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SOL (MSHA) V. HELVETIA COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF EARL KENNEDY, LARRY COLLINS, COMPLAINANTS	DISCRIMINATION PROCEEDING Docket No. VA 85-32-D MSHA Case No. NORT CD 84-7 Mine No. 1
v.	
RAVEN RED ASH COAL CORPORATION, RESPONDENT	

DECISION

Appearances: Sheila K. Cronan, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;
Daniel R. Bieger, Esq., Copeland, Molinary & Bieger, Abingdon, Virginia, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainants against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainants contend that they were discharged from their employment with the respondent because of their purported refusal to work under unsupported roof. The respondent maintains that the complainants voluntarily quit their jobs and were not discharged for refusing to work under the alleged unsafe roof conditions. A hearing was held in Abingdon, Virginia, and while MSHA filed a posthearing brief, the respondent did not. I have considered MSHA's arguments, as well as the arguments made by the respondent's counsel during the hearing.

Issues

The issue presented in this case is whether or not the complainants were in fact discharged for refusing to work under unsafe conditions. Assuming a finding of a violation of section 105(c) of the Act, an additional issue is the amount of the civil penalty which should be imposed on the respondent for the violation.

Applicable Statutory and Regulatory Provisions

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

2. Sections 105(c)(1), (2) and (3) and 110(a) and (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The respondent was the owner and operator of the mine in question.

2. The respondent was a corporation under laws of the State of Virginia, and the mine was subject to the Act.

3. The complainant Larry Collins was employed by the respondent as a scoop operator from August 13 to August 23, 1984, and was a "miner" as that term is used in the Act.

4. The complainant Earl Kennedy was employed by the respondent as a scoop operator from August 14 to August 23, 1984, and was a "miner" as that term is used in the Act.

5. As of August 23, 1984, the daily coal production at the subject mine was 250 tons.

6. The mine is a non-union mine.

Complainants' Testimony and Evidence

Roger Lee Clevenger testified that he is employed by MSHA as a mine inspector and roof control specialist working out of the Grundy field office. He testified as to his background, experience, and duties and confirmed that he has

inspected the mine. He identified the mine as a drift mine with one working section, and stated that mining is done by the continuous miner method (Tr. 8Ä11).

Mr. Clevenger identified exhibit CÄ1 as the approved mine roof-control plan and he confirmed that he assisted the respondent in the formulation of the plan. He confirmed that an initial plan providing for full roof bolting for a full pillar recovery was first formulated for the mine in question in approximately April, 1983, and at that time the mine was operated by the VirginiaÄWest Virginia Mining Company. The August, 1984, plan is fully applicable to the present owner-respondent, and the prior plan simply reflected ownership by VirginiaÄWest Virginia. He confirmed that he updated the plan to reflect ownership by Raven Red Ash Coal Corporation, and that he conducted a mine inspection in connection with the plan on August 3, 1984, at which time the mine was operating with a continuous miner engaged in retreat mining (Tr. 11Ä14).

Mr. Clevenger explained the procedures involved in retreat pillar extraction, and he stated that once the mine is advanced on either 60 or 70 foot centers, the pillars are extracted on the retreat cycle in an effort to remove all of the coal. He identified exhibit CÄ2 as the applicable full pillar recovery portion of the current plan (Tr. 16). He explained the mining sequence required by the plan, and confirmed that Plan A, Number 1 is the applicable plan provision relevant to this case. He also confirmed that the different plan provisions which may be used depend on the direction the operator determines to use when approaching the pillars for removal (Tr. 14Ä20).

Mr. Clevenger explained the roof bolting procedures and sequences while cutting the pillar blocks and splits, and he confirmed that for each 16 feet of coal which is removed, at least 15 36Äinch roof bolts on 4Äfoot centers should be installed, not exceeding 4 feet from the rib. The roof bolts are required to be installed in the areas marked 1, 2, 3, and 4 pursuant to the roof bolting patterns shown on page 12 of the plan and pillary recovery plan No. 3 (Tr. 20Ä23). He confirmed that roof support posts are not used because of the dimensions of the mining machine operating in the pillar splits (Tr. 23Ä23). He stated that no miners are ever permitted to advance inby the last permanent roof supports except to install temporary support (Tr. 24). He also confirmed that at no time are scoop operators ever permitted to work inby

permanent roof support (Tr. 25). If they do, they would expose themselves to the dangers and hazards of a roof fall since they would be under unsupported roof (Tr. 25).

Mr. Clevenger stated that in the course of a regular mine inspection, an inspector will check to determine whether or not roof bolts are installed in the pillar splits (Tr. 26). However, if the entire row of pillars have been removed, the top begins to fall and an inspector would not venture beyond the permanent supports to ascertain whether the bolts were installed. The roof would fall to the breaker posts, and an inspector could not readily observe from a safe distance whether or not the pillars had been bolted (Tr. 27).

On cross-examination, Mr. Clevenger testified that he last visited the mine on August 13, 1984, when the roof plan was changed from one mine company to the present one, and that he issued no citations. At the time of his prior visit in April, 1983, the mine was operated under the name of VirginiaÄWest Virginia Mining Company (Tr. 28).

Mr. Clevenger stated that if pillar recovery work were taking place on August 23, 1984, the roof would be subject to fall at any time, and its likely that it would fall at any time, including the next day. However, he had no knowledge that the roof fell between August 23 and 24, and he did not know whether or not MSHA Inspector Ron Matney found any roof violations if he were at the mine on August 24 (Tr. 30Ä31).

Mr. Clevenger stated that in the event coal is removed from a pillar split without the installation of temporary roof support, a violation would occur. Temporary supports would include timbers or jacks, and if the coal is removed, either temporary or permanent roof support should be installed. If the coal which has been removed is more than 4 feet from the face back to the permanent roof support, the support should be installed to within 4 feet of the working face of the pillar split. If the pillar split is mined all the way through, at least 32 bolts should be installed in the pillar split to support the two cuts of coal (Tr. 34).

Mr. Clevenger stated that if additional cuts are to be taken in a pillar split after the temporary supports are installed, permanent supports must then be installed. If the cut is more than 5 feet inby the permanent support, it would be a violation not to install additional permanent support (Tr. 35). Mr. Clevenger confirmed that in pillar recovery work, planned roof falls are expected, and it is not unusual for a row of pillars to be removed one day, and for the roof

to fall the next (Tr. 35). He also confirmed that under the plan, temporary roof support must be installed within 5 minutes after a cut of coal has been removed, and the temporary support remains in place until such time as the permanent support is installed. In such a case, the only time anyone is permitted inby the temporary support would be to install permanent support (Tr. 36Ä37). Mr. Clevenger confirmed that he has no personal knowledge of the facts surrounding the complaints filed in this case (Tr. 37).

Larry Collins testified that he has been a miner since 1979, and that prior to August, 1984, he worked as a scoop operator at the Jewell Ridge Coal Company, but was laid off in 1983. He was hired by the respondent on August 14, 1984, and mine superintendent William Brewster hired him. He initially worked on the first shift, but then worked the second shift from 2:30 p.m. to 11:00 p.m. He was paid $70 a day, and his supervisor was section foreman Hubert Sweeney.

Mr. Collins stated that he received no training regarding roof control plans. He confirmed that he was employed by the respondent as a scoop operator and that the mine was engaged in pillar recovery when he was employed there. Referring to exhibit CÄ2, a part of the roof-control plan, he explained that "Plan A" was being followed and that the pillar split shown as 1, 3, 5 was mined all the way through without any roof bolting taking place. The miner would then mine all of the numbered wing cuts as shown by numbers 6Ä13 without any roof bolting taking place.

Mr. Collins stated that during his 2 weeks of employment with the respondent, or a total of 8 shifts, no roof bolts were ever installed on the pillar split where he was working, and he never observed the roof-bolting machine in operation. He explained that the continuous-mining machine was remotely controlled, and that as the scoop operator it was his job to follow the continuous miner in order to load out the coal and take it to the belt for transportation out of the mine. During this process he was required to be under unsupported roof, and at times he would be 12 to 8 feet inby and under unsupported roof, and that this was true for the entire 2 weeks of his employment with the respondent.

Mr. Collins stated that during his employment with the respondent some rocks fell on his scoop from some roof bolts and that he received "a few scratches." He reported this to Mr. Sweeney and Mr. Sweeney stated that "it don't look that bad."

Mr. Collins stated that on one occasion during his employment with the respondent, the lights on his scoop went out. He reported this to Mr. Sweeney and suggested to Mr. Sweeney that the scoop be taken out of service and repaired. Mr. Sweeney directed him to operate the scoop anyway, and that if he didn't, he would fire him. Although Mr. Collins' believed that operating the scoop without lights posed a hazard to the miners because he would be unable to see them, he followed Mr. Sweeney's order and continued to operate the scoop without lights.

Mr. Collins stated that on August 23, 1984, he and Mr. Earl Kennedy were working under bad top and that they were required to work beyond permanent supports where the roof had not been bolted. The roof was cracking and popping, and he told Mr. Kennedy that he was not going to take his scoop under the unsupported roof. He and Mr. Kennedy then spoke to Mr. Sweeney and informed him that they would no longer work under unsupported roof. Mr. Sweeney informed them that if they refused to continue to work they were no longer needed. At that point, Mr. Collins and Mr. Kennedy left the mine.

Mr. Collins stated that when he and Mr. Kennedy returned to the mine the next day to pick up their pay, an MSHA inspector who he did not know was at the mine office with mine superintendent William Brewster, and after discussing the matter with him, he and Mr. Kennedy decided to file a complaint the next day.

Mr. Collins stated that after he and Mr. Kennedy left the mine on August 23, 1984, the mine continued to operate until April, 1985, when it was closed. Mr. Collins confirmed that after he was fired by Mr. Sweeney, he attempted to find other employment, but could not find a job until April, 1985, when he went to work with the Coon Branch Construction Company where he is now employed and earning $80 a shift (Tr. 38Ä60).

On cross-examination, Mr. Collins stated that he previously worked at the mine in 1983 when it was operated by Mr. Dave Jordan under the corporate name of VirginiaÄWest Virginia Coal Company. He was employed for 3 or 4 weeks as a scoop operator but voluntarily quit.

Mr. Collins confirmed that he never saw or read the respondent's roof-control plan. He also confirmed that while operating his scoop behind the continuous-mining machine his

scoop batteries would be under unsupported roof, and since he was positioned ahead of the batteries, he too would be under unsupported roof.

Mr. Collins stated that he was not aware of any roof falls in the mine on August 23 or August 24, 1984, and that the incident concerning the lack of lights on his scoop occurred on the third day of his employment at the mine.

In response to further questions, Mr. Collins stated that prior to his present employment with Coon Branch Construction, he worked for 2 weeks with the Bartlett Tree Trimming Company earing $4 an hour. He confirmed that he received no state unemployment benefits because he had used up all of his eligibility prior to his employment with the respondent.

Mr. Collins reiterated that during his employment with the respondent the entire coal pillars would be mined without any roof bolts being installed, and it was his view that this was a common practice. He confirmed that he never filed any safety complaints concerning this practice (Tr. 60Ä80).

Earl Kennedy testified that he was hired to work at the respondent's mine by Mr. William Brewster, the mine superintendent. He was hired on August 13, 1984, as a second shift scoop operator, and was paid $70 a shift. His supervisor was foreman Hubert Sweeney, and his last day of employment was August 23, 1984.

Mr. Kennedy stated that during his employment with the respondent he was engaged in pillar retrieval work splitting pillar blocks of low coal. He identified exhibit CÄ2 as the applicable roof-control plan for pillar extraction, and he confirmed that "Plan A" as shown on the plan was being followed.

Mr. Kennedy stated that during his work shifts at the mine he never observed any roof bolts installed while the pillar splits were being mined. Although a roof-bolting machine was in the area, it was backed out of the way and he never saw it used to bolt the roof.

Mr. Kennedy stated that he operated a scoop and was required to follow the remotely controlled continuous miner while the pillar was being mined. He would maneuver the scoop under the miner boom in order to load out the coal to the tail piece. He operated the scoop while lying on his

back, and there were occasions when he would make three or four trips following the miner under unsupported roof.

Mr. Kennedy stated that during his work shift on August 23, 1984, he observed a roof bolt which had dislodged along the last row of roof bolts and a large rock approximately 30 feet long had slipped down with the bolt. He pointed out this condition to Mr. Sweeney, and he "shimmed out the roof bolt" and instructed him to continue working. Mr. Sweeney instructed him to take his scoop and pull it in beyond the bolt and up to the miner, and when he refused, Mr. Sweeney told him "to pick up my bucket and go home." Mr. Kennedy and Mr. Collins then left the mine, but returned the next day to pick up their pay.

Mr. Kennedy stated that when he and Mr. Collins returned to the mine on August 24, 1984, an MSHA inspector was at the office speaking with mine superintendent Bill Brewster. Mr. Kennedy advised the inspector that he and Mr. Collins had been fired the previous day for refusing to work under unsupported roof. When the inspector asked Mr. Brewster about the matter, he told the inspector to speak with Mr. Sweeney about the matter. After the inspector left, Mr. Brewster told Mr. Kennedy that he and Mr. Collins "had no leg to stand on because they had always worked the mine that way." Mr. Kennedy returned to the mine a week later, and he discussed the matter further with Mr. Brewster and advised him that he was afraid of the roof conditions. Mr. Kennedy and Mr. Collins then filed their complaints with MSHA.

Mr. Kennedy stated that after he was fired by the respondent he was unemployed for approximately a month and a half, but then found a job with the Cumberland Coal Company earning $80 per shift. He worked for Cumberland for 5 weeks and then went to work for the Tripple G Coal Company earning $70 to $110 per shift. He was subsequently laid off and has been unemployed since September 1, 1985 (Tr. 81Ä94).

On cross-examination, Mr. Kennedy testified that while operating his scoop behind the continuous-mining machine he would be positioned approximately 2 to 3 feet from the machine dipper, and the pillar which was being split was approximately 40 to 50 feet deep.

With regard to the rock which had broken loose between two roof bolts at the last row of roof bolts, Mr. Kennedy stated that the continuous-mining machine ripper head was causing the rock to vibrate.

Mr. Kennedy stated that as the scoop operator he was expected to follow behind the continuous-mining machine for a distance of some 12 feet in order to load out the coal being cut by the miner. The dipper of his scoop would be under the miner boom. He confirmed that under the roof-control plan the continuous miner can only legally proceed for a distance of 20 feet under unsupported roof (Tr. 95Ä108).

William Brewster testified that he was employed by the respondent as the mine superintendent until the last week of March, 1985, when the mine was "worked out" and closed. He confirmed that Mr. Dave Jordan was then the owner of the mine and that he also owned and operated several other mines.

Mr. Brewster identified exhibit CÄ3 as a copy of a statement that he made to MSHA special investigator Dewey Rife during his investigation of the complaints filed by Mr. Kennedy and Mr. Collins. Mr. Brewster confirmed that Mr. Sweeney told him that he fired Mr. Kennedy because "he did not want to pull coal" and that Mr. Collins simply quit.

Mr. Brewster stated that Mr. Sweeney denied that Mr. Kennedy and Mr. Collins were ever required to work under unsupported roof. Mr. Brewster stated further that he was in the mine daily and that he never observed any pillars split when the roof in the area had not been roof bolted (Tr. 109Ä112).

On cross-examination, Mr. Brewster testified that he has 23 years of underground mining experience. He confirmed that Mr. Kennedy and Mr. Collins returned to the mine the day after they were fired and informed him that Mr. Sweeney had fired them because he wanted them "to run coal" and they refused. Mr. Brewster stated that he offered to rehire Mr. Kennedy and Mr. Collins but they refused his offer and stated that "they would find another excuse to fire them."

Mr. Brewster stated that on August 24, 1984, MSHA Inspector Ronald Matney was at the mine and had conducted an inspection that day. Mr. Brewster stated that he could recall no roof citations being issued that day by Mr. Matney, nor could he recall any roof falls in the mine.

Mr. Brewster stated that at all times while he was underground on the first shift the 40 foot long pillar splits were always bolted and he has never instructed anyone to work under unsupported roof. He also stated that during the period August 14 through August 23, 1984, the roof bolter was being used on the day first shift. He confirmed that one of his

sons worked during that shift as a scoop operator, and that another son worked as a mechanic's helper. Mr. Brewster stated that he would not jeopardize their safety, or any other miners safety, by requiring them to work under unsupported roof.

Mr. Brewster stated that he subsequently offered Mr. Kennedy his job back a second time but that he refused. He also stated that Mr. Kennedy asked him for a lay-off slip so that he could draw unemployment, but he refused to give it to him.

In response to further questions, Mr. Brewster identified exhibits CÄ4 through CÄ8 as citations issued by Inspector Matney on August 23, 24, and 29, 1984, and he confirmed that he was with Mr. Matney during his inspections and that the citations were served on him.

Mr. Brewster stated that the continuous-mining machine is 35 1/2 feet long, and the scoop is 25 feet long. Under the circumstances, he did not believe that it was possible for the scoop operator to be under unsupported roof since the pillar splits were 40 feet long (Tr. 121Ä128).

In response to further questions, Mr. Brewster reviewed copies of several citations issued at the mine by Inspector Matney (exhibits CÄ4 through CÄ8) and he stated that he could not remember all of them. However, he confirmed that he knows Inspector Matney, has observed Federal mine inspectors in the mine, has received citations from them, and is familiar with the citation forms (Tr. 138Ä139). He identified his name on the citation forms, and he specifically recalled a citation issued on August 24, 1985, and confirmed that he was present when it was issued. The citation was issued because the wing that was left in the pillar split was too narrow and extra support posts had to be installed (Tr. 141). He also conceded that he had personal knowledge of at least some of the other citations issued by Mr. Matney, including one which was issued for 15 dislodged roof bolts in a return hallway (Tr. 142). However, he explained that it is not unusual for roof bolts to be dislodged in a hallway because of the low coal, and that a hallway is not located on an active working pillar (Tr. 146).

In response to a question as to whether it was possible for a scoop operator to be under unsupported roof, Mr. Brewster responded as follows (Tr. 147Ä148):

> JUDGE KOUTRAS: Mr. Brewster, I've just got a couple of questions and then we'll let you go.

In response to a question by Mr. Bieger, he asked you how long the continuous-mining machine was and you said approximately thirty two and a half feet and he asked you about the scoop and you said twenty five feet. Then he said, well under those circumstances then would it be possible for one to be under unsupported roof for a distance of thirty five feet and your answer was that's true. So I assume that--what about for a distance of sixty feet, or fifty feet? Let's assume that under your mining plan your mining cycle that they mined for a distance of forty five, fifty, sixty feet without bolting, without roof bolting. Okay.

A. Alright.

JUDGE KOUTRAS: Of any kind. Is it possible that either the scoop operator or the continuous-mining machine operator would be under unsupported roof at any time when they go back in the mine?

A. Let's see. The miner would have to go inby the--the miner would have to go inby back to the controls is twenty foot where the deck is, okay. And from there on back to the deck is about six more foot, twenty six. Okay. And the scoop operator sits about, approximately twelve foot from the end of the scoop. So that gives you twenty six, thirty six, he'd have to go thirty eight foot before he would be inby the roof supports.

JUDGE KOUTRAS: Okay.

A. The miner would have to go at least thirty eight foot deep.

JUDGE KOUTRAS. So if it mined a sixty foot distance, with absolutely no roof bolts, then he would be under unsupported roof wouldn't he?

A. Right.

And at (Tr. 158):

BY MR. BIEGER:

Q. The Judge asked you what if they were mining for sixty feet would somebody be under that many feet of unsupported roof and you said well, yes, but how big were the--the blocks were only forty to forty five feet, right?

A. Approximately, yeah.

Q. So when you're pulling pillars and the pillar is forty to forty five feet, you don't have a situation where they are mining sixty feet, is that right?

A. Right.

Mr. Brewster stated that normally the continuous miner would not go beyond the end of the pillar being extracted because the roof could fall on the miner. He denied that he was under any pressure to produce coal, and confirmed that in pillar extraction on his section the maximum distance that is mined would be 40 feet (Tr. 160).

Mr. Brewster confirmed that he worked the day shift and would not be in the mine during the afternoon or night shift when the complainants were working. He stated that he would not be underground with the complainants, and he would not be aware of any instances where the pillars were not bolted. He confirmed that his testimony concerning the bolting of pillars would only apply to his day shift, and that he had no knowledge about the night shift. When asked whether it was possible that the night shift was mining pillar splits without roof bolting, he replied "It's possible" (Tr. 150).

Mr. Brewster stated that when the complainants returned to the mine the day after their termination, he discussed the matter with them and offered them their jobs back, and the inspector was present when this occurred (Tr. 151). He specifically recalled the complainants telling him (Brewster) that Mr. Sweeney expected or directed them to work under unsupported roof and when they refused to do so he told them to "pick up their buckets and go on down the road," or words to that effect (Tr. 151). Mr. Brewster stated that his reaction to these statements by the complainants was that Mr. Sweeney could not lay them off for refusing to work under unsupported roof (Tr. 152). Mr. Brewster stated further that he discussed the matter with Mr. Sweeney, and his testimony

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regarding the discussions which took place is as follows (Tr. 152Ä154):

JUDGE KOUTRAS: Did you discuss it with Mr. Sweeney?

A. Yes.

JUDGE KOUTRAS: Well, what did he tell you about it?

A. Well, he told me that they was sitting down at the mouth of the break talking and the best I can remember, he told me he hollered at them and I believe the Kennedy boy come on up there and he got on to him and he told him if he wasn't going to pull coal to go on to the house. And they went on.
JUDGE KOUTRAS: Well, what's that mean. I mean, there's a lot--I don't understand why Mr. Sweeney would just tell them--what were they doing? Goofing off or not working or what?

A. That's the way I understood it, just a goofing off.

JUDGE KOUTRAS: And, Mr. Sweeney told them if they weren't going to pull coal, just to go on home and you--why would you offer them their jobs back then? After they told you their side of the story?

A. Well, if Hubert wronged them, I mean that's the right thing to do.

JUDGE KOUTRAS: Which one--well, if Mr. Sweeney tells you that he told them to go home because they were goofing off and didn't want to work, and the two men told you that that's not true, that Mr. Sweeney expected them to work under unsupported roof, and that's why he told them to go home, who would you tend to believe? Or, how would you resolve that obvious conflict?

A. Rephrase that again.

JUDGE KOUTRAS: Well, what I'm saying is Mr. Sweeney told you one thing and the two men told you something else, right?

A. Uh-hum.

JUDGE KOUTRAS: So, without even talking to Mr. Sweeney, you told the two men to come back to work.

A. I said if that's the way it was, come on back out to work. When they come to work, I would have had to have talked it over with Hubert, you know.

JUDGE KOUTRAS: Okay. And by that time you had talked it over with Mr. Sweeney?

A. No. I didn't even know nothing about it until they come and told me.

JUDGE KOUTRAS: After the two men left, did you then talk to Mr. Sweeney?

A. Right.

JUDGE KOUTRAS: And Mr. Sweeney told you that they just didn't want to work or what?

A. That's what he told me. He said they was down there at the mouth of the breaker talking and he hollered at them and one of them, I believe Kennedy, come on up there and he told him if they wasn't going to pull coal, to go on to the house. Now, that's what he told me happened.

JUDGE KOUTRAS: Okay. Did you ask Mr. Sweeney about what Mr. Kennedy and Mr. Collins had told you? That he expected them to work under unsupported roof?

A. No, he didn't tell me anything like that.

JUDGE KOUTRAS: Did you mention it. Did you ask Mr. Sweeney whether there was any truth in what these two men told you?

A. Yeah. I told him what they said and he said it wasn't true.

Mr. Brewster stated that neither the complainants or their crew ever complained to him about any lack of roof bolting or unsafe conditions, and he was not aware of any rock ever falling on Mr. Collins' machine. He confirmed that Mr. Sweeney never complained about the complainant's work, and that he (Brewster) hired Mr. Kennedy because he had the reputation of being a good scoop man (Tr. 156).

Hubert Sweeney, testified that he was employed by the respondent as an underground section foreman on the second shift and that he was laid off on March 15, 1985, when the mine "worked out" and was closed. Prior to this time he worked at the mine in 1982 when it was operated as the VirginiaÄWest Virginia Coal Mine, and it was owned by Mr. Dave Jordan, the respondent's owner.

Mr. Sweeney confirmed that Mr. Kennedy and Mr. Collins worked for him as scoop operators on the second shift. He denied that he directed them to work under unsupported roof or that he fired them for refusing to do so. He stated that during the shift on August 23, 1984, he observed Mr. Kennedy and Mr. Collins sitting in their equipment talking and he told them that if they did not want to "pull coal" to go home. He stated that he fired them for "goofing off."

Mr. Sweeney confirmed that he was interviewed by MSHA special investigator Dewey Rife on September 20, 1984, during his investigation of the complaints and he admitted telling Mr. Rife that Mr. Collins and Mr. Kennedy quit their jobs and that he did not know what happened to cause them to quit (Tr. 160Ä165).

Mr. Sweeney testified as follows with respect to the circumstances under which the complainants left their jobs (Tr. 166Ä170):

JUDGE KOUTRAS: Why did these two men quit, Mr. Sweeney?

A. Sir, I don't know why they quit. They were down at the break a talking. They didn't want to pull no coal and I told them if they couldn't do no better than that they might as well go home. One got to preaching that I fired him and the other one, he didn't--I

don't know why, he jut walked on out of the mines.

JUDGE KOUTRAS: Tell me about this. What were they doing, talking? What are you talking about. Were they taking their break or what?

A. I couldn't hear them. Yes, they was sitting on the scoop. You have to crawl on your knees and hands and I hollered down to where I could hear them and they was--seen them a sitting down there in the break a talking.

JUDGE KOUTRAS: Just chit-chatting?

A. Just chit-chatting, right.

JUDGE KOUTRAS: And you told them what now?

A. If they couldn't do no better than that they might as well get their buckets and go on home.

JUDGE KOUTRAS: What did they tell you?

A. They didn't tell me nothing. They just got in the scoop. I crawled right back towards the face and I asked the other scoop man where he was at and said why, they've done gone home. And when I come outside they had done went home. Or otherwise they was still outside a waiting on a ride but they quit.

JUDGE KOUTRAS: That was the last you saw of them?

A. Yeah, that's the last I saw after they crawled on the outside.

JUDGE KOUTRAS: Did you tell anybody that the two men had quit?

A. Sir?

JUDGE KOUTRAS: Did you tell anybody at the mine that these two men had quit?

A. Yes, I told the others.

JUDGE KOUTRAS: Who did you tell?

A. I don't--a fellar by the name of Bill Asbury. He's not here, him and the miner operator.

JUDGE KOUTRAS: Did you tell the mine superintendent, Mr. Brewster?

A. Yes, the next day.

JUDGE KOUTRAS: What did you tell him the next day?

A. I told him they quit and I said I don't know why. They was no reason, they gave me no reason.

JUDGE KOUTRAS: Did you tell Mr. Brewster you fired them?

A. Yes, sir. I told him that I told them if they couldn't do no better than what they was doing, laying on the scoop, to get their bucket and go.

JUDGE KOUTRAS: Well, did you fire them or did they quit?

A. Well, I guess you'd call it firing them. They just took off going on outside. I guess you'd call it firing them.

JUDGE KOUTRAS: Have you ever had any miners in your experience leave a job under similar circumstances?

A. No, sir, I haven't.

JUDGE KOUTRAS: Isn't that a little unusual?

A. Unless they'd be sick or something.

JUDGE KOUTRAS: I mean it's a little unusual for two men to just up and quit because the supervisor told them to get on with working, to stop talking?

A. Well, I guess they got the impression that I fired them.

* * * * * * * * * *

JUDGE KOUTRAS: Does it seem kind of unusual to you for them to just get up and take off?

A. It seemed to me like they don't want to work. They tried to get me to get them a cut-off slip the night before that. I got the impression they don't want to work.

JUDGE KOUTRAS: What's a cut-off slip?

A. That's a slip where you could draw unemployment.

JUDGE KOUTRAS: The night before?

A. The night before, sir.

JUDGE KOUTRAS: Well, tell me about that? How did they expect you to give them a slip the night before?

A. They just wanted me to lay them off.

JUDGE KOUTRAS: Well, now if you laid them off or fired them, were they eligible for unemployment?

A. I don't know, sir.

JUDGE KOUTRAS: You mean the night before these two men come up to you and asked you for an unemployment slip? They got tired of working and they wanted to draw unemployment?

A. Yes, sir. They wanted to draw unemployment. Didn't want to work.

JUDGE KOUTRAS: The story I'm hearing is these two men didn't want to work under unsupported roof and you kind of suggested that if they didn't want to work under unsupported roof pulling coal, they might as well go on home?

A. I've never sent nobody out, sir, out from under roof supports.

JUDGE KOUTRAS: Did you ever suggest or say anything to them that would lead them to believe that?

A. No, sir. While you're in the mine, I ain't going to put nobody's life in danger. I've never had no problem with men all my life except these two. I don't know why. I treated them right. Didn't cuss them out or nothing.

JUDGE KOUTRAS: Had you known these two men before they came to work?

A. No, sir. The first time.

JUDGE KOUTRAS: And they had worked for you how long? A couple of days or what?

A. Yeah, a couple of days, or maybe three.

Mr. Sweeney denied that roof bolting was never done on his section, and he stated that he always followed the roof-control plan. He explained the bolting process and denied that his crew ever cut all the way through a pillar or worked under unsupported roof while cutting coal (Tr. 172). He conceded that he was not always present while the continuous miner was operating, and that when he was present he would always position himself next to the continuous miner (Tr. 174).

Terry Kennedy testified that he is Earl Kennedy's brother and that he has been employed with the Island Creek Coal Company for 7 years. He stated that while he was laid off from that job he worked for the respondent as a scoop operator and timber man on the second shift for 2 days on August 13 and 14, 1984, and that Hubert Sweeney was the shift foreman.

Mr. Kennedy stated that during the 2 days he worked on the second shift the coal pillars were split down the middle straight through and that the continuous miner would then pull out and mine the right and left wings. During this time he never saw any roof bolts installed on the mined pillar splits and the roof-bolting machine was never used. Although he was never required to work under unsupported roof while pulling the pillars he did so anyway in order "to keep his job." He stated that Mr. Sweeney knew he was working under unsupported roof.

Mr. Kennedy stated that he discussed the roof conditions with Mr. Sweeney and informed him that he was jeopardizing the safety of the miners by not roof bolting the pillars. He stated that Mr. Sweeney informed him that since the mine was a "small truck mine" they could "get by with just about anything" (Tr. 174Ä182).

Jerry Kennedy testified that he is currently unemployed and has 11 years of mining experience. He stated that he is not related to the complainant and that he was employed by the respondent from August 13, 1984 to August 23, 1984, as a second shift scoop operator and timber man, and he confirmed that shift foreman Hubert Sweeney was his supervisor.

Mr. Kennedy stated that during his employment with the respondent he was engaged in pillar work and he indicated that after the pillar was "timbered up" the continuous-mining machine would go in and cut the pillar split until it was mined through to the end. As the timber man he would be in and out of the pillar while it being mined and at no time did he ever observe roof bolts being installed in the pillar. Although a roof bolter was on the section, he never observed it being used to pin the roof.

Mr. Kennedy stated that during his shift on August 23, 1984, he overheard Mr. Sweeney tell Mr. Earl Kennedy that "if you can't do that I don't need you after this shift." He heard Mr. Kennedy reply "if you don't need me than you don't need me now." Mr. Kennedy stated that he had no idea what Mr. Sweeney and Earl Kennedy were discussing. He stated that he observed scoop operators working under unsupported roof and that this was a common occurrence on the second shift during his employment at the mine (Tr. 184Ä188).

On cross-examination, Mr. Kennedy stated that he first met Mr. Earl Kennedy and Mr. Collins when he went to work for the respondent. He confirmed that he quit his job on August 23, 1984, because he didn't like the pay and the height of the coal. He stated that he never complained about the roof conditions or the lack of roof bolting. He also confirmed that Hubert Sweeney was married to his cousin (Tr. 188Ä198).

Bobby Mullins testified that he is employed by the RockingÄR Coal Company and that he has 12 years of underground mining experience. He confirmed that he was employed by the respondent for 3 weeks during August, 1984. He worked on the first shift as a miner and pinner helper. He stated that

Mr. Brewster was the mine superintendent and that he was underground every day during the day shift.

Mr. Mullins stated that he worked at the faces pulling pillars, and that during his employment at the mine he never saw the roof bolter used to install roof bolts on the pillars (Tr. 199Ä202).

On cross-examination, Mr. Mullins confirmed that he grew up with Earl Kennedy. He stated that he quit his job with the respondent after Mr. Brewster threatened to fire him. He explained that he and several other miners were pulling a miner cable with a scoop and it separated. Since he was the "cable man," Mr. Brewster held him responsible for the cable separating and when he informed him that he would be fired, he quit before Mr. Brewster could fire him (Tr. 202Ä206).

Respondent's Testimony

David B. Jordan, testified that he was the President and part-owner of the Raven Red Ash Coal Corporation and he confirmed that the mine was closed down in March of 1985. He stated that he usually goes underground in his mines every 2 or 3 months. He stated that he has personally never fired any of his employees and that he has never directed anyone to fire any employee.

Mr. Jordan confirmed that he was at the mine in question on August 24, 1984, delivering the payroll and he learned at that time that Mr. Sweeney had fired Mr. Kennedy and Mr. Collins for "refusing to pull coal." Mr. Jordan stated that MSHA Inspector Ronald Matney was at the mine on August 24, 1984, and that he discussed the matter with him. Mr. Matney had conducted an inspection that day and except for some loose roof bolts on the haulage road Mr. Matney assured him that "everything looked fine" underground.

Mr. Jordan stated that no one had ever complained to him about unsafe working conditions underground. He confirmed that he has not paid any of the civil penalty assessments reflected in MSHA's computer print-out, exhibit CÄ9, because he could not afford it. He also confirmed that he was in the process of working out a "settlement" with the Department of Justice to pay those penalties (Tr. 219Ä224, 226).

Mr. Jordan stated that the No. 1 Mine where the complainants were employed is mined out and that it closed in March, 1985. He confirmed that he just opened a new mine, and when asked about the financial condition of his company, he

responded "I guess we're in no worse or no better shape than half the coal companies in Buchanan County" (Tr. 227). Mr. Jordan was of the opinion that the complainants quit their jobs, and he alluded to a prior proposed settlement offer by MSHA to compensate one of the complainants, and that if he agreed, the case would be dropped. He stated that had he believed the complainants were fired for working under unsafe conditions, he would have not contested the complaints (Tr. 229).

Mr. Jordan confirmed that since he was not underground from day to day, he would not know how Mr. Sweeney operated his section, and while he believed that it was possible that the complainants were terminated for reasons which they have testified to in this case, he would have no knowledge of this one way or the other (Tr. 231). He stated that he chose to believe Mr. Sweeney, Mr. Brewster, and Inspector Matney (Tr. 231). He disclaimed any knowledge as to the complainants' motives in claiming that they were fired for refusing to work under unsupported roof (Tr. 235).

Mr. Clevenger was recalled as the court's witness, and he stated that assuming the two complainant's were engaged in mining an entire 40Äfoot block of coal continuously while in their scoops, they could be 4 to 6 feet past permanent roof supports. If the entire coal block is mined without pulling out and bolting after cutting 20 feet, a violation of the roof-control plan would result because the plan stipulates that the maximum depth of the coal being mined should not exceed 20 feet without bolting. In addition, the remote controls for the miner may not advance beyond permanent roof support (Tr. 251Ä252).

Mr. Clevenger stated that he has been in the mine several times and has never received any complaints with respect to the mining procedures (Tr. 253). In response to questions from respondent's counsel, Mr. Clevenger stated as follows (Tr. 254Ä255):

> Q. Do you remember before when I asked you when you're pulling timbers, if you pull one is it likely that they have a roof fall the very next day and you said it's quite possible that the could have a roof fall at anytime?
>
> A. Yes, sir. I said that.
>
> Q. Well, doesn't that seem--doesn't it surprise you that not only--that if you can go

and mine backwards and forwards in all these pillars for nine days and never put the first bolt in and never have a major roof fall? Isn't that pretty much impossible?

A. It'd be according to the type of strata that you've got.

Q. Yeah, I know it would be, but if it's quite possible that it would fall the next day--

A. I don't know that this has been done.

Q. Well, I'm just asking you a hypothetical question.

A. Right, you're asking a theory.

Q. Isn't it unusual, if as you say, that the roof could fall the very next day, isn't it unusual that you would mine all of these pillars right and left for two weeks and never put the first bolt in and never have a roof fall? Isn't that pretty incredible?

A. If it's being done, yes.

Q. Okay.

A. There's no set time when a pillar fall would come because you have to put additional support, timbers, until you get enough weight to override these timbers--

Q. Right. I understand that.

A.--it's pretty well hold itself.

Mr. Clevenger explained the roof bolting pattern and sequence for the mine, and he indicated that if no roof bolts were installed in certain areas during the period from August 13 to 23, it was possible that Inspector Matney did not see the areas because of the roof falls and he would not venture inby the breaker posts (Tr. 257Ä259). In the event one cut of coal was taken when Mr. Matney was in the mine, temporary supports would have been installed, but no bolting was required until that cut was completed and a second one begun. If Mr. Matney was there the entire day, he would have

been aware of what the mining procedures were and what work was being done (Tr. 262).

MSHA Inspector Ronald C. Matney did not testify at the November 13, 1985, hearing in this case. However, by agreement of the parties, his deposition was taken on November 14, 1985, and it has been filed and made a part of the record in this case.

Mr. Matney stated that he has been employed by MSHA as a coal mine inspector since October 1, 1978. He testified as to his background, training, and experience, and confirmed that he is familiar with the respondent's mine. He stated that Mr. David Jordan was the president and owner of the Raven Red Ash Coal Company, and that the mine at one time operated under the corporate name of VirginiaÄWest Virginia Coal Corporation. He confirmed that Mr. Jordan was the president and owner of both corporations, and that during his inspections at the mine when they were under both corporate names he observed Mr. Jordan there. He also observed Mr. Bill Brewster and Mr. Hubert Sweeney at the mine when it operated under the name of VirginiaÄWest Virginia Coal Corporation (Tr. 3Ä6).

Mr. Matney stated that he inspected the respondent's No. 1 Mine four times a year, and that depending on the conditions of the mine, the inspection takes from 3 to 5 days to complete. He confirmed that he began an inspection of the mine on August 24, 1984, and that he was accompanied by Mr. Brewster. Mr. Matney stated that he arrived at the working face area of the mine at approximately 9:20 a.m., and day shift personnel were at work. Work had started approximately 2 hours earlier, and after checking the face area he proceeded to the area where employees were working removing coal. He observed that a split or pillar block of coal approximately 20 feet had been removed and the crew had moved back to the next line of crosscuts to begin a new phase of mining across the working faces. He confirmed that he issued a violation on the cut of coal that had been taken because the respondent was not complying with its roof-control plan for pillar extraction. The plan required that a 10Äfoot block of coal be left on each side of the pillar split as a means of roof support, and he found that instead of leaving a 10Äfoot wing for support, the wing of coal which was left was between 4 and 8 feet. Under the circumstances, Mr. Matney issued a section 104(a) "significant and substantial" citation charging the respondent with a violation of mandatory section 75.200, for failure to comply with the roof-control plan. Mr. Matney stated that the respondent did not contest the citation (Tr. 7Ä12).

Mr. Matney stated that during his inspection he looked at the pillar areas which had been mined on previous shifts and from his position at the pillar breaker line he shined his light back into the area in an attempt to observe what had been done. He did not venture beyond the pillar breaker line because of the "danger of the conditions of the roof." However, from his vantage point at the breaker line he could not see anything because the roof had collapsed "up next to the breaker line," and he could not determine whether the previous shift had installed roof bolts in the pillar splits. The coal had been mined out and the "roof was collapsed solid" up to the breaker line (Tr. 13).

Mr. Matney stated that after completing his underground inspection on August 24, he returned to the surface at approximately 12:00 to 1:00 p.m., in the company of Mr. Brewster and they proceeded to the mine office. While standing in the office doorway, Mr. Collins and Mr. Kennedy came by and Mr. Matney asked them "how they were doing." Mr. Kennedy responded "not so good," and when asked why by Mr. Matney, Mr. Kennedy informed him that Mr. Sweeney had fired them the previous evening "for not hauling coal out from unsupported roof that was broke." Mr. Matney stated that he commented to Mr. Brewster that he could not fire anyone "for unsafe work practices," and that there was a possibility that Mr. Kennedy and Mr. Collins could file discrimination charges against the respondent. Mr. Matney also stated that he informed Mr. Kennedy and Mr. Collins that he had inspected the faces and found "no violations that they had done" (Tr. 14Ä15).

Mr. Matney stated that when he mentioned the fact that Mr. Kennedy and Mr. Collins could file a discrimination charge, Mr. Brewster attempted to contact Mr. Sweeney underground and stated to Mr. Kennedy and Mr. Collins "if its like you say it is, you'll get your jobs back." At that point in time, Mr. Matney left the mine office to return to his own office, and he did not know whether Mr. Brewster contacted Mr. Sweeney. Mr. Kennedy and Mr. Collins were still at the office when Mr. Matney left. Mr. Matney stated that Mr. Jordan was not at the mine that day, and that at no time has he had any conversations with Mr. Jordan about the incident (Tr. 16).

On cross-examination, Mr. Matney stated that there was no doubt in his mind that he did not speak with Mr. Jordan on August 24 while at the mine. He stated that according to the legal identity files maintained in his MSHA office, Mr. Jordan was the president of both the VirginiaÄWest Virginia Coal Company and the Raven Red Ash Coal Company, and that when he

filed his reports Mr. Jordan was listed as the corporate president of both companies (Tr. 16Ä18).

Mr. Matney stated that a remote controlled miner was used to cut the pillar block of coal which he observed on August 24. One cut of coal approximately 20Äfeet wide by 20Äfeet deep had been taken out of the pillar and jacks had been set and a roof bolter was present and was about to begin the roof bolting cycle. He issued the citation because additional roof supports were required to be installed due to the subnormal roof conditions which resulted from not leaving enough coal for roof support. He drew a diagram of the block of coal being mined, and he explained how the pillar was cut and split and bolted and timbered (deposition exhibit-A; Tr. 22Ä26).

Mr. Matney stated that the respondent had no advance knowledge that he would inspect the mine on August 24, and that it is illegal for anyone to advise an operator of a scheduled inspection. He stated that at the time he observed the pillar which had been cut, no roof bolting had actually taken place, but the safety jacks had been set and the roof bolting machine was in place ready to bolt the roof (Tr. 27).

Mr. Matney stated that the last previous inspection of the mine was probably conducted 2 months prior to August 24, but he could not recall whether pillar work had been done at that time. Although he issued a citation for dislodged roof bolts during his August inspection, he could not recall issuing any citations during his previous inspection (Tr. 29). The dislodged bolts in question were in a crosscut hallway, and he explained that they are usually dislodged because the miner is too big for the low coal being mined (Tr. 30).

Mr. Matney stated that he did not discuss the respondent's pillar extraction procedures with Mr. Brewster, and he confirmed that because of the roof falls he could not determine whether roof bolting had been done during prior shifts. He stated that such falls are normal in pillar retrieval mining and that the roof is supposed to fall (Tr. 32). Mr. Matney reiterated that he heard Mr. Brewster state that if Mr. Sweeney fired Mr. Collins and Mr. Kennedy because of their refusal to work under unsupported roof, they would get their jobs back (Tr. 33).

Mr. Matney stated that a wing of coal could be mined in 25 minutes, and that it would take approximately 2 to 3 hours to mine a pillar. Two working shifts could probably extract five pillars of coal. He explained that the roof is falling

behind the areas where the coal has been extracted. Timbers are a means of temporary support for the roof, and after the coal is extracted roof bolts and timbers will not support the weight of the roof, and any resulting roof falls are "controlled falls" (Tr. 37). He believed it was possible or probable to pull a number of pillars over a period of time without installing roof bolts, but he would not recommend it (Tr. 38).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981); and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Secretary on behalf of Jenkins v. HeclaÄDay Mines Corporation, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the Complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983); and Donovan v. Stafford Construction Company, No. 83Ä1566, D.C.Cir. (April 20, 1984) (specifically-approving the Commission's PasulaÄRobinette test). See also NLRB v. Transportation Management Corporation, ÄÄÄ U.S. ÄÄÄÄ, 76 L.Ed.2d 667 (1983).

The issue in this case is whether or not the complainants were discharged by the respondent because of their reluctance or refusal to perform work as scoop operators under unsupported roof. MSHA's position is that the complainants were fired for refusing to work under unsafe roof conditions (Tr. 248 and posthearing brief). Although the respondent did not file any posthearing arguments, I assume from the arguments made by counsel on the record during the course of the hearing in this case that its position is that the complainants either quit their jobs voluntarily or they were discharged by second shift foreman Hubert Sweeney because of their "goofing off" on the job or refusing "to pull coal."

The respondent produced no mine records documenting the separation of the two complainants. Mr. Jordan testified that Mr. Brewster told him that the two had quit, and that Inspector Matney told him that they were fired by Mr. Sweeney "for refusing to pull coal" (Tr. 220Ä221). Mr. Jordan was also of the opinion that the two men quit (Tr. 229).

During his direct testimony, Mr. Brewster testified that Mr. Sweeney told him that he fired Mr. Kennedy because "he did not want to pull coal," and that Mr. Collins simply quit. On cross-examination, Mr. Brewster stated that Mr. Sweeney told him that he told Mr. Collins and Mr. Kennedy to "go on to the house," and that he (Brewster) was led to believe that Mr. Kennedy and Mr. Collins did not want to pull coal and that Mr. Sweeney told them to go home because they were "goofing off."

Mr. Sweeney's testimony as to whether he fired Mr. Collins and Mr. Kennedy, or whether they quit is inconsistent. Mr. Sweeney first testified that he fired the two for "goofing off" after he observed them sitting in their equipment talking. He then testified that he told at least one other man on the shift that the two had quit and that he told Mr. Brewster that they had quit and that he had fired them. When specifically asked whether he had fired them or whether they quit, Mr. Sweeney responded "Well, I guess you'd call it firing them. They just took off going on outside. I guess you'd call it firing them" (Tr. 168).

Mr. Sweeney admitted that when he was interviewed by an MSHA inspector on September 20, 1984, during the investigation of the discrimination complaints, he told the inspector that Mr. Collins and Mr. Kennedy quit their jobs, and that he (Sweeney) had no knowledge as to why they quit. Mr. Sweeney's prior denials of any knowledge as to why the two complainants left their jobs raises a question in my mind as to his credibility. If Mr. Sweeney had just cause to discharge the complainants, it seems to me that he would have told the investigating inspector his side of the story as to why the two men left their jobs rather than denying any knowledge of the incident.

Both Mr. Kennedy and Mr. Collins were consistent in their assertions that they had been fired by Mr. Sweeney. The statements to this effect, made to Inspector Matney and Mr. Brewster the day following their termination, are consistent, and both Mr. Brewster and Mr. Matney confirmed that Mr. Kennedy and Mr. Collins told them that Mr. Sweeney fired them. Further,

their testimony during the hearing that they had been fired by Mr. Sweeney is likewise consistent.

After careful consideration of all of the testimony in this case, I conclude and find that on August 23, 1984, Mr. Collins and Mr. Kennedy were fired from their jobs as scoop operators by Mr. Hubert Sweeney, respondent's second shift foreman, and that their termination was not the result of voluntary quits on their part.

Mr. Brewster confirmed that he had never received any complaints about the complainants' work performance. He confirmed that he initially hired Mr. Kennedy because of his reputation as a good scoop man, and that Mr. Collins was hired because he had worked at the mine in a previous occasion and Mr. Brewster believed that he could operate a scoop (Tr. 156). Mr. Sweeney testified that the complainants had only worked for him for 2 or 3 days before they were terminated, and he was under the impression that they did not want to work (Tr. 169). Other than this opinion by Mr. Sweeney, there is no evidence that the complainants were other than good employees, nor is there any evidence that they had ever complained to mine management or to any MSHA inspectors about any hazardous job conditions or safety infractions.

During the course of the hearing, mine operator Jordan suggested that since Inspector Matney had just been underground and assured him that "everything looked fine," the assertions by the complainants that they were asked or required to work under unsupported roof is incorrect. However, I take note of the fact that Mr. Sweeney did not advise management that he terminated the complainants until the next day. Significantly, after Mr. Jordan and Mr. Brewster were made aware of the terminations, and after Inspector Matney advised Mr. Brewster of the possible ramifications of the terminations, including a possible discrimination complaint by the complainants, Mr. Jordan and Mr. Brewster did not go underground to ascertain the facts or to determine or attempt to determine whether the area where the two individuals were working was in fact roof bolted. Mr. Brewster and Mr. Jordan apparently opted to believe Mr. Sweeney's explanation that he fired the complainants because they did not want to work. I find it rather strange that mine management, once alerted by a Federal inspector on the scene of the possible ramifications of the discharge, would not immediately ascertain all of the facts so as to protect itself from any possible discrimination claims.

Mr. Brewster worked the day shift and he would not be in a position to observe the working conditions during the evening shift which was supervised by Mr. Sweeney (Tr. 149Ä150). Mr. Brewster conceded that it was possible that the night shift could have been mining and splitting pillars without roof bolting (Tr. 150). However, since he was not underground during the night shift, he would have no way of personally knowing that this was the case, and he stated that no one on the night shift, including Mr. Collins or Mr. Kennedy, ever complained to him about the lack of roof bolting or hazardous conditions (Tr. 154Ä155).

Mr. Jordan testified that he may have been underground once every 3 or 4 months in response to calls from the superintendent concerning adverse mining conditions (Tr. 219). He confirmed that due to his absence from the underground mine on a day-to-day basis, he would have no way of knowing how Mr. Sweeney operated the section. While it was possible that Mr. Collins and Mr. Kennedy are correct in their assertions that pillars were pulled without roof support, Mr. Jordan stated that he had no personal knowledge that this was the case (Tr. 230Ä231).

Mr. Brewster asserted that during the period from August 14 to 23, 1984, the roof bolter was used on the first day shift. He also asserted that his two sons worked on that shift as a scoop operator and mechanic's helper, and that he would not jeopardize their safety by requiring them to work under unsupported roof. While these assertions may be true, the fact is that Mr. Collins and Mr. Kennedy worked the evening shift under Mr. Sweeney's supervision, and Mr. Brewster had no knowledge as to how Mr. Sweeney worked his shift. Under the circumstances, I find Mr. Brewster's assertions as to what may have transpired during his day shift to be irrelevant to the question concerning what Mr. Sweeney expected his shift to do, or whether or not the claims by Mr. Collins or Mr. Kennedy that they were expected to work under unsupported roof are supportable by credible evidence.

Mr. Jordan claimed that he spoke with Mr. Matney after discussing the matter with Mr. Brewster, and that Mr. Brewster informed him that the two men were going to file a complaint. Mr. Jordan also stated that Mr. Brewster advised him that Mr. Sweeney had fired Mr. Collins and Mr. Kennedy for "refusing to pull coal." Given these circumstances, I find it rather peculiar that Mr. Jordan did not go underground to ascertain precisely what had happened. If all of the principals were readily available a day after the discharge, it occurs to me that the natural thing for Mr. Jordan to have

done was to go underground with the inspector while the events were fresh in everyone's mind in order to view the areas which had been mined on the second shift the day before in order to ascertain all of the facts. Further, since Mr. Collins and Mr. Kennedy were readily available at the mine on August 24, I also find it rather peculiar that Mr. Jordan did not speak with them to ascertain their side of the events leading to their termination. I also find it rather strange that neither Mr. Jordan or Mr. Brewster spoke with any other members of Mr. Sweeney's shift to ascertain all of the facts. None of these individuals were called to testify on behalf of the respondent.

Mr. Jordan explained that he made no further inquiry because he assumed that Inspector Matney's comments that his inspection on August 24 detected nothing wrong with the conditions underground led him to believe that everything "had to be right" (Tr. 263). Mr. Matney denied speaking to Mr. Jordan when he encountered Mr. Collins and Mr. Kennedy at the mine office the day following the discharge. During their testimony, Mr. Brewster, Mr. Collins, and Mr. Kennedy did not mention that Mr. Jordan was present at the mine office on August 14, when Inspector Matney encountered the two men, and Mr. Brewster stated that he spoke with Mr. Sweeney after Mr. Collins and Mr. Kennedy left (Tr. 153). Mr. Matney testified that there was no doubt in his mind that he did not speak to Mr. Jordan on August 24, 1984.

Mr. Jordan stated that he could ascertain from the mine map and work shift records the mine areas which had been mined during the period August 3 to 24, 1984. I assume that those records would reflect the mine conditions in those areas, and that they would also possibly reflect whether or not certain areas had been bolted as the mining sequence took place. However, the respondent produced no records in this regard, nor did it call any witnesses for testimony in this case. All of the witnesses were either subpoenaed or called by MSHA, and Mr. Jordan, who was present at the hearing, was called as the court's witness. Although Mr. Sweeney mentioned that two other miners were present on the shift when he fired Mr. Collins and Mr. Kennedy, they were not called as witnesses, and the respondent produced no testimony or evidence from any other miners who may have also worked on the evening shift when Mr. Collins and Mr. Kennedy were fired.

In view of the foregoing, I have given little consideration to Mr. Jordan's defense that Inspector Matney assured him that everything was in order underground on the morning after the terminations. While it is true that Mr. Matney was

underground on the morning after the terminations of Mr. Collins and Mr. Kennedy, he testified that he could not tell whether any roof bolting had been done because pillar work had begun in a new area and he could not safely observe what had been done on prior shifts because the roof had fallen in up to the pillar break line.

I have also given little weight to the testimony by Mr. Jordan and Mr. Brewster with regard to the roof bolting practices or other conditions which may have existed on the second shift during the periods when the complainants were working on that shift. For the reasons stated earlier, I conclude and find that Mr. Brewster and Mr. Jordan had little or no presence underground during the second working shift and were in no position to personally observe any of the prevailing working or mine conditions during that shift.

Complainant Larry Collins testified that during his employment on the second shift, entire coal pillars were mined without any roof bolts ever being installed, and that this was a common practice. Complainant Earl Kennedy testified that during his employment on the second shift a roof bolter was present on the section but it was backed up out of the way and he never observed it being used to install roof bolts while the pillar splits were being mined.

Terry Kennedy, Earl's brother, testified that for the 2 days he worked on the second shift on August 13 and 14, 1984, no roof bolts were ever installed and the roof bolting mahine was never used. Terry Kennedy testified further that while no one ever directed him to work under unsupported roof, he did so anyway "to keep his job." He also asserted that he told Mr. Sweeney that the safety of the miners was being jeopardized by not roof bolting, and that Mr. Sweeney replied that since the mine was a small operation they "could get by with just about anything."

Jerry Kennedy, who is unrelated to the complainant, testified that during his employment on the second shift from August 13 to 23, 1984, he never observed the roof bolter in use or the roof being bolted. He testified that the pillars would be mined through to the end without any pillar roof bolting taking place, and that he observed scoop operators go under unsupported roof, and that this was a "common occurrence."

Bobby Mullins, who work the day shift as a pinner helper, testified that during his employment underground for 3 weeks

in August, 1984, he never observed the roof bolter in use installing roof bolts on the pillars.

The only testimony which directly contradicts the testimony of the complainants and the two corroborating witnesses who worked the same shift as the complainants with respect to whether or not roof bolting was ever done during the retreat pillar extraction process on the second shift is that of second shift foreman Hubert Sweeney. Mr. Sweeney testified that the roof was always bolted in accordance with the roof plan.

Mr. Sweeney confirmed that during MSHA's investigation of the complainants, he told MSHA special investigator Dewey Rife that Mr. Collins and Mr. Kennedy quit their jobs and that he (Sweeney) did not know why they had quit. At the hearing, Mr. Sweeney testified that he did not know why the complainants had quit and later admitted that he fired them for "goofing off" or not wanting to work. I find Mr. Sweeney's testimony to be inconsistent, and his failure to fully disclose to the special investigator all of the relevant facts concerning the terminations leads me to conclude that his testimony in this case is less than credible. Further, Mr. Sweeney was the second shift foreman and the safety of his crew was his responsibility. In these circumstances, I believe it is reasonable to conclude that any testimony by Mr. Sweeney must be viewed in light of a natural interest on his part not to put himself in a position of being held personally accountable for any adverse results which may flow from exposing miners to hazardous mining conditions or practices, or from any claims of discriminatory discharges.

After careful consideration of all of the testimony regarding the asserted absence of any roof bolting on the second shift during the complainants employment with the respondent, I find the testimony of the complainants and the corroborating witnesses to be credible and it supports a conclusion that roof bolting was not being accomplished on the second shift during all times relevant to the complaint.

During their employment at the mine on the second shift the complainants were working in low coal and were engaged in retreat coal pillar extraction. Such pillar extraction is in itself potentially more hazardous than normal mining because it includes self-induced roof falls behind the areas from which the coal has been removed, and the full natural roof support of the coal pillar which at one time served to support the roof has been removed or lessened because of the removal of the coal.

Mr. Kennedy testified that while operating his scoop he would be lying on his back, and Mr. Sweeney stated that after speaking with Mr. Collins and Mr. Kennedy underground about their "chit-chatting," he had to "crawl" out of the area on his hands and knees. Mr. Brewster testified that because of the low coal it was not unusual for roof bolts to become dislodged. Under all of these circumstances, I believe it is reasonable to conclude that the low coal heights posed an additional potential hazard to the complainants who were expected to work in these areas. Coupled with my finding that roof bolting was not being done during the pillar extraction process on the second shift, I conclude that during their employment on the second shift, the complainants were exposed to a serious hazard of a potential unplanned roof fall with resulting serious injuries.

Since I have concluded that the pillar splits were not roof bolted on the second shift during the complainants' employment on that shift, I also conclude and find that as scoop operators, Mr. Kennedy and Mr. Collins were necessarily required to work under unsupported roof and that section foreman Sweeney expected them to. In addition to the testimony of Mr. Collins and Mr. Kennedy that they were under unsupported roof when they operated their scoops, Mr. Brewster confirmed that assuming the pillars were not bolted, the scoop operators would be operating under unsupported roof. During his explanation of the respondent's roof-control plan and the procedures for pillar extraction, Inspector Clevenger stated that the cutting of a pillar for a distance of 20 feet without pulling out and bolting would violate the respondent's roof-control plan, and if the scoop operators worked the entire 40Äfoot pillar continuously with no bolting taking place, they would be 4 to 6 feet past permanent roof supports. Scoop operator Jerry Kennedy (not related to Earl), testified that it was a common occurrence for scoop operators to work under unsupported roof on the second shift.

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary of Labor/Robinette v. United Castle Coal Company, 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Company, 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (Feb. 1984), aff'd sub

nom., Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir.1985). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

I find the testimony of the complainants that they informed shift foreman Sweeney on August 23, 1984, that they would not continue to work under unsupported roof to be credible. Mr. Collins testified that at the time of the refusal, the roof was cracking and popping. Mr. Kennedy stated that prior to his work refusal, he observed a dislodged roof bolt and a large rock approximately 30 feet long which had slipped down with the bolt. After Mr. Sweeney "shimmed out the roof bolt," he instructed Mr. Kennedy to continue working his scoop beyond the slipped rock and up to the miner, but Mr. Kennedy refused. Mr. Collins testified that after discussing the situation further, he informed Mr. Kennedy that he would no longer work under unsupported roof, and that he and Mr. Kennedy so informed Mr. Sweeney.

Mr. Sweeney confirmed that he observed Mr. Kennedy and Mr. Collins sitting in their scoops at the pillar break carrying on a discussion. He then confronted them, and after some discussion, the two men left the mine. Mr. Sweeney subsequently first testified that he informed Mr. Brewster that the two had quit for no reason. He then testified that he informed Mr. Brewster that he had fired them for "goofing off." Mr. Brewster's subsequent offers to Mr. Kennedy and Mr. Collins to come back to work raises a strong inference in my mind that Mr. Brewster had some doubts about their termination, and that their contention that they were fired for refusing to work under unsupported roof has a ring of truth about it.

As discussed earlier, at the time of the discharges, the conditions which existed while the complainants were engaged in pillar extraction work presented a serious hazard of a potential unplanned roof fall. Further, Mr. Collins testified that he previously experienced rock falling on his scoop, that he was required to operate the scoop with malfunctioning lights, and that the roof was cracking and popping. Mr. Kennedy testified that a large rock had slipped out of the roof at the point where the roof had been bolted at the pillar break, and Terry Kennedy testified that he had previously informed Mr. Sweeney that the lack of roof bolting on the pillars was jeopardizing the safety of the miners. Given all of these circumstances, I

conclude and find that the complainants refusal to continue to work under unsupported roof on August 23, 1984, was justified. I further conclude and find that the complainants had a good faith, reasonable belief that continuing to work inby permanent roof support was hazardous.

The record in this case establishes that the complainants were satisfactory employees and had never been disciplined about their work. As a matter of fact Mr. Brewster confirmed that he hired them because of their reputation as good scoop operators. Further, there is no evidence that the complainants ever filed any safety complaints with MSHA or with mine management, or that they were considered troublemakers or malingerers.

The testimony and statements of Mr. Sweeney and Mr. Brewster concerning the termination of the complainants is inconsistent, and I have given it little weight. As indicated earlier, Mr. Sweeney's testimony that the two men quit, and his later statement that he fired them casts doubts as to his credibility. Likewise, Mr. Brewster's prior statements to the MSHA investigator, and his testimony at the hearing, indicates an inconsistency as to his understanding of whether the complainants were fired for cause or voluntarily quit their jobs. Contrasted with this testimony, is the consistent statements of the complainants, both during the hearing, and in their prior contacts with the MSHA investigator, Inspector Matney, and mine management, that they were fired by Mr. Sweeney because they refused to work under unsupported roof.

I conclude and find that the preponderance of the evidence and testimony adduced in this proceeding establishes that Mr. Kennedy and Mr. Collins were fired by shift foreman Sweeney because of their refusal to continue to work as scoop operators under unsupported roof. I further conclude and find that the work refusal by the two complainants was protected activity under the Act, and that their discharge by the respondent for this reason constitutes a violation of section 105(c)(1) of the Act.

The Relief Due the Complainants

Mr. Kennedy testified that after his discharge by the respondent on August 23, 1984, he was unemployed for approximately a month and a half. He then found a job with the Cumberland Coal Company earning $80 a shift, and worked there for 5 weeks. He then went to work for the Tripple G Coal Company earning $70 to $110, but was subsequently laid off

and has been unemployed since September 1, 1985 (Tr. 81Ä94). He worked continuously for Cumberland and Tripple G, until his lay off from the latter company, and then worked for approximately a month and a half at the Rookie Coal Company until his lay-off on September 1, 1985 (Tr. 94).

Mr. Collins testified that after his discharge by the respondent on August 23, 1984, he attempted to find other employment but could not find a job until April, 1985. He confirmed that he received no unemployment benefits because he had used up all of his eligibility for such benefits. He stated that he found a job in April, 1985, with the Coon Branch Construction Company where he is presently employed earning $80 per shift. Prior to this current employment, he worked for 2 weeks with the Bartlett Tree Trimming Company earning $4 an hour, but was laid off (Tr. 68Ä69).

The respondent opted not to file any posthearing arguments or to otherwise file any arguments mitigating its liability in these proceedings. In its posthearing brief, MSHA asserts that 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." Bailey v. ArkansasÄCarbon Co. & Walker, 3 MSHC 1145, 1150 (1983); Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 2 MSHC 1585, 1595 (1982). MSHA states that unless compelling reasons point to the contrary, the full measure of relief should be granted to an improperly discharged employee, including back pay with interest. Bailey v. ArkansasÄCarbona Co. & Walker, at 1150Ä1151. Since in this case the complainants were fired for engaging in protected activity, MSHA asserts that they must be made whole for any loss they suffered as a result of the discrimination, including full back pay. MSHA points out that the respondent bears the burden of proof with regard to any allegation of willful loss of pay. Secretary v. Metric Constructors, Inc., 3 MSHC 1259, 1265 (1984), aff'd sub nom. Brock on behalf of Parker v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir.1985).

MSHA points out that at the time Mr. Brewster offered the complainants their jobs back, they rejected the offer because they believed Mr. Sweeney would again require them to work under unsupported roof. Mr. Collins testified that when Mr. Brewster offered to take them back, he stated "We'll forget this ever happened." When Mr. Collins questioned whether they would again be required to work under unsupported roof,

Mr. Brewster responded "that's the way we do it" (Tr. 57), and when Mr. Collins asked for another work assignment, Mr. Brewster refused.

Mr. Kennedy testified that he and Mr. Collins advised Mr. Brewster that they would take their jobs back as long as they were not required to work under unsupported roof. He stated that Mr. Brewster replied "that's the way we always work," and that if they did not return to work they did not have a "leg to stand on" (Tr. 91).

I take note of the fact that at the time Mr. Brewster made the offer to the complainants to return to work, he did so in the presence of an MSHA inspector and after an inquiry by the inspector as to whether the complainants had in fact been fired for refusing to work under unsupported roof. Mr. Brewster testified that when he made the offer, the complainants refused and commented that the company would find another excuse to fire them. Mr. Brewster also testified that when he made the offer, it was contingent on his speaking with Mr. Sweeney to ascertain why he had fired the complainants. He subsequently was told by Mr. Sweeney that the complainants were fired for "goofing off," and he obviously believed Mr. Sweeney's version of the incident.

In view of the foregoing, I agree with MSHA's arguments that the reluctance of the complainants to accept Mr. Brewster's conditional offer to return to work, in the circumstances then presented, did not constitute a willful loss of pay on their part. I also agree with MSHA that the respondent has not established a willful loss or pay which would entitle it to mitigate its liability or obligation to make the complainants whole.

Mine operator Jordan testified that the No. 1 Mine was completely mined out and closed in March, 1985 (Tr. 227Ä228). He confirmed that his company reopened a new mine on October 15, 1985, but he was not aware that any employees who worked at the old No. 1 Mine are now employed at his new operation (Tr. 237). The hiring of new employees is left to the mine superintendent Leeland Hess, and he identified the mine foremen as Jim Cook and Gerald Hess (Tr. 237).

Mr. Sweeney testified that he is unemployed, and that he left his employment with the respondent on March 15, 1985 (Tr. 161). Mr. Brewster testified that he is currently employed by the Vesta Mining Company, and that he left the respondent's employ during the last week of March, 1985, because the No. 1 Mine "was mining out" (Tr. 110Ä112).

The back pay provisions of section 105(c), like the corresponding provisions of Title VII of the Civil Rights Act, appear to be modeled on section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c). Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1985). Questions arising under it should therefore be resolved by reference to NLRB precedent. Id. The general rule is that back pay is the difference between what the employee would have earned but for the wrongful discharge and his actual interim earnings. OCAW v. NLRB, 547 F.2d 598 (D.C.Cir.1976). In practice, this means gross pay minus net interim earning equals the award. Respondent, of course, is responsible for complying with applicable state and Federal laws on withholding. Cf. Social Security Board v. Nierotko, 327 U.S. 358 (1946).

MSHA asserts that since the respondent did not present any evidence that the complainants would have been discharged prior to the closing of the mine for non-discriminatory reasons, it has not met its burden of proof, and that back pay should be awarded to the complainants at the rate of $70 per day for the period from August 23, 1984 until the March 31, 1985. Taking into account the testimony of Mr. Collins and Mr. Kennedy with respect to their periods or unemployment and employment subsequent to their discharge, MSHA states that Mr. Kennedy is entitled to back-pay compensation in the amount of $2,170, with interest, which includes pay for Friday, August 24, 1984, and $350 per week for the next 6 weeks. With regard to the compensation for Mr. Collins, MSHA states that he is entitled to back-pay in the amount of $10,600, with interest, which includes pay for Friday, August 24, 1984, and $350 per week for the next 31 weeks with a deduction of $320 for his earnings with the tree trimming company. MSHA states that interest for both complainants should be determined in accordance with the Commission approved formula set out in Secretary, ex rel Bailey v. ArkansasÄCarbona Co. & Walker, 3 MSHC 1145 (1983); 5 FMSHRC 2042, 2050.

ORDER

The respondent IS ORDERED to pay to the complainant Earl Kennedy the sum of $2,170, less any amounts normally withheld

pursuant to state and Federal law, with interest to the net back-pay award at a rate of 9 percent until it is paid.(FOOTNOTE 1)

The respondent IS ORDERED to pay to the complainant Larry Collins the sum of $10,600, less any amounts normally withheld pursuant to state and Federal law, with interest to the net back-pay award at a rate of 9 percent until it is paid.(FOOTNOTE 1)

Payment is to be made to both complainants within thirty (30) days of the date of this decision and order.

Civil Penalty Assessment

On the basis of my prior findings and conclusions, the respondent's discharge of the complainants was in violation of section 105(c)(1), and a civil penalty assessment may be levied against the respondent for the violations.

MSHA argues that the violation was very serious, and it requests a civil penalty assessment in the range of $1,000 to $1,200. I agree that the violations were serious. The respondent's discharge of the complainants for refusing to work under unsupported roof constitutes a negligent disregard for their safety, and the respondent has advanced no arguments in mitigation of the violations.

The record reflects that the respondent is a small mine operator, and the No. 1 Mine is now closed. However, mine operator Jordan is still in business and operates other mines. The respondent has not established that the payment of a civil penalty in the amounts suggested by MSHA will adversely affect its ability to continue in business, and I conclude that it will not.

MSHA has submitted exhibits CÄ9 and CÄ10, two computer print-outs listing the assessed violation history for the Raven Red Ash Coal Corporation No. 1 Mine for the period August 23, 1982, to August 22, 1984 (CÄ9), and the violations history for all mines controlled by Mr. David Jordan for the period August 23, 1982, to August 22, 1984, (CÄ10). Exhibit CÄ9 reflects 42 section 104(a) citations and one section 104(a)Ä107(a) order for which the respondent was assessed $3,130, and has paid nothing. Exhibit CÄ10 reflects 157 section 104(a) citations and three orders for which the respondent was assessed $7,069, and has paid $1,255.

During the course of the hearing, the respondent objected to any consideration of violations issued prior to August 1984, on the ground that the mine was owned by a different corporation, the Virginia and West Virginia Coal Corporation, and that Mr. Jordan was not the owner of that company. MSHA submitted information to the contrary by letter and enclosures of January 9, 1986, and the respondent filed nothing in response to that information and has not rebutted MSHA's assertion that Mr. Jordan was the owner and controller of both corporations. In an order issued by me on February 13, 1986, the respondent's objections were overruled, and I concluded that the compliance history of the Raven Red Ash Coal Corporation, as well as the prior corporate entity for the No. 1 Mine, both of which were owned and operated by Mr. Jordan, are relevant to any civil penalty assessment levied in this proceeding. My interlocutory ruling in this regard is herein REAFFIRMED. The respondent has had ample opportunity to challenge the accuracy of the information contained in the computer print-outs, but it has not done so.

I take note of the fact that while the respondent has been assessed civil penalties for its prior infractions of the mandatory safety standards promulgated by MSHA under the Act in Part 75, Title 30, Code of Federal Regulations, it has made few payments. According to the computer codes reflected on the print-outs, most of the assessments have been the subject of MSHA demand letters for payment, and many have ended up as default judgments filed in the United States district court. Although Mr. Jordan is still in business and operating other mines, he has apparently failed to meet his obligations in paying civil penalties, and I have considered this in the civil penalty assessed for the violation in question. I have also considered the fact that the respondent has not previously been the subject of discrimination complaints or violations of section 105(c)(1) of the Act.

In view of the foregoing, and after consideration of the civil penalty criteria found in section 110(i) of the Act, I conclude and find that a civil penalty assessment of $1,000 is reasonable and appropriate for the violations which are the subject of these proceedings.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $1,000 for the violations in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

FOOTNOTE START HERE

1 This is the current adjusted prime rate used by the Internal Revenue Service for underpayments and overpayments of tax. Rev. Ruling 79Ä366. The NLRB also uses this figure to compute interest on back pay awards. Florida Steel Corp., 231 N.L.R.B. No. 117, 1977Ä78 CCH NLRB Para. 18,484; North Cambria Fuel Co., Inc., v. N.L.R.B., 645 F.2d 177 (3rd Cir.1981); Secretary ex rel Bailey v. Arkansas Carbona Coal & Walker, 5 FMSHRC 2042, 2050 (Dec. 1983).