

CCASE:  
ODELL MAGGARD V. CHANEY CREEK & SOL (MSHA)  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

ODELL MAGGARD,  
COMPLAINANT

v.

CHANEY CREEK COAL CORPORATION,  
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 86-1-D  
MSHA Case No. BARB CD 85-48

No. 3 Mine

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

ODELL MAGGARD,  
COMPLAINANT

v.

DOLLAR BRANCH COAL  
CORPORATION,  
AND  
CHANEY CREEK COAL CORPORATION,  
RESPONDENTS

DISCRIMINATION PROCEEDING

Docket No. KENT 86-51-D  
MSHA Case No. BARB CD 85-48

No. 3 Mine

DECISION

Appearances: Tony Opegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky, for Odell Maggard; Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor; Thomas W. Miller, Esq., and Julie Goodman, Esq., Miller, Griffin & Marks, P.S.C., Lexington, Kentucky, for Respondents

Before: Judge Melick

Background

On June 11, 1985, Odell Maggard filed a complaint with the Department of Labor, Federal Mine Safety and Health Administration (MSHA) alleging that on January 10, 1985, he had been discharged in violation of section 105(c)(1) of the

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Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et. seq., the "Act." (FOOTNOTE 1) On the same date the Secretary of Labor commenced his investigation pursuant to section 105(c)(2) of the Act.(FOOTNOTE 2) Subsequently, after the expiration of the 90-day notification period following the receipt of that complaint provided under section 105(c)(3) of the Act, the Secretary advised Mr. Maggard by letter that the investigation of his complaint had not been completed and that it had not yet been determined whether or not a violation of section 105(c) had occurred.(FOOTNOTE 3) That letter reads in part as follows: "[b]y the terms of the Act and the Federal Mine Safety and Health Review Commission's procedural rules, you have a right to file your own complaint with the Commission because the Secretary has not completed his consideration within 90 days."

Thereafter, on October 1, 1985, Mr. Maggard filed his own complaint with this Commission pursuant to section 105(c)(3) and Commission Rule 40(b), 29 C.F.R. 2700.40(b).(FOOTNOTE 4) On December 14, 1985, Maggard was informed by MSHA of the Secretary's determination that a violation of section 105(c) had occurred. The Secretary thereafter on December 26, 1985, filed his own complaint with this Commission on behalf of Mr. Maggard against Dollar Branch Coal Corporation under section 105(c)(2) of the Act.(FOOTNOTE 5)

In his complaint the Secretary states that Maggard's complaint filed October 1, 1985, under section 105(c)(3), had been filed before the Secretary "had an opportunity to determine whether or not a violation of the Federal Mine Safety and Health Act of 1977 had occurred" and maintains for that reason that Maggard's complaint should now be dismissed.

#### Motion to Dismiss

In his motion to dismiss the Secretary argues that he need not comply with the requirements of the Act that he make a determination as to whether or not discrimination has occurred within 90 days of his receipt of a complaint. He further argues that should the aggrieved individual file his own complaint under section 105(c)(3) after the statutory 90-day period, that case will become null and void as lacking a jurisdictional basis if the Secretary later decides to file a complaint of his own under section 105(c)(2).

While the Secretary has no standing to interpose a motion to dismiss in Maggard's section 105(c)(3) case, the Secretary's motion nevertheless raises a threshold jurisdictional question. Indeed the Act itself does not provide express guidance as to the procedures to be followed by an individual complainant under section 105(c) in the event the Secretary does not make his decision (as to whether a violation of the Act has occurred) within the 90-day time frame set forth under section 105(c)(3).

It is clear however that Congress intended that the miner have the right to file a complaint on his own upon the failure of the Secretary to act within the prescribed 90-day period. Indeed in recognition of this Congressional intent this Commission promulgated its Rule 40(b) under which the aggrieved miner is specifically provided the right to file his own complaint under these circumstances. This administrative interpretation is entitled to great weight. *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 104 S.Ct. 2778 (1984); *Manufacturers Ass'n v. National Resources Defense Council*, 105 S.Ct. 1102 (1985); *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 102 S.Ct. 38 (1981) and *Zenith Radio Corp v. United States*, 98 S.Ct. 2441 (1978). Such a construction is, moreover, consistent with the liberal construction to be accorded safety legislation. *Whirlpool Corp. v. Marshall*, 100 S.Ct. 883 (1980). More specifically this construction is essential to accomplish the objective of the statute and to avoid unjust and oppressive consequences to aggrieved miners where the Secretary fails to act within the prescribed time. *Caminetti v. United States*, 37 S.Ct. 192 (1917). Administrative notice may be taken of a recent case in which the Secretary delayed almost 4 years before deciding not to represent a miner on his 105(c) complaint. (*Dan Thompson v. Cypress Thompson Creek, MSHA Case No. 82-27*). The miner is seriously prejudiced by such delay as witnesses move, memories fade and documents are lost or destroyed, and may suffer unwarranted economic hardship. Such a result is clearly contrary to the objectives of the Act.

Under the circumstances it is clear that this judge has jurisdiction to entertain Mr. Maggard's case (under section 105(c)(3) and Commission Rule 40(b)) as well as the Secretary's case brought on behalf of Mr. Maggard under section 105(c)(2) of the Act. The Secretary's Motion to Dismiss is denied.

#### The Merits

In order to establish a prima facie violation of section 105(c)(1) of the Act, it must be proven by a preponderance of the evidence that Mr. Maggard engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. *Secretary ex rel. David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. *Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir.1981). See also *Boitch v. FMSHRC*, 719 F.2d 194 (6th Cir.1983) and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

Complainant's Case

Until the day before his departure on January 10, 1985, Odell Maggard had been working for the Dollar Branch Coal Company as the off-side shuttle car driver on the 3 p.m. to 11 p.m. shift. In this capacity he was transporting coal from the continuous miner to the feeder. As he entered the mine on January 10, 1985, he learned from Howard "Champ" Muncy, the second shift boss, that he was being switched from shuttle car operator to miner-helper. In this latter capacity he was expected to prevent the 440 volt power cable attached to the continuous miner from being run over by the miner as it backed up.

According to Maggard the power cable was not in good condition. He counted 8 temporary splices covered with tape and observed that 1 or 2 were lying in water "smoking." Shortly after they began cutting coal as Maggard was handling the cable 2 to 3 feet from a "bad splice" he was shocked. Maggard told Champ and miner operator Howard "P.J." Holland that the cable "bit" him. In response Champ merely patted him on the back and told him to "try to make it."

Later that evening as Maggard was again pulling the cable he was knocked "flat on [his] face" from electrical shock. Maggard was unable to use his arms to get up and they were numb for 20 minutes. Maggard says that he reported this incident to Champ and asked if he would fix the cable. Champ refused explaining that the miner had already been down on the shift. Champ also refused to fill out an accident report because Maggard had "only been juiced." Maggard then asked Champ for alternate work and when that request was rejected he refused to continue pulling the cable. He considered it to be "life threatening." He was then told to "pull the cable or else." Rather than continue, Maggard chose to leave the mine.

One of Maggard's coworker's Ronald "Spider" Talbert, testified that around the time of Maggard's discharge he had been relieving the regular miner-helper during lunch hours on a regular basis. He had also worked several full shifts pulling the cable when the regular miner-helper failed to show up. Talbert also observed that the miner cable was not then in good condition. The insulation was broken in several places with "naked wires" exposed. He was reluctant to pull the cable because he was regularly "juiced" by it at least twice a shift. Talbert recalled that Maggard told him that he was quitting because the cable had "juiced" him.

Another miner, Roscoe Nantz, also had occasion to pull the miner cable during January 1985. He too observed that the cable insulation had been cut off and taped in several locations. He saw "naked wires" and observed that the cable

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would smoke where it contacted the water. He had been shocked "quite a lot." It hurt and numbed his body. He reported these conditions to Champ but Champ told him to "keep running it" and nothing was done to correct the problem.

Gerry Michael Coots was a roof bolter operator at the mine until December 27, 1984. He observed that the trailing cable on the roof bolter was also then "not in that good a shape." The splices were "raggedy" and the tape had been torn off exposing "bare wires." He had seen this cable smoke where it was lying in the water and had been "juiced" while handling the cable.

MSHA Inspector Sylus Adams, inspected the subject mine on October 15 and 16, 1984 and on January 10 and 28, 1985. On the latter occasion he cited a violation for a temporary splice on the trailing cable within 25 feet of the miner. According to Adams the trailing cable carried 480 volts and a person could be shocked holding a wet cable even 3 to 4 feet from a bad splice. On his earlier inspections he did not have occasion to check the trailing cable.

Essie "P.J." Holland was the continuous miner operator on the evening Maggard was discharged. He observed that his trailing cable, the one Maggard was pulling, was not in good condition that evening. Bare copper wires were exposed and "sticking out" and the cable was smoking where the floor was wet. Maggard was only 10 feet away when Holland saw him get "juiced" and knocked into a water hole. Holland stopped the miner to see if Maggard was alright. Champ Muncy was also present and Maggard told both Holland and Muncy that he had been "juiced." According to Holland, Maggard told Champ that the cable "needed fixing" but Champ responded only that "we've been down too long and we can't fix it now." Holland also overheard Champ turn down Maggard's request for alternate work. Maggard then left the section and about 5 minutes later Hobert Turner came to help with the cable. Holland himself had been shocked while handling the cable only 2 weeks before. He too had told Champ about being shocked and Champ complained that the company would not give him anything to fix it with.

MSHA electrical supervisor Henry Standafer testified that even a pin hole in a trailing cable in a wet atmosphere could result in fatal electrical shock up to 15 feet away. Such a shock could also result in irregular heart beat, slurred speech and pain in the limbs. According to Standafer smoke from a cable splice indicates that the splice was not properly made and that

Respondents' Case

As previously noted Champ Muncy was shift boss on Odell Maggard's last day. Muncy testified that he met with the mine superintendent before that date concerning among other things shifting Maggard from shuttle car operator to miner-helper and replacing him with Bryant on the shuttle car. According to Muncy, Maggard was "slow on the car and not hauling as much coal as the others." After Bryant operated the shuttle car production seemed to increase. Muncy conceded however that he never checked the production records to verify whether production had in fact improved after Bryant took over. According to Muncy when Maggard was told of the job switch he "didn't like it" and said he was "going to quit." Muncy asserts that Maggard did not complain about being shocked by the trailing cable and claims that he was not aware of any problems with the cable. According to Muncy there was then only one permanent splice within 25 feet of the miner and no temporary splices in any part of the cable.

According to Muncy a newly rebuilt miner with a new trailing cable had been brought into the mine 1 1/2 months earlier. The cable was attached to the miner and had no splices in it. It was the same cable in place on January 10, and at that time it had only 2 permanent splices. Muncy also maintains that there was no water at the face area at the time Maggard "quit" although the coal was damp around the continuous miner from the continuous miners spray.

Wayne Howard was working on the second shift on January 10, 1985 as a bolting machine operator. According to Howard there was no part of the face area that had an inch of water in it. It was only "a little bit damp." According to Howard the subject trailing cable was in good condition on January 10, and indeed was the same cable still being used at the time of the hearing (in January 1986). He had an opportunity to examine the trailing cable from 50 to 200 feet from the miner since he had to hang the cable. He was not shocked and saw no bad splices. In fact he claims he had never seen a bad splice on the cable. Howard denied stating to Odell Maggard on the previous Tuesday that he did not know about the condition of the cable.

On January 9, 1985, Charles Bryant had been working as a miner-helper. On January 10, he took over Odell Maggard's job as shuttle car driver. He had been pulling the miner cable as miner-helper for the 6 months preceding this transfer. According to Bryant the cable was "new" and he could not recall ever having been shocked while handling it. He later testified that he could not "recall" getting shocked within 10 to 50 feet of the continuous miner on the 9th of January. He had been wearing protective gloves and gave the gloves to Maggard on January 10, after he was switched to the



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miner. According to Bryant, Odell told him on his last day that he "quit," that he "wasn't going to pull no miner cable" and that he was not "going to work that hard." Bryant denied that Maggard ever told him that he had been shocked. Bryant acknowledged however that only a few days before the hearing he told Maggard's attorney that he could not remember the condition of the cable very well.

Caleb Napier was the outside loader man on the second shift on January 10, and saw Odell come out of the mine late in the shift. According to Napier, Maggard said "he quit" because they took him off the car. Hobert Turner was setting timber on January 10, 1985, but when Maggard left he took over the job of pulling the cable. Maggard reportedly told Turner that he did not like being switched to miner-helper so he quit. Turner claims that on the ride home later that evening Odell again said that he quit because of the change in jobs. Turner states that he pulled the cable until the end of the shift and did not get shocked. Turner saw no temporary splices and noted that the cable was "very good" and that "it looked fairly new." He saw no exposed wires in the 30 feet of cable that he worked with that night.

Chaney Creek superintendent Darryl Napier, a certified electrician, claims that based on the testimony of the Respondents' witnesses it was impossible for Odell Maggard to have been shocked as alleged. Napier was involved in the decision to transfer Odell Maggard from shuttle car operator because he was "slow" and did not fill up the car. He thought Maggard was a "lazy" shuttle car operator. Napier conceded however that he had previously told an MSHA investigator that Maggard was a "good" shuttle car driver. He explained at hearing that he meant Maggard was a good driver only between picking up loads of coal.

#### Rebuttal Evidence

In rebuttal, Holland testified that Charles Bryant had been his regular miner-helper and indeed had complained to him as well as to "Champ" (Muncy) about being shocked on occasions prior to January 10, 1985. Hobart Turner also complained to Holland about the cable "juicing" him after Odell Maggard had left the mine.

Jerry Maggard (Odell Maggard's cousin) was working the second shift on January 10, 1985, as the right side shuttle car driver. Although he testified that he could not then remember the events occurring a year ago, he conceded meeting the night before with government attorney, W.F. Taylor at which time he said that he saw Odell throw the cable down and jump. In addition, Jerry Maggard then told Taylor that Odell

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said that he was leaving because he was juiced, that the cable would "just eat you up" and that every one on the section knew that the cable was "in real bad shape." Jerry Maggard told Taylor that he would like to come in and testify for Odell but he could not "cut off his head."

Odell Maggard was recalled as a witness and testified that at the meeting on January 10, 1986, Jerry Maggard told him that he saw (Odell) get shocked but that he (Jerry) could not testify for him because they did him a favor giving him a lay-off so that he could become eligible for unemployment compensation. Odell also denied saying anything about quitting because he had been taken off the shuttle car. Odell Maggard also stated that Wayne Howard had told him only a few days before these hearings that he could not remember the condition of the cable.

W.F. Taylor, an attorney with the U.S. Department of Labor, also testified in rebuttal. Taylor had spoken with Jerry Maggard the previous evening in the presence of Odell Maggard and his attorney. Taylor related his conversation with Jerry as follows:

"As I presented my credentials to Mr. Jerry Maggard, I told him I needed to speak with him about the discharge of Mr. Odell Maggard at the Chaney Creek mine, the White Oak mine. Mr. Jerry Maggard stated to me at that point that he couldn't help my any. Without any other questions being asked, he then told me that he remembered seeing Odell Maggard getting shocked. I asked him what he was doing at the time that he observed . . . Odell Maggard getting shocked, and he said that he was driving the right side shuttle car and that he was near the area where Odell Maggard was pulling the trailing cable. I asked Jerry Maggard how he could determine that Odell Maggard had been shocked. He stated to me that he could see him as he was . . . picking up and pulling on the trailing cable, that he threw it down and he threw his arms back and he jumped, and [Jerry] took that to indicate that [Odell] had received a shock. Mr. Jerry Maggard also told me that a few minutes later Mr. Odell Maggard approached him and asked him for the keys to his Scout and that Odell Maggard at that point told him he was leaving . . . He asked him why he was leaving, and [Odell] stated that he was leaving because he had been juiced by the cable."

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"I asked him if he had . . . ever handled the trailing cable and he stated that he had, and I asked him if he had received shocks, and he told me that he had, that the trailing cable would just eat you up."

Jerry Maggard also told Taylor that he would "like to come in and testify" for Odell, but that he "couldn't cut off his own head to do it," that "he knew the condition of the cable" and that "everyone on the section knew that the cable was in . . . real bad shape."

#### Evaluation of the Evidence

Witness credibility is critical to resolution of this case. In this regard, I find the Complainant and his supporting witnesses to be the more credible and accordingly I find that he has proven that his discharge was based solely on his refusal to work because of a reasonable and good faith belief that to continue working would have been hazardous. See *Miller v. FMSHRC*, 687 F.2d 194 (7th Cir.1982); *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981).

Significantly the Complainant's testimony that he was thrown to the mine floor by an electrical shock from the continuous miner's trailing cable was fully corroborated by P.J. Holland, the continuous miner operator, who witnessed the event. In addition, the Complainant's testimony that he was also shocked by this cable prior to the severe shock which precipitated his work refusal was confirmed by the out-of-court statement of Jerry Maggard.

Four other miners, namely P.J. Holland, Ronald Tolbert, Roscoe Nantz, and Jerry Maggard also attested to the dangerous condition of this cable in that they had all been shocked by the same cable at or near the time of the Complainant's discharge. Respondents attempted to discredit Tolbert and Nantz through the testimony of Charles Bryant, who stated that he had never been replaced as the miner-helper prior to January 10th. Bryant's testimony in this regard was however directly contradicted by the miner operator Holland, and even by foreman Muncy, another of the Respondent's witnesses. Muncy and Holland both testified that Bryant was replaced as the miner-helper nearly every day during the lunch break. Bryant's testimony is therefore without credibility in itself. Finally, I find no reason or motivation for these laid-off miners not to testify truthfully that they had been shocked by the trailing cable.

The testimony concerning the condition of the trailing cable and electrical shock suffered by those handling it is also indirectly corroborated by the MSHA electrical expert Henry Standafer. Standafer stated without contradiction that a miner could suffer electrical shock while handling a wet

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trailing cable having only a "pinhole" or defective insulation or splices. Respondent's own witnesses acknowledged that the area around the miner was damp from water sprays. Within the framework of this evidence I find that Odell Maggard did indeed suffer serious electrical shock while handling the trailing cable as alleged.

The conversation between Maggard and Muncy at the time of Maggard's work refusal on January 10th is also in dispute. Maggard states that he told Muncy he had been shocked, that he asked Muncy to fill out an accident report and to repair the cable, and then asked to be assigned to other work when Muncy refused to stop production to repair the cable. Maggard denied mentioning to Muncy the fact that he had been taken off the shuttle car. Muncy, on the other hand, claimed that Maggard did not tell him he had been shocked, and did not ask that an accident report be completed. Rather, Muncy claimed that Maggard was simply mad because he had been reassigned as the miner-helper.

I find Maggard's version of this conversation the more credible. The only other witness to this conversation was P.J. Holland, the miner operator, and Holland's testimony supports Maggard. Holland heard Maggard ask Muncy to repair the cable and Muncy's refusal because the section had been "down too long." Holland also heard Maggard ask Muncy if he had "anything else for him to do." The testimony of both Maggard and Holland that Muncy said the section had been "down too long" is also consistent with the circumstances surrounding Maggard's work refusal. Since the mine had not been running coal for the first 3 hours of the shift it may reasonably be inferred that Muncy would have been particularly resistant to any further delays in production at that time.

In addition, it is not realistic to believe that Maggard would leave a good paying job if Muncy had told him, as Muncy claims, that he would only have to pull the miner cable for a couple of days until he was reassigned to another position. This is particularly true since the job switch involved no cut in pay. Maggard had also previously been removed from his shuttle car for 2 hours on January 9th, but did not then quit his job.

Maggard was no stranger to the miner-helper position since he had pulled the trailing cable about 15 times as a substitute prior to January 10th. Thus when Maggard was reassigned at the beginning of the shift on January 10th he knew what to expect. He nevertheless worked about half a shift prior to his work refusal. Hobert Turner, a witness for Respondent also testified that Maggard did not complain to Muncy when he was given the new job assignment at the

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beginning of the shift on January 10th. It is therefore highly unlikely that Maggard would have quit his job in the middle of a shift but for some extraordinary reason such as unsafe working conditions.

Other critical aspects of Respondent's case also lack credibility such as the testimony of current employees Charles Bryant and Hobert Turner. These employees pulled the continuous miner cable directly before and after Maggard's work refusal. Particularly noteworthy is Bryant's testimony about his alleged conversation with Maggard on January 10th and his allegations concerning the condition of the trailing cable. Contrary to his testimony at hearing Bryant had previously expressed a complete lack of knowledge about the case to an MSHA investigator, and had also stated that he could not remember the condition of the trailing cable on the day in question. Three of Bryant's former co-workers, Holland, Nantz and Coats also testified that they had heard Bryant complain about the condition of the trailing cable while he was the miner-helper. Under the circumstances I can give but little weight to Bryant's testimony.

Wayne Howard's testimony about the condition of the trailing cable on January 10th is similarly discredited because of his statement to Maggard 2 days earlier that he could not remember the condition of the cable because it was "too far back" in time. The failure of Respondents to have identified these two witnesses until the day before the hearing and in violation of the prehearing order also suggests, under the circumstances, an attempt to protect them from pretrial scrutiny and anticipated inconsistent testimony.

Hobert Turner, presently a foreman for Respondent Chaney Creek, also described the trailing cable as being in good condition on January 10th. However, P.J. Holland, who worked with Turner that night, testified that Turner was also shocked by the cable after replacing Maggard as the miner helper. While Respondents argue that the same trailing cable handled by Maggard on January 10th was found by Inspector Adams on January 28th to be in good condition there was ample time during this 18-day interval for repair of the improper splices. In this regard the MSHA electrical inspector testified that a temporary splice can be converted into a permanent splice in only about an hour. Thus all of the "bad splices" present on January 10th could have been repaired by January 28th.

Respondents also attack the Complainant's credibility based on his admission that he testified untruthfully at his deposition about his conversation with Jerry Maggard prior to leaving the mine on January 10th. Maggard did however correct this false testimony while still at the deposition, and he testified consistently with that corrected testimony

at the hearing. Maggard's explanation for this testimony that his cousin had asked him "to keep him out of it," is understandable considering the hostility and loss of memory exhibited by Jerry Maggard when called to testify in this matter.

Under the circumstances I find that the Complainant has met his burden of proving that he was discharged by Chaney Creek Coal Corporation on January 10, 1985, in violation of section 105(c) of the Act. Accordingly Chaney Creek Coal Corporation and Dollar Branch Coal Corporation are directed to reinstate the Complainant, Odell Maggard, to his former or similar position (at the same rate of pay) held prior to his discharge on January 10, 1985. These cases will accordingly be set for further hearings on the amount of damages, costs and attorney's fees to be awarded the Complainant and a final decision will not be issued until these matters are determined.

#### Civil Penalty

The unlawful discharge found in this case was serious in that it would be expected to have had a chilling effect on the exercise of protected rights by those miners exposed to hazardous conditions. Respondent's foreman, Champ Muncy, was also negligent in denying the Complainant alternate work in the face of clearly hazardous conditions. In assessing a penalty herein I also have considered that the operators are small in size, and have no reported history of violations of section 105(c). Accordingly, I find that a civil penalty of \$1,000 is appropriate. A corresponding order in this regard will be issued when the final decision is rendered in these proceedings.

Gary Melick  
Administrative Law Judge

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

"No person shall discharge . . . or cause to be discharged . . . or otherwise interfere with the exercise of the statutory rights of any miner, . . . in any . . . mine subject to this Act because such miner, . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, . . . of an alleged danger or safety or health violation in any mine . . . or because of the exercise by such miner, . . . on behalf of himself or others of any statutory right afforded by this Act."

2 Section 105(c)(2) reads in part as follows:

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

appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint . . . . "

3 Section 105(c)(3) of the Act provides in part as follows:

"Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)."

4 Commission Rule 40(b) reads as follows:

"A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary."

5 The Secretary amended his complaint without objection at the commencement of hearings on January 15, 1986, to propose a civil penalty and to include Chaney Creek Coal Corporation as a party Respondent.