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J. PELEHAC, JR. V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

JOSEPH PELEHAC, JR., COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. PENN 89-226-D
v.	MSHA Case No. PITT CD 89-15
CONSOLIDATION COAL COMPANY, RESPONDENT	Dilworth Mine

DECISION

Appearances: Edward D. Yankovich, Jr., President, UMWA District No. 4, Masontown, Pennsylvania; Michael J. Healey and Paul Girdany, Esqs., HEALEY WHITEHILL, Pittsburgh, Pennsylvania, for the Complainant; Walter J. Scheller, III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Joseph Pelehac against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, (the Act). Mr. Pelehac filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), and he was advised by MSHA that after review of the information gathered during its investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred. A hearing was held in Washington, Pennsylvania, and the complainant filed a posthearing brief. The respondent did not file a brief, but I have considered all of the oral arguments made by the parties during the course of the hearing.

The complainant contends that the respondent discriminated against him when it refused to pay him wages or overtime pay after he was required to remain at work after his normal work shift on 3 days in order to be interviewed by company safety officials in connection with a company accident investigation, and to give testimony in the course of an MSHA accident investigation. The complainant asserts that two of his fellow miners

who participated in the accident investigation were paid overtime for the extra time they were required to stay over beyond their normal shifts, and that the respondent's refusal to pay him was based on the fact that his testimony was not favorable to the respondent and did not absolve the respondent of all responsibility for the accident.

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) 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.

Issue

The issue presented in this case is whether or not the respondent's refusal to pay the complainant for his time beyond his normal work shifts during the accident investigations constituted illegal discrimination under the Act. Additional issues raised by the parties are disposed of in the course of my adjudication of this matter.

Complainant's Testimony and Evidence

Complainant Joseph Pelehac confirmed that on Tuesday, January 24, 1989, an accident occurred on one of the barges where he was working. His normal quitting time was 2:15 p.m., but mine superintendent Louis Barletta informed him that he could not leave the mine because safety inspectors were on their way to investigate the accident. Mr. Pelehac stated that he did not leave work until 5:45 p.m., and was not paid for the extra hours he was required to stay at work that day.

Mr. Pelehac stated that he was scheduled to work the 12:01 a.m. night shift on Tuesday, January 24, 1989, but since he got home so late, he asked Mr. Barletta if he could work the day shift on Wednesday, January 25, 1989, and Mr. Barletta agreed. Mr. Pelehac stated that he reported to work at 8:00 a.m., that morning, but was called out of the mine to be interviewed by the inspectors. After speaking with an inspector for an hour, he returned to work and finished his work shift at 4:00 p.m., and was paid for the entire shift, including the hour he spent with the inspector. After finishing his work, he was again required to stay over to speak with the inspectors, and remained at the mine for approximately 2 hours beyond his normal 4:00 p.m., quitting time, and was not paid for these extra hours. He was

also required to stay two extra hours on Thursday, January 26, 1989, and was not paid.

Mr. Pelehac stated that he has worked at the mine for 12 years, and has worked for the respondent for six years. He confirmed that he has worked overtime "off and on" during these years, was always paid when asked to stay over, and has always assumed that he would be paid when told by management to stay. The instant case was the first time he was told to stay and was not paid. He conceded that this was the first time he was asked to stay to participate in an accident investigation (Tr. 8-14).

The parties stipulated that during the 3 days in question when Mr. Pelehac was requested to stay over to be interviewed by the accident investigators or mine management, he performed no work in his regular job classification (Tr. 16-17).

Mr. Pelehac confirmed that he made no safety complaint concerning the accident (Tr. 18). Respondent's counsel pointed out that the first day Mr. Pelehac was required to stay over, January 24, 1989, was in connection with the accident investigation conducted by mine management to ascertain the facts, and that the following 2 days, January 25, and 27, 1989, were in connection with the accident investigation conducted by the state and Federal mine inspectors (Tr. 20; 68). Mr. Pelehac confirmed that this was the case (Tr. 22-24).

Mr. Pelehac conceded that when he filed his initial complaint with MSHA on March 10, 1989, he did not allege that he was not paid because he gave unfavorable testimony against the respondent, and simply stated that he was discriminated against because he was not paid for the extra time he stayed at work (Tr. 25). When asked why he not mentioned his "unfavorable testimony" allegation, he responded "I didn't think it was necessary" (Tr. 26).

Mr. Pelehac stated that the respondent was attempting to establish that the accident victim, Paul Bandish, had violated a safety procedure when he was injured and that his injuries were the result of his violation. Mr. Pelehac believed that the respondent refused to pay him for the extra hours in question because "because I couldn't give testimony to the fact to say that he was doing something wrong" (Tr. 27). Mr. Pelehac confirmed that no one from management ever suggested or inferred that he should testify "one way or the other" (Tr. 28).

Mr. Pelehac did not believe that Mr. Bandish violated any safety rules, and he stated that he (Pelehac) was only a trainee and that Mr. Bandish was training him to take his job. Mr. Pelehac stated that he had no idea why the respondent may have taken the position that Mr. Bandish may have violated a

safety rule and caused the accident (Tr. 28). He further explained as follows at (Tr. 28-29):

> A. In the investigation they kept saying like, you're sure he didn't do this, you're sure he didn't do that, you're sure he didn't hit this thing with a hammer instead of doing it the proper way. And I said, no. They kept inferring, did he hit this with a hammer, did he hit this with a hammer.
>
> JUDGE KOUTRAS: Okay.
>
> A. And I said no.
>
> JUDGE KOUTRAS: Who?
>
> A. Lou in particular said that several times.
>
> JUDGE KOUTRAS: How about during the investigation on the 25th and the 26th by the MSHA and State people? Did those inspectors or investigators ask you the same questions?
>
> A. No. I don't believe they ever asked me.
>
> JUDGE KOUTRAS: Okay.
>
> A. But on each day he asked me or someone from management asked me.

Mr. Pelehac confirmed that he filed a grievance with his foreman over the pay issue, and that after he was informed that the respondent had no contractual obligation to pay him, this "ended" his grievance (Tr. 30).

Mr. Pelehac confirmed that the respondent was not served with any violations as a result of the testimony which he gave during the accident investigation. He believed that it would be in the respondent's best interest to try and establish that Mr. Bandish was negligent and "that they would want me to say that he did, in fact, do something wrong which I wasn't on the job long enough to know if he did something wrong or not" (Tr. 33). He confirmed that no one from management ever suggested that he not tell the truth (Tr. 34).

Mr. Pelehac believed that the repeated questioning by management was for the purpose of determining whether or not Mr. Bandish may have been negligent or violated any safety rule that resulted in his injuries in order to mitigate the respondent's liability, and that he did not find this unusual (Tr. 35). When asked to specify any testimony on his part that he believed would have been damaging to the respondent, Mr. Pelehac responded

as follows (Tr. 35): "Because if Mr. Bandish tries to assume at a later date, which I don't believe he has yet, they would have evidence that I, in fact, said that Mr. Bandish did violate a safety rule."

Mr. Pelehac stated that he gave no testimony which would indicate that Mr. Bandish violated any safety rule, and he believed that the respondent suspended Mr. Bandish for 5 days, effective when he returned to work, but that to his knowledge, Mr. Bandish has not returned to work since he is still recovering from his injuries (Tr. 36). Mr. Pelehac confirmed that Mr. Bandish contested his 5-day disciplinary suspension through arbitration, and that he (Pelehac) testified at the arbitration hearing held on November 13, 1989, and that the decision of the arbitrator is still pending (Tr. 38). Mr. Pelehac further confirmed that he was again questioned by the respondent during the arbitration hearing (Tr. 38).

Mr. Pelehac stated that he filed a "verbal grievance" because he was not paid for the time he spent during his accident investigation questioning, and it was verbally denied when his foreman who considered the grievance made a determination that the labor-management contract did not provide for such payments. Mr. Pelehac confirmed that he did not further pursue the grievance (Tr. 40; exhibit R-1).

Respondent's Testimony and Evidence

Louis Barletta, Jr., respondent's mine superintendent, testified that Mr. Pelehac has never filed any safety grievances or made any safety complaints, and that he considers him to be a good employee. Mr. Barletta stated that after being informed of the accident he went to the scene and observed Mr. Bandish receiving medical attention, and he spoke with Mr. Pelehac and two other employees, and requested Mr. Pelehac to remain after his normal work shift on January 24, 1989. Mr. Barletta explained that Mr. Bandish's injuries did not initially appear to be serious, but when it was later determined from the hospital report that they were, MSHA and the appropriate state agency were informed of the accident.

Mr. Barletta stated that he conducted the respondent's accident investigation and that it began at 1:15 or 1:30 p.m., shortly after Mr. Bandish was taken to the hospital, and he spent the rest of the day on his investigation. After Mr. Pelehac left the mine, MSHA and the state inspectors arrived at the mine, and Mr. Barletta was involved in the investigation until 9:30 p.m. that day, and it continued on January 25-27, 1989, and a few days in February (Tr. 50). He confirmed that Mr. Pelehac was not interviewed by the inspectors on January 24, and that he had requested to go home before the inspectors arrived, and he permitted him to leave (Tr. 50). Mr. Barletta stated that at the

time he conducted his interviews up to 5:00 p.m., on January 24, he did not believe that the accident would be investigated by MSHA (Tr. 51).

Mr. Barletta stated that he investigated the accident because it was the second serious accident in 15 years, and that since he was the superintendent, it was his responsibility to investigate accidents, and it was important for him to know how Mr. Bandish was injured. He confirmed that in addition to Mr. Pelehac, he also interviewed dockman Dan Bailey and barge loader operator Ronnie Seliga. He was not sure whether or not Mr. Bailey and Mr. Seliga remained over their normal work shift hours and stated that "I'm not positive but I know they are not paid for the investigation unless it was on their normal shift" (Tr. 52). He confirmed that Mr. Pelehac made no complaints about the accident in question (Tr. 52).

Mr. Barletta confirmed that in prior instances when he has requested to speak to miners before or after their work shifts, they were never compensated for their time because company policy only requires that employees be paid for work performed, and that investigations, counselling, matters dealing with employee problems, including discipline, are not considered to be "work performed," and that no one has been compensated for the time spent on such matters (Tr. 53). In response to certain bench questions concerning an employee's refusal to stay over and beyond his normal work shift unless he were paid, Mr. Barletta responded as follows (Tr. 53-54):

> JUDGE KOUTRAS: Can I just ask one question? What happens if an employee declines to stay? He says, I'm not getting paid, I'm not staying.
>
> A. Well, I don't believe that case ever occurred to me. I could answer that if it would.
>
> JUDGE KOUTRAS: Answer it in a hypothetical.
>
> A. If it would, I would give them a direct work order to make them stay.
>
> JUDGE KOUTRAS: How can you give them a work order if he's not going to do any work?
>
> A. Okay.
>
> * * * * * * *
>
> A. It depends on the situation. It would depend on the situation. I have had people saying they couldn't stay because they had other engagements. Then I would talk to them at the start of the next shift.

Mr. Barletta stated that an employee must report any accident on his shift to his supervisor prior to the end of the shift, and no later than the end of the shift. An employee must also fill out an accident report, and if this occurs after his normal shift, the report is reviewed with the employee, and he may be "tagged" to stop by the office at the end of his shift. The employee would not be compensated for his time because there are no contractual requirements for payment for time spent investigating accidents before or after a shift (Tr. 55).

Mr. Barletta testified that in September, 1988, he conducted an investigation of an incident involving an employee who was observed walking under an unguarded belt conveyor, which resulted in an imminent danger order issued by an MSHA inspector (exhibit R-3). He confirmed that the employee was suspended for 3 days without pay, and that during his investigation of the incident, the employee was asked to stay after her normal work shift for 2 days. The employee stayed over for 45 minutes after her shift on September 1, and for approximately 30 minutes on September 2, and she was not compensated for this time (Tr. 60-61).

Mr. Barletta stated that on Wednesday, January 25, 1989, an MSHA investigator began his formal accident investigation, and through a prior agreement with Mr. Pelehac, he was working the daylight shift that day. He was called out of the mine at 9:00 a.m., because the MSHA inspector wanted to hear his accident testimony. Mr. Pelehac was questioned by the inspector, management, and the mine safety committee, and then returned to his underground job assignment (Tr. 63). That evening, Mr. Pelehac was requested to stay over because another MSHA special investigator was coming to the mine and wanted to speak with witnesses. Mr. Barletta stated that he informed the inspector by telephone before he arrived that Mr. Pelehac was the only eye witness, and the inspector requested an opportunity to speak with him. Mr. Barletta then advised Mr. Pelehac that he was requested to stay at the end of his shift to testify about the accident (Tr. 64, exhibit R-2, MSHA accident report of investigation).

Mr. Barletta stated that the MSHA, state, and company investigation continued on Thursday, January 26, and Mr. Pelehac was not interviewed that day (Tr. 65). Mr. Barletta confirmed that Mr. Pelehac's claim for pay for 2 hours on January 26, is in error, and that he confused the days, and that the correct day for this claim should be Friday, January 27 (Tr. 67). Mr. Pelehac's representative confirmed that this was the case, and that the correct day was January 27 (Tr. 68).

Mr. Barletta stated that Mr. Pelehac requested to return to his normal midnight work shift, and that he worked that shift on January 27, from 12:01 a.m. to 8:00 a.m. Mr. Barletta requested Mr. Pelehac to stay over because the MSHA inspector requested

that he be available for testimony that morning during the continuing investigation. The investigation meeting was conducted by the MSHA inspector and special investigator, and other than their normal onshift work time, no one was compensated for the time spent during the investigation because of the company practice and policy pursuant to the contract that does not allow compensation for people involved in accident investigations (Tr. 69).

Mr. Barletta identified exhibit R-4, as the list of people who participated in the MSHA accident investigation, and the time sheets of the employees who were interviewed and questioned. He confirmed that none of these employees were paid for any time other than their regularly scheduled work times (Tr. 70-71).

Mr. Barletta confirmed that there have been other instances when MSHA has conducted investigations and miners were questioned after their work shift and were not compensated, and that this was a common occurrences in instances where miners have filed safety complaints pursuant to section 103(g) of the Act, and requested an MSHA investigation (Tr. 73). He stated that this occurred on April 13, 1989, when seven hourly and salaried employees working on the midnight shift were requested to stay over by MSHA and state inspectors who were conducting a section 103(g) investigation, and that none of these employees were compensated for the time spent during that investigation (Tr. 74, exhibit R-5). Although some of the time sheets for these employees reflects overtime pay, he explained that "there is some overtime but that was for production purposes because we do not change in the face on two or three hourly employees in question." He reiterated that management did not pay any of these employees for the time spent on the investigation, nor has it paid any overtime for such time (Tr. 74). He also confirmed that compensation has never been paid for extra time spent on state or company investigations (Tr. 75).

When asked about Mr. Pelehac's belief that he was discriminated against because his testimony did not absolve the respondent of liability for the accident, and whether he would have been paid if his testimony was "favorable," Mr. Barletta responded as follows (Tr. 75-77):

> A. I can't say his testimony was unfavorable. Favorable or unfavorable, no, I wouldn't have paid him either way. There was no reason to based on my policy and the policy Consolidation Coal has. But his testimony --- I can't do --- whoever determined it was unfavorable, I don't know. He basically said that he saw nothing of the accident. He turned his back and it happened. He turned around, the man was injured.

Q. Mr. Pelehac stated during his testimony that you repeatedly asked him about hammering and, in essence, that you were harassing him. Could you tell us why you were asking him about the accident?

A. I repeatedly asked him about a hammer. The reason I asked him about a hammer, that I observed a hammer laying on the landing on the empty side of the dock and Mr. Pelehac observed it too after I pointed it out to him. Our employees were trained not to use a hammer to knock down and bring them loose while it was under tension. Mr. Pelehac stated to me on the 24th he was informed by the victim, Mr. Bandish, and another person training him, you don't ever hit it while under tension.

When we looked --- when I say we looked, Consolidation Coal Company, and their employees looked at the accident scene, there was no hammer on the barges which came out in the testimony and the MSHA report. But the concern was that when the accident scene was recreated, the rope, the chain and the rachet assembly all functioned properly.

And later on that evening it was found out by Rich Werth, W-E-R-T-H, he is a safety inspector for management at Dilworth Mine, there were statements made at the hospital by the victim. And that's why the question was asked so many times. The statements made at the hospital by the victim was that he's never screwed up, and he used other four letter words, so bad that he beat high, he beat low, he beat high and everything just blew apart. And the victim said ---.

* * * * * * *

A. I had a reason to question it and I continue to question it.

JUDGE KOUTRAS: You suspected that the accident victim may have beat on this thing with a hammer?

A. Yes, sir.

On cross-examination, Mr. Barletta stated that he requested Mr. Pelehac to stay over his normal work shift hours on one day for his own investigation, and for 2 days for MSHA's investigation. When asked whether he makes it clear to an employee that such requests are a "direct work order," Mr. Barletta responded that this is not needed because "our employees should be responsible enough that they will do what they are told" (Tr. 78).

Mr. Barletta reviewed the time sheets of Tuesday, January 24, 1989, for Mr. Pelehac, Mr. Bailey, and Mr. Seliga, and he explained the entries made (Tr. 78-80, exhibit R-4). He confirmed that he shut the dock loading facility down when the accident occurred in order to investigate it and to prevent further accidents (Tr. 81). He also confirmed that he probably ordered a foreman to tell Mr. Pelehac that he was requested by MSHA to stay over on January 25 and 27, for the investigation (Tr. 82).

Mr. Barletta confirmed that the accident occurred at approximately 1:00 p.m., on January 24, and he, rather than MSHA, requested Mr. Pelehac to stay over beyond his normal quitting time at 2:15 p.m. (Tr. 85). In response to further questions on direct, Mr. Barletta confirmed that Mr. Pelehac performed no work in his job classification after his normal work shift ended on January 24, but that Mr. Bailey, who was asked to work a double shift for an employee who was absent, worked in his own job classification for nine and three-quarter hours during the entire shift. Mr. Barletta stated that in the course of the investigation, some of the witnesses were interviewed during their work shifts and were paid, including Mr. Pelehac who was called out of the mine on the morning of January 25, and that this was analogous to Mr. Bailey being paid when he was interviewed while working a double shift. With regard to Mr. Seliga, who was scheduled to work overtime every day of the week of January 23, although he was required to perform his work, he did not do so because the facility was shutdown, and he was not present to be interviewed (Tr. 86-88).

In response to questions concerning the time sheets and hours recorded for Mr. Pelehac, Mr. Bailey, and Mr. Seliga, Mr. Barletta further explained the time entries. He stated that Mr. Bailey's participation in the accident investigation consumed approximately 30 minutes, and Mr. Seliga consumed approximately 5 to 10 minutes because he observed nothing at the time of the accident. He further stated that Mr. Bailey and Mr. Seliga were both performing work during his investigation, but that Mr. Pelehac stayed with him (Barletta) for 3-1/2 hours while trying to resolve how the accident occurred. Mr. Barletta could not explain why Mr. Pelehac's time sheet for January 24, showed an entry for 3 hours overtime, and was then scratched out and initialed by the individual who signed the sheet (Tr. 89-102).

Mr. Pelehac was recalled in rebuttal, and he testified that on the afternoon of the accident on January 24, 1989, from 2:15 p.m. until 5:00 p.m., no coal was loaded on the barges. He stated that Mr. Bailey and Mr. Seliga were present with him, Mr. Barletta, and other management personnel during the questioning of the barge specialist which took place until he went home at 5:45 p.m. Mr. Pelehac stated that he assisted in carrying out the accident victim on a stretcher, and Mr. Bailey and Mr. Seliga

were assigned no other work duties, and he did not observe them doing any work. He further confirmed that no one did any work, and that "everything was left alone just the way it was, I guess, to preserve the evidence so the barge specialist from Clariton could come up and look at it." Mr. Bailey and Mr. Seliga were with him the entire time "in a group" (Tr. 112-113).

Complainant's Arguments

In his closing arguments at the hearing, the complainant's representative argued that Mr. Barletta's testimony reflects that Mr. Bailey and Mr. Seliga, two employees who were involved in the accident investigation, were compensated for their time, but that the complainant was not. The complainant concluded that he was discriminated against because he did not supply the testimony the respondent was seeking with respect to the employee who was injured. Complainant asserted that he was repeatedly questioned by the respondent's management in an effort to have him say that the injured employee caused the accident by beating on the pelican hook with a hammer.

The complainant further argued that the respondent failed to provide a satisfactory explanation as to why the other two employees (Bailey and Seliga) were paid, or why the complainant's time sheet on the day of the accident initially reflected 3 hours of overtime, and then subsequently marked out. He also pointed out that the complainant testified that Mr. Bailey and Mr. Seliga were with him the entire time on the day of the accident (Tr. 114-118).

In a posthearing brief filed on his behalf by counsel who entered a simultaneous appearance when they filed the brief, complainant asserts that he had been ordered in the past to remain past the end of his workshift by supervisors, but that the 3 days in question were the only times that he had ever been ordered to remain past the end of his workshift and received no overtime pay compensation.

The complainant points out that Mr. Bailey and Mr. Seliga also remained past the end of their shifts to assist in the accident investigation of January 24, 1989, and were compensated in overtime wages for their time. Complainant asserts that the respondent never offered a plausible explanation for this disparate treatment, and the fact that the respondent repeatedly and unsuccessfully tried to elicit testimony and information from him that the accident victim, through his own negligence, had caused the accident becomes extremely relevant.

The complainant argues that section 105(c) of the Act protects miners against retaliation by mine operators for their exercise of safety rights protected under the Act, and that section 105(c)(1) specifically protects a miner who "has

testified or is about to testify" in any proceeding "under or related to this chapter" or one who has exercised "any statutory right afforded by this chapter." Complainant asserts that it is undisputed that he was interviewed by MSHA inspectors, and that he assisted in the investigation and provided information to MSHA during its investigation of the January 24, 1989, accident. Complainant takes the position that such participation on his part is akin to delivering testimony in an MSHA proceeding and is clearly one of the statutory rights afforded by the Act.

Citing several NLRB decisions under the Labor Management Relations Act, the complainant asserts that the NLRB has consistently held that participation and assistance in NLRB investigations by an employee, even when such employee has not actually filed charges or testified in any formal proceedings, is protected activity which an employer may not retaliate against in any way, whether through disciplinary action or failure to pay proper wages. Complainant concludes that it is clear that he engaged in protected activities under the Act when he stayed past the end of his shift on the 3 days in question to assist in the investigation of the January 24, 1989, accident.

The complainant maintains that he exercised his protected rights by submitting to the interviews during the course of the accident investigation, and that the respondent was aware of the exercise of those rights but refused to pay him for the hours he remained at the mine despite the fact that it had ordered him to remain at work to assist in the investigation. Complainant concludes that the respondent's refusal to pay him overtime wages was an act of discrimination because there was no legitimate business reason not to do so.

Complainant argues that the cooperation of witnesses in accident investigations is essential for proper administration and enforcement of the Act, and he concludes that the refusal of the respondent to pay him for his time discourages witness cooperation and constitutes discrimination and impairs enforcement of the Act.

Complainant cites a West Virginia Supreme Court of Appeals decision in Carpenter v. Miller, 325 S.E. 2d 123 (1984), involving a state law similar to section 105(c)(1) of the Act. Complainant asserts that the court held that the withholding of compensation by employers from a miner who testifies at a mine safety proceeding is a form of discrimination prohibited by the statute, and that coal companies were required to fully compensate each miner whose pay was docked on days they testified in a mine safety proceeding.

Complainant also cites a decision by Commission Judge William Fauver in Joseph G. DeLisio v. Mathies Coal Company, 11 FMSHRC 2353 (November 1989), holding that the failure by a

mine operator to pay a miner the difference between his regular daily wage and the $30 statutory witness fee he received for appearing as a subpoenaed witness on behalf of MSHA in a Commission proceeding constituted a violation of section 105(c) of the Act. In that case, Judge Fauver held that the operator's refusal to pay the wages of the miner who testified against it at the hearing, while at the same time paying the wages of other miner witnesses who testified on its behalf, constituted discriminatory treatment of witnesses in violation of the Act.

The complainant concludes that the public policy in the Act favors far ranging enforcement of its provisions, and that one manner of enhancing enforcement is the ability to interview employees/witnesses who will provide first hand information about the cause and circumstances surrounding mine accidents. The complainant believes it is clear that if a witness/employee must remain on the mine site after he has completed a full work shift in order to be accessible to MSHA investigators, that there will be less incentive for him to remain at the mine site if he must give up several hours of his free time without receiving any compensation after having completed a full work shift, and that this obviously undercuts the public policy embodied in the Act.

Respondent's Arguments

In his closing oral arguments, the respondent's counsel asserted that the complainant has not establish that he engaged in any protective activity under the Act, made no safety complaint, and that the respondent took no adverse action against him because of any protected activity on his part on January 24, 1989. With regard to the other 2 days, counsel asserted that the accident investigation was an official MSHA investigation, that the respondent was not in charge, and that the MSHA inspectors requested that the complainant be present for testimony. Counsel concluded that the complainant has failed to establish any adverse motive by the respondent, and has not established that he was treated any differently than any other employee.

Counsel further asserted that the work time sheets show that the union has paid its safety committeemen for union business during the accident investigation, while the respondent did not. Counsel suggested that the union could have paid the complainant for his time, and that in the event the respondent paid him, his testimony would have been suspect because someone could point out that he was paid to give favorable testimony for the respondent. Counsel pointed out that the respondent does not even compensate foremen or management personnel for staying over during an accident investigation.

Counsel asserted that any protected activity pursuant to the Act must be in connection with complaints to MSHA, mine management, or to the union, and that the complainant has not shown that he engaged in this kind of activity (Tr. 120-124).

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); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). 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 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. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, _____ U.S. _____, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

The record in this case establishes that while in the course of his regularly scheduled work duties on January 24, 1989, the complainant was a witness to a serious, non-fatal injury accident involving Mr. Paul Bandish, a fellow miner. Although the complainant's normal quitting time was 2:15 p.m., mine superintendent Barletta requested him to stay at the mine in order to be interviewed by the respondent about the accident. At the conclusion of the interviews, the complainant was released from work at 5:45 p.m. The following day, January 25, 1989, the complainant was again notified by the respondent that he had to remain at the mine in order to be interviewed by the respondent and State and Federal mine inspectors who were conducting an accident investigation. He was again interviewed and was not released to go home until after 6:00 p.m. His normal work shift on this day ended at 4:00 p.m. On January 27, 1989, the complainant was again required to stay after completing his work shift, to be interviewed by the respondent and government mine inspectors, and he was not released to go home until approximately 2 hours later.

The complainant spent approximately 7-1/2 hours past his normal work times during a 3-day period while being interviewed as part of the accident investigations conducted by the respondent and State and Federal mine inspectors. Superintendent Barletta confirmed that if the complainant had declined to stay and make himself available for the investigations he would have given him a direct work order to stay. Under the circumstances, I conclude and find that the complainant's staying over beyond his normal work shifts on the days in question was involuntary. Despite his involuntary presence at the mine, the respondent refused to pay the complainant the overtime wages he would normally be entitled to if he had remained and worked. These wages would have been $171.64.

The parties agreed that although the applicable UMWA/management bargaining agreement allows for compensation for safety

committeemen in connection with a fatality, mine explosion, or disaster inquiry, it does not allow or provide for compensation for miners who participate in accident investigations which take place after their normal working shifts (Tr. 102-102). Complainant's representative confirmed that in the event the union initiates the investigation, i.e., pursuant to section 103(g) of the Act, a miner may be made an "employee" of the union for purposes of the investigation, and he would be compensated by the union for the time spent on the investigation (Tr. 103-104). This was not done in this case because the union did not initiate the accident investigation in question (Tr. 104).

The respondent contended that in this case, the union could have placed the complainant on union business and paid him for his time after his normal work shift, as it did in the case of the safety committeemen who participated in the investigation, but that it did not do so (Tr. 105). The respondent confirmed that in the event of an MSHA investigation with respect to a union initiated section 103(g) complaint, an employee who is "on the clock" is made available to the inspectors (Tr. 106). Mr. Barletta confirmed that if an inspector requests access to an employee during his work shift, the employee is made available to the inspector, and if the request is made by the inspector after the employee's work shift, management will notify the employee that the inspector wishes to see him and will request the employee to stay over (Tr. 107-108).

The complainant asserts that he had been ordered in the past to remain past the end of his workshift by supervisors, but that the 3 days in question were the only times he had been ordered to remain and received no overtime pay. While this may be true, the complainant conceded that he had never previously been involved in an accident investigation and had never been asked to stay over to participate in such an investigation. He also conceded that when he was asked to stay over in the past, he was paid overtime for work which he performed, and that at no previous time during his employment with the respondent was he ever asked to stay and did not perform his normal work duties (Tr. 12, 16). The complainant has stipulated that he performed no work in his job classification on the 3 days that he stayed over to participate in the accident investigation.

The Protected Activity

Section 105(c)(1) of the Mine Act provides in pertinent part as follows:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * because such miner * * * has filed or made a complaint

> under or related to this Act * * * or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner * * * of any statutory right afforded by this Act.

A threshold determination to be made in this case is whether or not Mr. Pelehac was engaged in any protected activity at the time of the alleged discriminatory act. The alleged discriminatory act is the failure by the respondent to compensate Mr. Pelehac for the extra time he spent answering questions and giving information in connection with the accident investigation. Mr. Pelehac claims that the respondent refused to pay him because he failed to give favorable testimony absolving the respondent of responsibility for the accident.

In Donovan v. Stafford Construction Company, 732 F.2d 954 (D.C. Cir. 1984), the court held that an employee was protected by the Mine Act against retaliation for providing testimony in connection with an MSHA investigation concerning a discrimination complaint filed by a miner. The court took a broad view of section 105(c) of the Act, and stated as follows at 732 F.2d 959:

> There can be little doubt that an employee's right to testify freely in mine safety proceedings encompasses the giving of statements to MSHA personnel conducting preliminary investigations. * * * Although a literal reading of the statute might indicate that a discharge is illegal only if the employee has testified or is about to testify against the employer, we decline to adopt such a hypertechnical and purpose-defeating interpretation. Instead, we hold that an employee's refusal to agree to provide MSHA investigators with testimony that the employee in good faith believes to be false is protected activity, regardless of whether the employee eventually happens to be asked for a statement.

In Elias Moses v. Whitley Development Corporation, 4 FMSHRC 1475 (August 1982), the Commission held that the coercive interrogation, harassment, and subsequent discharge of a miner suspected of reporting an accident to MSHA was discriminatory and constituted a violation of section 105(c)(1) of the Act. The Commission found that discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1). The Commission stated in relevant part as follows at 4 FMSHRC 1478-1479:

> We find that among the "more subtle forms of interference" are coercive interrogation and harassment

> over the exercise of protected rights. A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act. We therefore conclude that coercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Act.8

In the footnote noted at 4 FMSHRC 1479, the Commission stated as follows:

> This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem and, therefore, would not amount to coercive interrogation or harassment. Whether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions. (Emphasis added).

In upholding the judge's finding of discrimination, the Commission concluded that the persistence with which the subject of Moses' supposed accident reporting was raised by the operator, and the accusatory manner in which it was done, could logically result in a fear of reprisal and a reluctance by Moses to exercise his rights in the future, and therefore constituted prohibited interference under section 105(c)(1).

In Joseph G. DeLisio v. Mathies Coal Company, 11 FMSHRC 2353 (November 1989), Commission Judge William Fauver held that the withholding of a miner's wages from a miner who is subpoenaed to testify at a hearing before a Commission judge on behalf of MSHA and against a mine operator was discriminatory. Judge Fauver took a broad view of section 105(c) of the Act and held that it prohibits "any manner" of discrimination. With regard to the mine operator's discriminatory motive in refusing to pay DeLisio the difference between his regular daily wages and the witness fee paid by MSHA, Judge Fauver found that the refusal by the mine operator to pay wages to DeLisio, who was an opposition witness, while at the same time paying the wages of the witnesses who testified on behalf of the operator, was discriminatory on its face and required no further examination of the operator's discriminatory motive.

In the instant case, the evidence establishes that Mr. Pelehac made no safety complaints to mine management or to MSHA, and there is no evidence that he refused to perform any job tasks because of any safety concerns, or that he reported or complained about the accident. He was simply required to remain beyond his normal work shift in order to testify or give information about the accident which he purportedly witnessed.

The respondent's assertion that Mr. Pelehac's protected rights under the Act are limited to safety complaints is rejected. The applicable case law clearly established that the protections afforded miners in the exercise of their rights pursuant to the Act must be broadly construed. Section 105(c)(1) of the Act prohibits a mine operator from discriminating against a miner because he has testified in any proceeding related to the Act.

Section 103(a) of the Act requires the Secretary of Labor (MSHA) to investigate a mine accident to determine its cause, and to determine whether a mine operator has violated any mandatory safety or health standard. Section 103(d) of the Act requires a mine operator to likewise investigate all mine accidents to determine the cause and means of preventing a recurrence. The operator is also required to retain all accident investigation information and records and to make them available to MSHA, and section 103(j) requires the operator to prevent the destruction of any evidence which would assist in investigating the cause of an accident.

Section 103(b) of the Act authorizes the Secretary to hold a public hearing, after notice, and to subpoena witnesses to testify in connection with an accident investigation. In this case, although the testimony of Mr. Pelehac was not presented at any formal public hearing, and he was not subpoenaed, the information sought to be elicited from him in connection with the accident was part of the fact finding inquires being conducted by mine management and the MSHA inspectors pursuant to their obligations under sections 103(a), (d), and (j) of the Act.

In view of the foregoing, I conclude and find that the accident investigations in question were proceedings related to the Act and that Mr. Pelehac's participation in those investigations as a witness to the accident was a protected activity within the meaning and intent of section 105(c)(1) of the Act, Donovan v. Stafford Construction Company, supra. I further conclude and find that the respondent is prohibited from interfering with this activity on the part of Mr. Pelehac, and is prohibited from harassing, intimidating, or otherwise impeding Mr. Pelehac's participation in these kinds of accident investigations or inquiries.

The Respondent's Alleged Discriminatory Actions

Mr. Pelehac confirmed that he had worked overtime on an intermittent basis while employed with the respondent and that he was always paid for this work. He apparently assumed that he would be paid when he was asked to stay beyond his normal work shift on the 3 days in question, even though he conceded that he performed no work in his regulation job classification during this time. I take note of the fact that at the time Mr. Pelehac filed his complaint with MSHA he did not allege that the respondent refused to pay him because he gave unfavorable testimony. He explained that he did not do so because he did not believe it was necessary, and during the hearing he asserted that the respondent refused to pay him because he could not testify that the accident victim (Bandish) had done anything wrong, or that the accident was the result of his own negligence. I also take note of the fact that Mr. Pelehac filed a grievance for overtime pay, but it was apparently not pursued further because he had no contractual right to be paid for time spent away from his regular work duties (exhibit R-1).

In order to prevail in this case, there must be some credible showing by the complainant that the refusal by the respondent to compensate him for the extra time spent in the accident inquiries was motivated by its desire to punish him or retaliate against him because of his alleged failure to give favorable testimony on behalf of the respondent. Such a showing may be established by direct evidence, or by circumstantial evidence establishing a strong and unrebutted inference of discriminatory motive. In the Elias Moses case, the Commission held that a mine operator's coercive and harassing interrogation of a miner to support its suspicion that he had reported an accident to MSHA was discriminatory. In the Joseph G. DeLisio case, supra, Judge Fauver found that the refusal by the mine operator to pay him for his time as an opposition witness, while at the same time paying witnesses who appeared on behalf of the operator, was discriminatory on its face.

Although it is clear that Mr. Pelehac filed no safety complaints or reported the accident, he is protected against any harassing and coercive interrogations of the kind found by the Commission to be discriminatory in Elias Moses. With regard to the application of the DeLisio decision to the facts of this case, I take note of the fact that DeLisio was subpoenaed as an adverse witness by MSHA to testify against the operator in a hearing before a Commission judge involving an alleged violation of a mandatory safety standard. In the instant case, Mr. Pelehac was but one of several employees who were interviewed and gave information or "testimony" regarding the accident, and I find no support for any conclusion that any of these employees were "adverse" witnesses. The record reflects that the accident

investigation revealed no violations on the part of the respondent which would have contributed to the cause of the accident, and Mr. Barletta testified credibly that he could not conclude that the information given by Mr. Pelehac during the accident inquiries was "unfavorable" to the respondent because he basically testified that he did not actually see the accident because he had his back turned at the time that it occurred and that when he turned around he saw that Mr. Bandish was injured (Tr. 75).

Mr. Pelehac believed that his failure to exonerate the respondent of any fault or liability for the accident was "the damaging testimony" which served as the basis for the respondent's refusal to pay him for the extra time in question. However, as noted earlier, the MSHA accident investigation revealed no violations on the part of the respondent which may have contributed to the cause of the accident, and Mr. Pelehac conceded that his questioning by mine management with respect to the accident victim's purported negligence and possible violation of company safety rules was not unusual. Further, as previously noted, Mr. Pelehac agreed that mine management at no time ever suggested that he not tell the truth about what he knew about the accident. Although Mr. Pelehac believed that it would be in the best interest of the respondent to establish that Mr. Bandish was negligent, he nonetheless agreed that it was not unusual for the respondent to attempt to mitigate its liability in the event it were sued by Mr. Bandish, and that he would probably do the same thing if he were sued.

Mr. Pelehac asserted that the respondent "repeatedly" questioned him during the course of the accident inquiries, as well as in the course of the grievance hearing involving the respondent's disciplinary action against Mr. Bandish. Mr. Pelehac suggested that he was "hounded" by the respondent in its attempts to elicit testimony from him to support the respondent's belief that Mr. Bandish was negligent and caused the accident by striking the piece of equipment which injured him with a hammer.

Superintendent Barletta confirmed that he repeatedly asked Mr. Pelehac about Mr. Bandish's possible use of a hammer because he had reason to believe that Mr. Bandish may have used a hammer to beat on the piece of equipment which blew apart and struck him in the head. Although MSHA's accident report contains information that Mr. Bandish did not have a hammer in his possession when he was last observed by Mr. Pelehac, the report also reflects a statement by a company safety inspector that during a conversation with Mr. Bandish at the hospital on the day of the accident, Mr. Bandish informed the inspector that he used a hammer to beat on the piece of equipment in question "when all of a sudden everything let loose" (exhibit R-2, pg. 7). In these circumstances, and given the fact that the respondent had an obligation to ascertain the cause of the accident, and to prevent

a recurrence in the future, I find nothing unusual or unreasonable in Mr. Barletta's pursuing the question of the possible use of the hammer by Mr. Bandish. I also find nothing unusual or unreasonable in the respondent's attempts to mitigate its liability by pursuing this question with Mr. Pelehac, the only other person at the immediate scene of the accident at the time Mr. Bandish was injured.

During the course of the hearing, Mr. Pelehac's representative confirmed that there was no transcript of the testimony given during the arbitration hearing in connection with Mr. Bandish's grievance. The transcript of Mr. Pelehac's testimony in connection with MSHA's accident investigation, if it exists, was not produced or offered by any of the parties in this proceeding, and it is not a matter of record in this case. Under the circumstances, I have no basis for concluding that Mr. Pelehac was "hounded" because the respondent "repeatedly" questioned him about Mr. Bandish's use of a hammer. Although Mr. Pelehac testified that Mr. Barletta or someone from management questioned him each day as to whether or not Mr. Bandish may have struck the equipment with a hammer, and that Mr. Barletta in particular asked him about this "several times," I find no credible or probative evidence to support any conclusion that the respondent's questioning of Mr. Pelehac was coercive, or that it constituted harassment of Mr. Pelehac, or an attempt by the respondent to intimidate him. To the contrary, based on the record in this case, I cannot conclude that the respondent's questioning of Mr. Pelehac, and its request that he remain beyond his normal work shift to make himself available to mine management and the inspectors investigating the accident was anything other than a bona-fide good faith effort on the part of the respondent to ascertain all of the facts in connection with the accident in question.

The Alleged Disparate Treatment of Mr. Pelehac

There is no evidence in this case that mine management harbored any ill towards Mr. Pelehac, and he agreed that no one ever suggested that he not tell the truth during the course of the accident investigations. Superintendent Barletta considered Mr. Pelehac to be a good employee, and the record reflects that he granted Mr. Pelehac's request to leave the mine on January 24, after the accident was reported, and before the arrival of an MSHA accident investigator. Mr. Barletta also accommodated Mr. Pelehac by agreeing to certain changes in his work shifts during the accident inquiries (Tr. 62). Although Mr. Barletta indicated that he would have issued a direct order to Mr. Pelehac to remain at the mine if he had refused to do so, he also indicated that if an employee advised him that he could not stay because he had other engagements, he would talk to him at the beginning of his next shift. Mr. Barletta confirmed that during a prior MSHA investigation on April 17, 1989, one of his

employees, Bobby Clark, went home because he did not want to get involved in the investigation, and he was interviewed a week later by the inspector at the beginning of his shift (Tr. 109, exhibit R-5). In this case, there is no evidence that Mr. Pelehac requested to go home at the end of his work shifts, and was refused.

The parties are in agreement that the applicable bargaining agreement does not provide for compensation for the extra time spent by miners on matters dealing with accident investigations. The record also establishes that in the absence of any contractual obligation to compensate miners for time spent on matters other than work, the respondent has a policy of not compensating miners for any time spent beyond their normal work shift on such matters as counselling, disciplinary problems, and accident investigations. If an employee is required to remain at the mine after his normal work shift to give information, or to otherwise participate in the fact-finding process with respect to these matters, he is not paid for his time. However, if an employee is called out of the mine during his normal work shift to give information during an accident investigation, or is interviewed during his shift at his work location, he continues to receive his regular pay even though he is not performing any work.

Mr. Barletta's credible testimony establishes that those employees interviewed during their normal work shifts, including Mr. Pelehac, were paid for their regular shift. With regard to the respondent's failure to pay Mr. Pelehac for the time spent on an investigation beyond his normally scheduled work shift, Mr. Barletta's credible testimony further establishes that in the absence of any contractual obligation to do so, the respondent has not compensated other employees who were required to stay beyond their normal work shifts in order to participate in an accident investigation or similar inquiries dealing with employee safety and disciplinary matter.

Mr. Barletta testified that in April, 1989, seven employees were asked to stay beyond their normal work shifts by MSHA and state mine inspectors who were investigating a safety complaint, and that none of these employees were compensated from their time. He also testified to an investigation which he conducted in September, 1988, in connection with an imminent danger order issued by MSHA involving an employee who was observed walking under an unguarded belt conveyor. Mr. Barletta stated that the employee was required to stay over her normal work shift on 2 days and that she was not compensated for the extra time (Tr. 61, exhibits R-3 and R-5).

Mr. Pelehac's allegation of disparate treatment lies in his assertion that hourly employees Daniel Bailey and Ronald Seliga, both of whom stayed beyond their normal work shift during the accident inquiry on Tuesday, January 24, were paid overtime, and

he was not. Mr. Pelehac does not suggest, nor has he established, that these individuals were paid overtime by the respondent because they may have given "favorable" testimony or information. He simply concludes and suggests that since Mr. Bailey and Mr. Seliga were paid, and he was not, he was discriminated against. In support of this argument, Mr. Pelehac relies on the payroll time records which reflects that Mr. Bailey was paid for 9-3/4 hours of overtime for January 24, and that Mr. Seliga was paid for 3 hours of overtime that day (exhibit R-4). Mr. Pelehac points out that his time record for that day reflects that he was initially credited for 3 hours of overtime, but that the timekeeper scratched it out, and that the respondent has not satisfactorily explained why this was done.

Superintendent Barletta testified that the initials of the individual who scratched out the 3 hours of overtime on Mr. Pelehac's time record appears to be those of Mr. Pelehac's underground section foreman Mel Robinson, who was located 2 miles from the office where the records are kept. Mr. Barletta confirmed that Mr. Pelehac was working on temporary assignment at the river barge location on Monday and Tuesday, January 23 and 24, and that the outside foreman would have probably reported Mr. Pelehac's work time. However, Mr. Barletta stated that he had no actual knowledge as to how Mr. Pelehac's time may have been reported, who reported it, and he did not know why Mr. Robinson may have scratched out and initialed the overtime entry made on Mr. Pelehac's time record (Tr. 90-93).

Mr. Barletta confirmed that he interviewed Mr. Bailey and Mr. Seliga on Tuesday, January 24, and he stated that "I know they were not paid for the investigation unless it was on their normal shift" (Tr. 52). He further confirmed that in keeping with company policy, employees are paid their wages if they are interviewed during a scheduled shift while "on the clock," but that no employee would be paid for an extra time beyond his normal shift (Tr. 69, 71). He explained that Mr. Seliga was paid for 3 hours overtime on January 24 because he was scheduled to work 3 hours overtime that day, as well as on Monday, January 23, and the rest of the week loading barges (Tr. 80). Mr. Bailey was paid overtime because he was scheduled to work a double shift that day replacing another employee who was absent from work (Tr. 79).

Mr. Barletta testified that Mr. Bailey's participation in his investigation on January 24, consumed approximately 30 minutes, and that Mr. Seliga's participation lasted for 5 or 10 minutes (Tr. 100). MSHA's official accident investigation report reflects that the accident occurred at approximately 1:55 p.m., on January 24, and Mr. Barletta testified that the dock loading facility was shutdown for 3 hours, and that no work was performed by anyone during the shutdown, including Mr. Bailey

and Mr. Seliga, but that they continued working after the facility was reopened (Tr. 89). He testified that Mr. Bailey performed work "dumping the sampler" and sweeping the barges, and that Mr. Seliga was assigned other work while his investigation continued (Tr. 97, 101). He confirmed that Mr. Seliga and Mr. Bailey were both "on the clock" during the investigation, but that Mr. Pelehac was not because his regularly scheduled shift ended at 2:15 p.m. (Tr. 97-99). Mr. Barletta had no knowledge that Mr. Pelehac was also previously scheduled to work 3 hours that day (Tr. 99).

Mr. Pelehac confirmed that no coal was loaded on the barges from 2:15 p.m. until 5:00 p.m., on Tuesday, January 24. He testified that Mr. Seliga and Mr. Bailey were with him during the time that Mr. Barletta was conducting his interviews, but that he (Pelehac) went home at 5:45 p.m. Mr. Pelehac further testified that Mr. Seliga and Mr. Bailey were not assigned any work duties and he observed them doing no work during this time (Tr. 112-113).

MSHA's accident report reflects that the accident was not immediately reported because it was not initially considered to be life threatening. However, when it was learned at approximately 5:00 p.m., that Mr. Bandish had sustained a skull fracture and was being transferred to another hospital for possible surgery, the mine safety supervisor notified MSHA of the accident by telephone, and an MSHA inspector was dispatched to the mine to obtain facts pertaining to the accident.

Mr. Seliga and Mr. Bailey were not called to testify in this case. Although the evidence reflects that no one may have performed any work during the 3-hour shutdown period immediately following the accident, since Mr. Pelehac left the mine at 5:45 p.m., he would have no way of knowing whether or not Mr. Bailey or Mr. Seliga continued to perform any work while Mr. Barletta was continuing his inquiry, and Mr. Barletta's testimony that work resumed stands unrebutted. Mr. Seliga's time record reflects that he was paid 3 hours of overtime for each day of the week in question, and this lends credence Mr. Barletta's testimony that he had been previously scheduled to work overtime and was in fact "on the clock." Mr. Pelehac offered no testimony that he too was previously scheduled to work 3 hours of overtime on January 24, and in these circumstances, I find Mr. Barletta's testimony explaining Mr. Seliga's overtime pay to be credible, particularly in light of his unrebutted testimony that Mr. Seliga's interview time only consumed 5 or 10 minutes. With regard to Mr. Bailey's overtime pay for January 24, Mr. Barletta's testimony that his interview with Mr. Bailey only consumed 30 minutes, and that he was scheduled to work a double shift on January 24, is unrebutted, and I find Mr. Barletta's explanation as to why he was paid to be likewise credible.

Mr. Barletta's investigation notes (exhibit R-4), for Wednesday, January 25, include a list of individuals who participated in the MSHA and state investigations, and although Mr. Pelehac's name is included as one of the individuals who participated in a 5:30 p.m. meeting on that day, the names of Mr. Bailey and Mr. Seliga are not included among those individuals who participated in the investigation on that day. Mr. Pelehac did not participate in the investigation which continued on Thursday, January 26, and although Mr. Seliga and Mr. Bailey are listed among those who were interviewed that day, there is no evidence that they were interviewed on or off their regular work shift. Further, although Mr. Pelehac's name is included as a "witness" who participated in the investigation on Friday, January 27, Mr. Seliga and Mr. Bailey are not listed as participants on that day.

As noted earlier, Mr. Seliga and Mr. Bailey did not testify in this matter. Mr. Pelehac's underground foreman, Mel Robinson, the individual who apparently signed Mr. Pelehac's work attendance and time record, and who apparently initialed and scratched out the entry crediting Mr. Pelehac with 3 hours of overtime on January 24, did not testify. I take note of the fact that the time records for Mr. Bailey and Mr. Seliga were signed by an individual other than Mr. Robinson. In the absence of any credible or probative evidence to the contrary, I cannot conclude that the deletion made on Mr. Pelehac's work time record crossing out the 3 hours of overtime was the result of mine management's desire to retaliate or otherwise penalize Mr. Pelehac. Nor can I conclude that this deletion supports any reasonable inference of any disparate treatment of Mr. Pelehac. To the contrary, I conclude and find that Mr. Barletta's explanations as to why Mr. Bailey and Mr. Seliga were paid overtime, and Mr. Pelehac was not, is credible and plausible.

I conclude and find that the respondent has established that it has consistently applied its policy of not compensating its employees by paying overtime for time spent on accident investigations to all of its work force. The policy is based on the fact that the union/management agreement does not provide for such compensation. Absent any evidence of any discriminatory motive on the part of the respondent, I simply cannot conclude that the record in this case supports any conclusion that its failure to pay Mr. Pelehac overtime was the result of his giving unfavorable testimony or information, or his failure to exonerate the respondent from all liability for the accident. As noted earlier, I find no evidentiary support for any conclusion that any information given by Mr. Pelehac was unfavorable, and MSHA's accident investigation failed to reveal any violations by the respondent which would have contributed to the cause of the accident.

In my view, the facts presented in this case are distinguishable from those presented in the Elias Moses and Joseph DeLisio cases, supra. In the Elias Moses case, the mine operator indulged in conduct which amounted to coercive interrogation and harassment of a miner suspected of reporting an accident to MSHA, and the Commission concluded that this was a subtle form of interference with the miner's protected rights under the Act. I find no such conduct on the part of the respondent in this case. In the Joseph DeLisio case, Judge Fauver found that the withholding of wages from a miner subpoenaed by MSHA as an adverse witness to testify against a mine operator, while paying other miners who testified on behalf of the operator was discriminatory on its face, and required no further examination of the operator's discriminatory motive. I simply cannot reach such a conclusion in this case.

The complainant's assertion that the respondent's refusal to pay him was an act of discrimination because there was no legitimate business reason not to pay him is rejected. The parties agreed that the applicable UMWA/Management bargaining agreement does not provide for payment of wages for a miner's participation in accident investigations which take place after their normal work shift. The respondent's credible and unrebutted evidence reflects that in the absence of any contractual obligation to compensate a miner for the time spent on such investigations, company policy only allows the payment of wages for work performed by an employee, and that pursuant to this policy, the time spent by an employee beyond his normal work shift participating in accident investigations, counselling sessions, and employee disciplinary matters, is not considered compensable "work performed" under the contract.

The record in this case suggests that Mr. Pelehac's union could have placed him on "union business" and compensated him for his time after his normal work shift while participating in the accident investigations, as it apparently did in the case of the safety committeemen who participated in the investigations. Mr. Pelehac conceded that this was true, but asserted that union compensation was only available in a case where the union initiates the accident investigation. In this case, although it is true that the union did not initiate the investigation, it would appear that the union nonetheless apparently paid the safety committeeman, but did not pay Mr. Pelehac.

Absent any evidence of discrimination within the parameters of section 105(c) of the Act, it is not my function to mediate or arbitrate the question of whether or not Mr. Pelehac should have been paid for the time spent on the accident investigations. I find no statutory right to such payment, and it seems clear from the record that the respondent was not obliged to pay Mr. Pelehac pursuant to the bargaining agreement, and Mr. Pelehac's grievance was apparently not pursued further because of this fact. Under

all of these circumstances, I conclude and find that the respondent's refusal to pay Mr. Pelehac was a reasonable and plausible management business decision unrelated to any unfavorable or adverse information or testimony which may have been given by Mr. Pelehac in the course of the accident inquiries. In this regard, I take particular note of the Commission's decision in Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). Citing its Pasula and Chacon decisions, the Commission stated in part as follows at 4 FMSHRC 993: "* * * Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge