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RICK HAYS V. LEECO
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

RICKY HAYS,	DISCRIMINATION PROCEEDING
COMPLAINANT	
v.	Docket No. KENT 90-59-D
	MSHA Case No. BARB CD 89-32
LEECO, INC.,	No. 62 Mine
RESPONDENT	

DECISION

Appearances: Tony Opegard, Esq., Stephen A. Sanders, Esq.,
Appalachian Research & Defense Fund of Kentucky,
Inc., Hazard, Kentucky, for the Complainant;
Timothy Joe Walker, Esq., Reece, Lang & Breeding,
London, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant, Ricky Hays, against the respondent Leeco Inc., pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant by letter dated November 7, 1989, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, on December 18, 1989, the complainant filed a complaint with the Commission.

The complainant, who was employed by the respondent as an electrician, alleges that he was discharged by the respondent's electrical maintenance foreman Clayton Hacker, on September 7, 1989, because of his failure to service (grease and oil) a mobile bridge carrier speed reducer grease fitting. The bridge carrier in question was a component part of the continuous haulage system used on the section. The complainant further alleges that the respondent required all of its electricians to service the

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haulage system while it was in operation, that this is in violation of Federal law, and that his failure to service the part in question was based on his reasonable good faith belief that it was unsafe to service the system while it was in operation.

The respondent denies that the respondent's discharge was discriminatory, and it takes the position that the complainant was discharged not only for failing to service the component part in question, but also because of his failure to generally service the equipment as he was expected to do during his shift.

A hearing was held in Pikeville, Kentucky, and the parties filed posthearing briefs. I have considered their respective arguments in the course of my adjudication of this matter.

Issues

1. Whether the complainant's belief that the servicing of the continuous haulage system in question while it was in operation would be unsafe and hazardous, and would expose him to serious or fatal injuries, was reasonable and made in good faith.

2. Whether the complainant's failure to service the system in question because of his reasonable and good faith belief that to do so while it was in operation would be unsafe and hazardous and would place him at risk of serious injuries or death constituted protected activity.

3. Whether the complainant communicated his reasons for failing to service the system to mine management, and whether the respondent's discharge of the complainant in spite of his communicated safety concerns was justified or otherwise nondiscriminatory.

4. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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.

Stipulations

The parties stipulated to the following (Tr. 8-10):

1. The mine where Mr. Hays was employed is a nonunion mine, and it is subject to the Act.
2. At the time of the discharge, the first and second shifts were production shifts, and the third shift was a non-production maintenance shift.
3. At the time of the discharge, Mr. Hays' hourly rate of regular pay was \$15.65, and his hourly overtime pay rate was \$23.47.
4. At the time of the discharge, the continuous haulage system in question was comprised of four bridges and three mobile bridge carriers which are referred to as "carriers."
5. Complainant's Exhibit C-8, is a Long-Airdox brochure regarding the continuous haulage system, and the circled portion in the listed specifications is the particular Model No. MBC-30C involved in this case.
6. The complainant's personal notebook or work log, received as evidence in this case, is an authentic document.
7. Respondent's "downtime records," provided to the complainant's counsel during discovery, are authentic business records.
8. Photographic Exhibits C-2 through C-7, taken during the complainant's discovery inspection of the mine are authentic and are what they purport to be.
9. The presiding judge has jurisdiction to hear and decide this matter.

Complainant's Testimony and Evidence

Ricky Hays testified that he is currently employed by the Golden Oak Mining Company in Knott County, Kentucky, as an electrician, and that he has been so employed since October 7, 1989. He previously worked for the respondent as an electrician for 2 years until his discharge on September 7, 1989. At the time of his discharge he was working the day shift at the No. 62 Mine, and was responsible for servicing the four bridges and three carriers on the continuous haulage system, including the digging arms of the mining machine, and the servicing entailed the greasing and oiling of the equipment. He also serviced two scoops and two roof bolters. He confirmed that the continuous haulage system was approximately 250 feet long, and as the miner

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advanced, the bridge and bridge carriers also advanced by tramping on tracks (Tr. 15-23).

Mr. Hays stated that he had to grease the system "from the miner back to the bridge or belt line," and that there were approximately 100 grease fittings on the system. Each bridge and carrier had six grease fittings which he greased with a cartridge fed grease gun which he had to put on the ground so that he could have leverage to hold the hose from the ground and place it over the fitting to pump the grease. The equipment was oiled by means of a suction-type gun approximately 18 to 20 inches long, and the oil was sucked into the gun from an oil bucket by vacuum. He had to oil two speed reducers on the bridge and carrier conveyor, and an inner and outer carrier drop box which used gear oil (Tr. 25).

Mr. Hays stated that on the day of his discharge, he was working on the day shift (7:00 a.m. to 3:30 p.m.), on the No. 2 section. A "pulling star," which is an axle gear on a conveyor shaft that pulls the conveyor chain used for coal loading, broke at 12:30 p.m., and he called outside for a replacement part and to report the downtime. Outside foreman Clyde Collins came to the area with the parts, and after looking around, he found a grease or dust cap that attaches to the end of the shaft on the offside of the speed reducer on the No. 1 bridge, and it had a broken grease fitting on it. Mr. Collins asked Mr. Hays how long the fitting had been broken off, and Mr. Hays told him that he was not sure, but that it could not have been long because he had serviced the equipment that morning and did not notice that the fitting was broken. Mr. Hays told Mr. Collins that he had last serviced the dust cap itself 5 days earlier, and when Mr. Collins asked him why he had not recently serviced it, Mr. Hays told him that it was too dangerous to do so while coal was being run because it was offset on the shaft, and that there was no way to connect a grease hose to the fitting while it turned, and "that it would get you against the rib or something" (Tr. 28).

Mr. Hays explained the differences between a grease fitting which is "offset" and one which is "centered." He confirmed that there are eight offset fittings on the haulage system, two on each bridge, and he indicated that these fittings turn with the shaft when the machine is operating and that it is impossible to attach a grease hose to the fitting when it is turning with the equipment running. However, he can attach a grease hose to a fitting which is centered, even though the machine may be running, but he must watch and stay out of the way of the machine (Tr. 31-36; Exhibits C-2 through C-5, C-7). He believed that servicing a centered fitting while the equipment was running is not safe because he could be run over, pinned against the rib, or "various things could happen," if he were unaware that the bridge carrier operator was moving the equipment (Tr. 40).

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Mr. Hays believed that the width of the entries at the time of his discharge was 18 feet, and that the distance between the equipment and the ribs would vary depending on the width of the cuts. He stated that the equipment "rakes" or rubs the ribs most of the time, except in a break. He stated that injuries ranging from a "mashed finger to being killed" may result by trying to grease the system while it is in operation, and that the severity of any injury would depend "on what situation you was in." He explained the dangers involved in attempting to service the fittings while the equipment is running, and he confirmed that none of the grease fittings on the system in question had extended fittings (Tr. 40-44).

Mr. Hays stated that he completed the repair of the pulling star at approximately 3:00 p.m. Mr. Collins did not ask him about any other fittings or whether he had serviced any other equipment. Mr. Collins told him to gather up his tools and that "we were going outside," and did not inform him at that time that he had been fired. Mr. Hays stated that the broken grease fitting on the pulling star, or the fact that it had not been serviced that day, or the past 5 days, had nothing to do with the breakdown of the equipment (Tr. 46).

After reaching the surface of the mine, Mr. Hays was informed by the "light lady," Mabel, that there was a note for him to meet with his supervisor, maintenance foreman Clayton Hacker, in his office. Mr. Hays met with Mr. Hacker. The second shift electrician, Jerry Caudill, also known as "blockhead," was also summoned to the office and was present when he arrived. After Mr. Hacker arrived, he picked up the dust cap which had come off the bridge, and asked them when they last serviced it. Mr. Caudill stated that he had serviced it 2 days before, and Mr. Hays said that he had serviced it 5 days earlier than that. When asked for an explanation, Mr. Hays informed Mr. Hacker that he could not service it while the equipment was running because it was too dangerous and that there was no way to attach the grease hose while it was running, and Mr. Caudill "told him pretty much the same thing" (Tr. 48). Mr. Hays informed Mr. Hacker that "the only way you can do it is shut it down," and Mr. Hacker stated "we can't shut it down, . . . we can't stop running coal just to grease that" (Tr. 48).

Mr. Hays stated that he informed Mr. Hacker that he could stay between shifts to service the system, but that there was no way he could service the offset fittings while the equipment was running, and he explained his reasons to Mr. Hacker. Mr. Hacker informed him that "there wasn't no excuse" and that he (Hacker) had serviced the system while it was running and said "he knowed we could" (Tr. 49). Mr. Hays confirmed that on a previous occasion, Mr. Hacker had informed him that servicing the system while it was running would allow the grease to reach the bearing "real

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good," and that if it were serviced while it was shutdown, the grease will come out (Tr. 50).

Mr. Hays stated that he and Mr. Caudill informed Mr. Hacker that they had been "riding the machine to service what we could on it, because there wasn't no room on the sides" between the equipment and the rib when it was cutting in a belt entry, and that he had to position himself on top of the machine to ride it. Mr. Hacker then discussed his maintenance program and informed them "we had to work together" and that "if one of us didn't do our part, then he couldn't have another one coming in and filling in for the one that couldn't do their part," and he then informed both of them that they were fired (Tr. 52).

Mr. Hays stated that Mr. Hacker mentioned no other grease fitting other than the grease cap he was referring to, and that this was the same cap which he (Hays) had discussed with Mr. Collins underground. Mr. Hacker mentioned no other broken grease fittings, said nothing about his (Hays) failing to service any other equipment on the section, and said nothing about notifying him if he believed he could not service that particular fitting (Tr. 53).

Mr. Hays confirmed that he had previously discussed the servicing of the system with Mr. Hacker, and asked him if it was being serviced while it was running in the same way it was done at the No. 49 Mine where he (Hays) was assigned prior to his transfer to the No. 62 Mine, and that Mr. Hacker told him that it was. Mr. Hays confirmed that 2 or 3-days prior to his discharge, he asked Mr. Hacker if he could stay late to service the system. Mr. Hays stated that the maintenance system at the No. 49 and No. 62 Mines were the same, and he acknowledged that although he serviced the system at the No. 49 Mine while it was running, he complained to Mr. Hacker that he could not do it because it was dangerous. Mr. Hacker informed him "you do it" or "he would replace us" (Tr. 54-56).

Mr. Hays stated that he regularly greased and oiled the system while it was running on a daily basis while he was employed on the day shift at the No. 62 Mine. However, he only serviced the grease fittings which were centered, and not the ones which were offset, while the system was running (Tr. 57). Mr. Hays stated that he was able to service the grease fitting which was discussed with Mr. Hacker when he was fired 5 days earlier because the power and equipment was down and "I had a chance to get them" (Tr. 58).

Mr. Hays explained how he serviced the system by "riding it" while it was in operation and trammed. He stated that because of the location of some of the grease fittings, he had to lay on top of the machine in order to reach them, and that he would have to position himself between the equipment and the coal rib to reach

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others. In order to reach the carrier bridge grease block which has five grease fittings, he would have to lay on the machine and reach down, and that there was a danger of "just getting you against the top" (Tr. 60-65, exhibit C-6).

Mr. Hays confirmed that he knew it was illegal and unsafe to service the system while it was in operation, but did it because "I was told to either do it or be replaced" (Tr. 66). He stated that the system had never been intentionally shutdown and locked out on any production shift so that he could service it, but he did not know whether this was ever done during the third or idle shift (Tr. 67).

Mr. Hays stated that if the system were deenergized and locked out so that he could service it, it would take him 45 to 75 minutes to grease all of the fittings. It would take approximately 45 minutes to 1 hour to check the oil and oil the system, and to do both together, or to completely service the entire system, it would take approximately 1 hour and 45 minutes to 2 hours and 15 minutes (Tr. 71). If an equipment breakdown occurred during the shift, he would be responsible for making the repairs rather than servicing the system while it was down (Tr. 72). He confirmed that during the last week of his employment, he was responsible for servicing all of the equipment on the section, except the scoops. During the changing of the continuous miner bits in the last week of his employment, he would grease the miner digging arms, and would sometimes have 2 or 3 minutes to check the bits and lugs or call out to report anything that required repairing (Tr. 74).

Mr. Hays identified a notebook which he maintained on a daily basis during his working shift (exhibit C-1; Tr. 76). He confirmed that his section foreman was aware of the fact that he was servicing the system while it was in operation because he observed him doing it all of the time. The foreman never told him not to service the system while it was running, never took any disciplinary action against him for doing so, and never deenergized the system before he serviced it (Tr. 78). Mr. Hacker was aware that the system was being serviced while it was running because "he is the one that instructed us to do so" (Tr. 78).

Mr. Hays stated that prior to his discharge, he had never been disciplined or "written up" for any improper servicing of equipment, and was never told that he was not servicing the equipment properly at the No. 62 Mine. He confirmed that he was out of work for 1 month after his discharge, and that his next job after his discharge was his present employment (Tr. 78).

On cross-examination, Mr. Hays testified as to certain entries made in his notebook. He confirmed that the equipment was supposed to be serviced every day, and that if he could not

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service it, he was not required to tell anyone, and he "just let it go" if he could not service it (Tr. 79-83). He confirmed that he had previously serviced the offset speed reducer grease fitting while working at the No. 49 Mine, and he stated that "most of them stayed tore up. They didn't serve no purpose. No one really worried about it" (Tr. 86). However, he could not service it while it was running, and only did so "when it was off. When you got a chance." He stated that the haulage system in question is approximately 2-1/2 feet high, and that the grease gun hose that he uses is 18 inches to 2 feet long (Tr. 88).

Mr. Hays stated that depending on the cut and the individual operating the equipment, the system would advance or tram approximately 8 inches or a foot every 2 or 3 seconds (Tr. 89). He described how the system advanced while coal was being mined, and he explained how he would attach his grease gun hose to the fittings (Tr. 89-98).

Mr. Hays stated that the first time he complained to Mr. Hacker about his belief that it was unsafe to service the system while it was running was when he worked on the second shift at the No. 49 Mine. Mr. Hays believed that there were no bridge parts which could be safely greased while the system is running (Tr. 101). He confirmed that there were times during his shift when he observed the changing of the miner bits once, but he did not recall more than one change except for bit changes on the third or idle shift when overcasts were being cut. He would not record such bits changes in his notebook unless he helped change them, and he could recall no bits being changed more than once on any of his day shifts (Tr. 104-107).

Mr. Hays confirmed that the system was shutdown when belt setups were made, and that there were no belt setups made on his shift during his last week on the job, or during the 2 or 3 weeks when he worked at the No. 62 Mine. He stated that the system advanced 270 to 300 feet before a belt setup was made (Tr. 107).

Mr. Hays acknowledged that he was given a 3-day suspension by Mr. Hacker on July 27, 1989 for "unsatisfactory performance" for not servicing the brakes on a shuttle car. He explained that he had repaired the brakes, but when they went out 6 hours later, Mr. Hacker told him he had not "fixed them good enough where they lasted, you know, forever" and suspended him. He also acknowledged that he received prior written reprimands from other supervisors, for not installing a spillboard on a face drive on January 13, 1989, and for not hooking up a battery charger on December 7, 1988 (Tr. 111-112).

Mr. Hays confirmed that Mr. Hacker instructed him to service the system and that he pointed out the importance of servicing all of the speed reducers while the bearings were turning so that they could be serviced sufficiently. He agreed with Mr. Hacker

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that it was best to grease the bearings while they were turning in order to draw the grease freely from the grease gun (Tr. 113). Mr. Hays acknowledged that even though he was an electrician, he was required to repair brakes and spillboards, and to do "whatever they told you to do" (Tr. 114).

Mr. Hays confirmed that he knows the respondent's mine safety director and some of his staff and has seen him at safety meetings. He also knew that there was a suggestion box at the mine for anonymous safety suggestions by miners, has taken advantage of it, but never in regard to grease fittings on a speed reducer because he "confronted" Mr. Hacker about that matter "face-to-face" at the No. 49 Mine (Tr. 116).

In response to further questions, Mr. Hays confirmed that he did not sign any of the prior three "disciplinary slips" because he did not agree with them (Tr. 117-118). Counsel Oppegard agreed that two of the disciplinary actions were 3-day suspensions, and the other one was a warning (Tr. 119). Mr. Hays explained the system for deenergizing and locking out the equipment and the haulage system, and he stated that the amount of time required to deenergize the equipment would depend on its location at any given time and the location of the power center (Tr. 120-125). He also explained his notebook notations in reference to greasing the system bridge and bridge carriers (Tr. 126-128).

Mr. Hays stated that Mr. Collins did not blame him for the broken star piece gear mechanism and did not indicate to him that it had broken because he did not service it properly. Mr. Hays stated that it broke because "they were running rock and it wouldn't carry rock good" (Tr. 131). He stated that on the day of his discharge Mr. Hacker mentioned his prior disciplinary actions, as well as those of Mr. Caudill "right before he fired us" (Tr. 131). He confirmed that he tried to get his job back after he was fired, spoke to the safety department, and tried to get an appointment with the company president, but that "they called me back and more or less made fun of me" (Tr. 133).

Mr. Hays stated that he never complained to the safety department about being required to service the equipment while it was being operated, but did complain to Mr. Hacker, his immediate boss. Mr. Hays acknowledged that he has observed federal and state inspectors at the mine, but never mentioned that he had to service the equipment while it was running, and he was certain that the respondent had never been cited for servicing the equipment while it was running, and if it had "it would have warned us about it, you know, not to do it, while they was there" (Tr. 135). He confirmed that he was not aware of any miner safety representative or safety committee at the mine, and that if he had any safety problem he would go to his boss "through the chain

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of command." He acknowledged that he could have gone to the safety department, but never did (Tr. 137).

Jerry M. Caudill testified that he is employed by the Blue Diamond Coal Company, and previously worked for the respondent. He confirmed that he was fired on September 7, 1989, with Mr. Hays, but that his discharge was changed to a 3-day suspension and he was assigned to the No. 29 Mine where he worked for a week and a half before going to work at his present job. He confirmed that he worked as a second shift electrician for the respondent, and that he is a certified mine foreman. His electrician duties entailed the repair of all of the equipment, including the continuous haulage system, bolters, scoops, and miner digging arms (Tr. 141).

Mr. Caudill explained what transpired on the day that he and Mr. Hays were fired, including their discussions with Mr. Hacker. He confirmed that Mr. Hays told Mr. Hacker that he could not grease the grease cup fitting which Mr. Hacker had referred to while the system was running because it was offset on the shaft. Mr. Caudill stated that he told Mr. Hacker the same thing, and that it was too dangerous to grease it while it was running. Mr. Hacker replied that "he wasn't going to hear no excuses. It had to be done during our shift" (Tr. 143). Mr. Hays asked Mr. Hacker if the system could be shutdown for service, and Mr. Hacker "said we had to find time to do it. But it had to be done during our shift, but they would not shut it down to grease it" (Tr. 144).

Mr. Caudill stated that when he worked as a second shift electrician he was expected to service and oil the haulage system while it was running and "that this is the only way to do it" (Tr. 145-146). If the system were down it would take someone 2-1/2 to 3 hours to do "a real good job" greasing and oiling the entire system, and 1 hour or 1-1/2 hours to grease only the fittings. It was not possible to grease the system every shift while it was running (Tr. 147).

Mr. Caudill identified photographic exhibit C-6, as a bridge carrier, and he explained that he could grease part of the carrier by walking next to it with a grease gun, but would grease the top fittings while seated on top of the carrier start box while the machine was moving and while coal was being cut. If he were servicing the fittings from the side, the distance between the machine and the rib would sometimes be a foot and a half, "hardly no more than that," and this presented a danger in that "if they move nary a bit, they'll drag you into the rib. You can't get away from it" (Tr. 149). He has never been injured trying to service the system, but stated that "I've been lucky, I've went under through it before to get away from it" and that he has had close calls more than once (Tr. 149).

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Mr. Caudill stated that he never saw the system deenergized specifically for the purpose of greasing it, and he confirmed that Mr. Hacker knew that he was servicing it while it was moving because he observed him doing it. Mr. Hacker never warned him not to do it, never disciplined him for doing it, and never told him to deenergize the system before servicing it. His section foremen were also aware of the fact that he was servicing the equipment while it was running because they too observed him doing it (Tr. 151). Mr. Caudill stated that he complained to his section foreman and outside foreman about servicing the system while it was running, and that the section foreman would say nothing about it, and the outside foreman did not want to talk to Mr. Hacker about the matter. Mr. Caudill stated that he complained to Mr. Hacker that it was dangerous to service the system while it was operating on at least four occasions, and that Mr. Hacker told him he "wasn't going to hear no excuses," and that "we would do it during our production shift if we stayed there" (Tr. 153). Mr. Caudill also asked to stay over on overtime to service the system on the third shift, but Mr. Hacker "said no" (Tr. 153).

Mr. Caudill did not believe it was safe to service any of the fittings on the system when it was running, regardless of the fact that they were offset or on the center of the shaft, because "they go to the face and come back so rapid that you can't get away from the equipment." The system is so long that if he is on the corner and the equipment is on a break, "the whole thing comes over all at once and you ain't got nowhere to run unless you go over top of it or through it" (Tr. 154). He believed that he could be injured while trying to grease the system "on the run," and that "it could be drug plumb over top of you or get caught in a conveyor chain or slide pan. You could get caught in them" and be killed "real easy" (Tr. 154).

Mr. Caudill stated that on the day of the discharge Mr. Hacker said nothing to him or to Mr. Hays about any other grease fittings other than the one that he had in his hand. Mr. Hacker said nothing about their failure to service any other equipment on the section other than that one grease fitting, and he did not mention their failure to service the bolters or miner digging arms. Mr. Hacker did not tell them that they should have contacted or notified him if they could not service the fitting in question (Tr. 156). The only reason he could think of for his discharge was the grease cap that Mr. Hacker was holding (Tr. 157). His discharge was changed to a suspension after he spoke with another official at the company's London office (Tr. 157). That individual made Mr. Hacker put him back to work, but Mr. Hacker said some bad things about him and humiliated him and he left later because "I didn't feel right working for the company" and quit. He did not know why Mr. Hays did not get his job back (Tr. 159-160). Mr. Caudill confirmed that he had received prior disciplinary warnings or suspensions before his discharge

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at the No. 3 Mine 3-years ago, but they were not related to his work (Tr. 160).

On cross-examination, Mr. Caudill explained that his prior disciplinary actions were not related to his work and that he had a "habit of bad language" and had personal differences with a supervisor. He admitted that when he and Mr. Hays were called to Mr. Hacker's office he told Mr. Hacker "that he knew that Hays was going to get him fired" (Tr. 162). He explained that he made that statement because approximately a month earlier he would find three bridge speed reducers "bone dry" on his shift after he had serviced them and he believed that he was going to be fired by Mr. Hacker because of this (Tr. 162-163).

In response to further questions, Mr. Caudill stated that he informed a second shift mechanic foreman about the dry reducers and took him into the mine and showed him how he was greasing them and that the foreman stated that "he didn't see how we could do it, oil that stuff, and keep it up" (Tr. 168). Mr. Caudill also confirmed that he wrote up and reported the conditions of the reducers. He stated that he and Mr. Hays were both fired "over the grease cap" and that Mr. Hacker blamed them for it, and stated "I can't fire one of you without letting you both go because both of you were supposed to be doing that job," and that "he wouldn't listen to nothing," even after he told him that he needed his job. Mr. Hacker told him "it ain't my damn problem" (Tr. 170).

Mr. Caudill stated that he did not know whether the respondent had ever been cited for servicing the system while it was running, and that he contacted a federal inspector after his discharge, and the inspector told him he couldn't be fired. He also complained to a federal inspector who inspected the mine before his discharge but nothing came of it. Mr. Caudill confirmed that he never complained to the safety department (Tr. 171).

Mr. Caudill explained that his complaint to Federal Inspector Franklin Nahew was about greasing the system while it was running, and that he complained during the "middle of 1988." His complaint concerned the Leeco No. 22 Mine, where the same system of servicing the equipment while it is operating is used. He stated that "they do it the same way at all their mines" (Tr. 173). He confirmed that he knew some of the training instructors in the safety department, and that there was a suggestion box available for anonymous safety complaints and that he used it to complain about greasing the haulage system. He signed the complaint, but a foreman cut the lock off the box and took out his complaint. The foreman was disciplined for doing this and was nearly fired, and he (Caudill) "got in trouble over it" (Tr. 170). He also confirmed that the dried up condition of the reducers which he thought he was going to be fired over, and

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which caused him to make the statement that Mr. Hays was going to get him fired, was caused by the equipment which had been reported by him two or three times during the week he was fired, and not by Mr. Hays (Tr. 180).

William Craft testified as to his mining background and experience, and he confirmed that he formerly served as the MSHA District Manager in Madisonville, Kentucky. He taught classes at the federal mine academy, and served on a committee which recommended the promulgation of mandatory safety standards, and was familiar with the standards. He has been self employed as a mining consultant since 1981, when he retired from MSHA because of a back disability. He has testified in many proceedings before the Commission's judges and has been qualified as an expert on mine safety matters (Tr. 180-184). Mr. Craft was accepted as an expert witness, over the objection of the respondent (Tr. 185-186).

Mr. Craft confirmed that he toured the No. 002 section of the No. 26 Mine on April 24, 1989, and inspected the continuous haulage system in question. He also confirmed that he has reviewed the depositions of Mr. Collins and Mr. Hacker, as well as others, and has heard the testimony of Mr. Hays and Mr. Caudill. He has also reviewed the manufacturer's manual concerning the haulage system (exhibit C-8), and he explained the respondent's mining method used on the section in question (Tr. 186-192).

Mr. Craft stated that the system is greased and oiled manually, and he explained that when a grease hose is attached to a speed reducer with a fitting which is centered, the hose will stay still while the shaft turns, and if it is attached to a fitting which is offset, "the whole thing goes around" (Tr. 198). He believed that servicing the system while it is in operation presented a "dangerous situation" (Tr. 200). In addition to his opinion that it was dangerous, Mr. Craft cited mandatory safety standard sections 75.509 and 75.1725(d), which he believed prohibited the lubrication, servicing, or greasing of the system while it is in operation (Tr. 201-205).

Mr. Craft explained why he believed it was dangerous to grease an offset speed reducer fitting with the equipment energized, and he believed that the system could not legally be greased and oiled without deenergizing the power and locking out the system (Tr. 206-207). He did not believe that the grease fittings can be safely serviced without first locking out the system at the power center, and he stated that "You've heard them testify they were hanging on the sides of it and on the top of it, that, in itself, would be enough to tell you that it wasn't safe" (Tr. 208).

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On cross-examination, Mr. Craft stated that the words "work" and "equipment" found in section 75.509, cover greasing or lubrication on the haulage system in question, and that the system must be deenergized before this work is done (Tr. 208-209). He also believed that the use of a grease gun and the oiling of the system constituted "work" within the meaning of the standard (Tr. 210-211). If he were still employed by MSHA, he would either cite a violation, or issue instructions to cite a violation, for the lubrication of a bridge system without deenergizing it (Tr. 212). He would cite a violation of section 75.509, and 75.1725(c) or (d) (Tr. 213-215). Mr. Craft confirmed that when he visited the mine, he found no right angle crosscuts, but did find some crosscuts cut at 60 degree angles (Tr. 217).

Terry Richardson, third-shift electrician and foreman, testified that he was working as a "floater" on the second shift on the day Mr. Hays was discharged. He confirmed that he has worked with Mr. Hays on the third shift at the No. 62 Mine, and that he considered Mr. Hays to be a hard worker. Mr. Richardson was familiar with the haulage system, and stated that he was responsible for servicing it on the second shift. He confirmed that he has serviced the system while it was operating and not deenergized or locked out and that "in some ways" it was dangerous. He stated that "about the only thing you've got to watch--any piece of equipment that is moving, you've got to watch it. There is always a possibility that you could get mashed. You've got to be careful" (Tr. 223). He believed that it would be possible for an electrician to be injured or killed while attempting to service the system while it was in operation (Tr. 224).

Mr. Richardson believed that it would take 2-1/2 hours to service the entire system, and he doubted that there was that much available "down time" during a production shift to completely service the system. He stated that when he serviced the system while it was operating he tried to position himself "in the safest place you could" so that he could not be "caught" (Tr. 225). He would position himself on top of the equipment when it was in low coal, and that "most of the time you're beside of it" and that there is always a danger of getting mashed into the rib (Tr. 226). He confirmed that after Mr. Hays was discharged, his foreman Bobby Strunk commented to him (Richardson) that he believed Mr. Hays was a good worker (Tr. 226).

On cross-examination, Mr. Richardson stated that he has worked at other mines and believed that the respondent's mine is "as safe as any mine that I've worked in" (Tr. 229). He confirmed that he has serviced shafts on the system while the conveyor was off and "while they were backing out of a cut." In those instances, he would be walking alongside the miner if the coal were high enough, but "most of the time you would probably be on your knees. You try to get it as they back up." He

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believed that he would be exposed to a danger while doing this at certain times when the equipment is running and the operator may not see him, but that he tries to let the operator know where he is "most of the time" (Tr. 230). He confirmed that he was never specifically told to walk alongside the equipment to service it, but that "you've got to do what you need to do to service it" (Tr. 230).

Mr. Richardson confirmed that he has serviced the speed reducer grease fitting which is offset on the shaft, that it cannot be serviced when the conveyor is running, and that "you try to service it when you get a chance, when this equipment -- if it's stopped or if they're backing up" (Tr. 231). If the system conveyor chain is running, "there is no way you can grease it." He can keep up with the system while it is moving if he were walking, but if he were crawling, he cannot. He can service some of the system fittings if it is not advancing, and "you have to get what you can. Try to get them all, if you can" (Tr. 232). He also stated that "it's pretty much left up to the repairman. You just got to get it done" (Tr. 233). He makes an attempt to grease all fittings, and if he cannot, he tries to tell the oncoming shift repairman about the ones that he has not serviced (Tr. 235).

Mr. Richardson stated that he has not discussed the servicing of the system while it was running with his foreman or with Mr. Hacker, and he could not recall discussing this with Mr. Hays (Tr. 236). Mr. Richardson believed that it would be illegal to service a piece of equipment while it was energized, and that "just your general mine law" would prohibit this (Tr. 240). He confirmed that this particular question has never been discussed by the foreman and the crew.

Marty Lewis, roof bolter operator, testified that he worked with Mr. Hays, and that Mr. Hays was responsible for servicing, or greasing and oiling his machine every day. He had no complaints about Mr. Hays' servicing his machine, and prior to his discharge had no problems or breakdowns because the machine had not been properly serviced by Mr. Hays. He confirmed that Mr. Hays serviced the bolter during the shift, and he has also observed him servicing the haulage system during the shift. The system was not deenergized when Mr. Hays was greasing it, but if electrical repair work were required, the system would be locked out. Mr. Lewis believed that Mr. Hays was a good worker, and he heard foreman Bobby Strunk state that Mr. Hays was a good worker but "wasn't a good enough electrician to be on the section" (Tr. 241-247).

On cross-examination, Mr. Lewis stated that he could not recall helping Mr. Hays grease his machine, but he has helped other repairman with the greasing. He confirmed that he has never been required to work under dangerous conditions, and he

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believed that the respondent was "a lot safer than any coal company I've ever worked for" (Tr. 248).

Ricky Eversole, roof bolter operator, confirmed that he has worked with Mr. Hays and considered him to be a good worker. He had no problems with Mr. Hays' servicing of his machine, and stated that Mr. Hays serviced it regularly (Tr. 249-252).

On cross-examination, Mr. Eversole could not recall specifically helping Mr. Hays to grease his bolter, but that he would have done so if he asked (Tr. 252). He would also have helped other repairman if they had asked him to.

Dewey Eldridge, miner operator, testified that Mr. Hays was responsible for greasing and oiling the gathering arms of his machine while he (Eldridge) was "setting bits." He had no complaints about the manner in which Mr. Hays serviced his machine, and had no problems with any broken grease fittings that were not being replaced. He confirmed that Mr. Hays serviced the haulage system while it was in operation, and he never knew the system to be locked out while Mr. Hays was servicing it (Tr. 253-256).

On cross-examination, Mr. Eldridge stated that there were shifts when he changed the miner bits more than once, but that the electrician did not grease them everytime he changed the bits, and only greased them once. After this was done, the electrician could do something else. He had no knowledge about any instructions to an electrician as to when he was to grease the haulage system, and he believed that the respondent's mines are "as safe as the other mines" he has worked in (Tr. 257).

David Combs, mobile bridge carrier operator, explained his duties, and he confirmed that he has observed Mr. Hays greasing and oiling the system. He stated that he had no complaints or problems with Mr. Hays' servicing of the mobile bridge carrier, but he did not know whether Mr. Hays ever serviced it while it was in operation. He confirmed that the power was on while Mr. Hays serviced the system, and he never saw the system shutdown or locked out at the power center while it was being serviced (Tr. 258-262).

On cross-examination, Mr. Combs stated that he worked 1 week with Mr. Hays on the same shift, and he could not recall whether he ever saw Mr. Hays greasing the equipment while it was not in operation. He confirmed that there is a block of grease fittings in front of the control station on the bridge carrier where several hoses come together from different parts of the carrier, and that he can see them while he is operating the carrier. If a repairman was greasing those fittings, he could observe him and would not start up and possibly injure him (Tr. 263).

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In response to further questions, Mr. Combs confirmed that there are other operators for the other mobile bridge carriers on the system. During the week that he worked with Mr. Hays, there was an average of two bridge carriers on the system, and he identified a photograph of a bridge carrier similar to the one that he operated. He confirmed that he would be seated at his control compartment looking forward, and that he could see a serviceman such as Mr. Hays at all times while working on that part of the system, if he were "standing erect or hunched over." However, if he were kneeling down to grease something, he could not see him (Tr. 265). He confirmed that Mr. Hays serviced the system while it was being trammed, and that he has observed Mr. Hays around the machine while it was standing still "for a matter of minutes," but it was still operating with the rest of the system, and that he could see him if he were not lying down. If Mr. Hays was at the rear of the machine, he could not see him unless he turned around to look (Tr. 268).

Mr. Combs stated that while seated on the "onside" of his machine, he could not see Mr. Hays if he were servicing the other side, or "offside" of the machine and was kneeling or crouched down (Tr. 268). He confirmed that the bridge carrier and the entire haulage system, continues to move forward as the miner is cutting coal, and the system "follows the miner" (Tr. 268). He confirmed that he has an emergency stop control on his carrier that can keep the entire system from advancing and that he can stop the system to prevent someone from getting hurt. However, he could not deenergize the miner machine using this control. Although he could shutdown the miner, he cannot start it up again (Tr. 270).

Clifton Lewis, Jr., testified that he was working with Mr. Hays as a scoop operator at the time of his discharge. He did not believe that Mr. Hays was responsible for servicing the scoops, but he did observe him "help grease it every now and then" (Tr. 273). He has observed Mr. Hays service the haulage system while it was in operation, and he never saw the system deenergized or locked out while Mr. Hays was performing this service (Tr. 274).

On cross-examination, Mr. Lewis stated that he was present with Mr. Hays prior to his discharge at a meeting which took place with Mr. Collins and Mr. Hacker, and the scoop operators were informed at that time that they would have to grease the scoops. He stated that he has worked at other mines, and compared to these mines, the respondent's mine, in terms of safety, was "A-1, excellent, good" (Tr. 276).

Mr. Lewis confirmed that he had no problems with Mr. Hays' job performance when he worked with him (Tr. 278). He believed that the scoop operators were assigned the task of servicing the scoops so that the repairman could have more time to do what they

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were supposed to do (Tr. 280). He confirmed that he shuts down his battery powered scoop to grease it, and that he can grease it anytime during the shift (Tr. 282).

Gary R. Caudill, scoop operator, testified that he worked with Mr. Hays, and although Mr. Hays has helped him grease and service the scoop, Mr. Caudill greased his own scoop and was responsible for servicing it. He stated that no one was ever specifically assigned this service work, but that a meeting was held prior to Mr. Hays' discharge, and the scoop operators were given this responsibility. He had no complaints about Mr. Hays when he serviced his scoop, and he has observed Mr. Hays servicing the haulage system while it was in operation (Tr. 286). In terms of safety, and compared to other mines he has worked in, he believed that the respondent's mine was "pretty good" (Tr. 286).

Respondent's Testimony and Evidence

Richard Garcia, respondent's general manager, testified that he is responsible for the operation of five underground mines operated by the respondent, and that his responsibilities include production, safety, personnel, and equipment. Prior to his employment with the respondent, he worked for MSHA as the assistant district manager, District No. 7, Barbourville, Kentucky. Mr. Garcia identified Exhibit R-1, as a copy of a form that he uses for the reporting of downtime on each of the respondent's mine sections, and he explained how the information is reported to him and recorded on the form (Tr. 7-15).

Mr. Garcia stated that he became aware of the discharge of Mr. Caudill and Mr. Hays after receiving a telephone call from Mr. Collins or Mr. Ron Helton, the mine superintendent, and that it was normal policy to inform him of any discharges. He then met with Mr. Jerry Elliott, the respondent's personnel manager, and they reviewed the personnel file of the two employees. Based on the information in their files, they decided to let Mr. Hays' discharge stand, and that Mr. Caudill would be suspended for 3 days and transferred to another mine. Mr. Caudill's suspension, rather than discharge, was based on the fact that he had no recent disciplinary actions against him justifying a discharge (Tr. 17).

On cross-examination, Mr. Garcia confirmed that Exhibit C-12, is a copy of the same downtime form that he previously referred to, and he confirmed that he had no personal knowledge of the accuracy of the information recorded on the forms, and that he simply records what is reported to him from the superintendent, and that the superintendent would obtain the information from a section foreman. He conceded that the information could be inaccurate (Tr. 20).

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Mr. Garcia confirmed that he could recall no conversations with Mr. Collins or Mr. Helton at the time he was informed about Mr. Hays' discharge indicating that Mr. Hays told mine management that he believed it would be unsafe to grease the haulage system while it was in operation. He also could not recall being told that Mr. Hays was discharged for any reason other than his failure to lubricate the system, and that "it was basically a failure to perform the job as he was assigned is generally the way it was put to me" (Tr. 21). He further confirmed that the respondent has no "hard and fast rule" as to when an employee should be discharged, and that it would depend on the circumstances. The fact that an employee may have been suspended does not mean that he will automatically be discharged (Tr. 21-22).

Mr. Garcia confirmed that he was involved in the transfer of Mr. Collins as superintendent from the No. 47 Mine to the No. 62 Mine, but he could not recall whether he was involved in the decision to rehire Mr. Collins, but that he would have been involved in any recommendation to do so. He was aware of the fact that Mr. Collins had been discharged for smoking underground, and confirmed that he was involved in that discharge. He was also aware of the fact that Mr. Collins had been previously discharged for leaving a mine area unbolted without gobbing it off, but that this occurred prior to his employment with the respondent. Although he was concerned about these discharges, Mr. Garcia explained that the respondent needed qualified foremen, and that Mr. Collins was told "to clean up his act" and was informed that the respondent would not tolerate future acts of this kind. Mr. Collins' good reputation for producing coal was a part of the decision to rehire him (Tr. 25).

Mr. Garcia could not recall the details of what was in Mr. Hays' personnel file when he reviewed it at the time of his discharge, and he confirmed that he does not generally determine the merits of any prior disciplinary actions. He has had an occasion to meet with employees to discuss such matters, but could recall no further discussion in the case of Mr. Hays (Tr. 28). He confirmed that Mr. Hays never contacted him about his discharge, and he could recall no further information from Mr. Hacker concerning the matter. If an employee believes that he is wrongfully discharged, he can seek an appointment with someone "in the main office" to discuss the matter, and Mr. Hays made no attempts to contact him about the matter, but may have done it with someone else, in which case "I would have been involved in any discussion at that point" (Tr. 31). He believed that Mr. Hays could have discussed his case with someone "higher in management than his supervisor" or with the safety department, and that all employees have an opportunity to express safety concerns if they are required to do an unsafe job (Tr. 32).

Mr. Garcia confirmed that he had no knowledge of any company policy regarding the servicing of the haulage system, and that he

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knew of no policy requiring anyone to lubricate a machine while it is in motion or while it was being trammed from place to place. He believed that Mr. Hays should have complained earlier to someone higher in management than his supervisor if he believed that he was in danger or at risk of getting caught between the machine and the rib or being run over while servicing the machine. Suggestion boxes are available for employees to use and they are encouraged to report safety problems to the safety department. He could not recall any other personnel problems with Mr. Hays other than the prior disciplinaries which were in his file, and he made no further inquiries concerning Mr. Hays' work record (Tr. 35-38).

Mr. Garcia stated that servicing the haulage system while it is in operation would be a violation of section 75.1725, but not section 75.509, which deals only with electrical work. Section 75.1725 only requires that the power be off at the equipment itself when it is being serviced, but it need not be tagged and locked out. Section 75.509, would require the equipment to be locked out and tagged only when electrical work is being done (Tr. 38-40).

With regard to some of the downtime entries made on Exhibit R-1, Mr. Garcia confirmed that the haulage system would be in use when rock was being cut, and that it was very likely that an electrician such as Mr. Hays would have performed some or all of the work connected with the tightening of the chains, and helped out in the cleaning and setting of bits (Tr. 42).

Mr. Garcia conceded that he may not have known about Mr. Hays' contact with Mr. Elliott after he was discharged, and that he (Garcia) did not contact Mr. Hays prior to his discharge "to get his side of it," and he did not speak with Mr. Hacker (Tr. 44). He first learned that Mr. Hays had raised a safety concern as part of his discharge when he saw a copy of his complaint filed with MSHA (Tr. 49).

Mr. Garcia had no knowledge of whether the servicing of the system was ever done on the third shift, and he would not approve of shutting down for an hour or an hour and a half during a production shift in order to service the system. He would also avoid shutting down the system for 30 or 45 minutes for servicing during a production shift. He confirmed that pursuant to section 75.1725(c), maintenance could not be performed on the system unless the power was off and the system blocked against motion. However, the power would only have to be off at the machine, and it would not be required to be locked and tagged out for lubrication. He believed that "repairs" would include lubrication under subsection (c), and he assumed that lubrication is treated separately in subsection (d) because MSHA did not require tagging and locking out when equipment is lubricated (Tr. 52).

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Clyde Collins testified that he was the mine superintendent when Mr. Hays was discharged, and that he came to the No. 62 Mine from the No. 47 Mine in July, 1989. Mr. Collins confirmed that he had been fired by the respondent on three occasions, and that his last discharge was 6 or 7 years ago (Tr. 57). He was fired for smoking and having smoking articles in his possession, driving deep cuts, and refusing an assignment to another mine section (Tr. 58).

Mr. Collins stated that he went underground on the day Mr. Hays was discharged to check on a bridge sprocket which had been reported out on a prior shift and to check another bridge sprocket which had been reported out by the immediate night shift. He found that the speed reducer shaft had a broken fitting and that it had not been greased. He checked the rest of the system and found several fittings broken off, and that "a lot of it hadn't been serviced. It had just been neglected" (Tr. 64). He spoke with Mr. Hays and asked him if he had serviced the system within the past 2 days, and Mr. Hays replied that he had not, and did not know the last time he serviced it. Mr. Collins then called Mr. Hacker, the maintenance foreman, to come inside and check out the system. Mr. Collins confirmed that he is the immediate supervisor of Mr. Hacker, and that Mr. Hacker is Mr. Hays' supervisor. After checking the system for an hour, Mr. Hacker called Mr. Collins and asked him to come out and to bring Mr. Hays and his tool box with him. Mr. Hays went to Mr. Hacker's office, but Mr. Collins did not go with him, and did not speak with Mr. Hays again (Tr. 67).

Mr. Collins confirmed that it was within Mr. Hacker's discretion to discharge Mr. Hays. He also confirmed that Mr. Hays had never complained to him about any unsafe mine conditions, but that during a meeting a week or two prior to his discharge, he believed that Mr. Hays brought up the matter of servicing the system while it was running, and that he (Collins) informed the people at the meeting to service the equipment "while it was belting up" or when bits were changed, and if it could not be serviced during the shift it was to be reported (Tr. 68). Mr. Collins denied that he ever observed any repairmen servicing the system while it was moving, and that no one ever informed him that this was being done (Tr. 70).

On cross-examination, Mr. Collins confirmed that at the time he was last discharged by the respondent he admitted that he was smoking underground, and that most of his crew was also fired that time, including Mr. Hacker. He confirmed that he knew it was illegal to smoke underground, but allowed his crew to do it (Tr. 75). He also confirmed that he was fired for driving cuts deeper than permitted by the roof-control plan, and that he knew it was illegal, but did it anyway (Tr. 76).

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Mr. Collins confirmed that he did not know Mr. Hays prior to July or August, 1989, when he became the superintendent at the No. 62 Mine, and was only familiar with his work at this mine. Prior to Mr. Hays' discharge, he had no concern about Mr. Hays' job performance other than his servicing of the system on the day of his discharge (Tr. 77). The meeting held prior to Mr. Hays' discharge concerned personnel on both of the mine sections, and he had no particular concern about Mr. Hays' job performance at that time, and no complaints were made to him about Mr. Hays prior to his discharge on September 7, 1989 (Tr. 78). He identified the particular piece of machinery that he was looking at on the day of the discharge as a broken sprocket on a bridge of the haulage system, and confirmed that Mr. Hays was in the process of repairing it when he arrived underground and called Mr. Hacker "to come in and check the equipment" (Tr. 70).

Mr. Collins stated that when he spoke with the MSHA special investigator who investigated Mr. Hays' complaint, he stated that he had asked Mr. Hacker to come underground to "Look at the bridge" because it had not been serviced. Mr. Collins stated that he also told Mr. Hacker to "check his equipment" because he had checked the entire system prior to calling Mr. Hacker and found other fittings which were broken and not serviced (Tr. 82). He could not recall whether or not he told the investigator about looking at the other equipment or about the other broken grease fittings, and stated that he told Mr. Hacker to "come in and look at the bridge" (Tr. 83).

Mr. Collins stated that he was not involved in the decision to discharge Mr. Hays, and that Mr. Hacker did not discuss his decision with him. He further confirmed that after Mr. Hacker came to the mine on the day of the discharge, he did not speak with him about Mr. Hays' job performance (Tr. 83). He stated that when the third shift mechanic told him on the day of the discharge that there was a problem with the servicing of the equipment, he did not tell him that he believed that Mr. Hays was not doing his job, nor did he mention anyone in particular who he believed was at fault (Tr. 84). Mr. Collins confirmed that after Mr. Hays informed him that he did not know when he had last serviced the system, he could have fired him, but did not do so. He also did not suggest to Mr. Hacker that some disciplinary action needed to be taken against Mr. Hays (Tr. 91).

Mr. Collins believed that while some of the haulage system could be legally serviced while it was in operation, the remaining portion did not have to be deenergized at the power center and locked out (Tr. 92). Mr. Collins conceded that in his pretrial deposition he stated that the system had to be deenergized and blocked against motion in order to service fittings that could not be safely serviced while the system was in operation. He further conceded that he had previously stated that in order to service and oil the fittings, the equipment had to be locked

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out at the power center. Mr. Collins stated that he misunderstood the questions asked of him during his deposition, and confirmed that the equipment must be locked out if electrical work is being performed. He explained that while servicing the system "all you would have to do is kick the breaker on the start box." After speaking with the respondent's safety department, he formed a different opinion about the need to lock the power out at the power center before servicing the system (Tr. 95).

Mr. Collins conceded that servicing the system while it is in operation would expose the serviceman to danger, and that it could result in his being caught between the equipment and the rib, or being run over, and that this could result in serious injury or death (Tr. 95-96). He confirmed that prior to the discharge Mr. Hacker never told him that Mr. Hays was not reporting to him that equipment needed servicing or repairing, and that neither he (Collins) or anyone else in management ever disciplined any employee for servicing the system while it was in operation (Tr. 97). He confirmed that at least five people on different shifts were responsible for servicing the haulage system, and when the prior shift mechanic told him that the system was not being serviced, Mr. Collins did not conclude that this was Mr. Hays' fault, and he simply concluded that "it wasn't being serviced" (Tr. 114). He also concluded that "Hays and Caudill, neither one, wasn't servicing it," and that they were the only two individuals on the first and second production shifts on the section who were responsible for servicing the system (Tr. 114-116). He confirmed that it is not legal to service a moving part of the system while it was in operation (Tr. 117).

Mr. Collins confirmed that after Mr. Hays was discharged, Mr. Hacker informed him that he had fired him for "not servicing equipment," but he did not blame Mr. Hays for the broken sprocket. The sprocket in question has a grease fitting which is "off-center," and it turns. There was no way it can be serviced while it is moving, and if the system were running all of the time, it could not be serviced. However, if this occurred and there was no time to service it, it is supposed to be reported to him or to Mr. Hacker. At no time has any serviceman ever informed him at the end of his shift that there was servicing left to do. If it is not reported, he assumes that the system has been serviced, and no one would know any different unless it broke down or someone visually inspected it (Tr. 121). He confirmed that he does not ask his people to service the system while it is in operation, and had no knowledge that Mr. Hays was doing this (Tr. 122).

Mr. Collins confirmed that there is no company policy or written instructions advising employees to stop the equipment before servicing it, and he did not know why this is not covered by the company safety rules booklet (Tr. 123-124). Respondent's

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counsel stated that the safety rule booklet was published at a time when the haulage system was not in use and that it may be outdated (Tr. 125, exhibit C-16).

Mr. Collins believed that Mr. Hays was fired for not servicing the entire haulage system, rather than the one bridge sprocket which was broken, because "we checked the entire haulage system and there was lots of fittings on it that hadn't been greased. There was fitting on it that were broke" (Tr. 126). He confirmed that a broken fitting cannot be greased, and that no broken fittings had been reported. He did not believe Mr. Hays' assertion that the system was running all of the time and that he did not want to service it while it was running. He believed that Mr. Hays could have serviced the system when it was down, as reflected by the downtime reports, but conceded that he did not know what happened on September 6, other than what is reflected on the form (Tr. 129).

Mr. Collins stated that he has never observed Mr. Caudill or Mr. Hays use a grease gun to service the system, and that Mr. Caudill worked a different shift than Mr. Hays. Prior to the date of the discharge, he never checked on Mr. Hays' work. He would have expected Mr. Hays or Mr. Hacker to check the system and report any broken fittings. He had no reason to question Mr. Hays' work prior to his discharge, and Mr. Hacker never reported any problems with Mr. Hays' work. He confirmed that Mr. Hacker only told him that Mr. Caudill and Mr. Hays told him that they "didn't have time or something other," to service the system, and that Mr. Hacker did not mention Mr. Hays stating that he did not believe it was safe to service the system while it was running (Tr. 133). He believed that Mr. Hays should have asked for help if he did not have time to service the system, and that help would have been made available. In the alternative, Mr. Hays should have reported that he had not serviced the system (Tr. 134).

Clayton Hacker testified that he has served as a maintenance foreman for the respondent for 5 years, and has been the maintenance foreman at the No. 62 and No. 63 Mines since May 19, 1989. He confirmed that Mr. Hays worked under his supervision as an electrician, and also worked for him at the No. 49 Mine. He confirmed that he fired Mr. Hays (Tr. 143-145). He stated that on the day Mr. Hays was fired, he received a call from Mr. Collins to come underground to look at the equipment. Mr. Hays was working on a broken bridge discharge sprocket shaft, and Mr. Collins "mentioned about the servicing." Mr. Hacker then proceeded to look over the system, which consisted of three carriers and four bridges, and he also looked at the roof-bolting machines and one of the scoops. He looked at the lubrication points on all of this equipment and found "a lack of servicing." He explained that he found six or more grease fittings which were broken off on major components of the haulage system, identified

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the components, and indicated that there was no way they could have been greased with a grease gun because of the broken fittings (Tr. 149-150).

Mr. Hacker stated that after looking at the equipment, he retrieved the cap from the broken sprocket grease fitting, left the mine, and then called Mr. Collins and asked him to inform Mr. Hays to come out and to bring his tools with him. He then spoke with Mr. Hays and Mr. Caudill in his office, and asked them why they had not serviced the equipment. Mr. Caudill informed him that he had no time to service it, and Mr. Hays informed him that he could not service it while it was running. Mr. Collins stated that he told Mr. Hays that he was not instructed to service it while it was in motion, and he explained further as follows at (Tr. 153):

A. He was instructed to do his servicing within his shift. He was not told to do all the servicing at one time, in a complete thirty minutes, forty minutes, whatever. He was told to do it within the shift, itself. This could consist of ten minutes at a time during intervals; I mean, at anytime it was down for a period of time, which you could maybe get one bridge, one side of one bridge.

Almost all repairmen will go up and do one side at a time. They won't do everything. You know, it's never -- you know, hardly -- seldom done that all the machinery is serviced at one time. The only time this is ever done is in case a belt drive is down for a long period of time or a stacker is down outside, something that is going to be a long period of time.

Most all the service is done by just a little bit at a time. Repairmen keep their grease gun close to them so they can do this. They don't -- you know, their tools. They're not always having breakdowns to be working on the breakdown, so it's within theirself, when they find the time to do this.

Mr. Hacker denied that he ever suggested or instructed his servicemen to service the equipment while it was running (Tr. 154). At the time that he discharged Mr. Caudill and Mr. Hays, he was familiar with Mr. Caudill's work record through another individual who did not work for the respondent, and he had not previously reprimanded Mr. Caudill. He had previously reprimanded Mr. Hays and suspended him for 3 days for not fixing the brakes on a shuttle car. He also supervised Mr. Hays' work at the No. 49 Mine, and received a complaint from another repairmen in 1989 who asked him to replace Mr. Hays with another repairmen because Mr. Hays "wasn't going to make it" (Tr. 159). Mr. Hacker stated that when Mr. Hays previously worked for him he "was young

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at his job and I wanted to give him the benefit of the doubt," and that "as far as his work is concerned, he would patch things up, but as far as really passing on and getting the things fixed correct, he was never really interested in anything like that" (Tr. 159-160).

Mr. Hacker stated that he has never observed anyone servicing the haulage system while it was in operation (Tr. 167). He stated that it was illegal to service a piece of equipment while it is moving unless it has an extended grease fitting or cup. He confirmed that each mobile bridge carrier has nine different locations which have extended grease fitting, but no grease caps. It would still be illegal to grease these fittings while the system was running because "the way it moves, you know, if it would be there by the belt structure not outby the belt structure, you would be in a dangerous position to pin someone" (Tr. 168). Mr. Hacker confirmed that he has worked as an electrician on a continuous haulage system, and that in his experience, it has never operated for a full 8-hour production shift. Both he and Mr. Collins instructed the servicemen to report the fact that they were unable to service the equipment during their shift (Tr. 172).

On cross-examination, Mr. Hacker confirmed that he knew the miners who testified that they observed Mr. Hays servicing the haulage system while it was in operation, and that he had no reason to believe that these individuals were not honest or were lying (Tr. 175, 177). He confirmed that he did not consider Mr. Hays to be very good at his job, and that he was not very good at overall maintenance or mechanical work (Tr. 178). He confirmed that Mr. Hays had worked for him for a year at the No. 49 Mine, and that when he learned that he was being transferred to the No. 62 Mine, he (Hacker) did not object (Tr. 179).

Mr. Hacker confirmed that at the time he gave a statement to the MSHA investigator investigating Mr. Hays' complaint, he told the investigator that Mr. Hays was fired for not servicing the mobile bridge carrier the way he was instructed and that the bearings, grease caps and speed reducers had not been serviced within the past week. He stated that the investigator did not ask him about any of the other equipment, and that he told the investigator that he had fired Mr. Hays over the mobile bridge carrier and mentioned no other equipment (Tr. 185-186). He confirmed that when the investigator took his statement, a representative of the safety department, Pat Graham, was present, but he denied that he discussed what he would tell the investigator with Mr. Graham (Tr. 188). Mr. Hacker further confirmed that in his deposition he testified that he found that "most" of the grease fittings on the system were broken off, but that he does not now believe that six broken fittings was "most" of them (Tr. 189).

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Mr. Hacker stated that when he spoke to Mr. Hays and Mr. Caudill at the time he fired them, he was showing them the speed reducer grease cap with a broken fitting, and that Mr. Hays told him that he could not service the system while it was operating and that it was unsafe to service it while it was operating (Tr. 190). Mr. Hacker stated "I know it's unsafe to do so, but why would an individual wait up to this time to complain about something to you" (Tr. 191). He confirmed that he had no reason to believe that what Mr. Hays was telling him was not true (Tr. 192).

Mr. Hacker confirmed that he knew at the time of the discharge of Mr. Hays that it was illegal to service the system while it was in operation, and that this included all of the fittings. He stated that the system has extended fittings on the manifolds, and blocks on each side of the mobile carriers, but that he did not mention this during his prior deposition and stated at that time that there were no extended fittings, and that this was what he believed at the time he fired Mr. Hays. He subsequently learned of the existence of extended fittings when he examined the system (Tr. 193-194). He also confirmed that he previously stated during his deposition that any time the system was greased, it had to be deenergized and blocked against motion, but that he was confused about the question because he had previously talked about electrical or maintenance work (Tr. 195-197). He denied that he thought the haulage system had to be deenergized and locked out at the time he fired Mr. Hays, and conceded that his present testimony was different from his prior deposition testimony "on that specific thing" (Tr. 198).

Mr. Hacker agreed that if an electrician were greasing the system with the breaker off on the machine, and if someone were to turn the breaker on and the machine was not locked out, the electrician could be injured (Tr. 199). He stated that electrical work must be locked out and tagged, and that the term "maintenance" found in section 75.1725, includes greasing and oiling. He confirmed that when one is greasing the system, machinery motion is not required in order to make adjustments, and that it is his understanding that if any greasing is performed on the system, the power must be off and it must be blocked against motion (Tr. 201).

Mr. Hacker confirmed that he never informed Mr. Hays or any of his electricians that the machine had to be deenergized and locked out while they were greasing it. He believed that the particular grease fitting which he showed Mr. Hays at the time he fired him could be safely greased while the system was in operation, and he saw no danger in doing this, and did not believe there was any way that an injury would occur while greasing the system while it was in operation. He confirmed that even though he thought it was illegal to grease the system while it was in operation, and thought that half of the fittings on the whole

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system could be safely greased while it was in operation, he was not going to let his men do it (Tr. 203-204). He confirmed that he had never disciplined any employee for greasing the system while it was in operation, and stated that "I only know the safety department said it was against policy" (Tr. 205).

Mr. Hacker confirmed that the grease cap with the broken fitting which he showed to Mr. Hays at the time of his discharge had nothing to do with the equipment breakdown which Mr. Hays was working on at that time (Tr. 211). Mr. Hacker acknowledged that he did not ask Mr. Hays about his work that day and had no knowledge as to what he was doing. Mr. Hacker confirmed that servicing the system while it was in operation could result in serious or fatal injuries to a miner and this is why it is illegal to grease or oil the system while it is in operation. Mr. Hacker further confirmed that 2 days before the discharge he conducted an electrical inspection of the system and did not observe any broken grease fittings (Tr. 212-213). Prior to the discharge, no one ever reported any broken grease fittings, including the equipment operators who are responsible for the pre-operational inspection of their equipment and the reporting of any broken fittings (Tr. 214-215).

Mr. Hacker stated that prior to the discharge of Mr. Hays, he never told him that he was not complying with the maintenance "card system," and no one from management ever complained that Mr. Hays was not complying with this system. Mr. Collins has never "written up" Mr. Hays for failing to notify management about any needed equipment repairs or servicing, and many times Mr. Hays would have been responsible for repairing equipment, and when he finished, the system would begin operating immediately (Tr. 218). During the 2 or 3-weeks prior to the discharge, Mr. Hacker was not aware of any time that he or the section foreman suggested that the system be shutdown so that Mr. Hays could grease it, and that this would be an unusual procedure because he tries to get the least amount of downtime on a production shift (Tr. 221). He confirmed that the electricians did not always contact him personally to report work that needed to be done, and they would frequently call "Mabel in the light house" and she would write down what was needed (Tr. 222).

Mr. Hacker confirmed that on the day of the discharge, Mr. Hays informed him that it would be unsafe to grease the system while it was in operation. Prior to firing Mr. Hays, Mr. Hacker made no inquiries to determine whether Mr. Hays was in fact greasing the system while it was in operation (Tr. 225). He confirmed that the 3 hour and 15 minute downtime shown on one of the reports resulted from two broken sprockets, but he did not attribute this to Mr. Hays' failure to service the system properly. The broken sprockets were not the result of any lack of oil or grease, but were caused by cutting rock, and there was

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nothing Mr. Hays could have done to prevent the sprockets from breaking (Tr. 229).

Mr. Hacker stated that his visit underground on the day of the discharge was prompted by the two broken sprockets and the grease cap that Mr. Collins and Mr. Hays found while working on the equipment which was down (Tr. 230). He showed the cap to Mr. Caudill and Mr. Hays "because that was a topic to get started on the servicing of the equipment," and the lack of grease on the cap raised an inference that Mr. Caudill and Mr. Hays were not doing their job (Tr. 231). Commenting on some of the entries made by Mr. Hays in his daily notebook, exhibit C-1, Mr. Hacker stated "That is the best I've ever saw" and "That is very impressive." He confirmed that Mr. Hays never showed him the book, and if he had, it would have changed his mind because the notations reflect "a very hard working individual right there" (Tr. 233). However, based on what he knew of Mr. Hays, Mr. Hacker did not believe him to be a very hard worker (Tr. 234).

Mr. Hays was recalled by the Court, and he stated that on the day of his discharge he was not aware of any broken fittings on the system except for the one which had broken that day. He confirmed that when he could not grease the offset fittings, they were left ungreased and he did not report this (Tr. 240). He stated that Mr. Hacker instructed him to grease the system while it was in operation and told him that this was the way he preferred it (Tr. 241). Mr. Hays stated that prior to his discharge he told Mr. Hacker that he had a problem with greasing the system while it was moving, and that he greased it while it was moving because he believed he was expected to and wanted to keep his job, and no one told him that he was not supposed to grease the system while it was moving (Tr. 244).

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

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prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Company*, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, supra. See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir. 1983); and *Donovan v. Stafford Construction Company*, No. 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.

Protected Activity

A miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that his continued work involves a hazardous condition. *Pasula*, supra, 2 FMSHRC at 2789-96; *Robinette*, supra, 3 FMSHRC at 807-12; *Secretary v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-30 (February 1984), aff'd sub nom. *Brock v. Metric Constructors Inc.*, 766 F.2d 469, 472-73 (11th Cir. 1985). However, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that hazardous conditions exists. In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate his safety concerns to mine management in order to afford the operator with a reasonable opportunity to address them. See: *Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company*, 8 FMSHRC 303 (March 1986); *Simpson v. Kenta Energy, Inc. & Roy Dan Jackson*, 8 FMSHRC 1034, 1038-40 (July 1986); *Secretary on behalf of Dunmire & Estle v. Northern Coal Co.*, 9 FMSHRC 992 (June 1987); *Miller v. FMSHRC* 687 F.2d 194, 195-97 (7th Cir. 1982) (approving *Dunmire & Estle* communication requirement); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391 (June 1984); *Charles Conatser v. Red Flame Coal Company, Inc.*, 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

In *Gilbert v. Sandy Fork Mining Company*, 12 FMSHRC 177 (February 1990), on remand from *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989), rev'd *Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327 (1987), it was held that a violation of section 105(c) is established when a miner has a reasonable, good faith belief that certain work conditions are hazardous, communicates that belief to mine management, and management does not address his safety concerns in a manner sufficient to reasonably quell his fears.

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The complainant views this case as a "work refusal" case, and takes the position that Mr. Hays' refusal to fully grease the continuous haulage system was both reasonable and made in good faith.

The respondent argues that in order to demonstrate "good faith," Mr. Hays must show that he timely informed the respondent of his belief in the safety hazard so that the respondent would have an opportunity to correct the situation. Respondent takes the position that a work "refusal" requires communication of a miner's intention not to perform work, and that the purpose of the Act is not served when a miner keeps his "refusal" to do unsafe work to himself. Respondent concludes that Mr. Hays' surreptitious failure to service the grease fitting on the speed reducer shaft for 5 consecutive days did not constitute a valid work "refusal" protected by the Act.

Although Mr. Hays' discrimination complaint may not directly involve a "work refusal" in the traditional sense, I conclude and find that the principles enunciated in the aforementioned case law apply in this case, and that Mr. Hays' reluctance or failure to service the haulage system or any of its component parts in question while it was in operation because of his belief that to do so would be unsafe and hazardous and would expose him to serious injuries would be protected activity within the intent and scope of section 105(c) of the Act. Mr. Hays has the burden of establishing that he was required or expected to service the system while it was in operation, that servicing it while it was in operation was unsafe and hazardous, that his safety concerns with respect to the servicing of that equipment were reasonable and made in good faith, and that he timely communicated these concerns to mine management.

The Safety Issue

MSHA's mandatory safety standards, which are applicable to the respondent's mine, provide in relevant part as follows:

75.509 Electric power circuit and electric equipment; deenergization.

[STATUTORY PROVISIONS]

All power circuits and electric equipment shall be deenergized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing.

75.1725 Machinery and equipment; operation and maintenance.

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

(b) Machinery and equipment shall be operated only by persons authorized to operate such machinery or equipment.

(c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

(d) Machinery shall not be lubricated manually while in motion, unless equipped with extended fittings or cups.

The respondent argues that it never required or instructed Mr. Hays to service the system while it was in operation and that the testimony of Mr. Garcia, Mr. Collins, and Mr. Hacker establishes that Mr. Hays was not instructed to grease equipment while it was running, but was instead instructed to work safely in general and specifically to perform his greasing duties during "those scattered occasions throughout the shift when there were pauses in production for various reasons." Respondent believes that such idle times did occur during the shift, and that if they did not, or if Mr. Hays found them too short or too infrequent to allow for complete servicing of the equipment, he should have made this fact known to somebody in charge. Assuming that Mr. Hays did not have sufficient down time to service the equipment, the respondent concludes that he apparently worked on the equipment in an unsafe manner and/or left the work undone and failed to advise management that the work was not being done.

Respondent's General Mine Manager Garcia had no knowledge of any company policy regarding the servicing of the haulage system, and he was unaware of any policy requiring anyone to lubricate the equipment while it was in motion or being trammed. However, he confirmed that he would not approve of, and would avoid, the shutting down of the haulage system during a production shift for the purpose of servicing it. He conceded that servicing the equipment while it was in operation would be a violation of section 75.1725. He further conceded that subsection (c) of section 75.1725, would require the equipment to be deenergized and blocked against motion while it is serviced, but that it was not required to be tagged or locked out. He also considered "repairs," as that word is used in subsection (c), to include

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lubrication of the equipment, and assumed that any lubrication is covered separately by subsection (d) of section 75.1725.

Mine Superintendent Collins denied that he ever observed anyone servicing the haulage system while it was in operation, and he confirmed that no one ever informed him that this was being done. Although Mr. Collins believed that a portion of the haulage system could legally be serviced while it was in operation, and that the remaining portion was not required to be deenergized at the power center and locked out, he conceded that the electrical breaker on the "start box" had to be "kicked" while the system was being serviced. When asked to reconcile his testimony with his prior deposition testimony that the system had to be locked out at the power center before servicing and oiling the fittings, Mr. Collins stated that he misunderstood the questions asked of him during his deposition and that his present opinion is that the equipment has to be locked out only if electrical work is being performed.

I have reviewed Mr. Collins' pretrial deposition of April 25, 1990, and I cannot conclude that the questions asked and answered at pages 26 through 31 are confusing. The questions pertained to the greasing and oiling of the system fittings, and not to any electrical work. Mr. Collins' deposition testimony reflects his belief that two or three fittings, or those fittings located together at the front of the bridge carrier operator's control station, could be safely greased while the equipment was running because they are stationary and have no turning shafts and "there's nothing you can get hung into" (Q212 answer, pgs. 27-28). He further clarified his answer when he stated that the carriers are equipped with some, but not all, fittings which are extended or have cups, but that none of these fittings have anything extending out from the grease fitting itself (Q231-233 answers, pgs. 30-31). Mr. Collins doubted that it would be legal to oil the system while it was running and stated "I don't even see how you can put oil in it with it running" (Q218 answer, pg. 28). He also confirmed that in order to service the system fittings which were not otherwise safe to service, the system power had to be deenergized and the system had to be blocked against motion and he stated that "that's the only way you could service it" (Q228-229 answers, pg. 30).

During his hearing testimony, Mr. Collins confirmed that servicing a moving part of the system while it was operating is illegal, and he conceded that servicing the system while it is in operation would expose the serviceman to danger, and could result in his being caught between the equipment and the rib, or being run over, and that this could result in serious injury or death. This testimony is consistent with his deposition testimony that servicing the equipment while it is running would expose an electrician to serious hazards and injuries (deposition, pgs. 31-32). Mr. Collins also conceded during his trial testimony

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that a fitting which is "off-center" and is turning while the system is operating cannot be serviced because it is impossible to grease them while the system is in operation. He also conceded that a broken fitting cannot be greased.

Maintenance foreman Hacker denied that he ever suggested or instructed his service personnel to service the system while it was in operation, or that he ever observed anyone servicing the system while it was in operation. He confirmed that he expected each serviceman to service the system "when they find the time to do it." He was unaware of any time that the section foreman suggested that the system be shutdown so that Mr. Hays could grease it, and he confirmed that this would be an unusual procedure during a production shift because he tries to have the least amount of "downtime."

Mr. Hacker conceded that it was illegal to service the haulage system while it was in operation, and that it would be illegal to service any equipment while it was moving unless it was equipped with an extended grease fitting or cup. Although he confirmed that each bridge carrier has some extended grease fitting at different locations, he confirmed that these fittings have no grease caps and that it would still be illegal to grease these fittings while the system was in operation because it would expose the serviceman to a hazard of being pinned if it were operating near a belt structure. Although Mr. Hacker claimed some confusion about his prior deposition testimony that the system had to be deenergized and blocked against motion when it was being greased, he agreed that if an electrician were greasing the system with the circuit breaker off, if someone were to turn the breaker back on, and the equipment was not locked out, the electrician could be injured.

Mr. Hacker agreed that the term "maintenance" as found in section 75.1725, includes greasing and oiling, and that when the system is being greased, machinery motion is not required in order to make any adjustments. He confirmed that it was his understanding that if any greasing is being performed on the system, the power must be off and the system must be blocked against motion.

Mr. Hacker conceded that at the time he discharged Mr. Hays, even though he knew that it was illegal and unsafe to service the system while it was running, he had never informed Mr. Hays or any of his electricians that the system had to be deenergized before it was serviced. Mr. Hacker further conceded that during his discussion with Mr. Hays on the day of his discharge, and immediately prior to discharging him, Mr. Hays told him that he could not service the system while it was in operation because he believed it was unsafe. Mr. Hacker acknowledged that he had no reason to believe that Mr. Hays was not telling the truth about his safety concerns, and that he had no reason to question the

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honesty of the miner witnesses who testified about their servicing of the system while it was running, or their safety concerns and the hazards of servicing the system while it was in operation.

Former MSHA official William Craft testified credibly that pursuant to mandatory safety standard 30 C.F.R. 75.509, the greasing and lubrication of the haulage system in question encompasses "work" and "equipment" within the meaning of this section, and the system must be deenergized before this kind of work is performed. He also confirmed that lubricating the system without deenergizing it would be unsafe and would constitute a violation of mandatory safety standard 30 C.F.R. 75.1725(c) or (d).

Mr. Hays testified that Mr. Hacker was aware of the fact that the system was being serviced while it was in operation because Mr. Hacker had instructed the servicemen to do so. Mr. Hays also testified credibly that when he previously informed Mr. Hacker that he could not grease the fittings while the system was in operation, Mr. Hacker informed him that the system could not be shutdown for greasing, and instructed him to grease the speed reducers while the bearings were turning and informed him that the system could be greased while it was in operation because he had done so himself and knew that it could be done. Mr. Hays stated that he knew it was illegal and unsafe to service the system while it was in operation but did it anyway because he was told that he would be replaced if he didn't, and he confirmed that he asked Mr. Hacker to permit him to stay over his shift to service the system while it was not in operation, but was refused.

Mr. Jerry Caudill testified that when he worked as a second shift electrician, he was expected to service and oil the system while it was in operation, and that Mr. Hacker and his section foremen knew that he was servicing the system while it was in operation because they observed him doing it. Mr. Caudill further testified that he complained to his foremen about servicing the equipment while it was running, but they did nothing about it. He also informed Mr. Hacker on at least four different occasions that it was dangerous, but that Mr. Hacker "wasn't going to hear no excuses."

Shift foreman and electrician Terry Richardson testified that he had serviced the system while it was in operation and not deenergized. Roof bolter Marty Lewis, who worked with Mr. Hays, confirmed that he observed Mr. Hays greasing the system when it was not deenergized. Miner operator Dewey Eldridge observed Mr. Hays servicing the system while it was in operation and not locked out. Bridge carrier operator David Combs testified that while he observed Mr. Hays greasing and oiling the system, he never observed him doing this while the system was in operation.

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However, he confirmed that the system power was on while Mr. Hays serviced it, and he never saw the system shutdown or locked out at the power center while this work was being done. Scoop operator Clifton Lewis, who also worked with Mr. Hays at the time of his discharge, testified that he observed Mr. Hays servicing the system while it was in operation, and that it was never deenergized or locked out while he was doing this work. Scoop operator Gary Caudill also worked with Mr. Hays and he confirmed that he observed Mr. Hays servicing the equipment while it was in operation.

The credible testimony of Mr. Hays and Mr. Jerry Caudill, as corroborated by the credible testimony of the other equipment and system operators, establishes that Mr. Hays serviced the system while it was in operation. Although Mr. Hacker denied that he ever observed anyone servicing the system while it was in operation, I credit the testimony of Mr. Hays and Mr. Caudill that Mr. Hacker and other foremen had observed them servicing the system while it was in operation. I also credit the testimony of electrician foreman Richardson who confirmed that he serviced the system while it was in operation and not deenergized, and Mr. Hays' testimony that Mr. Hacker would not allow the system to be shutdown for greasing because he had greased it himself while it was in operation and believed that it could be done.

The credible and unrebutted testimony of Mr. Hays and Mr. Jerry Caudill reflects that the servicing of the haulage systems at all of the respondent's mines where they had worked was done while it was in operation and that this was a standard practice or procedure. Although management was aware of the fact that servicing the system while it was in operation was contrary to the law and exposed its service personnel to potential hazards and injuries, there is no evidence that management ever issued any instructions or adopted any safety rules prohibiting this practice, and it never disciplined anyone for doing this.

Notwithstanding the lack of any written or published company policy requiring the system to be serviced while it was in operation, the testimony of respondent's management personnel in this case reflects that short of a mechanical breakdown in the system, they would not approve of routinely shutting down the system or scheduling a shutdown to allow its service personnel ample time to grease, oil, or perform other normal and routine servicing of the system while it was not in operation. Management expected Mr. Hays to find the time during his shift to service the system, preferably during the "belting up" and changing of the miner bits, would not allow him to stay over and service the system while it not operating, would accept no excuses or explanations from him if he failed to service the system during his shift, and apparently simply expected him to report the fact that he could not service the system during his shift. Under all of these circumstances, I conclude and find that management condoned and

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tacitly approved of Mr. Hays' practice of servicing the system while it was in operation. I further conclude and find that it was not unreasonable for Mr. Hays to conclude that he was expected and required to service the system while it was in operation.

Mr. Jerry Caudill testified that greasing some of the fittings on the carrier, including the speed reducers, regardless of whether they were centered or off-centered on the shaft, while he was "riding" it or "on the run" between the machine and coal rib would place him at risk of being caught against the rib or in the conveyor chain or slide pan, and that he has had "close calls" on more than one occasion while attempting to service the system under these conditions. Electrician and foreman Richardson believed that it was possible for someone to be injured or killed while attempting to service the system while it was in operation.

Although bridge carrier Combs testified that he can engage an emergency stop control to stop the carrier from advancing and stop the miner machine, and that he could observe Mr. Hays at all times if he were servicing the system while it was moving if Mr. Hays were standing erect or hunched over, he could not see if he were lying down or on his knees greasing the fittings, and could not see him if he were at the rear of the machine unless he (Combs) turned around to look.

Mr. Collins conceded that servicing the system while it was in operation could result in the individual doing the work being caught between the machine and the rib, or being run over, and that this could result in serious injury or death. He also conceded that it would be impossible to service a fitting which is off-centered while the system is in operation.

Mr. Hacker conceded that servicing the system while it was in operation was illegal and unsafe. Although he alluded to several carrier fittings which have extended fittings, he confirmed that they were not equipped with grease caps and that it would still be illegal to grease these fittings while the system was running because he could be pinned against a belt structure. He agreed that an electrician greasing the system while the system power was off but not locked out, could be injured if the power breaker was turned on.

Having viewed Mr. Hays during the course of the hearing, I find him to be a credible witness, and I take note of the fact that Mr. Hacker had no reason to disbelieve his assertions that the servicing of the system while it was in operation exposed him to hazards and potentially serious or fatal injuries. Mr. Hays believed that it was physically impossible to attach a grease hose to an off-centered carrier speed reducer fitting while it was turning on the shaft and while the system was in operation,

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and Mr. Collins agreed that this was true. Although Mr. Hays indicated that he could physically attach a grease hose to a fitting which was centered and not turning on the shaft, he believed it was unsafe to do so and had to watch and stay out of the way of the moving equipment while doing this, and that he could be run over or pinned against the rib by the machine, particularly if he were unaware that the bridge carrier operator would move the machine.

Mr. Hays also believed that he could be seriously injured while servicing the system while it was in operation, and that none of the system fittings he was required to service had extended fittings. He stated that he had to "ride" or lie on top of the machine to grease the fittings when there was no room for him to stand between the machine and the coal rib when the miner was cutting coal in a belt entry. Because of the location of some of the fittings he had to lay on top of the machine while it was moving in order to reach them, and would have to position his body between the coal rib and the machine to reach other fittings. With regard to the five grease fittings located at the bridge carrier block, he had to lay on the machine to reach them and this exposed him to a hazard of coming in contact with the mine roof.

Given all of the aforementioned circumstances, I conclude and find that Mr. Hays had a reasonable and good faith belief that greasing, oiling, or servicing the haulage system in question, including its component parts and bridge carrier speed reducer with off-centered fittings which turned on a shaft, while the equipment was energized and in operation or moving, would expose him to dangerous safety hazards and possible serious or fatal injuries. Although Mr. Hays may not have directly refused to service the system while it was in operation, and he acknowledged that he had previously serviced it while it was in operation, I accept as credible his assertion that he was instructed to do so by Mr. Hacker, that he reasonably believed that he would be replaced if he did not follow these instructions, and that he had reasonable grounds for believing that management expected or required him to service the system while it was in operation, regardless of any resulting hazard or injury exposure.

I conclude and find that the respondent required or expected Mr. Hays to service the haulage system, including its component parts, while it was in operation, and that his failure to do so was tantamount to a work refusal. I further conclude and find that this work refusal was reasonable and made in good faith, and that it constitutes protected activity within the scope and intent of section 105(c) of the Act.

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Mr. Hays' Communication of His Safety Concerns to Mine Management

Mr. Garcia's suggestion that Mr. Hays should have discussed his safety concerns with someone "higher up" in management is rejected. The credible testimony establishes that Mr. Hays specifically informed maintenance foreman Hacker of his safety reasons for not servicing the haulage system immediately before Mr. Hacker discharged him, and Mr. Hacker himself acknowledged that this was true and that he had no reason to disbelieve Mr. Hays. Rather than addressing Mr. Hays' concerns, or taking them into consideration, Mr. Hacker summarily discharged him, and he did so without any further inquiry as to the work which Mr. Hays may have performed on the system prior to the discharge. The credible and un rebutted testimony of Mr. Hays and Mr. Caudill establishes that Mr. Hacker would accept no excuses for what he believed was a failure by Mr. Hays to service the equipment.

The credible testimony of Mr. Hays reflects that during a meeting held a week or two prior to his discharge, and in the presence of Mr. Hacker and Mr. Collins, he raised his safety concerns about servicing the system while it was in operation, and Mr. Collins acknowledged and believed that this was true. Further, Mr. Hays' testified credibly that he had previously voiced his safety concerns about servicing the system while it was in operation with Mr. Hacker and complained to Mr. Hacker about the matter when he worked at the No. 49 Mine, and that he had "confronted" Mr. Hacker "face to face" about greasing the speed reducers while the system was in operation.

Under all of the aforementioned circumstances, I conclude and find that Mr. Hays' concern and belief that the greasing and servicing of the system while it was in operation was unsafe and hazardous and exposed him to potential injuries was communicated to mine management prior to his discharge, and that management had a reasonable opportunity to address his safety concerns, but did nothing about it. I further conclude and find that Mr. Hays' communications were timely made and that they met the requirements enunciated by the Commission in *Secretary of behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126 (February 1982), *Secretary on behalf of John Cooley v. Ottawa Silica Company*, 6 FMSHRC 516 (March 1984); and *Gilbert v. Sandy Fork Mining Company*, supra.

The Respondent's Defense

The respondent takes the position that the complainant has not established that he engaged in any protected activity and has not established a prima facie case of discrimination. The respondent argues that Mr. Hays' termination was not motivated in any part by any protected activity, and that he was discharged for not servicing other equipment which was found to be dry and dusty and ungreased when it was examined by his supervisors

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(Collins and Hacker). The respondent points out that prior to the inspection of this equipment by the supervisors, they were unaware that Mr. Hays and Mr. Caudill were not lubricating those parts properly, and until they discovered that grease fittings were missing or broken, they had no knowledge that the work was not being performed. After meeting with both miners, Mr. Hacker questioned them and fired them both.

The respondent argues further that at the time of the discharge of Mr. Hays, Mr. Hacker knew about his "record of previous misconduct," and attempted to find a niche for him at the mine in spite of his feelings that he was the best of workers. Although Mr. Hacker believed that Mr. Caudill had a poor work record, when Mr. Hacker's superiors reviewed the dismissals and discovered that Mr. Caudill had never been disciplined before, they offered him reinstatement. Respondent concludes that this "is the most compelling evidence of the respondent's true motive," and that if the respondent had wanted to punish miners for exercising their rights to safe working conditions it would not have brought Mr. Caudill back to work.

The respondent's termination notice of September 7, 1989, reflects that Mr. Hays was terminated for "unsatisfactory performance," and the explanation for this action is shown as "Improper Servicing of Equipment." In its answer to the complaint, respondent states that Mr. Hays was discharged "in part" because he "had not serviced a grease fitting for the speed reducer on the No. 1 bridge" (emphasis added). During his opening statement at the hearing, the respondent's counsel stated that Mr. Hays was discharged because of his failure "to service a large number of the components that were within his responsibility" and that "the single grease fitting on the speed reducer shaft was merely the means by which his failure to do his job was discovered" (Tr. 12). Counsel further stated that when the speed reducer broke down, Mr. Hacker examined it and found that it had not been greased. At the same time, he found other pieces of equipment that had not been maintained and summoned Mr. Hays to his office and interviewed him regarding his failure to service "the equipment." Counsel concluded that Mr. Hays' previous disciplinary record, coupled with his "egregious failure to service any equipment on the day . . . or during the week preceding his discharge" led to his termination (emphasis added, Tr. 13).

The complainant asserts that he was discharged because of his refusal to grease the No. 1 bridge carrier speed reducer grease fitting. Complainant argues that it is undisputed that when Mr. Hacker met with him and Mr. Caudill immediately prior to his discharge he showed them the offset grease fitting that Mr. Collins had discussed with him earlier that afternoon, and asked them when they had last serviced it. Complainant maintains that at no time during his conversation with Mr. Hacker did

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Mr. Hacker claim that he had found other broken grease fittings on the section, nor did he accuse him or Mr. Caudill of failing to service other equipment on the section. Complainant points out that during his extensive trial testimony Mr. Hacker did not claim that he had discussed other broken grease fittings and/or the failure to service other equipment with him or Mr. Caudill, and that Mr. Caudill unequivocally testified that they were both fired "over that grease cap." Complainant further points out that the respondent's general manager Garcia testified that he was discharged for failing to lubricate the continuous haulage system and that Mr. Garcia was not told that management had found numerous broken grease fittings, or that the complainant had also failed to service other equipment on the section.

The complainant states that Mr. Hacker admitted that prior to the day of the discharge, there had not been any reports of broken grease fittings on the section despite the fact that the individual equipment operators were required to inspect their equipment each shift prior to its operation. Complainant points out that Mr. Hacker also admitted that he had been on the section every other day prior to the discharge and never saw any of the several broken grease fittings that he claimed to have found that day. Complainant asserts that Mr. Hacker attempted to avoid this inconsistency by stating that the grease fittings could not have been broken for long (when he allegedly discovered them on the day of the discharge) because otherwise breakdowns of the haulage system would have occurred. Complainant concludes that this explanation contradicts the respondent's argument that he had not serviced any of the equipment on the section during the week preceding his discharge.

Complainant further concludes that had he failed to service all of the equipment, it is clear that equipment breakdowns would have occurred. However, there were no such breakdowns, and the respondent admitted that the broken conveyor sprocket which malfunctioned on the day of the discharge did not break because of the failure to grease the offset fitting in question. Complainant emphasizes the fact that although Mr. Hacker claimed at his deposition that "most" of the grease fittings on the haulage system were broken when he inspected the system, at trial, he alleged that he had only found about six broken fittings.

The complainant points out that the respondent failed to call any day shift or second shift foremen to testify to his alleged failure to service the haulage system and other equipment on the section, and failed to elicit testimony from any supervisory or hourly employees regarding his otherwise allegedly poor job performance. On the other hand, complainant states that he called six former coworkers and equipment operators who testified credibly that he was a good worker, and that Mr. Collins admitted that he had not received any complaints from Mr. Hacker, or

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anyone else, regarding his job performance prior to discovering the broken grease fitting on the day of his discharge.

The complainant asserts that the respondent's allegations that he had not serviced any of the equipment on the section during the week prior to his discharge and that he admitted this to Mr. Collins on the day of the discharge are refuted by the daily notes which he kept in order to keep track of the repair work that needed to be done. Complainant points out that after reviewing these notes during the hearing, Mr. Hacker stated that the amount of work reflected by these notes was "very impressive" and revealed a "hard working individual" who had put in a "very rough day."

The complainant argues that the hearing testimony of Mr. Collins and Mr. Hacker is inconsistent with their prior statements made to the MSHA special investigator during the investigation of his complaint. Complainant points out that Mr. Collins did not tell the investigator that he had examined other equipment on the section after observing the broken grease fitting on the day of the discharge, or that he had found other broken fittings. Complainant states that Mr. Collins' statement indicates that after he saw the broken grease fitting on the No. 1 bridge, he told Mr. Hacker to "come underground and look at the bridge," and does not reflect that he asked Mr. Hacker to examine the entire haulage system and the other equipment on the section. With regard to Mr. Hacker, complainant argues that he did not tell the investigator that the complainant had been discharged for failing to service equipment other than the mobile bridge carrier.

Complainant asserts that Mr. Collins' testimony that the complainant did not complain that it was unsafe to service the haulage system while it was in operation at the time he asked about the broken grease fitting is not credible in light of Mr. Hacker's admission that the complainant raised this issue immediately after being sent out of the mine. Complainant notes that Mr. Collins, who testified in a previous safety discrimination case, was found by Judge Melick not to be a credible witness. *Tolbert v. Chaney Creek Coal Corporation*, 9 FMSHRC 580 at 583-584, 589 (March 1987).

The complainant asserts that Mr. Hacker's lack of credibility is plainly evidenced by his testimony regarding the complainant's reassignment to the day shift electrician's job. Complainant points out that although Mr. Hacker testified that he considered the complainant to be an inept electrician who was not interested in doing a good job, and claimed that the complainant's previous foreman had told him that the complainant would have to be replaced, Mr. Hacker transferred the complainant to a production shift a couple of weeks before his discharge. The complainant finds incredible Mr. Hacker's testimony that he does

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not usually try to put good electricians on his production shifts and assigns his worst electricians to those shifts.

The complainant also concludes that Mr. Hacker's testimony that he told the complainant that he was not instructed to service the haulage system while it was in motion is likewise clearly not credible. In support of this conclusion, the complainant points out that had Mr. Hacker just learned for the first time that his electricians were servicing the haulage system while it was in operation, and had he been concerned enough to tell them they were not supposed to do this, he would certainly have investigated the situation further. However, Mr. Hacker made no further inquiry to determine whether the system was being greased while it was in operation, and when the complainant complained to him about the dangers of servicing the system while it was in operation, he was precipitately discharged. Complainant concludes that his abrupt discharge clearly indicates that Mr. Hacker knew that the haulage system was regularly being serviced while it was in operation, and that his refusal to service the fitting in question was the reason for his discharge.

With regard to the three prior disciplinary actions taken against him, the complainant takes the position that they are irrelevant to the issue presented in this case, and he points out that in each case he refused to sign the disciplinary slips because he disagreed with the reasons for the stated discipline. Complainant also points out that Mr. Hacker confirmed that he was never disciplined by the respondent for failing to notify management of repairs that needed to be made. The complainant points out that if he were discharged for his protected refusal to service the offset grease fitting in question, then his discharge clearly was in violation of the Act. If, on the other hand, he was discharged for the unprotected failure to service any of the equipment on the section during the week preceding his discharge, as claimed by the respondent, his discharge did not contravene the Act. However, even assuming that this was a mixed motivation case, complainant concludes that his prior disciplinary record, i.e., his unprotected activities, would not be at issue, Secretary of Labor on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2800 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

Complainant asserts that the respondent failed to introduce any concrete evidence to support its attempts to establish that he may have had time during the final week of his employment in which he could have serviced the eight offset grease fittings that he refused to grease while the haulage system was in operation, and that its trial testimony in this regard was mere conjecture. The complainant believes that the respondent's defense in this case is misplaced and that the gravamen of this case is

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that the respondent required him to spend 1-1/4 hours or more every shift performing an unsafe and unlawful act, namely, servicing the continuous haulage system while it was in operation.

The complainant concludes that the fact that he regularly acceded to the respondent's unlawful requirement by servicing most of the system while it was in operation does not absolve the respondent of liability for his unlawful discharge for refusing to service the offset grease fitting on the No. 1 bridge. Complainant further concludes that the fact that there theoretically may have been 5 minutes available to him during which the haulage system could have been deenergized and the fitting in question serviced, is irrelevant, and that the respondent cannot dissolve its unlawful conduct by surmising that there may have been time when its illegal requirement could have been lawfully performed.

With respect to the respondent's assertion that he should have reported to management each day that he had not greased the offset fitting on the haulage system, complainant points out that there is no precedent or legal justification for requiring a miner to daily report his refusal to perform a hazardous job assignment which his employer requires as a condition of employment. The complainant points out that he had complained about the respondent's illegal requirement prior to his discharge but his complaints were ignored. He was then given the Hobson's choice of his safety or his job, an action which the complainant concludes was prohibited by the Act.

The evidence in this case establishes that Mr. Hays was expected or required by management to service the continuous haulage system while it was in operation. In addition to these duties, Mr. Hays was responsible for the daily servicing of a roof-bolting machine and the gathering arms of the continuous-mining machine. He was also assigned other duties on the section. In the event of any haulage equipment breakdown, Mr. Hays was responsible for making the repairs. Contrary to Mr. Hacker's belief that Mr. Hays was not a good electrician, Mr. Hacker himself conceded that such repairs were accomplished by Mr. Hays as required, and the system would be placed back into operation immediately. Further, after reviewing Mr. Hays' notebook entries reflecting the work he performed during the time period prior to his discharge, Mr. Hacker agreed that it appeared that Mr. Hays was a hard working individual. Although the respondent asserted that these work entries were self-serving, and suggested that they may have been fabricated, it nonetheless stipulated that the notebook was authentic, and I find it to be credible and probative. In addition, the credible and unrebutted testimony of several of the equipment operators reflects that Mr. Hays was doing a good job in servicing their equipment, and they had no complaints about his job performance. Mr. Collins

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confirmed that he was not concerned about Mr. Hays' job performance prior to his discharge, and had received no complaints about Mr. Hays prior to this time.

Contrary to the respondent's assertion that Mr. Hays failed to service any equipment on the section during the week prior to his discharge, the credible un rebutted testimony of Mr. Hays and the daily work log which he maintained establishes that he greased and serviced several bridge carrier components, a roof bolter, a continuous-mining machine, conveyor chains, scoops, and made necessary repairs. Except for 2 days when he noted that he was off on September 3 and 4, 1989, because of labor day, all of this work was accomplished during the period August 29, 1989 through September 6, 1989, the day before his discharge. In response to several bench questions concerning these work entries, Mr. Hacker conceded that some of the work performed was on the continuous haulage system, and that it was obvious to him that the equipment was being serviced while it was in operation (Tr. 209-210). He also confirmed that he had no knowledge of the work performed by Mr. Hays on the section on the day of his discharge and did not ask him about his work that day (Tr. 212).

General mine manager Garcia testified that he learned of Mr. Hays discharge through a telephone call, and he could not recall any conversations with Mr. Collins about the discharge, nor could he recall receiving any information from Mr. Hacker about the matter. Mr. Garcia further testified that he could not recall being told that Mr. Hays was discharged for any reason other than his failure to lubricate the haulage system. He confirmed that the discharge "was basically a failure to perform the job as he was assigned is generally the way it was put to me."

Mine Superintendent Collins testified that he believed that Mr. Hays was fired for not servicing the entire haulage system, rather than the one offset grease fitting on the No. 1 bridge. Mr. Collins further testified that when he checked the haulage system on the day of the discharge he found other broken fittings which had not been greased, and that after Mr. Hays was fired Mr. Hacker informed him that he had fired Mr. Hays for "not servicing equipment." However, Mr. Collins confirmed that he was not involved in the decision to fire Mr. Hays, did not discuss Mr. Hacker's decision to fire Mr. Hays with Mr. Hacker, did not speak with Mr. Hacker about Mr. Hays' job performance, and did not suggest to Mr. Hacker that any disciplinary action needed to be taken against Mr. Hays.

Mr. Hacker testified that when he inspected the equipment on the section after Mr. Collins summoned him underground on September 7, 1989, he did not speak with Mr. Hays about the servicing of the equipment. Mr. Hacker stated that upon inspection of the haulage system, the roof-bolting machines, and one of

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the scoops he found "a lack of servicing," and found six or more broken grease fittings on all of the bridge carriers. He then retrieved the No. 1 bridge carrier broken sprocket grease fitting and cap which needed repair and took it with him to his office. He then met with Mr. Caudill and Mr. Hays in his office and showed the fitting to Mr. Caudill and Mr. Hays and asked for an explanation as to why "they had not serviced," and Mr. Caudill informed him that he did not have time "to service," and Mr. Hays informed him that he could not "service that while it is running" (Tr. 152). Mr. Hacker confirmed that Mr. Hays also informed him that it was unsafe to service the haulage system while it was operating (Tr. 190).

Mr. Hacker testified that he discharged Mr. Hays for "improper servicing of equipment" because "he had not serviced it the way he was instructed to" (Tr. 184-185). He admitted that he informed the MSHA special investigator that he fired Mr. Hays because he had not serviced the mobile bridge carrier, and that the bearings, grease caps and speed reducers had not been serviced within the past week (Tr. 185). He confirmed that he told the investigator that he fired Mr. Hays "over the MBC," and did not mention the roof-bolting machine, continuous miner and the other equipment on the section (Tr. 186).

In response to several bench questions, Mr. Hacker stated that he concluded that the broken No. 1 bridge carrier speed reducer sprocket fitting had not been serviced because it showed the lack of any greasing when he removed the cap. Mr. Hacker further stated that when he showed that part to Mr. Caudill and Mr. Hays, he asked them why they had not reported that it was broken, and that he showed them the part "because that was a topic to get started on the servicing of the equipment" (Tr. 231). I find no evidence or credible testimony from Mr. Hacker supporting any reasonable conclusion that he discussed any equipment, other than the offset broken speed reducer fitting in question with Mr. Hays or Mr. Caudill at the time of their discharge. I conclude and find that it was reasonable for Mr. Hays to believe that he was being discharged for his failure to grease or service the broken speed reducer which Mr. Hacker displayed during their meeting, and all of the testimony regarding this issue leads me to conclude that this was in fact the case.

I find no credible or probative evidence to support the respondent's assertion that Mr. Hays was discharged because of his failure to service any of the equipment on the section during the week immediately preceding his discharge, or because of his failure to service other parts on the continuous haulage system. The "other parts" of the haulage system which the respondent has alluded to as not being properly serviced or greased by Mr. Hays appear to be the six additional broken and ungreased fittings which Mr. Hacker claimed he found during his inspection of the system on the day he discharged Mr. Hays. However, Mr. Hacker

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confirmed that none of these fittings could have been serviced or greased because they were broken off.

Although Mr. Hacker testified that each mobile carrier has nine different locations which have extended fittings, but no grease cups, there is no evidence that the six fittings alluded to by Mr. Hacker were equipped with extended fittings. Even if they were, Mr. Hacker conceded that it would be illegal to service those fittings while the system was in operation because it would be dangerous (Tr. 168). I also take note of the fact that in his deposition, Mr. Hacker stated that the haulage system had no extended fittings, and he believed that this was the case at the time he discharged Mr. Hays. He also reconfirmed the fact that he knew it was illegal to service any of those fittings while the equipment was in operation, and that the system had to be deenergized and blocked against motion when it was being greased (Tr. 194, 196-197, 201). I also take note of Mr. Hacker's prior statement to the MSHA investigator that "the bearings, grease caps and speed reducers had not been serviced within the past week," but I find no evidence to establish that these components included extended grease fittings. The extended fittings mentioned by Mr. Hacker had no grease cups, and the evidence establishes that the speed reducers have offset fittings which are hazardous to service while the equipment is in motion.

Although Mr. Collins and Mr. Hacker testified that they expected Mr. Hays to report any problems or lack of available time to service the system and the equipment, I find no evidence to support any conclusion that Mr. Hays was discharged for failing to report his inability to service the system during his regular work shift. Mr. Hays' note book notations, which I find credible, reflect that he periodically reported equipment malfunctions and other problems. The record also reflects that Mr. Hays made necessary repairs on the section during the period prior to his discharge.

Mr. Hacker acknowledged that no one from management ever complained about Mr. Hays' failure to comply with the maintenance "card system," and that he had never "written up" Mr. Hays for not informing management about any needed equipment and repairs. He also confirmed that the electricians did not always personally report to him work which was needed to be done and that they frequently called a lady in the light house and that she would take their reports. The respondent's suggestion that Mr. Hays may have waived any protected rights under the Act by continuing to service the haulage system knowing that it was unsafe is rejected. I believe Mr. Hays' testimony that Mr. Hacker gave him no choice and would have replaced him if he failed to service the system while it was in a production mode, and the record establishes that management did not address Mr. Hays' complaints in this regard.

General manager Garcia testified that there is no specific company rule dictating when an employee should be discharged, and that the fact that an employee has been previously suspended does not necessarily or automatically provide grounds for a discharge. He indicated that any decision to discharge an employee would "depend on the circumstances." He confirmed that in Mr. Hays' case, he and company personnel manager Richard Elliott reviewed the personnel files of Mr. Hays and Mr. Caudill subsequent to their discharge by Mr. Hacker. He confirmed that on the basis of this review, Mr. Hacker's decision to discharge Mr. Hays was allowed to stand, but Mr. Caudill's discharge was changed to a 3-day suspension because his file did not contain any recent prior disciplinary actions.

With regard to Mr. Hays' prior disciplinary actions, although Mr. Hacker may have known about them at the time he made the decision to discharge Mr. Hays, and may have mentioned them, I find no evidence that he discussed these prior actions with Mr. Hays in any detail, or informed him that they impacted on his discharge. The termination notice given to Mr. Hays does not mention these prior disciplinary actions. I agree with the complainant's arguments that these prior actions are irrelevant to the issue presented in this case. Mr. Hays was not discharged for being a poor electrician, and I conclude and find that but for his refusal or failure to service the No. 1 bridge offset grease fitting which he reasonably believed was hazardous, the respondent would not have fired him.

On the basis of the foregoing findings and conclusions, which I find are supported by a preponderance of all of the credible and probative evidence adduced in this case, I conclude and find that Mr. Hays has established a prima facie case of discrimination, and the respondent's arguments and defense to the contrary are rejected. I conclude and find that Mr. Hays was unlawfully discriminated against and discharged by the respondent on September 7, 1989, for engaging in activity protected under section 105(c) of the Act, and his complaint of discrimination IS SUSTAINED.

Relief and Remedies

The remedial aspects of this case were held in abeyance pending my adjudication of the merits of the complaint. The record reflects that subsequent to his discharge on September 7, 1989, Mr. Hays was out of work for approximately one month, and since that time he has been employed by another coal mine operator as an electrician. In his complaint, Mr. Hays requested the following relief:

- (1) A finding that the respondent discriminated against him in violation of section 105(c)(1) of the Act by discharging him on September 7, 1989.

(2) An order requiring his reinstatement with full backpay and benefits, plus interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.

(3) An order requiring that all references to his unlawful discharge be expunged from his personnel file and/or from any and all records maintained by the respondent.

(4) An order requiring him to be reimbursed for all expenses incurred in the institution and prosecution of this proceeding, including attorneys fees.

(5) An order requiring the posting of the decision in this proceeding at the mine where he is reinstated and at all of the respondent's other underground mines in eastern Kentucky, said postings to be in conspicuous, unobstructed places where notices to employee are customarily posted, each for a period of 60 consecutive days.

(6) The imposition of a civil penalty against the respondent for unlawfully discharging him.

(7) Any additional relief as is deemed just and proper to make him whole.

ORDER

1. Respondent IS ORDERED to reinstate Mr. Hays to his former position with full backpay and benefits, with interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.

2. Respondent IS ORDERED to expunge from Mr. Hays' personnel file and/or any company records any reference to his discharge of September 7, 1989.

3. Respondent IS ORDERED to reimburse Mr. Hays for all reasonable expenses incurred by him in the institution and prosecution of his discrimination complaint, including reasonable attorneys fees.

The parties ARE ORDERED to confirm with each other during the next thirty (30) days with respect to the aforesaid remedies due the complainant, and they are encouraged to reach a mutually agreeable resolution of these matters. Any stipulations or agreements in this regard shall be filed with me within the next

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30 days. In the event the parties cannot reach an agreement, they ARE FURTHER ORDERED to file their respective positions with me in writing, with any relevant documentation and supporting arguments, within the next 30 days. If the parties believe that a further hearing may be required on the remedial aspects of this matter, they should so state.

I retain jurisdiction in this matter until the remedies due the complainant are finalized. Until those determinations are made, and pending a finalized dispositive order by the undersigned presiding judge, my decision in this matter is not final.

George A. Koutras
Administrative Law Judge