

CCASE:
SOL (MSHA) V. STAFFORD CONSTRUCTION
DDATE:
19810924
TTEXT:

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

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA), ON
BEHALF OF STEPHEN SMITH, DONALD HANSEN,
THOMAS SMITH, AND PATRICIA ANDERSON,

COMPLAINANTS

v.

APPLICATION FOR REVIEW OF
DISCRIMINATION

DOCKET NO. WEST 80-71-DM
WEST 80-155-DM
WEST 80-156-DM
WEST 80-165-DM

STAFFORD CONSTRUCTION COMPANY,
RESPONDENT

(Consolidated)

Appearances:

James H. Barkley, Esq., Office of Henry C. Mahlman, Associate
Regional Solicitor, United States Department of Labor, Denver,
Colorado 80294,

for Complainants

Richard D. Alaniz, Esq., Pate, Bruckner & Sipes, Attorneys at
Law, Houston, Texas 77056,

for Respondent

Before: Judge John J. Morris

DECISION
STATEMENT OF THE CASE

The Secretary of Labor of the United States, the individual
charged with the statutory duty of enforcing the Federal Mine
Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the Act)
brings this action on behalf of four complainants. He asserts
the workers were illegally discharged from their employment by
Stafford Construction Company (Stafford) in violation of
815(c)(1) of the Act.

The statutory provision, now codified at 30 U.S.C.
815(c)(1), provides as follows:

105(c)(1) No person shall discharge or in any manner
discriminate against or cause to be discharged or cause
discrimination against or otherwise interfere with the
exercise of the statutory rights of any miner,
representative of miners or applicant for employment in
any coal or other mine subject to this Act because such
miner, representative of miners or applicant for
employment has filed or made a complaint under or
related to this Act, including a complaint notifying
the operator or the operator's agent, or the
representative of the miners at the coal or

other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits commenced in Canon City, Colorado in May 1980. The hearing was concluded in September, 1980. The parties filed extensive post trial briefs.

ISSUES

The issues are whether complainants were discharged as a result of engaging in a protected activity. Further, if the finding is affirmative, what relief, if any, should be granted. Additional issues arise from the affirmative defenses of respondent.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving with 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. Consolidation Coal Company, (David Pasula) 2 FMSHRC 2786 (1980), petition for review filed, No. 80-2600 (3d Cir. November 12, 1980).

The four cases herein were consolidated. The acts of alleged discrimination are essentially diverse and accordingly, each case is discussed separately and in the same order as presented at the hearing.

The four persons allegedly discriminated against were: Stephen Smith, a heavy equipment operator; Thomas Smith, the brother of Stephen Smith and a heavy equipment operator; Patricia Anderson, the Stafford office secretary, and Donald Hansen, at various times a heavy equipment operator, assistant project manager, and safety officer. All of the cases involve credibility determinations.

DOCKET NO. WEST 80-156-DM
STEPHEN SMITH

INTRODUCTION TO THE CASE

Stephen Smith claims he was discharged because he complained about unsafe conditions at the Cotter Mill site. After various oral complaints to Stafford officials he contacted MSHA on December 19 and filed a written complaint on December 20. He was not allowed to work on December 20 and he was terminated that evening.

Stafford asserts it did not discriminate against Smith. It's affirmative defense is that Smith was terminated because the company was reducing its work force in anticipation of a shut down.

FINDINGS OF FACT

The evidence is conflicting. I find the following facts to be credible:

1. Stephen Smith was hired by Stafford on July 7, 1978 and terminated December 20, 1978. Smith operated a pusher cat in breaking rock and cutting new roads (Tr. 17, 18).

2. Stafford was building a retention dam for Cotter Mill. Stafford's answers in two cases admit it is an operator and that its products enter or affect commerce, (Tr. 18, 68, Answer in WEST 80-156-DM and in WEST 80-71-DM).

3. During Smith's employment he complained verbally to Stafford officials concerning safety. His verbal complaints involved lighting in the dump and borrow areas as well as lighting and brakes on the machines. Whenever he felt something was unsafe he would speak to someone about it. He complained about 10 times from July to December (Tr. 19, 71-75, 79).

4. Smith asked for illumination because it was dark during half of his shift. (Tr. 19).

5. There were no brakes on Smith's #351 scraper. To stop the equipment it was necessary to drop the pan and drag it. This condition existed throughout a three week period when Smith operated the #351 (Tr. 79).

6. His safety complaints, which Smith considered serious, were directed to Rick Auten, Mark Jackson and Richard Schneider, respectively Stafford's superintendent, foreman and maintenance foreman. (Tr. 21, 80).

7. Other operators were complaining of safety conditions such as the condition of the tires on the equipment, lack of working lights, lack of back-up lights, no illumination on the cat itself, lack of seat belts and back-up alarms (Tr. 72-80).

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8. In November, Smith told Auten and Jackson that he was going to request an MSHA inspection. Auten and Jackson did not reply. Prior to December 20, MSHA had been on the plant site quite a few times (Tr. 22, 241, 681-685). MSHA showed up about every month. When Hansen took over as safety engineer there were 20 to 30 MSHA citations on the board dated between September 1978 and January 1979. (Tr. 22, 241, 681-685).

9. Smith called the MSHA office on December 19, 1978, and he met with two MSHA inspectors the following morning. The morning of December 20, Smith presented a written complaint signed by himself and his brother, Thomas Smith. The written complaint had been made out by Smith and his brother at home. Smith took the complaint to work with him on December 20, had other operators sign it, and delivered it to MSHA after he was sent home. (Tr. 22, 23, 140-144, Exhibit P-1).

10. On December 20, Smith showed his handwritten complaint to Auten and Jackson on the jobsite at 12:30 p.m. The shift was to begin in 30 minutes. Smith wasn't allowed to work that day. Smith's failure to work came about in this manner: It was the custom to assemble the operators and then drive them to their respective equipment. Jackson, according to Smith, was a hot rodder with the truck; further, Smith previously had a bad experience while riding in the back of a pickup. He, accordingly, asked Jackson if he could ride in the front seat. Since the front seat was already occupied Jackson said he'd return to pick him up. When Jackson returned he told Smith he wasn't needed that day (Tr. 25, 31-34).

11. The equipment normally assigned to Smith was operated on this particular shift on December 20; no equipment was idle that was capable of running. (Tr. 34, 59).

12. Smith didn't work his shift on December 20. He next appeared on the jobsite at 9:30 p.m. on the same date to pick up his brother. At that time Mark Jackson gave Smith his paycheck and termination slip (Tr. 52, P-2). The pay slip showed the termination was due to a reduction in force. However, Smith had no knowledge of any such reduction, and Stafford was working two shifts per day (Tr. 57-58, Exhibit P-2).

13. On December 19, Patricia Anderson was asked to fill out a termination slip for Stephen Smith (Tr. 244, 249).

14. At the time of the MSHA investigation of the Stephen Smith discharge, Pat Anderson, the Stafford secretary, was directed by management to prepare a documentation from the personnel records showing that a reduction in force had occurred. Anderson could not prepare such a report because so many men had been hired. On December 20, 1978, Stafford was hiring new employees (Tr. 173, 183, 184).

15. Prior to December 20, Stephen Smith had never been suspended in any way by Stafford (Tr. 18).

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16. Before December 20, Pat Anderson participated in and overheard conversations between Harold Stafford (President) and Richard Schneider (held various managerial positions), and others in management where they stated that they had determined it was Stephen Smith who was informing MSHA of the accidents and problems on the jobsite. They stated that Stephen Smith was to be fired (Tr. 189, 192-199, 208, 212-213, 305, 341).

17. On or about December 1, 1978, when Donald Hansen was promoted to assistant project manager, Hansen was involved in conversations with Poynter (project manager) and Harold Stafford about employees turning in complaints to MSHA. Stafford said if they found out who these individuals were they were to find a reason to terminate them immediately (Tr. 671-673)

18. On or about December 22, Poynter, in a conversation with Hansen, identified Smith as the one who'd been making the complaints to MSHA. He further stated that Harold Stafford had wanted him fired and for that reason he was terminated (Tr. 672-673).

19. Stafford officials were concerned about time constraints in their contract, and they planned on working through the winter if the weather permitted. (Tr. 425).

20. Harold Stafford, president of the company, planned on working through the winter if the weather permitted. (Tr. 173, 176, 183, 425).

21. The daily reports of foreman Mark Jackson indicate the weather was good for the most part from December 18 through December 28, (Exhibit P-5, R-13).

22. The job was shut down January 5, 1979 when the ground froze (Tr. 181).

DISCUSSION

The credible facts establish that Stephen Smith was engaged in a protected activity and he was terminated for engaging in such activity.

Stafford's defense seeks to establish that Stephen Smith was discharged due to a reduction in the working force. For the following reasons, I do not find Stafford's evidence to be persuasive.

Pat Anderson was in a position to know the facts concerning a reduction in force since she was in charge of issuing pay checks and termination notices. She testified that Stafford, on December 20, 1978 was operating two shifts per day and was not in the process of reducing its work force (Tr. 172-174, 182, 244). Stafford and Hansen had prior to December 20 stated to her that they would work through the winter. (Tr. 176-183). Anderson had been instructed to indicate "reduction in force" on all termination slips unless the worker quit or moved away (Tr.

322-326, R-4, R-5). As many men were hired as were fired in November and December (Tr. 302). Anderson had only prepared a list of those fired, not those workers hired (Tr. 391).

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In December Stafford had approximately 160 employees (Tr. 252). Its asserted reduction in force as shown by its own evidence, consisted of the following terminations:

December 19 - Smith and Baun
December 21 - May
December 22 - Auten and Spier

A reduction of five, in these circumstances hardly constitutes a quantitative persuasion of a reduction in force.

Additionally, I do not find it credible that Stephen Smith was selected to be part of any anticipatory reduction in force due to his alleged tardiness and general incompetence as an operator. The exhibits show that Stephen Smith worked every week beginning with his initial employment in July 1978 (R-7). Prior to December 20, 1978 he had never been reprimanded for any alleged tardiness, absenteeism or incompetence.

Schneider, who held various managerial positions with Stafford, testified that the company planned to work through the winter. Further, he agreed that Stephen Smith's absenteeism wasn't greater than any other employee's. (Tr. 428 -430). Schneider concluded that a reduction in force caused Smith's termination. However, I find the reduction in force took place on January 5, 1979 when the job was shut down by the project engineers, Wahler and Associates, due to the weather. (Tr. 609).

One matter requiring discussion is the evidence that the termination slip was made out by Pat Anderson on December 19, 1978. Stafford argues that this establishes the fact that the decision to lay off Smith was made prior to Stafford's knowledge of Smith's written complaint to MSHA. Stafford's position then is that if the complaint to MSHA is the protected activity at issue, it played no part in the decision to terminate Smith.

Stafford's position overlooks several factors. The termination slip was not delivered to Smith until December 20, after Stafford was aware of Smith's complaints to MSHA. Further, prior to December 19, respondent had concluded that Smith was informing MSHA of accidents and safety problems on the job. As a result of this conclusion, Stafford decided to terminate Smith.

The evidence does not show that Smith had contacted MSHA prior to December 19, 1978. However, Smith's verbal safety complaints to management officials must have given rise to Stafford's suspicions and supported respondent's conclusion that Smith had been discussing safety matters with MSHA. Therefore, Smith's expressed concern for safety was the basis for his termination. Accordingly, I find that Stephen Smith was fired for engaging in protected activity, and, thus he was discriminated against in violation of the Act.

BACK WAGES

Stephen Smith's regular rate of pay was \$11.50 per hour, and

his overtime pay was \$16.32. Overtime was paid after eight hours per day or 40 hours per week. (Tr. 59-61). Stephen Smith was discharged on December 20, 1978 and reinstated on May 16, 1978. During the above period the project was shut down due to weather from January 5, to early March (Tr. 838).

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Between December 20 and January 5, Smith contends he missed 65 days of work. He asserts that his back wages are \$8,101.60 (\$124.64 x 65).

I find the Stafford records, because they are records, are more reliable than Smith's oral testimony on the back wage issue (Tr. 61, R-7). The wage summary indicates Stephen Smith did not work any overtime in December or November, 1978. An award including overtime would in this case be speculative because the record fails to offer any evidence that overtime was worked during the period Smith was laid off. Accordingly, any back wages would be calculated at \$92.00 per day (\$11.50 x 8).

Smith urges he is entitled to wages for 65 days, but I calculate that there are 66 days of lost wages involved. Accordingly, Stephen Smith's back wages are \$6,072.00 (\$92.00 x 66). Smith testified that between his termination and reinstatement he had gross income totaling \$2,050.00 (Tr. 63, 64). This is to be deducted from the total back wages. Smith is due the amount of \$4,022.00 in unpaid back wages, less amounts withheld pursuant to state and federal law.

DOCKET NO. WEST 80-165-DM
TOM SMITH

INTRODUCTION TO THE CASE

Tom Smith asserts he was fired because he and his brother Stephen filed a written complaint with MSHA.

Stafford denies it discriminated against him. It contends he was fired on January 5, 1979, because he negligently broke a lift arm; further, Stafford claims he could have prevented such damage.

FINDINGS OF FACT

The evidence is conflicting. I find the following facts to be credible.

1. Tom Smith, the brother of complainant Stephen Smith, was employed by Stafford between August 20, 1978 and January 3, 1979. Tom Smith operated dozers and pulled a disc (Tr. 745, 747).

2. Tom Smith made four or five oral complaints concerning safety to management representatives Auten, Jackson and Schneider during the months of September, October and November. Specifically, he complained about a lack of lights on his dozer and that a short stack was causing smoke to blow in his face (Tr. 746-747).

3. On December 20 Tom Smith and his brother, Stephen, filed a written complaint with MSHA concerning safety at the Stafford site (Tr. 745-747, Exhibit P-1).

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4. On January 3, while operating a 16 motorgrader Smith struck a partially buried rock. The impact broke the lift arm on the blade. Usually when equipment is damaged in this manner the operator helps the welder or mechanic make the repairs and then goes back on the job as it takes about an hour to weld the break. On this date Smith was sent home. (Tr. 749).

5. On January 3, after the incident involving the grader Smith saw a D-8 dozer which he'd operated before pulled off to the side and shut down. He pointed this machine out to Schneider, but Schneider replied that his machine was broken. He was told to go home. (Tr. 779, 780).

6. Smith called in to work on January 4. He was told that his machine was still down. On January 5 he came in to pick up his payroll check. At this time Donald Hansen gave him his termination notice and two payroll checks. (Tr. 749, 750, 753).

7. The Stafford termination notice to Tom Smith contains three main headings, namely, "Lay off", "Discharge", and "Voluntary Quit". Under "Voluntary Quit" the box "Dissatisfied" had been scratched over. Under "Discharge" the box of "other" was marked. The explanation written on the slip was that "Subject operated a blade in a manner that broke a lift arm per witnesses costing company money". (Exhibit P-9).

8. Prior to this occurrence Tom Smith hadn't damaged any Stafford equipment (Tr. 743).

9. Operators who had damaged Stafford equipment and who were not terminated included: Larry Provost (motor blown up); Loren Pennington (broke an arm); Richard Gangler (broke a track); Gary Hust (broke a left arm); Steve Smith (not a relative of complainants), (rolled a scraper).

10. After December 20 and a few days before Smith's termination, Donald Hansen (FOOTNOTE 1) was driving Harold Stafford across a field and upon seeing Smith, Stafford said "there is that SOB who is causing us a lot of -- whose brother is causing us a lot of problems, and if you get a chance, fire him." (Tr. 848).

11. Hansen fired Tom Smith because he broke a blade and because Harold Stafford wanted him fired. (Tr. 849, 851).

12. Hansen said Tom Smith was the only one ever fired for breaking a lift arm. (Tr. 852).

DISCUSSION

The credible facts establish that Tom Smith was engaged in a protected activity and he was terminated for engaging in that activity.

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Stafford asserts Tom Smith was fired because he carelessly damaged company equipment. The company policy was that it would let a man go if through his negligence he broke company equipment, and it was obvious he could have prevented the damage. (Tr. 873).

Respondent's evidence shows that certain workers were terminated and respondent's reasons therefor were as follows:

Norman Coulter, discharged in September 1978, was let go because he was rough in handling equipment. (Tr. 876, 877).

Jack McCullough, was let go in October 1978. McCullough walked away from the oiling truck after turning the oil on. He was responsible for the loss of about 400 gallons of oil. (Tr. 878, 879).

John Smith, (not related to complainants), on November 1978, was instructed that the hydraulic was out on the disc and that as a result it could only turn one way. Smith ignored the instructions. This tore the disc up, and pulled the tongue off. (Tr. 880).

Bill Ryball, (November 1978), who claimed he was a top mechanic, broke each sprocket tooth when he installed a double flange roller rather than a single flange. (Tr. 882).

Randall K. Jones, (November 1978), fell asleep and as a result he was involved in a head-on collision with a 651 scraper. (Tr. 883).

Clarence Harding, (March 1979), was "terribly hard" on equipment. He'd go forward and "throw it" in reverse. He was warned but continued to abuse the equipment. (Tr. 884-886).

John Jones, (June 1979), was let go because he abused equipment. (Tr. 886).

Steve McGinnis, (June 1979), a grader operator, ignored instructions given to all operators to check their oil and water. The engine froze. (Tr. 886).

Ron Durham, (August 1979), was on the water wagon apparently involved in a head-on collision (Tr. 886).

Al Sanchez, (May 1979), was operating a scraper and he sideswiped a 641 water wagon. Sanchez had been warned several times about being careless. (Tr. 888, 948).

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Stafford's evidence does not establish its defense. Rather, the facts indicate a worker will be terminated if his activity approaches a deliberate disregard of instructions or gross negligence rather than mere carelessness.

It is interesting to note that none of those terminated in the Stafford list (R-12), except for Tom Smith, were involved in the breaking of a lift arm. Additional positive evidence of the weakness of Stafford's argument is that Schneider confirms Hansen's testimony that he broke a lift arm but was not terminated. (Tr. 852).

Additional persuasive evidence against respondent's affirmative defense is that Schneider, after investigating the Smith accident did not recommend that Smith be fired. Schneider, as maintenance supervisor, normally would terminate an operator if he believed he was negligent in the operation of equipment. He testified at length concerning his reputation for this policy. The workers had also given him a nickname (unstated) in this regard. (Tr. 873, 874). With that background, Schneider investigated the Tom Smith accident, but he was not involved in the decision to terminate him. (Tr. 906, 921, 938). Based on the above, if credence is to be given to respondent's contentions, one would expect that Schneider would have recommended that Tom Smith be fired.

Smith contends he should have been treated like workers Provost, Pennington, Gangler (also called Gekler), Hust, and Steve Smith (not related). These workers damaged company equipment but were not terminated. (Finding of Fact, ¶57 9). Stafford seeks to destroy this evidence by showing that the workers were basically not at fault and for this reason they were not terminated. I am not persuaded. A careful analysis of that evidence establishes factual situations which are more akin to Tom Smith's accident than are those situations where the workers were terminated. Respondent's account of these incidents is as follows:

Respondent does not address the Provost accident.

Pennington had done slope work which caused the ball joints on the motor grader to snap off (Tr. 889-890). Probably 20 such ball joints were broken during the Cotter project. Pennington wasn't terminated because Schneider, then the maintenance manager, didn't feel he was abusing the equipment (Tr. 891).

Richard Geckler ran the tracks off of a push cat three times. They were trying to keep this particular equipment going until the track could be rebuilt. (Tr. 891-893).

Gary Hust damaged a #494 while working rocks. He had a rock go off his dozer and push in the radiator guard. (Tr. 893-894).

Steve Smith (not complainant) while operating a 651 scraper (#351) had a rock come out from under his left rear tire. This knocked the scraper

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off of the embankment and caused it to roll. This happened to several scrapers. (Tr. 895-896).

A final issue to be addressed concerns the statement of Harold Stafford that Tom Smith should not have been in the area when the accident occurred. (Tr. 962-968). The evidence is uncontroverted that Smith was instructed by a supervisor to operate his blade in this area; further, he had been there about two hours when the accident occurred. I find from the credible uncontroverted evidence that Smith had been instructed to operate in the zone where he was located. (Tr. 753, 768, 770).

In summary, I conclude that Stafford has not established its affirmative defense.

I find Smith's termination arose from the "problems" created for Stafford by the submission of the safety complaints to MSHA on December 20, 1978 by Stephen and Tom Smith. Donald Hansen alone fired Smith. He testified that he terminated Smith because of the instructions from Harold Stafford to find an excuse to fire Smith because his brother had caused trouble for Stafford. I find from the record taken as a whole that the "trouble" attributable to Stephen Smith was the safety complaint.

The submission of the safety complaint was a protected activity. Therefore, I conclude that Tom Smith was discharged for engaging in a protected activity in violation of the Act.

BACK WAGES

Tom Smith was terminated January 3, 1979. His straight time rate of pay was \$11.50 per hour, or \$92.00 per day. (Tr. 760). The uncontroverted evidence shows the ground froze and the work stopped on January 5, 1979, and resumed in early March, 1979 (Tr. 838). Smith was reinstated on May 16, 1979. Smith's days of lost wages would be as follows:

January 1979	2 days
February	None
March	20 days
April	30 days
May	11 days
Total	63 days

Complainant calculates 56 lost working days, but he does not detail those calculations. Based on 63 working days at \$92.00 per day, Tom Smith is entitled to a gross award of \$5,796.00. Smith earned \$348.00 while he was laid off. This amount is to be deducted from his gross award. Accordingly, he is due \$5,448.00 in unpaid back wages, less amounts withheld pursuant to state and federal law.

CROSS EXAMINATION OF WITNESS HANSEN

Respondent refused to cross examine witness Donald Hansen in

the Tom Smith case. The basis of respondent's objection is that
MSHA had not pro

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vided them with a statement purportedly given by Hansen on January 31, 1979. An extensive inquiry was conducted on the record by the Judge to establish the whereabouts of the purported statement.

It is uncontroverted that Donald Hansen gave MSHA three statements all of which were transcribed and signed by Hansen. Two statements dealt with his own case and one related to Patricia Anderson's case. (Tr. 1219). The possibility of the existence of an additional Donald Hansen statement arises from the following events: a round table discussion between MSHA inspectors and Stafford officials occurred on the morning of January 31, 1979. On the same afternoon Harold Stafford, respondent's president and MSHA officials talked in private to Donald Hansen. Stafford and the MSHA official had recorders but the MSHA official inadvertently failed to turn on his recorder. (Tr. 1234). On discovering that MSHA had no transcription of the conversation with Hansen MSHA requested and received the tapes made by Harold Stafford. These tapes had only a buzzing background and no transcriptions could be made. (Tr. 1221). The Stafford tapes were returned to the Stafford attorneys. (Tr. 1221). No statements were available from Hansen in either of the Smith brothers' cases. (Tr. 1220). Copies of all available statements that were taken that day were provided to Stafford attorneys. (Tr. 1223).

On these facts I conclude that the motion to produce the Hansen statement in the Tom Smith case was improvidently granted. There was no statement of witness Donald Hansen that could have been transcribed for cross examination in the case. Therefore, I vacate my prior order to produce.

DOCKET NO. WEST 80-71-DM
DONALD HANSEN

INTRODUCTION TO THE CASE

There are several possible reasons for Stafford's decision to fire Donald Hansen. Among them are (1) he told Harold Stafford not to change witness statements; (2) he called a superintendent a son-of-a-bitch; (3) a combination of (1) and (2); then he was rehired and terminated a second time when Harold Stafford had a flare up of temper over Hansen's MSHA discrimination complaint; (4) he was not discharged at all but he quit. Hansen contends the evidence supporting the views that he quit and that he was initially fired for his comment regarding a superior is not credible.

Stafford denies it discriminated against Hansen. It's affirmative defense is that Hansen quit.

FINDINGS OF FACT

The facts are conflicting. I find the following facts to be credible.

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1. Donald Hansen was employed by Stafford Construction Company on May 15, 1978. (Tr. 1039).

2. Hansen was originally hired as an equipment operator and later he was placed in charge of maintenance. In October 1978 he went back to operating a bulldozer. In December he was assistant project manager. (Tr. 1040).

3. Hansen was not involved in the discharge of Stephen Smith, but he supervised the discharge of Tom Smith. (Tr. 1040-1041).

4. When Jim Fritz was installed as superintendent in February 1979, Hansen assumed various other duties including that of safety engineer. Conflicts between Fritz and Hansen began at that time. (Tr. 1086-1087, 1193).

5. Hansen was in daily contact with Fritz. Hansen describes his relationship with Fritz as "one day good and the next day bad". (Tr. 1098).

6. Hansen and Fritz had several arguments concerning company activities. (Tr. 1099-1100).

7. One dispute began on March 6 when Hansen asked Fritz why the sand trucks weren't running. Fritz didn't answer then but on the following day, Fritz told Hansen it wasn't any of Hansen's business. Hansen agreed it wasn't his business. Hansen and Fritz swore at each other. Shortly thereafter, about 10:00 a.m., Hansen went to Harold Stafford's office. He told Stafford there was a problem between Fritz and himself. (Tr. 1101-1104).

8. While Hansen was in Stafford's office he observed Harold Stafford writing on MSHA statements. These statements had been taken from various supervisors involved in the discharge of Steve and Tom Smith. There were little pieces of yellow paper or tabs attached to the statements. Hansen only recognized foreman Mark Jackson's statement. Everett Poynter, who was present, was adding to his written statement because the recorder had not been working all of the time when the statement was taken. (Tr. 1103-1106, 1249-1255, Exhibits R-15, R-16).

9. Hansen questioned Harold Stafford about the statements. Stafford indicated he was going over the statements as he had been instructed to do by his attorney. The statements had yellow stickers advising him of changes to be made. (Tr. 1248, 1249, Exhibit R-15).

10. Hansen stated he didn't think it was right for Stafford to be changing the statements. He stated that any changes should be a matter for the person who wrote the statement. Harold Stafford told Hansen not to worry about it. (Tr. 1254-1255).

11. After 15 or 20 minutes Stafford and Hansen left the office together and made the six or seven minute drive to the job site. After leaving the office Hansen said "I am tired of Jim

Fritz's shit and I don't want to work with him anymore, and I'm going to quit." Stafford then

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stated that the problem between Hansen and Fritz involved a difference of opinion and a personality conflict. (Tr. 1104, 1109, 1110, 1258).

12. On the jobsite Stafford and Hansen immediately met with Fritz, who spoke first. He said, "Don, you got to keep your nose out of my business. You are going out there and talking to the foreman and accusing me and calling me a son-of-a bitch, and a dumb one, and I can't put up with that. You are under my authority and you are undermining my authority, and pretty soon nobody is going to listen to me. I just can't put up with it. I don't want you running down and sticking your nose in my business like you did with the sand and whatever." As the meeting concluded Stafford asked the two men to shake hands. This occurred on March 7. (Tr. 1112-1113, 1261).

13. On March 8 Fritz confronted Hansen about changes Hansen had made on a company organizational chart. Hansen had redrawn the chart to show that he was directly responsible to Harold Stafford rather than to Fritz. Hansen denies this was a "heated" argument, but he concedes that Fritz seemed "very irritated." (Tr. 1117, 1118, 1195).

14. On March 9 about 7:30 or 8:00 o'clock in the morning Hansen talked to foreman Potter about hauling rock. After a brief conversation Potter said (referring to Fritz) "Well, that dumb son-of-a-bitch doesn't know nothing." Hansen replied: "Well, he may be a son-of-a-bitch but the thing about it, you are going to have to talk to him, not to me." (Tr. 1120-1121).

15. At an undetermined time on March 9 Fritz terminated Hansen. He stated as his reason that the foreman said that Hansen had called him a son-of-a-bitch. (Tr. 1116).

16. On or about March 20 Hansen filed a discrimination complaint with MSHA. The basis for his complaint was that he had been fired for disagreeing with the actions of Harold Stafford in changing the MSHA statements. (Tr. 1050).

17. On March 29 Harold Stafford found out about the discrimination complaint. He called his attorney and was advised to rehire Hansen because there were too many other lawsuits going including Rippy's, the NLRB, and the trust suits. (Tr. 1267, 1268).

18. Fritz called Hansen on March 29 and said maybe they'd made a mistake in firing him. Hansen was offered his old job as blade operator. (Tr. 1125-1126).

19. On April 2, the following Monday, Hansen returned to the jobsite but didn't work. He spent the entire shift riding in the pickup with foreman Chuck Luther. Luther and Schneider told Hansen there was no available equipment for him to operate. (Tr. 1055, 1061).

20. On the same day Hansen asked Fritz about back pay and

Fritz said he (Hansen) would have to talk to Harold Stafford about that. Hansen told

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Fritz that his return to work was conditioned on his receiving his back pay, and he would talk to Stafford about the pay. Stafford was not present at the jobsite on April 2. (Tr. 1128, 1134).

21. On the night of April 2 Hansen went to Stafford's apartment. Fritz, Schneider, and Stafford were present. Hansen asked Stafford if he was going to pay him his back pay. Stafford picked up an envelope and said "This is a bunch of horseshit and lies you old son-of-a-bitch, and I'm not going to give one dam dime unless you work for it, and everyone else has the same treatment." Hansen renewed his request for back pay. Stafford replied "You quit, and that is not my fault." Hansen said "Well, Theisen said if I continued working, I could jeopardize my back pay." Stafford replied "Bullshit." (Tr. 1136, 1140, 1272-1273).

22. The next afternoon (April 3) at the jobsite, as Hansen was turning in his equipment, Stafford heard Aldrich, the office manager, arguing with Hansen. Fritz was also present. Aldrich said (referring to Hansen) "He is quitting. He is not coming back to work, and he wants a lay off slip." Stafford said "We are not going to give any lay off slips if you are going to quit and you are not coming back. Now, is there any problem with that? Hansen said "No, whatever." The termination slip was made out at that time. Hansen didn't receive his check that day because since he'd quit he could pick it up on Friday (Tr. 1268-1271).

DISCUSSION

Under the doctrine expressed in Consolidation Coal Company, (David Pasula), supra, complainant must show by a preponderance of the evidence that he was engaged in a protected activity and that the adverse action against him was motivated in part by the protected activity. In this case I do not find that Hansen was engaged in a protected activity. A careful weighing of the evidence leads to the foregoing voluminous findings of fact. The ultimate conclusion is that Hansen was fired by Fritz for reasons other than for any actions of Hansen that could be considered protected activity. He was subsequently offered back his old job as a blade operator. The offer was never accepted by Hansen because he could not resolve to his satisfaction payment of his back wages.

Complainant's post trial brief asserts there are several possible reasons for his discharge. These are (1) that Hansen told Stafford not to change the witness statements; (2) He was discharged for calling a superintendent an S.O.B; (3) He was discharged for the events in (1) and/or (2) then rehired and later terminated when Harold Stafford had a flare up of temper occasioned by Hansen filing an MSHA related complaint; (4) He was not discharged at all but quit. However, Complainant asserts the credible evidence does not support either the "quit" theory or the second reason above.

Only allegations (1) and (3) raise any question of the

existence of protected activity. Complainant's initial possible reason focuses on the witness statements. Hansen concludes Harold Stafford was upset with his comment on changing the witness statements. Stafford was not his usual

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"jolly go smiley" self in the six or seven minute drive to the worksite. (Tr. 1109-1110).

Hansen's conclusions are not credible. On the way to the jobsite Hansen said he'd rather quit than cause any problems. Stafford replied "Oh no, I need you, you can't quit" (Tr. 1110-1111). Stafford's statements and his willingness to drive to the jobsite and arrange a conference with Hansen and Fritz contradicts Hansen's conclusion.

The MSHA complaint later filed by Hansen, although not introduced in evidence, apparently asserts that he was fired for commenting on Stafford's activities in changing the witness statements. Inferentially complainant has charged Harold Stafford with tampering with MSHA statements, but such statements were never offered in evidence. The only statement containing a yellow tag was the statement of Adair Rippy (Exhibit R-15). The cover page of the six page typed statement contains a yellow tag with this writing appearing on it: "need to add information p. 4." On page four the following typed question and answer, among others, appear in the text of the statement:

Q: To your knowledge that you know of no one that was discharged for breaking an arm?

A: No. I don't know other than Tom Smith; the following appears handwritten after the foregoing typed portion:

"but we have fired approx 5 or 6 individuals for breaking or misuing (sic) equipment in a reckless manner"

Further down the page appears the following script on a yellow tag: "Here, the question was not asked whether he knew of any other equipment has been broken and if so, how".

The above changes in the MSHA witness statements are certainly innocuous and do not support Hansen's allegation that Harold Stafford was tampering with the statements.

I am unable to find any basis for Hansen's claim that he was fired because of his comments in connection with MSHA statements. There would hardly have been an effort by Harold Stafford to patch things up between Hansen and Fritz if Stafford intended to be retaliatory.

Complainant's second contention centers on the fact that Hansen could not have been fired by Fritz for merely calling him an S.O.B. Considering the record in this case, calling a foreman an S.O.B. by itself would not be

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a basis for discharge of the employee. However, that fact when considered in combination with Hansen's other conflicts with Fritz supports Stafford's contention that the conflict between Hansen and Fritz was the reason for Hansen's discharge. Hansen's arguments and disputes with Fritz began virtually from the first day Fritz became superintendent, (Findings of Fact %57 4, 5, 7, 11, 12, 13, 14, 15). The evidence on these conflicts arises from Hansen's testimony. The Stafford evidence merely confirms it. Hansen cannot ignore his own evidence.

I conclude Hansen was lawfully discharged by Fritz on March 9, 1979. An employer may discharge an employee for abuse of authority or insubordination, provided these reasons are real and not pretextual. In re Spalding, Division of Questor Corporation, 225 NLRB 946 (1976). An employee was lawfully discharged for repeated arguments and outbursts against his supervisor in Butler-Johnson Corp. v. NLRB, 608 F. 2d 1303, (9th Cir., 1979). Cf Manuel San Juan Co., Inc. 211 NLRB 812 (1974); Farah Mfg. Co., Inc. 202 NLRB 666, (1973); Cable Dairy Products Cooperative, Inc. 205 NLRB 160, 84 LRRM 1094 (1973). While the above cases deal with the National Labor Relations Act they give guidance here by analogy.

Complainant's third contention is that he was fired because of a combination of telling Stafford not to change the MSHA statements and because he called Fritz an S.O.B. Hansen maintains that he was then rehired and terminated a second time when Harold Stafford had a flare up of temper occasioned by Hansen filing an MSHA discrimination complaint.

After he was fired by Fritz, Hansen filed his MSHA complaint. He was thereupon offered back his old job. He went to the site the following Monday but always in issue was Hansen's claim for back pay (March 9 through April 2). Fritz could not resolve the matter and said only Harold Stafford could resolve the point. Hansen was on the jobsite all day but there was no opportunity to talk to Stafford. That night he went to Stafford's apartment where the back pay issue was raised. Stafford refused to pay him any back wages and that concluded the discussion.

I disagree with complainant's allegation that Harold Stafford's flare up of temper and accompanying statements on April 2 are indicative of retaliatory actions for Hansen filing an MSHA complaint. (Facts %57 21). I have previously concluded there was no basis for Hansen to file his MSHA complaint. Even if there had been a basis for Hansen to file such a complaint, an employer may legitimately dispute those allegations.

Briefly stated, I find that Hansen had already been discharged by Fritz, and it was Hansen, and not Stafford, that placed conditions on his accepting reemployment with the company. Hansen cannot ignore his own testimony that he was not returning to work until the issue of back pay was resolved with Stafford. (Tr. 1133-1134).

I conclude that Hansen was not fired on April 3 in retaliation for having filed an MSHA complaint, but, in fact, Hansen never accepted Stafford's offer of reemployment.

Complainant attacks the credibility of the evidence that supports the view that he quit after the shift on April 2. In essence, complainant argues that Harold Stafford is not a credible witness because he says Hansen quit after he worked his shift on April 2, but the termination slip is dated April 3. (Exhibit P-14). I am not persuaded by complainant's argument for several reasons. Stafford at many times failed to display a dexterity with specific dates. I agree with complainant that Stafford testified Hansen quit at the close of the shift on April 2. However, the following events are very clear: first, Hansen went back to the jobsite on April 2; second, Hansen did not see Stafford on the site that day to resolve the back pay issue; third, Hansen went to Stafford's apartment that night; fourth, Hansen was asked to and did turn in his gear the next day; fifth, on April 3 Stafford directed the office manager to indicate on the termination slip that Hansen had quit and Hansen didn't argue with Stafford at that time. The fact that Stafford's testimony on this point was erroneous as to the date Hansen quit does not add greater credibility to Hansen's case. In summary, I conclude that Stafford could consider that Hansen's failure to accept the offer of reemployment constituted a showing that he had quit.

Two events in this case require comment. One event involves an alleged telephone call from Harold Stafford to Hansen. Hansen contends that when he answered the telephone the only "conversation" was the clicking of a revolver. The other event concerns Hansen's conclusion that he was severely pressured at Stafford's apartment the night of April 2. Complainant's post trial brief does not claim that these occurrences establish any particular point so it is not necessary to lengthen this decision with a further discussion of these factual situations.

For the foregoing reasons I conclude that Hansen was not engaged in a protected activity prior to his discharge on March 9, 1979 and without such protected activity no claim for discrimination can lie under the Act. I also conclude that Stafford did not discharge Hansen on April 3 in retaliation for Hansen's filing a discrimination complaint with MSHA. Hansen's complaint of discrimination should accordingly be dismissed.

DOCKET NO. WEST 80-155-DM
PATRICIA ANDERSON

INTRODUCTION TO THE CASE

Complainant's theory of the evidence is as follows: Mrs. Anderson, the Stafford secretary-bookkeeper was asked by Harold Stafford to help prepare documents that would show MSHA investigators that Stafford was undergoing a reduction in force. Mrs. Anderson reviewed the records but was unable to

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find any support for Stafford's argument. Thereafter, Mrs. Anderson was asked to tell MSHA investigators that when Steve Smith was terminated Stafford was undergoing a reduction in force. Anderson told Stafford officials she would not lie to MSHA investigators. In retaliation for her refusal to cooperate in obstructing the Steve Smith investigation she was terminated.

Respondent denies any claim of discrimination and contends Patricia Anderson was terminated because of her inability to handle her bookkeeping job.

FINDINGS OF FACT

The evidence is conflicting. I find the following facts to be credible.

1. Patricia Anderson was employed as a bookkeeper and secretary for Stafford Construction from June 1978 to February 12, 1979. (Tr. 1308).
2. The night of January 30, 1979, Mrs. Anderson met with Stafford Company officials on two separate occasions. (Tr. 1345-1346, 1369).
3. The first meeting was held at the construction trailer and was with Schneider, Fritz, and Hansen. The purpose was to secure documents for the MSHA investigators who were to meet with Stafford officials the following day. They went through the employees files and made a list of dates and the indicated reasons for terminations. A majority of the termination slips indicated there had been a reduction in force. (Tr. 1346, 1370, 1375).
4. One of the most common terms on the termination slips was a "reduction in force." (Tr. 1394).
5. Mrs. Anderson was called to a second meeting at the Stafford office in downtown Canon City. Harold Stafford, Mrs. Stafford, Schneider, Poynter, Jackson, Hansen and Mrs. Anderson were present. The meeting lasted 1 1/2 to 2 hours. (Tr. 1346, 1371, 1373).
6. Anderson was asked to listen to the company attorney's tape. This tape was a conversation between Harold Stafford and the attorney on handling MSHA business. Anderson was also asked to listen to a tape by Mark Jackson. She was also requested to read Mark Jackson's statement so she could see the way that MSHA tricked people into making statements that weren't exactly right. Mrs. Anderson didn't read the Jackson statement. (Tr. 1348, 1372-1373).
7. The purpose of the meeting, according to Anderson, was also to instruct her as to what she was to testify to at the MSHA meeting. She was asked to testify that there had been, in the Steve Smith case, a reduction in force. (Tr. 1347).

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8. Anderson said she couldn't lie; she couldn't testify that there had been a reduction in force. Harold Stafford finally said Mrs. Anderson could just say whatever she wanted to. (Tr. 1348, 1349).

9. Mrs. Anderson was asked to testify about the Stafford records. Harold Stafford told her that if she had any questions in her mind she was to write them on the blackboard. (Tr. 1373, 1392).

10. After this meeting Harold Stafford didn't talk to Anderson anymore and would come in and glare at her. (Tr. 1350).

11. Mrs. Stafford didn't speak to Anderson after the January 30 meeting, but Mrs. Stafford had started glaring at her two to three weeks before the January 30 meeting. (Tr. 1350, 1384).

12. Mrs. Anderson's last working day was February 8. She was given her termination slip on February 12. (Tr. 1350, 1351, 1355-1356).

DISCUSSION

The threshold issue to be addressed concerns respondent's contention that Patricia Anderson, as a clerical-secretary-bookkeeper employee, was not a "miner" under the Act. Respondent relies on the definitions of "miner" (FOOTNOTE 1) and "coal or other mine" (FOOTNOTE 2) as well as an interagency agreement between MSHA and OSHA. The agreement (FOOTNOTE 3) specifically lists what MSHA considers to be mining operations.

In May 1979, the United States Court of Appeals for the Third Circuit considered the definitions of "miner" and "operator" in the 1977 Act. The Court ruled, in part, that nonproduction personnel (those not directly involved in the extraction process) logically fall within the statutory definition of miner, for the definition of "coal or other mine" includes not only the immediate area of mineral extraction, but all lands, means of access, excavations, and equipment ancillary to the extraction process. Persons working in these ancillary areas are persons working in coal or other mines, and, therefore, are miners even though they are unlikely to be immediately involved in the production or extraction process. *National Industrial Sand Association v. Marshall.*, 601 F. 2d 689, (3rd Cir., 1979).

The agreement between MSHA and OSHA, cited by respondent, is not controlling. The agreement does not purport to include coverage by job classifications. It merely gives examples of the type of mining operations which MSHA and OSHA consider to be within the coverage of the Act.

Accordingly, I conclude that Patricia Anderson is a miner within the coverage of the Act.

MERITS OF ANDERSON CASE

The circumstances giving rise to the foregoing findings of fact must be put into perspective.

On January 30, 1979, the day before the MSHA investigators arrived to take statements in the Steve Smith case, Mrs. Anderson was instructed to review personnel records and list those employees who had been terminated because of a reduction in force (RIF). Later that night a meeting was held with various company officials.

Seven company officials were present at the later meeting. Stafford was preparing his defense that Steve Smith was terminated because of a reduction in force. At this point in time virtually all of the work force had been reduced due to the ground freeze on January 5th.

At the meeting, Anderson was asked to testify that there had been a RIF. She refused, saying she couldn't lie. However, Anderson admitted she was never asked to lie. (Tr. 1381). All of the testimony about anyone implying that she should lie was generated solely by Mrs. Anderson.

Certainly efforts to suborn perjury can be very subtle, but I conclude no such effort was made here. After Mrs. Anderson gratuitously stated "I can't lie" there was additional conversation. Mrs. Anderson credits Harold Stafford with "finally" stating "Just say whatever you want to." (Tr. 1349). Also, at the meeting, Harold Stafford commented that if Mrs. Anderson had a question in her mind she was to write out the question on the blackboard. (Tr. 1373).

The above activities in my view are not indicative of an effort to obstruct the investigation of the Stephen Smith case. Nor do they constitute discriminatory conduct since at this point no adverse action had been taken nor indicated against Mrs. Anderson. Mrs. Anderson claims she was made to feel unpopular and was threatened at the meeting. No threats or the exertion of pressure against Mrs. Anderson which would constitute discrimination appear in the record. The fact that Harold and Mrs. Stafford glared at her does not amount to a violation of 105(c).

As previously noted, supra. page 5, Stafford's defense in the Stephen Smith case, although unsuccessful, has more than a scintilla of evidence to support it. To rule that Stafford's conduct during the January 30 meeting was in violation of the Act would essentially mean that an employer could never discuss with any employee what he considered his defense to be in an MSHA case.

The only possible protected activity in this case was the right of Mrs. Anderson to testify that there had not been a reduction in force. As stated above, Stafford did not interfere with this right prior to the MSHA investigation. Mrs. Anderson

never did give a statement to the MSHA investigators. (Tr. 1381).

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At the time her employment was terminated, nearly two weeks after the January 30 meeting, Mrs. Anderson was not preparing to testify nor had she previously testified adversely to Stafford's case. Accordingly, I conclude that Mrs. Anderson was not fired in retaliation for any protected activity. Therefore, Mrs. Anderson's complaint of discrimination should be dismissed.

REINSTATEMENT

At the time they filed their complaints the parties requested that they be reinstated to their former positions; however, at trial they waived that right.

CIVIL PENALTIES

In each of these cases the Secretary seeks a civil penalty of \$4,000.00 against Stafford for the violation of Section 105(c) of the Act.

The credible evidence has been reviewed and the complaints of Stephen Smith and Thomas Smith are to be affirmed. The Act provides that any violation of the discrimination section shall "be subject to the provisions of section 108 (FOOTNOTE 4) and 110(a). (FOOTNOTE 5) The statute authorizes the imposition of a penalty in an amount not to exceed \$10,000. 30 U.S.C. 820(a). In assessing civil monetary penalties the Commission is to be guided by section 110(i) (FOOTNOTE 6) of the Act.

Considering the pertinent statute and in view of the facts in the Stephen Smith and Tom Smith cases I deem a penalty of \$2,000.00 to be an appropriate civil penalty in each case.

Based on the foregoing findings of fact and conclusions of law as stated above I enter the following:

ORDER

DOCKET NO. WEST 80-156-DM
STEPHEN SMITH

1. Complainant Stephen Smith was unlawfully discriminated against and discharged by Respondent for engaging in an activity protected under Section 105(c) of the Act, and his complaint of discrimination is sustained.

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2. Respondent is ordered to pay Stephen Smith the sum of \$4,022.00 in back pay. Further, respondent is to pay interest on said back pay at the rate of 12 1/2% per annum. (FOOTNOTE 7)

3. The employment record of Stephen Smith is to be completely expunged of all comments and references to the circumstances involved in his discharge.

4. A civil penalty of \$2,000.00 is assessed against respondent for violating Section 105(c) of the Act.

DOCKET NO. WEST 80-165-DM
THOMAS SMITH

1. Complainant Thomas Smith was unlawfully discriminated against and discharged by respondent for engaging in an activity protected under Section 105(c) of the Act, and his complaint of discrimination is sustained.

2. Respondent is ordered to pay Thomas Smith the sum of \$5,488.00 in back pay. Further, respondent is to pay interest on said back pay at the rate of 12 1/2% per annum.

3. The employment record of Thomas Smith is to be completely expunged of all comments and references to the circumstances involved in his discharge.

4. A civil penalty of \$2,000.00 is assessed against respondent for violating Section 105(c) of the Act.

DOCKET NO. WEST 80-71-DM
DONALD HANSEN

The complaint of discrimination filed by Donald Hansen is dismissed.

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DOCKET NO. WEST 80-155-DM
PATRICIA ANDERSON

The complaint of discrimination filed by Patricia Anderson is dismissed.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE

1 30 U.S.C. 802(g)

~FOOTNOTE_TWO

2 30 U.S.C. 802(h)(1)

~FOOTNOTE_THREE

3 CCH Health and Safety Law Reports %57 516.62 p. 9 370

~FOOTNOTE_FOUR

4 30 U.S.C. 818

~FOOTNOTE_FIVE

5 30 U.S.C. 820(a)

~FOOTNOTE_SIX

6 30 U.S.C. 820(i)

~FOOTNOTE_SEVEN

7 Interest rate used by Internal Revenue Service for underpayments and overpayments of tax, Rev Ruling 79-366 Cf. Cf. Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH, N.L.R.B. Para 18,484; Bradley v. Belva Coal Company, WEVA 80-708-D April 1981.