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ROBERT SIMPSON V. KENTA ENERGY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ROBERT SIMPSON, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 83-155-D MSHA Case No. BARB CD 83-06
KENTA ENERGY, INC., & ROY DAN JACKSON, RESPONDENTS	No. 1 Mine

DECISION

Appearances: Tony Oppegard, Esq., Hazard, Kentucky and
Stephen A. Sanders, Esq., Prestonsburg,
Kentucky for Complainant;
Rudy Yessin, Esq., Frankfort, Kentucky,
for Respondents.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant alleges that he was constructively discharged by Respondents in that he was forced to leave his job as scoop operator on September 21, 1982, because of safety related conditions at the subject mine. He further complains that Respondents refused to reinstate him on or about December 7, 1982. Both the constructive discharge and the refusal to reinstate are alleged to have been in violation of section 105(c)(1) of the Mine Safety Act.

Following extensive pretrial discovery, the case was noticed for hearing and was heard in Hazard, Kentucky on September 8 and 9, 1983 and on January 11 and 12, 1984. Robert Simpson, Henry Quesenberry, Paul David Helton, Marvin Brewer, Charles Patterson, Roy Anthony Gentry and Clyde Gailey were called as witnesses for Complainant. Respondent Roy Dan Jackson was called as an adverse witness. The depositions of Vernon Morgan, Danny Noe, Roy Dan Jackson, and Charlie Patterson were received in evidence pursuant to Rule 32 of the Federal Rules of Civil Procedure. Mike McClure and Roy Dan Jackson testified on behalf of Respondents. Both parties have filed posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

The Operator

The complaint alleges that Respondent Kenta Energy Incorporated ("Kenta") operated the coal mine in which Complainant was employed. It also alleges that Respondent Jackson was the President and owner of Kenta. The record contains some confusing evidence concerning the relationship of Jackson and Kenta, and concerning the relationship of Jackson to the operation of the subject mine. It was decided at the hearing that the issue of the personal liability of Jackson would await a determination of whether a violation of section 105(c) was established. If such a violation was found, the parties would be afforded the opportunity of submitting additional evidence on the question of Jackson's liability.

From January, 1981, until September 20, 1982, Complainant was employed as a scoop operator at the subject mine, variously known as the Kenta No. 1 Mine, the Black Joe Mine, and the No. 1 Mine, and bearing MSHA ID No. 15-12090, located in Harlan County, Kentucky. The mine height varied from 28 to 32 inches, and the coal was extracted by cutting into the face with a cutting machine, drilling and shooting. The coal was then removed by a scoop.

Mine Foreman

Danny Noe was mine foreman at the subject mine from December, 1980 until September 3, 1982. He reported directly to Roy Dan Jackson. Noe performed the preshift and onshift examinations required by law. He called the information out to Charles Patterson, the "outside man," who signed Noe's name on the books. As of September 3, 1982, the mine had been driven over 3,000 feet from the drift mouth. It was contemplated that it would be driven about 4,000 feet to the property line and then turned right toward an abandoned mine property. Noe's last day of work was September 3, 1982. He entered the hospital on September 4, because of a back condition, and did not return to work.

Respondent Jackson testified that Stanley Gilbert, a certified mine foreman, was sent to the subject mine to act in Noe's place. There is also some evidence that Tony Gentry, the bolting machine operator at the subject mine who was attending a foreman's school, did some of the "firebossing" for Gilbert. There is substantial other evidence that

Gilbert was not at the mine between September 3 and September 21, 1983. Respondent did not call Gilbert as a witness. Gentry denied that he performed the required preshift and onshift examinations during this time. Patterson testified that he continued to sign Noe's name to the books although Noe did not come back to the mine. I find that the preponderance of the evidence establishes that there was no supervisor at the subject mine between the time that Noe left and the time Complainant left. I further find that the preshift and onshift examinations were not performed during the same period.

The Old Works

Some time after Noe left (and the record is unclear as to the exact date), the mine headings turned right, toward the old abandoned works. The crew had advanced about 200 to 250 feet in the headings to the right as of September 21, 1982. Test holes were not drilled before the cuts were made. In fact a workable test auger had not been provided at the mine site before September 21, 1982. Complainant and at least two other miners specifically requested that Patterson, who was in charge of supplies and equipment, obtain a test auger. One was ordered but did not arrive at the mine site until some days after September 21. Complainant and at least some of the other crew members had expressed their fear of cutting into the old works on many occasions. The fear related to the possibility of releasing "black damp" (oxygen deficient air), methane or water into the section where the miners were working.

Respondent Jackson testified that he crawled through the old works on two occasions and found them safe, once with his engineer Mike McClure and once with Barry Rogers who became foreman after Noe and Simpson left their employment. There is confusion and dispute as to whether he crawled the old works with McClure before Complainant left. Whether he did or not, it is clear that Complainant and at least some other members of the crew were not informed that he had done so. Complainant had no reason to believe that the old works were safe and free from black damp, methane and water.

Work Refusal

After completing his shift on September 20, 1983, Complainant decided not to return to the job. He stated that he made this decision because there was no boss and no test auger at the mine and this made working dangerous. Two

days later at about mid-shift, he returned to the mine site to pick up his equipment. He talked to Patterson and told him that he had quit. Patterson suggested that he return to work and he would be paid for the whole day. (Patterson was the mine time keeper, but had no supervisory or hiring authority). Complainant asked whether there was a foreman and a test auger. Patterson replied there was not. Complainant said "it still wouldn't help me none" (Tr. 48), and did not return to work. There is no evidence in the record that Complainant notified Jackson or Noe or anyone else in authority that he was quitting or the reasons for his quitting at the time he left or for some weeks thereafter. There is no evidence in the record that Complainant complained to Jackson or anyone else in authority between September 3 and September 20 about the absence of a boss and a test auger at the mine. Complainant lived about 3 or 4 miles from Jackson's home. He had known him for about 15 years. On three or four occasions, Complainant went to Jackson's home to borrow money.

Refusal to Rehire

About 1 month after Complainant quit, Vernon Morgan (a member of the crew at the subject mine) told Complainant's father that a boss had been sent to the mine and a test auger supplied. Complainant then attempted to call Jackson but could not reach him. Thereafter (approximately in December, 1982), Complainant and his father saw Jackson and Complainant asked for his job back. For the first time, he told Jackson that he had been afraid while on the job because there was no boss and no test auger. Jackson told him that he had no opening at that time, and refused to rehire or reinstate Complainant. He also told him, "next time you'll learn not to get a wild hair" (Tr. 51).

Subsequent Work History

Since leaving his job with Respondent, Claimant has worked 3 days at a soft drink plant, about 4 months for a reclamation company on strip mined land, and about 1 month for a coal mine company. He was laid off the latter two jobs and was not working at the time of the hearing in this case. When he left his job with Respondent, Complainant was earning $10.64 per hour.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners, or applicant for employment . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner, represenative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

* * * * * * * * * *

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of

> paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems approrpiate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of section 108 and 110(a).

ISSUES

1. Whether Complainant's leaving work at the end of the shift on September 20, 1982, was activity protected under the Mine Act?

2. Whether Complainant was constructively discharged for protected activity?

3. Whether Respondent's refusal to reinstate or rehire Complainant was a violation of section 105(c) of the Act?

4. If a violation of section 105(c) of the Act is established, to what relief is Complainant entitled?

CONCLUSIONS OF LAW

Refusal to Work

It is no longer a matter of doubt that a miner is protected under the Mine Act where he refuses to perform work which he reasonably and in good faith believes to be hazardous. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). It is his refusal to work that constitutes the basis of the complaint in this case. Respondent's argument that Complainant did not make a safety complaint to MSHA is beside the point. Respondent introduced evidence that Complainant quit work because of family problems rather than because of safety concerns. I have considered this evidence, but conclude that it is not sufficient to overcome the credible testimony of Complainant that he quit work in good faith because of concerns for his safety. The evidence very clearly establishes that the work refusal was reasonable. I have found that there was no qualified supervisor at the mine to perform the required preshift and onshift examinations. Complainant and at least some of the other members of the crew believed that they were cutting in the direction of an abandoned mine. The failure to drill test holes in such a situation is hazardous and a clear violation of 30 C.F.R. 75.1701. If in fact Jackson had crawled through the old works and found them free of hazards, he failed to communicate this fact to Complainant. Complainant's work refusal resulted from a reasonable good faith belief that continuing to work would be hazardous.

Adverse Action

The next issue is whether Respondent took adverse action against Complainant because of his work refusal. Unlike Pasula and Robinette, he was not formally discharged. Two theories are advanced by Complainant to show adverse action: (1) he was constructively discharged because he quit to escape an intolerable situation; (2) he was refused reinstatement or rehiring when he sought it in December, 1982.

Constructive Discharge

The doctrine of constructive discharge as developed in cases under the National Labor Relations Act and Title VII

of the Civil Rights Act holds that if an employee's working conditions are made so intolerable that he is forced into an involuntary resignation, the employer is deemed to have constructively discharged him and is liable as if it had formally discharged the employee. Young v. Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir.1975); J.P. Stevens & Co. v. N.L.R.B., 461 F.2d 490 (4th Cir.1972). The doctrine is applicable under the Mine Act if the "intolerable conditions" are motivated in any part because of activity protected under the Act. Rosalie Edwards v. Aaron Mining Inc., 5 FMSHRC 2035 (1983). The evidence before me establishes intolerable conditions, i.e., a perceived dangerous work environment. There is no evidence that Respondents were "motivated" in maintaining that environment by any protected activity. But this in a way is circular reasoning. The protected activity here is Complainant's refusal to work itself. The intolerable conditions which caused him to quit his employment are the same conditions justifying his work refusal. Under such circumstances, I hold that Respondent's motivation is not controlling.

Communication to Operator

The most difficult question in this case is whether Complainant communicated his safety concerns to Respondent prior to or reasonably soon after his work refusal, or, if he did not, whether unusual circumstances excused his failure to do so. In Secretary/Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 133 (1982), the Commission formulated the rule as follows:

> Where reasonably possible, a miner refusing to work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonably possibility' may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, "ordinarily' in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances--such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.

The safety hazards in this case involve (1) approaching the old works without drilling test holes, and (2) working without a foreman and therefore without preshift and onshift examinations being made. Complainant did not directly communicate his belief in the hazard of approaching the old works to Jackson or to anyone in authority before December, 1982. He did ask the outside man, who was not a supervisor (but was related to Jackson), for a test auger and told him that he was quitting because of the perceived hazards. This communication was not relayed to Jackson so far as the record shows. Neither Jackson nor any other management personnel were at the mine site at the time, and therefore communication to the operator may not have been reasonably possible at that time. However, Complainant knew where the mine office was (he drove there every day while working), and he knew where Jackson resided. It was certainly reasonably possible for him to have directly communicated his concerns to Jackson and thus give him an opportunity to correct the situation or to explain that he had crawled the old works and they were hazard-free. See Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539 (1981) (ALJ).

On the other hand, with respect to the absence of a foreman and the failure to perform the preshift and onshift examinations, Jackson must be charged with actual knowledge of the hazards related to these situations, and communication of them I believe would have been futile. I do not consider that it is necessary in order to invoke the protection of section 105(c), that it be shown that the operator was specifically aware of the reason for a miner's work refusal, if the operator was aware of the hazardous conditions which prompted the refusal.

Refusal to Rehire

Respondent contends that because of a recession in the coal business, Complainant would have been laid off in any event and that he was not rehired in December because there was no job for him. However, no one had been laid off from the mine as of December, 1982, and the two miners who were laid off in January or February, 1983, were not scoop operators.

CONCLUSIONS

I conclude that Complainant's refusal to return to work after September 20, 1982, resulted from a good faith, reasonable belief that continuing on the job would be hazardous. The perceived hazards were cutting toward old works without drilling test holes, and working without a foreman and without preshift and onshift examinations being performed. Although his safety concerns were not communicated to Respondent, Respondents were aware of the hazardous conditions and communication of Complainant's concerns would have been futile. Therefore, the evidence establishes a violation of 105(c) of the Mine Act. The evidence does not show the Complainant would have been laid off for economic reasons. Therefore, he is entitled to reinstatement and back pay.

EVIDENTIARY RULINGS ON EXHIBITS

Respondent offered in evidence a copy of an order of the Kentucky Unemployment Insurance Commission which affirmed a Referee's Decision denying unemployment benefits to Complainant because he voluntarily left his employment without good cause attributable to the employment. Respondent's Exh. 1. I excluded the document on the ground of relevance. A determination that an employee is not entitled to unemployment compensation benefits has no bearing on his rights under section 105(c) of the Mine Act.

Complainant served a subpoena to MSHA Special Investigator Larry Layne who investigated Complainant's discrimination complaint to MSHA. The Solicitor of Labor declined to authorize Layne to testify and the subpoena was not honored. Thereafter, an expurgated copy of MSHA's investigation report was supplied Complainant's attorney and it was offered in evidence, under the Seal of the Department, as Complainant's Exhibit 5. I obtained from the Solicitor an unexpurgated copy of the report (attached to numerous other documents) in camera with the understanding that I would not disclose any part of the report which would give the names of informers. I admitted the exhibit, as supplemented by my reading into the record all the deleted parts of the report (including the conclusions of the Investigator) except those identifying informants. The report is clearly relevant, and the upholding of the government's informer privilege is supported by case law. Usery v. Ritter, 547 F.2d 528 (10th Cir.1977).

The Depositions of Danny Noe, Vernon Morgan, and Charlie Patterson were admitted in evidence pursuant to Federal Rule of Civil Procedure 32(a)(3) and the Deposition

of Roy Dan Jackson was admitted in evidence pursuant to Rule 32(a)(2).

RELIEF

Based upon the above findings of fact and conclusions of law, I conclude that Claimant was constructively discharged on September 21, 1982, for activity protected under the Mine Safety Act. Respondent's refusal to reinstate or rehire him was a further violation of section 105(c) of the Act. Complainant is entitled to reinstatement in the position he held on September 20, 1982, or a similar position at the same rate of pay and with the same employment benefits. Respondents are ORDERED to reinstate him in such position. Complainant is entitled also to back pay from September 21, 1982 until the date of his reinstatement with interest thereon. His earnings at other employment shall be a credit against his back pay entitlement. Complainant is entitled to be reimbursed by Respondent for reasonable attorneys' fees and costs of litigation. Further proceedings shall be had in this matter to resolve the question of Respondent Jackson's liability and, if necessary, the amount to which Complainant is entitled as back pay and attorneys' fees. In preparation for these proceedings, the following is ordered:

1. Complainant shall on or before June 28, 1984, file a statement explaining with particularity the legal basis for his claim against Respondent Jackson, and the evidence it expects to produce to establish that claim.

2. Complainant shall file a statement on or before June 28, 1984, showing the amount he claims as back pay and interest using the formula set out in the case of Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1983) to determine the interest due. (A copy of the Arkansas-Carbona decision is appended hereto).

3. Complainant shall file a statement on or before June 28, 1984, showing amount he rquests for attorneys' fees and necessary legal expenses. The attorneys' hours and rates shall be set out in detail.

4. On or before July 14, 1984, Respondents shall reply to the above statements, and, if they object to the amounts claimed as back pay or attorneys' fees, shall state their objections with particularity.

5. Following receipt of the above statements, a further hearing will be scheduled, if it appears necessary.

6. Until the issues of Jackson's liability, if any, the amount due as back pay and interest and the amount due as attorneys' fees are determined, the decision is not final.

James A. Broderick
Administrative Law Judge

December 12, 1983

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

On behalf of MILTON BAILEY Docket No. CENT 81-13-D

v.

ARKANSAS-CARBONA COMPANY

and

MICHAEL WALKER

DECISION

This discrimination case presents four issues: whether the Commission's administrative law judge abused his discretion in severing the Secretary of Labor's request for a civil penalty from the complaint of discrimination; whether the judge erred in awarding 6% interest on the back pay award; whether he erred in tolling the back pay award on the date the Secretary filed a complaint on Bailey's behalf; and whether he erred in refusing to award Bailey tuition and certain miscellaneous expenses. For the reasons that follow, we hold that the judge did not abuse his discretion in this case when he severed the request for a civil penalty from the discrimination complaint, but we also announce our intention to amend Commission Procedural Rule 42, 29 C.F.R. 2700.42, to end the need for such severance in future cases. We adopt as the Commission's interest rate formula for back pay awards the interest formula used by the National Labor Relations Board--that is, interest set at the "adjusted prime rate" announced semi-annually by the Internal Revenue Service for the underpayment and overpayment of taxes. We hold that the judge erred in assessing 6% interest on the back pay award and remand for recalculation of the award pursuant to the computation rules announced in this decision. We reverse the judge's order tolling back pay on the date of the Secretary's complaint on behalf of Bailey. We continue the award until the date Bailey informed the Secretary he did not wish reinstatement, and additionally remand for determination of the date when that notification occurred. Finally, we affirm the judge's holding that Bailey was not entitled to payment of college tuition and related expenses.

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I. Factual and procedural background

We briefly summarize the facts, which are undisputed, as background for our discussion of this case. Arkansas-Carbona Company, a joint venture, operated a small surface anthracite coal mine in Dardanelle, Arkansas at the relevant time. Milton Bailey was employed by Arkansas-Carbona from May 13, 1980, until his discharge on June 27, 1980. Bailey was the company's safety director and he earned $1,000 per month. Michael Walker was the president of one of the firms comprising the Arkansas-Carbona joint venture, and after June 13, 1980, took over control of mine operations at the mine site. On June 27, 1980, Bailey complained to Walker that the mine's first aid kit, which had been moved from the main office to a screened porch, should remain in the office to prevent its exposure to dust. Walker contended the kit was in a dustproof container. An argument ensued which resulted in Bailey's discharge.

On October 20, 1980, the Secretary of Labor filed a discrimination complaint before this independent Commission on behalf of Bailey against Arkansas-Carbona and Michael Walker. (FOOTNOTE 1) His complaint alleged that Bailey was unlawfully discharged for exercising rights protected by section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1976 & Supp. V 1981). The relief sought included back pay with 9% interest, and reinstatement on the same shift with the same or equivalent duties at a rate of pay "presently proper" for the position. The Secretary's complaint also requested "an order assessing a civil penalty of not more than $10,000 against [the operator] for [the] violation of section 105(c) of the Act." 30 U.S.C. 815(c) (Supp. V 1981). On January 22, 1981, the Secretary filed a motion to amend his discrimination complaint. The motion stated in part: "Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses."

The Commission's administrative law judge first held that Bailey's complaint concerning the first aid kit on the day of his discharge was protected activity and that Bailey's discharge was motivated in part by that protected activity. Thus, the judge held that a prima facie case of discrimination, that is, adverse action motivated in part by protected activity, was proved. 3 FMSHRC 2313, 2318-19 (October 1981) (ALJ). The judge then examined each non-discriminatory ground the operator presented as the cause of Bailey's termination and concluded, "Neither singularly nor in combination do Respondents' contentions establish that Respondents would have discharged Complainant for the reasons given." 3 FMSHRC at 2319. Therefore, the judge determined that Arkansas-Carbona's discharge of Bailey violated section 105(c)(1) of the Mine Act. 30 U.S.C. 815(c)(1).

The judge awarded Bailey back pay with 6% interest from the date of discharge until October 19, 1980, one day before the Secretary's complaint was filed. 3 FMSHRC at 2323. Because the

complaint on behalf of Bailey was amended January 22, 1981, to request one year's college tuition and related expenses in lieu of reinstatement, the judge applied

Rule 15(c), Federal Rules of Civil Procedure, and concluded that the amendment related back to October 20, 1980, the date of the Secretary's complaint. (FOOTNOTE 2) Therefore, the judge concluded that Bailey did not request reinstatement from that date and that, accordingly, the obligation for back pay ceased on that date. 3 FMSHRC at 2321. The judge also declined to order the payment of one year's college tuition and expenses because Bailey "failed to establish any entitlement to an award of 1 year of college tuition." 3 FMSHRC at 2322. The judge also ordered expunging of all references to "this matter" from Bailey's employment record.

In addition, the judge severed MSHA's proposed assessment of a civil penalty from this proceeding, and he ordered MSHA to proceed under Commission Procedural Rule 25, 29 C.F.R. 2700.25. (FOOTNOTE 3) At the outset of the administrative hearing, the judge explained the reason for the severance: "I will sever the civil penalty proceeding because there has not been the required administrative processing of the proposal through the notification to the respondents of the amount of the proposed penalty or the opportunity to discuss this matter with the District Manager's office." Tr. 4.

II. Severance of the civil penalty from the proceedings involving the complaint of discrimination

We first consider the question of how civil penalties for violations of section 105(c) should be proposed and assessed in cases where the Secretary files a complaint on behalf of a miner, and then whether the judge erred in severing the penalty proceeding.

Civil penalties are assessed under the Mine Act to induce compliance with the Act and its standards. See, for example, S.Rep. No. 181, 95th Cong., 1st Sess. 40-41 (1977) ("S.Rep."), reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978) ("Legis.Hist."). Penalties are mandatory for violations of

the Act and its standards. The Act separates the procedures for civil penalty assessment between the Secretary and the Commission. The Secretary proposes the penalty he wishes assessed for a violation and the Commission assesses a penalty of an appropriate amount. See Sellersburg Stone Co., 5 FMSHRC 287, 290-92 (March 1983), pet. for review filed, No. 83-1630, 7th Cir., April 8, 1983; Tazco, Inc., 3 FMSHRC 1895, 1896-98 (August 1981). (FOOTNOTE 4)

This bifurcation of functions is set forth in sections 105 and 110 of the Act. 30 U.S.C. 815 & 820 (Supp. V 1981). Section 105(a) requires the Secretary to take certain steps to notify an operator of the civil penalty "proposed to be assessed under section 110(a) for the violation cited." 30 U.S.C. 815(a). Section 110(a) provides, in turn, for penalty assessments of not more than $10,000 per violation. 30 U.S.C. 820(a). Section 110(i) provides, "The Commission shall have authority to assess all civil penalties provided in this Act." 30 U.S.C. 820(i). After listing the six statutory penalty criteria, section 110(i) concludes, "In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above [six] factors." (FOOTNOTE 5)

Section 105(a) states that the civil penalty proposal procedures set forth for the Secretary therein are only invoked "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104 [30 U.S.C. 814]." 30 U.S.C. 815(a). (FOOTNOTE 6) The Secretary must notify an operator "within a reasonable time" of the penalty he proposes. If the operator chooses to contest a proposed penalty, the Secretary must "immediately advise" the Commission so that a hearing can be scheduled. 30 U.S.C. 815(d). The statutory procedures for prompt notification

and contest of a proposed civil penalty assessment reflect Congress' belief that penalty assessment had lagged under the 1969 Coal Act, 30 U.S.C. 801 et seq. (1976) (amended 1977), and its consequent desire to speed the process. Thus, the thrust of the penalty procedures under the Mine Act is to reach a final order of the Commission assessing a civil penalty for violations without delay.

Cases involving violations of the discrimination provisions, however, are not initiated with the issuance of a citation or order under section 104 but, rather, with filing of special complaints before the Commission under sections 105(c)(2) or 105(c)(3). 30 U.S.C. 815(c)(2) & (3). These two statutory subsections provide for complaint by the Secretary if he believes discrimination has occurred, or complaint by the miner if the Secretary declines to prosecute.

It is clear that a penalty is to be assessed for discrimination in violation of section 105(c)(1). The last sentence of section 105(c)(3) states, "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 [30 U.S.C. 818] and section 110(a)." 30 U.S.C. 815(c)(3). (FOOTNOTE 7) Section 110(a) requires the Secretary to propose penalties to be assessed for violations of the Act. Neither section 105(c) nor section 110(a), however, states how and when the Secretary is to propose a penalty for a violation of section 105(c)(1).

The Secretary's regulations in 30 C.F.R. Part 100 set forth "criteria and procedures for the proposed assessment of civil penalties under section 105 and 110 of the [Mine Act]." 30 C.F.R. 100.1. (FOOTNOTE 8) Section 100.5 lists a number of "categories [of violations which] will be individually reviewed to determine whether a special assessment is appropriate" including "discrimination violations under section 105(c) of the Act." (FOOTNOTE 9)

In spite of this reference to discrimination cases, none of the Part 100 regulations specifies how the Secretary shall propose a civil penalty when he files the complaint of discrimination, and it does not appear that the Secretary contemplated that his administrative review procedures for proposed penalties should apply to a determination that an operator had violated

section 105(c)(1). Similarly, the Commission's procedural rules do not specifically address penalty procedures for alleged violations of section 105(c)(1). Our rules more generally require the Secretary to notify the operator of "the violation alleged" and the penalty proposed and to afford the operator 30 days in which to notify the Secretary if it wishes to contest the proposal. Commission Procedural Rule 25 (n. 3 supra). See also Commission Procedural Rules 26 through 28, 29 C.F.R. 2700.26 through 28. (FOOTNOTE 10)

The Secretary argues that the penalty proposal procedures in section 105(a) of the Mine Act and Commission Procedural Rule 25 apply only to citations and orders issued under section 104. Violations of the discrimination section, the Secretary urges, are subject only to the provisions expressly mentioned in section 105(c) itself. The Secretary relies on the last sentence in section 105(c)(3), which states that violations of section 105(c)(1) "shall be subject to the provisions of sections 108 [injunctions] and 110(a)." 30 U.S.C. 815(c)(3). He argues that because section 110(a) contains no reference to section 104 or to section 105(a), the assessment proposal procedures required therein need not be applied in penalty proposals under section 105(c)(3).

Thus, from the language of sections 105(c)(3) and 110(a), the Secretary argues that it is not necessary to have separate penalty proceedings in discrimination cases. Rather, he contends that penalties should be assessed by Commission judges when liability is determined--that is, when an operator is found in a discrimination proceeding to have violated section 105. The Secretary asserts he is "always" prepared to provide the information on the penalty criteria in section 110(i), and that an administrative law judge will never be more competent to decide the penalty question than at the close of a discrimination case in which the judge has determined the existence of a violation.

We agree with the Secretary that it is desirable to adjudicate in one proceeding both the merits of the discrimination claim and the civil penalty. The Mine Act emphasizes, "Proceedings under [section 105(c)] shall be expedited by the Secretary and by the Commission." 30 U.S.C. 815(c)(3). Because the last sentence of section 105(c)(3) references penalty proposals under section 110(a), we conclude that penalty proposals for section 105(c) violations are to be expedited as well. The express statutory intent to expedite these proceedings is furthered by having the Secretary avoid dual proceedings and incorporate his penalty proposal in his discrimination complaint.

We also conclude, however, that it is incumbent upon the Secretary in a combined proceeding to set forth in the discrimination complaint the precise amount of the proposed penalty with appropriate allegations concerning the statutory criteria supporting the proposed amount. Experience makes us somewhat skeptical about the Secretary's assertion that he has "always" been prepared to present evidence on penalty criteria. Formal penalty allegations in the complaint better afford operators adequate notice of penalty issues in discrimination cases. Because the Secretary may "rely on a summary review of the information available to him" in proposing penalties (30 U.S.C. 820(i)), the penalty allegations in the discrimination complaint may be stated in summary fashion.

In this case, the Secretary's naked request in his complaint for a penalty of "up to $10,000" is scarcely a penalty proposal at all. Henceforth, we shall require in these cases that the Secretary propose in his complaint a penalty in a specific dollar amount supported by information on the section 110(i) criteria for assessing a penalty. This new rule shall apply to cases pending with our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. Leave to amend complaints to add the penalty allegations shall be freely granted. Thus, the operator will be informed not only of the dollar amount proposed, but also the basis therefor. The parties will then be better prepared to litigate at the hearing any disputes concerning the penalty sought.

Because the Secretary did not provide in his complaint sufficient notice to the operator of the amount of the penalty sought and the basis therefor, we cannot say that the judge erred in severing the penalty proposal in order to provide such notice to the operator. Nor do we see the utility of a remand to allow the Secretary to amend his complaint. The judge's approach to the Secretary's inadequate proposal is consistent with the Act's notice requirements and with the position we now enunciate. Accordingly, we affirm the judge's severance of the penalty proposal from the underlying discrimination complaint. (FOOTNOTE 11)

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III. The rate and computation of interest on back pay awards

The next question in this case is whether the judge erred in assessing 6% interest on the back pay award. The remedial goal of section 105(c) is to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC at 142. As we have previously observed, " "Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.' " Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982), quoting Goldberg v. Bama Mfg. Corp., 302 F.2d 152, 156 (5th Cir.1962).

Included in that "full measure of relief" is interest on an award of back pay. Section 105(c)(3) of the Mine Act expressly includes interest in the relief that can be awarded to discriminatees, while leaving it up to the discretion of the Commission to determine the exact contours of such an award. (FOOTNOTE 12) The Senate Committee that drafted the section which became section 105(c) stated in its report:

> It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, backpay with interest, and recompense for any special damages sustained as a result of the discrimination.

.Rep. 37, reprinted in Legis.Hist. 625 (emphasis added).

Our judges have awarded interest at rates varying from 6% per annum to 12.5% per annum and have used a variety of methods to compute interest awards. At least two of our judges have adopted the NLRB's rate of interest on back pay awards. See, e.g., Bradley v. Belva Coal Co., 3 FMSHRC 921, 925 (April 1981) (ALJ) aff'd in part, remanded in part on other grounds, 4 FMSHRC 982 (June 1982); Secretary on behalf of Smith et al. v. Stafford Construction Co., 3 FMSHRC 2177, 2199 (September 1981) (ALJ) aff'd in part, rev'd in part on other grounds, 5 FMSHRC 618 (April 1983), pet. for review filed, No. 83-1566, D.C.Cir., May 27, 1983. The experience of our

judges in this area has greatly aided our evaluation of different methods of assessing interest. It has also led us to the conclusion that it is time to adopt a uniform method of computing interest so that all discriminatees will be treated uniformly when they are awarded back pay under the Mine Act.

The miner has not only lost money when he or she has not been paid in violation of section 105(c), but has also lost the use of the money. As the NLRB has stated with regard to interest on back pay awards under the National Labor Relations Act, "The purpose of interest is to compensate the discriminatee for the loss of the use of his or her money." Florida Steel Corp., 231 NLRB 651, 651 (1977). Thus, in selecting an interest rate, we have considered the potential cost to the miner both as a "creditor" of the operator, and as a potential borrower from a lending institution under real economic conditions. We have therefore sought a rate of interest that compensates the discriminatee fully for the loss of the use of money. In addition, we have attempted to select a rate of interest flexible enough to reflect economic and market realities, but not so complex in application as to place an undue burden on the parties and our judges when attempting to implement it.

For all of these reasons we adopt the interest rate formula used by the NLRB: interest set at the "adjusted prime rate" announced semi-annually by the Internal Revenue Service under 26 U.S.C.A. 6621 (West Supp.1983) as the interest it applies on underpayments or overpayments of tax. The "adjusted prime rate" of the IRS is the average predominant prime rate quoted by commercial banks to larger businesses as determined by the Federal Reserve Board and rounded to the nearest full percent. 26 U.S.C.A. 6621 (West Supp.1983). Under the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. 97-248, 345, 96 Stat. 636 (to be codified at 26 U.S.C. 6621), the adjusted prime rate must be established semi-annually: by October 15 based on the prime rates from April 1 to September 30, and by April 15 based on the prime rates from October 1 to March 31. The rate announced in October becomes effective the following January 1, and the rate announced in April becomes effective the following July 1.

We agree with the NLRB that the IRS adjusted prime rate comes closest to compensating the miner fully for loss of the use of money. On the one hand, if the miner had the money, he or she could invest it or save it and probably earn less than the prime rate. On the other hand, if the miner has to borrow money because he or she is deprived of a paycheck, the rate of interest most likely would be higher than the prime rate. In these circumstances, we concur with the NLRB that the IRS formula "achieves a rough balance between that aspect of remedial interest which attempts to compensate the discriminatee or charging party as a creditor and that which attempts to compensate for his loss as a borrower." Olympic Medical Corp., 250 NLRB 146, 147 (1980). This "rough balance" in our view achieves the goal of making the miner whole for the loss of the use of money.

The IRS adjusted prime rate is also attractive for pragmatic reasons. It is a per annum rate adjusted semi-annually, based on the prime rates for the six months preceding its calculation. In this way, the rate reflects economic conditions with reasonable accuracy. Its announcement well in advance of the effective date offers notice to all parties and our judges. Cf. Olympic Medical Corp., supra.

The relevant adjusted prime rates, which we adopt as the Commission's remedial interest rates, are:

January 1, 1978 to December 31, 1979	6% per year	(.0001666% per day)
January 1, 1980 to December 31, 1981	12% per year	(.0003333% per day)
January 1, 1982 to December 31, 1982	20% per year	(.0005555% per day)
January 1, 1983 to June 30, 1983	16% per year	(.0004444% per day)
July 1, 1983 to December 31, 1983	11% per year	(.0003055% per day)
January 1, 1984 to June 30, 1984	11% per year	(.0003055% per day)

Because the IRS rates of interest are announced as annual rates, it is necessary, as explained below, to convert them to daily rates to calculate interest on periods of less than one year. (FOOTNOTE 13)

There must also be a uniform method of computing the interest on back pay awards under the Mine Act. We have considered a number of possible computational approaches. We are mindful of the NLRB's extensive administrative and legal experience in this area. The NLRB's general back pay methodology is sound and has met with judicial approval. The labor bar is familiar with this system. We conclude that rather than expending administrative resources in attempting to devise a new system, we will best, and most efficiently, effectuate the remedial goals of section 105(c) of the Mine Act by adopting the major features of the NLRB computational system. We are satisfied that this system will do justice to the miner, avoid unnecessary penalization of the operator, and not prove unduly burdensome for our judges and bar to apply.

We therefore announce the following general rules for the computation of interest on back pay.

Back pay and interest shall be computed by the "quarterly" method. See Florida Steel Corp., 231 NLRB at 652; F.W. Woolworth Co., 90 NLRB 289 (1950), approved NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). (FOOTNOTE 14)

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Under this method (referred to as the "Woolworth formula," after the NLRB's decision in the case of the same name, supra), computations are made on a quarterly basis corresponding to the four quarters of the calendar year. Separate computations of back pay are made for each of the calendar quarters involved in the back pay period. Thus, in each quarter, the gross back pay, the actual interim earnings, if any, and the net back pay are determined. See n. 14.

Interest on the net back pay of each quarter is assessed at the adjusted prime interest rate or rates in effect, as explained below. Like the NLRB, we will assess only simple interest in order to avoid the additional complexity of compounding interest. Interest on the amount of net back pay due and owing for each quarter involved in the back pay period accrues beginning with the last day of that quarter and continuing until the date of payment. See Florida Steel Corp., 231 NLRB at 652. In calculating the amount of interest on any given quarter's net back pay, the adjusted prime interest rates may vary between the last day of the quarter and the date of payment. If so, the respective rates in effect for any quarter or combination of quarters must be applied for the period in which they were operative. The interest amounts thus accrued for each quarter's net back pay are then summed to yield the total interest award.

For administrative convenience, we will compute interest on the basis of a 360-day year, 90-day quarter, and 30-day month. Using these simplified values, the amount of interest to be assessed on each quarter's net back pay is calculated according to the following formula:

> Amount of interest = The quarter's net back pay x number of accrued days of interest (from the last day of that quarter to the date of payment) x daily adjusted prime rate interest factor.

The "daily adjusted prime rate interest factor" is derived by dividing the annual adjusted prime rate in effect by 360 days. For example, the daily interest factor for the present adjusted prime rate of 11% is

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.0003055% (.11/360). The daily interest factors are shown in the list of adjusted prime rates above. A computational example is provided in the accompanying note. (FOOTNOTE 15)

The major alternative computational approach would involve awarding interest on the total lump sum of net back pay from the date of discrimination to the time of payment. We recognize that this method would involve less complex calculations. We reject the lump sum method, however, because it would penalize the operator by assuming that the entire amount of the back pay debt was due and owing on the first day of the back pay period. We will carefully monitor the experience of our judges and parties in applying the computational system announced in this decision. We will modify the system if that experience over time demonstrates the desirability of adjustment.

In discrimination cases, our judges should advise the parties of the methodology for calculating back pay and interest. The parties shall submit to the judge the requisite back pay figures and calculations, and are urged to make as much use of stipulation as possible. The burden of computation of interest on back pay awards should be placed primarily on the parties to the case, not the judge, in order to comport with the adversarial system.

We apply the foregoing principles in this proceeding because the issue of the appropriate rate of interest in discrimination cases arising under the Mine Act was squarely raised on review. As a matter of discretionary policy in judicial administration, we will otherwise apply these principles only prospectively to discrimination cases pending before our judges as of the date of this decision or filed with the Commission as of, or after, the date of this decision. We do not mean to intimate that any previous awards of interest by our judges in other cases, based on different computational methods, are infirm.

Applying our formula to the present case, we conclude that reversal is necessary. The judge's award of 6% interest is so disparate from the adjusted prime rates in effect from the date of Bailey's discharge on June 27, 1980, as to raise questions concerning whether the complainant would truly be made "whole" if the judge's award stands. Accordingly, we hold that the judge erred in awarding 6% interest, and will remand for recalculation of interest pursuant to the interest formula and computational methods announced in this case.

IV. Tolling of the back pay award

The judge concluded that Bailey was not entitled to back pay after October 20, 1980, the date on which Bailey's complaint was filed. That complaint requested reinstatement, but it was amended January 22, 1981. The amended complaint sought back pay and requested the Commission to "order respondents to pay Mr. Bailey $900.00 for one year college tuition plus $400.00 book and maintenance expense allowance in lieu of reinstatement at respondents' mine." The accompanying motion to amend stated:

> Subsequent to his filing of the complaint the Secretary was informed by complainant Bailey that he did not wish to be

reinstated by respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses.

The judge granted the motion to amend and, when determining the back pay award, applied Rule 15(c), Fed.R.Civ.P., and tolled the award on October 20, 1980. Rule 15(c) provides that where a claim or defense in an amended pleading arises out of the same circumstances set forth in the original pleading, the amendment relates back to the date of the original pleading. Relation back has been generally permitted where the movant seeks to enlarge the basis or extent of a demand for relief. See, for example, Goodman v. Poland, 395 F.Supp. 660, 682-86 (D.Md.1975) (change of theory of recovery from equity to law permitted); Wisbey v. Amer. Community Stores Corp., 288 F.Supp. 728, 730-32 (D.Neb.1968) (amendment seeking additional damages in FLSA action permitted). We do not believe that the restrictive application of relation back by the judge was appropriate in this case.

Rather, in determining when back pay should terminate, we look to the date when Bailey informed the Secretary he no longer sought reinstatement at Arkansas-Carbona. We agree with the judge's related conclusion: "It would be unfair and improper to require a mine operator to pay a former employee back pay for a period of time when the employee has unequivocally stated that he does not want to return to his former employment." 3 FMSHRC at 2321. In a case involving similar issues, this judge compared a miner's lack of desire to be reinstated to a rejection of an offer of reinstatement under the National Labor Relations Act. Secretary on behalf of Ball v. B & B Mining, 3 FMSHRC 2371, 2378 (October 1981) (ALJ). We concur with the NLRB rule that an employer is released from his back pay obligations when the employee rejects an appropriate offer of reinstatement, and consider the analogy to the facts of this case appropriate. See, for example NLRB v. Huntington Hospital, 550 F.2d 921, 924 (4th Cir.1977); NLRB v. Winchester Electronics, Inc., 295 F.2d 288, 292 (2d Cir.1961); Lyman Steel Co., 246 NLRB 712 (1979).

Tolling the back pay award on the date Bailey informed the Secretary that he no longer desired reinstatement effectuates the preceding principles, while the judge's relation back to the original complaint needlessly and unfairly penalizes Bailey. Therefore, we reverse the judge's relation back to the date of the original pleading. The present record does not reveal the date Bailey informed the Secretary of his waiver of reinstatement. Accordingly, we additionally remand for determination of that date in order that the back pay period may be established and the necessary computations properly made.

V. College tuition and related expenses.

Bailey's remaining contention concerning the award is that the judge erred in not granting him tuition and miscellaneous college expenses. The judge held, "Complainant failed to establish any entitlement to an award of 1 year of college tuition plus $400 book and miscellaneous expense allowance." 3 FMSHRC at 2322. We affirm the judge on this point.

The Secretary argued in his brief before the judge that Bailey would not have paid tuition and expenses, but for his

accepting the position at Arkansas-Carbona. (FOOTNOTE 16) The judge found that, prior to his employment with

Arkansas-Carbona, Bailey worked as a campus security guard at Arkansas Tech, and as a fringe benefit of that campus job did not pay tuition. 3 FMSHRC at 2315. (The judge made no finding on whether Bailey's campus job also entitled him to college expenses.) After Bailey accepted a position at Arkansas-Carbona, and resigned from his campus job, he paid his own tuition.

The remedial goal of section 105(c) of the Act is to return the miner to the status quo before the illegal discrimination. Secretary on behalf of Dunmire and Estle v. Northern Coal, 4 FMSHRC at 142. Had Bailey not been discharged illegally, he would have been working at Arkansas-Carbona and would have had to pay tuition for his classes. We do not see how Arkansas-Carbona can be held responsible for a fringe benefit Bailey did not receive from that company. Although at times we may need to seek alternative remedies to make a miner whole for illegal discrimination (for example, where reinstatement is impossible or impractical), such considerations are not present in this case.

Accordingly, we affirm the judge's refusal to award tuition and college expenses.

VI. Conclusion

For the foregoing reasons, we affirm the judge's severing of the request for a civil penalty from the merits of the discrimination case, and hold that in future cases the Secretary must propose in his discrimination complaints a specific penalty supported by allegations relevant to the statutory penalty criteria. As we have stated above, we are accordingly in the process of amending our Procedural Rule 42 to provide for unified proceedings in the future.

We reverse the judge's assessment of 6% interest on back pay, and remand to the Chief Administrative Law Judge for assignment to a judge for calculation of back pay and interest according to the principles and methodology announced in this decision. (FOOTNOTE 17) We reverse the judge's tolling of the back

pay award on the date the complaint was filed, and additionally remand for determination of the date Bailey informed the Secretary he no longer wished reinstatement. Finally, we affirm the judge's denial of Bailey's request for college tuition and related expenses.

Rosemary M. Collyer
Chairman
Richard V. Backley
Commissioner
Frank F. Jestrab
Commissioner
A.E. Lawson
Commissioner
L. Clair Nelson
Commissioner

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~FOOTNOTE_ONE

1 We refer to the respondents collectively as "the operator."

~FOOTNOTE_TWO
2 Rule 15(c), Fed.R.Civ.P., provides in part:
Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

~FOOTNOTE_THREE
3 Commission Procedural Rule 25 provides:

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) the violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification or proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

~FOOTNOTE_FOUR
4 When penalties proposed by the Secretary are not contested, however, a proposed civil penalty is not actually assessed but is deemed to be a final order of the Commission, as if the Commission had assessed it. 30 U.S.C. 815(a). See also Commission Procedural Rule 25 (n. 3 supra).

~FOOTNOTE_FIVE
5 The words "shall be assessed a civil penalty by the Secretary" in section 110(a) must be read in pari materia with sections 105(a) and 110(i). Although section 110(a) uses the language "shall be assessed a civil penalty by the Secretary," the express language of sections 105(a) and 110(i) makes clear that this Secretarial function is one of proposal, not disposition. The legislative history bears out this reading of section 110(a). Conf.Rep. No. 461, 95th Cong., 1st Sess. 58 (1977) reprinted in Legis.Hist. 1336; S.Rep. 43, 45-46, reprinted in Legis.Hist. 631, 633-34. Thus, the reference to "shall be assessed" in section 110(a) means "shall be subject to a proposed assessment of a civil penalty by the Secretary." See Sellersburg Stone Co., supra.

~FOOTNOTE_SIX
6 Section 104, 30 U.S.C. 814 (Supp. V 1981), contains the procedures through which an operator's violations of the Act or its standards are enforced. Section 104(a) makes clear that citations shall be issued for violations of "this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act." 30 U.S.C. 814(a).

~FOOTNOTE_SEVEN
7 Section 108 permits injunctive relief and is not relevant to the issues presented in this case.

~FOOTNOTE_EIGHT
8 In this analysis, for convenience, we will refer to the current Part 100 regulations, which became effective May 21, 1982. They are substantially similar to those in effect when the judge's decision issued. The changes made do not affect our analysis, and we would reach the same conclusions under either version.

~FOOTNOTE_NINE
9 A review of the discrimination cases adjudicated by this Commission indicates that the Secretary has used the section 100.5 special assessment procedure in discrimination cases only when the miner has proceeded on his own behalf pursuant to section 105(c)(3) of the Act and prevailed, or when, as here, the judge has severed the penalty proceedings from the discrimination case. In other discrimination cases, the Secretary has requested a penalty in his complaint of discrimination.

~FOOTNOTE_TEN
10 Commission Procedural Rules 40 through 44 (29 C.F.R. 2700.40 through 44) deal with discrimination complaints, but do not resolve the issue of how a penalty is to be proposed. Rule 42 requires that a discrimination complaint include, among other things, "a statement of the relief requested." The rule tracks section 105(c)(2) of the Act, which requires the Secretary in his complaint to "propose an order granting appropriate relief." 30 U.S.C. 815(c)(2). The Secretary contends that a civil penalty is part of the "relief" he may request in the complaint, and that inclusion of such a request in a complaint conforms to Rule 42 and section 105(c)(2). We conclude, however, that "relief" as

used in section 105(c) and Rule 42 indicates only those remedies available to make the discriminatee whole. Section 105(c)(3) states in part, "The Commission shall . . . issue an order . . . granting . . . relief . . . including . . . rehiring or reinstatement . . . with backpay and interest or such remedy as may be appropriate." 30 U.S.C. 815(c)(3). The legislative history also supports this reading of "relief." See Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (February 1982), citing to S.Rep. 37, reprinted in Legis.Hist. 625. A civil penalty, on the other hand, is not intended to compensate the victim but rather to deter the operator's future violations.

~FOOTNOTE_ELEVEN
11 We are presently in the process of adopting an interim amended Rule 42, which will reflect our resolution of the penalty issue. We also note that this case does not raise, and we do not reach, the question of how penalties should be proposed when the Secretary does not file a discrimination complaint on the miner's behalf and the miner files his own complaint under section 105(c)(3).

~FOOTNOTE_TWELVE
12 Section 105(c)(3) provides in part:

The Commission . . . shall issue an order, . . . if the charges [of discrimination] are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.

30 U.S.C. 815(c)(3).

~FOOTNOTE_THIRTEEN
13 Prior to the passage of the Tax Equity and Fiscal Responsibility Act of 1982, the IRS announced the adjusted prime rate in the October of the appropriate year to take effect the following February. For ease of administration under the Mine Act, however, we have bounded certain interest periods at December 31 and January 1 rather than at January 31 and February 1. (The NLRB's General Counsel has followed the same simplifying approach. NLRB Memorandum GC 83-17, August 8, 1983.)

~FOOTNOTE_FOURTEEN
14 Back pay is the amount equal to the gross pay the miner would have earned from the operator but for the discrimination, less his actual interim earnings. Bradley v. Belva Coal Co., 4 FMSHRC 982, 994-95 (June 1982). The first figure, the gross pay the miner would have earned, is termed "gross back pay." The third figure, the difference resulting from subtraction of actual interim earning from gross back pay, is "net back pay"--the amount actually owing the discriminatee. Interest is awarded on net back pay only.

In a discrimination case where, as here, there has been an illegal discharge, the back pay period normally extends from the

date of the discrimination to the date a bona fide offer of reinstatement is made. (As we conclude below, the period may also be tolled when the discriminatee waives the right to reinstatement.)

~FOOTNOTE_FIFTEEN
15 The mechanics of the quarterly computation system may be illustrated by the following hypothetical example, in which a miner is discriminatorily discharged on January 1, 1983, and offered reinstatement on September 30, 1983. Payment of back pay and interest is tendered on October 15, 1983. After subtraction of the relevant interim earnings, the net back pay of each quarter involved in the back pay period is as follows:

First quarter (beginning January 1, 1983)	$1,000
Second quarter (beginning April 1, 1983)	1,000
Third quarter (beginning July 1, 1983)	$1,000
Total net back pay	$3,000

The adjusted prime interest rates in effect in 1983 are: 16% per year (.0004444% per day) from January 1, 1983, to June 30, 1983;

11% per year (.0003055% per day) from July 1, 1983, to December 31, 1983.

The interest award on the net back pay of each of these quarters is as follows:

(1) First Quarter:

(a) At 16% interest until end of second quarter of 1983:
$1,000 net back pay x 91 accrued days of interest (last day of first quarter plus the entire second quarter) x .0004444 = $40.44
Plus,

(b) At 11% interest for entire third quarter through the date of payment:
$1,000 net back pay x 105 accrued days of interest (the third quarter plus 15 days) x .0003055 = $32.07
(c) Total interest award on first quarter:
$40.44 á $32.07 = $72.51

(2) Second Quarter
(a) At 16% interest for the last day of the second quarter
$1,000 x 1 accrued day of interest x .0004444 = $.44

Plus,

(b) At 11% interest for the entire third quarter through date of payment:
$1,000 x 105 accrued days of interest x .0003055 = $32.07

(c) Total = $.44 á $32.07 = $32.51

(3) Third Quarter:

At 11% interest for the last day of the third quarter through date of payment:

$1,000 x 16 accrued days of interest x .0003055 = $4.88 total

(4) Total Interest Award:
$72.51 á 32.51 á 4.88 = $109.90
This amount is added to the total amount of back pay ($3,000), for a total back pay award of $3,109.90.

~FOOTNOTE_SIXTEEN
16 The Secretary did not raise this issue on review and, although Bailey briefly raised it in his petition for review, he did not file a brief before us.

~FOOTNOTE_SEVENTEEN
17 The judge who decided this case has left the Commission.