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SOL (MSHA) V. MULLIN COAL
DDATE:
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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 CLYDE SMITH, JR.,
JAMES R. CLEVINGER,
MONROE MULLINS,
DAVID MAY,
JERRY LEE SMITH,
JOHN R. TELFER, JR.,
JAMES THACKER,
H. K. TILLEY, JR.,
AND THOMAS W. WALKER,
COMPLAINANTS

Complaint of Discharge, Discrimination,
or Interference
Docket No. KENT 81-17-D
No. 1 Mine

v.

MULLIN CREEK COAL COMPANY, INC.,
RESPONDENT

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S.
Department of Labor, for Complainants
Charles E. Lowe, Esq., Lowe & Lowe, Pikeville, Kentucky, for
Respondent

Before: Administrative Law Judge Steffey

Two hearing sessions were held in the above-entitled proceeding. The first hearing was held on March 6 and 7, 1981, in Pikeville, Kentucky, and pertained only to the merits of complainants' contention that they had been discharged in violation of section 105(c)(1), 30 U.S.C. 815(c)(1), of the Federal Mine Safety and Health Act of 1977. A bench decision was mailed to the parties on March 17, 1981. The bench decision found that all nine complainants had been discharged in violation of section 105(c)(1) of the Act and paragraph (B) of the bench decision provided for reinstatement of the four miners who had requested reinstatement and paragraph (C) of the bench decision ordered respondent to make payments of back pay to all nine complainants. Paragraph (G) of the order accompanying the bench decision provided for an additional hearing for the purpose of determining the facts required to compute back pay. The second phase of the hearing in this proceeding was held on November 17, 1981, in Prestonsburg, Kentucky, and a 17-page order was issued on January 12, 1982, setting forth the methodology to be used in computing back pay.

Counsel for the parties filed on February 1, 1982, two letters showing that counsel for the parties agree to the correctness of the calculations for back pay computed by complainants' counsel. The parties have not raised any issues with respect to the methodology I used in directing the

computation of back pay. Therefore, I find that the calculations submitted by complainants' counsel in his letter of January 22, 1982, should be used as the basis for ordering payment of back pay and the letters of counsel showing agreement as to the calculations are attached as an appendix to this decision.

WHEREFORE, it is ordered:

(A) The 16-page bench decision mailed to the parties on March 17, 1981, is confirmed and hereby issued as the final decision on the merits of the discrimination charges alleged in this proceeding.

(B) The final decision in this proceeding is comprised of: (1) the 16-page bench decision confirmed in paragraph (A) above, (2) the two-page Order Granting Request for Extension of Time, (3) the 16-page Order Providing for Computation of Back Pay, and (4) the six-page Appendix made up of letters from the parties agreeing to the computations of back pay.

(C) Paragraph (B) of the bench decision is confirmed, to wit, the Complaint of Discharge, Discrimination, or Interference filed in this proceeding on October 24, 1980, is granted for the reasons given in the bench decision confirmed in paragraph (A) above.

(D) Paragraph (B) of the bench decision is rescinded as moot because respondent has already reinstated all of the complainants who wished to be reinstated.

(E) Paragraph (C) of the bench decision is rescinded as moot because back pay has been computed and payment is awarded in paragraph (J) below.

(F) Paragraph (D) of the bench decision is rescinded as moot because respondent has already provided the basic data required for computing back pay.

(G) Paragraph (E) of the bench decision is rescinded as moot because the parties have already participated in the gathering of the necessary data for computing back pay.

(H) Paragraph (F) of the bench decision is confirmed, to wit, the employment records of all nine complainants shall be completely expunged of all references to their unlawful discharge and matters relating thereto.

(I) Paragraph (G) of the bench decision is rescinded as moot because counsel for the parties have already requested a reconvening of the hearing for the purpose of determining back-pay data, the hearing has already been held, and the amount of back pay due to each complainant has been computed.

(J) Respondent, within 30 days from the date of this decision, shall pay each complainant the amount set forth after his name in the tabulation below, together with interest at 12 percent per annum.

(1) Thomas V. Walker.....	\$16,226.95
(2) John R. Telfer, Jr.....	15,979.90
(3) Clyde Smith, Jr.....	10,478.15
(4) James R. Clevenger	26,410.30

(5)	Jerry Lee Smith	17,082.30
(6)	David May	13,241.65

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(7)	H. K. Tilley, Jr.....	19,224.95
(8)	Monroe Mullins.....	4,484.70
(9)	James Thacker.....	1,830.00

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

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The 16-page bench decision reproduced below was mailed to the parties on March 17, 1981, and is confirmed by paragraph (A) above as the final decision on the merits of the discrimination charges raised in this proceeding.

This hearing involves a Complaint of Discharge, Discrimination, or Interference filed on October 24, 1980, in Docket No. KENT 81-17-D by the Secretary of Labor and the Mine Safety and Health Administration on behalf of nine coal miners, namely, Clyde Jr. Smith, James R. Clevenger, Monroe Mullins, David May, Jerry Lee Smith, John R. Telfer, Jr., James Thacker, H. K. Tilley Jr., and Thomas V. Walker, pursuant to section 105(c)(2), 30 U.S.C. 815(c)(2), of the Federal Mine Safety and Health Act of 1977, alleging that complainants were illegally discharged by Mullin Creek Coal Company, Inc., on or about April 10, 1980, because they had withdrawn from Mullin Creek's No. 1 Mine and had refused to produce coal from an area of the mine having allegedly unsafe and hazardous roof conditions.

The issues raised by the Complaint are whether respondent violated section 105(c)(1) of the Act so as to entitle the complainants to the relief they are seeking under section 105(c)(2) of the Act. My decision will be based on the findings of fact which are set forth below:

Findings of Fact

1. The No. 1 Mine of Mullin Creek Coal Company, Inc., has two working sections. On April 10, 1980, when most of the events resulting in the filing of the Complaint in this proceeding occurred, a continuous-mining machine was being used in one section and conventional mining procedures were being used in the other section. The men using the conventional equipment were engaged in secondary mining or the extracting of pillars. Two production shifts per day were used in the pillar-recovery section. Respondent has stipulated that it is subject to the provisions of the Act and to the regulations promulgated thereunder.

2. Jerry Lee Smith was the operator of the roof-bolting machine on the 3-p.m.-to-11-p.m. shift and had worked at the No. 1 Mine for about 1 year prior to April 10, 1980. He left the mine about 6 p.m. on April 10 because he claimed that hazardous conditions made it unsafe for him to work. He described the unsafe conditions as an absence of the proper number of breaker posts, excessively wide bolting places, and lack of timbers for use as line posts or roadway posts. He claimed that such wide cuts of coal had been taken from the No. 2 and No. 3 pillars, that he had to install 32 bolts on 4-foot centers instead of the 15 bolts which would have been required if excessively wide cuts had not been taken. Smith also refused to install bolts in the No. 7 pillar after the coal was loaded because the roof just outby that pillar had dropped down about 2 or 3 inches. Smith said that it was unsafe to pass under that portion of bad roof in order to bolt the roof in the fresh cut which had been loaded from the No. 7 pillar. Smith also claimed that eight breaker posts were required to be set inby the end of each pillar but in only one entry in the entire line of pillars had breaker posts been set, and even for that single entry, only six of the eight required posts had been installed. Also, Smith said that an adequate amount of air was not reaching the working face because of the complete absence of brattice curtains. Smith asks that he be reinstated to his former position.

3. Monroe Mullins was the operator of the cutting machine in the pillar-recovery section on the 3-to-11-p.m. shift on April 10, 1980. He had worked at the No. 1 Mine about 4 months prior to April 10. Mullins left the mine about 6 p.m. on April 10 because he believed it was unsafe to work in the mine. Mullins claimed that six breaker posts had been installed in only one entry out of seven entries, and that in the single entry where breaker posts had been set, only six had been set of the eight which were required. Mullins asked the section foreman for additional timbers, but the section foreman told him to run coal and no timbers were provided. Mullins also stated that proper ventilation was lacking because no brattice curtains at all had been installed. All seven pillars had been completely cut from one side to the other without leaving wings on either side of the pillars. Mullins asks that he be reinstated to his former position as operator of the roof-bolting machine.

4. Thomas V. Walker now works for the A and S Coal Company and does not ask to be reinstated to his former position at Mullin Creek's mine. On April 10, 1980, Walker was the "shot firer" or the person who filled holes

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with explosives and detonated them. Walker left the mine on April 10 at about 6 p.m. because he considered the mine to be unsafe. The conditions which he described were that the entire ends of all seven pillars had been drilled and undercut. No timbers had been installed by the previous day shift, but timbers were brought in and set for him to shoot the coal down in the No. 7 pillar. Walker had difficulty in shooting the other pillars because of their having been drilled and undercut all the way across the pillars. The undercutting had weakened the coal to be shot to such an extent, that the coal was settling down to the floor of the mine and causing the holes which had been drilled for insertion of explosives to be crushed and obliterated. Despite that problem, Walker was able to shoot coal in the No. 6 pillar; he shot only half of the No. 5 pillar; he shot all of the No. 4 pillar and half of No. 3. The coal had fallen so badly in the No. 1 and No. 2 pillars, that he was unable to shoot any part of them. The hazard which upset Walker the most was that the roof was tending to override the working section and all coal fell so far into the area where he was working that his powder and detonators were covered by falling coal and it was necessary for him to dig them out of the coal so that he could finish shooting the pillars where holes were still visible. Walker was also concerned about being asked to set timbers beside the loading machine while it was still in operation. Walker additionally resented the fact that the section foreman would not stop the loading machine long enough for the miners to determine from sound whether the roof and timbers were making noises indicating an imminent roof fall. Walker was also concerned about the poor ventilation that existed as a result of the complete absence of brattice curtains on the section.

5. H. K. Tilley was working at the No. 1 Mine on April 10, 1980. He is unemployed at the present time and would like to be reinstated. On April 9, Tilley had worked as an operator of a ram car, but when he went into the mine on April 10, the mine foreman told him that his job was being changed from that of operator of a ram car to that of helper for the operator of the roof-bolting machine. He left the mine on April 10 at or about 6 p.m. because he feared for his safety. The hazards he described were that all pillars had been cut from one side to the other without leaving wings on each side. He also was concerned about the complete lack of any brattice curtains on the section. Tilley was upset about having been transferred suddenly to the position of helper for the operator of the roof-bolting machine without having received any prior training to do that kind of work.

6. James Thacker was an operator of a ram car on April 10, 1980. He is now working for Preece Coal Company and does not want to be reinstated to his former position. Thacker left the mine on April 10 after working only a few hours. The hazards he was upset and nervous about consisted of cracked roof, availability of only one or two timbers, and failure of ventilation. He saw no brattice curtains at all on the section. Thacker said that failure to set timbers prevents the miners from having a means of being warned by the cracking of timbers if the

roof should begin to fall prematurely or suddenly.

7. Clyde Smith was working at Mullin Creek's mine on April 10, 1980. He is now working for the McGinnes Coal Company and does not want to be reinstated. When Smith came to work at 3 p.m. on April 10, 1980, he was told that

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his job had been changed from that of operator of the coal drill to that of a general laborer. Smith went to the face area and spent the first part of the shift installing six timbers between the No. 2 pillar and the No. 3 pillar. Two other miners helped him set those six timbers which had to be cut with a dull saw. Smith realized that no timbers were available to set in other places where they were needed and requested the section foreman to get them. David May, one of the men helping Smith set timbers, stated that he would see the section foreman about obtaining additional timbers. Smith was concerned about lack of ventilation which resulted from a complete absence of brattice curtains. Smith asked the section foreman to get additional pillars and the section foreman said he would worry about availability of timbers and refused to stop production until timbers could be set. Smith considered conditions in the mine to be so bad that he became upset and nervous and left the mine after working only a few hours.

8. David May is now working for Dot Coal Company. He does not want to be reinstated to his former position. May was working at Mullin Creek's No. 1 Mine on April 10, 1980, as a beltman and general laborer. He went into the mine about 3 p.m. and saw several unsafe conditions, including cracked roof, pillars being cut all the way across the ends, and poor ventilation because of the complete lack of brattice curtains. May asked the section foreman for additional timbers and the section foreman promised to have some brought into the mine. May waited at the power center for the timbers to be brought in, but they did not arrive before the mine foreman came into the mine and called all men together for a talk which was highly critical of their working habits. May became upset after the foreman's speech and left the mine a short time afterward, believing that conditions in the mine were too unsafe for him to continue working there.

9. John R. Telfer, Jr., now works for Wolf Creek Collieries and does not want to be reinstated to his former position at Mullin Creek's mine. Telfer was working on the 3-to-11-p.m. shift on April 10, 1980. He had been a helper for the operator of the roof-bolting machine, but when he entered the mine to work on April 10, he was given the job of being an operator of a ram car. He believed conditions to be unsafe in the mine because the pillars had been cut all the way across the ends and there was a complete lack of brattice curtains. There were not enough timbers on the section and Telfer asked the section foreman to get some timbers, but the section foreman declined to stop production to install timbers and told Telfer to haul coal. Telfer left about 6 p.m. after deciding that conditions were too hazardous for him to continue working on the section.

10. James R. Clevenger was working at Mullin Creek's mine on April 10, 1980, as a repairman. He is presently unemployed and would like to be reinstated to his former position. He left the mine on April 10 about 6 p.m. after deciding that conditions were too hazardous for him to continue working. The conditions he described were that the pillars had been cut all the way

across, that complete lack of any brattice curtains failed to provide proper ventilation, and that no roadway timbers had been set. He repaired a cutting machine and a tractor for a ram car before he stopped working on April 10, 1980.

11. All of the nine complainants named in the preceding paragraphs stated that when they were leaving the mine property on April 10, the mine foreman saw them on the surface of the mine and stated, as they passed the mine office, that he would interpret their leaving before the shift had expired as a voluntary resignation or act of quitting. All of the complainants stated that they disagreed with the mine foreman's position and some of them told the mine foreman that they were not quitting and would report to work the next day.

12. When complainants returned to work on Friday, April 11, 1980, the day after they had declined to work in unsafe conditions, they first went by the office to pick up their paychecks. The checks were accompanied by "quit" slips which the men refused to accept. According to the testimony of respondent's bookkeeper and one of the former owners of the mine, Kenneth Stanley, the quit slips were supplemented on Monday, April 14, 1980, with lay-off slips. The lay-off slips allowed the complainants to draw unemployment compensation after April 10, 1980, whereas the "quit" slips would not permit them to claim unemployment compensation.

13. Stanley was at the mine office when complainants picked up their checks on April 11, 1980, and he talked to them individually, or in a group, in his office. He asked them to call him after he had investigated their complaints. They did call back on Monday, April 14, 1980, and Stanley, or his secretary, told them that they no longer had jobs at Mullin Creek's mine.

14. All of the complainants testified that they received certified letters asking them to come back to work on May 1, 1980. All of them returned to work after receiving the certified letters. None of the nine complainants were reinstated to their former positions on a production shift. Instead, they were assigned work related to laying track in the mine for the purpose of opening a new section which would use a continuous-mining machine. On May 9, 1980, after they had worked less than 2 weeks, all of the complainants received lay-off slips. According to the testimony of Earl Tolman and Debbie Stanley, who worked in respondent's office, on May 9, 1980, the same day that complainants were laid off, a total of 23 miners, including complainants, were laid off. On May 30, 1980, 11 additional miners were laid off; on June 3, 1980, 10 miners were laid off; and on June 6, 1980, 3 miners were laid off.

15. Two MSHA inspectors, named Hugh V. Smith and Danny Harmon, conducted a spot inspection of respondent's No. 1 Mine on April 11, 1980, the day after the complainants had left the mine in protest of unsafe conditions. Inspector Smith wrote Citation No. 713379 at 4:15 p.m., under section 104(d)(1) of the Act, alleging that a violation of 30 C.F.R. 75.200 had occurred in the area of the mine where retreat mining was in progress. The citation states that respondent's roof-control plan had been violated by the failure of respondent to install roadway posts in the Nos. 1, 2, and 3 pillar blocks and by the failure to use wooden cap blocks on the radius turn posts that had been

installed in the Nos. 1-6 pillar blocks. The citation also alleges that the pillar blocks appeared to be taking weight because coal was sloughing from the

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ribs and reducing the size of the pillar blocks. The other inspector, Danny Harmon, issued Withdrawal Order No. 730125 at 5:45 p.m. on April 11, 1980, alleging a violation of 30 C.F.R. 75.301 because the minimum quantity of 9,000 cubic feet per minute of air was not reaching the last open crosscut to carry away any harmful dust and explosive gases which might have accumulated in the mine. The order stated that there was insufficient air movement to turn the blades of an anemometer. Inspector Harmon stated that no brattice curtains at all had been installed on the section and that 10 brattice curtains had to be erected to direct an adequate volume of air to the last open crosscut on the working section.

16. Kenneth Stanley was a co-owner of the No. 1 Mine on April 10, 1980, when complainants left the mine after objecting to the hazardous conditions which existed in the mine. Stanley sold his stock in June 1980 and, at the time of the hearing held in March 1981, Stanley had no interest in Mullin Creek Coal Company. On April 11, 1980, when complainants reported to the mine office to pick up their checks, Stanley asked the miners to come into his office to discuss the reason for their leaving the mine on April 10. He talked to three or four of them individually and then all of them came into his office at once. Stanley stated that the reason they gave for walking out was that they were upset and nervous about the way the mine foreman had talked to them on April 10. As indicated in Finding No. 13 above, Stanley investigated their complaints and then advised all of them that they no longer had jobs at Mullin Creek's mine.

17. Both Stanley and respondent's bookkeeper testified that the miners came to the mine dressed in casual clothes and that none of them wore hard-hats or other clothing required for working underground. Both Stanley and the bookkeeper saw the miners when they came for their checks around 11 a.m. or noon and did not know whether the miners had brought their working clothes with them for use around 3 p.m. when the second shift on which they worked began.

18. Stanley stated that the mine foreman on the second shift, Elbert Church, had reported to him that the complainants had left the mine before their shift had ended, but Stanley could not recall whether Church had given him a reason for complainants' leaving. Stanley stated that instructions had been placed on the bulletin board and that all miners had been told that they should report any unsafe conditions first to the section foreman, then to the mine foreman, then to him, and that if the unsafe conditions were not eliminated by any of the management personnel at the mine, the unsafe conditions should be reported to both the State and Federal inspectors.

19. Freddie Meade is a ram car operator who was hauling coal on the second shift (3-to-11-p.m.) when the complainants left the mine. He said that one of the complainants, Clyde Smith, tried to get him to leave at the time the nine complainants left, but he declined to leave. Meade said that the miners on the day shift were not setting timbers on their shift

and that the men on the second shift resented having to install timbers which should have been set by the miners who worked on the day shift. Meade stated that the

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required number of timbers had not been set on the second shift on April 10, but he claimed that plenty of timbers could be found within three breaks of the face and that the operators of the ram cars would bring timbers to the working face if they were needed. Meade testified that there were plenty of brattice curtains in the mine, but he did not like to see curtains hung near the face because, in his opinion, they are a hazard to the loading of coal because they obstruct vision. Meade agreed that conditions on the section were unsafe on April 11 when the inspectors examined the mine.

20. Bobby Smith was the operator of the loading machine on April 10, 1980, when the nine complainants left the mine before their second shift had ended. He agreed with the nine complainants that conditions in the mine were bad on April 10 because the pillars had been cut all the way across, no brattice curtains had been installed, and no roadway posts had been erected. Bobby Smith, however, said that no one complained about not having timbers. He also said that the reason the men left the mine on April 10 was that they were upset because the mine foreman, Elbert Church, had changed some of their positions around, such as Clyde Smith's reassignment to setting timbers and H. K. Tilley's reassignment as helper for the operator of the roof-bolting machine. Bobby Smith said that the complainants were also upset because they were having to set timbers on their shift which should have been set on the day shift. Bobby stated that in Church's speech to the men on the second shift on April 10, Elbert Church, the mine foreman, emphasized the fact that he could not do anything about the way the day shift did its work, but that he was responsible for the way they (the miners on the 3-11 p.m. shift) did their work. Church also made it clear to the miners on the second shift that they would have to increase production on their shift because the second shift's production had declined considerably.

21. Bobby Smith also emphasized the fact that the miners on the second shift were deliberately doing acts which interfered with production. He mentioned such acts as deliberately stalling a ram car in a mud hole, throwing a metal guard on the belt to stall it, and dumping coal on the feeder when the beltline was already stalled. Smith claimed to have personal knowledge only as to the stalling of the ram car.

22. Lawrence Kindrick is a certified mine foreman and is now working for Moore and Moore Coal Company, but on April 10 he was employed by respondent and was operating a coal drill on the 3-to-11 p.m. shift. He testified that the mine foreman, Elbert Church, made a speech to the miners toward the first part of the shift. The miners were upset about the things Church said and left the mine, but Kindrick did not know when they left. He stated that he saw nothing unsafe that night. Although he first stated that he did not recall how the section looked, he thereafter stated that the section was being ventilated, that timbers had been set in each entry, and that there were plenty of timbers available on the section.

23. Elbert Church was the mine foreman on the 3-to-11 p.m. shift on April 10, 1980, when the complainants in this proceeding left the mine before their shift was over. He has worked for respondent for the past 4 years. He

stated that production on the second shift had dropped to about half of the amounts previously produced. He called the miners together on the night of April 10 and told them that the section would be closed down if they did not start producing more coal than they had been producing. He told them that they were idle an excessive amount of the time and that if he found them loafing when the section foreman had assigned them work to do, they would be discharged on the spot. Church said that the miners on his shift had been complaining because they had to set the timbers which the day shift should have installed. He said that he told them the day shift was the day-shift foreman's responsibility and that he would let the day-shift foreman worry about that shift and that he would worry about his shift.

24. In Church's opinion, the complainants had left on April 10 because, in his speech to them, he had threatened to fire them if they continued to loaf when they should be working. Church agreed with the testimony of one of the complainants, Clyde Smith, to the effect that Church had refused to grant Smith's request for permission to talk to Church after Church had completed making his speech on April 10. Church said the reason that he refused to talk to Smith was that Smith had, on a previous occasion, talked to Church for 45 minutes during a production shift. For that reason, Church believed that anything Smith might have to say to him could be postponed to the end of the shift. Church stated that he would not ask miners to work in unsafe conditions and claimed that he had had brattice curtains installed to within two crosscuts of the working face. Church testified that he was on the surface of the mine when complainants left early on April 10 and that he warned them at the time they left that he would consider their leaving to be the same as if they had been discharged.

Violations of Section 105(c)(1) of the Act Were Proven To Have Occurred

I believe that the 24 Findings of Fact set forth above summarize the basic facts on which my decision should be based. The ultimate question raised by the Complaint in this proceeding is whether violations of section 105(c)(1) occurred. Section 105(c)(1) provides, in pertinent part, that:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal mine subject to this Act because such miner * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent * * * at the coal * * * mine of an alleged danger or safety or health violation in a coal * * * mine, * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

The section foreman, Joe Beard, to whom complainants reported safety and health violations, did not testify as a

witness to this proceeding. Several of the complainants testified that they had complained to him about a lack of

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timbers to set on the evening of April 10, that they had complained about the unsafe roof conditions that existed on April 10, and that they had complained about the lack of ventilation caused by the nonexistence of brattice curtains. Respondent's witnesses did not purport to claim that they were in the presence of the section foreman at all times on April 10 so as to be able to state that no safety complaints were made to the section foreman.

Complainants' testimony to the effect that they complained about safety clearly preponderates, especially in the absence of any testimony by the section foreman giving his version of the events which occurred on April 10. The Commission held in Local Union No. 1110, UMWA v. Consolidation Coal Co., 2 FMSHRC 2812 (1980), that it is unrealistic to require that each of a group of miners make his own individual complaint about safety if he knows that other miners have already complained without receiving any improvement in conditions.

There can be no doubt about the existence of unsafe conditions in the mine on the 3-to-11 p.m. shift on April 10, 1980. Even respondent's witnesses, with the exception of Lawrence Kindrick, testified that conditions in the mine were unsafe on April 10, 1980. Kindrick's testimony is entitled to almost no weight because he first testified that he did not recall what conditions existed on April 10 and thereafter stated that timbers had been set and that ventilation curtains had been installed. The mine foreman stated that brattice curtains had been installed to within two crosscuts of the working face. Even if that were true, curtains installed within two crosscuts of the working face will not provide the volume of 9,000 cubic feet per minute of air at the last open crosscut which is required by 30 C.F.R. 75.301. Therefore, the mine foreman's testimony does not controvert the complainants' contention that proper ventilation was not being provided on April 10. Moreover, the mine foreman stated that he rejected the complainants' objections to having to install timbers which should have been set by the day shift on the ground that he was not responsible for the failure of the day shift to comply with respondent's roof-control plan. The mine foreman completely ignored the fact that the day shift's failure to install timbers caused the miners on his shift to be exposed to unsafe roof conditions until the miners on his shift could install the timbers which had not been erected by the day shift. The mine foreman's excuse that the day shift's foreman could worry about the day shift and that he would worry about the night shift was a clear failure on his part to carry out his responsibility to see that the working section was safe. Obviously, one of the reasons that his second shift's production had declined was that his men were having to do the roof-support work which should have been performed by the crew of men who worked on the day shift. It is not surprising that his men became upset when he threatened to fire them for loafing and refused to listen to their complaints.

Respondent's Claim that Miners Did Not Stop Working Because of Unsafe Conditions

The primary defense which respondent makes to the complainants' contention that they refused to work on April 10 because of the unsafe conditions in the mine, is that all of the miners who refused to work gave as their reason for refusing to work that they they were upset and nervous. Nearly all of the complainants testified that they were nervous and upset when they refused to work on April 10. That would be a normal reaction for men to have who were exposed to unsafe roof conditions each day when they reported to work. That would also be a normal reaction for men to have when their foreman blames them for failure to produce large quantities of coal while simultaneously expecting them to do the roof-control work which should have been performed by the miners on the day shift.

Every one of the unsafe and unhealthful conditions cited by the complainants who refused to work was corroborated by the testimony of respondent's own witnesses. The mine foreman conceded that one of the complainants had been sent to obtain a supply of timbers and therefore was not present at the time he made his speech threatening to fire the men if they did not increase their production of coal. The fact that a man had been sent to obtain timbers supports the complainants' contention that an adequate supply of timbers was unavailable on the section at the time they were told to set timbers.

The complainants' contention that timbers were not being set by the day shift is also supported by the fact that when Inspector Smith examined the mine on April 11, the day after the men refused to work because of unsafe roof conditions, he cited respondent for an unwarrantable failure violation of its roof-control plan in that roadway posts had not been set in the Nos. 1, 2 and 3 pillar blocks, that cap blocks were not being used on the radius turn posts that had been installed in the Nos. 1 to 6 pillar blocks. Additionally, the inspector noted that two of the pillar blocks had been endangered off by respondent as being unsafe for extraction operations. The danger signs had been erected on the next shift following the one on which the complainants had refused to work. The inspector's finding of unsafe roof conditions on April 11 is strong corroboration for the complainants' contention that the roof was unsafe at the time they refused to work.

As to the complainants' contention that an inadequate amount of air was being provided at the working face, Inspector Harmon wrote an order of withdrawal under the unwarrantable failure provisions of the Act on the next day after the men refused to work. The reason given for his writing the order was that his anemometer would not even turn when he tried to determine whether the required volume of 9,000 cubic feet of air per minute was being provided at the last open crosscut. Inspector Harmon testified that no brattice curtains whatsoever had been installed in the working section and that it was necessary for the miners to erect 10 brattice curtains before an

adequate volume of air could be directed to the working face. The inspector's finding on April 11 as to a complete lack of brattice curtains is strong corroboration for the complainants' contention that the section was not being ventilated properly on April 10 when they refused to work.

As I have indicated above, respondent's mine foreman conceded that curtains had been installed only up to two crosscuts from the working face. It is not likely that the day shift would have come in and torn down the curtains on the morning of April 11 if they had actually existed on the evening of April 10. Even assuming that the mine foreman's testimony is correct, the lack of curtains for a distance of two crosscuts from the place where complainants were working would have failed to provide adequate ventilation at the working face.

It is true that Stanley, one of respondent's co-owners, claims to have interviewed the men on April 11 after they had walked out on April 10. He claims that the men defended their refusal to work only on the grounds that they were nervous and upset and that they did not complain about unsafe or hazardous conditions on April 11. Stanley promised to investigate the cause of their being upset and nervous, but the only investigation he made was to ask the mine foreman what had happened. Stanley did not go underground on either April 10 or April 11 to examine the working section. He had told the complainants to call him on Monday after he had finished his investigation. When the complainants did call, Stanley told them that he no longer had a job for them.

The conditions described by the complainants on April 10 and the conditions described by the inspectors on April 11 would be expected to cause miners to be upset and nervous. The fact that complainants may not have articulated the reason for their being upset and nervous at the time they refused to work is not a sufficient reason to dismiss the Complaint when the evidence shows that working conditions in the mine were both unsafe and unhealthful at the time they refused to work. Several of the complainants testified that they were too nervous to eat their lunch and one man was so upset that he vomited.

It should be noted that the mine foreman did not try to determine the cause of their refusal to work. The only action he took when he saw the complainants leaving on April 10 was to tell them as they walked past his office that he would consider them to have been discharged if they walked out before the shift had been completed.

The Alleged Sabotage

Respondent claims that the miners were committing acts of sabotage in the mine. The mine foreman testified that the miners were throwing objects into the feeder and on the conveyor belt for the purpose of causing it to become so choked with foreign materials that the equipment had to be stopped while the clogging materials were extricated. The operator of the loading machine claimed that he saw one of the complainants deliberately drive a ram car in a mud hole for the purpose of rendering it inoperative.

One of the complainants, James Clevenger, testified that he repaired a wire in the control panel on the ram car. No one

tried to controvert Clevenger's claim that he repaired a wire in the ram car. Therefore, the

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evidence is at least equivocal as to whether the ram car was deliberately stuck in a mud hole or simply ceased to run because of the defective wire at the time it became mired in mud. Respondent does not take the position that it discharged complainants because of the alleged acts of sabotage described above. Since Respondent does not claim that it discharged complainants because of the alleged acts of sabotage, it is unclear to me just how respondent would have me use its claim that complainants were deliberately trying to slow down production.

Respondent's Claim that Complainants Refused To Work Because of Peer Pressure

Respondent claims that complainants refused to work on April 10 because several of the miners' jobs had been changed. The mine foreman changed H. K. Tilley's job from that of an operator of a ram car to that of a helper to the operator of the roof-bolting machine and the mine foreman changed Clyde Smith's job from operator of the coal drill to that of setting timbers. Two of the men (Freddie Meade and Bobby Smith) who remained in the mine and continued working on April 10 testified that two of the complainants, Tilley and Smith, respectively, tried to get them to leave the mine because Tilley and Smith were upset over the changes in their jobs.

Each of the complainants testified that he had refused to work on April 10 because of unsafe and unhealthful conditions in the mine. If the evidence discussed above and the findings of fact set forth above had failed to show that unsafe and unhealthful conditions existed in the mine on April 10, respondent's claim that the men were persuaded to leave by Tilley and Smith who were dissatisfied with their job assignments would be more persuasive than it is. Clyde Smith testified that the change in his job from operator of the coal drill to that of setting timbers did not upset him because the change provided him with an opportunity of making the mine safe by giving him time to set the timbers which were required by the roof-control plan. Smith claimed, however, that only six timbers were available on the section at the time he started to set timbers on April 10. After he and two other miners had set the six timbers available, he asked the section foreman to obtain a supply of additional timbers. The mine foreman testified that David May had been dispatched to obtain timbers. The evidence, therefore, supports Smith's claim that he could not set timbers because none were available after he had installed the six which were present on the section when he reported for work.

The fact that all nine complainants left at the same time indicates that they probably had a discussion among themselves about leaving before they actually left the section. There is a lack of evidence, however, to show that the primary reason the miners left was that four of them had had changes in their job assignments. Assuming that Smith was upset over the change in his job assignment, the evidence shows that he had additional reasons for refusing to work and for trying to influence some of the

other miners to refuse to work. He testified that when he asked the section foreman for additional timbers, the section foreman told him that he could not stop

production while timbers were set. Smith also testified that the section foreman became very agitated when Smith suggested that a Federal inspector be called to examine conditions on the section. Smith also said that the mine foreman refused to listen to his complaints after the mine foreman had made his speech exhorting the men to increase production. The mine foreman himself corroborated that David May had been sent to obtain a supply of timbers. Consequently, Smith had quite a few reasons to be upset about conditions in the mine on April 10 and it is quite likely that he included his job reassignment as one of the reasons for suggesting that all of the men ought to refuse to work in protest of the conditions which existed. Both of respondent's witnesses who claimed that Tilley and Smith had tried to get them to leave the section also testified that conditions on the section were unsafe on April 10 when the nine complainants refused to work and left the section.

In view of the circumstances described above, I cannot conclude that the Complaint in this proceeding should be dismissed just because one or two of the complainants may have been active in persuading the other seven complainants to refuse to work in protest of the unsafe conditions under which they were asked to perform, especially in light of the mine foreman's request that they increase production at the same time that he declined to take action to provide proper roof support and ventilation.

The Recall of Complainants on May 1, 1980

One of the few facts in this proceeding which was undisputed is the fact that all nine of the complainants were sent certified letters asking that they report for work on May 1, 1980. All of them did report for work in response to the certified letters. None of them, however, were reinstated to the positions on a production section which they held prior to their discharge on April 10. Both Stanley, the co-owner who testified at the hearing, and the company's bookkeeper stated that the nine complainants were recalled for the sole purpose of doing manual labor, such as laying railroad track, required for opening a new section which would utilize a continuous-mining machine in lieu of the conventional equipment which was being used in the section of the mine where complainants were working on April 10. Stanley stated that he knew when he recalled the nine complainants that they would be used in connection with opening the new section and that they would be laid off when that limited work had been completed. As it turned out, the nine complainants did various types of manual labor at the mine and were then laid off on May 9 after working less than 2 weeks.

The evidence shows that on May 9, when complainants were laid off, 14 other miners were laid off. Additional miners were laid off on other dates: 11 on May 30, 10 on June 3, and 3 on June 6. The reason for the general reduction in personnel was that the mine was converted to use of continuous-mining machines which require fewer miners than operation of a mine using conventional equipment. Respondent contends that even if

violations of section 105(c)(1) are found to have occurred so as to warrant the reinstatement of some of the miners, and payment of lost wages to all of them, that the only period for

which they should be permitted to earn back wages would extend from the time of their discharge on April 10, 1980, to the time of their reinstatement on May 1, 1980. The reason for respondent's position as to back pay is, of course, based on its argument that the miners were laid off on May 9 as a part of a general reduction in working force and not because of anything which happened on April 10, 1980.

I find that respondent's position as to back pay must be rejected for several reasons. There was not a true reinstatement of complainants to the positions which they held at the time of their discharge. The co-owner who testified at the hearing stated unequivocally that when complainants were recalled on May 1, respondent's management knew that complainants would be employed only for a very brief period of time for the purpose of laying track to open the new section. Respondent's witnesses did not explain how the reduction in force was made. All of complainants were discharged on May 9, the day when the first group of miners were laid off. There is nothing in the record to show that all nine complainants would have been laid off on May 9 if they had not refused to work on April 10. The fact that complainants were recalled for a short-term job and then laid off again 9 days later as a general reduction in force supports a conclusion that the rehiring and second discharge were part of a plan deliberately designed to prevent the miners from recovering back pay in the event their Complaint in this proceeding should be granted.

The Miners' Right To Withdraw Because of Unsafe Conditions

The findings of fact set forth at the beginning of this decision show that complainants had been exposed to unsafe conditions on April 10, 1980. The Commission held in *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980), that a miner has the right under the Act to refuse to work in hazardous conditions. The evidence shows that complainants had objected to the lack of roof support and ventilation on April 10, 1980, prior to the time that they refused to work. Therefore, respondent violated section 105(c)(1) of the Act with respect to each of the nine complainants when respondent refused to allow complainants to return to work on April 11 because of their refusal to work in unsafe and unhealthful conditions on the afternoon and evening of April 10, 1980. The order accompanying this decision will hereinafter require respondent to reinstate to their former or equivalent positions all of the complainants who wish to be reinstated. Respondent will also be ordered to pay all complainants the wages which they would have earned if they had not been unlawfully discharged on April 10, 1980.

It was agreed at the hearing that evidence would not be taken with respect to the jobs which some of the complainants have held between the time they were discharged on April 10, 1980, and the time that they are paid back wages under the order accompanying this decision. At the conclusion of the hearing on the merits, I stated that I would provide a period of time for complainants to calculate their back pay and that a supplemental

hearing would thereafter be scheduled at which respondent would be given the opportunity to challenge any of the facts underlying the calculations of back wages. No final decision

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will be issued in this proceeding until the facts necessary for awarding back pay can be obtained.

Civil Penalty

Counsel for complainants requested at the conclusion of the hearing that I assess civil penalties for the violations of section 105(c)(1) which I have found to exist. My order issued January 13, 1981, providing for hearing in this proceeding, consolidated the civil penalty issues with the issues raised by the filing of the Complaint, but that order made it clear that I would defer the assessment of civil penalties until such time as the Secretary of Labor files a Proposal for Assessment of Civil Penalty pursuant to the provisions of sections 105(a) and 110(a) of the Act and sections 2700.25, 2700.26, and 2700.27 of the Commission's Rules of Procedure (29 C.F.R. 2700.25, 2700.26, and 2700.27).

WHEREFORE, it is ordered:

(A) The Complaint of Discharge, Discrimination, or Interference filed in this proceeding on October 24, 1980, is granted for the reasons hereinbefore given.

(B) Respondent shall reinstate Jerry Lee Smith, Monroe Mullins, H. K. Tilley, and James R. Clevenger to their former or equivalent positions at respondent's No. 1 Mine.

(C) Respondent shall pay all nine complainants the wages they would have earned if they had not been unlawfully discharged on April 10, 1980. Back pay may be reduced by the amount which any of the complainants earned from working at other jobs between the date of their discharge on April 10 and the time of their reinstatement with respect to the four miners named in paragraph (B) above or to the time of repayment of back pay with respect to the remaining five complainants who do not wish to be reinstated.

(D) Respondent shall provide MSHA's investigators and complainants with such information as they may need from respondent's payroll records in computing the back pay.

(E) Complainants' counsel is responsible for assuring that the basic facts required for computing back pay and offsets thereto are gathered, compiled, and computed. The time for accomplishing the gathering of said information and making the necessary calculations will expire on May 22, 1981, unless an extension of time is required and requested.

(F) The employment records of all nine complainants shall be completely expunged of all references to their unlawful discharge and matters relating thereto.

(G) Counsel for complainants and counsel for respondent shall confer and agree upon a mutually convenient time for recovering of the hearing for

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the purpose of permitting respondent's counsel to develop any facts which may be required pertaining to places where complainants have worked between the time they were discharged on April 10, 1980, and the time the hearing is reconvened. The date agreed upon shall be reported to me and an order providing for reconvening of the hearing will be subsequently issued subject to openings in my calendar of hearings and the availability of a suitable hearing room. If the date requested by counsel conflicts with my calendar or the availability of a hearing room, a change in the date will not be made without giving counsel for both parties an opportunity to arrive at an alternative date.

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