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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:
WAYNE TICE,

COMPLAINANT

v.

Complaint of Discharge,
Discrimination, or Interference

Docket No. SE 79-25-D
CD 78-95

Nauvoo Strip Mine

RADIANT COAL COMPANY, INC.,
RESPONDENT

Appearances: Inga Watkins, Esq., Office of the Solicitor, U.S.
Department of Labor, Arlington, Virginia, for
Complainant;
Joseph W. McCullough, Radiant Coal Company, Inc.,
Birmingham, Alabama, for Respondent.

DECISION

Before: Judge Stewart

The above-captioned case is a complaint of discharge,
discrimination, or interference brought pursuant to section
105(c) (FOOTNOTE.1) of the Federal Mine Safety and Health Act of
1977, 30 U.S.C. 801 et seq. (hereinafter, the Act).

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At the hearing, the parties introduced stipulations, admissions, exhibits, (FOOTNOTE.2) and the testimony of witnesses. The Complainant called as witnesses Wayne Tice; Billy Starnes, United Mine Workers of America (UMWA) executive board member for District 20; Terry Hunter, president of UMWA Local 6855; David Lawson, UMWA safety inspector; and Lawrence Layne, Special Investigator for Coal Mine Safety and Health, U.S. Department of Labor. Joseph McCullough, president of Radiant, testified on behalf of Respondent.

Wayne Tice was employed by Radiant Coal Company (hereinafter Radiant) from October 10, 1977, until June 8, 1978, when he was discharged. The reasons given for his discharge were an incident which occurred on June 6, 1978, when Tice allowed a drill truck to roll while a person was underneath it and other alleged safety infractions for which he had been reprimanded.

Tice, a UMWA member, was idled from December 1977, to April 1978, by a strike. After he returned to work on April 10, 1978, and complained of mechanical problems he encountered while operating the drill, he was not allowed to work as many hours as the other employees.

Radiant is not in operation and is no longer active but it has not gone bankrupt nor has it been dissolved. The last coal mining at the Nauvoo Strip Mine took place in September 1978. The machinery which had been leased was returned to its owners. Radiant currently has no assets. It owes \$11,000 to the Internal Revenue Service in withholding taxes. Other major obligations include amounts owed to a fuel distributor and a power company. The total liabilities amount to a minimum of \$40,000.

ISSUES

I. Whether Wayne Tice is entitled to relief pursuant to the provisions of section 105(c) of the Act.

II. If Wayne Tice has been discriminated against in violation of section 105, to what relief is he entitled?

In order to establish a prima facie case of a violation of section 105(c), Tice must establish (1) that he engaged in protected activities, and (2) that the adverse action taken against him was motivated in part by the protected activities. Tice bears the ultimate burden of persuasion with regard to these issues. On the other hand, Radiant may affirmatively defend by proving by a preponderance of the evidence that, although part of its motive was unlawful, (1) it was also motivated by the miner's unprotected activities and (2) that it would have taken adverse action against the miner in any event for the unprotected activities alone. *Pasula v. Consolidation Coal Company*, 2 MSHC

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1001, 1010 (1980) (hereinafter, Pasula); Robinette v. United Castle Coal Company, Docket No. VA 79-141-D, 2 MSHC 1213 (1981).

STIPULATIONS AND ADMISSIONS

That the Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

That Wayne Tice, Complainant, worked for Radiant Coal Company at the Nauvoo Strip Mine between October 10th, 1977 and June 7th, 1978.

That during the working shift between April 14th and 21st, 1978, the drill steel of the 650 CP drill had to be placed back into the rack. The drill steel fell out of the rack and injured Wayne Tice's foot.

That Wayne Tice did not receive work between May 8th, 1978 and May 30th, 1978.

That on June 8th, 1978, Wayne Tice was discharged from Radiant Coal Company.

That the 650 CP drill assigned to Wayne Tice while employed at the Nauvoo Strip Mine was repaired on June 13th, 1978. The repairs included, but were not limited to, adjustment to the latches on the steel rack, welding the mast and replacing the pin on the steel rack lock.

That on May 30th of 1978, Radiant Coal Company was aware that Mr. Tice claimed that the drill jumped into reverse while being operated by him.

That on June 5th, (FOOTNOTE.3) Mr. Tice was sent home and asked to stop working at 3:45 p.m., and that all other miners working at the mine that day continued to work the remainder of the day.

DESCRIPTION AND CONDITION OF DRILL

The CP650 drill, which is truck-mounted, drills a hole 6-7/8 inches in diameter. Separate engines run the drill and the truck. When in operation, the drill stands vertically 28 feet in the air. The steels used for drilling are mounted on the drill mast and are attached to a drilling head. A rack

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alongside the drill carries seven spare steels to be used in drilling. The steels have an outside diameter of 5 inches and an inside diameter of 3 inches. They are 25 feet long and weigh 4,000 pounds. The spare steels are held in place in the rack by brackets and secured there by latches operated by means of rods.

When Tice returned to work after the strike on April 10, 1978, rods were missing on some latches and some of the latches were frozen. As a result, once latched, the latches could not be undone. If left undone, the steels would move around. Steels would come loose when the drill was in a vertical or horizontal position.

The rotation lever on the drill was also defective. When the lever was in the reverse position, a counterclockwise rotation unscrewed the steels from the drill operating head. A pin and part of its linkage were broken. Because of the broken pin, the drill would vibrate itself into reverse. As a result, the steel would be unscrewed from the drill head. When the carrier was to be moved, the mast would be lowered to a horizontal position. The drill motor was left running to maintain the hydraulic pressure. If the rotation lever vibrated into reverse, the steel would detach itself and then fall when the drill mast was again raised to a vertical position.

The rotation lever and a throttle lever had first become defective on December 1, 1977, just prior to the strike. The throttle lever had been repaired during the strike. Part of the problem with the rotation lever--the broken linkage--was also repaired during the strike.

The drill was a used machine which required maintenance on a regular basis. At various times, the throttle was adjusted, parts of the motor were taken off and repaired, bolts were tightened and adjusted, and welding was done on the latches. This welding on the latches was done by Radiant employees. Additional work was done on the drill on June 13, 1978, after Tice had been discharged. Repairs were made to the latches, the pin was replaced in the "steel rack lock" and welding was done to fix the latch on the mast.

During the period from December 4, 1977, until the end of March 1978, Joseph McCullough, Radiant's president, personally ran the drill on occasion. He did not have any problem with the steels dropping out. After adjusting the throttle control, he did not have any problem with it. During this time, the carrier was moved several hundred miles without the drill or the drill steels coming loose. McCullough did not operate the drill from the conclusion of the strike through June 19, 1978.

The Nauvoo Pit was inspected on May 23, 1978. Radiant's daily report for May 23 mentioned an inspection but did not contain any indication that the drill was in operation on those days and did not state whether or not the inspector examined the drill. The drill was useable but was not used in normal mining operations that day because there was no need to drill. Lawrence

Layne, the MSHA special investigator who investigated Tice's discrimination complaint,

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visited the Nauvoo Strip Mine on June 21, 1978. Mr. Layne had questioned Mr. Henderson, the MSHA inspector who conducted the inspection of the Nauvoo Pit in May 1978. Henderson stated that he did not inspect the drill. Edward McCullough at first believed that the drill had been run for the inspection but later admitted that he had no personal knowledge that the the inspector had examined the drill, or if he did, whether it was running at the time.

The record establishes that Wayne Tice complained of conditions which he believed to be a danger to him in the operation of the 650 drill and that he did not make these claims frivolously. Because of a defective rotation lever, the drill would vibrate into reverse when being transported from place to place. The steel would become disengaged from the drill head and fall from the mast. Defects in the latches which held the steels to the mast allowed the steels to come loose. Although Joseph McCullough had no problem operating the drill during the strike, Tice experienced difficulties in the operation of the drill due to the defects after the strike.

SAFETY COMPLAINTS

Tice regularly complained of the condition of the drill to Tommy Johnson from April 10, 1978, through June 6, 1978. He estimated the total number of complaints to Tommy Johnson to have been 12 to 15 and asserted that he did so every time he encountered a problem with the steels. He specifically identified one occasion on which he complained. On April 21, 1978, Tice was slightly injured while attempting to replace a steel which had been allowed to fall from the drill. Tice warned Johnson that someone might be seriously injured if the condition were not corrected.

Tice also complained of the condition to Terry Hunter on a number of occasions and on at least one occasion to Billy Starnes. The first occasion on which Tice complained to Hunter occurred when Hunter went to the Nauvoo Pit during the third week in April, 1978, to have Radiant Coal Company sign the new contract. He observed efforts to replace two steels which had fallen from the drill. He spoke with both Tice and Tommy Johnson. It was Hunter's opinion that Johnson knew of Tice's complaint because Johnson was "standing there" and responded to Johnson's inquiry by saying "We'll try to get it fixed."

Hunter next spoke with Tice about the condition of the drill a week to a week and a half later. He again observed Radiant employees placing steels back into the drill. Chains and chain binders had been used around the steels in an attempt to keep the steels in place. Hunter again spoke with Tommy Johnson who assured him that the necessary welding would be done to repair the drill.

The third occasion on which Tice complained occurred in the last week of May, 1978. Hunter visited the Nauvoo Pit in response to a complaint made by Tice over the telephone. Hunter

spoke with Tice at the mine and called Billy Starnes for him.
Tice explained his complaint to Starnes and gave Tommy Johnson
the phone. Johnson told Starnes that they would fix the machine

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before using it again. Hunter testified that the condition of the drill was such that he would have refused to operate it; he would have called for an inspection by MSHA pursuant to section 103(g) of the Act instead.

Radiant introduced four exhibits entitled "Operator's Daily Report" completed by Tice with regard to the CP650 drill. These machine operator's reports were dated April 21, April 26, April 28, and May 30. Although space was provided for a listing of needed mechanical care or attention and Tice had noted problems with the drill in each report, he made no mention of a defective rotation lever or defective securing latches. Mr. McCullough testified that he did not see a complaint regarding the rotation lever or securing latches. Even if no such report were made in writing, the record establishes that verbal complaints were made by Tice.

PROTECTED ACTIVITY

It is established by the record that Tice engaged in activity which gave rise to the protection of section 105(c). In pertinent part, section 105(c) protects a miner who has "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."

A safety complaint is a protected activity within the meaning of section 105(c) if such complaint is made to the operator, the operator's agent or the representative of miners at the mine.

Terry Hunter and Billy Starnes were representatives of miners within the meaning of section 105(c). A "representative of miners" is defined in 30 C.F.R. 40.1(b)(1) as a person or organization which represents two or more miners at a coal or other mine for the purposes of the Act. Each was charged by virtue of his position with responsibility for representing union members. In his capacity as president of Local 6855, Terry Hunter served as chairman of the union's safety committee. Billy Starnes was a member of the district executive board, more commonly referred to as a field representative.

Section 3(e) of the Act defines an "agent" to be any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine.

Tommy Johnson was Radiant's secretary-treasurer. He had authority to sign, and actually signed, pay checks for the corporation. Tommy Johnson was also Radiant's "designated representative" for the purpose of conducting examinations and signing records of such examinations.

McCullough's position was that he, McCullough, was the only

supervisor at the Nauvoo Pit. He asserted that there was no foreman at the mine. He stated that he was "out there frequently (although) not necessarily every day." McCullough spoke with Johnson every day. Johnson conveyed information

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to McCullough and advised him. He would relay McCullough's orders to the other Radiant employees.

Notwithstanding the Respondent's assertion that Johnson was not a foreman, it is found that Tommy Johnson was "charged with * * * the supervision of the miners" within the meaning of the Act. Tice received his work orders from Johnson. He was told by Johnson when he was to begin and when he was to cease work. It is also clear that Johnson held himself out to non-employees as being charged with responsibility. When he was questioned about Tice's safety complaints by Terry Hunter and Billy Starnes, Johnson responded to their questions as if he had the authority to do so.

Tommy Johnson was a member of the UMWA during the times pertinent herein. His membership in the union does not preclude a finding that he was the agent of Radiant. He was also found by an arbitrator upon a grievance filed by Wayne Tice not to have been a supervisor within the meaning of the 1978 National Bituminous Coal Wage Agreement. The conclusion of the arbitrator as to Tommy Johnson's status has been thoroughly considered herein. The underlying premise of the arbitrator's opinion was that no individual should be exempted from the coverage of the contract if it was possible to avoid doing so. The arbitrator concluded that Johnson was not a supervisor because he spent much more time in production work than he actually did supervising. The arbitrator's conclusion that Tommy Johnson was not a supervisor will be given little or no weight in this decision. In view of the underlying premise employed by the arbitrator, the contractual and statutory categorizations of an individual as a supervisor turn upon different criteria.

Ultimate control over operations may not have been delegated to Johnson; however, in McCullough's absence, Radiant employees looked to Tommy Johnson for their orders. In conveying orders, he supervised the other miners and, he exercised a substantial measure of control over daily operations. It would be unrealistic to categorize Tommy Johnson as other than an agent of Radiant Coal Company within the meaning of the Act.

Wayne Tice made complaints regarding alleged safety defects to Tommy Johnson, the operator's agent, and to representatives of miners. In so doing, he engaged in activities protected by section 105(c) of the Act.

REDUCTION IN HOURS

During the period from April 10 through June 6, 1978, Tice was permitted to work fewer hours than other Radiant employees after he had made safety complaints. The record establishes that this was adverse action motivated by protected activity.

Tice had been hired on Tommy Johnson's recommendation on October 10, 1977. He was to run the drill and do any work required in the pit. Because Radiant did not yet have a drill, he ran a bulldozer, pumped water, cleaned coal, helped load coal,

and did anything in the pit that needed to be done for the first
2 or 3 weeks of his employment.

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Because Radiant Coal Company, Inc., was not a member of the Bituminous Coal Operators' Association, it signed an appendix to the National Bituminous Coal Wage Agreement. The contract with the UMWA provided for payment at an hourly rate. The contract also provides that, in mines producing coal for 6 days a week, each individual shall be given a fair and equal opportunity to work on each of those 6 days.

Radiant employees were paid on a salary basis. The salary exceeded what they would have gotten if paid on an hourly basis. Radiant employees were supposed to work when needed and to do whatever work was necessary. Tice was paid on a salary basis when he was hired. After the strike, Tice stated that he wanted to be paid by the hour and only wanted to operate the drill. At that time, Radiant had a quantity of coal stockpiled. The work that Radiant did amounted to selling stockpiled material. It had finished mining of the area for which it had a permit. There was, therefore, no need to use the drill until the permit was obtained for the new area to be mined on April 8, or April 9, 1978. Tice was called back on April 10 and only he ran the drill until June 6, 1978.

After Tice complained to Radiant management and the miners' representatives, the number of hours he was permitted to work were curtailed. Tice believed that this action was taken because of his safety complaints. He worked many partial days and sometimes worked only once per week. Only once did Tice work for more than 7-1/4 hours. Normally, after working a day, he would be told that he would be notified when to return to work. He worked from 7 to 21 hours per week from May 10 through June 7. Tice estimated that the other men generally worked a minimum of 60 hours per week. Because his home was about 1-1/2 miles from the mine on the road to the mine, he could observe the other Radiant employees going to and coming from work. Other employees of Radiant worked as many as 10 to 12 hours per day and on Saturdays and some Sundays.

Tice worked to this limited extent from April 10, 1978, to May 8, 1978. He was laid off from May 8 through May 30 purportedly because a dozer was broken but Radiant had a second dozer. The dozer was used to make a path for the drill and to remove rock after the shot. Leo Stubbe, who was classified as a drill helper, worked at least part of these 3 weeks. The drill was not operated during this period.

Tice first complained about the condition of the drill to Tommy Johnson, and hence to mine management, on his return to work after the strike on April 10, 1978. He continued to complain to management throughout the period in which he was employed by Radiant. Tommy Johnson responded to Tice's complaints negatively. He directed Tice to continue drilling or go home. Tice continued to complain to Johnson and to union officials. On three separate occasions, he voiced his concerns to Terry Hunter. On the last occasion, he also complained to Billy Starnes. Tommy Johnson was aware that Tice complained to the union on these occasions. Johnson was questioned by the union

officials involved regarding the alleged safety problem and told the officials that the condition would be corrected.

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Tice was the only individual to run the drill during the period of time from April 10, 1978, through June 6, 1978. Respondent asserted that Tice opted to only run the drill and Radiant complied with his wishes. The issue as to whether Tice had requested to operate only the drill had arisen as early as March 27, 1978, a week before Tice returned to work. Respondent introduced an unsigned copy of a letter, dated April 3, 1978, purportedly from Ed Johnson to Terry Hunter. The letter was written for the sole purpose of informing Mr. Hunter that Radiant had been advised on March 27, 1978, by "a pit committeeman" that Tice asserted he wanted to run the drill only and that "he has repeatedly said that he did not want any other." However, in his statement given to Lawrence Layne, the special investigator of Tice's discrimination claim, Terry Hunter stated that both he and Tice had informed Tommy Johnson on or about April 4, 1978, that Tice would do any type of work and that Tice did not make the statement that he wanted to operate only the drill. Tice stated that he "never refused to do anything that there ever was for me to do, when they told me to do it." As noted in the daily reports, Tice occasionally was called upon to perform tasks other than drilling.

McCullough did not speak with Tice with regard to this matter. To support Radiant's contention, he introduced a photocopy of a statement which was purported to be that of Rosemary Stubbe, wife of Leo Stubbe, in which she reported statements made to her by Wayne Tice on March 27, 1978. At the hearing, Tice denied having made the statement to Mrs. Stubbe. Mr. McCullough also testified that a number of people, including Tommy Johnson, James Connell, a policeman and the mayor also told him that Wayne Tice had told them that he wanted to run the drill only and that he would not do other work. Tice specifically denied having made such comments. The nature of the evidence introduced by Respondent is such that Tice's rebuttal testimony is more persuasive. Although Tice stated a preference to run the drill rather than do other work when he returned from the strike, he did not refuse to do other work. Even if that statement had been understood initially as a declaration that he would do no other work, Tice made it clear to mine management that such was not his intent. Tice's assertion that he never refused to do any work assigned to him is borne out by frequent references in Respondent's daily reports to his performance of work other than drilling. Moreover, Tice's unrefuted testimony was that he asked "a couple of times" to do other classified work and was told that there was nothing for him to do.

Under these circumstances, the continued negative response to Tice's complaints and the disparate treatment given him after he made the complaints show that Tice's protected activity was motivation for the reduction in the number of hours he was permitted to work during the period from April 10, 1978, through June 6, 1978. The record does not establish that Radiant was motivated by unprotected activities.

REPRIMANDS

After Tice had made safety complaints about the condition of the drill, he was issued a number of reprimands for alleged safety infractions. There was no basis for some of these reprimands. The record establishes that Tice's protected activity in making the safety complaints was the motivation for the adverse action taken by Radiant in issuing the unwarranted reprimands.

Tice was issued a reprimand dated April 14, 1978, for failure to comply with company safety rules.(FOOTNOTE.4) On April 13, 1978, after a steel worked loose, Tice stopped drilling and attempted to get the steel back in its rack. He was wearing safety goggles and a respirator initially as required by the company safety rules but he removed them because they prevented him from seeing properly. He believed that the goggles and respirator had to be worn only when the drill was in operation. Alan Bradford, a part-time employee who served as Radiant's safety director, saw Tice and told him to put his glasses and respirator back on. Bradford asked, and was told, Tice's reason for having removed the protective equipment. Tice was nevertheless given a reprimand for failing to wear goggles and a respirator while running the drill.

Tice was also given a written reprimand for violation of company safety rules because he used an air hose to clean the dust from his clothing. He had been using the hose to do so since he began working at Radiant and was unaware that he violated company safety rules by doing so. Joseph McCullough testified that Tice had signed and dated a copy of the company's safety rules. Tice testified that he did not remember doing so. The signed copy of the rules was not produced. Although it has not been definitely established that Tice actually signed the rules, he was aware of other provisions in the rules and should have also known of the prohibition against using the air hose to clean his clothing.

In the first of two reprimands dated June 5, 1978, J. R. Newton, a person hired by Radiant to advise on safety matters, alleged on review of the daily reports that Tice was negligently causing the drill steels to fall because "the only way to drop these steels is to reverse the rotation of the drill on pulling the steel out of the bore hole." In the second reprimand, J. W. McCullough alleged that Tice failed to turn a fuel line valve on the drill back on. As a result, the services of a mechanic were required to get the equipment back in operation. Tice testified that he had cut off the fuel line valve to replace a filter but had been sent home by Tommy Johnson before he could replace the filter.

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The record establishes that some of these reprimands issued to Tice were part of a pattern of harassment against him. Of the four pertinent reprimands issued to Tice (not including the letter issued with regard to the June 6 incident) after his complaints to Radiant, only one appears to have been of substance. Tice admitted having dusted his clothing with an air hose on April 10, 1978, in violation of company safety rules. On the other hand, Tice was cited on April 14, 1978, for not wearing goggles and a respirator at a time when he was not operating the drill. The company safety rule required such use only when drilling. Although Tice was also reprimanded for negligently having caused steels to fall from the drill, it has been established that the drill had faults that had not been corrected. J. R. Newton had no reasonable basis for his conclusion that Tice was at fault. Finally, Tice was also given a reprimand for failing to turn the fuel line back on. In view of the fact that it is uncontradicted, Tice's explanation of the incident is accepted. Because the filter change had not been completed when Johnson directed him to quit for the day, Tice could not have turned the fuel line valve back on. The lack of a sound basis for the issuance of three of the four reprimands supports a finding that they were issued to harass Tice. The assertions of Joseph McCullough to the effect that Radiant management did not have a "program" to get rid of Tice and that the concurrence of Tice's complaints with the issuance of reprimands was coincidental are without foundation. It is clear that the unwarranted reprimands were not motivated by unprotected activity.

DISCHARGE

The record establishes that Tice's discharge on June 8, 1978, after he had made safety complaints about the condition of the drill, was adverse action motivated in part by protected activity.

The letter of termination sent to Tice on June 7, 1978, gave as the cause for the discharge "the continuing violations * * * of the Federal, State and company safety rules and especially the seriousness of the latest violation occurring on June 6, 1978." The accident which occurred on June 6, 1978, was due in part to Tice's negligence. As the arbitrator found, the role that Tice played in causing the accident was serious enough to have warranted suspension. Obviously, the violation of a Federal, state or company safety rule or regulation is not the type of activity afforded the protection of the Act, however, the record establishes disparate treatment of Tice for his part in the June 6 incident and that some of the reprimands issued for the alleged violations were part of a pattern of harassment taken against Tice in part for the safety complaints that he made.

On the last day on which Tice worked for Radiant, Tice and his helper Stubbe encountered problems getting the drill carrier started. Once they succeeded in doing so, they proceeded to the appropriate location and commenced drilling. Tice's helper informed Tommy Johnson that a problem existed starting the

carrier. While Tice was still drilling and without Tice's knowledge, Tommy Johnson crawled under the vehicle. Tice was at the rear of the carrier; Tommy Johnson was in front of the carrier. Tice completed the

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drilling, pulled the drill out of the ground and lowered the leveling jacks. When he did so, the vehicle began to roll and almost ran Johnson over. The helper had left the vehicle in neutral and the parking brakes were either not set or not functioning. Tice believed that the carrier had a hand-set emergency parking brake but he had never tried the lever to see if the brakes worked. He testified: "I was never in the carrier. That wasn't my job." Stubbe told Tice that the brake would not hold the carrier well enough to be relied upon, but because he had never attempted to set the brake, Tice was not sure if it was defective.

Johnson did not reprimand Tice at the time of the near accident and the day proceeded without further incident until the drill bit wore out. Tice was sent home by Johnson and told that he would be notified in the normal fashion when he was again needed to work. Tice received the letter terminating his employment with Radiant on June 8, 1978.

McCullough testified that he believed the incident which occurred on June 6 was the result of either an intentional act or one demonstrating a serious lack of common sense on the part of Tice. He testified that Tice's claim that his view was obstructed and that he did not observe Tommy Johnson or Stubbe was not plausible because Stubbe stood immediately to the side of the right front door of the truck, 10 to 14 feet from where Tice was standing, and Tommy Johnson was half under the truck. McCullough asserted that Tice should have seen the helper or Johnson.

The daily report for June 6, 1978, contained a statement to the effect that Johnson was halfway under the carrier and Stubbe was squatting beside him when Tice hoisted the jacks, letting the machine roll. McCullough was not present at the scene of the incident and Tice did not see Stubbe, so it has not been established whether Stubbe was standing or squatting. Nevertheless, Tice should have known the two were there. He should have seen Stubbe and Johnson approach the carrier. Testimony had been given at the arbitration hearing on June 19, 1978, to the effect that Stubbe and Tice started out together to get Johnson who was 200 to 300 feet away and that Tice turned around and returned to the drill while Stubbe continued on to get Johnson. Other testimony was given at the arbitration to the effect that Stubbe went to get Johnson without Tice's knowledge. In the present proceeding, the direct testimony of Tice that he did not go with Stubbe when he left to get Johnson is accepted. Nevertheless, Stubbe did go and get Johnson, and Tice should have known of their presence. Although there was negligence on the part of Tice, there is no basis for McCullough's suggestion that the incident was due to an intentional act by Tice.

The accident on June 6 occurred as a result of the concurrent fault of Tice and Johnson. There was negligence on the part of Johnson as well as Tice. Before going under the drill, Johnson should have taken steps to notify Tice and to determine that the drill would not roll. Johnson conceded at the

meeting held June 9, 1978, that he had committed a safety infraction in failing to do so. On the other hand, Tice should have known that Johnson and Stubbe were in the vicinity of the carrier. He certainly should not have

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lowered the carrier without ascertaining whether he could do so safely; that is, he should have checked to see where his helper was and made certain that the vehicle would not roll when lowered.

Despite the fact that both men were clearly at fault, action was taken against Tice alone. There is no indication that Johnson was given even an oral reprimand. Conceivably, Tice's earlier safety infractions might account for some difference in the severity of the discipline meted out to Tice and Johnson. It does not account for the complete absence of adverse action against Johnson.

In context, the nature of the disparate treatment of Johnson and Tice leads to the conclusion that there were reasons for the discharge other than those expressed. In view of the hostility of management towards Tice which was partially motivated by protected activities, it is found that Tice established a prima facie case that his discharge was motivated in part by his having engaged in protected activities.

The test announced in Pasula provided the employer an affirmative defense if it could be established that, "although part of his motive was unlawful, (1) he was also "motivated by the miners' unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone." Respondent may have been motivated in part by Tice's unprotected activities. Certainly, Tice was deserving of some form of discipline for the role he played in the June 6th accident. However, Respondent failed to show that it would have taken adverse action against Tice because of his actions on June 6th or for any other unprotected activity.

The ostensible reason for Tice's discharge was his culpability for the accident which occurred on June 6th in light of a number of earlier safety infractions. It has been found, however, that the reprimands for said earlier infractions were for the most part without substance and were part of a pattern of harrassment by mine management against Tice. It has also been found that the record contains no indication that Tommy Johnson was reprimanded or otherwise disciplined for his concurrent, and equally serious, negligent disregard of safety.

As noted in the arbitration opinion of June 30, 1978 (Exh. R-9), Tice's role in the accident may have warranted some disciplinary action. It was established that Tice acted in negligent disregard of mine safety and endangered the life of Tommy Johnson who was also negligent. Even though cause for disciplinary action may have existed, Respondent failed to establish that it would have discharged Tice for his unprotected activities, whether or not he had engaged in protected activity. The record actually supports a conclusion to the contrary. There is no evidence that Respondent made it a practice to reprimand any employee other than Tice for safety infractions. The only instance on the record of a safety infraction by an employee other than Tice was committed by Tommy Johnson when he proceeded

under the carrier while it was in operation. Although his infraction was serious, no indication exists that he was disciplined. Discounting the earlier reprimands for

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the reasons noted above, there is nothing on the record which would lead to the conclusion that Tice would have been treated differently than Johnson was treated had it not been for the former's participation in protected activity. That is, there is nothing which would indicate that Respondent would have discharged Tice for the safety infraction he committed on June 6, 1978.

Tice successfully established a prima facie case of unlawful discrimination. Respondent failed to counter Complainant's case directly or to establish any affirmative defense. It is found, therefore, that Tice established by a preponderance of the evidence that the discriminatory action taken against him was motivated in part by his participation in activity protected by section 105(c) of the Act, entitling him to the relief afforded by that provision.

RELIEF TO BE AFFORDED

After receiving the letter of discharge dated June 7, 1978, Tice called Starnes and told him of the letter. Tice was in turn informed that this was not the proper termination procedure to be followed by Radiant. He was also informed that the union contract called for a meeting between the employee, his representative, and a company representative within 24 to 48 hours of the firing (hereinafter, 24/48 meeting). Tice set up this meeting in a telephone conversation with either Ed or Tommy Johnson.

The 24/48 meeting was held during working hours in Radiant's Gardendale office on June 9, 1978. Tice, Starnes, Hunter, and Lawson were met by Mr. McCullough at the office. When they had been seated, approximately seven other classified Radiant employees from the pit entered the room. Three members of mine management were present: J. W. McCullough, president; Edward Johnson, vice president; and Tommy Johnson, secretary-treasurer. When an objection was raised regarding the presence of the classified employees, the explanation was given that the employees were there of their own accord.

Various threats were made in the course of the meeting. At one point, Tommy Johnson, holding his knife by the blade, shook it in Tice's face. Tommy Johnson told Tice that "if the union got Tice his job back and there was an accident within 500 feet of Tice, Tice would be held responsible and would answer to Johnson's personal satisfaction."

Tommy Johnson told Hunter that Tice was a safety hazard and was trying to kill people. Johnson said Hunter would be personally responsible if Tice was given his job back. While he spoke to Hunter, Johnson also shook his knife at him. Johnson also told Starnes and Lawson that they would be held responsible.

Some of the classified union employees said that they would not work with Tice whatever the union said because Tice was unsafe. They believed that Tice had deliberately let the drill

truck roll when Tommy Johnson was underneath it. At least four or five of the employees had their knives out at the meeting pretending to be cleaning their fingernails. Tommy Johnson and Ed Johnson,

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another employee listed as an officer of Radiant, were brothers. Three of the radiant employees were Ed Johnson's sons-in-law.

When Lawson told Tommy Johnson that he had violated the law first by crawling under the drill while it remained in operation, Johnson replied that Tice "should have known [he] was under there." Thereafter, the discussion became heated. During the argument, Tommy Johnson grabbed Tice by the arm and said "come on outside. We'll settle this now. I'll show you exactly what I am talking about." Starnes and Lawson attempted to stop Johnson from doing so and Tice did not go outside.

It was established that Joseph McCullough did not have a knife out at the meeting and that his demeanor was friendly. McCullough testified that he had a feeling that Tice was getting farther away from the other men who worked with him in the pit, that there was a gradual change in the men's attitudes culminating at the meeting on June 9th and that they were not happy working around him.

Tice took the matter to arbitration on June 19, 1978, 10 days after the 24/48 meeting. The arbitrator ruled that Tice could return to work but did not grant him back pay due to Tice's role in the June 6th incident. After the ruling, various threats were directed at Tice by Radiant employees. James Connell made a statement to the effect that Tice would get beaten up if he returned to work and that accidents could be programmed or set up to happen. Tice overheard one of the Johnson's agreeing with this last statement. Tice believed that Mr. McCullough had something in his pocket that looked like a gun at the arbitration meeting. McCullough testified that he has never owned a gun in his life. The record establishes that McCullough did not have a gun at the arbitration. At the conclusion of the hearing, the Johnsons "ganged up around the elevator and tried to get Tice and the union representatives to ride the elevator with them."

After the arbitrator ruled that Tice should be permitted to return to work, Tice told McCullough that he would be at work on the following morning. However, Tice did not report back for work after the arbitration; nor did he phone or write to Radiant to inform them that he would not be there. Tice stated that he did not return to work at Radiant because of the threats made against him and his family.

Despite the apparent willingness of Mr. McCullough to permit Tice to return to work, Tice will not be denied recovery herein because of his failure to do so. Among others, Ed Johnson and Tommy Johnson repeatedly threatened Tice with physical harm if he returned to work. Both Johnsons were officers of the company. It has been established that Tommy Johnson was an agent of Respondent within the meaning of the Act. Therefore, his threatening words and actions are imputed to Respondent. Tice reasonably believed that he or his family would suffer physical harm if he returned to work. Under the circumstances, he is properly compensated even though he did not return to work at the Nauvoo Pit.

~1487

Tice was unsuccessful in his subsequent efforts to obtain employment with other local mining operations. Tice stated that he went to every "strip or underground mine in Walker and Jefferson county." In the middle of July, he took employment with a construction company.

At the conclusion of the hearing, Complainant submitted the following calculations of wages and overtime lost by Tice during the period from April 10, 1978, through June 9, 1978, and to wages lost as a result of his idlement from (but not including) June 9, 1978, through July 15, 1978.

(a) \$953.24: This amount represents "the difference between the hours actually worked by Complainant, Wayne Tice, (from April 10, 1978, through June 9, 1978) and the hours that were actually worked by all men, regular time, based on 7-1/4 hours being regular time," multiplied by the hourly contract rate then in effect of \$8.91.

(b) \$596: That amount would represent "the total hours of overtime worked by the Union employees at the mine during the period between April 10th and June 9th. The total hours overtime would be 44.60 hours based on the daily reports. The total amount of overtime hours is multiplied by the overtime rate which was according to the Contract at the mine. The UMW Contract provided for an overtime rate of \$13.37 per hour * * *. [T]he total number of overtime hours was divided by eight men, including Mr. Tice, based on the new Contract which provides in Article IV that all overtime available would be equally distributed amongst all men working at the mine. The number of men working at the mine (was calculated from the daily reports)."

(c) \$1,614.94: This amount was achieved by multiplying "the total number of days between June 9 and July 15 by the hours per day and the amount of wages * * * provided by the contract (\$8.91)."

Counsel for Complainant offered the daily reports(FOOTNOTE.5) for the period from April 10, 1978, through June 6, 1978, in support of the estimation of damages. Mr. McCullough was offered the opportunity at the hearing to rebut the Complainant's estimation of damages. He stated that he had no statement to make regarding damages and that he would not dispute that the figures given by Complainant reflected "the amount of money he is claiming that is owed him in this discrimination case."

On November 14, 1980, an order was issued setting the date December 19, 1980, for the closing of the record. An opportunity was given therein for the parties to submit further information and/or clarification of their positions regarding compensatory damages. Neither party chose to submit additional information or clarification.

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Complainant's unchallenged claims are accepted herein as the appropriate measure of the damages suffered by Complainant, except to the extent that the claims are directly at odds with evidence of record.

Mr. McCullough testified that Radiant Coal Company, Inc., was not in active operation from June 7, 1978, through June 19, 1978. This testimony was not rebutted by Complainant. The last daily report submitted by Complainant was dated June 6, 1978.

The inactivity of Radiant on June 19, 1978, was the result of the arbitration held that day. Because the shut down of operations on that day was directly related to the discriminatory action taken against Tice, he is properly compensated for loss of that day's wages.

The damages claimed by Complainant are accordingly reduced to account for the 8 working days in the time period between June 7 and June 18 during which no work took place at the Nauvoo Pit. Complainant's calculation of lost wages during the period from April 10, 1978, through June 9, 1978, is reduced by 3 days' wages (\$193.79). The calculation for the period from June 9, 1978, through July 15, 1978, is reduced by 5 days' wages (\$324.82).

It is found that Wayne Tice suffered damages in the amount of \$759 in lost wages (regular time) from April 10, 1978, through June 9, 1978; \$596 in lost wages (overtime) for this same time period; and \$1,290 in lost wages (regular time) from June 9, 1978, through July 15, 1978.

Complainant also requested that his employment record be expunged of any unfavorable references to alleged safety violations for which he was not at fault. This request is granted with regard to the three reprimands discussed above which were improperly issued to Tice.

There is no evidence that Radiant Coal Company has continued to harass, threaten or engage in other punitive action against Tice, his family or any other miner.

The Act and the Commission's Rule of Procedure contain statutory criteria that must be considered and require specific steps to be taken in connection with penalty assessments. Under the circumstances of this case, an assessment of a civil penalty would not be appropriate at this time because the procedural requirements have not yet been met. At the end of the discrimination case, MSHA requested leave to present evidence concerning the statutory criteria that must be considered in a penalty case. This request was denied due to unavailability of time as well as the failure to file a proper petition for assessment of civil penalty meeting the procedural requirements of the Act and the Commission's Procedural Rules.

ORDER

It is ORDERED that Respondent, Radiant Coal Company, Inc.,

pay the sum of \$2,645 plus interest in the amount of 8 percent per annum, calculated

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from the date of his discharge, to Wayne Tice within 30 days of the date of this decision.

It is further ORDERED that Respondent expunge from Wayne Tice's employment records reference to the reprimands issued (a) on April 10, 1978, for failure to wear goggles and a respirator, (b) on June 5, 1978, for failure to turn a fuel line back on, and (c) on June 5, 1978, for causing steels to fall from the drill.

Forrest E. Stewart
Administrative Law Judge

AA

~FOOTNOTE_ONE

Section 105(c)(1) of the Act reads in pertinent part as follows:

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, 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 * * *."

~FOOTNOTE_TWO

The transcript of this hearing contains references to an exhibit, M-8. This number was included as a designation of one of a group of premarked exhibits which were offered at one time. No exhibit offered actually has the designation M-8.

~FOOTNOTE_THREE

Although Complainant's witnesses mistakenly referred to the last day on which Tice worked as June 5, 1978, the record as a whole establishes that the last day he worked was June 6, 1978.

~FOOTNOTE_FOUR

Tice was also reprimanded in November of 1977 by Ed Johnson for sleeping on the job and not performing the work expected of him. Tice explained that he had been observed with his eyes closed but that he had closed them because sand was blown into them while he was operating a dozer in a 10-mph wind.

~FOOTNOTE_FIVE

These daily reports were introduced at the hearing with the acquiescence of Mr. McCullough. Petitioner retained possession of the reports until August 10, 1980, presumably to aid in further calculation of damages. The reports were filed at that time.