

CCASE:

MARK SEGEDI v. BETHLEHEM MINES

DDATE:

19810331

TTEXT:

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

MARK SEGEDI,
ON BEHALF OF:
S. J. EZARIK, E. P. AVERY,
A. ANTANOVICH, E. H. ROSEMIER, JR.,
M. ZOLDAK, J. OLESKY, C. AVERY,
W. E. CLARK, L. CASPER, F. PAULISH,
A. R. BARKER, A. RUSILKO, B. G.
MILLER, R. FILBY, C. L. PHILLIPS,
A. J. SEYKOSKI, JR., D. W. CLARK,
C. J. ZUKAUCKAS, S. A. JESTAT, T. L.
PYSH, J. M. JIBLETS, W. L. BROWN,
S. T. FORTE, G. J. EVANS, K. R.
WATKINS, J. J. KURUCZ, M. L. HOYT,
T. J. SMITH, D. WYTOVICH, R. D.
STAUFFER, R. T. HARRIS, D. PHILLIPS,
F. PABIAN, G. R. WHEELER, C. J.
ROCCO, T. M. BURGER, C. ZUKAUCKAS,
R. MULAC, T. P. GRIMES, S. CLARK,
S. DURKO, JR., L. T. PRUSKI,
F. PERRI, J. VIARA, W. WHITE,
N. GURIEL, J. C. FIEM, S. ROBERTSON,
C. J. WASHLACK, R. B. TAYLOR,
J. FIDAZZO, R. L. EMERY, R. A.
CHANEY, L. T. BIZET, T. TAYLOR,
F. DI BASILIO, J. ANTANOVICH,
J. FIDAZZO, S. KOTCHMAN, C. E.
MONTGOMERY, J. E. CARNATHAM, J. G.
ZERAMBO, R. S. MARTOS, A. J. MARTOS,
C. M. VILCESK, K. E. WILEY, J. J.
STEPKO, F. V. FEMIA, S. W.
PERCHINSKY, S. EZARIK, J. S. GLEMBA,
T. E. ZGORLISKI, A. R. FIEM, R. L.
SCICCHITANO, J. STEPKO, R. HOPKINS,
P. A. SKIRCHAK, L. N. HRUTKAY, G. C.
DENNY, G. BOSTICH, D. L. TIBERIE,
J. H. ZAMISKA, J. F. PIASECKI,
R. GATLING, B. F. VISCHIO, J. L.
ANTANOVICH, J. S. KUBOVCIK, N. BOSIC,

Application for Review
of Discrimination

Docket No. PENN 80-273-D

Somerset No. 60 Mine

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M. J. REBICH, L. HUEY, J. MOTICHAK,
E. J. LACOCK, M. POYE, JR.,
E. AMBROSEY, J. R. KENNEDY, J.E.
PUSKARICH, R. T. RADOS, J. E.
KARPOFF, K. G. THOMPSON, L. ROSSERO,
J. LINNEN, L. DI BASILIO, A. KISKI,
E. DERESH, M. TOTH, J. J. DI BASILIO,
R. E. MAIN, J. L. JOHNSON, J. E.
TIMLIN, H. W. AMBROSY, G. A. DEAN,
AND G. G. MC KETA,

COMPLAINANTS

v.

BETHLEHEM MINES CORPORATION,
RESPONDENT

Appearances: Kenneth J. Yablonski, Esq., Yablonski, King, Costello &
Leckie, Washington, Pennsylvania, for the Complainants
Thomas W. Ehrke, Esq., Bethlehem Mines Corporation,
Bethlehem, Pennsylvania, for the Respondent

DECISION

Before: Judge Cook

I. Procedural Background

On June 30, 1980, Mark Segedi, filed a discrimination complaint in the above-captioned proceeding on behalf of 148 miners (Complainants) alleging that Bethlehem Mines Corporation (Respondent) committed acts of discrimination in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act). The complaint was filed with the Federal Mine Safety and Health Review Commission (Commission) pursuant to section 105(c)(3) of the 1977 Mine Act following a determination by the Department of Labor's Mine Safety and Health Administration that no violation of section 105(c)(1) had occurred. The discrimination complaint states, in part, as follows:

1. The Federal Mine Safety and Health Review Commission (Commission) has jurisdiction over the subject matter of this case.
2. Mark Segedi, (Complainant) is a miner defined in Section 3(g) of the Act and is an elected Safety Committeeman of UMWA Local Union 1197.
3. Exhibit A, attached hereto and made a part hereof, contains the names of the complainant miners as defined in Section 3(g) of the Act who were present and prepared to work on the 7:00 a.m. shift on January 30, 1980.

4. Somerset Mine #60 is owned by the Bethlehem Mines Corporation, Box 143, Eight Four, Pennsylvania.
5. Somerset Mine #60 is an underground mine operating three shifts a day, employing 580 men.
6. Charles McGlothlin [sic] is the superintendent of Somerset Mine #60.
7. Mark Segedi has been delegated by the members of UMWA Local Union 1197 aforesaid to act on their behalf in filing a Complaint with MSHA.
8. On January 30, 1980, the aforesaid miners scheduled to work the 7:00 a.m. to 4:00 p.m. shift at Somerset Mine #60 refused to enter the mine because the automatic guard door on the Otis elevator failed to close properly and operate in a safe manner.
9. Angelo Giacomantonio, cleaning plant foreman, attempted to close the elevator doors manually and thereafter use it to lower the miners into the mine but the men refused.
10. The miners were then told by mine management personnel to ride the elevator, walk into the mine by use of the slope or go home.
11. The men refused to walk into the mine by using the slope because it was unsafe in that the handrails were broken and there were ice accumulations in the foot paths.
12. Federal Inspector Cantini arrived at the mine at 7:20 a.m. and he was informed by UMWA Local President Lloyd Hrutkay of the problem but he refused to make an investigation of the problem and sometime thereafter left the mine premises.
13. At 8:10 a.m. on January 30, 1980, a representative of Otis Elevator Company made some repairs to the automatic doors and determined that the elevator was safe to use.
14. At 8:30 a.m. on January 30, 1980, the mine management representatives told the men to enter the mine but also advised them that their pay would be docked until 8:30 a.m.
15. The Safety Committeemen then met with mine management in an effort to resolve the dispute and at 10:00 a.m. the men entered the mine.

16. On January 31, 1980, a written complaint was filed by the UMWA Safety Committee at the Washington, Pennsylvania Field Office of MSHA.
17. On February 1, 1980, Inspector John Poyle made an investigation and issued a citation under Part 75.1725(A), 30 C.F.R. because the mine operator failed to take unsafe equipment out of service.
18. On February 5, 1980, the Federal Subdistrict office personnel concluded that if the shaft guard doors could be closed manually there was no violation and the citation was vacated.
19. On March 3, 1980, the district manager received a legal opinion from Joseph O. Cook, Administrator for Coal Mine Safety and Health concerning 75.1725 which stated that to operate the automatic doors manually was a violation.
20. In February, 1980, Mark Segedi filed a Complaint with the Mine Safety and Health Administration on behalf of the aforesaid miners scheduled to work on the 7:00 a.m. shift on January 30, 1980 against the Bethlehem Mines Corporation alleging that the Company had violated Section 105(c) of the Act.
21. On May 30, 1980, the Mine Safety and Health Administration determined that no violation had occurred and in a letter dated May 30, 1980, and received June 4, 1980, Mark Segedi was advised of the Administration's decision.
22. The aforesaid miners were discriminated against by Bethlehem Mines Corporation because of their refusal to work in unsafe and unhealthy conditions. Prior to and at the time the Complainants were discriminated against they were engaged in protected activity under Section 105(c) of the Act.

The Complainants' prayer for relief requested: (1) a finding that the Complainants were unlawfully discriminated against by the Respondent for engaging in activity protected under section 105(c) of the 1977 Mine Act; (2) the entry of an order directing the Respondent to pay the Complainants full back pay and employment benefits which were lost due to the alleged acts of discrimination; (3) an award of interest to be added to all back pay until the date such back pay is tendered; (4) the entry of an order requiring that the Complainants' employment records be cleared of all unfavorable references concerning the activities that occurred on January 30, 1980; (5) the entry of an order requiring the Respondent to cease and desist all harassment of the Complainants because said harassment has a chilling effect upon the Complainants' contractual and legal right to refuse to work where there are safety and health hazards; and (6) the assessment of an appropriate civil penalty

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for the Respondent's unlawful interference with the Complainants' exercise of rights protected by section 105(c) of the 1977 Mine Act.

On July 18, 1980, the Respondent filed an answer which states, in part, as follows:

1. Respondent denies that it committed any acts of discrimination involving the complainants.
2. Respondent specifically denies that it committed any acts of discrimination concerning activities protected under the provisions of 105(c)(1) of the Act.
3. Respondent denies that any "unfavorable references" concerning this incident of January 30, 1980 are part of the employment records of the listed complainants.
4. Respondent further denies that any harassment of the Complainants by Respondent regarding this incident has ever occurred or is occurring.
5. Respondent states that an investigation of this complaint has been made by a special investigator of the Mine Safety and Health Administration and upon a review of the facts surrounding this incident, MSHA properly determined that a violation of Section 105(c) had not occurred.
6. Respondent denies that all circumstances related to this issue entitle the Complainants to any of the relief requested by Complainants.
Respondent, therefore, respectfully requests that all requests for relief contained in Complainant's [sic] Application for Review be denied because they are without merit.

On August 18, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on September 15, 1980, in Washington, Pennsylvania. The hearing was held as scheduled with representatives of both parties present and participating.

Various discussions were held on the record between counsel for the parties and the undersigned concerning the precise number of Complainants and their names, the number of hours that each Complainant was scheduled to work on January 30, 1980, and the precise number of hours of back pay claimed by each Complainant. The parties agreed to address these matters by the filing of an appropriate stipulation. The stipulation was filed on November 26, 1980. The requisite information is set forth in an attached document styled "complainant status summary," a copy of which is attached to this decision as Appendix A.

Following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, difficulties experienced by counsel necessitated a revision thereof. Briefs and proposed findings of fact and conclusions of law were filed by the Respondent and the Complainants on November 3, 1980, and November 13, 1980, respectively. The Respondent and the Complainants filed reply briefs on November 26, 1980, and December 1, 1980, respectively.

II. Witnesses and Exhibits

A. Witnesses

The Complainants called as their witnesses Lloyd Hrutkay, a mine mechanic at the Somerset No. 60 Mine, and president of Local Union No. 1197, District 5, United Mine Workers of America; Gary Bostich, a maintenance repairman, or mechanic, at the Somerset No. 60 Mine, and a mine committeeman for Local Union No. 1197; Harry L. Nicklow, special assistant to the safety director of the United Mine Workers of America; and Mark Segedi, a continuous miner operator at the Somerset No. 60 Mine, and a safety committeeman for Local Union No. 1197.

The Respondent called as its witnesses Paul Vancura, an electrical engineer employed by the Respondent; Neal Merrifield, the assistant mine superintendent at the Somerset No. 60 Mine; and Herbert Sutter, a maintenance mechanic employed by the Otis Elevator Company.

B. Exhibits

1. The parties introduced the following joint exhibits into evidence:

J-1 is a copy of a BCOA-UMWA Standard Health and Safety Grievance Form filed under Article III, Section (i) of the National Bituminous Coal Wage Agreement of 1978.

J-2 is a copy of the National Bituminous Coal Wage Agreement of 1978.

J-3 is a copy of a BCOA-UMWA Standard Grievance Form.

J-4 is a copy of Citation No. 626046, February 1, 1980, 30 C.F.R. 75.1725(a), issued by Federal mine inspector John N. Poyle.

J-5 is a copy of a February 6, 1980, determination vacating J-4, issued by Federal mine inspector Alvin Shade.

2. The Complainants introduced the following exhibits into evidence:

U-1 is a copy of a letter dated February 11, 1980, from

Mr. Harry Nicklow to Mr. William Dupree, coal mine
inspection supervisor.

U-2 is a copy of a letter dated April 14, 1980, from Mr. Donald W. Huntley, District Manager, Coal Mine Safety and Health District 2, to Mr. Harry Nicklow, in reply to U-1.

U-3 is a copy of a memorandum dated March 3, 1980, for Mr. Donald W. Huntley, from Mr. Joseph O. Cook, Administrator for Coal Mine Safety and Health, setting forth a legal opinion concerning mandatory safety standard 30 C.F.R. 75.1725.

U-4 is a drawing prepared by Mark Segedi during the course of his testimony.

3. The Respondent did not introduce any exhibits into evidence.

III. Issues

1. Whether any or all of the Complainants refused to use the Otis automatic elevator at Respondent's Somerset No. 60 Mine on January 30, 1980.

2. If any or all of the Complainants refused to use the Otis automatic elevator at Respondent's Somerset No. 60 Mine on January 30, 1980, then whether such refusal was activity protected by section 105(c)(1) of the 1977 Mine Act.

3. If any or all of the Complainants refused to use the Otis automatic elevator at Respondent's Somerset No. 60 Mine on January 30, 1980, and such refusal was activity protected by section 105(c)(1) of the 1977 Mine Act, then whether the Respondent discriminated against or otherwise interfered with the exercise of the statutory rights of such Complainants in retaliation for engaging in such protected activity.

4. If the Respondent discriminated against or otherwise interfered with the exercise of the statutory rights of any or all of the Complainants in retaliation for engaging in activity protected by section 105(c)(1) of the 1977 Mine Act, then what is the appropriate remedy.

IV. Opinion and Findings of Fact

A. Stipulations

1. The parties entered into the following stipulations on September 15, 1980:

- a. The Administrative Law Judge has jurisdiction in the above-captioned proceeding (Tr. 12-14).
- b. Two written grievances related to this section 105(c) complaint have been filed by appropriate United Mine Workers of America representatives and are currently pending resolution in the grievance procedure (Tr. 13-14).

c. The Somerset No. 60 Mine employed 606 employees as of January 30, 1980, and produced 920,575 tons of clean coal in 1979 (Tr. 13-14).

d. Bethlehem Mines Corporation produced 12,499,402 clean tons of coal in 1979 (Tr. 13-14).

e. The Somerset No. 60 Mine had 158 employees scheduled to work the January 30, 1980, day shift (Tr. 13-14).

f. Mark Segedi properly filed the discrimination complaint in the instant case on behalf of all affected miners (Tr. 13-14).

2. On November 26, 1980, the parties filed the following stipulations with respect to the Complainants whose names appear on Exhibit A of the discrimination complaint filed on June 30, 1980:

a. The attached Complainant Status Summary (FN.1) accurately reflects the regularly scheduled hours and starting times of the complainants on the day in question. (The regularly scheduled starting times of ineligible complainants have not been included.)

b. The attached Complainant Status Summary accurately reflects the number of hours the complainants worked and were paid for on the day in question.

c. The attached Complainant Status Summary accurately reflects the number of hours for which each of the eligible complainants is seeking pay.

d. Thirty-six of the complainants are not considered eligible for pay in this proceeding, for the reasons listed on the attached Complainant Status Summary. Certain of these ineligible complainants who did not work as scheduled still received pay from other sources, such as the Personal and Sick Leave and Floating Vacation provisions of the collective bargaining agreement. Others who did not work received workmen's compensation payments.

e. The Judge should utilize the Complainant Status Summary and the transcript as bases for determining the number of hours, if any, for which an eligible complainant is entitled to be paid.

f. If it is determined that Respondent is liable for any hours' pay to any complainant listed as an eligible complainant in the Complainant Status Summary, Respondent will determine the permanent job classification held by the complainant on January 30, 1980. Respondent will then multiply the standard hourly wage rate for that classification, as set forth in

Appendix A-Part I of the collective bargaining agreement, by the number of hours to which the complainant is entitled, in order to determine the full amount of pay due the complainant.

B. Discussion

The activities giving rise to the instant claim of discrimination occurred on January 30, 1980, at the Respondent's Somerset No. 60 Mine. The affected miner-complainants were employees at the mine who were scheduled to work the day shift. Their regularly scheduled starting times ranged from 7 a.m. to 8:15 a.m. The facts and surrounding circumstances are set forth in the paragraphs below.

1. Activities Occurring Prior to 7 a.m.

Mr. Lloyd Hrutkay, a day shift mine mechanic and president of Local Union No. 1197, District 5, United Mine Workers of America, arrived at the Respondent's Somerset No. 60 Mine at approximately 5:40 a.m. on January 30, 1980 (Tr. 16-18). Thereafter, he was informed by Mr. Thomas Huddock, the midnight shift lampman, that the Otis automatic elevator had "gone down," or malfunctioned, at approximately 3:20 a.m. (Tr. 18, 51). This elevator is used to transport the miners to the coal seam (Tr. 17-18). Although Mr. Huddock did not explain the nature of the problem (Tr. 38), he did inform Mr. Hrutkay that the Otis Elevator Company had been contacted but that the elevator repairman had not yet arrived (Tr. 18).

At approximately 6 a.m., Mr. Paul Vancura, an electrical engineer employed by the Respondent, received a telephone call at his home from mine management pertaining to an unrelated problem. Mr. Vancura was informed that the rotary dump equipment located underground had encountered problems, or gone down, several hours earlier. Mr. Vancura was advised to go to the mine and investigate the problem (Tr. 134, 136-137).

Mr. Vancura arrived at the mine at approximately 6:40 a.m. At that time, mine management advised Mr. Vancura that he would not be able to go underground because the elevator was not functioning. Specifically, Mr. Vancura was informed by mine management that they were having trouble with the outer doors at the top level. Mr. Vancura was asked to determine the cause of the problem (Tr. 136-137).

Mr. Vancura proceeded to the elevator and noted that the outer doors were open approximately 8 to 10 inches, a condition that would prevent the elevator from performing. Certain individuals were instructed to prevent people from entering the elevator. Mr. Vancura then proceeded to the elevator machinery control room located atop the elevator. There, he found Mr. Joe Forte, the chief electrical foreman, and one of the Wilson Shop electricians. The three men proceeded to perform a rather thorough examination of the elevator (Tr. 137-138, 141-143).

According to Mr. Vancura, the test results indicated that the elevator was electrically sound (Tr. 138, 142-143). Following the test, he apprised Mr. Neal Merrifield, the assistant mine superintendent, that the sole problem with the elevator was a sticky door switch on the outer doors at the top level (Tr. 139).

The switch, a sill trip switch, is activated when a mechanical

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bar located inside the outer doors falls down to lock the outer doors in a closed position (Tr. 143-144). The switch functions as a safety device by insuring that the outer doors are completely closed before allowing the elevator car to descend, and thus prevents individuals on the top level from falling down the elevator shaft (Tr. 85, 145). However, once the doors close and the mechanical bar locks the doors, the elevator will operate. Once the car leaves the landing, the inside doors will not open unless one bends or breaks something (Tr. 257-258). On the day in question, the only problem was getting the doors to close. Closing the doors manually enabled the switch to operate in a normal fashion (Tr. 145).

Mr. Vancura and Mr. Forte informed Mr. Merrifield that the elevator was not in an unsafe condition (Tr. 156-157). Then, it appears that Mr. Vancura proceeded to the change room to prepare to go underground. By the time he returned to the elevator, Mr. Forte and the Wilson Shop electrician had already proceeded underground by way of the elevator. At approximately 7:10 a.m., Mr. Vancura boarded the elevator for the trip underground. Several attempts were made to close the outer doors manually before such doors would remain closed. Once they closed, the elevator transported Mr. Vancura to the bottom of the shaft (Tr. 139, 146, 156-157).

2. Activities Occurring Between 7 a.m. and 9:40 a.m.

Messrs. Hrutkay, Bostich, and Merrifield were intimately involved in the activities occurring between 7 a.m. and 9:40 a.m. The testimony of each of these witnesses reflects general agreement as to certain matters. There is some disagreement as to certain details which is significant enough to warrant summarizing the testimony of each witness separately. The findings of fact based on this testimony are set forth in Part IV(B)(2)(d) of this decision.

The testimony of Mr. Herbert Sutter, the elevator mechanic from the Otis Elevator Company who performed the January 30, 1980, elevator repairs, has not been summarized separately because most of the matters addressed by Mr. Sutter are reflected in, and in harmony with, the testimony of Mr. Merrifield. Findings of fact based on Mr. Sutter's testimony appear in Part IV(B)(2)(d) of this decision.

a. Mr. Hrutkay's Version

Mr. Hrutkay and his fellow mine mechanics were scheduled to begin work at 7 a.m. Mr. Hrutkay apprised his colleagues that the elevator was down (Tr. 18, 20). Mr. Hrutkay testified that when he first observed the elevator, Mr. Jack Price, the outside foreman, and Mr. Richard Matthews, a shop mechanic, were attempting to close the outer doors by banging them together (Tr. 23, 48). The inner doors were closing, but the outer doors were springing open approximately 1 foot each time such outer doors were forced together manually (Tr. 23). Mr. Hrutkay observed them perform this operation approximately five or six times, and

deduced that the same problem had existed at 3:20 a.m. (Tr. 24, 37-38). To the best of Mr. Hrutkay's recollection, the elevator operated on those occasions when the men succeeded in manually closing the outer doors (Tr. 43).

Then, according to Mr. Hrutkay, at approximately 7:15 a.m., Mr. Merrifield approached and informed the men that the elevator was safe. According to Mr. Hrutkay, Mr. Merrifield accorded the men three options at that time: (1) either use the elevator to enter the mine, or (2) use the slope to walk into the mine, or (3) go home (Tr. 18, 24, 39). Mr. Hrutkay and the other men promptly boarded the elevator and the inner doors closed (Tr. 24-25, 39).

Mr. Hrutkay testified that the mine mechanics remained aboard the elevator for approximately 15 minutes while the men on the outside attempted to manually close the outer doors. He testified that he heard the outer doors bang together approximately five or six times. During this time, the elevator never began its descent to the bottom of the shaft. Finally, Mr. Gary Bostich, a mine committeeman, expressed both a strong desire to get off of the elevator and strong reservations about whether the elevator was safe to operate (Tr. 24-26, 39-41). The statement was made loud enough for all aboard the elevator to hear. The men promptly got off of the elevator (Tr. 26-27).

Mr. Hrutkay testified that he and Mr. Bostich then went to see Mr. Charles McGlothlin, the mine superintendent (Tr. 27, 47). Mr. Hrutkay testified that he wanted to tell Mr. McGlothlin certain things, but that Mr. McGlothlin abruptly cut him off, stating: "Lloyd, I want you to understand one thing. You're not going to run this mine." (Tr. 27-29). According to Mr. Hrutkay, Mr. McGlothlin accorded the miners the same three options mentioned by Mr. Merrifield, i.e., either use the elevator, or walk the slope or go home (Tr. 31). He testified that Mr. Bostich inquired as to whether the slope was safe, and that Mr. McGlothlin responded in the affirmative. He further testified that Mr. Bostich raised the issue of ice on the slope, and that Mr. McGlothlin responded by suggesting that the men carry some sand to deal with the problem (Tr. 27-28). At that point, Messrs. Hrutkay and Bostich left the mine superintendent's office (Tr. 27-28).

Mr. Hrutkay testified that he then talked to Federal mine inspector Guido Cantini. Inspector Cantini was at the Somerset No. 60 Mine at the time. Mr. Hrutkay testified that he informed the inspector that the elevator was not operating automatically, and that he requested an inspection. Inspector Cantini gave a noncommittal reply and left the mine without inspecting the elevator (Tr. 32, Exh. U-2).

Mr. Hrutkay testified that following his conversation with Inspector Cantini, he returned to the elevator and observed Mr. Sutter performing some type of work on it (Tr. 33). However, it appears that Mr. Hrutkay never spoke to Mr. Sutter (Tr. 49).

According to Mr. Hrutkay, at approximately 8:15 a.m., mine management stated that the elevator was safe to operate. At the miners' request, Mr. Hrutkay took a test ride to determine whether the elevator was safe. Everything functioned properly and, upon returning to the surface, he pronounced the elevator safe at approximately 8:15 a.m. or 8:20 a.m. Mr. Hrutkay

testified that he did not know what Mr. Sutter did to repair the elevator (Tr. 33-34, 45-46).

Then, according to Mr. Hrutkay, he approached Mr. Merrifield and raised the pay issue. The gist of Mr. Hrutkay's inquiry was whether the men's time, for purposes of pay, would commence at their regularly scheduled starting time, i.e., whether the men would be paid for the time period encompassed by the safety dispute. Mr. Merrifield replied that the men would be paid "portal-to-portal" (Tr. 35). The term "portal-to-portal" refers to Article IV, Section b, Paragraph 1, of the National Bituminous Coal Wage Agreement of 1978, which provides, in part, that for "all inside Employees a work day of eight (8) hours from portal-to-portal * * * is established * * *" (Tr. 46, Exh. J-2). The message conveyed was that the men's starting time, for pay purposes, would commence when they boarded the elevator to go underground, and that the men would not be paid for the time period encompassed by the safety dispute (Tr. 35-36).

According to Mr. Hrutkay, an uproar ensued when the men learned of Mr. Merrifield's determination. Mr. Bostich, acting on instructions from Mr. Hrutkay, persuaded the men to go to work and to file a grievance over the pay issue. According to Mr. Hrutkay, the union persuaded the men to enter the mine at approximately 9:40 a.m. (Tr. 35-36). Mr. Hrutkay testified that the pay issue was the only issue that prevented the men from entering the mine after he pronounced the elevator safe at approximately 8:15 a.m. (Tr. 46). Mr. Hrutkay did not recall any further meetings with mine management aimed at resolving the dispute (Tr. 36).

b. Mr. Bostich's Version

Mr. Bostich's version of what occurred that day is generally in accord with Mr. Hrutkay's version. The two versions differ as to certain details. Mr. Bostich's version is set forth as follows:

Mr. Bostich testified that he arrived at the elevator at approximately 7 a.m. on January 30, 1980. The elevator's outer doors were not closing completely in that they remained approximately 8 to 12 inches apart. For approximately 10 or 15 minutes, the outside foreman and a mechanic attempted to manually close the outer doors. Then, the assistant supervisor arrived and tinkered with it for awhile in an attempt to close the doors. According to Mr. Bostich, Mr. Sutter arrived at approximately 7:30 a.m. (Tr. 55-57).

Mr. Bostich testified that before Mr. Sutter's arrival, mine management told the assembled mine mechanics to board the elevator. It appears from Mr. Bostich's testimony that the mine mechanics objected, stating that the doors were not closing (Tr. 57). At some point in the exchange, Mr. Merrifield accorded the men three options, i.e., either ride the elevator, or walk the slope or go home (Tr. 63).

According to Mr. Bostich, he and the other mine mechanics boarded the elevator after Mr. Sutter's arrival. Mr. Bostich testified that this occurred between 7:25 a.m. and 7:45 a.m.

Once the men boarded, the inner doors closed. They could not see what happened to the outer doors. The elevator did not move, and the men heard those on the outside bang the outer doors together at

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least six times. The men remained aboard the elevator for approximately 3 or 4 minutes, at which point Mr. Bostich expressed a rather strong desire to get off of the elevator, stating that he did not believe that the elevator was safe. The mine mechanics thereupon got off of the elevator (Tr. 58-59).

In response to a question from Mr. Merrifield, Mr. Bostich expressed the opinion that the elevator was unsafe, and indicated that he would not ride the elevator while it was in such condition. At that point, work resumed on the elevator (Tr. 59).

Mr. Bostich testified that after getting off of the elevator, he and Mr. Hrutkay went to Mr. McGlothlin and expressed their concerns about the elevator. He further testified that they informed Mr. McGlothlin that they did not want to ride the elevator until it was fixed properly. According to Mr. Bostich, Mr. McGlothlin started to get "a little bit smart-mouthed." Mr. Bostich testified that Mr. McGlothlin told them that if they were not going to ride the elevator, then to either walk the slope or go home. At that point, Mr. Bostich inquired as to the condition of the slope, and specifically asked whether it was safe to use. Mr. Bostich's testimony characterizes Mr. McGlothlin's response to the question as angry and somewhat what sarcastic. According to Mr. Bostich, Mr. McGlothlin suggested, through the use of vulgar language, that he take a bag of sand with him. At that point, the meeting adjourned (Tr. 63-64). At approximately 10 a.m., Mr. Bostich checked the mine examiner's book and found entries recording ice on the slope and a broken handrail (Tr. 65-67).

Thereafter, at approximately 8:10 a.m., mine management apprised the men that the elevator problem had been corrected. Mr. Hrutkay completed his test ride at approximately 8:20 a.m. and pronounced the elevator safe to ride. Then, either Mr. Dickson or Mr. Error stood on a bench and addressed the men, stating they were going to perform mostly "dead work" underground because the rotary dump had gone down on the midnight shift. It appears from the tenor of Mr. Bostich's testimony that the speaker ended his presentation on a handclapping high note by stating: "How about let's go down and do our work." According to Mr. Bostich, the consensus amongst the miners was to go to work because the elevator was safe to ride (Tr. 67-69).

The next thing Mr. Bostich heard was Mr. Merrifield's statement that the men would not be paid for the time they had already spent at the mine, that their time would start when they boarded the elevator to go underground. The miners were angered by the decision, and Messrs. Bostich and Hrutkay returned to Mr. McGlothlin's office to discuss the matter. They apprised Mr. McGlothlin of Mr. Merrifield's decision, and notified him of a provision in the collective bargaining agreement which they interpreted as entitling the men to reporting pay for the time already spent at the mine. Mr. McGlothlin affirmed Mr. Merrifield's determination, and stated that the decision was final (Tr. 69-70). According to Mr. Bostich, the issue as to ice on the slope was not discussed during this meeting (Tr. 92).

Messrs. Hrutkay and Bostich left the office, and it was decided that Mr. Bostich would apprise the men of the decision regarding pay.

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The miners greeted the news with a chorus of boos and hisses. Mr. Bostich informed the men that the collective bargaining agreement required them to work under protest and to file a grievance over the pay issue. Mr. Bostich testified that it required "some time" to explain things to the men. Finally, the men boarded the elevator at approximately 9:40 a.m. to enter the mine (Tr. 70).

c. Mr. Merrifield's Version

Mr. Merrifield's version of the events is set forth as follows:

Mr. Merrifield testified that shortly after 7 a.m., he observed that the mine mechanics were still on the surface. He inquired of them as to why they had not gone to work. He testified that in response to the question, the mine mechanics stated that there was a problem with the elevator, that they felt it was unsafe, and that they were not going to use the elevator (Tr. 157). Mr. Merrifield further testified that he thereupon informed the mine mechanics that Messrs. Vancura and Forte had inspected the elevator and had concluded that a problem with a relay switch was preventing the outer doors from making contact; that the outer doors were a safety feature; that the elevator would not operate unless the outer doors made contact; that it was necessary to close the outer doors manually in order to make the elevator operate; and that once the outer doors were closed, the elevator would operate normally (Tr. 157-158, 210). It is significant to note, however, that notwithstanding this statement, mine management was not entirely certain at that point in time as to the precise nature or extent of the problem. Mr. Merrifield testified at a later point in his testimony that although a determination had been made that the switch was the cause of the problem, mine management did not really know what the problem was (Tr. 171-172).

Following the explanation, Mr. Merrifield requested the mine mechanics to go to work but they refused (Tr. 158).

Approximately 15 minutes later, the mine dispatcher and the slope motorman presented themselves at the elevator, and Mr. Merrifield requested them to go to work. Both men complied by boarding the elevator. The doors were closed manually and the elevator transported the two men underground (Tr. 158).

Thereafter, the motormen scheduled to begin work at 7:45 a.m. refused to enter the elevator. Mr. Merrifield testified that he explained the situation to them, that he requested them to go to work, and that they refused. Subsequent thereto, he addressed the men who were scheduled to begin work at 8 a.m., explained the problem to them and requested them to go to work (Tr. 159).

Mr. Merrifield testified that Mr. Sutter arrived at approximately 7:30 a.m. or 7:45 a.m. Mr. Merrifield explained the problem to Mr. Sutter, and requested that he examine the elevator, diagnose the difficulty, and determine whether the

elevator was safe to operate (Tr. 159).

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According to Mr. Merrifield, some of the mine mechanics entered the elevator at approximately 7:45 a.m. Two unsuccessful attempts were made to close the doors manually. Then, the men got off of the elevator and claimed that it was unsafe to operate. They refused to ride it (Tr. 161).

When Mr. Sutter completed his inspection, he informed Mr. Merrifield that the problem was in the sill trip switch and that the elevator was safe to use. However, Mr. Sutter was unsure as to how much time would be required to determine precisely what was wrong with the switch. Mr. Merrifield inquired as to whether he could use the elevator to transport the men underground and then turn the elevator over to him for repairs. Mr. Sutter responded in the affirmative (Tr. 159-160).

Then, at approximately 8:15 a.m., Mr. Merrifield addressed the miners, telling them that Messrs. Vancura, Forte and Sutter had inspected the elevator, that the problem was in the sill trip switch, and that the three men had determined that the elevator was safe to operate. The men still refused to ride the elevator. Mr. Merrifield thereupon instructed the men that only underground work was available, and accorded them three options, i.e., either ride the elevator, or walk the slope or go home. Then, Mr. Mike Error, the mine foreman, addressed the men, telling them that the elevator was safe to ride, and that the rotary dump was down. He requested the men to go to work, and the miners began to move toward the elevator. As some of the miners started to enter the elevator, someone asked Mr. Merrifield about pay. Mr. Merrifield responded that in accordance with both the collective bargaining agreement and company policy, the men would be paid "portal-to-portal." The miners thereupon decided against entering the elevator, and began arguing and talking amongst themselves (Tr. 160-162).

Mr. Merrifield testified that at that point he reached the conclusion that the miners were refusing to work, because none of them were going to enter the elevator, and because none of them wanted to walk the slope. He thereupon took the elevator out of service and turned it over to Mr. Sutter for repairs (Tr. 162).

Mr. Merrifield testified that he proceeded to Mr. McGlothlin's office, and explained the matter to him. Shortly thereafter, Messrs. Hrutkay and Bostich entered the office accompanied by other members of the local union. They asked Mr. McGlothlin whether he was going to pay them from the time their shift started. Mr. McGlothlin apprised them of company policy and affirmed Mr. Merrifield's determination. Later, during the same meeting, the issue was raised as to whether the slope was safe. Messrs. Merrifield and McGlothlin responded that the area had been examined during the preshift examination and that no unsafe conditions had been reported. Based on that report, the men were told that the slope was safe to enter. Mr. Merrifield testified that the subject of possible ice on the slope was raised, that the fireboss book indicated that the slope was safe, and that it was suggested that the men take sand with them (Tr. 163-164).

The employees used the elevator to enter the mine at approximately 9:40 a.m. (Tr. 164).

d. Findings Based on the Three Versions

Messrs. Hrutkay and Bostich and their fellow mine mechanics arrived at the elevator at approximately 7 a.m. on January 30, 1980. They observed Mr. Jack Price, the outside foreman, and Mr. Richard Matthews, a shop mechanic, attempting to manually close the outer doors by banging them together. With each attempt, the doors would spring open approximately 8 to 12 inches. There was no problem with the inside doors. Mr. Hrutkay appears to have inferred that this was the same problem that had existed at 3:20 a.m. Additionally, Mr. Hrutkay knew that the elevator repairman had not yet arrived to correct the problem.

Mr. Merrifield, after observing that the mine mechanics had not gone underground, approached them and inquired as to why they were still on the surface. The mine mechanics stated that there was a problem with the elevator, that they felt it was unsafe, and that they were not going to use the elevator. Mr. Merrifield thereupon explained that Messrs. Vancura and Forte had inspected the elevator and had concluded that a problem with a relay switch was preventing the outer doors from making contact; that the outer doors were a safety feature; that the elevator would not operate unless the outer doors made contact; that it was necessary to close the outer doors manually; and that once the outer doors were closed, the elevator would operate normally. He thereupon requested the men to board the elevator and go to work. However, it is significant to note that at that point in time mine management was not entirely certain as to the precise nature and extent of the problem. Mr. Merrifield accorded the mine mechanics three options, i.e., either ride the elevator, or walk the slope or go home. The mine mechanics boarded the elevator, and the inside doors closed. They heard the men on the outside make several attempts to close the outer doors by banging such doors together. After approximately 3 or 4 minutes, Mr. Bostich expressed a rather strong desire to get off of the elevator, stating that he did not believe the elevator was safe. The statement was made loud enough for all aboard the elevator to hear. The men got off of the elevator. Then, in response to a question, Mr. Bostich told Mr. Merrifield that, in his opinion, the elevator was unsafe, and stated that he would not ride the elevator while it was in such condition.

Messrs. Hrutkay and Bostich thereupon proceeded to Mr. McGlothlin's office and explained the problem. Mr. McGlothlin took the same approach as Mr. Merrifield and told them to either use the elevator, or walk the slope or go home. Mr. Bostich thereupon asked Mr. McGlothlin whether the slope was safe to use and specifically raised the issue of ice on the slope. Mr. McGlothlin, through the use of a rather explicit vulgarity, advised Mr. Bostich to carry a bag of sand. The entries in the mine examiner's book recorded the presence of ice on the slope and a broken handrail. Messrs. Hrutkay and Bostich thereupon left Mr. McGlothlin's office.

Then, Mr. Hrutkay approached Inspector Cantini, advised him that the elevator was not operating, and requested an inspection.

Inspector Cantini gave a rather noncommittal reply, and left the property without inspecting the elevator.

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At various times between approximately 7:30 a.m. and 8 a.m., Mr. Merrifield addressed other groups of miners as they reported to the elevator to begin work. It appears that Mr. Merrifield informed all of these groups of the determination made by Messrs. Forte and Vancura. All refused to board the elevator, except the mine dispatcher and the slope motorman.

At some point in time between 7:15 (Tr. 261) and 7:30 a.m., Mr. Sutter arrived at the mine to attend to the elevator problem. Mr. Merrifield explained the problem and the findings of Messrs. Forte and Vancura, and requested an examination of the elevator, a diagnosis of the problem, and a determination as to whether the elevator was safe to operate. Upon completing the examination, Mr. Sutter informed Mr. Merrifield that the problem was in the sill trip switch and that it would be safe to use the elevator. However, Mr. Sutter was uncertain as to the amount of time that would be required to determine precisely what was wrong with the switch. Mr. Merrifield inquired as to whether he could use the elevator to transport the men underground and then turn the elevator over to him for repairs. Mr. Sutter responded in the affirmative. It should be noted that the elevator was an important part of the escapeway system for the three sections on the left side of the mine (Tr. 220-224).

At approximately 8:10 or 8:15, mine management apprised the miners that the elevator was safe to operate. Mr. Hrutkay, acting pursuant to the request of the miners, took a test ride to determine whether the elevator was safe. Everything functioned properly during the test ride, and, upon returning to the surface, Mr. Hrutkay pronounced the elevator safe. At approximately 8:15 a.m., the miners headed toward the elevator for the trip underground. At that point, Mr. Hrutkay raised the pay issue with Mr. Merrifield. Mr. Merrifield stated that the men would not be paid for the time they had already spent at the mine. The miners were angered by the decision and all movement in the direction of the elevator ceased. Mr. Merrifield reached the conclusion that the miners were refusing to work and that they were not going to use the elevator. Accordingly, he removed it from service and turned it over to Mr. Sutter for repairs.

Mr. Merrifield went to the mine superintendent's office and explained the matter to Mr. McGlothlin. Shortly thereafter, Messrs. Hrutkay and Bostich, accompanied by other members of the local union, entered Mr. McGlothlin's office to discuss the matter with him. They told Mr. McGlothlin about Mr. Merrifield's decision, and notified him of a provision in the collective bargaining agreement which they interpreted as entitling the men to reporting pay for the time already spent at the mine. Mr. McGlothlin then apprised the men of company policy, affirmed Mr. Merrifield's determination, and stated that the decision was final. It is possible, although unlikely, that the issue of ice on the slope was raised again during this meeting.

After Messrs. Hrutkay and Bostich left the superintendent's office, they decided that Mr. Bostich would inform the miners of the decision regarding pay.

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The miners greeted the news with a chorus of boos and hisses. The miners were told that the provisions of the collective bargaining agreement required them to work under protest and to file a grievance over the pay issue. It required "some time" to explain things to the men. Finally, the men boarded the elevator at approximately 9:40 a.m. to enter the mine. The elevator repairs had been completed at approximately 8:45 a.m. (Tr. 262-263). (FN.2)

The pay issue was the sole issue that prevented the men from entering the mine at 8:15 a.m.

3. Safety Concerns

Mr. Hrutkay was a mine mechanic with 12 years of experience in repairing the electrical components of mechanical equipment, such as locomotives (Tr. 16, 50-51). It appears that he had no experience as relates to performing repair work on the elevator (Tr. 29).

Mr. Hrutkay was concerned that banging the doors together manually would have an adverse effect on the automatic switches. His experience gained from

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working with other types of equipment indicated that the banging could knock the arc chutes, wires and coils off the contactors. He was also concerned about the possibility of the elevator descending uncontrolled to the bottom of the shaft (Tr. 30-31). However, it is significant to note that Mr. Hrutkay did not express any of these concerns to Inspector Cantini when making the inspection request (Tr. 44-45, 47-48).

Mr. Bostich's duties as a mine mechanic required him to perform mechanical work on electrical equipment. At least some of this equipment was designed to operate automatically, as opposed to manually. Mr. Bostich had been trained to remove automatic equipment from service when it failed to operate properly. When an electrical component malfunctions, it can prevent equipment designed to operate automatically from operating automatically. When the components burn out, the equipment is ordinarily "down" (Tr. 60-62).

Mr. Bostich was not concerned about an uncontrolled descent. Rather, he feared that the malfunction in the circuitry might cause the elevator to become stuck in the shaft and trap those aboard it (Tr. 60, 87). Additionally, he feared the possibility of a fire generated by an electrical arc (Tr. 100-101).

In the past, manual operation of the elevator had been accomplished through a procedure different than the one used on the morning of January 30, 1980. On January 30, 1980, the inner doors were closed first and then the outer doors were closed. The procedure used in the past was exactly the opposite. In the past, the elevator operator closed the outer doors manually from inside the elevator and then closed the inner doors (Tr. 99-100). Mr. Sutter, a trained elevator mechanic, used a similar technique on January 30, 1980 (Tr. 256).

4. Condition of the Slope

A joint union/company inspection party examined the slope after 9:40 a.m. Mr. Mark Segedi, a continuous miner operator and a member of the mine safety committee, and Messrs. Bostich and Merrifield were members of the inspection party (Tr. 71, 124, 164-166).

The slope was angled at 17 degrees, and was approximately 1,200 to 1,500 feet in length (Tr. 74, 91, 166). A conveyor belt, hoist equipment and a staircase were located in the slope.

The conveyor belt was located on the lefthand side of the slope and was used to transport coal out of the mine (Tr. 72). The hoist was located on the righthand side of the slope and was used to transport supplies into the mine. An engine-powered, surface-mounted cable hoist caused the hoist cars to ascend or descend through the slope on a railroad track (Tr. 72, 75-76).

The concrete staircase was located between the conveyor belt and the hoist equipment. The steps were approximately 14 to 15 inches wide and had 6- to 8-inch risers (Tr. 73, 232). Steel

girders, or "I" beams, were located

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to the right of the staircase. The girders were spaced approximately 3 to 5 feet apart and were numbered for identification. A handrail was located on the righthand side of the steps. The handrail was bolted to the girders (Tr. 72, 74-76, 91).

The inspection party encountered a patch of ice on the steps which extended from approximately 141 girder to 152 girder. This location was at the approximate midpoint of the slope. The patch of ice was approximately 15 feet in length. The thickness of the ice varied from approximately 1 inch to approximately 4 inches. The handrail was broken at that location and, accordingly, it was necessary to negotiate the patch of ice without the assistance of a handrail. It required a substantial degree of caution to successfully negotiate the patch of ice (Tr. 78-79, 91, 102-103, 125-127, 164-165, 233).

The combination of ice and a broken handrail indicates that the danger of falling was great. The slope did not afford a safe means of access to the mine for a large contingent of men. If one man had fallen on the ice, he could have caused some or all of the men in front of him to fall in domino sequence.

5. Governing Legal Standard and Application of the Law to the Facts

The question presented in this case is whether the Complainants were deprived of earnings in retaliation for engaging in activity protected by section 105(c)(1) of the 1977 Mine Act. The protected activity alleged is a refusal to work under unsafe or unhealthful conditions.

Section 105(c)(1) of the 1977 Mine Act provides that:

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.

In *Secretary of Labor ex rel. David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2 BNA MSHC 1001, 1980 CCH OSHD par. 24,878 (1980), the Federal Mine Safety and Health Review Commission (Commission) held that section 105(c)(1) of the 1977 Mine Act accords a miner the right to refuse to work under conditions which he believes, in good faith, to be unsafe or unhealthful. The Commission's Pasula decision has not "definitely set all the contours of the right to refuse to work." 2 FMSHRC at 2793. However, it appears that some objective evidence supporting a conclusion that a threat to health or safety existed is necessary before it can be determined that the miner has proved a condition believed, in good faith, to be unsafe or unhealthful, and thus be able to rely upon such reason as a foundation for the refusal to work. 2 FMSHRC at 2793-2794.

As relates to the burden of proof, the Commission held in Pasula that:

[T]he 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. [Emphasis in original.]

2 FMSHRC at 2799-2800.

At the outset, one critical point should be noted. The testimony of Messrs. Sutter and Vancura proves that the elevator was safe to operate. Neither the defect existing on January 30, 1980, nor closing the outside doors manually constituted an unsafe condition. However, the fact that the elevator was actually safe to use does not mean that the miners engaged in unprotected activity when they refused to use it. The right to refuse to work accorded by section 105(c)(1) of the 1977 Mine Act is not geared to whether the condition is in fact unsafe, but to whether the miner believes, in good faith, that the condition is unsafe.

A preponderance of the evidence establishes that the Complainants who were scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m., engaged in protected activity on the morning of January 30, 1980, but that such protected activity ceased at approximately 8:15 a.m. Various arguments have been raised as to the existence of the slope as an alternate means of access to the mine. These arguments are rejected because the slope did not afford safe access to the mine for a large body of men.

The discrimination complaint will be dismissed as relates to those Complainants whose regularly scheduled starting time was 8:15 a.m. because the record fails to show that such Complainants engaged in activity on January 30, 1980, protected by section 105(c)(1) of the 1977 Mine Act. Therefore, the discussion set forth in the following paragraphs will be confined to those Complainants whose regularly scheduled starting times were 7 a.m., 7:45 a.m. and 8 a.m.

As relates to the time period between 7 a.m. and 8:15 a.m., the record discloses that the Complainants scheduled to begin work between 7 a.m. and 8 a.m. refused to use the elevator for safety reasons. This activity was protected activity within the meaning of section 105(c)(1) because some objective evidence existed to support a good faith belief on their part that the elevator was unsafe. The objective evidence consisted of: (1) the failure of the elevator's outer doors to function normally; (2) the violent manner in which company personnel were attempting to manually close the outer doors; (3) the repeated, violent efforts needed to successfully close the outer doors manually; and (4) the Respondent's unexplained departure from the method used in the past when it had been necessary to close the outer doors manually.

The Respondent concedes that protected activity occurred in the form of Messrs. Hrutkay and Bostich notifying Mr. Merrifield of their concern about the elevator. However, Respondent appears to argue that the subsequent refusal to work was not protected activity because mine management had discovered and investigated the problem prior to 7 a.m. and, as a result, had determined that the elevator was safe. According to Respondent, Mr. Merrifield gave a reasonable response to Messrs. Hrutkay's and Bostich's protected activity by relaying to them the results of Mr. Vancura's investigation. According to the Respondent, the activities occurring subsequent thereto were unprotected (Respondent's Posthearing Brief, pp. 10-12; Respondent's Reply Brief, pp. 6-7).

I disagree with the Respondent's position because, in effect, it penalizes the miners for refusing to accept management's evaluation of the safety hazard. A miner is not required to accept his supervisor's evaluation of the danger. *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974). In fact, the record reveals that the so-called "reasonable response" from mine management was anything but reasonable. Mr. Merrifield was attempting to persuade the miners to use the elevator and attempting to persuade them that

it was safe to do so at a point in time

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when, by his own admission, mine management did not know the precise nature and extent of the problem. The miners acted prudently by not substituting Mr. Merrifield's judgment for their own judgement.

The Respondent argues, in the alternative, that if protected activity did not cease when Mr. Merrifield explained the results of Mr. Vancura's investigation to Messrs. Hrutkay and Bostich, then it definitely ceased when Mr. Hrutkay apprised Inspector Cantini of the problem and Inspector Cantini took no action. (FN.3) According to the Respondent, Inspector Cantini's failure to investigate the complaint constituted, in effect, his determination that the elevator's condition neither violated a mandatory safety standard nor constituted an imminent danger. Therefore, according to the Respondent, there was no need for the statutory protection regarding Mr. Hrutkay's complaint to continue (Respondent's Posthearing Brief, pp. 11-12; Respondent's Reply Brief, p. 7).

The Respondent's interpretation of the legal consequences of the inspector's inaction falls squarely within the realm of the ludicrous. Accordingly, the Respondent's interpretation is rejected.

Additionally, the Respondent contends that the miners' safety concerns were unreasonable. In support of its position, the Respondent points to the fact that the slope motorman and the dispatcher used the elevator despite the door problem, and to the fact that all of the miners were ready to use the elevator at 8:15 a.m. in spite of the fact that no repairs had yet been made (Respondent's Posthearing Brief, p. 12). However, these considerations do not establish that the miners' belief was unreasonable as relates to whether the elevator was safe. The fact that the dispatcher and the slope motorman used the elevator to enter the mine standing alone, raises an ambiguity. Although it could be interpreted as tending to support the Respondent's position, it could also be interpreted as either poor judgment or as

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a decision to simply remain silent in order to avoid a confrontation with management. Similarly, the fact that the miners were willing to use the elevator at 8:15 a.m. is not dispositive. It had been pronounced safe by Mr. Hrutkay after his test ride and it appears that the miners thought it had been repaired.

As relates to the second element of the Complainants' prima facie case, the evidence clearly shows that the determination to deny pay for the time period prior to 8:15 a.m. was motivated by the Complainants' protected activity. Mine management clearly knew, as demonstrated by Mr. Merrifield's testimony, that the miners had refused to use the elevator for safety reasons. The decision with respect to pay was motivated by the safety dispute, and, to an extent, was apparently intended to penalize the miners for refusing to accept management's appraisal of the danger. Under the circumstances, it is immaterial that the Respondent elected to justify its actions by reliance on the "portal-to-portal" pay provisions of the collective bargaining agreement and on company policy.

In view of the foregoing, Pasula requires the mine operator to affirmatively defend by showing that he was motivated by the miners' unprotected activities, and that he would have taken adverse action against the miners in any event for the unprotected activities alone. The Respondent has not shown that unprotected activities were involved in its decision to deny pay. In fact, no unprotected activities occurred between 7 a.m. and 8:15 a.m. The decision to deny pay was motivated solely by protected activity.

The activities occurring after 8:15 a.m. were not protected by section 105(c)(1) of the 1977 Mine Act. The refusal to work under conditions believed, in good faith, to be unsafe ended at 8:15 a.m. when Mr. Hrutkay pronounced the elevator safe and the men began to move toward the elevator with the intent to use it. When the pay issue was raised, all movement toward the elevator ceased. Even Mr. Hrutkay testified that the pay issue was the only thing that prevented the men from entering the mine at 8:15 a.m.

The Complainants who were scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m., however, seek a remedy for the time period between 8:15 a.m. and 9:40 a.m. by claiming that such time was lost as result of the Respondent's retaliatory or discriminatory action. The Complainants contend that the delay was caused by the Respondent's pay announcement and that such delay could have been avoided if the Respondent had used reasonable restraint. Additionally, the Complainants contend that the elevator was out of service until 9:40 a.m. (Complainant's Posthearing Brief, p. 14; Complainants' Reply Brief, pp. 8-9).

I disagree with the contention that such considerations entitle the Complainants to a remedy covering the time period from 8:15 a.m. to 9:40 a.m. Section 105(c)(1) authorizes a refusal to work under conditions believed, in good faith, to be

unsafe or unhealthful. It does not authorize a refusal to work over a pay dispute. Therefore, according the Complainants a remedy for

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the time period encompassed by the pay dispute would do violence to the provision set forth in the statute for securing redress for violations of section 105(c)(1). Such self-help remedies are not encompassed by the statute. If a miner suffers discrimination, then section 105(c) accords him a remedy and a lawful means to secure it.

Furthermore, one additional consideration is noteworthy. The work stoppage over the pay issue occurred immediately following the refusal to work under conditions believed, in good faith, to be unsafe. The timing of these two events is attributable entirely to chance. The pay dispute would not have arisen at 8:15 a.m. had Mr. Hrutkay not posed, and Mr. Merrifield not answered, the question concerning pay at that precise point in time. Under other circumstances, the miners might not have learned of the company's decision until they received their pay checks several days later. Their rights should be the same in both instances. Section 105(c)(1) would not authorize a work stoppage in the latter case, and therefore should not be construed to authorize it in the former.

In view of the foregoing, I conclude that the Complainants scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m. engaged in activity protected by section 105(c)(1) between their regularly scheduled starting times and 8:15 a.m. on January 30, 1980. I further conclude that the Respondent discriminated against such Complainants in violation of section 105(c)(1) by denying them pay for the time period between their regularly scheduled starting times and 8:15 a.m. (FN.4)

V. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.
2. Bethlehem Mines Corporation and its Somerset No. 60 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

3. The Mine Safety and Health Administration conducted an investigation of the dispute which is the subject matter of this case and concluded that a violation of section 105(c) of the 1977 Mine Act had not occurred.

4. Mark Segedi properly filed the discrimination complaint in this case with the Federal Mine Safety and Health Review Commission on behalf of all affected miners.

5. The Complainants scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m. engaged in activity protected by section 105(c)(1) of the 1977 Mine Act on January 30, 1980, commencing at their regularly scheduled starting times and ending at 8:15 a.m.

6. The Complainants scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m. engaged in activity unprotected by section 105(c)(1) of the 1977 Mine Act on January 30, 1980, from 8:15 a.m. to 9:40 a.m.

7. The Respondent discriminated against the Complainants scheduled to begin work at 7 a.m., 7:45 a.m. and 8 a.m. by denying them pay from their regularly scheduled starting times to 8:15 a.m.

8. The Complainants scheduled to begin work at 8:15 a.m. did not engage in activity protected by section 105(c)(1) of the 1977 Mine Act on January 30, 1980.

9. All of the conclusions of law set forth in Part IV, supra, are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

The parties filed the posthearing submissions identified in Part I, supra. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

A. IT IS ORDERED that the above-captioned proceeding be, and hereby is, DISMISSED as to those Complainants who were scheduled to begin work at 8:15 a.m. on January 30, 1980. Such Complainants are identified as B. G. Miller; R. Filby; D. W. Clark; C. J. Zukauckas; S. A. Jestat; T. L. Pysh; R. T. Harris; D. Phillips; G. R. Wheeler; C. J. Rocco; S. Durko, Jr.; L. T. Pruski; J. R. Kennedy; R. T. Rados; J. E. Karpoff; M. Toth; J. E. Timlin; H. W. Ambrosy; G. A. Dean; and G. S. McKeta.

B. IT IS FURTHER ORDERED that Respondent (1) immediately determine the permanent job classification held by the following Complainants on January 30,

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1980, and (2) multiply the standard hourly wage rate for that classification, as set forth in Appendix A, Part I, of the collective bargaining agreement, by the number of hours of back pay to which each respective Complainant is entitled:

Complainant	Regularly Scheduled Starting Time; January 30, 1980	Hours of Back Pay Due
S. J. Ezarik	8:00 a.m	.25
E. P. Avery	8:00 a.m	.25
A. Antanovich	8:00 a.m	.25
E. H. Rosemier, Jr	8:00 a.m	.25
M. Zoldak	8:00 a.m	.25
J. Olesky	8:00 a.m	.25
C. Avery	8:00 a.m	.25
W. E. Clark	8:00 a.m	.25
L. Casper	8:00 a.m	.25
F. Paulish	8:00 a.m	.25
A. R. Barker	8:00 a.m	.25
A. Rusilko	8:00 a.m	.25
C. L. Phillips	8:00 a.m	.25
A. J. Seykoski, Jr.	8:00 a.m	.25
J. M. Jiblets	8:00 a.m	.25
W. L. Brown	8:00 a.m	.25
S. T. Forte	8:00 a.m	.25
G. J. Evans	8:00 a.m	.25
K. R. Watkins	7:45 a.m	.50
J. J. Kurucz	8:00 a.m	.25
M. L. Hoyt	8:00 a.m	.25
T. J. Smith	8:00 a.m	.25
D. Wytovich	7:45 a.m	.50
R. D. Stauffer	8:00 a.m	.25
F. Pabian	7:45 a.m	.50
T. M. Burger	8:00 a.m	.25
C. Zukauckas	8:00 a.m	.25
R. Mulac	8:00 a.m	.25
T. P. Grimes	8:00 a.m	.25
S. Clark	8:00 a.m	.25
F. Perri	8:00 a.m	.25
J. Viara	8:00 a.m	.25
W. White	7:45 a.m	.50
N. Guriel	7:45 a.m	.50
J. C. Fiem	7:45 a.m	.50
S. Robertson	7:45 a.m	.50
C. J. Washlack	7:45 a.m	.50
R. B. Taylor	7:45 a.m	.50
J. Fidazzo	7:45 a.m	.50
R. L. Emery	7:45 a.m	.50
R. A. Chaney	7:45 a.m	.50

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L. T. Bizet	7:45 a.m	.50
T. Taylor	7:45 a.m	.50
F. DiBasilio	7:45 a.m	.50
J. Antanovich	7:45 a.m	.50
J. Fidazzo	7:45 a.m	.50
S. Kotchman	8:00 a.m	.25
C. E. Montgomery	7:00 a.m	1.25
J. E. Carnatham	8:00 a.m	.25
J. G. Zerambo	8:00 a.m	.25
R. S. Martos	7:00 a.m	1.25
A. J. Martos	8:00 a.m	.25
C. M. Vilcesk	7:00 a.m	1.25
K. E. Wiley	7:00 a.m	1.25
J. J. Stepko	7:00 a.m	1.25
F. V. Femia	8:00 a.m	.25
S. W. Perchinsky	7:00 a.m	1.25
S. Ezarik	7:00 a.m	1.25
J. S. Glemba	7:00 a.m	1.25
T. E. Zgorliski	7:00 a.m	1.25
A. R. Fiem	7:00 a.m	1.25
R. L. Scicchitano	7:00 a.m	1.25
J. Stepko	7:00 a.m	1.25
R. Hopkins	7:00 a.m	1.25
P. A. Skirchak	7:00 a.m	1.25
L. N. Hrutkay	7:00 a.m	1.25
G. C. Denny	7:00 a.m	1.25
G. Bostich	7:00 a.m	1.25
D. L. Tiberie	7:00 a.m	1.25
J. H. Zamiska	8:00 a.m	.25
J. F. Piasecki	7:45 a.m	.50
R. Gatling	8:00 a.m	.25
B. F. Vischio	7:45 a.m	.50
J. L. Antanovich	8:00 a.m	.25
J. S. Kubovcik	8:00 a.m	.25
N. Bosick	8:00 a.m	.25
M. J. Rebich	8:00 a.m	.25
L. Huey	8:00 a.m	.25
J. Motichak	8:00 a.m	.25
E. J. Lacock	8:00 a.m	.25
M. Poye, Jr.	8:00 a.m	.25
E. Ambrosey	8:00 a.m	.25
J. E. Puskarich	8:00 a.m	.25
K. G. Thompson	8:00 a.m	.25
L. Rossero	8:00 a.m	.25
J. Linnen	8:00 a.m	.25
L. DiBasilio	8:00 a.m	.25
A. Kiski	8:00 a.m	.25
E. Deresh	8:00 a.m	.25
J. J. DiBasilio	8:00 a.m	.25
R. E. Main	8:00 a.m	.25
J. L. Johnson	8:00 a.m	.25

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C. IT IS FURTHER ORDERED that the Complainants identified in Part B of this order, be and hereby are, awarded interest at the rate of 6 percent per annum on their respective back pay awards, commencing on the day following the day upon which such pay was due in 1980, and ending on the day when such back pay award is actually paid.

D. IT IS FURTHER ORDERED that the Respondent pay the back pay and interest awarded herein within the next 30 days.

E. IT IS FURTHER ORDERED that the Respondent clear the employment records of the Complainants identified in Part B of this order of all unfavorable references, if any, concerning the activities that occurred prior to 8:15 a.m on January 30, 1980.

F. IT IS FURTHER ORDERED that Respondent refrain from discriminating against or interfering with the Complainants identified in Part B of this order because of any activities which are protected under section 105(c) of the 1977 Mine Act.

G. IT IS FURTHER ORDERED that Respondent reimburse the Complainants identified in Part B of this order for all costs and expenses, including attorney's fees, reasonably incurred in connection with this proceeding. Counsel for the parties are directed to confer and attempt to agree as to the amount of such costs and expenses. If they are unable to agree, the Complainants identified in Part B of this order will, within 60 days from the date of this decision, file an itemized statement of costs and expenses. Thereafter the Administrative Law Judge will, after affording the parties an opportunity to be heard, determine the amount of reimbursable costs and expenses to be recovered by the Complainants identified in Part B of this order. For this purpose, I retain jurisdiction of this proceeding.

H. IT IS FURTHER ORDERED that the Respondent within 15 days from the date of this order, post a copy of this decision and order on all bulletin boards at the mine where notices to miners are normally placed and shall keep it posted there, unobstructed and protected from the elements and from unauthorized removal, for a consecutive period of 60 days.

John F. Cook
Administrative Law Judge

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~FOOTNOTE_ONE

1 A copy of the document styled "complainant status summary" is appended to this decision as Appendix A.

~FOOTNOTE_TWO

2 On January 31, 1980, the Mine Safety and Health Administration's Washington, Pennsylvania, field office received a written complaint from the mine safety committee regarding the elevator (Exh. U-2). During the ensuing MSHA investigation on February 1, 1980, Federal mine inspector John Poyle issued Citation No. 626046 alleging a violation of mandatory safety

standard 30 C.F.R. 75.1725(a) in that "the outside doors on the Anderson shaft elevator were not working properly for the 8 a.m shift on January 30, 1980, in that the outside doors had to be closed manually. This elevator is used as portal for men entering and exiting the mine" (Exh. J-4). On February 6, 1980, the citation was vacated by Federal mine inspector Alvin Shade, acting on instructions from the subdistrict manager, based upon MSHA's determination that the condition did not violate mandatory safety standard 30 C.F.R. 75.1725(a) (Exhs. J-5, U-2). A March 3, 1980, memorandum from Joseph O. Cook, Administrator for Coal Mine Safety and Health, to Donald W. Huntley, District Manager, sets forth a subsequent legal opinion concerning 30 C.F.R. 75.1725 (Exh. U-3). MSHA's opinion on the matter is set forth in Exhibit U-3 as follows:

"Section 75.1725 states in part that:

"a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

"In our view, the elevator doors in question were designed and installed to operate automatically. If the operator wishes to manually operate landing doors, the elevator should be refitted with this type of door. However, if they order automatic doors, they should be maintained in that condition. The failure to do so, and to not remove from service until a knowledgeable person had determined the exact cause of the malfunction and corrected it, or determined that the malfunction would not detract from the safe operation of the elevator, would constitute a violation of Section 75.1725."

~FOOTNOTE THREE

3 The Complainants characterize Inspector Cantini's actions as improper. However, Exhibit U-2, a copy of a letter from Mr. Donald W. Huntley, District Manager, Coal Mine Safety and Health District 2, to Mr. Harry W. Nicklow, offers the following explanation for Inspector Cantini's actions:

"Inspector Cantini arrived at the mine about 7:20 a.m He was informed by mine management that the shaft guard door was being closed manually by an assigned person. Cantini went into the lamp house and observed the door being closed manually and persons being transported in and out of the mine. While dressing and preparing for the inspection, he was informed of the same condition by Lloyd Hrutkay, President, U.M.W.A. Local Union 1197. Cantini told him he had observed the shaft guard door being closed manually, but did not give a conclusive response. While proceeding through the lamp house toward the shaft entrance to start his inspection, he heard mine management inform the workmen that they were to ride the elevator, walk the slope, or go home. At that point, Cantini called his supervisor, informed him a labor dispute had occurred, and was instructed to leave the property in accordance with instructions in the Coal Mine Inspectors Manual."

~FOOTNOTE_FOUR

4 The Complainants prayed for the assessment of an appropriate civil penalty for the Respondent's violation of section 105(c) of the 1977 Mine Act. This request will be denied for two reasons.

First, the proceeding was filed solely pursuant to section 105(c)(3) of the 1977 Mine Act. Civil penalty proceedings before the Commission must be filed pursuant to section 110 of the 1977 Mine Act. Accordingly, it must be concluded that the Commission's authority to assess civil penalties has not been properly invoked.

Second, the provisions of sections 105(a), 105(c)(3), 105(d), 110(a), and 110(k), collectively indicate that the 1977 Mine Act requires civil penalties to be proposed by the Secretary of Labor. Commission jurisdiction attaches in penalty matters when the operator has notified the Secretary of Labor that it intends to contest the Secretary's penalty assessment. Since these steps have not been followed in this case, the assessment of a civil penalty by the Commission would be premature at this stage.

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COMPLAINANT STATUS
SUMMARY