this proceeding in Docket No. VA 80-99-D.

The issues raised by respondent's brief are (1) whether complainant sustained his burden of proof on the question of whether Isaac Fields was discharged for activity protected under section 105(c)(1) of the 1977 Act, and (2) whether I have jurisdiction to assess a penalty under section 110(i) of the Act if a violation of section 105(c)(1) is found to have occurred.

The following findings of fact will be the basis for my decision in this proceeding:

Findings of Fact

1. United Castle Coal Company, respondent in this proceeding, produces approximately 200,000 tons of coal on an annual basis at its No. 1 Mine (Tr. 6-7). The company also owns a coal-processing facility which is operated under the name of Virginia Coal Processing Corporation and employs about 90 employees at both operations (Tr. 7-8).

2. Complainant in this proceeding is Isaac Fields who worked for United Castle from the fall of 1977 to September 5, 1979, when he was allegedly discharged for insubordination based on an incident which occurred on August 30, 1979 (Tr. 26; 136-137; 196; 198; 200; 205).

3. The alleged act of insubordination resulted from events which occurred on August 30, 1979, as hereinafter described. On August 30, 1979, Isaac and five other employees rode an S&S mantrip into the No. 1 Mine (Tr. 26; 72). An axle broke on the mantrip about one-third of the way to the working section and the men refused to walk the remaining distance to the section because they would have been left with no means of emergency transportation out of the mine in case someone should have been injured (Tr. 27; 54; 105-106; 117; 148; 160). When the section foreman learned that the miners had refused to walk to the working section, he sent a Kersey tractor into the mine to pull the disabled mantrip from the mine (Tr. 27; 74-75; 113).

4. When the miners reached the surface, the superintendent, Fuller Helbert, retained about four of them for the purpose of extending a conveyor belt and told the remaining miners that they would not be needed again until Tuesday, September 4, 1979. Monday, September 3, 1979, was a holiday and no one worked that day (Tr. 27; 29; 117-118; 144; 160-161; 184; 210-213).

5. After Isaac learned that he had been laid off until Tuesday, he became upset and charged that the company always retained the same people to work when incidents like the broken axle occurred (Tr. 27; 104-105). As Isaac was leaving the mine

site, he remarked, while walking past Denver Cooke,

the mine administrator, that this place sucks (Tr. 27; 55; 125; 143; 175; 190; 194-195). Denver heard the remark and stated that Isaac did not have to work there and that if Isaac did not like working there, he should get his ass out of the hollow (Tr. 28; 56; 144; 147; 210). Isaac's reply to Denver was that he could not deal with him on company property, but that if he would leave the mine site, they could settle things (Tr. 28; 55-56; 125; 143-144; 175; 196).

6. Denver Cooke reported Isaac's remarks to the superintendent, Fuller Helbert, who in turn reported the remarks to respondent's president, Michael Fourticq (Tr. 176; 196). Michael Fourticq asked them to make a written report regarding the incident and that was done as is shown by Exhibit 4 in this proceeding (Tr. 176-177). Although Exhibit 4 is an Employee Warning Form, Michael Fourticq testified that Denver Cooke had simply chosen to write an account of Isaac's remarks of August 30 on that form. Although Exhibit 4 has a section which is supposed to reflect the employee's version of the facts set forth on the form, Isaac was never shown the executed form and Michael Fourticq stated that it was not his intention to use the form as a warning because he had already decided to discharge Isaac for his insubordinate conduct rather than to give him a warning (Tr. 180-183; 185-190; 217-220).

7. Isaac returned to work on Tuesday, September 4, 1979, following the August 30 interchange between him and Denver Cooke (Tr. 29-30; 111-112). No mention of the August 30 event was made on September 4 because Michael Fourticq had not yet had an opportunity to discuss the events of August 30 with Denver and other persons at the mine (Tr. 29-30; 64-65; 177; 198).

8. On September 5, 1979, the day of Isaac Fields' discharge, Isaac reported to work as usual and rode to the working section as usual (Tr. 112). Shortly after Isaac and the other men on the crew arrived on the working section, an MSHA inspector took an air reading and found that the mean air velocity was 35 instead of 60 as required by 30 C.F.R. 75.301-4 (Tr. 12; 21; 154). The inspector wrote Citation No. 683058 at 9:30 a.m., alleging a violation of section 75.301-4 (Tr. 18). The inspector asked the men on the section if the air was often as low as he had found it and Isaac stated that it was often low but that the company ignored his complaints about ventilation (Tr. 12; 30).

9. Isaac also claims that he asked the inspector if the amount of oil on the continuous-mining machine was excessive (Tr. 30). The inspector gave a statement to an MSHA investigator on December 26, 1979, in which he stated that Isaac had asked him about excess oil on the continuous-mining machine (Tr. 12; 13-20; 30). When he testified at the hearing on September 10, 1980, however, the inspector could not recall that Isaac had mentioned the oil to him, but the preponderance of the evidence shows that Isaac did ask the inspector about the oil because Fourticq said that Isaac's statements to the inspector about inadequate air and excess oil had been reported to him before

he discharged Isaac, but that those reports had nothing to do with the discharge because he had decided to discharge both Isaac and his brother, Joe, because of their insubordination which had occurred on August 30, 1979 (Tr. 12; 14; 214; 217).

10. The discharge of Joe Fields was related to a threat made by Joe to the section foreman, E. O. Salyer, Jr., to the effect that Joe would whip Salyer's ass if Salyer assigned someone else to operate the roof-bolting machine, normally operated by Joe, on August 30 after Joe had been sent home that day with other miners who had refused to walk to the section after the axle on the mantrip broke (Tr. 159; 163). Joe did not file a discrimination complaint with respect to his discharge on September 5 because he found work at another coal mine within 3 days after his discharge and did not feel that he would gain much by filing a complaint (Tr. 103).

11. Isaac testified that when the slack in the trailing cable of the shuttle car operated by Gary Smith was suddenly taken up on September 5, 1979, the cable caught his feet and threw him against the rib (Tr. 31; 56-57; 88-90; 144-146). Gary Smith claims that the cable could not have hit Isaac because Isaac was standing in an entry where the cable could not have touched him (Tr. 127). Jerry Sargent, the operator of the continuous-mining machine, testified that he saw Isaac sitting against the rib or getting up from that position (Tr. 145-146; 149; 156). Jerry had given a written statement to management saying that the cable did not touch Isaac, but at the hearing, he agreed that it was possible that the cable could have struck Isaac and he also disputed Gary Smith's claim that Gary could have seen Isaac's position in the mine because Gary's position on the left side of the shuttle car would have prevented Gary's being able to see Isaac at all (Tr. 152-153; 155-156). Jerry did not look in Isaac's direction until after the cable was jerked loose from the shuttle car's reel so as to cause the lights on the shuttle car to go off (Tr. 146-147; 157).

12. Isaac said that his being thrown against the rib only bruised his shoulder and he declined to allow anyone to examine him for injuries (Tr. 57; 164; 199-200). On the other hand, as Isaac was leaving the mine on September 5, he reminded his section foreman that an accident report should be made concerning his trailing-cable encounter because he was going to the hospital to obtain an examination (Tr. 165).

13. E. O. Salyer, Jr., Isaac's section foreman, testified that Isaac was a troublesome employee and that he had remarked more than once that he would like to have had Isaac eliminated from his crew (Tr. 148-149; 169-170; 214-215). When Salyer was asked for examples of the types of acts committed by Isaac which caused him trouble, he said that Isaac would have the continuous-mining machine to stop until the curtains could be replaced or he would complain about the mean air velocity being lower than it should have been. Salyer agreed that such things needed to be done (Tr. 170-171).

14. Michael Fourticq, respondent's president, is a lawyer and a member of the Texas bar (Tr. 203). He said that he laid the ground work for

Isaac's discharge very carefully because he knew that Isaac is the type of person who, if discharged, would claim that his rights had been violated (Tr. 196-197). Fourticq said that he was familiar with section 105(c)(1) of the Act and that it is such an abused provision of the law, that it is hardly possible to discharge a person without having a complaint filed alleging discrimination in violation of section 105(c)(1) (Tr. 202-203).

15. The miners were called out of the mine on the afternoon of September 5, 1979, because the inspector found that certain respirable dust samples had not been taken (Tr. 25; 67). After Isaac had reached the surface, he was asked by Fuller Helbert, the superintendent of the mine, to report to Michael Fourticq at the tipple office which is located about a half mile from the underground mine (Tr. 58; 67). When Isaac reported, he stated that Fourticq asked him how he was and then asked him if he had complained to the inspector about inadequate air and excess oil on the continuous-mining machine (Tr. 32; 63-64). Isaac answered "Yes." Then Isaac states that Fourticq told him that he was being discharged for insubordination (Tr. 32; 63-64). Isaac claims that Fourticq did not explain what the acts of insubordination were and that Fourticq promised to give him the reasons in a discharge slip when Isaac picked up his check, but no such slip was ever given to Isaac even though he asked for it on three different occasions (Tr. 96-97; 159; 200-201).

16. Fourticq denies that he mentioned anything about Isaac's conversation with the inspector on September 5, and states that he must be given credit for having sense enough as a lawyer not to refer to safety complaints at the time he is discharging an employee for insubordination (Tr. 203; 213-214). Fourticq defended his failure to provide Isaac with a written statement of discharge on the ground that he did not have to do so under company policy (Tr. 201).

17. There was an inconsistency between Fourticq's answers to interrogatories and testimony in that Fourticq's answer to Interrogatory No. 11 stated that there was no written policy providing for discharge for insubordination, but stated at the hearing that the company did have such a written policy at the time of Isaac's discharge on September 5, 1979 (Tr. 201-205). Fourticq explained the inconsistency in redirect testimony by stating that the company's written disciplinary policy did refer to insubordination, but that he did not think the written policy's reference to insubordination constituted a written insubordintion policy, per se (Tr. 210-211).

18. There was a place in the mine called the "swamp," as well as other places, which were difficult to traverse on foot and which made it difficult, if not impossible, to carry an injured person from the mine (Tr. 106-107). On August 30, 1979, there was a Kersey tractor which was used to pull the inoperative S&S mantrip out of the mine, but the chief electrician told Isaac that it was not dependable on August 30, 1979, and could not be used to transport men in or out of the mine (Tr. 112-113). The superintendent stated that if anyone who had walked into the mine

on August 30, 1979, were

to be injured, he would be carried out of the mine (Tr. 115). No one disputed Isaac's claim that carrying a person out would either have been impossible or would have taken so long and would have exposed the injured person to so much stress that he would have been likely to die from shock (Tr. 107). Isaac cited as an example of the consequences of failing to have an emergency means of transportation, an incident involving a miner named Roscoe Anderson whose hand was badly injured while he was working underground. He was too large a man to be carried out on a stretcher through mud and water by other miners, and the scoop became mired in mud when they tried to use it for transportation. Therefore, Anderson had to walk out of the mine; as a result of the accident, he lost a finger, but Isaac claimed that if Anderson had had a serious leg injury which would have prevented his being able to walk out of the mine, he would have died from shock before he could have been removed from the mine (Tr. 106).

CONSIDERATION OF PARTIES' ARGUMENTS

RESPONDENT'S CONTENTIONS

Respondent's Opening Argument

Respondent's brief (p. 14) begins its arguments by citing a decision issued by the former Board of Mine Operations Appeals in Smitty Baker Coal Co., 1 IBMA 144 (1972), in support of its claim regarding complainant's burden of proof in a case initiated under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. The portion of the former Board's decision cited by respondent refers to the Federal Coal Mine Health and Safety Act of 1969 and to procedural rules which are no longer applicable to our proceedings. Moreover, the Board's Smitty Baker case has been the subject of so many reversals and remands, that I no longer consider the former Board's statement in that case to be particularly pertinent to cases brought under section 105(c)(2) of the 1977 Act.

The portion of respondent's brief beginning on page 16 faces up to the realization that the testimony of all witnesses supported complainant's contention that his discharge had resulted from the fact that respondent wanted to eliminate complainant from respondent's work force because of his complaints about health and safety matters in respondent's mine (Finding Nos. 8-9, 13-14, supra). Respondent's brief seeks to avoid the impact of testimony showing that complainant consistently complained about hazardous conditions by arguing that most of complainant's case is fatally deficient because the chief witness who appeared in support of complainant's case was the complainant himself and that the evidence shows that complainant is not a credible witness.

The Question of Complainant's Credibility

The Discharge Conversation. Respondent's brief (p. 17) claims that it is preposterous to think that Michael Fourticq, respondent's president, who discharged complainant, Isaac Fields,

would have mentioned Isaac's complaints

about health and safety in the conversation which had been initiated by Fourticq with the sole purpose of advising Isaac that he was being discharged for insubordination. Respondent's brief (p. 17) notes that Fourticq is a lawyer, a member of the Texas bar, and was at the time of the discharge fully aware of the provisions of section 105(c)(1) of the Act (Finding Nos. 14-16, supra).

One would normally agree that a lawyer would avoid referring to an employee's complaints about health and safety during the conversation which had been initiated for the sole purpose of discharging the employee. The testimony of Fourticq in this proceeding, however, contains admissions and inconsistencies with which one would not expect a lawyer to become embroiled. For example, Fourticq stated unequivocally that Isaac was a troublesome fellow who was always complaining about all sorts of things and that it was Fourticq's intention to discharge Isaac without running afoul of the provisions of section 105(c)(1). Despite Fourticq's declared intention of finding a reason for discharge which would not be subject to a successful appeal under section 105(c), Fourticq picked an insubordination charge which would not normally be considered a good reason for discharging anyone (Finding Nos. 3-6, supra).

One would also expect a lawyer to answer questions during direct and cross-examination in a manner which would be consistent with the answers given in response to interrogatories. Yet, Fourticq stated during cross-examination that respondent has a written policy regarding the disciplinary action which should be taken for insubordination, but in answer to interrogatory No. 11, he had previously stated that no such written policy existed (Tr. 204-205). On redirect, Fourticq sought to rehabilitate himself by claiming that respondent has no written policy regarding insubordination per se, but that respondent has a written policy in general which includes a discussion regarding insubordination (Tr. 211).

The other aspect of Fourticq's testimony which one would have expected a lawyer to avoid was the fact that Fourticq stated during cross-examination that it was unlikely that he had talked to Jerry Sargent, one of the witnesses to Isaac's alleged act of insubordination, prior to discharging Isaac (Tr. 207). Fourticq had, however, answered interrogatory No. 6 by stating unequovically that he had talked to Jerry Sargent as a part of his investigation of the alleged act of insubordination (Tr. 208).

The record shows that Fourticq spurned the offer of his lawyer to be present during his discharge conversation with Isaac (Tr. 42). Therefore, the lawyer who wrote respondent's brief in this proceeding is in no position to state for certain whether Fourticq also stumbled into another error by having inadvertently referred to Isaac's complaints about inadequate air and excess oil on the continuous-mining machine. in any event, I am unwilling to conclude that complainant was necesarily mistaken when he alleged that Fourticq referred to his complaints about

health and safety at some time during the discharge conversation with Isaac. Fourticq talked to Isaac for 15 to 20 minutes before Isaac was allowed to call his witnesses (Tr. 136). Neither Fourticq's nor Isaac's description of the discharge conversation

explains why 15 or 20 minutes would have been required if the subjects mentioned by Fourticq and Isaac had been the only subjects discussed during the discharge conversation (Tr. 59-60; 199-200).

The Failure to Call Joe Fields as a Witness. Isaac Fields' brother, Joe Fields, was discharged at the same time that Isaac was discharged (Finding No. 10, supra). Respondent's brief (p. 18) claims that an adverse inference should be drawn from the fact that the Secretary's counsel failed to call Joe Fields as a witness for the purpose of corroborating Isaac Fields' statement that Fourticq had mentioned Isaac's safety-related complaints during the discharge conversation.

During the hearing no one asked either Isaac or the Secretary's counsel why Joe Fields was not called as a witness in support of Isaac's case. Some reasons why Joe was not called may be that Isaac apparently does not communicate with his brother very often because Isaac did not even know the status of Joe's case filed with NLRB in connection with the incidents which occurred on August 30, 1979, and which are described in Finding Nos. 3 and 4, supra (Tr. 103). Additionally, it may well be that the Secretary's counsel did not want to expose Joe to being cross-examined regarding the incidents of August 30, 1979, prior to the completion of Joe's case against respondent which is apparently still pending before NLRB. For the foregoing reasons, I am unwilling to make a conclusion that the Secretary's counsel failed to call Joe Fields as a witness because he knew that Joe could not truthfully make statements in support of Isaac's claim that Fourticq referred to Isaac's safety-related complaints during the discharge conversation.

Isaac's Alleged Inconsistent Statements Regarding Witnesses to the Discharge Conversation. Respondent's brief (pp. 19-20) claims that Isaac's testimony was disputed by miners who were witnesses to the discharge conversation. Respondent states that three miners (Donnie Poston, Gary Smith, and Tony Cardon) were witnesses to the discharge conversation and that the two miners (Gary Smith and Tony Cardon) who testified in this proceeding stated that Fourticq told them that he had discharged both Isaac Fields and his brother solely for insubordination. Respondent's brief argues that it does not make sense to claim that Fourticq would tell Isaac and Joe that he had discharged them for making safety complaints and then tell the miners who were called as witnesses by Isaac that Fourticq had discharged Isaac and Joe for insubordination.

There are several flaws in the foregoing argument. Respondent has overlooked some facts about the discharge conversation which are important when it comes to placing the discharge conversation into proper perspective. When Isaac asked Fourticq if he could have his selected fellow miners as witnesses at the beginning of his discharge conversation, Fourticq stated that that would not be necessary (Tr. 32; 64). Therefore, the three miners who allegedly heard Fourticq give insubordination as his reason for discharging Isaac and Joe were not present at the

beginning of the discharge conversation and are therefore in no position to testify about what occurred during the

first part of the discharge conversation (Tr. 32; 64; 136; 200). Indeed, the three miners referred to in respondent's brief were called into the inner office where Fourticq was seated only after Fourticq had finished his conversation informing Isaac and Joe that they had been discharged. At that time, they heard Isaac ask Fourticq if he wanted his miners to violate safety laws when they were working underground. That question was naturally answered "No" by Fourticq. After the miners had heard Isaac's question answered, Isaac and Joe were dismissed and then Fourticq explained to the miners, out of Isaac's and Joe's presence, that he had discharged both of them for alleged acts of insubordination which occurred on August 30, 1979 (Tr. 201).

In view of the fact that the two miners who testified in this proceeding regarding the reason Fourticq gave for discharging Isaac were not present during the actual discharge conversation, I am unwilling to make any conclusions on the basis of their testimony about whether or not Isaac is a credible witness.

Another alleged inconsistency in the testimony which respondent's brief (pp. 19-20) claims to be proof of Isaac's lack of credibility is that for some inexplicable reason, Isaac claimed that although he had asked Tony Cardon to be a witness, Tony had declined to be one. Respondent's brief quotes Isaac's testimony to the effect that Tony did ultimately go into Fourticq's office to talk to him and that Tony did so after Isaac had left. Respondent's brief alleges that Tony Cardon did not know anything detrimental to Isaac's case and that Isaac's deliberate misstatements concerning Cardon's presence can only be another example of Isaac's total lack of credibility (Brief, p. 21).

If respondent's counsel will read Cardon's testimony again, he may not be so certain that Isaac is the witness who lacks credibility. As I have noted above, not one of the three miners who were asked to be witnesses to Isaac's discharge conversation actually heard the discharge conversation. Cardon claims that he came into the office at the time Isaac asked them to witness his question to Fourticq about compliance with safety laws. Isaac stated that Cardon did not want to be a witness and that when he called in the two men who were willing to be witnesses, he "looked at" only Smith and Poston because he knew Cardon did not want to be a witness. It should be noted that Cardon rode back and forth to work with Isaac. Cardon therefore had an opportunity to hear Isaac talk about his conversation with Fourticq in greater detail than the other three miners who allegedly witnessed Isaac's question about compliance with safety laws. Cardon is the only one who claims that Fourticq told Isaac that he could pick up a discharge slip on Friday when he picked up his check. Fourticq denies that he agreed to give Isaac a discharge slip, but Isaac says Fourticq promised to give him such a slip. If Cardon is to be given absolute credibility with respect to his having been a witness to Isaac's question regarding compliance with the safety laws, then Cardon should also be given absolute credibility with respect to Cardon's

statement that Fourticq did agree to give Isaac a written discharge slip.

I believe the foregoing discussion justifies a refusal by me to find that Isaac necessarily misstated the fact that Cardon declined to be a witness as to Isaac's question regarding compliance with safety laws. Isaac's claim that Cardon went into Fourticq's office after Isaac's question regarding compliance with safety laws and after Isaac left is just as credible as Cardon's claim that he was present in Fourticq's office at the same time that Smith and Poston were present.

Isaac's Inconsistent Statments Regarding Identity of Person Who Discharged Him. Respondent's brief (pp. 21-22) claims that Isaac's credibility is further eroded by the fact that in his original complaint filed with the Mine Safety and Health Administration (MSHA), he alleged that he had been discharged by respondent's mine superintendent, Fuller Helbert, rather than by its president, Michael Fourticq. Respondent concedes that Isaac justified the mistake at the hearing by explaining that he had been out of work for a considerable period when he made the statement to the MSHA investigator and that he was under so much emotional stress because of unpaid bills piling up, that he did not realize that he had used Fuller Helbert's name instead of Michael Fourticq's and that he had signed the statement without realizing the use of the incorrect name until he was asked about it by MSHA investigators at a subsequent time.

Isaac explained at the hearing that he normally talked to the mine superintendent and received instructions from the mine superintendent and that the superintendent's name came readily to mind when he was filing his original complaint with MSHA. He stated that he was not in any doubt about the fact that it was Michael Fourticq who had discharged him and that his original statement was otherwise correct. Respondent's counsel refuses to accept Isaac's explanation that the mistake was the result of emotional stress and alleges that the mistake in names occurred "* * * because the entire matter was fabricated by Fields to gain the protection of the Act and this was simply the first of the two lies" (Brief, p. 22).

Although respondent's counsel refuses to accept Isaac's explanation for the mistake in names, he asks me to overlook Fourticq's inconsistent statements as to whether Fourticq talked to Jerry Sargent prior to discharging Isaac and whether respondent had a written policy pertaining to discharge of employees for insubordination (Brief, pp. 33 and 34). If a lawyer and a member of the Texas bar can be excused for inadvertently stating one fact at one time and a different fact at another time, then surely Isaac cannot be considered a completely incredible witness simply because he used an incorrect name when he was filing his original complaint in this case. There could have been no possible advantage in Isaac's having named Fuller Helbert as the person who discharged him instead of Michael Fourticq. Therefore, I am accepting Isaac's explanation for his mistake in names just as I am accepting Fourticq's explanation for his mistakes in factual statements.

Denver Cooke's Role as Administrator. Respondent's brief

(pp. 22-23) claims that Isaac's propensity for altering facts to suit his needs is further evidenced by Isaac's claim that he did not consider Denver Cook to

be a part of management. Although Isaac recalled that Denver had set some spads underground and that Isaac had gone to Denver to ask for corrections in days erroneously charged to Isaac as sick leave, respondent's counsel claims that Isaac overlooked the fact that Denver had initially interviewed Isaac when he filed his application for employment, that Denver had recommended that Isaac be hired, and that Denver had assigned Isaac a self-rescuer when Isaac first came to work at respondent's mine. It is additionally argued by respondent that when employees Smith and Sargent were testifying, they clearly stated that they considered Denver to be a part of management. Respondent concludes from the foregoing claims that Isaac downgraded Denver to his own level so that he could justify having threatened to deal with Denver in some unspecified way if Isaac caught Denver off of company property.

There are several defects in the foregoing argument insofar as they relate to an attack on Isaac's credibility. First, employees Sargent and Smith, in addition to stating that they thought of Denver as a part of management, stated that they considered him to be a clerical employee (Sargent, Tr. 155) and that Denver had worked underground doing acts such as applying rock dust just as any other hourly employee would do (Smith, Tr. 142). Thus, the preponderance of the evidence shows that Denver was at most an administrative assistant who had no supervisory powers whatsoever over the miners who worked underground. Therefore, Isaac's claim that he responded to Denver's suggestion that Isaac get his ass out of the hollow by answering with a similar retort, whereas he would have filed charges instead, if such a remark had been made by a true supervisor such as the mine foreman or superintendent, is a reasonable explanation for what occurred. In any event, Isaac's response was at least as much justified as Denver's inflammatory statement was. If management personnel expect to receive respect from their employees, they should address their employees in acceptable terms in the first instance.

The Events of August 30, 1979

Respondent's Position Regarding Events of August 30. Respondent's brief (p. 23) begins its discussion of the events of August 30, 1979, with a statement that respondent's position on the events of that day is clear in that the only events of that day which are related to Isaac's and Joe's discharge are their conversations with Denver Cooke and E. O. Salyer, respectively. That claim is contrary to the testimony of respondent's president, Michael Fourticq, who testified that all of the events which occurred on August 30 are interrelated. Fourticq stated that he was distressed because no coal had been produced when the men followed Isaac's example of refusing to walk to the section (Tr. 196; 209). Fourticq stated that it was obvious that if Isaac had agreed to walk to the section, the whole crew would have walked and coal would have been produced in a normal manner. Fourticq's testimony shows without doubt that Isaac's refusual to walk to the section was responsible for the fact that the miners all came to the surface and the alleged acts of insubordination

all resulted from the fact that Isaac had refused to walk to the section (Tr. 211).

I am not willing, in view of Fourticq's testimony discussed above, to find that respondent's position about the events of August 30 is as stated on page 23 of respondent's brief because Fourticq was respondent's policy witness and his testimony must be considered as a statement of respondent's position regarding the events of August 30 until such time as Fourticq asks that the record be opened so that he can retract his statements to the effect that all of the events of August 30 are interrelated (Tr. 209-210; 212).

The Merits of Isaac's Fears. Respondent's brief (p. 24-25) claims that there was no justification for Isaac's claim that it was hazardous to work in the mine without having a means for transporting miners from the mine in the event of an emergency. Respondent first contends that there is no Federal law requiring transportation in event of an emergency except for surface transportation from the mine itself to the nearest hospital. Such an argument is logically incorrect because it would do an injured miner no good whatsoever to have an ambulance waiting for him on the surface if he could not be quickly transported out of the mine. Respondent's argument is also contrary to the requirements of 30 C.F.R. 75.1704 which requires each operator of a coal mine to maintain two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, to the surface. The last sentence in section 75.1704 provides as follows:

> * * * Escape facilities approved by the Secretary or his authorized representative * * * shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency. [Emphasis supplied.]

Respondent made no attempt through any of its witnesses or otherwise to disprove Isaac's claim that there was so much mud and water in respondent's mine that it would have been impossible to transport a large man from the mine by his being carried manually on a stretcher (Findings No. 18, supra.) Moreover, as the Commission held in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), a miner has a right to refuse to work in a hazardous situation and Isaac's testimony to the effect that a hazard existed stands unchallenged and unrebutted in the record. Therefore, respondent's claim that no hazard existed and that no law required a means of emergency transportation under the conditions described by Isaac, is rejected as being contrary to the preponderance of the evidence and the mandatory safety standards.

Respondent's brief (p. 26) also contends that the evidence shows that Isaac incorrectly claimed that an emergency means of transportation was unavailable. In support of that argument, respondent's brief states that a Kersey tractor was available to pull the mantrip out of the mine or transport an injured person. It is said that the Kersey was used to pull the mantrip with the broken axle out of the mine and that it could have been used to

transport an injured person out of the mine if he had been injured after having walked to the working section after the S&S mantrip broke down. Respondent acknowledges the fact that Isaac testified that the chief electrician, Bill Holbrook, told Isaac that the Kersey was unreliable and could not

be used to transport the men to or from the working section. Respondent argues that Bill Holbrook was not a part of management and that "* * * it is ridiculous to assert that Fuller Helbert, the general superintendent, would deny the use of equipment to an injured miner and respondent submits that this is simply more fabrication on the part of Fields in an attempt to justify his insubordination on August 30" (Brief, p. 26).

Contrary to the arguments in respondent's brief, Isaac's claim that the Kersey would not be used for emergency transportation is supported by the preponderance of the evidence. First, it should be noted that Isaac controverted that very argument during cross-examination by pointing out that when Roscoe Anderson was injured, the Kersey tractor was not used as an emergency means of transportation (Finding No. 18, supra; Tr. 114). Isaac also testified that he was willing to ride the Kersey to the working section on August 30, but the chief electrician refused to let them use the Kersey for that purpose (Tr. 113). In view of the fact that respondent's president expressed distress because the miners had failed to produce coal on August 30 (Tr. 196), the record supports a conclusion that the chief electrician's ruling about the undependability of the Kersey tractor was unchallenged by the mine superintendent. Otherwise, the miners would surely have been allowed to ride to the section on the Kersey tractor so that coal could have been produced.

Respondent's brief (p. 26) additionally claims that Isaac's alleged fears were shown to be unfounded by the fact that Isaac stated that he walks to the working section at the mine where he now works (Tr. 105). Respondent chooses to ignore the fact that Isaac distinguished the reason he will walk to the working section where he now is employed, as opposed to walking in respondent's mine, by stating that his present employer promptly repairs any equipment which may be broken down, whereas respondent made no effort to repair equipment promptly (Tr. 105).

Respondent's brief (p. 27) also expresses the belief that Isaac took a cavalier attitude about refusing to walk to the working section because it is alleged that Isaac stated that he did not feel like walking on August 30 and laughed when he said it. The claim that Isaac laughed was made by Gary Smith (Tr. 122) who obviously resented having been subpoenaed by the Secretary's counsel as a witness and whose testimony is almost entirely hostile toward Isaac and almost wholly supportive of respondent's position in this proceeding. Smith's bias in support of respondent's position is understandable when it is realized that Smith still works for respondent and that respondent's president was sitting only a few feet from him while he was testifying. On the other hand, another employee, Jerry Sargent, who also still works for respondent, did not appear to be as fearful of retaining his position, and he specifically stated that Isaac refused to walk to the working section beause there was no means of transportation out of the mine in case of an emergency (Tr. 148). The miners agreed with Isaac and all of them refused to walk to the working section (Tr. 148).

Although respondent's brief (p. 27) states that the question of whether respondent discriminated against some miners on August 30 by retaining some

to work while sending the remainder home is not an issue material to this proceeding, respondent proceeds to argue that the selection process was entirely free of discrimination against those who refused to walk to the section. Respondent claims that its employee witnesses throughly explained how the men who were retained to work were selected. It cites the testimony of Smith who claimed that the miners' willingness to walk to the section had nothing to do with the selection (Tr. 124). It also cited the testimony of Cardon who said he did not know who worked because he had planned a long weekend for Labor Day and left for home immediately after the miners came to the surface (Tr. 161). While respondent claims that its president capably explained how the miners who were retained to work were selected (Tr. 212), it is a fact that Fourticq agreed that the miners who were retained to work were also necessarily miners who had agreed to walk to the working section because that is where the miners had to work to extend the conveyor belt. Fourticq frankly stated that there was some prejudice to his having selected Jerry Sargent to work because Sargent knew how to operate the Kersey tractor which was used to drag the conveyor belt parts to the site where they were needed. (FN.1) Thus, the explanation of Fourticq as to how the men were selected was inconsistent with Smith's testimony to the effect that the miners' willingness to walk to the working section had nothing to do with their selection.

Respondent's brief (p. 27) also notes that Isaac filed a complaint with MSHA with respect to alleged discrimination by respondent in having sent Isaac home on August 30 and claims that Isaac filed that complaint in a further attempt to bring himself under the protection of the Act to avoid being discharged for what he knew was insubordination. The evidence shows that both Isaac and his brother, Joe, filed complaints with respect to the events of August 30, but Joe filed a complaint with NLRB and put Isaac's name on it along with his own. Isaac did not know that Joe had put Isaac's name on Joe's complaint when Isaac filed his complaint with MSHA. When MSHA thereafter advised Isaac that he could not file a complaint with two different Federal agencies regarding the same incident, Isaac withdrew the complaint he had filed with MSHA (Tr. 37). Respondent's brief correctly states that the issue of whether respondent discriminated against Isaac for sending Isaac home on August 30 is not an issue to be determined in this proceeding. Therefore, I express no views on whether respondent's selection of men to work on August 30 constituted a violation of section 105(c)(1) of the Act.

The Act of Insubordination. The last portion of respondent's brief (pp. 28-30) dealing with the events of August 30 answers the argument of the Secretary's counsel to the effect that Isaac's alleged act of insubordination in his heated conversation with Denver Cooke on August 30 was not sufficiently serious to warrant Isaac's discharge. Respondent directs a large part of its argument to demonstrating the importance of Denver Cooke's position with

emphasis upon the fact that if Isaac considered Denver to hold a position no more important than that of a fellow employee, Isaac was the only employee who was unaware of Denver's position as a part of management. That contention has previously been discussed and I have found that Denver's role as time-keeper, receiver of employment applications, issuer of self-rescuers, and supervisor of secretaries and spare-parts personnel, would, at most, warrant his being called an administrative assistant. Isaac claimed that he would have filed charges if a truely recognized supervisor, such as a mine foreman or superintendent, had ordered him to get his ass out of the hollow if he did not like the way he was being treated. Since Isaac had, in fact, filed a complaint against one of respondent's former superintendents who cursed him, Isaac was truthful when he stated that he differentiated between the way he responded to Denver from the way he would have responded to Fuller Helbert who was the mine superintendent on August 30.

The difficulty with respondent's efforts to demonstrate the seriousness of Isaac's response to Denver's comments on August 30 (Finding No. 5, supra) is that respondent's justification for discharge begins with an administrative assistant who departed from the kind of acceptable and restrained language which one would expect management to use and then seizes upon the reaction of an angry and frustrated miner as a excuse to discharge him. Since neither Denver nor Isaac conducted himself in a desirable fashion, management has a very poor basis for its claim of gross insubordination. The evidence shows that the section foreman, the superintendent, and the president of the company all considered Isaac to be a source of irritation and all of them wanted to eliminate him from the work force (Tr. 123; 148-149; 196; 202-203; 215). Fourticq says he was trying to find a reason for discharging Isaac which would not run afoul of the protective provisions of section 105(c)(1). The reason given by Fourticq for the discharge is just not persuasive in the circumstances and he showed poor judgment in discharging Isaac on the basis of an alleged insubordination which was nothing more than an exchange of heated words by two miners and which should have been ignored by Fourticq until he had a really justifiable reason for discharging an emloyee he alleges was unsatisfactory.

Additional comments will be made about Isaac's alleged insubordination at a later point in my decision. The above comments are sufficient at this point to show why I feel there is no merit to the argument set forth by respondent on pages 28 to 30 of its brief.

The Events of September 5, 1979

Isaac's Questions Regarding Adequate Air and Excess Oil. Respondent's brief (p. 31) claims that an MSHA inspector checked the mean air velocity in the vicinity of the continuous-mining machine on his own volition and issued a citation for a violation of section 75.301-4 before Isaac ever raised any question about respondent's failure to provide an adequate amount of air at the working face. Respondent also states that if Isaac did ask the

inspector about an excess amount of oil on the continuous-mining machine,

it is obvious that the inspector found no excess accumulation because he did not issue a citation in connection with any accumulation of combustible materials on the continuous-mining machine.

The evidence shows that the above-described statements in respondent's brief are correct, but respondent's brief misses the point because Fourticq admitted in his testimony that the mine superintendent had told him about Isaac's complaints to the inspector about lack of adequate air on the working section and excess oil on the continuous-mining machine before he had his discharge conversation with Isaac, but Fourticq denied that Isaac's safety-related complaints on September 5 had any effect on Isaac's discharge because Fourticq had already decided before hearing about Isaac's safety-related complaints to discharge Isaac for insubordination (Finding No. 9, supra). If the superintendent had not thought Isaac's complaints significant or annoying, he would hardly have bothered to advise Fourticq that Isaac had made the complaints. Therefore, Isaac's complaints on September 5 can hardly be ignored because they were, in fact, known to Fourticq prior to the time that Isaac was discharged. They become just one more factor to be considered in the overall evaluation of the evidence in this case.

Isaac's Injury on September 5, 1979. Respondent's brief (p. 32) claims that Isaac fabricated the fact that the shuttle car's trailing cable had knocked him against a rib during the morning of September 5 (Finding No. 11, supra). The grounds for respondent's claim that Isaac invented the trailing-cable incident are that Isaac refused to allow the first-aid man to check him for injury because Isaac said that it was not serious enough to warrant any treatment. When Isaac was leaving the mine on September 5, he told the section foreman to turn in an accident report about the incident because Isaac was going to the hospital to obtain an examination. Respondent claims that Isaac knew he was going to be discharged for his alleged insubordination on August 30 and that Isaac fabricated the trailing-cable injury to gain sympathy from Fourticq in the hope that Fourticq would not discharge him.

There is little logic to the above allegation. Respondent notes that immediately after the trailing cable had allegedly knocked Isaac against the rib, Isaac ran down to where the section foreman was talking on the phone and told the section foreman not to send any more shuttle cars down the crosscut until Isaac had signaled that he was ready for them to come. Respondent claims that that is another example of Isaac's insubordinate attitude toward his superiors. If, as respondent claims, Isaac suspected that he was going to be discharged for an act of insubordination which occurred on August 30, it is not logical that Isaac would deliberately produce yet another alleged act of insubordination by addressing his section foreman in a manner which showed that he was upset by the fact that the trailing cable had thrown him against the rib.

It is generally true that when a person is unexpectedly

knocked down, but not actually injured, he becomes irritated at that moment by the realization that he could have been seriously injured by the occurrence which knocked him down. If Isaac did not feel that he had been injured enough to

break the skin or a bone, there is nothing strange, contrary to respondent's claims, about the fact that Isaac declined to have the first-aid man examine him. Moreover, there is nothing extraordinary about the fact that Isaac later told the section foreman to fill out an accident report because Isaac was planning to go to the hospital to obtain a checkup. Isaac has worked long enough to know that compensation and hospital bills are more likely to be paid when actual injury is documented immediately after an accident occurs. Moreover, the section foreman never did check to ascertain if Isaac went to the hospital (Tr. 165). Therefore, respondent's claims that Isaac fabricated the injury are not supported by the record.

Finally, it should be noted that Jerry Sargent, the continuous-mining machine operator, first wrote a signed statement about the trailing-cable incident and gave the statement to management. In that statement, Sargent alleged that the trailing cable did not touch Isaac. At the hearing, however, Sargent said he did not see everything that occurred and retracted his unequivocal statement to the effect that the trailing cable did not touch Isaac (Tr. 156-157).

One of the witnesses at the hearing was Gary Smith, the operator of the shuttle car whose trailing cable threw Isaac against the rib. Smith claimed that he saw Isaac shortly before Isaac claims to have been hit by the trailing cable and Smith contended that the trailing cable could not possibly have hit Isaac (Tr. 127-130).

Sargent, on the other hand, stated that it would have been impossible for Smith to have seen Isaac because Isaac was on the right side of Smith's off-standard shuttle car (Tr. 150-153). Additionally, Sargent said that Isaac was in direct line with the shuttle car's trailing cable (Tr. 153) and that the trailing cable was jerked "* * * like pulling a rubber band and letting it go" (Tr. 144).

Sargent's testimony largely corroborates Isaac's claims regarding the trailing-cable incident. I believe that Jerry Sargent was a very credible witness. Despite the fact that respondent's president was sitting just a few feet from Sargent when he testified, he gave a great deal of very damaging testimony about respondent. He stated, for example, that management personnel had stated in his presence that they would like to get rid of Isaac because he was an instigator and kept the men stirred up (Tr. 148-149). Sargent also stated that respondent frequently failed to provide adequate ventilation in the mine, that the curtains were too short to be effective on September 5, and that he would have cut coal on September 5 without seeing that the ventilation was adequate if the inspector had not forced the miners to establish proper ventilation by writing a citation for the lack of ventilation (Tr. 147; 154).

Respondent's brief (pp. 32-33) defends the inconsistencies between statements made by Fourticq in interrogatories and those made by Fourticq in his testimony at the hearing. I have already

discussed those inconsistencies and need not give them further consideration at this point.

The Reason Given by Respondent for Discharging Isaac Fields

Isaac's Alleged Unsatisfactory Record as an Employee. Respondent's brief (pp. 34-38) argues that the Secretary's counsel has failed to demonstrate that Isaac Fields was other than a disruptive employee whom management justifiably wanted to eliminate from its work force for reasons having nothing to do with complaints about safety. Respondent relies on the testimony of Gary Smith for its claim that Isaac was a disruptive employee who would do such things as lie on the continuous-mining machine so that it could not be operated (Tr. 119). Respondent concedes that Smith also testified that he had heard respondent's superintendent state that he would like to get rid of Isaac because he gave him a lot of headaches. Respondent used that testimony as a basis for claiming that Isaac was simply an uncooperative employee who disrupted production activities for reasons having nothing to do with health or safety (Brief, p. 36).

I agree that there is testimony in the record showing that Isaac was not always a shining knight in every incident involving compliance with the health and safety standards. For example, Isaac admitted that he had not added a piece to the bottom of the curtain on September 5 although he knew the curtain was too short to provide an adequate volume of air at the working face (Tr. 80-81). Isaac also stated that it was not normal practice to add a piece to the bottom of curtains when high coal was encountered, whereas Jerry Sargent stated that he had added such extensions to the curtains (Tr. 81; 155).

It is difficult, however, to place the sole blame for lack of ventilation on September 5 entirely on Isaac's shoulders. It must be recalled that the inspector found the lack of adequate ventilation before any production had begun. Jerry Sargent was the operator of the continuous-mining machine, while Isaac was only his helper. In the first instance, it was the responsibility of the section foreman, E. O. Salyer, to have observed the excessively short curtain and to have had the curtain extended before any production was begun. Secondly, it was Sargent's responsibility next to have made sure that there was adequate ventilation, but he candidly stated that he had not done so and would have produced coal without extending the curtain if the inspector had not forced them to correct the problem. Isaac defended his failure to do anything about the curtain by claiming that the curtains were erected by other personnel and that all he was required to do before the continuous-mining machine entered a working place to cut coal was to drop down the curtains which had been rolled up by the men who cleaned up the place in preparation for the continuous-mining machine to resume production of coal. Again, it should be noted, that Isaac was the one who advised the inspector that respondent frequently failed to provide adequate ventilation and asked about excessive oil on the continuous-mining machine. It is significant that the section foreman thought that Isaac's comments were sufficiently noteworthy to be reported to respondent's president prior to Isaac's discharge.

Even though several witnesses were asked to give examples of Isaac's uncooperative attitude, the examples given almost without exception showed

that they related to matters of health and safety. Smith's testimony regarding Isaac's safety-related complaints is 50 percent in favor of Isaac and 50 percent against him because Smith stated that he had heard Isaac make safety complaints and he had seen him do things that were unnecessary like lying down on top of the continuous-mining machine. On the other hand, the section foreman, who was one of the management personnel who wanted to get Isaac dismissed, gave examples wholly involving Isaac's insistence that an adequate amount of air be provided and that curtains be hung properly before Isaac would allow the continuous-mining machine to operate (Tr. 169-170). Although Smith criticized Isaac for doing unnecessary things, he also stated that he would expect to lose his job if he should report a safety violation to MSHA instead of making his complaints directly through channels, that is, first to the section foreman, then to the superintendent, and then to the president before going to MSHA (Tr. 120).

Smith said that if they reported safety hazards to their section foreman, they would be corrected nine time out of 10 "if an imminent danger" was involved (Tr. 122). Respondent's president, Michael Fourticq, confirmed that Smith had correctly stated respondent's policy with respect to having miners report safety hazards directly to management before reporting them elsewhere because, for one thing, that enabled management to take care of such complaints quickly (Tr. 215).

Fourticq gave examples of Isaac's complaints. He said that they ranged from complaints about the soda in the Coke machine to the contention that the softball team was not being given the right uniforms. Fourticq also stated that Isaac complained because hammers were not provided for the roof-bolting machine for the purpose of sounding the roof. Fourticq said that the hammers kept disappearing from the machine, so management proposed to solve the problem by having the miners sign for the hammers, but Isaac refused to do so because he believed that would be a violation of his rights (Tr. 216). Since Isaac was a helper on the continuous-mining machine, there appears to be no good reason why he should sign for a hammer to be placed on the roof-bolting machine.

Jerry Sargent, as an example of an act by Isaac which kept the men stirred up, cited the event on August 30 when Isaac refused to walk to the working section when the S&S mantrip broke an axle. Sargent said the men would have walked to the section if Isaac had not refused to do so, after stating that there was no provision for transportation out of the mine in case of an emergency. Smith also cited Isaac's refusal to walk on August 30 and added that "What [Isaac] usually said, we went along with him" (Tr. 122).

The foregoing review of the witnesses' testimony shows that the preponderance of the evidence supports a finding that Isaac had a reputation as a leader and that he was the foremost person among to the miners to complain about safety problems as well as other problems which were somewhat unimportant. It is not

possible for me to conclude that management wanted to dismiss Isaac because he complained about the soda in the Coke machine or the softball team's uniforms. Fourticq stated that he was distressed by the fact

that the men had not produced coal on August 30. The evidence unequivocally shows that the men would have walked to the section and would have worked if Isaac had not objected. I have no alternative but to conclude that the evidence shows that management wanted to dismiss Isaac because of the annoyance associated with his safety-related complaints.

Pretext for Discharge. The remainder of respondent's brief (pp. 37-38) on the discrimination issue is devoted to defending its decision to discharge Isaac because he was "grossly insubordinate" on August 30, 1979.

I do not like to see the provisions of section 105(c)(1) abused any more than Michael Fourticq does (Tr. 202-203). I believe that Congress placed section 105(c)(2) in the Act so that the Secretary can ferret out at the threshold those complaints of discharge which he thinks are totally without merit. I believe that an employer should be able to discharge unsatisfactory workers without being subject to the unpleasantness of a hearing where the employer has to defend each step he took before determining to discharge a miner. I have found in the employer's favor in several discrimination cases when the employer's reasons for discharge were soundly based on meritorious considerations.

As respondent argues in its brief (p. 37), "* * * it is not the function of the Mine Safety and Health Act to protect employees from errors in judgment by management. The function of the Act is to prevent discrimination toward employees who engage in activity protected by the Act." The Commission's decision in the Pasula case, supra, however, requires a judge to examine the reason given by a respondent for discharge to determine whether respondent has carried its burden of demonstrating that complainant was discharged for the reason given by respondent or whether complainant was discharged because of his safety-related complaints.

In this proceeding, respondent's reason for discharging Isaac Fields will not stand close scrutiny. The sole reason given by Fourticq when he discharged Isaac was that Isaac had been insubordinate on August 30, 1979, when Isaac replied in an irascible fashion to inflammatory comments made by Denver Cooke. All of the witnesses who heard the remarks knew that Isaac's complaints about the company's releasing some men and retaining others to work were not specifically addressed to Denver Cooke. Yet Denver took it upon himself to address Isaac in language which could have been expected to inflame Isaac because Isaac had justifiably refused to walk to the section at a time when management had no method to transport men out of the mine if someone had been sufficiently injured to require that he be taken out on a stretcher. Isaac's stand for safety had cost him that day's work as well as the next day because management, after Isaac's stand for safety had prevented the men from walking to the section, had decided to advance an extension of the belt conveyor, previously planned for the coming weekend, to that day and the following day.

With those facts as background, it is understandable that Isaac would have reacted strongly to Denver's remarks by telling him that they could

settle the matter when Denver left mine property. When Denver saw Isaac off mine property at a subsequent time, Isaac made no further threats or showed any inclination to assault Denver (Tr. 191). Moreover, as I have discussed at some length above, Isaac had reason to believe that Denver was not a person cloaked with supervisory powers over underground employees.

Fourticq claims that he made a thorough investigation of the facts before he decided to discharge Isaac. Yet Fourticq did not interview one of the witnesses to the conversation between Denver and Isaac and Fourticq did not interview Isaac to obtain his version of the incident even though the written report provided to him by Denver Cooke fails to mention the inflammatory language which Denver had used in the first instance and which Denver admitted at the hearing had been used. If the company expects its employees to be docile and polite in addressing management, management should conduct itself in an exemplary fashion in the first instance.

Moreover, there is considerable doubt as to whether Isaac's remarks to Denver were properly categorized as "insubordinate." Webster's Dictionary defines "insubordinate" as not being obedient or not submitting to authority. When a supervisor suggests to an employee that if he does not like the way his employer is treating him, he should "get his ass off" the company's property, the supervisor is not really asking the employee to do an act which is a part of his assigned job. If the employee becomes angry at such a remark and suggests that a fight might be an appropriate way to settle the matter, the employee is not really refusing to do any act for which he was hired. When Denver made his report to Fourticq on the Employee Warning Record, he appropriately checked the box for "Conduct" rather than the box for "Disobedience;" consequently, Denver himself recognized that he was not reporting Isaac's statement on August 30 as a case of "insubordination."

As I have indicated above, my review of the entire record shows that respondent's management wanted to remove Isaac Fields from its payroll because he was a constant problem. Yet nearly all of the examples of the problems caused were related to situations involving complaints about safety. Respondent's president acknowledged that he wanted to find a way to discharge Isaac without running afoul of the language of section 105(c)(1). Nevertheless, the president came up with a very unconvincing episode in which an administrative assistant used insulting language in addressing Isaac and received similar language in return. I find that such a flimsy excuse for discharging Isaac is unconvincing and that the real reason Isaac was discharged was to eliminate from the company's payroll a miner whose safety-related complaints had become intolerable. Therefore, I find that respondent violated section 105(c)(1) when it discharged Isaac Fields on September 5, 1979, because Isaac had been engaged in activities protected under section 105(c)(1) of the Act. For the foregoing reason, Isaac is entitled to the affirmative relief requested in his complaint.

At the hearing, Isaac stated that he has a job at another coal mine and that he did not want to be reinstated. The amount of back pay to which he is entitled was agreed upon in the event a decision adverse to respondent should

be rendered (Tr. 38). My order will hereinafter require that sum to be paid to Isaac Fields with interest at the rate of 9 percent requested in the complaint. Since the wages accumulated over a period of 20 weeks, the total amount did not accrue until the 20-week period had expired. Therefore, to avoid a complicated calculation, the interest may be computed on the entire amount beginning at the end of the first 10 weeks, unless respondent would prefer to calculate the interest on a daily basis from the first day to the last day in the 20-week period. Of course, interest is due on the full amount after the 20-week period ends to the day the payment is made to Isaac Fields. It is also assumed that normal deductions for tax, etc., will be made. Assuming that deductions for hospitalization are normal, they should be made, and Isaac Fields should be reimbursed for any medical expenses incurred during the 20-week period which would have been paid under his medical coverage if he had not been unlawfully discharged.

Respondent's Opposition to Assessment of a Civil Penalty

The Right to a Second Hearing. In my order issued July 28, 1980, scheduling this case for hearing, I gave respondent notice that the hearing would involve all civil penalty issues associated with the alleged violation of section 105(c)(1). That order carefully explained that the civil penalty would not be assessed until the Secretary had filed a Petition for Assessment of Civil Penalty and until that Petition had been assigned to me for disposition on the basis of the record which would be developed at the hearing in this proceeding. Respondent had notice that the hearing would comprise the usual issues which are considered in a civil penalty proceeding, that is, whether a violation of section 105(c)(1) had occurred and, if so, what civil penalty should be assessed, based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

Therefore, respondent's brief (pp. 39-40) improperly argues that it is entitled to another hearing regarding the violation of section 105(c)(1) which I have found occurred. Respondent correctly argues that a Petition for Assessment of Civil Penalty will have to be filed by the Secretary and an answer to that Petition must be filed by respondent before the case will be in a procedural posture for assessment of a penalty. Of course, if respondent's counsel, in his answer to the Petition, could show that another hearing is needed for introduction of facts which he could not have presented at the hearing held in this proceeding, I would grant such a hearing. I do not believe that respondent can demonstrate a need for a second hearing, however, because the primary question at the first hearing in the discrimination case and on the civil penalty issues was whether a violation had occurred. I have found, after review of all of respondent's and the Secretary's evidence, that a violation of section 105(c)(1) occurred. It is certain that respondent is not entitled to a second hearing on the question of whether a violation occurred.

Section 105(c)(3) states that when a violation of section

105(c)(1) has been found to have occurred, the civil penalty provisions of the Act become applicable. Therefore, the only issues which could be considered at a

second hearing would be evidence pertaining to the six criteria. Facts were introduced at the hearing regarding the size of respondent's business and I stated at the hearing that there was no history of previous violations to be considered in view of the information provided by the Secretary's counsel (Tr. 9-10). The evidence already in the record is ample for making findings as to the two remaining criteria, that is, whether the violation was associated with negligence, and whether the violation was serious. The criterion of whether respondent demonstrated a good faith effort to achieve rapid compliance will be dependent upon whether respondent carries out the affirmative relief provisions of the order accompanying my decision. A hearing should not be required for respondent to advise me as to whether it has complied with those provisions, but if a hearing is required for that purpose, a second hearing will be scheduled if respondent should file a request for hearing demonstrating that a hearing is required. Likewise, if respondent should change its position that payment of a penalty for the violation of section 105(c)(1) would not cause it to discontinue in business (Tr. 8), a second hearing will be scheduled for that purpose if respondent should be able to demonstrate a need for a hearing for that purpose.

The Reference in Section 105(c)(3) to Section 110(a). Respondent's brief (pp. 41-43) claims that an administrative law judge cannot apply the provisions of section 110(i) of the Act to a violation found to have occurred under section 105(c)(1) of the Act. In support of that argument, among other things, respondent cites Baker v. The North American Coal Co., 8 IBMA 164 (1977), in which the former Board of Mine Operations Appeals held that a judge could not find violations of the substantive provisions of the mandatory health and safety standards on the basis of evidence received in a discrimination proceeding and then, sua sponte, impose civil penalties for such violations. The former Board at no time held that a judge lacked the power and authority to assess civil penalties for violations of the discrimination provisions of the 1969 Act. Therefore, the North American case cited by respondent is inapplicable to the question of whether a judge has authority under the 1977 Act to assess civil penalties for violations of section 105(c)(1) of the 1977 Act.

It is obvious from the language of section 105(c)(3) that once a violation of section 105(c)(1) has been found to have occurred, that the civil penalty provisions of the Act become applicable for that violation just as they are applicable to all other violations of the Act or the mandatory health and safety standards promulgated under the Act. Therefore, when and if a Petition for Assessment of Civil Penalty has been filed by the Secretary for the violation of section 105(c)(1) found in this decision to have occurred, I have the authority to assess a civil penalty for that violation once respondent has filed its answer to the Petition and I have determined whether respondent has demonstrated a need for a second hearing regarding any of the six criteria set forth in section 110(i) of the Act.

COMPLAINANT'S BRIEF

The brief filed by the Secretary's counsel in this proceeding is well written, concise, and contains references to the legislative history of the

1977 Act in support of the Secretary's arguments. Inasmuch as my decision has already found in the Secretary's and complainant's favor, I do not believe that any purpose would be served by further extending this lengthy decision to comment on the Secretary's arguments.

WHEREFORE, it is ordered:

(A) The complaint filed by the Secretary in Docket No. VA 80-99-D is granted because a violation of section 105(c)(1) did occur when respondent discharged Isaac Fields. Therefore, respondent is ordered to provide the following relief:

(1) Respondent shall, within 30 days from the date of this decision, pay to Isaac Fields a sum of $3,326.96 in back pay plus 9 percent interest calculated as hereinbefore explained on pages 21-22 of my decision.

(2) Respondent shall remove from Isaac Fields' personnel file all references to his unlawful discharge on September 5, 1979, including removal of the Employee Warning Sheet which was admitted in evidence as Exhibit 4 in this proceeding.

(B) When and if the Secretary files a Petition for Assessment of Civil Penalty for the violation of section 105(c)(1) found to have occurred in this proceeding, I shall, when that case has been assigned to me, determine whether respondent is entitled to a second hearing regarding the civil penalty issues upon the basis of the pleadings filed in that proceeding. The civil penalty issues are severed from this proceeding for decision as described in the preceding sentence and in my decision.

(C) The motion made at the hearing by the Secretary's counsel for amendment of the complaint to add Exhibit B as an attachment to the complaint is granted (Tr. 5-6).

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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~FOOTNOTE_ONE

1 Another reason that management may have refused to use the Kersey tractor for transporting men may have been that management had decided to reserve the Kersey solely for the purpose of dragging conveyor belt parts into the mine.