CCASE:
LADY JANE COLLIERIES
DDATE:
19860127
TTEXT:

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

LADY JANE COLLIERIES, INC., CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. PENN 85-116-R Citation No. 2403626; 2/5/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. PENN 85-117-R Citation No. 2403627; 2/5/85 Docket No. PENN 85-151-R Order No. 2403644; 2/21/85 Docket No. PENN 85-152-R Order No. 2403645; 2/21/85 Stott No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. PENN 85-216 A.C. No. 36-00880-03533
v.	Stott No. 1 Mine
LADY JANE COLLIERIES, INC., RESPONDENT	

SUMMARY DECISIONS

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern two citations issued to the contestant/respondent Lady Jane Collieries (hereinafter Lady Jane), on February 5, 1985, for two alleged violations of mandatory health standard 30 C.F.R. 90.103(b). The citations were issued pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 814(a), because of the alleged failure by Lady Jane to maintain the pay status of two "Part 90" miners who were transferred to other jobs. The citations were timely contested by Lady Jane in Docket Nos. PENN 85Ä116ÄR and PENN 85Ä117ÄR.

On February 21, 1985, two section 104(b) orders were issued to Lady Jane because of its alleged failure to timely abate the previously issued section 104(a) citations. Lady Jane timely contested the issuance of these orders in Docket Nos. PENN 85Ä151ÄR and PENN 85Ä152ÄR. MSHA subsequently filed a proposal for assessment of civil penalties pursuant to section 110(a) of the Act seeking civil penalty assesments of $90 for each of the alleged violations.

The parties mutually agreed to waive a hearing on the merits, and agreed to submit the matters to me for summary decisions pursuant to Commission Rule 64, 29 C.F.R. 2700.64. The parties have filed cross motions for summary decision, a joint stipulation of facts, and briefs in support of their respective positions.

Issues

The principal issue presented in these proceedings is whether or not Lady Jane violated the provisions of 30 C.F.R. 90.103(b) by failing to adequately compensate the two "Part 90 miners" in question. Additional issues raised by the parties are disposed of in the course of these decisions.

Stipulations

The parties have stipulated to the issuance of the citations and orders, the size and scope of Lady Jane's mining activities, and to the relevant civil penalty assessment criteria found in section 110(i) of the Act. The joint stipulation of facts with respect to the remaining issues in these proceedings are as follows:

1. The Stott No. 1 Mine was a medium sized mine producing approximately 200,000 tons annually.

2. Lady Jane Collieries, Inc., is ultimately owned by Pennsylvania Power and Light Company. Captive coal mines owned by Pennsylvania Power and Light Company produced 2,925,361 tons of coal in 1984.

3. Lady Jane employed approximately 100 employees, while operating two active working sections.

4. The mine operated 5 days a week on three production shifts and produced approximately 1,000 tons of coal per day.

5. In the middle 1970's, the company built a cleaning plant which processed the coal from the mine and also from coal purchased from neighboring operations.

6. During 1983, it was determined that the workable coal seam was being exhausted and would in fact be depleted sometime late in 1984.

7. In April 1983, the company met with its employees and informed them of the fact that the mine's life was nearing an end.

8. It then indicated to the employees that at the conclusion of the underground reserves Lady Jane would remain as a surface facility.

9. The surface facility would consist of a preparation plant which would handle coal purchased locally from various operators.

10. The employees were informed that fewer jobs would be available at the plant, probably 15 or 20 as a maximum.

11. The employees were further advised that they would be informed in the near future as to who was chosen to remain at Lady Jane.

12. Additional employees would be afforded opportunities, if they so chose, at either construction jobs at Pennsylvania Power and Light Company or at mining positions with Pennsylvania Mine Corporation and its various related companies.

13. Additionally, the opportunity for severance pay and for early retirement was discussed at a meeting with the employees.

14. On May 23, 1983, a list of personnel to remain at Lady Jane was published. That list included names of personnel and the jobs

for which they had been selected. Selection was done on the basis of seniority and ability to perform the position in question (Exhibit 1).

15. Shortly thereafter, some employees who were not designated to remain at Lady Jane began to take advantage of jobs with PP & L or PMC. Exhibits 2 and 3 show employee displacement activity as of June 24, 1983 (Exhibit 2) and January 28, 1985 (Exhibit 3).

16. Exhibits 4 and 5 show organization charts of Lady Jane as it existed in 1982 (Exhibit 4) and in August 1984 (Exhibit 5).

17. The underground mining operations at Lady Jane ceased on December 14, 1984.

18. At that time, all underground coal production ceased at Lady Jane; the only underground activity which remained was the recovery of the equipment and the mine sealing work.

19. The equipment recovery took a relatively short time while the mine sealing work currently continues, and it is estimated that the sealing project will be completed sometime prior to the end of 1985.

20. On December 17, 1984, a reorganization took place at Lady Jane. That reorganization is exemplified by an organizational chart (Exhibit 6) which shows the structure of the organization effective December 17, 1984.

21. At that time, Lady Jane began functioning as a coal preparation facility. Coal from various local suppliers was trucked into Lady Jane, processed through its preparation plant and shipped via Conrail to the Sunbury Power Plant of PP & L. The only underground activity that continued was the sealing project which would continue well into 1985.

22. On December 14, 1984, a number of employees were displaced from Lady Jane. Each was given an option election in which they could chose the following:

~161

Option 1 - Possible employment with PP & L or PMC

Option 2 - Early retirement with severance allowance

Option 3 - Severance allowance

Each employee had 30 days following the date of his layoff to make his determination.

23. Prior to December 14, 1984, Arnold McCracken had been employed as the general outside foreman. His job responsibilities were those as listed on Exhibit 7. With the closing of the underground mining operation, many of Mr. McCracken's duties as outside shop foreman were eliminated since a majority of his activities had to do with the repair of underground mining equipment which was no longer called for. Based upon the completion of underground mining, Mr. McCracken's position and that of a number of other employees were terminated as no longer needed.

24. In May 1983, Mr. McCracken had been designated to stay at Lady Jane as a sampler (Exhibit 1). The rate on the sampler position was $10.78 per hour. That rate did not become effective for Mr. McCracken until January 2, 1985, since from December 17 until January 2, he was on vacation (Exhibit 8).

25. In 1983, when positions were assigned for the surface facilities, it was determined by management that Mr. McCracken did not have the necessary experience to perform the position of plant foreman. He had never performed that task in the past, and the incumbent, Clair Ireland, was designated to perform that task subsequent to the termination of underground mining operations at Lady Jane.

26. Some tasks formerly done by Mr. McCracken were now assigned as additional responsibility to Mr. Clair Ireland or other Lady Jane employees; other tasks formerly

assigned to Mr. McCracken were completely eliminated due to the closing of the underground facilities. (Exhibit 9 shows those tasks involved).

27. On January 2, 1985, Arnold McCracken assumed the position of coal sampler which had been designated to him since May 23, 1983. During that period of time, Mr. McCracken would have had opportunities to move to other facilities of PP & L or PMC had he so chosen. Even though he designated to stay at Lady Jane, he could have opted to transfer as several others on the designated list had done.

28. On January 11, 1985, Mr. McCracken retired.

29. He indicated in his option election form the option of early retirement with severance allowance. This option entitled Mr. McCracken to retire at full retirement even though he had not reached the age of 65 and the severance option permitted him 1 week of severance pay for each full year of Lady Jane service. (Exhibit 10.)

30. On January 15, 1985, Mr. McCracken filed a discrimination complaint with the Mine Safety and Health Administration.

31. In November 1984, Lady Jane was notified by MSHA that Mr. McCracken was a Part 90 Miner who must be working in an environment which meets the respirable dust standard (Exhibit 11).

32. Mr. McCracken was sampled for dust and MSHA was advised by letter dated December 3, 1984, that he was already working in an atmosphere which complied with the reduced standard and there was no need to transfer him from his position as outside foreman (Exhibit Nos. 12 and 13).

33. On January 14, 1985, Lady Jane wrote to MSHA informing them that Mr. McCracken had retired (Exhibit 14).

34. Lady Jane received a letter dated April 16, 1985, from Ronald J. Schell, Chief, Office of Technical Compliance and Investigation for MSHA, concerning Mr. McCracken's 105(c) discrimination complaint. The Schell letter concluded" "A review of the information gathered during the investigation has been made. On the basis of that review, MSHA has determined that a violation of Section 105(c) has not occurred" (Exhibit 15).

35. On November 9, 1979, Lady Jane was informed that Raymond R. Graham was a Part 90 miner (Exhibit 16).

36. On August 27, 1980, Raymond R. Graham transferred from his position as belt maintenance man to the position of car dropper-surface, retaining his underground rate of pay (Exhibit 17).

37. Pursuant to the May 23, 1983, reorganization plan, Mr. Graham was designated to stay at Lady Jane as a greaser and mechanic (Exhibit 1).

38. On December 17, 1984, the Lady Jane facility was reorganized from a deep mine facility into a surface preparation facility.

39. Immediately prior to December 17, 1984, Mr. Graham's rate of pay was $15.12 per hour as a car dropper. (The normal rate of pay for this surface position was $13.38). Mr. Graham had retained his high rate from underground.

40. On December 17, 1984, Mr. Graham's position was changed from a car dropper-surface to a greaser-surface. His new rate of pay was $13.38 per hour, which is the surface rate of pay.

41. The car dropper-surface position was not eliminated but is currently filled by Ardell Wallace.

Discussion

Section 101(a) of the Act authorizes the Secretary to "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines."

Section 101(a)(7) of the Act provides in pertinent part as follows:

> [W]here appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazard in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. * * * (emphasis added).

The mandatory health standards covering miners who have evidence of the development of pneumoconiosis were promulgated pursuant to section 101 of the Act, and they became effective on February 1, 1981, 45 Fed.Reg. 80760Ä80774. The regulations appear at Part 90, Title 30, Code of Federal Regulations.

A "Part 90 Miner" is defined at 30 C.F.R.   90.2, as follows:

> "Part 90 miner" means a miner employed at an underground coal mine or at a surface work

area of an underground coal mine who has exercised the option under the old section 203(b) program (36 FR 20601, October 27, 1971), or under 90.3 (Part 90 option; notice of eligibility; exercise of option) of this part to work in an area of a mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air, and who has not waived these rights.

The term "transfer" is defined by 30 C.F.R. 90.2, as follows:

> "Transfer" means any change in the work assignment of a Part 90 miner by the operator and includes: (1) Any change in occupation code of a Part 90 miner; (2) any movement of a Part 90 miner to or from a mechanized mining unit; or (3) any assignment of a Part 90 miner to the same occupation in a different location at a mine.

30 C.F.R. 90.3(b) and (c) provide as follows:

> (b) Any miner who is a section 203(b) miner on January 31, 1981, shall be a Part 90 miner on February 1, 1981, entitled to full rights under this part to retention of pay rate, future actual wage increases, and future work assignment, shift and respirable dust protection.
>
> (c) Any Part 90 miner who is transferred to a position at the same or another coal mine shall remain a Part 90 miner entitled to full rights under this part at the new work assignment.

30 C.F.R. 90.103 (Compensation), provides in pertinent part as follows:

> (a) The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner immediately before exercising the option under 90.3 (Part 90 option; notice of eligibility; exercise of option).

(b) Whenever a Part 90 miner is transferred, the operator shall compensate the miner at not less than the regular rate of pay received by that miner immediately before the transfer.

(c) The operator shall compensate each miner who is a section 203(b) miner on January 31, 1981, at not less than the regular rate of pay that the miner is required to receive under section 203(b) of the Act immediately before the effective date of this part.

(d) In addition to the compensation required to be paid under paragraphs (a), (b) and (c) of this section, the operator shall pay each Part 90 miner the actual wage increases that accrue to the classification to which the miner is assigned.

Lady Jane is charged with a failure to maintain the pay status of Part 90 miners Arnold M. McCracken (Citation No. 2403626), who was transferred from his occupation of outside shop foreman to surface coal sampler, and Raymond R. Graham (Citation No. 2403627), who was transferred from his occupation of surface car dropper to surface greaser. The factual stipulations provide the information upon which this matter arises. The stipulations reveal that in April 1983, Lady Jane met with the mine employees and informed them that the workable coal seam would soon be exhausted and at the conclusion of the underground reserves, Lady Jane would remain as a surface facility. The surface facility would consist of a preparation plant which would prepare coal purchased from various local operators. Arnold M. McCracken and Raymond G. Graham were employees at Lady Jane at that time. The employees were further informed that as a result of this change in circumstances, fewer than 15 to 20 jobs would be available at the preparation plant and that a list of employees chosen to fill those jobs would soon be posted. The remaining employees would be afforded the opportunity to go to work at construction jobs with Pennsylvania Mines Corporation and its various related companies.

On May 23, 1983, a list of personnel to remain at Lady Jane was posted. The personnel were selected on the basis of seniority and ability to perform the position. Mr. McCracken's name appeared on the list as a sampler. Mr. Graham's name appeared on the list as a greaser and mechanic. On

December 14, 1984, the underground mining operations at Lady Jane ceased, and on December 17 1984, the reorganization as reflected on the May 23, 1983, list took effect. As of December 17, 1984, Lady Jane began functioning as a coal preparation facility.

MSHA's Arguments

In support of its position in these proceedings, MSHA relies on the specific wage protection provisions found in Part 90, as well as its comments and policy statements made during the rulemaking process in connection with the promulgation of the regulations. The relevant comments deal with the transfer and compensation rights of the affected miners, and one significant area of comment concerns changed circumstances at a mine which may require changes in job assignments. These comments are noted in pertinent part as follows at 45 Fed.Reg. 80761:

> The operator may transfer a Part 90 miner without regard to these job and shift limitations if the respirable dust concentration in the position of the Part 90 miner complies with the dust standard, but circumstances require changes in job assignments at the mine. Reductions in workforce or changes in operational methods at the mine may be the most likely situations which would affect job assignments. Any such transferred Part 90 miners would still be protected by all other provisions under this Part. (Emphasis added.)

Another relevant rulemaking comment relied on by MSHA in connection with section 90.3, is found at 45 Fed.Reg. 80764, and it is as follows:

> Although the incidence of pneumoconiosis among miners in surface occupations is thought to be less than that of underground miners, dust levels in certain surface jobs, for example, at cleaning and preparation plants, may frequently exceed average respirable dust concentrations of 1.0 mg/m3. Accordingly, under this rule, any Part 90 miner who is transferred by the operator to any surface position, including positions at surface coal mines, remains a Part 90 miner in the new surface job and is entitled to all Part 90 protections. (Emphasis added.)

MSHA also relies on the comment made at 45 Fed.Reg. 80767, in connection with the promulgation of section 90.103, that "This wage protection afforded miners by this regulation is consistent with Section 101(a)(7) of the Act and the legislative history pertaining to the enactment of that section."

With regard to the circumstances in connection with the citation for failure to adequately compensate Arnold McCracken, MSHA states that prior to December 14, 1984, Mr. McCracken had been employed at Lady Jane as the general outside foreman earning $20.70 per hour. A lot of his duties would be eliminated during the conversion of the facility because as foreman he had been responsible for the repair of underground mining equipment. This job would no longer be necessary at the preparation facility. His new position in the reorganization would be a coal sampler, and the rate of pay for the sampler position was $10.78 per hour.

By letter dated November 13, 1984, Lady Jane was notified by MSHA that Mr. McCracken was a Part 90 miner, who had exercised his option to work in a less dusty atmosphere. The letter informed Lady Jane that by the 21st calendar day after receipt of the letter, Mr. McCracken must be working in a low dust area. If however, he was already working in an atmosphere which complied with the reduce standard, there would be no need to lower the dust concentration or to transfer him, but he nevertheless retained his Part 90 rights until he waived them.

In response to this letter, Lady Jane advised MSHA by letter dated December 3, 1984, that Mr. McCracken was already working in an atmosphere which complied with the reduced standard, and thus, there was no need to transfer him to another position. To support its position, Lady Jane took five samples of dust from Mr. McCracken from December 3, 1984 to December 7, 1984, which revealed low dust levels.

On December 17, 1984, the date that the reorganization took effect, Mr. McCracken began his vacation. He did not return to work until January 2, 1985. Upon his return on January 2, he assumed the position of coal sampler. On January 11, 1985, Mr. McCracken retired pursuant to the option of early retirement with severance pay.

On January 15, 1985, Mr. McCracken filed a section 105(c) discrimination complaint with reference to his transfer. During the course of that investigation, section 104(a) Citation No. 2403626 was issued, because Lady Jane had failed to maintain Mr. McCracken's pay status as an outside general

foreman. He had been transferred to the coal sampler position and paid the coal sampler's lower rate of pay.

In response to Lady Jane's assertions that it had no obligation to continue to pay Mr. McCracken at the rate of pay of an outside general foreman because a year and a half earlier, on May 23, 1983, he was made aware of his transfer based upon the mine reorganization and not his Part 90 status, MSHA submits that the preamble to Part 90 clearly recognizes no exceptions to the provisions found in Part 90, and that any transfer of a Part 90 miner pursuant to a reduction in work force or change in operational methods does not negate the protections afforded by Part 90. Further, MSHA points out that any Part 90 miner who is transferred to any surface position, including positions at a surface coal mine, remains a Part 90 miner in the new surface job. MSHA concludes that upon Mr. McCracken's transfer on December 17, 1984, his Part 90 rights remained with him, and the record is void of any decision on his part to waive his Part 90 rights. Accordingly, MSHA believes that the compensation provisions found at Part 90.103(b) followed Mr. McCracken to his new position, and his rate of pay as a coal sampler should have been the same rate of pay he received as an outside general foreman, i.e. $20.70. MSHA concludes that Lady Jane's failure to compensate him accordingly was clearly a violation of Part 90.103(b), and that the citation was appropriately issued.

With regard to the issuance of the citation in connection with the failure by Lady Jane to adequately compensate Raymond S. Graham, MSHA states that on August 27, 1980, Mr. Graham was transferred from his underground position as belt maintenance man to the surface position of car dropper. This transfer occurred as a result of Lady Jane's notification on November 9, 1979, that Mr. Graham was a Part 90 miner who had elected to transfer. As a result of the transfer, Mr. Graham incurred no lost wage rate in that he retained his underground rate of pay.

The May 23, 1983, reorganization plan indicated that Mr. Graham was to remain at Lady Jane as a greaser and mechanic. Prior to December 17, 1984, Mr. Graham's salary was that of an underground belt maintenance man, i.e. $15.12 per hour, although he actually worked on the surface as a car dropper. The normal rate of pay for the car dropper was $13.38 per hour. As of December 17, 1984, Mr. Graham's new position became effective, i.e., greaser and mechanic-surface, and his new rate of pay became the normal rate of pay for said

position, i.e. $13.38 per hour. Mr. Graham's former position, of car dropper was not eliminated during the reorganization.

MSHA states that Mr. Graham was transferred from one surface position to another surface position as a result of Lady Jane's change in operational method, and that during this transition he never declined to exercise his Part 90 option. Relying on the rulemakers comments at 45 Fed.Reg. 80764, MSHA maintains that Mr. Graham was in fact a Part 90 miner who was protected by the Part 90 provisions at the time of the proposed reorganization, as well as at the time of the actual reorganization. Accordingly, his rate of pay as of December 17, 1984, should have continued to have been that of an underground belt maintenance man. MSHA concludes that the reduction in pay which Mr. Graham incurred as a result of his transfer was clearly a violation of section 90.103(b), and that the citation was appropriately issued.

With regard to the issuance of the section 104(b) orders, MSHA argues that Lady Jane's failure to abate the violations within the time allowed by the inspector (February 19, 1985), appropriately resulted in the issuance of the orders. Citing Judge Melick's decision in Consolidation Coal Company v. Secretary of Labor, 3 FMSHRC 2201 (September, 1981), MSHA asserts that the criteria for examining the validity of the orders are (1) the degree of danger that any extension would have caused to miners, (2) the diligence of the operator in attempting to meet the time originally set for abatement, and (3) the disruptive effect an extension would have upon operating shifts.

Although conceding that the violation did not present any immediate health or safety threat to any miner, MSHA maintains that the violations presented a "chilling effect" upon the miner's guaranteed statutory Part 90 rights. Since Congress guaranteed these rights to miners affected by pneumoconiosis without exception, MSHA concludes that Lady Jane's lack of diligence in attempting abatement, and its continued failure to date to abate the violations, compounds the "chilling effect" upon statutorily guaranteed compensation rights.

Lady Jane's Arguments

Lady Jane states that in April of 1983, it met with its employees and informed them that the life of the underground mine was coming to an end. On May 23 1983, a list of personnel to remain at the mine along with job titles was posted. On that list Arnold McCracken was listed as a sampler and Raymond Graham was listed as a GreaserÄMechanic. Underground

mining operations ceased on December 14, 1984, and on December 17, 1984, a reorganization took place and the mine began functioning as a surface coal preparation facility.

Lady Jane asserts that in November of 1984, it was notified that Mr. McCracken had Part 90 status. After Mr. McCracken was sampled for dust, it was determined there was no need to transfer him. On January 2, 1985, Mr. McCracken assumed the position of coal sampler-surface. Prior to the closing of the underground mine, he had been outside shop foreman, but that position was eliminated as of December 14, 1984. Prior to December 14, 1985, Mr. McCracken's rate of pay as outside shop foreman was $20.70 per hour and his rate of pay as coal sampler was $10.78 per hour. On January 11, 1984, Mr. McCracken retired, choosing an early retirement with severance pay option. On January 15, 1985, Mr. McCracken filed a discrimination complaint with MSHA, and by MSHA letter of April 16, 1985, to Mr. McCracken, it was determined that no violation had occurred. No appeal of that decision has been taken.

Lady Jane points out that it was not notified of Mr. McCracken's Part 90 status until November of 1984. However, in May of 1983, Mr. McCracken had been designated to stay at Lady Jane as a sampler. Under the circumstances, Lady Jane maintains that it did not violate Part 90 in his case by reducing his compensation upon transfer to the sampler position because that designation had been made in May 1983, approximately 6 months prior to Lady Jane being notified of his Part 90 status.

Lady Jane points out that section 101(a)(7) of the Act states in pertinent part that "any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer." However, in Mr. McCracken's case, Lady Jane maintains that no transfer "as a result of such exposure" ever took place. In support of this argument, Lady Jane points out that after it was notified of Mr. McCracken's Part 90 status in November of 1984, he was sampled for dust and MSHA was advised by letter of December 3, 1984, that he was already working in an atmosphere which complied with the reduced dust standard and there was no need to transfer him from his outside foreman position.

Lady Jane concedes that there is a substantial difference in the pay rate of $20.70 an hour received by Mr. McCracken while serving as an outside shop foreman, and

the $10.78 hourly rate he received in his coal sampler's job. However, Lady Jane states that the $10.78 hourly coal sampler's pay is the prevailing pay rate on that particular job classification, and it points out that Mr. McCracken had ample opportunity from May 1983 to seek other job opportunities with either Pennsylvania Power and Light Company or Pennsylvania Mines Corporation, but did not do so. Instead, he expects to be paid approximately twice as much per hour as of December 17, 1984, as a similarly situated employee, and Lady Jane believes that this is windfall which makes no economic sense.

Lady Jane states that Mr. McCracken filed a discrimination complaint in which he made the following complaint:

> They transferred me from general outside foreman to sampler at the scales for truck coal and in doing this they cut my wages, and still have another man doing my original job. They said my job was no longer there so if I wanted to work it would be the sampling job.

Lady Jane points out that Mr. McCracken's complaint was thoroughly investigated by MSHA, and that on April 16, 1985, MSHA made a determination that Lady Jane had not discriminated against Mr. McCracken, and that a violation of section 105(c) the Act did not occur. Mr. McCracken did not appeal that ruling.

With regard to Mr. Graham, Lady Jane asserts that on November 9, 1979, it was informed that Mr. Graham was a Part 90 miner. On August 27, 1980, Mr. Graham transferred from his underground position as belt maintenance man to the surface position of car dropper, retaining his underground rate of pay. On May 23, 1983, Mr. Graham was designated to stay on after the reorganization as a greaser and mechanic. Immediately prior to December 17, 1984, Mr. Graham's rate of pay was $15.12 per hour as a car dropper. (The normal rate of pay for this surface position was $13.38). Mr. Graham had retained his high rate from underground. On December 17, 1984, Mr. Graham became a greaser-surface at $13.38 per hour. The car dropper surface position was not eliminated, but is currently filled by Ardell Wallace. The rate for that job is $13.38 per hour. Mr. Graham's previous underground position of belt maintenance man was eliminated on December 14, 1984.

Lady Jane maintains that the purposes of the Act are not served by requiring it to continue paying Mr. Graham underground pay rates after the closing of its underground mine.

Lady Jane states that although Mr. Graham transferred from the underground mine in August of 1980 and retained his underground rate of pay until December 14, 1984, when the underground mining operation ceased, MSHA would now require Lady Jane to pay him $15.12 per hour when his fellow surface employees are receiving $13.38 per hour for a like position.

Lady Jane submits that as of December 14, 1984, it ceased underground coal mining operations and became a surface preparation facility only for coal from other mines. Since it was no longer an "underground coal mine" or a "surface work area of an underground coal mine" as stated in 30 C.F.R. 90.3(a), Lady Jane maintains that the cited mandatory health standard 30 C.F.R. 90.103(b), is no longer applicable and the citations and order should be dismissed.

Lady Jane argues that the legislative history of the Act reflects a congressional intent that Part 90 miners be protected when they are transferred because of a dust problem, and not when they are transferred because of independent legitimate business reasons. Further, Lady Jane argues that MSHA's Part 90 rules must be interpreted and applied in light of their underlying statutory goals and purposes, and since it is clear in these proceedings that Mr. McCracken and Mr. Graham were indisputably transferred for legitimate business reasons rather than any dust problems, MSHA's policy determinations with respect to the interpretation and application of its Part 90 rules in these proceedings conflict with the legislative intent and should not be followed.

Lady Jane submits that MSHA's Part 90 rules should not be interpreted to create a class of "elite miners" who are immune to the economic forces that affect everyone else, and that simply because a miner has exercised his Part 90 option, does not mean that he has acquired economic invulnerability. Lady Jane asserts that the rules must be interpreted with an eye to protecting miners who may be developing black lung and to encourage them to exercise their right to transfer, without, in the process, "turning them into demigods."

Lady Jane submits that so long as no discrimination is shown under the Act, a Part 90 miner should be able to be discharged for cause or laid off as a result of a down turn in employment. So too, given a reorganization from an underground mine to a surface preparation facility and a work force of substantially smaller proportion, the mine operator should not be required to pay a Part 90 miner a premium rate for surface work when the purpose for the regulation no longer exists.

Assuming that MSHA prevails in these proceedings, Lady Jane believes that any payment to Mr. Graham should only be the pay differential between $13.38 and $15.12 per hour from December 17, 1984, to the present for hours worked. Lady Jane does not believe that a penalty and/or interest would be appropriate under the instant circumstances. As to Mr. McCracken, Lady Jane believes that the pay differential would be the difference between $10.78 per hour and $20.70 per hour for hours worked between January 2, 1985, (prior to this Mr. McCracken had been on vacation) when he took the sampler position, and January 11, 1985, when he retired (Stip. 36, 37, 38 and Exhibit 10). Lady Jane does not believe that a penalty and/or interest would be appropriate under the circumstances.

Findings and Conclusions

With regard to Mr. McCracken, MSHA does not dispute the fact that upon elimination of Lady Jane's underground mining operation and the conversion to a surface mining coal preparation facility, many of Mr. McCracken's duties as a general outside foreman would be eliminated, and his prior responsibilities for the repair of underground equipment would no longer be necessary. MSHA concedes that Mr. McCracken's new position in the reorganization would be as a coal sampler at the regular rate of pay of $10.78 per hour for such a position.

MSHA takes the position that when Lady Jane was notified on November 13, 1984, that Mr. McCracken was a Part 90 miner who had exercised his option to work in a less dusty atmosphere, his rights at a Part 90 miner vested, and the fact that a subsequent reduction in the work force or change in operational methods resulted in the elimination of the underground mine, including Mr. McCracken's surface position, did not divest him of his Part 90 miner rights.

At the time Lady Jane was advised that Mr. McCracken had Part 90 miner status, MSHA also advised Lady Jane that there would be no need to transfer Mr. McCracken if he were already working in an atmosphere which complied with the reduced dust standard. Lady Jane advised MSHA that Mr. McCracken was already working in an atmosphere which complied with the reduced dust standard, and that there was no need to transfer Mr. McCracken. When the reorganization took effect on December 17, 1984, Mr. McCracken's prior position as a general outside foreman was eliminated, and he was placed in the position of coal sampler. He assumed the duties of this position on January 2, 1985, when he returned from vacation, and

served in that capacity until his retirement on January 11, 1985.

Mr. McCracken had prior notice that his outside foreman's job would be eliminated and that he would assume the job as a coal sampler when Lady Jane posted a list of employees who were slated to remain at the new surface facility on May 23, 1983, approximately six months prior to Mr. Mcracken's designation as a Part 90 miner. Under the circumstances, I conclude and find that Lady Jane's decision in connection with its reorganized operations and realignment of the remaining workforce was communicated to Mr. McCracken prior to his transfer option eligibility as a Part 90 miner, and there is nothing to suggest that the decision in this regard was other than a legitimate and good faith business decision made by Lady Jane in the face of changed economic circumstances. It seems clear to me that the placement of Mr. McCracken in the coal sampler position came about as a result of the reduction of the workforce rather than any hazardous dust exposure.

I conclude that Mr. McCracken was entitled to take advantage of the "wage savings" provisions of section 101(a)(7) of the Act and 30 C.F.R. 90.103(b), provided it is established that his placement or "transfer" in the new position was the direct result of his exposure to hazardous levels of dust. I construe the transfer language found in section 101(a)(7) to require a showing of a nexus between the dust exposure and the transfer. The statute requires that a miner exposed to hazardous levels of dust be removed from such exposure and reassigned. If he is transferred as a result of such exposure, he is entitled to be compensated according to his regular rate of pay for the job held immediately prior to his transfer. The miner's exposure to hazardous dust levels is a condition precedent to his removal and reassignment.

The purpose of the protected wage provisions found in the Act and rule with respect to Part 90 miners is to encourage miners to exercise their transfer option to a job in a less dusty atmosphere. By not having to take a pay cut upon transfer to a position which may pay less, the miner is more likely to transfer to protect his health than he would be otherwise. In Mr. McCracken's case, at the time Lady Jane was advised of Mr. McCracken's Part 90 status no transfer took place, and Lady Jane had no duty to transfer him because it was in compliance with the dust exposure requirements connected with Mr. McCracken's working environment. As a matter

of fact, Mr. McCracken ended up in the position of coal sampler after a legitimate reduction in force eliminated his prior position.

MSHA's argument that Part 90 recognizes no exceptions with respect to the reasons for a miner's transfer IS REJECTED. I find nothing in the legislative history to suggest that Congress intended that an eligible Part 90 miner or potential transferee be forever insulated from the economic realities of the mining business. Nor do I find anything to suggest that a mine operator must forever guarantee a miner's wages in any subsequently acquired jobs which may come about as the result of changed economic circumstances.

I find nothing in the legislative history to suggest that when Congress enacted the remedial provisions of section 101(a)(7), it intended to guarantee a miner continued job security, or to insulate a miner from any future adverse economic consequences which may flow from a mine operator's legitimate business concerns and decisions. Further, I find nothing in the legislative history to suggest that Congress intended to forever penalize a mine operator economically in the case of a Part 90 miner transferee. The intent of the statute is to afford the miner an opportunity to remove himself from dusty work environment, and I take note of the fact that while a transferred miner is entitled to the pay rate of his old position, any future pay increases are based on his new position. If the new position is at a pay rate lower than that of the previous job held by the miner, the miner would only be entitled to future raises computed on the basis of the lower pay scale of the new job classification, notwithstanding the fact that his regular salary remains tied to his former job. It seems to me that had Congress intended to fully guarantee a miner's pay, it would have enacted a provision to ensure that any future salary increases be maintained at the higher rate of pay. However, rather than doing that, Congress placed a special limitation on any subsequent wage increases received by a transferred miner.

I take note of MSHA's rulemaking comments at 45 Fed.Reg. 80767. In referring to the legislative history from the Conference Committee Report, MSHA quotes language which reflects a Congressional concern that miners reassigned jobs pursuant to section 101(a)(7) should not suffer an immediate financial disadvantage. While this suggests an intent that a miner not be penalized economically at the time he exercises his option to transfer to a job in a less dusty atmosphere, it does not suggest that he be forever insulated from the prospects of receiving a lower wage in any future jobs which

come about as a result of events which are far removed from the conditions which placed him a Part 90 status in the first place.

I find no rational support for MSHA's suggestion that once transferred, a Part 90 miner is entitled to perpetual wage protection as long as he remains on a mine payroll, even though that mine may no longer fall within the parameters of section 101(a)(7) of MSHA's Part 90 regulations. I note that during the rulemaking comment period when it was suggested that Part 90 miners who are so situated on the effective date of the rules receive retroactive wage increases, MSHA was of the view that there would be no benefit in terms of enhanced health protection to be gained from applying the rule retroactively, 45 Fed.Reg. 80767. Similarly, I cannot conclude that there is any enhanced health benefit to be gained by requiring a mine operator to forever guarantee a miner's wage when he finds himself in another job that is the direct result of changed economic circumstances rather than health or safety circumstances.

I conclude and find that Mr. McCracken's placement in the coal sampler's job was the result of a legitimate and good faith reorganization and reduction in force, rather than an exposure to hazardous dust levels. Under the circumstances, and in view of my findings and conclusions concerning my interpretation and application of section 101(a)(7) and 30 C.F.R. 90.103(b), I conclude that Lady Jane was under no obligation to maintain Mr. McCracken's pay status as an outside shop foreman at the time he was placed in the coal sampler's job. Accordingly, MSHA has not established a violation of 30 C.F.R. 90.103(b), and section 104(a) Citation No. 2403626, February 5, 1985, and section 104(b) Order No. 2403645, February 21, 1985, are VACATED. MSHA's civil penalty proposal for the citation IS REJECTED AND DISMISSED.

As stated earlier, the purpose of the wage provision found in the Act and rule with respect to Part 90 miners is to encourage miners to exercise their transfer option to a job in a less dusty atmosphere. By not having to take a pay cut upon transfer to a position which may pay less, the miner is more likely to transfer to protect his health than he would be otherwise. In Mr. Graham's case, his August, 1980, transfer from underground belt maintenance man to surface car dropper was an option exercised by Mr. Graham to preclude his further exposure to hazardous dust, and the transfer was accomplished by Lady Jane in response to MSHA's earlier notification of Mr. Graham's Part 90 miner status.

At the time of his transfer to the car dropper's position, Mr. Graham retained his underground belt maintenance man pay rate and continued to be paid at that rate while occupying the position of surface car dropper. Although he was subsequently designated by Lady Jane in May, 1983, to be retained in its employ as a surface greaser after the effective date of the reduction in force and reorganization, Lady Jane continued to pay him his underground rate until December 17, 1984, when he actually became a surface greaser. Under these circumstances, it seems clear to me that Mr. Graham's initial transfer and salary retention were accomplished in full compliance with the applicable statutory and regulatory requirements of the law. It also seems clear that Mr. Graham's initial transfer in 1980 was the direct result of his Part 90 miner status, and his decision to exercise his transfer option. There is no evidence to suggest that at that point in time Lady Jane or Mr. Graham had knowledge of the subsequent chain of events which gave rise to the reorganization and reduction in force.

With regard to Mr. Graham's subsequent placement in the surface greaser position, I conclude and find that it came about as the result of the reorganization and reduction in force, and not because of Mr. Graham's Part 90 miner status. On the effective date of the reorganization, the underground mine was no longer in existence, the remaining work force was realigned in accordance with seniority, and Mr. Graham was placed from one surface job to another. Even if he had not been a Part 90 miner, the result would have been the same, and his options were somewhat limited. He could have resigned, taken optional retirement, or sought employment in other positions within Lady Jane's corporate structure. He obviously opted to stay on as an employee of Lady Jane, and had no choice as to the position for which he was selected to be retained in the realigned work force.

I conclude and find that Mr. Graham's placement in the surface greaser's position was the result of a legitimate business need of Lady Jane, and that it was the result of a reduction in force and reorganization, rather than a transfer resulting from dust exposure. For the same reasons discussed with respect to my findings and conclusions concerning my interpretation and application of section 101(a)(7) and 30 C.F.R. 90.103(b), in Mr. McCracken's case, I conclude and find tha Lady Jane was under no obligation to maintain Mr. Graham's pay status as a greaser. Accordingly, I cannot conclude that MSHA has established a violation of section 90.103(b), and section 104(a) Citation No. 2403627, February 5, 1985, and section 104(b) Order No. 2403644,

February 21, 1985, ARE VACATED. MSHA's civil penalty proposal for the citation IS REJECTED AND DISMISSED.

Lady Jane's contentions that the citations and orders should be dismissed because it no longer operates an underground coal mine or a surface work area of an underground coal mine, and therefore 30 C.F.R. 90.103(b) is no longer applicable, ARE REJECTED. I conclude that at the time of the operative violations in these proceedings, Lady Jane was subject to the provisions of section 90.103(b). When the underground mine was in operation, the surface cleaning plant processed coal from that mine as well as neighboring mines, and it was shipped to the Sunbury power plant of Pennsylvania Power & Light Company. When the underground mine was closed, the surface preparation plant continued to process coal from various local mine operators, and it continued to be shipped to the Sunbury plant. Thus, I conclude that the area of the new surface preparation plant was a surface work area of an underground mine at the time Mr. McCracken and Mr. Graham were designated and placed in their last work positions. I also conclude that the definition of "surface work area of an underground coal mine" found in 30 C.F.R. 90.2, is broad enough to cover Lady Jane's surface preparation facility.

ORDER

On the basis of the foregoing findings and conclusions, Lady Jane's contests ARE GRANTED, and the citations and orders in question ARE VACATED. MSHA's civil penalty proposals ARE REJECTED, and the civil penalty proceeding IS DISMISSED.

George A. Koutras
Administrative Law Judge