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

DAVID HOLLIS, COMPLAINANT	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE
v.	
	Docket No. WEVA 81-480-D
CONSOLIDATION COAL COMPANY, RESPONDENT	Osage No. 3 Mine

DECISION

Appearances: J. Montgomery Brown, Esq., Fairmont, West Virginia for Complainant
Jerry Palmer, Esq., Pittsburgh, Pennsylvania for Respondent

Before: Judge Melick

This case is before me upon the Complaint of David Hollis, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," alleging that the Consolidation Coal Company (Consol) discharged him on September 29, 1980, in violation of section 105(c)(1) of the Act. (FOOTNOTE 1) Evidentiary hearings were held on Mr. Hollis's complaint in Morgantown, West Virginia.

Motion to Dismiss

At hearing, Consol renewed, in a Motion to Dismiss (and Motion for Summary Decision), its argument made in prior motions that Complaint had failed

to meet the time deadlines set forth in sections 105(c)(2) and 105(c)(3) of the Act. (FOOTNOTE 2) Under section 105(c)(2), of the Act, the miner or representative of miners who believes that he has been discharged in violation of the Act "may, within 60 days after such violation occurs, file a complaint with the Secretary". There is no dispute in this case that the Complainant, David Hollis, was discharged by Consol on September 29, 1980, but did not file a complaint of discriminatory discharge with the Secretary of Labor, Federal Mine Safety and Health Administration (MSHA) until April 7, 1981, more than six months later.

In UMWA v. Consolidation Coal Co., 1 FMSHRC 1300 (1979) the Commission examined the legislative intent underlying the statutory time periods established for filing discrimination complaints:

> In explaining section 105(c)(2)'s requirement that a discrimination complaint be brought within 60 days of the alleged Act, the Senate Committee [Committee on Human Resources, Subcommittee on Labor] stated:
>
> The bill provides that a miner may, within 60 days after a violation occurs, file a complaint with the Secretary. While this time limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time limit would include a case where the miner within the 60 day period, brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the act. [Report No. 95-181, 95th Congress, 2nd Session at page 624 (1978)].
>
> The Senate Committee also expressed a similar view as to the 30 day period provided for in section 105(c)(3) in which a miner can file a discrimination complaint on his own behalf if the Secretary determines that no violation has occurred:
>
> [A] As mentioned above in connection with

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the time in filing complaints, this 30 day limitation may be waived by the court in appropriate circumstances for excusable failure to meet the requirement. Legislative History, supra, at 625.

> Thus, it is clear that Congress intended that the time periods for filing discrimination complaints under the 1977 Act can be extended in appropriate circumstances.

The specific issue to be decided, then, is whether appropriate circumstances exist in this case that would justify an extension of the filing deadlines set forth in sections 105(c)(2) and (3). The operator as the moving party and proponent of the statutory limitation periods carries the burden of establishing that the Complainant is barred by those provisions. 5 U.S.C. 556(d); Raymond v. Eli Lilly & Co., 412 F. Supp. 1392, at p. 1401 (DCNH, 1976).

Mr. Hollis explained in his initial complaint to MSHA the reasons for his late filing:

> First of all, the reason that I did not file under this Act was just plain ignorance of the Act. I was basically in total confusion during my whole discharge proceedings. No one informed myself [sic] of any rights I may have used after my discharge. Union representatives urged myself [sic] to have the five-day arbitration hearing and once the verdict was in. Discharge was upheld by arbitrator (P. Selby). I was told by the union local indirectly and by District Vice-Pres. Carrol Rogers they were not obligated to do anything else for me. I was appointed to the chairmanship of the safety comm. after Robert Moore's resignation during the Four States [Mine] discharges and I had never been on the safety comm. and never attended a safety comm. training class to have direct knowledge of safety act.
>
> After my discharge, I filed with the Human Rights Comm., a state funded organization, and the National Labor Review Board [sic]. I filed with H.R.C, (October 15, 1980) against Consol and Local and District (Local 4043 and District 31) for discrimination and unfair representation. It has been over six month [sic] since filing with West Virginia H.R.C. and still no fact finding meeting or investigation. I felt it was solely my obligation as the complaintee to be able to verify my charges against both respondents. I felt I knew what had taken place, resulting in my discharge; but the problem was verifying the reasoning for my discharge and what each accused party had done to abuse or deny my rights under the Health and Safety act.

Subsequently, in his deposition, Hollis alleged that he first became aware of his right to file a discrimination complaint under the Federal Mine Safety and Health Act only a few

days before he actually filed the complaint.

He claims that he discovered this right in talking to MSHA employee Earl McManus at the Morgantown MSHA office. McManus did not testify in this case.

Consol argues that Hollis knew of his section 105(c) rights within the statutory filing period and consciously chose not to exercise those rights. It is clear that, because of the position held by Hollis as Chairman of the Mine Safety Committee, he certainly should have known of his rights under the Act to file complaints of unlawful discharge and discrimination with MSHA. Indeed, it is not disputed that he had been an active, if not militant, chairman of the Safety Committee since his appointment by the local union in April 1980, and that in that capacity he frequently met with state and Federal (MSHA) safety officials. He had access to copies of the Federal law and Hollis himself asserts that he "knew the law" and had more knowledge of the Federal Mine Safety law than any other member of the Safety Committee. Moreover, the successor chairman of the Safety Committee, Edward Pugh, acknowledged that it was one of the duties of that position to advise miners of their rights under section 105(c) of the Act. The fact that Hollis has also achieved a high level of education, having completed two years of college, also reflects on his ability to have understood and waived his rights.

However, even if Hollis did not, even in his capacity as Chairman of the Safety Committee, know of his section 105(c) rights, he nevertheless was clearly advised of those rights in the decision of Arbitrator Paul Selby. In that decision, issued October 20, 1980, Arbitrator Selby specifically informed Mr. Hollis that "[i]n both the Mine Health and Safety Act and the National Labor Relations Act, there are prohibitions against an employer taking disciplinary action against an employee for making charges or filing claims under the particular legislation." (Operator's Exhibit No. 15 at p.37).

In light of the foregoing, I do not find the Complainant's claimed ignorance of his rights under the Act to be credible. It may reasonably be inferred that he did not file timely under the Act because the Arbitrator had already specifically rejected his claims that he had been fired for activities protected by the Act. In a well-reasoned and thorough decision, the Arbitrator had found "no evidence in the record that this discharge action was taken in any time reference to, or was caused by, any activity of the Grievant [Hollis] with respect to any grievances, or any of the demands for inspection under 103(g) of the Mine Health and Safety Act * * *" (Operator's Exhibit No. 15 at p. 37). Hollis admitted that after the Arbitrator's decision, he thought his best case was with the West Virginia Human Rights Commission, charging discrimination against a racial minority. It appears from Hollis's initial complaint to MSHA that he changed his mind and decided to file under the Act only after more than 6 months had elapsed and the state Human Rights Commission had not even begun its investigation.

Under all the circumstances, I conclude that Mr. Hollis did

indeed know, within 60 days of the alleged unlawful discharge, of his right to file a complaint under section 105(c) of the Act but consciously chose not to file such a complaint until more than 5 months after he knew that such a right existed. I do not find in this case any justification to extend the filing time. Accordingly, Consol's Motion to Dismiss is granted and this case is Dismissed.

Secondary Disposition on the Merits

Even assuming, however, that the Complaint had been timely filed, the case would nevertheless fail on its merits. A prima facie violation of section 105(c)(1) of the Act may be proven by a preponderance of the evidence showing that the miner has engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary ex rel David Pasula, v. Consolidated Coal Co., 2 FMSHRC 2786 (1980), Rev'd. on other grounds, Consolidated Coal Co. v. Secretary, 663 F. 2d 1211 (3rd Cir. 1981). In this case, it is not disputed that Mr. Hollis had engaged in protected activities. Indeed, the parties have stipulated as follows:

> During the period, April 1980 through September 1980, on the date of his discharge; that the safety committee filed with the operator approximately 30 safety complaints; all of which eventually were examined or read or seen by Mr. Joseph Pride [mine superintendent] at some point in time; and that Mr. Price was aware at all times that Mr. Hollis was a member of or chairman of the safety committee during that period, when these safety complaints were filed.

Consol specifically concedes in its brief that Hollis did in fact engage in safety related activities during his tenure on the Safety Committee at the Osage No. 3 Mine (Operator's Brief p. 27).

The second element of a prima facie case is a showing that the adverse action was motivated in any part by the protected activity. The Complainant herein alleges the following circumstantial evidence to show discriminatory intent: knowledge by management of his protected activities, hostility towards those protected activities, and disparate treatment of him. See Secretary ex rel Johnny Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981).

At the time of his discharge on September 29, 1980, Mr. Hollis had been employed by Consol for more than eight years. He had various experience in the mines as a buggy operator, loading machine operator, general inside laborer, and lastly, as a wireman. In April 1980, Hollis was appointed by the union local to serve as chairman of the Safety Committee at the Osage No. 3 Mine. Hollis claims in this case that it is because of his activities on the Safety Committee that he was singled out for discharge. In this regard it is undisputed that during the period April 1980 through September 1980, the Safety Committee filed with the operator approximately 30 safety complaints. It is further undisputed that all of these complaints were at some point in time seen by mine superintendent Joseph Pride. In particular, Hollis cites four complaints written by him under section 103(g) of the Act during his tenure as chairman of the Safety Committee. (FOOTNOTE 3) While ordinarily the identity of the

person initiating such a complaint is not disclosed to the operator, Mr. Hollis apparently did not hide from Superintendent Pride the fact that he had authored those complaints. According to Hollis, the complaints dealt essentially with coal spillage on the tracks at the lower end of the mine. Superintendent Pride was apparently irritated at these complaints because he felt that area of the mine "wasn't in that bad a shape". Pride conceded that he wanted to clean the outby areas, particularly in light of complaints in that area originating from the motorman, but that Hollis would disagree, and insist on cleaning the lower end of the mine. According to Pride, Hollis would get his way by filing a 103(g) complaint with MSHA and "pretty soon, we'd be cleaning track [in the lower end of the mine]". Pride admitted that as a result of these complaints, he was required to do "all the work in one area, the lower part of the mine", thereby interfering with work he wanted to complete in other areas of the mine.

While the Complainant produced testimony from other members of the Safety Committee, including Larry Taylor, concerning statements made by Superintendent Pride that the Safety Committee "was costing him a lot of money on a lot of equipment checks we was [sic] making and shutting down a lot of sections that we had went [sic] to", it appears that at least some of these statements had been uttered in 1979, several months before Hollis had even become a member of that Safety Committee. Ralph Hicks testified, on the other hand, that members of the Safety Committee, including Hollis, did in fact attend a meeting about a month before Hollis's discharge at which Pride also complained of the increased costs caused by the Safety Committee.

There is no doubt that the relationship between Hollis and Superintendent Joe Pride, for whatever reasons, was poor. This poor relationship was due at least in part to problems under the collective bargaining agreement unrelated to health or safety and to Mr. Hollis's admittedly arrogant nature. Indeed, the label "trouble-maker" placed by Superintendent Pride upon Hollis was, according to the Complainant's own witness, David Gearde, based upon Hollis's apparent involvement in a wildcat strike. According to the Complainant's witness, Larry Taylor, the relationship between Pride and Hollis was "pretty rocky". "They didn't like one another a damned bit and they had lots of squabbles". Gearde testified that in several safety committee meetings he attended "it was always a shouting match". Gearde admitted that he too joined in the shouting at these meetings. It appears that the relationship between Hollis and Pride may have been further aggravated by Hollis's admitted arrogance and the fact that he "showed off" his knowledge of "the contract and the law" in the presence of other miners to the apparent irritation and humiliation of Superintendent Pride.

In a somewhat related matter, the Complainant alleges that he had broken a personal "agreement" with Superintendent Pride to improve their relationship. Hollis claims that this was an additional source of ill-will toward him. The terms of the alleged "agreement" are not at all clear, however. According to Complainant's testimony, it was as follows:

Q. Now, in exchange for Mr. Pride being safe and for his providing indirect assistance to you in the election, what were you to give to him in return?

> A. He told me that I'd have to confine my act, you know, sort of -- excuse me. Let me answer it this way; Mr. Pride directly said, he said, the problem with you, Hollis, is you know law and contract and when you come out -- when you come out the mine or you come to the mine, that you -- like, you may catch me in the hallway and you embarrass me in front of the other union -- union and company people. And he said, that's what you got to tone down. He said, now, I don't mind you going into your act, you know, your aggressiveness and stuff, but wink at me, let me know you don't mean it. And I asked him specifically, is that what goes on with the other people in the committees? They -- before me, you know, I said, I asked him specifically, is that the way people act on the committee, as I'm on now or the people before me? And he said, well, we had arrangements that, you know, in front of the men we acted like we didn't like one another, but behind closed doors was another -- was another thing.

Hollis alleges that he breached this "agreement" by subsequently becoming "aggressive" again and by writing a personal safety grievance under state law against assistant mine foreman McNair. Within this framework of evidence, however, I certainly cannot conclude that there was any "agreement" in the first place. The description of the alleged "agreement" is so ambiguous, it is difficult to discern how its terms may have been breached by Hollis. At best, the "agreement" seems essentially to call only for civility between the men. In any case, it is impossible to draw any reasonable inference that Superintendent Pride would, as a result of any breach of that agreement, have necessarily harbored anti-safety animus toward Hollis. (FOOTNOTE 4)

Thus, while Hollis and Pride no doubt disliked each other and did not get along, many reasons for this attitude and relationship existed that were not related to any activity protected by section 105(c)(1) of the Act. While there is also evidence to show that part of the poor relationship between the men may have been the result of Hollis's safety complaints, there is insufficient evidence that a causal connection existed between that specific aspect of their relationship and Hollis's discharge.

As other evidence of alleged unlawful motivation, however, the Complainant charges that the reason given by Consol for his discharge, namely fighting, was merely a pretext and that no one who had previously engaged in fighting at the Osage No. 3 mine had ever been discharged. This precise factual issue was thoroughly addressed by the Arbitrator. (Operator's Exhibit No. 15). Considering the criteria set forth in Pasula (2 FMSHRC at p.2795), and in Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974), I accord the arbitral

findings on this factual issue great weight. (FOOTNOTE 5) Moreover, after my own de novo analysis of all the evidence before me, I find that I am in complete agreement with Arbitrator Selby's considered analysis and conclusions on this issue.

The credible evidence in this regard clearly demonstrates that the Complainant as well as all mine employees had been informed, and it was well recognized, that fighting was a dischargeable offense. The evidence further shows that following a raucous Christmas party in December 1979, the local union demanded from Superintendent Pride stricter enforcement of the disciplinary rules against, among other things, fighting. The credible evidence further shows that shortly thereafter, and no later than February 1980, a large bulletin was posted on a mine bulletin board restating the rules against fighting.

The facts as reviewed by Arbitrator Selby surrounding the fight at issue are as follows:

> Turning to the events shown in the record to have led to the discharge and grievance under consideration, as background, the record shows that at the bottom of the shaft through which the cage runs, where the cage opens at the bottom for entry and exit, a room, separate from the other structures in the mine proper, has been constructed which is equipped as a waiting room. It is to be inferred from the testimony that the cage is operated electrically in response two signal buttons in the same fashion as other passenger elevators operate. The waiting room was generally described by the witnesses to be some 50 feet long. The cage, its doors and shaft enclosure, along with the button signal panel, apparently constitutes the major portion of the wall of the waiting room at that end. At the opposite end of the room, there is a revolving door opening out into the mine, and that apparently constitutes the major portion of that wall. The two side walls are equipped with benches on

which the employees may sit while waiting for the cage and the trip out of the mine to the surface.

> The record also shows, as further background to the events in this case, that prior to Friday, September 26, 1980, there had been some difficulty between management and the employees, at least those on the afternoon - the 4:00 p.m. to midnight - shift so far as this record shows, concerning the time at which the employees coming off the shift should "cage" to the surface. Cutting through much of the details of the dispute, management sought to assure that the employees would not cage out until 15 minutes to the hour. A number of employees had been caging out as early as 11:15 p.m. and collecting pay until the 12:00 midnight time for the end of the shift. To stop this practice, the Employer had docked the pay of employees to reflect their early caging from the bottom. This had caused some protest, but according to the record, apparently was not altogether effective. A meeting between management and the Mine Committee did not resolve the matter of the acceptable time for caging out, and in the meeting, management announced that it would be taking steps to issue disciplinary slips (apparently, from the reaction expressed, a part of the progressive discipline policy to remedy "unsatisfactory work") for caging out early.
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> At any rate, one of the first such "slips" issued after that meeting was issued to the Grievant [Complainant Hollis in this case] for his caging out earlier than 5 minutes until the hour. On the grievance filed over the issuance of that slip, a series of meetings was had with mine supervision and higher supervision. As a result of those meetings, it was agreed that henceforth no one would "cage out" until 20 minutes until the hour and an agreed procedure for enforcement of the agreed caging time was worked out. That is, on the first offense thereafter, the offending employee would be "talked to" by the Superintendent. On the next and subsequent offenses, a further series of progressively more serious forms of discipline would be assessed. And, as a particular and specific part of the agreement, it was agreed that the matter would be handled as a disciplinary matter and there would be no further docking of pay as a remedy. Importantly, a part of the agreement on the policy and in settlement of the grievance on the Grievant's slip, that slip was removed and expunged. It is to be inferred from the testimony that all of this had just occurred shortly before September 26, 1980.
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> Then, on the night of September 26, 1980, toward the end of the afternoon shift, as the Grievant testified, the

Grievant and his buddy, David Cottingham, both classified and working as wiremen, had gone about their normal duties which included bringing equipment to the bottom. They got to the bottom at about 11:05 to 11:15 p.m (putting the testimony of both together on the timing). As the Grievant came through the revolving door into the waiting room, he saw two employees going onto the cage and on up to the top. Shortly after, members of a "dead-head" crew, which included Ralph Hicks, William Coburn, and two ladies, came in and sat on one of the benches at about the middle of the room. In the short period following, a number of persons began to gather in the waiting room up to number ranging in estimates by witnesses from 15 to 30 or so.

Then, according to the testimony, Mr. Hicks said, "Let's go up at 11:25." At this Grievant raised up from his resting position, saying that the agreement was to stay on the bottom until 11:40, and that Hicks, as a Committeeman, ought to aid in observing the agreement. With that, Grievant got up from the bench and walked over and leaned against the cage door. At the same time, since Grievant did not carry a watch, he asked another employee, David Mollisee, who was sitting on the bench next to the cage door and the button device used to signal for the cage, what time it was, and was told: "11:23."

A short while later, estimated by the Grievant to be two or three minutes, William Coburn got up from the bench where he was seated, moved toward the cage, saying, "let's go", and asking Mr. Mollisee to push the button for the cage. At this point, an altercation between the Grievant and Mr. Coburn ensued, which altercation, its nature, extent, and course of events, is the subject of controverted testimony, and, eventually, the basis on which this case arose.

William Coburn, subpoenaed as an Employer witness, stated that he came to the waiting room around 11:15 p.m. with his crew and sat down with them on the bench. Other employees came in and he estimated that some 30 had gathered. Some time around 11:30, he got up, walked to the cage, and asked Mr. Mollisee to push the button and Mr. Mollisee did so. At this, the Grievant told Mr. Coburn it was not time to go out, and Coburn retorted that Grievant was not going to tell him when he could go out or come in. At this remark, he said, the Grievant started cussing him. During this exchange, the cage came down and the door opened. At about this time, Grievant hit Mr. Coburn on the right side of his face alongside his nose and pushed him onto the cage. Mr. Coburn was dazed by the blow, but did recall that others got on the cage and that Mr. Cottingham restrained the Grievant.

Mr. Coburn also said that there were some 15 employees on the cage when the cage doors closed and it started up. He claims that three times on the way up, the Grievant broke away from restraining fellow employees and came at Mr. Coburn, grabbing him, one time getting a headlock on Mr. Coburn before he was restrained and pulled off. On the occasion of one of those rushes, Mr. Coburn threw up his hands to protect himself, and his dinner bucket which he was holding was knocked from his hands to the floor where it was smashed. He also reports that Grievant threw his, the Grievant's hard hat at him, but it missed.

When the cage got to the top, Mr. Coburn sought out supervisory employees to report the incident and to make a complaint. In the course of this, he reported to Kurt Zacher, a section foreman; Bill Pride, Shift Foreman; and eventually, "Pete" Simpson, the Assistant Superintendent. After making his report, Mr. Coburn went on to the bathhouse, took his shower and got dressed, and went to his buddy'ls truck to ride home. He reports that after he got in the truck, the Grievant came out and tried to get Mr. Coburn out of the truck, saying that he would "get him".

Mr. Coburn claimed he got a broken nose in the affray, and that he went to the doctor for treatment after the meeting on Saturday, the next day.

On cross-examination, Mr. Coburn denied using abusive language toward the Grievant at the bottom, but admits he probably used such language in his yelling back and forth at the grievant on the cage. He also admitted that he told the Grievant that Grievant couldn't tell him when to leave.

On the other hand, the Grievant testified that when Mr. Coburn moved to the cage and remarked, "Let's go," he asked Mr. Coburn where he was going. Mr. Coburn replied that he was going outside. Grievant explained that it was too early and why they must wait until 11:40. At this Mr. Coburn said grievant couldn't tell him when to leave and that Grievant didn't care anyway. Grievant responded that Mr. Coburn was one of those who was always trying to tear down what he was working for, and that they - the two - were going to see Joe Pride (the Superintendent) tomorrow to get it straightened out. To this, Grievant reported, Mr. Coburn made derogatory remarks, repeating for the record the alleged words as he remembered them.

All this while, the cage was on the way down. When the cage arrived, Grievant got on the cage with Mr. Coburn, intending to go to management. Grievant stated that there is always a "mad dash" by everyone to get on the cage on the first trip, and on this occasion, there was a lot of shoving in the course of which he got shoved into Mr. Coburn as the Grievant started around him to go on the cage and while the two were still having words. They made contact with each other and both grabbed each other's clothes. Grievant conceded that, under the conditions of the verbal exchanges between them, Mr. Coburn thought this was an agressive move. When the cage began moving up, the others on the cage restrained both of them. After both were restrained, the Grievant told the others on the cage that the people were going to ruin the policy that he had worked for and that he was trying to represent the majority of them. Grievant reports that Mr. Coburn then said that Grievant was an egotistical Committeeman, to which the Grievant replied that Mr. Coburn was no good and was selfish.

Grievant further stated that, by the time the cage got to the top, the confrontation got out of hand and he probably set a bad example, and probably should have let Mr. Coburn go on up. He reported that he has had problems with Mr. Coburn before, and while he tries to do his job, he knows he is not the most popular person. He explained that his way of doing things is to go at it aggressively and go straight to the point - even to the extent that it might be called emotional, sometimes using rough and harsh language. However, that is the way most people around the mine who get things done, both Union and supervisors, go about getting things done. In this case, there were no licks thrown and thus there was not a fight. While there may have been derogatory language used by both men, it was nothing out of the ordinary around a mine.

Employer witnesses Zacher and Simpson, both supervisors on the afternoon shift, reported that Mr. Coburn had come out of the mine and reported to them about the incident. Both reported that, within a short time after he got off the cage, Mr. Coburn told them that there had been a fight on the bottom and on the cage and that Grievant had "pounded on him" in the cage and on the way up and that he wanted to make a complaint. Both reported that Mr. Coburn was very upset, hands shaking, and lips and voice trembling as he spoke. Both reported that Mr. Coburn had a scratch on his face in the vicinity of his right cheek bone, and his nose was red as if bruised.

Mr. Simpson also testified that when he went into the men's shower room to tell Grievant about the

investigative meeting to be held the next day, Saturday, Grievant had a

scratch on his face along in front of his eyes. He also reported that as he told Grievant about the meeting, the Grievant told him to leave him alone, that he didn't want to talk about it right then.

Other than the grievant and Mr. Coburn, there were eleven witnesses who testified that they had been on the bottom at the end of the afternoon shift on September 26, 1980, at the time the altercation took place. All were classified employees. (The Employer witnesses stated that, in their investigation, they determined that no supervisor was present at the bottom or on the cage at the time, and that the one who arrived at the bottom nearest the time involved, did not arrive until after the cage had gone up with the two.) Seven testified in the Employer's presentation, having been subpoenaed pursuant to the Interim Order entered at the end of the Sunday first partial hearing. Of the eleven, seven witnesses (four testifying in the Employer's case and three in the Union case) could testify only about what they saw and heard at the bottom while the cage door was open and before doors closed and the cage started up. These seven witnesses did not ride up in the cage with the Grievant and Mr. Coburn, some because they did not attempt to get on for one reason or another; and some because they got on but were pushed off or got off when they saw what was going on. The other four witnesses, three testifying in the Employer case, and the other in the Union case, were on the cage during the whole affair.

None of the eleven witnesses reported seeing any blows struck outside the cage. All of them reported that there was an exchange of language in argument between Grievant and Mr. Coburn about whether Mr. Coburn was going up and why. Most reported the exchange to include profanity derogatory to the character, ancestry and sexual practices of the receiver, and that both of the men used such words in loud and angry tones of voice.

Of the witnesses who did not ride up in the cage with the two, one reported that he didn't see anything because he came into the waiting room just as the cage started up; however, he did hear angry yelling and a ruckus going on. Another of those witnesses, reported only that she heard the discussion about going up early and saw a "scuffle" before the doors closed. None of the witnesses who did not ride up in the cage reported or corroborated that there was a "mad rush" to get on the cage. To the contrary, most reported that the Grievant and Mr. Coburn got on ahead of the others who did get on. The other five who did not ride up with the two (one testifying in the Union case and four in the Employer's case) reported seeing the Grievant pushing and grappling Mr. Coburn and Mr. Coburn pushing

back.

They also stated they saw a Mr. Cottingham restraining the Grievant and holding him off Mr. Coburn. Two of those witnesses reported seeing another employee, a Mr. Mayhew, also holding the Grievant and restraining along with Mr. Cottingham. One of the witnesses, who says he knows the Grievant well and only reluctantly testified because he was subpoenaed, also said that he heard the Grievant say something to the effect, "Let me go; I'll kill him." However, the witness hastened to say that the words were said in anger and he doesn't believe they were meant in the literal sense that the Grievant did mean to kill Mr. Coburn. This witness also reluctantly made the comment, in response to close questioning, that the only thing between him and the Grievant over the five years he has known the Grievant is that the Grievant has a quick temper and reacts "badly" to criticism, and that was the reason, as he told Grievant at the time, that he wouldn't support the Grievant for Union office.

Of the four witnesses who were on the cage as it went to the top with Grievant and Mr. Coburn on it, three were subpoenaed to testify in the Employer's presentation; the other testified in the Union's presentation. Mr. Cottingham, testifying in the Union's presentation, reported that, in getting on the cage, all the while with the angry exchange of words between Grievant and Mr. Coburn going on, because of the press, the Grievant bumped into Mr. Coburn and Mr. Coburn swung his bucket, hitting Grievant with it. The Grievant grabbed Mr. Coburn on the face, and Mr. Cottingham grabbed the Grievant and restrained him while others restrained Mr. Coburn.

The other three witnesses contributed various aspects of a point of view of the events. All testified that there were some 15 employees on the cage while it was going up, and, questioned on cross-examination about the reasonableness of any such action as they reported given the crowded condition on the cage, they reported that the cage is rated to carry 26 persons and is large enough to hold 40. Thus, they said, even though it may have been awkward, and certainly dangerous, there was room to move around.

John Yellets testified to seeing the Grievant have a headlock on Mr. Coburn and seeing Messrs. Cottingham and Mayhew pull Grievant off Mr. Coburn. Then, he reported, the Grievant broke away from the two holding him and surged after Mr. Coburn again. This time, a Mr. Nunez, along with Mr. Cottingham pulled Grievant off. Then, Grievant broke away again and went after Mr. Coburn; and this time, Messrs. Mayhew and Cottingham pulled him off. In the course of all this, Mr. Yellets reported, the two took a full revolution or two around the cage with others getting out of the way as best they could. Mr. Yellets also reported seeing a hard

hat fly by him, which he assumed was thrown by the Grievant because only the Grievant was without a hat at the time.

Anthony Nunez reported that while Mr. Cottingham was holding the Grievant, he, Nunez, grabbed the Grievant's arm and told the Grievant to wait until they got to the outside. Mr. Nunez was thrown off and got shoved against the door, reinjuring his back (he'd had a prior injury to his back) to the point where he filed an accident report on the incident. Mr. Nunez objected to the writing in the report characterizing the incident in which he got his back hurt as a "fight", saying that was not the language he used, but what the safety men for the Company had written. However, in his testimony in the hearng, while not characterizing the action of the parties involved, he did report as stated here in that testimony. Further in the course of his testimony, Mr. Nunez reported that the Grievant "surged at" Mr. Coburn three times. And, in addition, he saw the Grievant throw his hard hat at Mr. Coburn.

Ralph Hicks had made a written statement in the course of the Employer's investigation. However, he stated, at the time of the hearing, that some of the statements in the writing were inaccurate and not what he had wanted to say. He explained his signing the statement by saying that he had not read the statement because he did not have his glasses with him at the time. This testimony was controverted by Employer witnesses who reported that the statement had been read back to him, before he signed it, and that several changes had been made, at his request, even to the extent of adding a further paragraph which was signed separately in addition to the main body of the statement.

However that may be, in the hearing, Mr. Hicks testified that he had seen the Grievant "have Mr. Coburn by the face" and that Mr. Coburn had his hands up. He also reported that Messrs. Cottingham and Mayhew "restrained" the Grievant, while others "got in front of" Mr. Coburn. Mr. Hicks also reported seeing the Grievant pick up a bell wrench which was taken away from him, although the witness said he did not see the Grievant attempt to use or swing the wrench (Operator's Exhibit No. 15, pp. 20-27).

Arbitrator Selby also thoroughly analyzed the claim that other miners had previously engaged in fighting but were not discharged.

Turning now to the matters involving the contention of the Union that the discharge of the Grievant in this case was discriminatory, the factual thrust of the claim and the testimony elicited to support it was that the Employer has not, prior to this incident, asserted

discipline to enforce its Rules, and that this is the first time anyone can recall that any employee has been disciplined for a breach of the Rules.

On cross-examination of virtually every witness testifying in the Employer's case, the Union elicited, or sought to elicit, recollections of incidents of breaches of the Employer's Rules by both classified and supervisory employees. Upon such recollections, further questions were asked for the details of time, place, and whether any discipline was assessed. The recollections were of incidents of breaches of the rules against drinking, gambling, horseplay, and a few fights. All the witnesses stated that they could not recall any employee, classified or supervisory, who had been disciplined for the breaches.

Of the eleven witnesses called in the Union's case, four were called, including the Grievant, to testify to the events on the cage, September 26. Mr. Hicks was also called as a witness in the Union case, but his testimony at this point was directed to facts involving the enforcement of the Rules rather than the facts of the incident in question. The point, however, is that with all of its witnesses, the Union also sought to elicit testimony concerning the laxity of enforcement of the Rules prior to this case. And, again, the thrust was directed at reported incidents of breaches of the Rules against drinking, gambling, horseplay and fighting. Another aspect of the point is that, as is the case in any situation where the object is to establish a course of conduct, it was relevant to that matter to present a substantial number of incidents along with a substantial number of details. In this case, the testimony produced a larger number of such incidents, and a recital of them in any summary would produce an extremely long piece of writing - even longer than is already imposed here.

The incidents related included a great number of incidents of horseplay in which both classified and supervisory employees indulged. They also included incidents of drinking and gambling, some notable ones involving Christmas parties at the mine which seems to have been a tradition at this mine. There were also incidents of fights. All of the incidents were claimed to have gone without discipline being imposed upon the participants. For purposes of relevance and materiality, however, it has to be noted that the great majority of incidents reported were stated in generalities in terms of: "great deal of horseplay goes on all the time"; "a great deal of gambling and drinking goes on all the time at the mine"; and "there have been a number of fights which management did nothing about". In a great number of those instances where time and details were provided, relevance and materiality to the issues in this case were attenuated by reason of time and nature of the claimed offenses.

That is, many of those incidents on which detail of

time and happening was given were reports of breaches of rules against drinking, gambling and horseplay. The record shows that, although prohibiting such activities and making breaches thereof

causes for discipline, the Employer's Rules state that such breaches "may" be cause for disciplinary action, but do not make the breaches specifically dischargeable offenses unless they are liable to, or do cause personal injury. Only fighting is made specifically a dischargeable offense by the Rules, and it is the assertion of discharge discipline for fighting which is the subject of this case. Thus, while the various illustrations may tend to show a laxity in enforcement of other rules, unless they are related to the more serious offense of fighting, or a showing of personal injury caused by the other offenses, such illustrations do not demonstrate laxity in enforcement of the Rule against fighting and the failure to discharge for breach of that Rule.

Further on the matter of relevance and materaliality of the various illustrations, the timing of the incidents contributes to such judgments. The record shows that since Joe Pride has become Superintendent at this mine, there has been an attempt to "tighten up" enforcement of the Rules. That is, after complaint made by the Mine Committee, the new summary was posted and even Union witnesses concede that after the posting "things were better" even while insisting that "it still goes on". The record also shows that, effective April 1, 1980, the Safety rules, reiterating that fighting is a dischargeable offense, were promulgated and the Grievant was given a copy of the same. Whatever may have been the "policy and practice" prior to about the first of the year 1980, the record shows that the Employer has attempted to reverse any apparent laxity, and the material question on fighting, especially, is the course of enforcement of the Rules with respect thereot since that time.

Another problem to be dealt with with respect to the use of examples of lack of enforcement is the question whether management knew of the incidents and did nothing about them. As this case demonstrates, it is one thing to complain that management does not enforce Rules, but it is material to any determination of discriminatory enforcement to have evidence that management knew of the incidents and took no steps for assessment of discipline.

Accordingly, it is important to note here that of the many incidents reported in the testimony, I have summarized those which, under the foregoing principles of relevance and materiality, I judge to be probative on the question of discriminatory enforcement of the Rules here asserted. On that point, then, even of those incidents reporting fights in the past, I do not summarize the evidence thereon which does not show that management knew of the incidents, either because they were not reported or because it was shown that any such knowledge could have come only by hearsay without

anyone being willing to present factual testimony on which the Employer could assay to "establish just

cause for discipline or discharge" as has been required by the National Agreement specifically since 1971 or by virtue of burdens of proof imposed by the arbitrators prior to the introcuction of those provisions into the Agreement. And, I do not summarize those incidents in which there was an angry exchange of words and threatening gestures, but no physical contact, on the ground that such instances do represent threats to safety, to be sure, but could well be judged at the time, not to have developed into a fight, and thus, subject to different treatment than discharge discipline for fighting.

Cindy Loughry Hammond, testifying in the Union case, related an incident in September, 1979, during the term of Joe Pride as Superintendent, about an altercation she had with Keith Fox, a section foreman, over an unsatisfactory work slip. In the course of an angry argument in the parking lot during which Mr. Fox cussed her and called her names, he punched her in the chest with his finger, threw her into a car and slapped her. She reported the incident to management. A meeting was held to investigate the matter at which Steve Webber and Dave Gearde of the Mine Committee were present along with her. Present for manaagement were Joe Pride, Superintendent and "Pete" Simpson, Assistant Superintendent. Mrs. Hammond contended in her testimony that she and Keith Fox made their statements before the supervisory employees and that Keith Fox called her a liar in most profane and derogatory terms. Since Dave Fox, a classified employee had been present, he was called into the meeting to state what he saw. Mrs. Hammond stated that Dave Fox corroborated her story. Her testimony is that management did nothing about the incident and that Keith Fox is still working as a supervisor.

Both Steve Webber and Dave Gearde testified in the Union case about this matter (as well as other pertinent matters, of course). In the course of outlineing a list of past instances of fighting in which management did nothing, Mr. Webber cited the Cindy Hammond incident, but did not add detail. Dave Gearde, on the other hand, also cited the Mrs. Hammond incident, saying that Dave Fox "admitted that Keith had punched her", and otherwise corroborated her testimony.

Keith Fox, however, called as a rebuttal witness for the Employer, denied that he had touched Mrs. Hammond. He also stated that Dave Fox had corroborated his version of the events in the course of the meeting before higher supervision, and had stated only that the two were arguing and using bad language to each other. His testimony in this hearing was that Dave Gearde, in that previous meeting on the affair, had stated that he knew Keith Fox and didn't believe that he would have poked or punched Mrs. Hammond. He stated that that previous meeting had broken up with agreement that

nothing further would be done. Joe Pride

and Thomas Simpson, also testified to the matter. Both reported that the statements in the meeting on the Cindy Hammond affair were that Keith had "shook his finger" at Cindy, but did not touch her. Both reported that Dave Fox said that Keith was shaking his finger at her, but did not touch her. Both reported that the meeting broke up with an agreement that there had been no contact and thus nothing further was to be done. Both also reported that neither Mrs. Hammond nor the Mine Committee took up a grievance on the matter.

Michael Kovach testified that during the Christmas Party, 1979 in the "safety room", they all were sitting around playing cards and drinking. Some of the guys were going home. He was sitting in a chair next to a fellow named Keener. Someone hit Mr. Kovach alongside his head knocking him to the floor. Mr. Kovach got up and hit Mr. Keener. Mr. Keener told him that he didn't hit him, that it had been Bill Pride, Afternoon Shift Foreman, who was pointed out as at that moment going out the door to the room. Mr. Kovach said he then went home. He also said that he later asked Bill Pride if he had hit him to which Mr. Pride responded that of course he did not. Mr. Kovach made no complaint to anyone, adding that he was going to take care of it himself. No one was disciplined for any breach of the Rules on this occasion.

Steve Webber related an incident which he said had been reported to the Mine Committee by Joe Pride. In that incident, apparently two men, one named Gene Pugh and the other McNair, were arguing loudly in the hallway outside the Superintendent's Office. In the course of that argument a coffee cup was knocked to the floor. Joe Pride called them into the office and discussed the matter. According to Mr. Webber, the findings were reported to the Committee that the two were arguing and McNair shook his finger in Pugh's face and Pugh knocked it away. Mr. Pride testified that the way it was determined was that McNair had a cup of coffee in his hand and while Pugh was talking and waving his hands around, he knocked the cup from Mr. McNair's hand. There was no discipline assessed on this occasion. Mr. Webber also reported that he himself had had a fight with another classified employee in which they "had got into it pretty heavy". This, however, was back in 1972, and although he contended management knew about it, nothing ever came of it by way of discipline nor did anyone even mention it.

Mr. Cottingham testified that in early part of 1979, while on the section on which Keith Fox was the foreman, Keith Fox didn't want Mr. Cottingham to do something he was supposed to do and Mr. Cottingham insisted upon doing it. There

were angry words and a Bobby Carter jumped in between them. No blows were struck, and Mr. Cottingham reported no ill feelings because he shortly thereafter bid off the section. Reports were made to management but no discipline was taken.

Mr. James Michaels, presently a member of the Mine Committee, testified to a fight he had in June, 1977 with an employee named Varner. There had been some horseplay on the cage in the presence of the shift foremen during which a shirt had been ripped off Mr. Michaels and when he didn't take kindly to it and remonstrated, Mr. Varner made threats to others about getting Mr. Michaels. After the following working shift, Mr. Michaels made claim to Mr. Varner for payment for the shirt. A fight ensued in which Mr. Varner was injured. Mr. Varner tried to report the incident as an accident to the Assistant Shift Foreman.

Mr. Michaels said the Assistant Shift Foreman talked Mr. Varner out of filing the report warning him that the consequences would likely be that Mr. Varner would be disciplined. No discipline was assessed. On cross-examination, Mr. Michaels conceded that if discipline or discharge had been assessed, and if the two involved had denied there had been a fight, it would have been difficult for managment to make the discipline stick. In this case, no boss saw the fight and no bosses were present. Mr. Michaels said that he understood that Mr. Weimer, the Company Safety Man did try to look into it without much success. (Operator's Exhibit Number 15 p. 27-32)

* * *

The Union contends the Employer has not enforced its Rules against fighting by disciplining offenders at any time prior to the occasion even though there have been numerous incidents of violations of the Rules by fighting in the past. The record does show that there may have been laxity in the enforcement of the Rules of Conduct in the past. However, as commented upon in the summary of the evidence, in my opinion, that laxity was neither as broad as the union argues, nor was any laxity with respect to enforcement of rules against drinking, gambling or horseplay necessarily carried over to the far more serious offense of fighting. The fact shown in this record is that fighting was and is treated separately and more seriously than the other offenses by the Rules. Moreover, much of the evidence of past fights-gone-undisciplined was afflicted with lack of specificity as to time and detail, and more importantly, with lack of any indication that the Employer knew or had reason to know the incidents so as to be able to do anything about them. Even some of those where knowledge was alleged, the evidence was in

the form that "management knew of it", but "no reports were made to to management." Thus, most of the incidents related,

even though related in this case by first person protaginists, were just unprovable hearsay and rumor so far as the Employer could do anything about it at the time the incidents occurred.

In addition, the incidents of fighting shown in the evidence to have occurred before Joe Pride bcame Superintendent have been discounted. The reason is that even though an Employer may have been lax in enforcement of its rules over a period of time, that laxity cannot result in a "past practice" binding upon a employer to the point where that employer is bound to forever ignore fighting or other activity which may or does cause injury. Thus, an Employer may, on proper notice, call a halt to any such laxity, especially with regard to safety rules, and to renew enforcement. That renewed enforcement, of course, is bound by the limitations and protections that notice must be given, the renewed enforcement must be evenhanded and consistent, and must be pursued with a proper "business purpose" as opposed to some discriminatory or arbitrary purpose.

The record here shows that this Employer did, around the first of the year 1980, take steps to tighten up enforcement of its rules. Moreover, the Mine Committee assumes substantial responsibility for urging such renewed enforcement, even asserting that if the Employer didn't do something to stop some of the things going on, it would take steps to stop them.

Pursuant to that resolve, the Rules summary was posted as a reminder that the Rules remained in effect and that the Employer would take steps to enforce them. It is to be acknowledged that many of the Mine Worker witnesses denied having seen the Rules posted, but the record clearly shows that they were posted. Then, the new Safety Rules, specifically stating that fighting is a dischargeable offense were promulgated. These were given to the Grievant as chairman of the Safety Committee for the purposes of Article III, section (g) requiring that notice be given before proposed new rules are scheduled to become effective. No protest of this part of the rules of the Committee, or of any part of the rules is shown in this record. Grievant had specific notice that the rules would be enforced as written with respect to fighting.

During the term of Joe Pride as Superintendent, the record discloses one other incident of fighting for sure, and possibly two others occurred. Except for the Cindy Hammond incident, the evidence clearly shows that all such incidents either were not fights of the kind involved here, or management was not notified of them so that it could take any action. One such incident, the Pugh-McNair incident, illustrates that the Employer

did investigate those instances

> which came to its attention and did make determinations concerning whether a fight did in fact occur. That Pugh-McNair incident cannot, in my opinion, be called a fight anywhere near like was involved in this case.
>
> The Cindy Hammond-Keith Fox incident was of a more serious nature. However, that case was not presented to me for determination on all its facts and evidence. What was presented was sharply conflicting testimony about who said what and what agreements were made concerning the incident and whether it should be pursued. In light of the fact that no grievance was filed and taken up, and in light of the necessities of proof if disciplinary action is taken, I find that this incident was not one in which the Employer ignored evidence and facts on which to take disciplinary action for fighting in breach of the Rules.
>
> The point is that I find from this record that the Employer, during the term of Joe Pride's Superintendency, has not failed to pursue discipline for fighting in violation of its renewed rules in cases where there has been evidence available on which it could reasonably be expected to establish that a fight occurred and that the particular employees were accountable for the fight. In this case, the Employer took disciplinary action against both employees involved, and on that basis, in this first such case, there was no disparity of treatment between the Grievant and Mr. Coburn, so far as the Employer's actions are concerned.
>
> Now, I have found that the Grievant did engage in the fight with Mr. Coburn and that such fight was in violation of the Rules and was a dischargeable offense. I do not find from the evidence in the record that the Employer took disciplinary action against the Grievant because of any built-up, accumulated animus against the Grievant because of his activities on behalf of the Union and because of his activities in making claims and charges with regulatory agencies. Instead, it cannot be avoided that the Grievant did engage in fighting. It cannot be avoided that the response of the Employer was in reaction to the fight and was assessed against both the Grievant and Mr. Coburn, the employees involved. (Operator's Exhibit No. 15 pp. 39-41).

While the evidence developed at the hearing before me provided some greater detail than was available to the Arbitrator, there is nothing in that additional evidence that would warrant any change in the analysis and conclusions of these incidents made by the Arbitrator. Within this framework of evidence, I have no difficulty concluding that the Complainant was engaged

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in fighting with co-worker Coburn on September 26, 1980, that physical injuries were sustained by Coburn, that the matter was a serious breach of the known rules of conduct of a severity far beyond that of any other incident cited, and that fighting was and is a well-recognized dischargeable offense. In addition, I have no difficulty concluding that Hollis's discharge was not discriminatorily disproportionate.

Under all the circumstances, I do not find sufficient evidence to conclude that, in discharging Hollis, the operator was motivated in any part by his protected activities. Moreover, because of the seriousness of his infraction, it is clear that the operator would have in any event, been justified in discharging Hollis and indeed would have done so based on his unprotected activities (fighting) alone. Pasula, supra.

For these additional reasons, the Complaint herein is accordingly Denied and this case is Dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

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~FOOTNOTE_ONE
1 Section 105(c)(1) provides in part as follows:

"No person shall discharge * * * or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal or other 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, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine * * * or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this act * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this act."

~FOOTNOTE_TWO
2 Judge John Cook, to whom this case was initially assigned, had treated Consol's Motion to Dismiss as a Motion for Summary Decision under Commission Rule 64, 29 CFR 2700.64, and denied the Motion for the reason that unresolved issues of material fact then existed. I am now ruling on the Motion to Dismiss in light of the additional evidence presented at hearing and in light of my determinations of credibility.

~FOOTNOTE_THREE
3 Complaints under section 103(g) of the Act may be made by a representative of miners or a miner directly to MSHA and MSHA must then perform an inspection pursuant to those complaints.

~FOOTNOTE_FOUR
4 To the extent that Hollis believes he breached an agreement with mine management, that, of course, reflects

negatively on his own credibility.

~FOOTNOTE_FIVE
5 Under the Pasula and Gardner-Denver decisions, the arbitral findings may be entitled to great weight where, as here, full consideration was given by the arbitrator to the employee's statutory rights; the issue before the Commission Judge is solely one of fact; the issue was specifically addressed by the parties before the arbitrator; and the issue was decided by the arbitrator on the basis of what certainly appears to have been an adequate record. I observe, in addition, that Franklin Cleckley, a professor of law at the University of West Virginia Law School, and a practicing attorney with whom Mr. Hollis consulted regarding his discharge, conceded that he indeed respected Paul Selby as an arbitrator in the coal industry. Mr. Selby's special competence in the field is further recognized by the fact that he had been selected by both the coal operators and the union to be the Chief Umpire under the previous contract and the fact that he was also appointed to the faculty of the University of West Virginia Law School apparently as a specialist in the field of labor law.