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UNITED WORKERS V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA, ON BEHALF OF BILLY DALE WISE, COMPLAINANTS	Complaint of Discrimination
v.	Docket No. WEVA 82-38-D
CONSOLIDATION COAL COMPANY, RESPONDENT	Ireland Mine

DECISION

Appearances: Thomas Myers, Esquire, United Mine Workers of America, Shadyside, Ohio, for the complainants Jerry F. Palmer, Esquire, Pittsburgh, Pennsylvania, for the respondent

Before: Judge Koutras

Statement of the Proceeding

This matter concerns a discrimination complaint filed by the complainants against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Complainant Wise claims that he was unlawfully discriminated against and suspended from his job for three days by the respondent for engaging in activity protected under section 105(c)(1) of the Act. Respondent filed a timely answer denying any discrimination and asserting that complainant Wise was suspended because he violated State and Federal mine safety laws. A hearing was convened on March 16, 1982, in Pittsburgh, Pennsylvania, and the parties appeared and participated therein.

Issue Presented

The principal issue presented in this case is whether Mr. Wise's suspension was prompted by protected activity under the Act. Additional issues raised are discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 20 CFR 2700.1, et seq.

The discrimination complaint filed in this case states the following circumstances on which the alleged act of discrimination is based:

> 1. At all times relevant to this proceeding Complainant Billy Dale Wise was a member of the Mine Health and Safety Committee. In connection with his duties as a member of the Mine Health and Safety Committee, Mr. Wise regularly inspects areas of the mine and reports unsafe or unhealthy conditions to the employer and to the appropriate federal and state agencies.
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> 2. On or about June 30, 1981, Complainant Wise reported a condition involving an improperly functioning belt feeder to the West Virginia Department of Mines. After investigating the complaint, the State Department of Mines assessed a personal fine against Mine Superintendent Mr. Omear.
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> 3. On or about July 2, 1981, Complainant Wise filed a complaint with the State Department of Mines, which alleged that miners were permitted to enter an area of the mine prior to such area being declared safe by the fireboss. After investigating Mr. Wise's complaint, the West Virginia Department of Mines assessed a personal fine against Mine Superintendent Mr. Omear.
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> 4. In the course of conducting an inspection of the mine on Friday, July 10, 1981, Mr. Wise and another member of the Safety Committee, Mr. Leo O'Connor, observed that parts of the 1 North submain track entry contained inadequate roof support, a condition which they believed posed a serious danger to the miners at the Ireland Mine.
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> 5. After observing the above-described dangerous condition, Mr. Wise called Mr. Omear, the Superintendent of the Ireland Mine, and informed him that the area should be dangered off. When Mr. Omear disputed Mr. Wise's evaluation of the condition of the track entry, Mr. Wise requested that MSHA Inspectors Moffitt and Tyston be called to the affected area to evaluate the condition. Mr. Omear thereupon indicated that such action would not be necessary and that he would assign men to correct the situation.
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> 6. Approximately two hours later, the Safety Committee returned to the affected area to check on the progress being made toward correcting the condition. While he was inspecting the area in question and questioning the

workers regarding the adequacy of the temporary supports, Mr. Wise was ordered by Mr. Omear to leave the area. After assuring himself that the miners assigned to correct the dangerous condition were proceeding to do so in a safe manner, Mr. Wise left the dangered-off area.

> 7. Later that day, Mr. Omear informed Complainant Wise that his action in remaining in the dangered-off area constituted insubordination and that he would be disciplined for this activity. The following Tuesday, July 14, 1981, Complainant Wise was suspended for three days.

On July 15, 1981, Mr. Wise filed a complaint of discrimination with MSHA, and on September 28, 1981, he received written notification of the Secretary's determination that no violation had occurred. The instant complaint followed, and complainants maintain that Mr. Wise's suspension resulted directly from activity protected under the Act and that his suspension was, therefore, a violation of section 105(c).

Respondent's answer admits to the following:

> 1. Billy Dale Wise is employed at Consolidation Coal Company's Ireland Mine in Moundsville, West Virginia, and is a miner as defined in section 3(g) of the Act.
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> 2. At all relevant time herein mentioned, Respondent Consolidation Coal Company did business and operated the Ireland Mine in the production of coal and therefore was an "operator" as defined in section 3(d) of the Act.
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> 3. The subject Ireland Mine, located in or near Moundsville, West Virginia, is a "mine" as defined in section 3(h)(1) of the Act, the products of which enter or affect commerce.
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> 4. At all times relevant to this proceeding Complainant Billy Dale Wise was a member of the Mine Health and Safety Committee. In connection with his duties as a member of the Mine Health and Safety Committee, Mr. Wise regularly inspects areas of the mine and reports unsafe or unhealthy conditions to the employer and to the appropriate federal and state agencies.

Testimony and evidence adduced by the complainants

Billy Dale Wise testified that he has been employed at the mine for over 15 years and has been a member of the safety committee for some 13 years. He is familiar with the provisions of the 1981 Bituminous wage agreement as well as his rights and responsibilities under the applicable state and Federal mine safety laws. On July 10, 1981, sometime after 10:00 a.m. he and two members of the safety committee conducted a regular safety inspection of the mine and while in the One-North section observed three overcasts which were in need of attention. After discussing

the situation with shift foreman James Siburt, mine superintendent Robert Omear was called to the scene. After inspecting the area further, Mr. Omear agreed that the overcasts needed attention, and Mr. Wise advised him that work should proceed immediately to correct the conditions. Mr. Wise observed that several roof bolts were not tied into the roof, the overcasts were loaded with stone, and wire mesh was hanging down. Although Mr. Wise told Mr. Omear that the conditions did not present an imminent danger, he suggested to Mr. Omear that two Federal inspectors who were in the mine could be brought to the area to inspect the overcasts, Mr. Omear stated that this would not be necessary and assured Mr. Wise that the conditions would be immediately corrected. Mr. Siburt and Mr. Omear hung "Danger" tags over the overcast area, Mr. Wise left the area to inspect another mine section, and Mr. Omear proceeded to make preparations to correct the conditions.

Sometime between 1:30 and 2:00 p.m. on July 10, 1981, Mr. Wise and safety committeeman Leo Connor returned to the overcast areas. A man-door had been erected near the first overcast, and although Mr. Wise could observe two men working outby the door and from his position outby the danger tags, he could not observe the men who were working behind the door and a wall. He and Mr. Connor proceeded beyond the danger tags and Mr. Wise looked in the man door and asked one of the workmen, Kenneth Simmons, about how the work was progressing and whether they "were making the area safe." Mr. Simmons advised Mr. Wise that they were "making it safe as we go".

Mr. Wise stated that after leaving the overcast area and going outside at approximately 2:30 p.m. Mr. Omear advised him that he was "wrong" in going past the danger sign at the overcast area and that he was going to discipline him but did not know exactly what course of action he would take. The following Monday, July 13, Mr. Wise and Mr. Omear discussed the matter further but no decision was made. On Tuesday, July 14, they discussed it again, and later that evening Mr. Wise was summoned to Mr. Omear's office and he was advised that he would be suspended for three days for insubordination for going beyond the danger tag. Mr. Omear then gave him a letter of suspension (exhibit C-1), confirming his suspension in writing.

Mr. Wise testified that after receiving the letter of suspension he took the next two days off, and since the mine was on strike on Friday he consulted with his union as to whether he should count that day as a suspension day. He was advised not to, and therefore stayed off work the next Monday and reported to work on Tuesday. He subsequently filed a grievance contesting his suspension, and the results of his arbitration hearing held on October 22, 1981, were made a part of the record (exhibit C-2).

Mr. Wise stated that he was not aware of any company policy or procedure concerning a miner crossing a posted danger tag. He indicated that he has in the past crossed beyond such posted signs while conducting regular inspections in his safety

committeemen's capacity and that his July 14 suspension was his first for doing so.

Regarding prior safety complaints, Mr. Wise confirmed that on June 29, 1981, he observed pipe being carried on a personnel carrier "jeep" and advised Mr. Omear that it was a safety violation. Mr. Omear disagreed with him, and Mr. Wise reported the incident to a state of West Virginia mine inspector that same day and requested an investigation. A second incident occurred on June 30, 1981, when Mr. Omear summoned him to a belt feeder located in the 6-D, 2-South supply track section where a mechanic was performing some work. Mr. Wise observed a protective cover which had been removed from the belt, and he also observed that the feeder had been "pumped out" while the belt was running. He advised Mr. Omear that this was a violation and then reported it to the state mine inspector and requested an investigation. A third incident occurred on July 2, 1981, when Mr. Wise was informed that two men went into the mine at 3 p.m. before it was firebossed. He learned that Mr. Omear had sent them in and he discussed the matter the next morning with Mr. Omear and advised him that sending men into the mine before it was fire-bossed was a safety violation. Mr. Omear stated that he would send men into the mine "anytime he felt", and Mr. Wise then filed a complaint with state mine inspector Arthur Price (Tr. 8-59).

On cross-examination, Mr. Wise confirmed that he is aware of the fact that the respondent has taken prior disciplinary action against employees. He also confirmed that he was aware that employee Rex Whipkey had received a five day suspension, but had no knowledge concerning prior disciplinary actions taken against employees Roger King, Joe D. Marciano, and Alan Goody. He also testified that he has in the past observed danger signs posted in the mine and that did not cross beyond them. He also indicated that by crossing beyond such danger signs he exposes himself to the hazards which may be present in the danger areas.

Mr. Wise stated that when he first arrived at the overcast areas which had been posted with danger signs he could not observe the men working behind the man door from where he was standing outby the danger signs. Although he did not disagree with the corrective action being taken by Mr. Omear with regard to the roof conditions, he proceeded beyond the danger signs in order to inspect the area and work being done beyond the danger signs in order to inspect the area and work being done behind the man-door and to ascertain from the men working there as to the progress of the work. He indicated further that Mr. Siburt said nothing to him about crossing beyond the danger sign, and although Mr. Connor had also passed beyond it nothing was said to him. After crossing the sign Mr. Wise leaned in through the man door and discussed the work going on with Mr. Simmons. After determining that the area was "being made safe" he left the area. He estimated that he was in the "danger" area for about five minutes and he reiterated that he crossed the danger area because he believes he has a right to do in his capacity as a safety committman in order to check any area of the mine where men are working (Tr. 59-77).

Kenneth P. Simmons, employed by the respondent as a pumper, testified that on July 10, 1981, he was instructed to take some

cribbing material to the overcast area in question, and when he arrived there Mr. Omear

instructed him to proceed with the installation of roof cribbing in the first overcast location. Mr. Simmons observed that construction work was proceeding to complete a man door in the side of the overcast and he also observed a roof bolter in the area. The car carrying the cribbing material was parked near the man door beyond the danger signs which had been posted. Mr. Omear showed him where to install the cribs. Mr. Simmons and another miner were installing jacks and cribs inby the man door, and two other miners were outby passing the cribbing material through the door to them.

Mr. Simmons stated that at approximately 2:30 or 3:00 p.m., after completing the installation of two cribs and while working on the third one he heard some conversation outside the door. Mr. Wise then looked inside and asked him how the work was progressing. Mr. Simmons showed Mr. Wise where the jacks and cribs were installed and he heard Mr. Omear yelling at Mr. Wise not to go beyond the posted danger signs. Mr. Omear was positioned oubty the danger signs approximately 20 feet from the door. Mr. Simmons stated that he asked Mr. Omear "if it was not safe for Mr. Wise to be there, what about me." Mr. Omear told him to "shut up and keep working". He continued working until 3:25 p.m. when he left the area at the end of the shift (Tr. 99-108).

On cross-examination, Mr. Simmons confirmed that while Mr. Wise did not pass through the man door where he was working, he did lean in to observe the area and to inquire how the work was progressing. He also confirmed that Mr. Omear also looked in behind the man door after he had completed his work on the roof cribbing (Tr. 109-110).

Leo Conner testified that he has been employed by the respondent for approximately 15 years and is the president of the local union as well as a member of the safety committee. He confirmed that he was with Mr. Wise on July 10, 1981, during a post-vacation mine inspection when they observed an overcast area along the haulage track which needed attention. They passed through a man door for a closer inspection of one of the overcasts and observed that it needed roof support. The conditions were called to the attention of shift foreman James Siburt and Mr. Omear was then summoned to the scene. Although all of them agreed that the conditions did not present an imminent danger, Mr. Conner and Mr. Wise informed Mr. Omear that the overcast conditions required immediate attention and Mr. Omear agreed to take care of the situation. Mr. Conner and Mr. Wise then left to visit another area of the mine.

Mr. Conner stated that at approximately 2 or 2:30 p.m. on July 10, he and Mr. Wise returned to the overcast area. Mr. Conner had a hand saw with him and Mr. Siburt had asked him to bring it with him. Upon their return to the area Mr. Omear was there, and Mr. Simmons and several others were working on the roof crib installation. Mr. Conner proceeded beyond the danger sign, and as he was returning Mr. Wise walked inby the danger sign and proceeded to the man door to inspect the work which

was going on. Mr. Conner overheard Mr. Omear comment "How easy it is to forget", but he said nothing to Mr. Conner about passing beyond the danger sign. Mr. Conner later learned that Mr. Omear would take disciplinary action against Mr. Wise for passing beyond the danger sign.

Mr. Conner testified that he had no knowledge of any company policy regarding employees passing beyond a posted danger sign and never saw such a policy posted. He confirmed that weekly safety meetings were held between the safety committee and mine management, but was not aware that any policy concerning danger signs was discussed. He confirmed that he had previously crossed beyond danger signs while accompanied by mine inspectors or company management (Tr. 125-139).

On cross-examination, Mr. Conner stated that he was not aware that any employee at the Ireland Mine had ever been disciplined for violating safety regulations. He also confirmed that when he passed beyond posted danger signs in the past he was engaged in walkaround inspections with state or Federal Mine inspectors or inspecting the mine face areas. He also confirmed that when he passed beyond the signs in the company of management personnel he was authorized by management to do so. In the instant case, since he was carrying a hand saw to be given to the crew installing roof cribs he believed he was authorized to go beyond the posted danger sign and Mr. Omear said nothing to him.

Mr. Conner stated that he believed he and Mr. Wise had the authority to go beyond the danger sign in their capacity as safety committmen in order to check on the men working in the area, and he did not believe he needed Mr. Omear's authorization to do so. Mr. Conner confirmed that he commented to Mr. Omear that "you can't get me", and he explained his comment by indicating that since he had brought in a hand saw as directed he believed he had permission from management to pass beyond the posted danger sign (Tr. 140-171).

Arthur Price, State of West Virginia Mine Inspector, confirmed the fact that he investigated the complaints concerning three alleged violations of state mine laws which occurred at the mine on June 29 and 30, and July 2, 1981. The complaints concerned the matter of hauling pipe on a personnel carrier, a belt feeder safety switch being by-passed, and men entering the mine before it was fire-bossed. He explained the procedures he followed in conducting the investigations and confirmed that he interviewed Mr. Omear during the course of his investigations. He also confirmed that he recommended and proposed that individual personal assessment fines be issued to Mr. Omear for at least two of the citations and identified two reports which he prepared concerning the matter (exhibits C-3 and C-4; Tr 172-191).

On cross-examination, Mr. Price referred to sections of the West Virginia mining laws which set out the prohibitions against persons going beyond posted danger boards, specifically sections 22.114 and 22.2-21.

Mr. Price also testified that mining companies should make available to miners copies of the applicable laws and regulations and he confirmed that he was once employed by the respondent at the Ireland Mine but quit to go to work with the state as a mining inspector. He confirmed that Mr. Omear did contact him to inquire whether it was legal for a person to cross beyond a posted danger sign and he advised Mr. Omear that it would depend on the circumstances presented but gave him no definitive answer (Tr. 191-192).

Testimony and Evidence Adduced by the Respondent

Robert E. Omear, testified that he is the general superintendent at the Luveridge Mine, but that in July 1981, he was the underground superintendent at the Ireland Mine. He discussed the general company policy concerning employee safety violations, and indicated that depending on the circumstances or facts of a given case, employees may be reprimanded orally or in writing, or they could be discharged. The policy was enforced while he was superintendent at the Ireland Mine, and during that time he and members of the mine safety committee had weekly meetings concerning safety matters of mutual concern. He confirmed that during his tenure as the underground mine superintendent, Mr. Wise was a member of the safety committee, and he worked with him for a period of some eight years on matters dealing with mine safety. During this time he has discussed the matter of union safety committeemen going beyond "danger boards" and has advised them of his belief that they had no right to go beyond such signs (Tr. 213-216).

Mr. Omear testified that on July 10, 1981, he met with Mr. Wise, Mr. Conner, and foreman Siburt underground for the purpose of inspecting several overcasts which Mr. Wise and Mr. Conner believed were in need of some work. He agreed that the work needed to be done, and men and materials were called in to install some cribs and a man door. A danger sign was hung on the first rail of the overcast and Mr. Wise and Mr. Conner left to continue on their inspection rounds. Mr. Omear remained in the area to instruct the men as to where the work was to be performed and after calling over the radio for a saw to be brought in he left to have a cup of coffee which was on the motor car used by one of the miners performing the work (Tr. 217-222).

Mr. Omear testified that while he was having coffee Mr. Wise and Mr. Conner arrived on a jeep and parked it some 45 feet from the area where the danger board had been posted. Mr. Conner was carrying the saw which he (Omear) asked to be brought in, and both Mr. Wise and Mr. Conner proceeded to walk beyond the danger sign. Mr. Omear then yelled at them and told them that they should not be beyond the danger sign. Mr. Conner left the saw in the area and immediately came out, but Mr. Wise stayed in for about six minutes and refused to come out. After he came out, Mr. Omear advised Mr. Wise that he was violating company policy as well as state and federal laws by walking beyond the danger sign and that possible disciplinary action would be taken against him. Mr. Wise advised Mr. Omear that as long as union people

were working on the overcast he would stay in until he got ready to come out (Tr. 223-224).

Mr. Omear confirmed that Mr. Wise did not have his permission to go beyond the danger board to check on the work which was in progress. Had he asked, permission would have been granted and Mr. Omear would have gone in with Mr. Wise to show him what was being done and to insure that he was safe (Tr. 225). Upon leaving the mine, Mr. Omear telephoned state mine inspector Price who agreed that state law may have been violated. Mr. Omear then contacted higher mine management to determine the course of further action to be taken against Mr. Wise, and it was decided that Mr. Wise should be suspended for three days for going beyond the danger sign. Prior to this incident, Mr. Omear had never observed a safety committeeman go beyond a danger sign unless he accompanied them (Tr. 226-229).

On cross-examination, Mr. Omear stated that the prohibition against walking beyond a danger sign has been a policy at the Ireland for as long as he has been there, and while the policy is not in writing "it is a policy that we've lived with" (Tr. 230). Such policy is sometimes communicated verbally at meetings and sometimes its posted (Tr. 231). At one time all company policies dealing with safety matters were in a book published by the company but he has not seen it for the past five or six years (Tr. 233). With specific reference to crossing beyond a danger sign, Mr. Omear stated that while it is not in writing every coal miner knows that a danger board "means exactly what it says, you do not go beyond a danger board" (Tr. 234). This policy is generally communicated to the work force at weekly safety meetings and during annual retraining (Tr. 235).

Mr. Omear stated that the men performing the work in the overcast area were under his supervision, and that after he determined that the roof cribs were being installed in the right place for roof support and that the men understood his instructions, he left to use the radio to order a saw and to have a cup of coffee (Tr. 238). Mr. Omear confirmed that he told Mr. Wise three times to come out of the area where the work was being done, and he also confirmed that Mr. Conner came out immediately after leaving the saw and that Mr. Conner commented "you can't get me I was delivering a saw" (Tr. 241). He did not see Mr. Conner lean through the man door to observe the work going on and he indicated that Mr. Conner heeded the first warning that he gave to Mr. Wise and came out immediately without arguing the point (Tr. 242).

Mr. Omear stated that he and other members of mine management discussed the incident in question and determined that Mr. Wise had violated federal or state mining laws by crossing beyond the danger board in question, but he could not specify the specific section of the law he had in mind (Tr. 248). Mr. Omear could not state when the policy in question was last discussed with the safety committee, and he assumed everyone was aware of the policy. He also confirmed a past incident involving safety committeeman Bob Carney who reportedly passed under a danger board while in the company of a federal inspector who was conducting a mine inspection. Mr. Carney was not disciplined and he did not repeat the offense again (Tr. 252).

In response to bench questions, Mr. Omear stated that company policy dealing with employee sanctions for violations of safety rules is posted on the mine bulletin board and it is in the form of general work rules

(Tr. 255, 258). Mr. Omear confirmed that at the time he ordered Mr. Wise not to pass beyond the danger board, and during the time disciplinary action was being considered against Mr. Wise, he was aware of the fact that Mr. Wise had reported mine violations and made safety complaints to state mine inspectors. However, he denied that he was influenced by this in taking the action which was taken against Mr. Wise in this case (Tr. 264). He also confirmed that certain state mine violations which may subject him to individual personal assessments still have not been resolved (Tr. 270). In response to a question as to his assessment of Mr. Wise as a member of the safety committee, Mr. Omear responded as follows (Tr. 273):

> JUDGE KOUTRAS: Is he well intentioned?
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> THE WITNESS: I don't--honestly, I don't believe he is, no.
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> JUDGE KOUTRAS: Why do you say that?
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> THE WITNESS: I don't believe he'd give you a fair shake or gives you a fair chance to take care of things inhouse without--I think his first thing out of the bag is to get the company, and the heck with it, you know, and that's just the way I feel about it. That's my opinion.

James Siburt testified that on July 10, 1981, he was employed as an acting shift foreman at the mine in question, and on that day he was escorting the mine safety committeemen Wise and Conner on their "end of vacation" safety inspection tour of the mine. Upon inspection of the one north section, Mr. Wise pointed out an overcast which was sagging and in need of attention, and Mr. Omear was called to the area. Mr. Omear agreed that work was required to correct the condition and he and Mr. Omear hung some danger signs. Mr. Siburt then left the area with Mr. Wise and Mr. Conner to examine another mine area and they were gone for about three hours. Upon returning to the one north section, they got off the jeep and Mr. Wise and Mr. Conner walked under and past the danger signs. Mr. Conner had a saw which he delivered to the crew doing the work and Mr. Wise looked in through the man door to observe the work which was being performed to correct the overcast condition. Mr. Omear asked Mr. Wise to come out from the area at least three times and Mr. Wise stated that he was "checking on his people". Mr. Siburt then left the area, and he stated he had no part in the decision to discipline Mr. Wise for going under the danger signs (Tr. 275-281).

On cross-examination, Mr. Siburt stated that in the past the company has had a policy concerning the violation of safety regulations by miners and he indicated that the initial training of a new miner includes the fact that no one is to go inby danger boards or roped-off roof supports. He had no idea as to how long the company policy has been in effect, did not know whether it was in writing, and had never seen it in writing.

He stated that everyone working underground knows that there is a policy against going beyond a danger board, and he knows of no company guidelines dealing with any discipline taken against miners for safety policy violations. He observed both Mr. Wise and Mr. Conner cross beyond the danger sign, but did not know who went in first and he confirmed that he heard Mr. Omear tell Mr. Wise to come out at least three times and Mr. Wise's response that he "was checking on his people". He also confirmed that Mr. Omear asked Mr. Wise if he had two-hundred and fifty-dollars to pay for walking under the danger boards (Tr. 281-289).

Mr. Siburt confirmed that he has passed beyond danger boards to check on mine conditions and to see that certain work is performed by the crew and that he did so on July 10, 1981. On these occasions, he did not have Mr. Omear's permission because he is certified by the State of West Virginia, and as a member of mine management is authorized to determine whether work to correct violations is being done properly. He also indicated that Mr. Wise is not certified by the State of West Virginia, and he is not aware of the fact that Mr. Wise has certification papers to conduct pre-shift, on-shift, or fire-boss inspections (Tr. 296-299).

State Mine Inspector Arthur Price was recalled and testified that when he spoke with Mr. Omear about Mr. Wise walking under a danger sign he referred him to Article 22-1-4 of the state mining code and advised him that "he may or may not have a case" and that he should check further with the Inspector-at-Large. Mr. Price also indicated that by walking beyond the danger sign Mr. Wise was in violation of the state fire-bossing articles which state that it is a violation for anyone to pass beyond a danger board once the area has been fire bossed and dangered off as a result of that fire boss inspection (Tr. 303-304). However, in his 39 years of mining experience, the general practice is for miners to respect a danger sign and not walk beyond it unless they are going in to correct the conditions (Tr. 305). Mr. Price also cited state mining provision 22-2-54 which requires mine operators, as well as employees, to insure that state mining laws are complied with. This law also requires the publication and posting of applicable mine laws in a conspicuous place at the mine and that they be made available to employees upon request (Tr. 307).

Mr. Price stated that he worked at the mine in question for 12 years before quitting in 1969 and going to work for the State of West Virginia Department of Mines in 1971. he also inspected the mine for four years and had a good working relationship with the safety committee as well as the company (Tr. 308).

The UMWA's Arguments

Mr. Wise's alleged violations of State and Federal mining laws

In its post-hearing brief, the UMWA argues that Consol's reliance on the ventilation provisions of section 303(d)(1) of the Act in support of its contention that Mr. Wise was not

authorized to go inby the posted

danger signs in question is erroneous, and that this cited provision of the Act simply is inapplicable to the facts of this case because there is absolutely no evidence in the record to indicate that Mr. Wise had crossed the kind of "danger" sign contemplated in section 303(d)(1). The UMWA asserts that the incident in question occurred early in the morning, well after the time frame set out in section 303(d)(1) for pre-shift fire bossing, and that the respondent's reliance on this section is clearly misplaced. The UMWA points out that paragraphs (e) and (f) of section 303 contain a specific "carve out" for certain persons, which entitled those persons to enter an area of the mine from which all persons must be withdrawn, and that these paragraphs state in pertinent part:

> If such condition creates an imminent danger, the operator shall withdraw all persons from the area affected by such condition to a safe area, except those persons referred to in section 104(d) of this Act, until such danger is abated. (Emphasis added).

The UMWA asserts that Section 104 of the Act is the provision which governs mine inspections by Federal inspectors, and that pursuant to the withdrawal order provisions of section 104(c), there are exceptions governing those persons who must be withdrawn from a mine area closed by a Federal inspector, namely:

> (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;
>
> (2) any public official whose official duties require him to enter such area;
>
> (3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and
>
> (4) any consultant to any of the foregoing.

The UMWA maintains that Subparagraph (3) of section 104(c) is clearly designed to allow representatives of the miners or other persons accompanied by a representative of the miners to enter an area for which a withdrawal order has been issued when their presence is necessary for the investigation of the conditions described in the order. In support of this conclusion, the UMWA asserts that the legislative history bears out the fact that a miner and his representatives must play a key role in enforcement of the Act, and that section 104(c)(3) does just that, because it enables

representatives of miners to participate in the inspection of conditions cited in the various types of orders that can be issued under section 104. Citing the D.C. Circuit Court of Appeals decision in Phillips v. Interior Board of Mine Operations Appeals, 500 F. 2d 772 (D.C. Cir. 1974), the UMWA emphasizes the need for a liberal construction of the provision concerning discrimination, and maintains that liberal construction of section 105(c) (formerly section 110(b)) has been applied without question in an effort to effectuate the purpose of the Act.

Given the liberal construction of the Act, the UMWA states that Consol is unjustified in asserting that Mr. Wise violated section 303(d), especially when a more pertinent provision, section 104(c), is more applicable to the facts of this case. Surely argues the UMWA, had an inspector dangered off the area in question, Mr. Wise would be statutorily authorized to enter such area to insure that the union employees were working under safe conditions.

The UMWA does not take issue with the arguments made by Consol's counsel during the hearing (Tr. 156-157) that the representative of the miners must, in the judgment of the operator be qualified to make such mine examination. However, the UMWA maintains that by virtue of the 1981 Coal Wage Agreement, Mr. Wise is so qualified. In support of this conclusion, the UMWA has incorporated verbatim Article III, section (d), of the wage agreement dealing with the Mine Health and Safety Committee as part of its Brief. The pertinent portions of this section of the agreement are as follows:

> (1) At each mine there shall be a Mine Health and Safety Committee made up of miners employed at the mine who are qualified by mining experience or training and selected by the local union. The local union shall inform the Employer of the names of the Committee members. The Committee at all times shall be deemed to be acting within the scope of their employment in the mine within the meaning of the applicable workers' compensation law.
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> (2) * * * * * *
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> (3) The Mine Health and Safety Committee may inspect any portion of a mine and surface installations, dams or waste impoundments and gob piles connected therewith. If the Committee believes conditions found endanger the lives and bodies of the Employees, it shall report its findings and recommendations to the Employer. * * *
>
> (4) * * * * * *
>
> (5) * * * A Committee member shall not be suspended or discharged for his official actions as a Committee member. (Emphasis added).

The UMEA argues that the aforesaid contract provisions clearly indicate that Mr. Wise is qualified to make such mine examination in the judgment of the operator as required by section 104(c), and for the respondent to argue that he is not so qualified in this particular instance violates the wage Agreement as well as the direct language of section 104(c)(3). In light of the specific language set out in 104(c)(3), the UMWA concludes that it cannot be reasoned that Mr. Wise was in violation of section 303(d) of the Act.

In response to Consol's contention that Mr. Wise was in violation of Chapter 22, Article 22-2-21 of the West Virginia Code when he passed inby the posted danger sign, the UMWA asserts that this argument is faulty simply because that State code provision is inapplicable to the facts in this case. Section 22-2-21 states in pertinent part:

> It shall be the duty of the fire boss, or a certified person acting as such, to prepare a danger signal (a separate signal for each shift) with red color at the mine entrance at the beginning of his shift or prior to his entering the mine to make his examination and, except for those persons already on assigned duty, no person except the mine owner, operator, or agent, and only then in case of necessity, shall pass beyond this danger signal until the mine has been examined by the fire boss or other certified person and the mine or certain parts thereof reported by him to be safe. When reported by him to be safe, the danger sign or color thereof shall be changed to indicate that the mine is safe in order that employees going on shift may begin work. . . .

The UMWA asserts that the cited State code provision relied on by Consol, like section 303(d) of the Federal Act, applies to the pre-shift fireboss examination required before miners may enter the mine at the beginning of the shift, and that it does not apply to the facts presented in this case. Furthermore, the UMWA cites West Virginia State Code Article 22-1-14, paragraph (c), which it asserts contains an exemption similar to that found in section 104(c) of the Federal Act, for groups of persons authorized to enter mine areas which have been closed for the purpose of insuring that dangerous conditions do in fact get corrected and that they are corrected in a proper manner. Paragraph (c) of the State code states:

> (c) The following persons shall not be required to the withdrawn from or prohibited from entering any area of the coal mine subject to an issue under this section:

> (1) Any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the director, to eliminate the condition described in the order;
>
> (2) Any public official whose official duties require him to enter such area;
>
> (3) Any representative of the miner in such mine who is, in the judgment of the operator or an authorized representative of the director, qualified to make coal mine examinations or who is accompanied by such person and whose presence in cush area is necessary for the investigation of the conditions decribed in the order; and
>
> (4) Any consultant to any of the foregoing.

With regard to Mr. Omear's testimony during the hearing (Tr. 226), that State Inspector Price agreed that Mr. Wise's action in going beyond the posted danger sign violated State law, the UMWA points out that when called in rebuttal, Mr. Price testified that he made no such assessment (Tr. 304), but simply stated that if one were to apply State Code Article 22-2-21, there would be a violation, but that he knew of no other condition which have made Mr. Wise's action a violation (Tr. 304-305).

In summary, the UMWA submits that Mr. Wise did not violate section 303(d) of the Federal Act or Article 22-2-21 of the West Virginia Code by going inby the danger board to check on the men abating the roof condition for which the area was dangered off, and that the reliance of Consol on these provisions is misplaced, especially in view of the existence of section 104(c) of the Federal Act and Article 22-1-14 of the Code of West Virginia, which more clearly and closely address the fact circumstances presented in this case.

Mr. Wise's alleged violation of company policy

The UMWA characterizes Consol's Employee Conduct Rules (exhibit C-5), as a "general outline of some rather common sense policies", but points out that they are devoid of any company policy concerning the proper conduct in regard to danger boards, and therefore should be given no probative value in determining whether Mr. Wise violated the asserted policy. The UMWA argues that neither Mr. Omear nor Mr. Siburt could state with any degree of certainty that a company policy regarding danger boards even existed at the Ireland Mine, (Transcript - Mr. Omear, Pages 230-236; Mr. Siburt, Pages 281-284), and that at best, each of these men hint to the fact that the company policy is synonymous with federal and state laws. To that extent, the UMWA submits that Mr. Wise violated no statutory provision of federal or state law.

Assuming that Consol can establish a viable policy regarding the crossing of posted danger boards, the UMWA nonetheless argues that any such policy must not be inconsistent with federal or state law and it cites the provisions of Article III, section (g) of the Wage Agreement and Chapter 22, Article 22-2-54 of the West Virginia Code in support of this proposition. Further, even though the Federal Mine Act contains no such provisions, the UMWA suggests that it is axiomatic that a company policy cannot conflict with state or federal law. Further, the UMWA asserts that had the danger board in question been posted by an MSHA inspector, Mr. Wise would fall into the category of individuals exempt from a total withdrawal, and that federal and state law are explicit on this point. The UMWA concludes that Consol cannot assert that since Mr. Omear posted the danger board, Mr. Wise can be refused entry into the area where union employees are engaged in abating the condition, and that this is especially true in light of the legislative policy favoring participation and cooperation by the miners in enforcing the act.

Finally, in analyzing whether Consol had a policy concerning danger boards, the UMWA suggests that I should strongly rely on the arbitration decision rendered in Mr. Wise's case. Since Consol has asserted that Mr. Wise violated company policy, and that such conduct is not protected under the Act, the UMWA maintains that, to that extent, the arbitrator's decision should be relied on in determining if such a policy existed or if Mr. Wise was insubordinate. Once such a determination is made, consideration should then be given to whether Mr. Wise's activity was protected under the Act, its legislative history, and the administrative and judicial decisions interpreting the Act and its history.

Whether Mr. Wise was engaged in protected activity when he went inby the danger board.

In support of its arguments that Mr. Wise was engaged in protected activity when the ventured inby the danger board in question, the UMWA cites the legislative history of the Act, and emphasizes that, in the enactment of section 105(c)(1), Congress was well aware that the active involvement of the miners in the enforcement of the law could only be obtained by providing these miners with protection from retaliation for their efforts. Citing Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), a case interpreting the 1969 Coal Act, the UMWA points out that in recognizing that the purpose of the statutory provision was to encourage the reporting of suspected violations of health and safety regulations, the Court refused to limit the scope of protection to the bare words contained in the statute.

The UMWA maintains that the record in this case indicates that Mr. Omear forbid Mr. Wise from entering an area of the mine for the purpose of observing compliance or non-compliance with safety and health standards. If such activitiy were to be ruled unprotected, the UMWA asserts that it would impede the ability of miner's representatives to participate in the enforcement of the

Act, and would also provide Consol with an effective means of inhibiting safety activity in that in future situations where

a hazardous condition is pointed out to Consol, its management could put up its company danger board and prohibit safety committeemen from entering the area. Such a result, argues the UMWA, would be inconsistent with the purposes of the Act.

In support of its arguments that the Act should be liberally construed in favor of Mr. Wise, the UMWA cites Secretary of Labor, ex rel., Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, October 14, 1980. In Pasula, while the Act was silent on the right of a miner to refuse to work in hazardous conditions, the Commission relied on the legislative history in affirming the right of the miner. Just as the Act is silent on the right to refuse work, so too is it silent on the rights of Mr. Wise to enter the dangered off area. But the UMWA asserts that in order to effectuate the purposes of the Act, Mr. Wise's venturing inby the danger board must be held to be protected activity.

The UMWA argues that the importance of removing unnecessary restrictions on the ability of the miners' representative to engage in protected activity was recognized by the Commission in Local Union 1110 and Carney v. Consolidation Coal Company, 1 FMSHRC 388 (1979). In Carney, the Commission upheld Judge Broderick's decision striking down a company policy requiring safety committeemen to obtain permission before leaving their work area to perform their mine safety committeeman's duties. If, as the Commission has held in Carney, an employer cannot prevent a safety committeeman from leaving his work area to perform his official functions, the UMWA suggests that it would appear to be just as inherently discriminatory for an employer to interfere with the ability of the Safety Committees to enter a given area, and it submits that the Carney case is controlling and should be followed in Mr. Wise's case.

In distinguishing the Commission decisions in Maynard v. Standard Sign and Signal Company, 2 MSHC 1186 (1981), and Ross v. Monterey Coal Company, 2 MSHC 1300 (1981), from the facts in Mr. Wise's case, the UMWA asserts that in Maynard, the administrative law judge dismissed a complaint for failure to state a claim because the Act did not protect an employee for his failure to abate violations. A supervisor was fired because he had run coal prior to correcting cited violations as a result of his misunderstanding his orders from the superintendant. Although the case was dismissed, Maynard was allowed to amend his complaint so that it would state a cause of action.

In Ross, the UMWA asserts that the administrative law judge dismissed the complaint on the grounds that Ross had attempted to exercise his authority as a safety committeeman outside the employment content. He had no direct employment contact with either party committing the alleged discriminatory action. Since no question exists in regard to Mr. Wise's employment relationship with Consol, the UMWA concludes that the Ross holding is inapplicable.

Whether the disciplinary action taken by Consol was discriminatory and a violation of section 105(c) of the Act.

The UMWA concludes that if it is held that Mr. Wise engaged in protected activity on July 10, 1981 by going inby the danger board to check on the union employees abating the roof condition, the actions by Mr. Omear in suspending Mr. Wise amount to discrimination prohibited by the Act. Further, the UMWA asserts that the "dual motive" or "but for" test set out in Pasula, does not come into play, for Consol has not asserted that absent the protected activity, it would have suspended Mr. Wise, has not cited any other activity which could be asserted as an independent basis for Mr. Wise's suspension, but merely argues that Mr. Wise's activity of going inby the danger board is unprotected activity for which he can be disciplined. If the activity in question was protected, the UMWA concludes that the disciplinary action was unwarranted and discriminatory. If the activity was not protected, then the UMWA concedes that the disciplinary action was not discriminatory under the Act.

Summarizing its position in this case, the UMWA asserts that Mr. Wise's actions were protected activity under the Act for which he could not be disciplined, and to hold otherwise would effectively impede the ability of safety representatives to actively participate in the enforcement of the Act. Since the record clearly indicates that he was suspended only for going inby the danger board posted by Mr. Omear, such discipline constitutes discrimination under the Act for which Consol should be held accountable. The UMWA requests that a finding of discrimination be made, that a notice to that effect be posted at the Ireland Mine, that a fine be imposed on Consol, and that reasonable expenses and attorney's fees be assessed against Consol.

Respondent Consol's Arguments

Respondent prefaces its post-hearing arguments with a quotation from the Commission decision Pasula v. Consolidation Coal Company, 2 MSHC 1001, 1010, October 14, 1980, concerning the elements of a prima facie case under section 105(c) of the Act and the operator's defenses thereto as follows:

> We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the

ultimate burden of persuasion. (Emphasis in original).

Whether Mr. Wise was engaged in protected activity on July 10, 1981, when he went by the danger board.

Consol concedes that Mr. Wise engaged in protected activity in filing complaints with the West Virginia Department of Mines, but submits that this activity is sufficiently divorced from the three-day suspension of which Mr. Wise complains so as not to form the basis of a prima facie case. Consol asserts that in this case Mr. Wise did not introduce any testimony that mine management had threatened or harrassed him on account of his safety activity prior to his suspension.

Consol submits that the crux of the case is whether it was proper for Consol to discipline Mr. Wise for going past a danger board and refusing to heed the order of mine Superintendent Omear to leave the dangered-off area once he had entered it. It is Consol's position that Mr. Wise violated state and federal law in ignoring the danger board and was insubordinate when he refused to leave the dangered-off area. Thus, Consol believes that the issue for decision is whether Mr. Wise was engaged in protected activity on July 10, 1981, when he went by the danger board.

In support of its contention that Mr. Wise violated the Federal Mine Act, Consol cites section 303(d)(1) of the Act, which specifically mentions "danger signs" in connection with the posting of such signs in mine areas which are found to be hazardous by those certified persons designated by the operator to conduct the preshift examination of the active workings of the mine. Once such an area is posted, the statute provides that:

> No person, other than an authorized representative of the Secretary or a State mine inspector or persons authorized by the operator to enter such place for the purpose of eliminating the hazardous condition therein, shall enter such place while such sign is so posted.

Consol also cites other provisions of the Act which establish similar criteria as to who may enter a dangered-off mine area. As examples, Consol asserts that once an MSHA inspector issues a closure order pursuant to section 104 or 107 of the Act, section 104(c) provides that no one is permitted to enter the subject to the order except:

> (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;
>
> (2) any public official whose official duties require him to enter such area;
>
> (3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make

> such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and
>
> (4) any consultant to any of the foregoing.

Consol argues that the complianants' suggestion that section 303(d)(1) of the Act is inapplicable in this case because Mr. Siburt and Mr. Omear were not making a preshift examination at the time the danger sign was posted is a very technical one, which if accepted, would contravene the policy of the Act.

Consol submits that a distinction should not be drawn between danger boards hung by federal inspectors in the course of a health and safety inspection, by firebosses on preshift and onshift examinations, and by certified persons such as Messrs. Siburt and Omear in the course of a contractually mandated safety run. In all of these cases, the danger board is serving the same purpose, i.e., to warn miners of a hazardous condition beyond the danger board and to stop them from going inby. Furthermore, Consol submits that if a miner is not present at the time the danger board is installed, he may not be able to tell whether it was posted by a federal inspector, a preshift or onshift examiner, or by another certified person so the proposed distinction sought by the union in this case would not be practical in the mine environment. Finally, Safety Committeeman Conner's testimony is revealing on this question. He testified that a federal inspector would have put a danger tag on the area, so Mr. Conner apparently saw no difference in a danger sign posted by a federal inspector as opposed to a certified examiner. (Tr. 129-130).

Consol maintains that since the danger signs in the case at hand were installed pursuant to an examination comparable to one made under 303(d)(1) of the Act and since it contravenes the purpose of the Act and is also impractical to draw distinction based upon when and by whom the sign was hung, the question becomes whether Complainant Wise fell within one of those categories of persons who are permitted under the Act to go inby a danger board. Consol concludes that Mr. Wise was not an authorized representative of the Secretary or a State mine inspector, and that he admitted at the hearing that he did not seek authorization from Superintendent Omear to go inby the danger board. (Tr. 69)

Consol point out that Mr. Wise also filed a grievance with regard to his suspension pursuant to the National Bituminous Coal Wage Agreement of 1981, and that Arbitrator Miles Ruben affirmed the grievance and ordered Consol to reimburse Mr. Wise for lost wages and expunge the suspension from his personnel records. Consol states that on the basis of Article III, Section (d)(3) of the Wage Agreement, Arbitrator Ruben found:

It is of course true that no specific authorization was given by Management to the Grievant and the Chairman of the Mine Safety Committee, Mr. Conner, to enter the dangered-off area. However, a general, pre-existing authorization from Mine Management can be inferred from the provisions of the collective bargaining contract which gave members of the Safety Committee the right to inspect any portion of the mine when acting in pursuit of their official duties. (Page 16 of the Arbitration Award, Exh. C-2).

Consol maintains that the complainant's argument that the contractual provision found in Article III granted safety committeemen the authority to go inby posted danger boards should be rejected. Consol submits that Mr. Wise's argument, as well as the arbitrator's interpretation on this point, should not be accepted because the labor agreement provision in question does not refer to the federal and state laws regarding danger signs, and the arbitrator was required to draw an inference from the contract that Mr. Wise had authorization to go inby a danger board. However, Consol argues that I should not adopt the arbitrator's reasoning, and its supporting arguments follow.

First of all, Consol points out that section 303(d)(1), was not introduced into evidence at the arbitration hearing (footnote 3 on page 16 of the Arbitration Award). Since the arbitrator did not have the relevant portion of Section 303(d)(1) of the Act before him when he interpreted the labor agreement, his finding of preauthorization so far as federal law is concerned is erroneous. The arbitrator could not make an inference that Mr. Wise was authorized to go past a danger board when he (the arbitrator) was not informed of the scope of the authority set out in federal law. For this reason alone, Consol maintains that the arbitrator's reasoning should not be followed.

Furthermore, Consol maintains that the arbitrator's finding of preauthorization exceeds the authority established by section 303(d)(1). The arbitrator found that a safety committeeman had the right to inspect any portion of the mine, and because he had that right, he had the right to go past a danger board. However, Consol points out that under section 303(d)(1), mining management is permitted to allow persons (other than a federal or state inspector) to go inby a danger board to eliminate the hazardous condition. The right to inspect the mine is not equivalent to eliminating the hazardous condition. The right to inspect the mine permitted Messrs. Wise and Conner to make the safety run and to identify the hazardous condition that resulted in the posting of the danger signs in this case. Once the danger signs were posted, then the contractual right to inspect was qualified by the prohibition contained in federal law, and the safety committeemen were required to observe the danger board. At this point, the policy behind the contract and the Act had been served, i.e., miner participation in identifying hazardous conditions, and the management's right to direct the work force in correcting the conditions took precedence.

Consol cites the case of Ronnie R. Ross v. Monterey Coal Company, et al., VINC 78-38 (1979), where Administrative Law Judge Michels recognized that a safety committeeman's authority to inspect a mine is limited. In that case, Complainant Ross received a disciplinary letter for inspecting areas of the mine site where his employer was not working. Similarly, in this case, Consol maintains that it was proper for Consol to discipline Mr. Wise for going into an area where he was not authorized to travel.

Consol's disciplinary policy regarding danger boards.

Consol states that at the hearing, Complainant Wise, through his counsel, argued that it was unfair to discipline Mr. Wise because Consol did not have a written policy notifying its employees that they would be disciplined for going inby danger boards. Although Consol believes that this argument does not have any bearing on the question of whether Mr. Wise was engaged in protected activity when he went past the danger board, it presented the arguments which follow below.

Consol states that it does have a list of employee conduct rules posted at the Ireland Mine. Rule No. 1 notifies the employees that they will be disciplined for failing to observe safety regulations. At the hearing Mr. Wise admitted that he was aware of Consol's policy of disciplining employees for violating state and federal safety laws. (Tr. 59-60). Consol notes that Mr. Wise never introduced any testimony that the miners at Ireland Mine were unaware of the general prohibition in state and federal law against passing by danger signs. It is Consol's understanding that Mr. Wise contends that he was protected from discipline, not because the miners as a whole were not aware that they could not go past danger signs, but because he was empowered to do so as a safety committeeman. Consol does not understand Mr. Wise and the union to argue that any miner at Ireland Mine could have gone by the danger board at One North Section on July 10, 1981, and not have been held accountable for his action.

In concluding its arguments, Consol maintains that the issue in this case is whether Mr. Wise's going inby a danger board on July 10, 1981, was activity protected by the Act, and that it is Mr. Wise and the union that bear the ultimate burden of persuasion by a preponderance of evidence that a safety committeeman going inby a danger sign is protected activity. Consol anticipates that Mr. Wise and the Union may make two arguments:

> (1) The danger signs were not posted pursuant to a 303(d)(1) examination of the mine and, therefore, the prohibition against passing by a danger sign is inapplicable, and
>
> (2) Even if 303(d)(1) applies, Mr. Wise, as a safety committeeman, is not bound by the prohibition found in 303(d)(1).

In response to these arguments, Consol asserts that it has demonstrated that the complainants first argument is a technical one that leads to absurd results and does not advance the policy of the Act. Their second argument ignores the specific authorization language of 303(d)(1) which restricts the persons allowed to go by a danger board to those who are working on correcting the hazardous condition. Consol concludes that Mr. Wise fulfilled his role as a safety committeeman at Ireland by locating and identifying the hazardous condition, but after having done so, he overstepped his authority and entered a dangered-off area for which he could properly be disciplined.

Discussion

The crucial facts in this case are not in dispute. It seems clear to me that Mr. Wise did in fact walk inby a posted danger sign on July 10, 1981. It is also clear that when he was ordered to come out of the area at least three times by Mine Superintendent Omear, he chose to ignore those directives and came out after he was satisfied that his mission had been accomplished. Mr. Wise obviously believes that as a duly elected safety committeeman, he has a right to enter any area of the mine, including those areas that are dangered-off, for the purpose of insuring compliance with mine safety and health laws, as well as to insure the safety of miners while engaging in work connected with the correction and abatement of hazardous conditions brought to the attention of mine management. Conversely, while conceding that Mr. Wise has certain prerogatives in his capacity as a safety committeeman, including access to most areas of the mine for the purpose of conducting inspections to insure compliance with the law, Consol takes the position that simply serving as a committeeman does not give Mr. Wise carte-blanche authority to go wherever he pleases, and that his access to certain mine areas, particularly those that are dangered-off, is limited and restricted by state and federal law to those individuals specifically authorized to be there pursuant to those laws.

The crux of Consol's defense is that when Mr. Wise walked inby the posted danger sign he over-stepped his authority as a member of the mine safety committee, acted outside the scope of any "special status" which he may have enjoyed as a committeeman, and could therefore be held accountable for his actions. Recognizing the fact that the Act insulates Mr. Wise from reprisals by mine management for his safety activities, including acts of insubordination where it can be established that such insubordinate conduct was in fact protected activity, Consol takes the position that not only did Mr. Wise's action violate company policy, it also violated federal and state law and therefore could not be deemed to be protected activity under the Act.

As correctly pointed out by Consol, Mr. Wise does not contend that the disciplinary action taken against him was out of reprisal for his filing safety complaints with the State of West Virginia mining authorities.

Although there is some testimony that one or more of these complaints may have resulted in a personal assessment or fine against Mr. Omear under state law and regulations, the UMWA does not advance an argument that Mr. Omear, or any other mine management official, suspended Mr. Wise because of these complaints. Although the grievance record concerning Mr. Wise's grievance contains a reference to the Union's attempts to establish that Mr. Wise was suspended in retaliation for having filed safety complaints against company personnel (pg. 6, Exh. C-2), the arbitrator never reached that issue, and at page 20 of his decision he states as follows:

> * * * the Arbitrator finds that the Grievant in knowingly entering into a dangered-off area for the purpose of checking on the safety of the crew assigned to effect repairs, although in contravention of the directions of Superintendent Omear to quit the area, was nevertheless acting in his official capacity and protected against the suspension sanction.
> In light of the foregoing, the Arbitrator finds it unnecessary to consider the Union's contentions that the sanction violated the Federal Mine Safety and Health Act of 1977, as amended, and that it was imposed because of the Grievant's filing of complaints ov violations of the mine safety code of the State of West Virginia.

I am in agreement with Consol's view of the limited issue in this case; namely, whether Mr. Wise's entry into an area of the mine which had been "posted" or "dangered-off" was protected activity. The thrust of Mr. Wise's discrimination complaint throughout this proceedings is his belief that he has a right to go anywhere in the mine in his capacity as a committeeman, including areas that have been closed down by mine management, and he has not claimed, nor has he produced any evidence, to support any claim that the action taken against him by Consol was in retaliation for his filing of safety complaints. Nor has he advanced any arguments or evidence that mine management harrassed, threatened, or otherwise intimidated him for his safety activities.

There is no question that representatives of miners are afforded many rights and protections under the Act. They are free to request mine inspections or file complaints if they believe that a violation has occurred or dangerous conditions are present in the work environment. They are free to accompany mine inspectors on their inspection tours, at no loss of pay or other compensation. As miners, they are also free to refuse to work under unsafe conditions, and may leave their work area if they believe they are exposed to safety or health hazards. In addition, they are insulated from reprisals, intimidation, or harrassment by mine operators because of the exercise of these and other rights protected under the Act, and by the case law. In addition, pursuant to the existing Wage Agreement between miners and the industry, miners are assurred of a safe and healthful place to work, and the safety and health committees are

afforded many rights, as well as responsibilities.

I recognize the validity and merits of the competing interests which cut across this entire proceeding. On the one hand, we have a safety committeeman who sees no limits to his authority as a safety committeeman. On the other hand, we have a mine operator who concedes that a safety committeeman has certain prerogatives under the Act, but nonetheless believes that management has the prerogative to manage and control its mine and the employees who work there. The crucial question presented after balancing these interests, is to decide which one outweighs the other in the context of the applicable law. In this regard, an examination of two relevant Commission decisions is in order.

The case of Local Union 1110 and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979) (hereinafter "Carney"), concerned a safety committeeman who received three disciplinary letters of reprimand after several confrontations with mine management over his leaving his work area for the purpose of reporting safety violations and engaging in union business. He was charged with insubordination for failing to obtain management's permission before leaving his work area to perform duties as a safety committeeman. In affirming Judge Broderick's decision finding discrimination, the Commission, stated in pertinent part as follows at pg. 341 of its decision:

> * * * we concur in the judge's holding that the enforcement of the Company's "permission policy" violates section 110(b). The purpose of section 110(b) is to encourage communication between the miners, their representatives and the Secretary concerning possible dangers or violations. The Company's policy effectively impedes a miner's ability to contact the Secretary when alleged safety violations or dangers arise, a time when free access to the Secretary is most important. We therefore reject the Company's objections to the judge's order that the Company cease and desist from enforcing its policy.
>
> * * * we agree with Judge Broderick that issuance of the three letters of reprimand to Carney violated section 110(b) of the act. After voicing a safety complaint to his foreman, Carney left the mine section to contact MESA officials, through the chairman of the mine's Health and Safety Committee, to bring the safety dispute to MESA's attention and to obtain its view on the legality of the Company's safety practice.
>
> * * * Because Carney's activity was protected, and because the Company could not lawfully require him to obtain its permission before engaging in such activity, the first letter of reprimand was an act of discrimination. Further, the second and third

> letters were, as Judge Broderick found, "certainly r elated to the first letter and [were] issued in part at least because of the activity protected by section 110(b)." (Footnotes omitted).

In Carney, the Commission obviously recognized the fact that limiting a safety committeeman's free access to mine inspector's for the purpose of communicating real or alleged safety violations or dangerous conditions violated the intent of the anti-discrimination provisions of the Act that communication between the miners, their representatives and the Secretary be encouraged. Further, in his decision, Judge Broderick weighed the effect of mine management's "permission policy" and concluded that it severely limited the ability of miners to complain of hazards and violations during a working shift, by permitting only such complaints as mine management deems acceptable. Recognizing the fact that a contrary rule restricts management's ability to control production, Judge Broderick held that the health and safety of miners clearly outweighed production.

The UMWA argues that the importance of removing unnecessary restrictions on the ability of the miners' safety representatives to engage in protected activity was clearly recognized by the Commission in Carney. The UMWA maintains that if, as in Carney, an employer cannot prevent the safety committeeman from leaving his work area to perform his official functions, it would appear to be just as inherently discriminatory for an employer to interfere with the ability of the Safety Committees to enter a given area. The UMWA believes that the Carney holding is controlling in the instant case and that I should follow it.

Ronnie R. Ross, et al. v. Monterey Coal Company et al., 3 FMSHRC 1171; 2 BNA MSHC 1300 (May 11, 1981), concerned a safety committeeman who was reprimanded for inspecting a mine area where his employer was not conducting any work. With regard to Ross, it should be noted that the UMWA's factual statement of this decision is not totally accurate. Contrary to the UMWA's assertion in its brief that Mr. Ross had no direct employment contact with either party committing the alleged discrimination, and that he attempted to exercise his authority as a safety committeeman "outside the employment content" (UMWA brief, p. 24), the fact is that Mr. Ross was an employee of one of three respondent's against whom he filed his discrimination complaint. In Ross, Monterey Coal Company was the owner and developer of a coal mine. The underground portion of the mine development was completed and Monterey was mining coal. Construction of the mine development was completed and Monterey was mining coal. Construction of surface facilities and related activities were underway by several contractors, including the McNally-Pittsburgh Corporation, and Mr. Ross was employed by McNally as a carpenter. As a condition of employment at the mine site, the employees of each contractor were required to be members of the UMWA local union, and Mr. Ross was selected by McNally employees to serve as a health and safety committeeman.

During the course of an inspection tour of the project, Mr,

Ross alleged that he had been abused and threatened by another contractor working at the site (Looking Glass Construction Company). Judge Michels

found that Monterey, like Looking Glass, was not the employer of Mr. Ross and none of their actions directly affected his employment or pay. He concluded that Monterey and Looking Glass had not discriminated against Mr. Ross, and at page 77 of his reported decision, 1 FMSHRC 77, April 1979, Judge Michels stated "There was no direct employment connection with respect to either party named in this charge." Therefore, it seems clear to me that Judge Michels' conclusion of "no employment connection" was clearly limited to the one charge of alleged harrassment lodged against Looking Glass and Monterey.

The second alleged act of discrimination in Ross concerned a letter delivered to Mr. Ross on November 30, 1977, by his employer McNally. The letter was the result of information which came to the attention of McNally that Mr. Ross was inspecting areas other than where McNally employees were working. These areas included Monterey's underground mine, as well as the Looking Glass areas which prompted the aforementioned charge of harrassment. The McNally letter advised Mr. Ross that unless he limited his duties as committeeman to the McNally work site, he would be suspended, subject to discharge. The entire text of the letter is set out in Judge Michels' decision, and is as follows:

> This is to advise you that your duties as Project Union Health and Safety Committeeman are limited exclusively to McNally Operations at the Monterey Coal Mine #2. In the event of your violating the above, you will be suspended-Subject to discharge.

With regard to the letter incident, Judge Michels concluded that since Mr. Ross was singled out to receive the letter, while other committeeman in approximately similar circumstances were not, he was discriminated against within the meaning of the Act. However, in addressing the question of whether the discrimination was motivated by or in retaliation for the reporting of alleged safety dangers or violations, Judge Michels observed that the letter was directed to Mr. Ross's safety inspections outside of McNally's area of operations, and that it did not limit inspections otherwise. Considering the 1974 Contract which governed McNally's relationship with its employees, Judge Michels ruled that limiting Mr. Ross' activities as a committeeman to inspections on the McNally site was not unreasonable and that the motive for the letter was to prevent Mr. Ross from inspecting off the McNally site, not to punish him for reporting asserted dangers or violations. Recognizing the fact that an employer may reasonably control the activities of its work force, Judge Michels concluded that Mr. Ross was disciplined for unauthorized activity, and that the letter presented to him was to prevent him from engaging in activity reasonably perceived by management to be unauthorized and was not in retaliation for reporting safety complaints. After finding no violation of the Act on the part of McNally, Judge Michels dismissed the case.

Findings and Conclusions

The first issue to be addressed in this case is whether Mr. Wise's refusal to leave the dangered off area in question after being directed to do so at least three times by Mr. Omear constituted insubordination warranting the disciplinary action taken against him. Assuming that the answer is in the affirmative, the next question is whether or not the refusal by Mr. Wise to leave the area when ordered to do so was based on some legitimate right bestowed on him by the Act to remain. In short, the question is whether or not Mr. Wise was engaged in some protected activity at the time he was asked to leave the area. If he was, then the charge of insubordination as the basis for the disciplinary action taken must fail, and Mr. Wise will prevail. If Mr. Wise was not engaged in protected activity, then I believe his refusal to obey direct orders from Mr. Omear constituted insubordinate conduct warranting the action taken against him.

Consol's arguments that Mr. Wise's conduct violated State and Federal mine safety laws is rejected. On the basis of the entire record adduced in this case I cannot conclude that Consol has established any such violations as a legitimate basis for supporting the disciplinary action taken against Mr. Wise. In my view, Consol's reliance on section 303(d)(1) of the Act is not supported by the record. That section specifically applies to the preshift "fireboss" examination required to be made by certified mine examiners. Once that examiner posts a "danger" sign, no one may pass except for those persons specifically designated by the law. While it is clear that Mr. Wise does not fall into any of the categories of "persons" enumerated in section 303(d)(1), it is also clear that there is no evidence that the posting of the area resulted from any firebossing examination by a certified mine examiner. I reach the same conclusion with respect to the cited Article 22-2-1 of the West Virginia Code.

The parties rely on the withdrawal order exceptions found in section 104(c) and (d) of the Act in support of their respective positions concerning Mr. Wise's asserted violation of this section of the Act. Consol takes the position that Mr. Wise does not fall within any of the exceptions noted in section 104(c), and concludes that he violated the Act when he went inby the danger board. Unfortunately, the parties failed to call any Federal inspectors as witnesses to testify on this question and they rely on their legal conclusions based on their interpretation of the language of the exceptions. However, I would venture a guess that if an MSHA inspector concluded that Mr. Wise did not fall within one of the categories of persons permitted to remain in an area subject to a withdrawal order, he would probably cite Consol for the violation for failure to withdraw Mr. Wise from the area in question.

The UMWA concedes that under subsection (3) of section 104(c), the operator has a say as to who may be qualified to make mine examinations under section 104(a). However, the UMWA

concludes that pursuant to certain provisions in the 1981 Coal Wage Agreement Mr. Wise is so qualified

and that Consol is bound by these contract provisions. I have reviewed the cited contract provisions, but I cannot conclude that the fact that a committeeman selected by his union peers on the basis of his "mining experience or training" necessarily transforms him into a qualified or certified mine examiner for purposes of section 104 of the Act.

The term "qualified person" as defined by section 75.2(b) of Title 30, CFR is an individual designated by the operator to make tests and examinations required by Part 75 of the regulations. Further, the terms "qualified" and "certified" as they pertain to mine examinations by certain individuals are defined in various sections of Parts 75 and 77, Title 30, Code of Federal Regulations. Acceptance of the UMWA's theory could lead to the conclusion that anyone selected by a local union to serve as a safety committeeman is "qualified" or "certified" for the purposes of the Act simply because of his selection as a committeeman. Under the circumstances, I reject the UMWA's arguments that Mr. Wise comes within the exception found in section 104(c)(3) of the Act, and that this section authorized his presence in the dangered-off area in question.

I reject the UMWA's suggestion that the record in this case supports a conclusion that Consol tried to bar Mr. Wise's entry into an area which had been dangered off for the purpose of preventing him from observing compliance or noncompliance with safety standards. I do not view this case as one where a mine operator is attempting to conceal certain conditions or practices from a safety committeeman for the purposes of avoiding compliance with mandatory safety standards. In my view, the incident which sparked this controversy is a classic example of a labor-management confrontation challenging each others "turf".

With regard to any asserted violation of company policy by Mr. Wise, I do not believe it necessary to make any specific findings concerning the question as to whether company policy specifically prohibits miners from entering mine areas which have been dangered off because of hazardous conditions. In my view, anyone who needs to have this admonition put in writing has no business working in an underground coal mine. Regardless of any such written policy, the question here is whether Mr. Wise's disregard of direct orders from mine management to leave the area constituted insubordination warranting a three-day suspension.

During the course of the hearing in this case, both sides presented testimony regarding the question of miners crossing inby a mine area which had been dangered off. Mr. Wise testified that as a member of the safety committee he often passed beyond such posted areas during regular mine inspections. Mr. Omear stated that he never observed any committeeman go beyond such an area unless he had permission or was accompanied by a mine management representative. Safety committeeman Connor's testimony supports Mr. Omear's position. Although Mr. Connor stated that he had previously crossed beyond danger signs, he indicated that he was always accompanied by mine inspectors or company management representatives, and that in these instances he had

management's permission to do so. Further,

there is a strong inference that Mr. Connor did not believe he had an absolute right to be in the area with Mr. Wise since he heeded Mr. Omear's admonition to leave and did so immediately. Mr. Connor's purported comment "you can't get me", was in obvious reference to the fact that Mr. Connor was carrying a saw which had been requested by Mr. Omear and supports a further inference that Mr. Connor believed he had a legitimate excuse for being in the area. Once the saw was delivered, he immediately withdrew.

In this case the conditions or practices which led to the posting of the danger board by Mr. Omear were initially discovered by Mr. Wise and the shift foreman during a routine safety run of the section. Once those conditions were called to the attention of management, Mr. Omear agreed, albeit after some debate, that the area should be closed and corrective action taken. Mr. Omear posted the area and proceeded to attend to the conditions by seeing to it that work began to correct the conditions in question. Mr. Omear was at the scene supervising and directing the work, and Mr. Wise conceded that the corrective action being taken by Mr. Omear was correct and proper. As a matter of fact, once the area was posted, Mr. Wise left the area to continue with his inspection rounds and was gone for several hours before returning, and while he was gone, work to abate the conditions progressed under the supervision of Mr. Omear, apparently without incident. At this point in time, mine management was directly responsible for the area and work being conducted there and had a legitimate right to direct the workforce. As a matter of fact, the primary obligation to correct any hazardous conditions in a mine lies with the operator. It is the operator who is faced with a mine closure or civil penalty assessments for noncompliance, not the union. It seems to me that once the hazardous conditions are called to management's attention, and since the compliance obligation lies with the operator, he should be permitted to go about his abatement business in an orderly and reasonable manner. Of course, should the operator refuse to correct the conditions, then the union has ample recourse to insure compliance.

On the facts of this case, it seems clear to me that Mr. Wise performed all of his duties as committeeman without interference from mine management. Once he discovered the conditions which he believed needed attention, management put the wheels in motion to insure that the conditions were corrected. Since management had the responsibility for correcting the conditions, I believe that management has the right to dictate the terms under which those corrections will be made. Here, Mr. Wise concedes that Mr. Omear was taking the appropriate corrective action. Had Mr. Wise had any question about this, I would assume that he would have attempted to remain in the area to supervise the work, rather than leaving for several hours to inspect other mine areas. Further, although Mr. Wise indicated that he had crossed beyond danger signs in the past, on cross-examination he conceded that he has also observed and respected such signs for fear that he might expose himself to hazards which may have been present in those areas. By the same token, I believe that he should also respect the right of mine

management to protect him from those hazards, thereby reducing its liability in the event he were injured or killed while venturing into such areas without prior knowledge or approval.

After careful consideration of all of the arguments made by the parties in this case, I conclude and find that Mr. Omear's direct orders to Mr. Wise, made three times, to vacate and withdraw himself from the area which had been dangered off, were reasonable and proper, and that Mr. Wise's refusal to comply constituted insubordination. I further conclude and find that Mr. Wise's conduct in refusing to depart an area of the mine that had been dangered off for the purposes for correcting conditions called to mine management's attention was not protected activity under the Act. Once the conditions were called to mine management's attention, mine management then had responsibility and authority to correct the conditions and to direct the work force to insure that the job was done. Included in this authority was the discretion to determine who could assist them in this task. In the instant case, Mr. Wise simply took it upon himself to walk beyond a danger board without seeking mine management's permission. Had he asked and been refused, he may have been in a better position to litigate his case. Since he did not ask, I cannot conclude that management was wrong in suspending him for ignoring the mine superintendent's direct orders to leave the area. In my view, a contrary conclusion could lead to a situation where a safety committeeman, simply because he holds that position, could take it upon himself to walk into any dangered-off areas in a mine, thereby exposing himself to a multitude of hazards and dangers without the knowledge of mine management. Since mine management has the primary obligation under the law to insure compliance and to preclude any of its personnel being injured or killed by walking into these areas, I see nothing unreasonable in mine management's requiring that they be allowed to monitor and control these areas.

In view of the foregoing findings and conclusions, I conclude and find that the three-day suspension given Mr. Wise for insubordinate conduct was reasonable and proper in the circumstances, and that Consol did not discriminate against Mr. Wise. Accordingly, this case IS DISMISSED.

George A. Koutras
Administrative Law Judge