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MSHA V. NALLY & HAMILTON
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF CLAYTON NANTZ, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 92-259-D
	:	BARB CD 91-24
v.	:	
	:	Gray's Ridge Job
NALLY & HAMILTON ENTERPRISES, INCORPORATED, Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;
David O. Smith, Esq., Marcia A. Smith, Esq., Corbin, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed by the Secretary of Labor against the respondent pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). The complaint was filed on behalf of Clayton Nantz, a former employee of the respondent who claims that he was discharged on or about April 16, 1991, because he refused to continue to operate a bulldozer that had the back window broken out, a condition which he believed constituted a hazard to his health and safety.

The respondent filed a timely answer denying any discrimination, and contending that Mr. Nantz voluntarily quit his job. In its defense, the respondent asserted that the refusal by Mr. Nantz to continue to operate the bulldozer in question was not based upon a good faith reasonable belief that his health or safety were threatened. The respondent also contended that the initial complaint, and the amended complaint seeking a civil penalty assessment for the alleged violation of section 105(c) of the Act, were not timely filed as required by the Act and the Commission's R1les.

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

Issues

The issues is this case include the following: (1) whether the complainant was engaged in protected activity when he complained about the bulldozer in question and refused to operate it because he believed it was unsafe; (2) whether his work refusal was reasonable; (3) whether he timely communicated his safety complaints to mine management; and (4) Whether he quit or was fired from his job. Additional issues raised by the parties are identified and disposed of in the course of the 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) and 110(a) and (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1),(2) and (3).

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

Stipulations

The parties stipulated to the following (Exhibit J-1):

1. The Commission has jurisdiction in this matter.

2. The respondent, a Kentucky Corporation, engaged in the production of coal, and is therefore an "operator" as defined by the Act.

3. The respondent's Gray's Ridge Job Mine, is a surface mine, the products of which enter commerce within the meaning of the Act.

4. During the year 1990, the Gray's Ridge Job Mine produced 203,536 tons of coal, and the respondent corporation, as controller, produced 856,573 tons of coal in 1990.

5. Clayton Nantz was employed by the respondent as a bulldozer operator at its Gray's Ridge Job Mine, and is a "miner" within the meaning of the Act.

6. At the time he ceased to be employed by the respondent, Clayton Nantz was being paid at the rate of $10.50 per hour

for regular hours worked and $15.75 per hour for overtime hours worked.

The Complainant's Testimony and Evidence

Clayton Nantz testified that he was employed by the respondent on two or three occasions and that his most recent employment period was from June, 1990, to April 16, 1991. He stated that he has worked in the mining industry for 18 years as a heavy equipment operator, including dozers, loaders, and drills. He was laid off on the previous occasions because he had less seniority and that during his last period of employment with the respondent he operated a D8-L bulldozer, with an enclosed cab, and he described his duties (Tr. 11-14). Mr. Nantz stated that he was paid a regular rate of $10.50 an hour, and $15.75 an hour for overtime, and that he worked, five and six days a week, 10 hours a day. The regular work week was 40-hours, and anything over that was overtime. He worked the second shift from 3:30 p.m. to 3:30 a.m., moving dirt and rocks with the bulldozer (Tr. 13-15).

Mr. Nantz stated that the back window of his bulldozer was knocked out when a truck backed into the machine during the day shift and he was not at work when this occurred. Mr. Nantz stated that his shift foreman Henderson "Hen" Farley informed him that the window had been broken out and that he would have it replaced. The missing window resulted in problems which Mr. Nantz described as "choking, dust coming in, smothering headaches, just couldn't see" and he explained that the dust generated by the trucks when materials were dumped made it difficult for him to see the trucks backing in to him and that before the window was knocked out "the dust wasn't near as bad" (Tr. 17).

Mr. Nantz stated that foreman Farley was on the job for approximately one week before he left for another job. However, during the week that Mr. Farley served as foreman Mr. Nantz stated that he complained to him two or three times about the broken window and that Mr. Farley told him that "We'll try to get it, he said he'd get a glass ordered to put it in" (Tr. 18). Mr. Nantz confirmed that the window was not fixed when Mr. Farley left the job (Tr. 19).

Mr. Nantz stated that Wayne Fisher took over as foreman after Mr. Farley left, and that he complained to Mr. Fisher on "a regular basis every other day or so" about the broken window and informed him that "I couldn't stand the dust and the choking, smothering, gagging and going on from the dust" (Tr. 20). Mr. Nantz stated that he wanted the window fixed "Because the dust was so bad, it got in there and it just, you know, I couldn't breath. It was choking me to death, I was smothering, and it was causing me, you know, health problems, damage, I

couldn't take it" (Tr. 21). He also stated that he continued having problems seeing the trucks and that Mr. Fisher assured him that the window would be fixed (Tr. 20-21).

Mr. Nantz stated that four weeks passed from the time the window was broken out and the last night of his employment when he was discharged (Tr. 21-22). He described his appearance after his work shift both before and after the window was knocked out, and he stated that the water truck had a mechanical problem and was not operated after the dozer window was broken out (Tr. 23). Mr. Nantz stated that when he reported for work on April 16, 1991, he asked Mr. Fisher if the window had been repaired and Mr. Fisher informed him that it had not. Mr. Nantz then informed Mr. Fisher that he did not want to operate the machine in the dust with the window broken out and asked for other work. Mr. Fisher informed him that he had no other bulldozers and suggested that Mr. Nantz might be able to operate a loader for an hour or so, but that he would then have to operate the dozer with the broken window. Mr. Nantz then informed Mr. Fisher that he did not want to operate the dozer in the dust and gave Mr. Fisher his phone number and asked him to call him when the window was replaced because he did not want to operate the dozer without a window because "it was just so dusty, I couldn't breathe, I couldn't take it" (Tr. 26).

Mr. Nantz stated that he next returned to the mine one or two nights later and again asked Mr. Fisher if the window had been repaired. Mr. Fisher informed him that the window was not repaired and stated "The dozer's out there, do you want to run it like it is?" and "Either run it like it is or go to the house. You're fired it you don't run it" (Tr. 27-28). Mr. Nantz stated that he then picked up his check and went home and Mr. Fisher never called to tell him that the dozer had been repaired (Tr. 27).

Mr. Nantz stated that after his last evening's employment with the respondent he looked for other work and he explained his efforts in this regard and confirmed that he found other work (Tr. 27-30). He also confirmed that his hospitalization benefits ended when he was discharged by the respondent and that he has incurred medical expenses since that time (Tr. 30-31).

On cross-examination, Mr. Nantz testified about his prior employment and earnings with the respondent (Tr. 31-33). Mr. Nantz confirmed that he has operated an open cab dozer for at least nine years and that he would be exposed to dust while operating such a dozer. He stated that an enclosed cab is more comfortable because of the air conditioning and heating. He confirmed that he wore dust masks while operating equipment without a cab enclosure (Tr. 34-37).

Mr. Nantz explained the work that he was doing with the dozer in April 1991, and he confirmed that he had operated the machine with the doors open when the batteries overcharged and the doors would not stay shut, or when the air conditioning was putting out hot air. He explained that he would strap the doors together and denied that he ever operated the machine in dust with the doors open. Mr. Nantz could not recall that he ever told Mr. Farley that he strapped the doors open because he could not stand to be enclosed in the cab, but he stated that "I could have said that I don't like to be housed up, you know, when the heater's hot or something, maybe I said something like that, but I don't know" (Tr. 40-42).

Mr. Nantz stated that except for a possible absence for illness he never "laid off" or missed work during the time the window was broken because of any dusty conditions, and he stated that "You didn't lay off up there, if you did, you didn't have a job" (Tr. 42-43). Mr. Nantz confirmed that he never made any notes of the specific days that he asked Mr. Farley about the broken window, and that he did not document the specific number of days that the window was broken out of the machine (Tr. 44). Mr. Nantz further confirmed that when his deposition was taken he stated that the window was out three to four nights before Mr. Farley left, but that he was not positive about this and that it may have been out for four to seven days before Mr. Farley left. Mr. Nantz also stated that Mr. Fisher was on the job for two weeks while he operated the dozer with the broken window (Tr. 45-48).

Mr. Nantz confirmed that he filed a worker's compensation claim for silicosis on May 24, 1991, against the respondent claiming that he was totally and permanently disabled and unable to work, but that his claim was denied (Tr. 49-55; Exhibits R-2 through R-4). Mr. Nantz further testified about his subsequent employments, and he also confirmed that he drew some unemployment benefits (Tr. 56-63). Mr. Nantz stated that during his employment with the respondent he worked a fifty-hour regular week, and eight or eight and one-half hours on Saturday (Tr. 64-66).

Mr. Nantz described the damage sustained by the dozer window when it was knocked out. He stated that there was "very little" frame damage, and he confirmed that within a day or two after the window was damaged the mechanics "done what they could do" to straighten out the frame so that the glass would fit back in. He believed that the mechanics on the job replaced the window, but he did not know when this was done. Mr. Nantz confirmed that the frame was straightened out while Mr. Farley was still on the job, and while it was not perfect, he believed that it would have held a new window in place (Tr. 68).

Mr. Nantz believed that he initially refused to operate the bulldozer during his second shift on Monday, April 15, 1991, and that he spoke to Mr. Fisher that evening. Mr. Nantz confirmed that Mr. Fisher offered to let him run a highlift for an hour and one-half, and he also offered to water his work area with one load of water. Mr. Nantz characterized one load of water as "like pouring a cup of coffee out in that much dust" (Tr. 70). Mr. Fisher also mentioned the use of clear plastic over the back window area of the dozer, but Mr. Nantz indicated that he had tried this at another mining operation and could not see through the plastic material, particularly at night with rain and muddy conditions. He also indicated that he did like plexiglass because it gets scratched up, and with the accumulated dust, he cannot see through it (Tr. 70-72) Mr. Nantz stated that he did not request a dust mask or ear plugs because he thought the broken window would be replaced (Tr. 73). Mr. Nantz further explained his refusal to operate the dozer as follows at (Tr. 74-75):

> A. (Interposing) I wasn't going to operate in that kind of dust, I couldn't take it, you know, it was just like turning a blower in your face when them trucks come back through there and fan that dust, and there was no way I could live and stand that.
>
> Q. But you used these dust masks on other jobs?
>
> A. There was never dust on other jobs like that.
>
> Q. This is the dustiest job in your twenty (20) years?
>
> A. We always used trucks on this job, on the other jobs, nobody hardly ever used over one (1) truck years ago. And this job had a lot of rubber tired equipment, and they moved more dirt more than any other job I ever seed, because it had more trucks.
>
> Q. Well, there's two (2) trucks up there wasn't there?
>
> A. Yeah, but everybody else I ever have worked for, would haul maybe a mile down the road and dump into a fill.
>
> * * * * * * *
>
> Q. Now, you could have operated the 980 loader that they offered to you; couldn't you?
>
> A. For an hour and a half.
>
> Q. But you didn't want to do that?

A. Not get back out in that dozer, not the rest of the night, eight (8) hours in that dust.

Q. And you didn't want to -- you weren't interested in them watering the area with a water truck?

A. One load wouldn't have even reached to me.

Mr. Nantz confirmed that sometime in June or July, 1991, he spoke with Mr. Farley at the respondent's Leatherwood strip mining operation, and that Mr. Farley had called and asked him to come and look the job over. Mr. Nantz stated that Mr. Farley asked him if he would like to go back to work running a D10 dozer, and indicated that he would speak with the respondent's owner, Tommy Hamilton, about it. Mr. Nantz stated that he informed Mr. Farley that he would go back to work if the respondent paid his back wages, but that Mr. Farley never contacted him again. Mr. Nantz confirmed that he was willing to return to work if he received his back pay (Tr. 77-80; 82-83).

Mr. Nantz stated that during April 1991, he could not recall that the water truck was operating in the "fill area on top of the hill", and that during the entire time the dozer window was missing Mr. Farley and Mr. Fisher did not have the water truck operating around the dozer (Tr. 81). Mr. Nantz stated that he worked in the dust "going into the fourth week" and that he did not use a dust mask because "every day they was telling me we was going to get a window put in - - we're going to get a window put in. I kept waiting every day to get my window put in, why would I need a dust mask? If my window was in, I wouldn't have no problem" (Tr. 81-82).

Mr. Nantz stated that when he left the respondent's employment on April 16, 1991, the dozer window was still missing and he had no idea as to whether it was ever repaired, and he believed that the dozer was sold (Tr. 84). He confirmed that he did not want to operate the endloader for an hour and one-half as offered by Mr. Fisher because he would have had to go back and operate the dozer with the missing window and he did not want to operate it in the dust (Tr. 84). He further explained as follows at (Tr. 92-93):

Q. Okay, and you told them that you were available to work and that you would operate any other piece of equipment?

A. I told the foreman that.

Q. Okay. But you would not operate the 980 loader?

A. That was only for one (1) hour, or something, until the guy got ready to use it. I mean, I wasn't going to get to

use it a shift, just one (1) hour, and then I'd have to go back and start eating dust again.

Mr. Nantz confirmed that the mine is a non-union operation, and that he was not aware of any MSHA inspection of the dozer after the truck backed into it (Tr. 86). Mr. Nantz confirmed that he never spoke to Mr. Tommy Henderson about the missing dozer window, and that he was unable to speak to mine superintendent Chuch Brock about the matter because he would leave work in the evening when he (Nantz) began his work shift. Mr. Nantz further confirmed that he only spoke to foremen Farley and Fisher and they indicated that they would speak to higher management about the matter. He also confirmed that he had never filed any previous safety complaints against the respondent (Tr. 90-91).

Ronnie L. Napier, testified that he has been employed by the respondent for approximately 12 years. He stated that in April, 1991, he worked the second shift from 5:00 p.m. to 3:30 a.m. with Mr. Nantz, and that he operated an endloader. Mr. Napier confirmed that he has known Mr. Nantz since grade school and that they drove to work together. He worked with Mr. Nantz on the second shift for six or seven months before Mr. Nantz left on April 16, 1991.

Mr. Napier stated that he observed that the back window on the bulldozer that Mr. Nantz operated was broken out, and that it was in this condition for "a couple of weeks or more" before Mr. Nantz left. Mr. Napier stated that he heard Mr. Nantz ask shift foreman Wayne Fisher "a couple of times" about when the window would be replaced, and he also heard him complain to Mr. Fisher about the dust. Mr. Napier stated that he noticed a difference in Mr. Nantz's appearance before and after the bulldozer window was broken out. He confirmed that Mr. Nantz appeared clean before the window was out, but he was dusty and dirty after operating the machine with the missing window.

Mr. Napier stated that he worked with Mr. Nantz on the last evening of his employment on April 16, 1991, and Mr. Nantz asked Mr. Fisher if the window had been replaced, and Mr. Fisher informed him that it had not. Mr. Nantz then asked Mr. Fisher if there was other equipment that he could operate and Mr. Fisher replied "no". Mr. Nantz then gave Mr. Fisher his telephone number and asked him to call him when the window was fixed. Mr. Nantz then left after stating that he "couldn't eat anymore dust". The window was repaired 3 or 4 evenings after Mr. Nantz left, and Mr. Napier never observed Mr. Nantz operate the dozer after the window was replaced (Tr. 94-102).

On cross-examination, Mr. Napier stated that he did not see Mr. Nantz when he returned to the job site to pick up his check on April 17, 1991, and he never heard Mr. Fisher offer to let Mr. Nantz operate a 980 loader instead of the dozer with the missing window. Mr. Napier could not state that he ever heard Mr. Fisher offer to cover the broken window area with plastic.

Harold Farler testified that he has been employed by the respondent for four years as a mechanic, truck driver, and service man fueling, oiling, and greasing equipment. He worked the same shift with Mr. Nantz during his last employment at the mine, and he rode to work with Mr. Nantz and Mr. Napier.

Mr. Farler stated that Mr. Nantz complained to him about the missing bulldozer back window and also complained that the dust was so bad that he couldn't stand it. Mr. Farler stated that Mr. Nantz also complained to Mr. Napier, and he did not know whether he complained to anyone else. Mr. Farler stated that Mr. Nantz did not appear dirtier after work when the dozer window was not broken out, but after it was broken out, Mr. Nantz had dust all over him and he appeared "muddy" (Tr. 110-115).

Mr. Farler believed that the dozer window was missing "going on the fourth week" before Mr. Nantz left the job. Mr. Farler did not ride to work with Mr. Nantz on the last evening of his employment, but he was present during that shift. Mr. Farler did not hear the conversation between Mr. Nantz and Mr. Fisher on the evening that Mr. Nantz left the job, but he did hear Mr. Nantz complain to Mr. Fisher about the missing window, and he heard Mr. Nantz tell Mr. Fisher that the dust was so bad that he could not stand it. The dozer with the missing window was operated for three more shifts before it was repaired. Mr. Farler never observed Mr. Nantz operate the dozer after the window was replaced (Tr. 116-118).

On cross-examination, Mr. Farler stated that on the evening before Mr. Nantz left the site on Tuesday, April 16, 1991, Mr. Nantz told him that he was going to work and if the window was not replaced he would seek some other work to do. Mr. Farler stated that Mr. Nantz operated the bulldozer on Monday, April 15, 1991, and that Tuesday, April 16, 1991, was the first time he did not operate it. The dozer "sat for three nights" before a new man came in to operate it.

Mr. Farler could not recall if any repairs were started on the dozer before Mr. Nantz left and he did not know if any mechanics were working on the window frame. Mr. Farler stated that Mr. Fisher told him that the two water trucks at the site "were down", but he could not recall when this occurred. Mr. Farler stated that the water trucks did not operate during April (Tr. 119-123).

Mr. Farler stated that he rode home with Mr. Fisher after work on the evening that Mr. Nantz left the mine and that Mr. Fisher told him that "he hated to let Clayton go because he was a good worker" and that after informing Lewis Hamilton, the day shift supervisor and foreman, on the radio that Mr. Nantz did not want to operate the bulldozer with the window out of it, Mr. Hamilton told him (Fisher) "to cut him loose, let him go, he couldn't let him by with that. If he did, all the other men would gripe" (Tr. 124-126).

Daniel Belcher testified that he has worked for the respondent for four years and that he works on the evening shift from 6:00 p.m. to 4:30 a.m. operating an endloader. He worked with Mr. Nantz on the same shift for approximately a year. Mr. Belcher believed that the dozer back window operated by Mr. Nantz was missing for about three weeks before Mr. Nantz left, and that Mr. Nantz complained about the missing window and the dust.

Mr. Belcher stated that he heard Mr. Nantz complain to his shift foreman Wayne Fisher about the missing dozer window and the dust, and Mr. Nantz asked Mr. Fisher when the window would be replaced. Mr. Belcher stated that on the evenings that he drove a truck when Mr. Nantz was pushing fill material with the dozer with the missing window, the conditions were dusty. Mr. Belcher stated that he asked Mr. Fisher to speak with Mr. Nantz about the dust "getting so bad" and informed him that Mr. Nantz might quit because of these conditions. Mr. Belcher confirmed that he heard Mr. Nantz speak with Mr. Fisher about the missing window on the last night that he worked and that after Mr. Fisher told Mr. Nantz that the window had not been replaced Mr. Nantz wanted to know if another machine, or work in the shop, was available and Mr. Fisher stated that "he didn't have anything". Mr. Nantz then gave Mr. Fisher his telephone number and told him to call him when the window was repaired. Mr. Belcher recalled that the window was broken out for "around three weeks or something" before Mr. Nantz's last night of employment. Mr. Belcher stated that during the time the window was broken he operated the water truck two or three times spreading one load of water in the fill area each time (Tr. 128-136).

On cross examination, Mr. Belcher confirmed that the water truck was " a pretty good sized truck", but he was not sure of the tank capacity. He also believed that Mr. Fisher operated the water truck during the time the dozer window was broken out, and he remembered only one water truck, but indicated that there may have been two. He confirmed that Mr. Fisher offered to let Mr. Nantz operate the 980 loader while he (Belcher) operated the water truck to water the fill area. Mr. Belcher "guessed" that Mr. Nantz did not want to operate the loader, but he did not know what Mr. Nantz may have told Mr. Fisher in response to his offer. Mr. Belcher stated that he had no need for the loader for two

hours, but as soon he completed the watering task, and cleaning coal, he would have resumed operating the loader for the remainder of his shift (Tr. 136-140).

Mr. Belcher could not recall any conversation between Mr. Nantz and Mr. Fisher concerning the use of plastic over the dozer back window or the use of a dust mask. He confirmed that dust masks were available on the job and that some of the drill men use them and some do not. Mr. Belcher confirmed that he does not use a dust mask because his highlift has an enclosed cab (Tr. 141).

Johnnie Moore, testified that he previously worked for the respondent from 1980 to 1991, and that he was employed as a first shift mechanic in April, 1991. He knew Mr. Nantz as an evening shift bulldozer operator. Mr. Moore stated that he performed repair work on the D8 dozer operated by Mr. Nantz and he observed that the rear window was missing but he did not know how long it was missing.

Mr. Moore stated that he was working at the mine the last evening that Mr. Nantz worked and that he overheard a conversation over the company radio in his tool truck between the night shift foreman, who he knew by his nickname "Fish", and Mr. Lewis Hamilton, and he recalled the conversation as follows (Tr. 146-147):

> A. This has been over a year ago. He just told Lewis that Clayton had refused to run the dozer on the count of the window being out of it, and that if he had anything else for him to do he would do it, but he didn't have anything else for him to do. And Clayton went onto the house, I reckon, and he told Lewis that he had another man, that he could bring in another man tomorrow night to run the dozer if he wanted him to.
>
> Q. Did Mr. Hamilton say a reply to that?
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> A. He told him whatever he wanted to do.
> Q. Now, that night that you heard the conversation on the radio, was the back window still out of the bulldozer, at that time?
>
> A. Yes.

Mr. Moore stated that a week or so later, his shift foreman Charles Brock instructed him to help "the window people" install a new window on the dozer that Mr. Nantz refused to operate.

Mr. Moore stated that the window frame had not been straightened out prior to this time, and that it took him an hour or two to do this work, and that the window was then installed in an hour (Tr. 147-148).

On cross-examination, Mr. Moore stated that Mr. Brock instructed him to straighten out the dozer window frame "a couple of weeks" after Mr. Nantz left the job. Mr. Moore stated that the dozer may have had a cracked door window and that a small side window was also missing. He did not know if anyone else worked on the window frame before he did, and he reiterated that he and a welder worked on it after Mr. Nantz left the job. He stated that the window was replaced by the Bell Glass Company at the mine site, and that this is the way that broken windows were always repaired. Mr. Moore stated that during the radio conversation that he heard between Mr. Fisher and Mr. Hamilton, he did not recall Mr. Hamilton say anything about firing Mr. Nantz (Tr. 149-153).

Karen Nantz, the complainant's wife, testified that her husband has worked for the respondent on several occasions, and that he last worked for the respondent from July, 1990, to April 16, 1991. Mrs. Nantz stated that her husband was always dirty when he came home from work, which was not unusual, but she noticed a change in his appearance sometime in mid-March of 1991. She stated that he would be "caked with dust", and his clothes and lunch bucket were filled with thick dust, which was "blue-Grayish" in color (Tr. 153-156).

On cross-examination, Mrs. Nantz stated that when her husband worked for other coal companies, and when he operated a drill, his appearance was not as dusty and she did not notice as much dust on his clothing. She did not know whether her husband wore a dust mask. Prior to operating the dozer with the broken window her husband was never "caked" with dust, and the dust did not cover his nose, mouth, and hair. She acknowledged that "getting dirty" was normal on strip mining jobs.

In response to questions concerning certain medical expenses incurred by her husband after he left the respondent's employment, Mr. Nantz confirmed that the medical bills shown in exhibits C-13, C-14, and C-15, were for treatment her son and daughter received as the result of an accident in a four-wheel vehicle which was not covered by insurance. She also confirmed that a bill for $18.79 (exhibit C-6) was for medication for her husband for pleurisy (Tr. 156-162).

MSHA Special Investigator Ronnie Brock testified that he conducted the investigation of Mr. Nantz's complaint, and he confirmed that he prepared a back-pay computation based on the information supplied to him by Mr. Nantz and his wife

(Exhibit C-1) (Tr. 162-169). Mr. Brock also confirmed that he did not document all of Mr. Nantz's employments subsequent to his termination, did not verify through company records the claimed hours of regular and overtime pay by Mr. Nantz when he worked for the respondent, and that he did not ask Mr. Nantz about any unemployment payments or workers compensation benefits. Mr. Brock further confirmed that his investigation did not disclose any citations issued to the respondent as a result of the broken bulldozer window, and that there was no MSHA regulation requiring an enclosed cab for a bulldozer (Tr. 170, 182-188).

Respondent's Testimony and Evidence

Louis Hamilton testified that he is employed by the respondent as the mine superintendent and that he served in that position in April, 1991, and was familiar with the mining operation where Mr. Nantz was employed at that time. He confirmed that Henderson Farley was the second shift foreman, and after he was moved to the Leatherwood operation, Wayne Fisher became the foreman. Mr. Hamilton identified Exhibit R-5 as summaries of Mr. Nantz's earnings and hours worked during 1991, and he confirmed that the information was provided to him by the company payroll clerk. Mr. Hamilton confirmed that the normal work week is 50 hours, excluding any Saturday work, and that any work over 40 hours is considered overtime (Tr. 189-197).

Mr. Hamilton stated that the window on the bulldozer in question was broken out when a truck backed into it bending the frame. The frame needed to be straightened, and some welding work was required before the window glass could be replaced. The mechanic on the first shift would normally repair any frame damage but the glass would be replaced by a local glass company at the mine site (Tr. 198).

Mr. Hamilton stated that he was not aware of any complaints by the first shift dozer operator about the broken window, and he first became aware of Mr. Nantz's concern when he refused to operate the dozer and Mr. Fisher called him about the matter over the two-way radio. Mr. Hamilton assumed that Mr. Fisher called him on the second evening when Mr. Nantz came to the site to check about the glass and he believed that Mr. Fisher told him Mr. Nantz was quitting and going home because "he would not run the machine like that" (Tr. 199). Mr. Hamilton told Mr. Fisher "that if he wouldn't run it that we would have to get someone else, if he left" (Tr. 200).

Mr. Hamilton stated that Mr. Fisher told him that he had offered to let Mr. Nantz operate the 980 loader but that Mr. Nantz wanted his bulldozer fixed and wanted to run that machine and nothing else. Mr. Hamilton denied that he told

Mr. Fisher to fire Mr. Nantz or that he made any statement that he could not allow Mr. Nantz "to get away with something like that, because all the employees would start doing it" (Tr. 200). Mr. Hamilton stated that Mr. Nantz would not have been replaced or let go if he had operated the 980 loader, and that he would not have been fired (Tr. 201).

Mr. Hamilton stated that he has 15 years of surface mining experience, including the operation of loaders and bulldozers with open and closed cabs. In his opinion, Mr. Nantz could have avoided the dust coming in the back window by positioning himself and the machine to avoid the dust. He also did not believe that a short term, or four to six weeks exposure to dust, would be a health hazard or harmful (Tr. 203-204). He also believed that Mr. Nantz could have protected himself from the dust and he explained the loading and dumping process and the methods for operating the bulldozer (Tr. 205-207).

Mr. Hamilton stated that Mr. Nantz could have used an MSHA approved dust mask which was available at the work site, and he indicated that plastic is put on the machine back windows for protection and he did not believe that it decreases visibility at night. He stated that "we always try" to provide a light plant for illumination in the shot and fill areas (Tr. 207-208).

On cross examination, Mr. Hamilton stated that he worked at the mine on the same shift as Mr. Nantz and that he was there the entire time the window was broken out of the bulldozer in question. When asked if he ever mentioned to Mr. Nantz the ways to move the machine to avoid any dust, Mr. Hamilton responded "all operators know how to use it" (Tr. 210). In response to further questions, Mr. Hamilton reiterated that he was unaware of Mr. Nantz's complaints to Mr. Fisher until Mr. Fisher called him, and he did not know how long the window was broken (Tr. 216, 219).

James Cornett testified that in April, 1991, he was employed by the respondent as a second shift spare equipment operator and that he knew Mr. Nantz. He stated that he operated a D9 bulldozer at the "shot" area, and that he recalled that the back window of the D8 dozer was broken out during the first shift. Mr. Cornett stated that he overheard a conversation on the parking lot between Mr. Nantz and Mr. Fisher prior to a work shift. He heard Mr. Nantz complain "about wanting a window" and that Mr. Fisher offered him a loader to operate but Mr. Nantz told Mr. Fisher that he could not operate the loader. He also heard Mr. Fisher offer to install a piece of plastic in the back window, but he could not recall exactly what Mr. Nantz said about the plastic (Tr. 226).

On cross-examination, Mr. Cornett stated that he was standing close to Mr. Fisher and Mr. Nantz during their

conversation, but he could not specifically recall whether Mr. Nantz said he could not, or would not, operate the loader offered by Mr. Fisher (Tr. 227-228). Mr. Cornett could not recall the exact date of the conversation, and he indicated that it may have been 3 or 4 days before Mr. Nantz left the job. Mr. Cornett stated that Mr. Nantz also told him that he left because "the dust was bad" and Mr. Cornett confirmed that "we were working in a real dusty shot at that time" (Tr. 229).

William H. Farley testified that he is employed by the respondent as a foreman and that he was in that position when Mr. Nantz worked in April, 1991. He confirmed that he transferred from that particular job site on Friday, April 5, 1991, and reported to the "Leatherwood-Blue Diamond-Big Laurel" site on Monday, April 8, 1991, when Mr. Fisher replaced him as foreman. Mr. Farley stated that an accident involving the bulldozer in question occurred "a day before I left, which was probably on a Thursday". He stated that he operated the dozer the day he left because Mr. Nantz was off, and he also operated it the day before. When asked if the glass was completely out when he operated the dozer, Mr. Farley responded "No, it was still in there, there was one little glass on the side that was there, but the big glass in the back was still out" (Tr. 234). He described the damage to the dozer as "bent the side of the cab, just a little bit in, and knocked that one glass out" (Tr. 234-236).

Mr. Farley stated that Mr. Nantz never operated the bulldozer with the back window completely out, and that Mr. Nantz never complained to him about any dust or the missing side window (Tr. 236). He stated that Mr. Nantz would have operated the bulldozer with the damaged window frame for only one shift while he was foreman, and that the side window was the only one missing. The back window was still intact but "it might have been a little gap in one corner of it, where the cab was bent", and he did not know when the window came out (Tr. 237).

Mr. Farley stated that he observed Mr. Nantz operating the dozer with the doors open prior to the window damage on more than one occasion, "just about every day", including the winter season. Mr. Nantz told him that he had the doors open because "a lot of times he can't stand to be cooped up in that, you know, closed up and stuff" (Tr. 239-240). Mr. Farley also indicated that he has ridden with Mr. Nantz in a pickup with three people in the front seat, and that Mr. Nantz would get out and let the third person sit in the middle, or he would ride in the bed of the truck (Tr. 240).

Mr. Farley stated that Mr. Nantz never complained to him about the dozer doors or the air conditioning not working properly, and he did not know when the broken dozer window was repaired (Tr. 241). He confirmed that Mr. Nantz came to the

Leatherwoood job site to speak with him about going to work for him. Mr. Farley denied that he asked Mr. Nantz to come to the site, and he stated that Mr. Nantz "just showed up one evening". He stated that Mr. Nantz informed him that he did not want to work with Mr. Fisher and "asked me if I had anything for him to do" (Tr. 242). Mr. Nantz told him that he was interested in going back to work and if there were an opening he would come back. Mr. Nantz placed no conditions on his returning to work, and he never called on him again about any openings, and Mr. Farley never contacted Mr. Nantz again. Mr. Farley stated that when Mr. Nantz was preparing to leave after the conversation, Mr. Nantz "told me that he had decided he didn't want to work anyway, that he had the company sued and stuff, or something of that nature" (Tr. 243-244).

Mr. Farley stated that he has worked in the surface mining industry for 20 years, and has served as a foreman for the respondent for eight years. He has operated open-cab equipment and did not believe that it was reasonable to believe that anyone operating in dust for a month would result in serious health consequences. Although he would not like doing it, he would not object, and he has operated a dozer with an open cab in dust but has never operated one with an enclosed cab with a missing window. He stated that dozer fans and dust masks can minimize any dust with the back window of the dozer out, and he confirmed that he has used plastic around an open cab dozer to keep warm in the winter and that it does not impair his visibility and is a common thing with open cab equipment operators. He also believed that Mr. Nantz could avoid the dust by operating his machine in different directions and he confirmed that Mr. Nantz was an experienced good operator (Tr. 244-248).

On cross-examination, Mr. Farley confirmed that he did not document or note the date that the dozer back window was broken out in the foreman's book and that his testimony is from memory (Tr. 250). He also confirmed that he never personally offered a dust mask to Mr. Nantz, and never suggested ways of avoiding the dust by positioning his dozer in a certain way (Tr. 252).

In response to further questions, Mr. Farley stated that he operated the water truck every day during the last two weeks he was on the job with Mr. Nantz. He confirmed that he considered Mr. Nantz to be "sort of a friend" and that on a couple of occasions in the past when Mr. Nantz became upset and quit his job he talked him into coming back to work. Mr. Farley stated that when the MSHA inspector took his prior statement he told the inspector that the dozer window was broken two days before he left to go to the Leatherwood site (Tr. 253).

Wayne Fisher testified that he was the night shift foremen in April, 1991, and prior to that time worked as a loader operator at the Leatherwood site for approximately six years. He

stated that he was promoted to foreman on April 8, 1991, and had not met Mr. Nantz prior to this time. He inspected Mr. Nantz's D8 dozer that evening and noticed that the back window was broken out of it. He could not recall if Mr. Nantz complained to him that evening, and he stated that "It seems like I told him that I would get it put in" (Tr. 261). The next day on April 9, Mr. Fisher spoke with the day shift boss and told him that the window needed to be replaced, and that "he told me that they was planning on putting it back in, but they was wanting to wait on a weekend, or something, when the dozer was parked, to get it in" (Tr. 262). Mr. Fisher stated that Mr. Nantz "may have said something that night. I don't remember what was said, but they may have been something said about the glass" (Tr. 262).

Mr. Fisher confirmed that Mr. Nantz worked for him from April 8, through 12, 1991, and that everyone was off on Saturday and Sunday, April 13 and 14. Mr. Nantz came back to work on Monday, April 15, and during this entire time Mr. Fisher recalled that Mr. Nantz complained one or two times that "the dust was coming in the dozer pretty bad" and that he offered to cover it with plastic and told Mr. Nantz that "I would get the glass put in today" (Tr. 263). Mr. Nantz refused his offer for the plastic which was available in the shop. Mr. Fisher stated that it was clear plastic that he could see through and that he used it to cover open dozer cabs that he has operated in the past. Mr. Fisher confirmed that the plastic would not keep the dust out of an open cab, but dusk masks were available, and the plastic did not affect visibility or the safe operation of the dozers that he has operated (Tr. 264-265).

Mr. Fisher stated that Mr. Nantz would operate the dozer in second gear at three to four miles an hour, and he was of the opinion that placing plastic over the back window would not create a safety hazard. He confirmed that dust masks are available on the job but that Mr. Nantz never asked for one. Mr. Fisher stated that Mr. Nantz operated his machine all of the time with the doors open, but he never asked to him why he did this (Tr. 266).

Mr. Fisher stated that Mr. Nantz reported for work on Tuesday, April 16, 1991, but did not work that day. Mr. Fisher explained what transpired after Mr. Nantz came to work as follows at (Tr. 267-268):

> A. He come in and he told me he wasn't going to run the dozer. That if the glass wasn't put in he was going to go back home, and when I got the glass out in the dozer, he'd come back to work. And I offered to let him run a 980, and I told him, I said, "Run the 980, and I'll run the water truck and settle the dust, and then later on tonight, if I have to have the 980 to clean coal with, you can run your dozer." And he said, "No, I'm not running the 980, I'm

going home." He said, "You get the glass back in the dozer, call me, and I'll come back to work."

Q. Did you believe at that time, that you would have coal that night, in the 980 to clean?

A. No, at that time, the 92 trucks was still in the pits moving the rock off of it, and me and the day shift boss done talked about if I could clean it, clean it, and if I couldn't, we wouldn't haul the next day. It would be all right.

Q. So, there was a possibility he could have run the 980 most of that shift?

A. Yeah.

Mr. Fisher further explained that he intended to assign the normal 980 loader operator (Danny Belcher) to the water truck and that Mr. Nantz would have operated the loader at the fill area where he normally operated the dozer. The loader could be used to push fill material and Mr. Fisher believed that Mr. Nantz understood that he would be working in the fill area and not the shot area because he worked the fill all of the time and that was his job (Tr. 269).

Mr. Fisher stated that after his conversation with Mr. Nantz on April 16, he called Superintendent Hamilton and told him that Mr. Nantz refused to operate the dozer and was going home. Mr. Fisher stated that Mr. Hamilton did not say that he should fire Mr. Nantz. Mr. Fisher recalled that Mr. Hamilton stated "All right, just do what you have to do. If they're going to work, they're going to work, you know, if they ain't we're just going to have to get someone that will work" (Tr. 269-270).

Mr. Fisher stated that Mr. Nantz next returned to the mine on Wednesday, April 17, 1991, which was payday, and he recounted the following conversation with Mr. Nantz (Tr. 270-271):

A. Well, I give his check to him and he asked me if I got the glass back in his dozer. I told him, "No, it wasn't in." He said, "Well, I'm going back home, when you get it put in, call me, I'll come back to work." I said, "Clayton, you know, I've got to run that dozer, and if you want to run it, we'll work it, if your don't, I'll get somebody up her that will". And I think that was about all that was said that night, and he left, and then I hired another man on the dozer.

Q. Was the decision to replace him, basically, left up to you?

A. Yeah.

And, at (Tr. 286):

> MR. FISHER: He told me he was going home, and I said, "Well, if you're going to go home, I have to take it that you're quitting your job, and I'll have to get somebody, you know, in here on the dozer."

Mr. Fisher stated that everyone was off for the holidays from Thursday, April 18, 1991, until April 22, 1991, and that the dozer window was replaced on Thursday and Friday, April 18 and 19 (Tr. 272). He confirmed that the new dozer operator Terry Doolin operated the dozer for one shift before the window was replaced and he did not complain about any dust (Tr. 273).

Mr. Fisher stated that from April 8, to April 16, 1991, he operated one of the smaller water trucks and watered the fill area when it was dusty, and he confirmed that a larger capacity truck was not used because of a brake problem (Tr. 273-275). Mr. Fisher also confirmed that dust masks were available for the asking, and that during the time Mr. Nantz worked for him he never complained to him about the dozer doors not closing or staying locked, inoperative fans, or that the air conditioning was not working (Tr. 276).

Mr. Fisher stated that he spoke to the first shift foreman after April 9, about fixing the dozer window and mentioned it to him two or three times and that the foreman told him that "We're going to fix it, it's going to be fixed" (Tr. 277). Mr. Fisher could not recall if anyone was working on the window frame during this time, and he confirmed that there was no mechanic on his shift (Tr. 278). He stated that Mr. Nantz did not request to operate other equipment when he returned to the mine on April 17, and that he would not have replaced Mr. Nantz if he had agreed to operate the 980 loader (Tr. 281).

On cross-examination, Mr. Fisher stated that after Mr. Nantz left the mine of April 16, he had to take a D9 dozer out of the shot area and use it in the fill area, and he confirmed that the D9 had all of the windows in place, but that it was a different machine. Mr. Fisher also confirmed that he told Mr. Nantz that he would let him operate the loader and then operate the dozer later on in the shift "If I needed to, I would let him run the loader all night, if I didn't have coal to clean" (Tr. 283, 287).

Terry Doolin testified that he started working for the respondent in April, 1991, a couple of days before Easter, as a D8-L Dozer operator, and he confirmed that the dozer did not have a back window (Tr. 293). He stated that he operated the dozer in the fill when he first got the job, and while it was dusty he did not have any problem turning the dozer around in the fill area.

He stated that he operated the dozer with the doors closed, that the locks were operable, the lights worked, and that he did not turn on the fan or air conditioner (Tr. 293-294). He confirmed that there was a "light plant" at the fill area, and that he minimized the dust coming through the back window by turning the dozer around to keep the dust from coming in the back window (Tr. 295). Mr. Doolin did not believe that the fill area was dustier than any normal strip mining operation, and that he sometimes waited after the trucks dumped so that the dust could clear before he started pushing the fill (Tr. 296). He confirmed that the dozer window was installed within two or three shifts after he initially operated the machine (Tr. 297).

Findings and Conclusions

The Timeliness of the Complaint and Amended Complaint, and the Denial of the Respondent's Motion for a Continuance of the Hearing.

The Secretary's initial complaint of January 31, 1992, included a proposal for an order assessing an appropriate civil penalty against the respondent for a violation of section 105(c)(1) of the Act. The Secretary stated that the complaint would be amended to reflect the amount of the penalty and the criteria used in determining the penalty. The respondent's initial answer to the complaint, filed through counsel Lloyd Edens, included an affirmative defense that the complaint was not timely filed within the time limitations found in sections 105(c)(2) and (3) of the Act, and Commission Rules 40(a) and 41(a), 29 C.F.R. 2700.40(a) and 41(a).

On March 24, 1992, I issued a Notice of Hearing scheduling the case for hearing on July 14, 1992. On June 16, 1992, the Secretary filed a motion to amend the complaint to include a proposed civil penalty assessment of $8,000, for the alleged discriminatory violation. In filing the motion, the Secretary's counsel stated that she "has contacted Lloyd Edens, counsel for the respondent, regarding this motion, and Mr. Edens stated he has no objection thereto". Under the circumstances, and absent any objection from respondent's counsel, I granted the Secretary's motion to amend the complaint.

Respondent's counsel Edens withdrew from the case on July 1, 1992, and his motion for a continuance of the hearing in order to obtain substitute counsel was granted, and the case was rescheduled for hearing on August 12, 1992. On July 17, 1992, counsel J. P. Cline III, an associate of Mr. Edens, entered his appearance as counsel for the respondent. Mr. Cline filed an answer to the amended complaint asserting inter alia that the amended complaint was untimely.

On August 7, 1992, five days before the scheduled hearing, counsel David and Marcia Smith, entered their appearance and notified me that they were retained to represent the respondent. At the same time, counsel filed a motion for a continuance of the hearing until sometime in September, 1992, so that they could prepare for the hearing. In view of the pending hearing, the fact that it had been previously continued at the request of the respondent, the substitution of three different attorneys, and in order to preclude any additional delay, the motion for a continuance was denied and the matter proceeded to trial on August 12, 1992.

During opening remarks at the hearing, counsel Marcia Smith suggested that the respondent may have been prejudiced by my denial of the motion to continue the hearing, and she indicated a desire to preserve my ruling for the record (Tr. 5). Counsel asserted that at least two former employees, "the foreman that was involved and the mechanic that did the repair work", identified as "chuck and somebody else", were out of the area and could not be found to testify (Tr. 6, 7). Counsel further asserted that the mine superintendent would testify as to any prejudice to the respondent as the result of the absence of two key witnesses and the fact that they could not be located (Tr. 9).

In his posthearing brief, and citing transcript pages 208-209, counsel David Smith asserts that mine superintendent Lewis Hamilton testified that Chuck Brock was the first shift foreman in charge of bulldozer repairs and that his whereabouts were unknown at the time of the hearing, since he had moved to California (Brief, pgs. 12-13). At page 27 of his brief, Mr. Smith states that "Since the mechanic in charge, Chuck Brock, had left the state and was not available to testify at the hearing on behalf of Nally & Hamilton, it is impossible for Nally Hamilton to know at this point in time why the window was not fixed on the weekend of April 12, 1991, rather than on the following weekend". Finally, at page 41 of the brief, counsel asserts in part that in view of the Secretary's delay in bringing the complaint, Mr. Nantz's backpay claim should be denied.

I have reviewed the testimony of Mr. Hamilton, and while it is true that he testified that Mr. Brock was no longer employed by the respondent and had moved to California, Mr. Hamilton further stated that "I think he came back in this area in the last week", (emphasis supplied),and that it was rumored that "he's gone to work for Clover Fork" (Tr. 209). The record reflects that Mr. Nantz worked for the Cloverfork Mining and Excavation Company after he left the respondent's employ, and it would appear to me that this company would have been conveniently located to the respondent had it endeavored to pursue the rumor that Mr. Brock had returned from California and was working there, particularly since Mr. Hamilton believed that Mr. Brock

had returned to the area at least a week prior to the hearing. Thus, it would further appear to me that Mr. Brock may have been available for testimony had the respondent made some attempts to locate him, or at least made an effort to obtain his deposition. The respondent apparently did neither.

The respondent's suggestion that Mr. Brock was the only witness who could testify as to why the broken window in question was not repaired sooner is not well taken. I initially take note of the fact that Mr. Brock worked the first day shift, and that Mr. Nantz operated the bulldozer with the missing window on the second, or night shift. Insofar as any repairs to the bulldozer are concerned, superintendent Hamilton and second shift foremen William Farley and Wayne Fisher all testified for the respondent, and they all presented testimony regarding the condition of the broken window and framework, and the efforts made by the respondent to make the necessary repairs. First shift mechanic Johnny Moore, who was subpoenaed to testify for the Secretary, and who was cross-examined by counsel Smith, testified about the repairs which he and a welder named "Wayne" made to the window frame, as well as when the window glass was replaced. Under the circumstances, I conclude and find that the absence of Mr. Brock was not critical or prejudicial to the respondent's case. The respondent could have called the welder who assisted mechanic Moore, as well as the glass contractor who installed the dozer window, but it did not do so.

In view of the foregoing, and after further consideration of the respondent's assertions concerning the claimed prejudicial denial of its motion to continue the hearing, I conclude and find that the respondent was not prejudiced and that its counsel had a full and fair opportunity to defend the respondent's position through the testimony of all of the knowledgeable witnesses who appeared at the hearing. Indeed, the record attests to the fact that counsel Smith was well-prepared, conducted a thorough and competent examination of all witnesses, and submitted a brief which I believed reflects his grasp of the issues as well as his knowledge of the applicable case law.

With regard to the alleged failure by the Secretary to timely file the complaint, I take note of the fact that section 105(c)(3) of the Act requires the Secretary to proceed with expedition in investigating and prosecuting a miner's discrimination complaint. Sections 105(c)(2) and (c)(3), require the Secretary to act within the following time frames:

1. Commence the investigation of the complaint within 15 days of its receipt from the miner.

2. Within 90 days of the receipt of the complaint, notify the complaining miner of any determination as to whether a violation has occurred.

3. If a determination is made that a violation has occurred, immediately file a complaint with the Commission.

The Commission's Rules, at Part 2700, Title 29, Code of Federal Regulations, implement the statutory time provisions. Rule 40(a), 29 C.F.R. 2700.40(a) requires the Secretary to file a complaint after an investigation if she finds that a violation has occurred. Rule 41(a), 29 C.F.R. 2700.41(a), requires the Secretary to file the complaint within 30 days after her written determination that a violation has occurred.

The record in this case establishes that Mr. Nantz's employment with the respondent ceased on or about April 16, 1991, and that he subsequently went to MSHA's Harlan, Kentucky field office where he gave his initial statement of alleged discrimination on May 29, 1991 (Nantz Deposition of June 15, 1992, and Deposition Exhibit No. 2). MSHA Special Investigator Brock's investigation of the complaint followed shortly thereafter, and the Secretary's counsel confirmed that the investigation was completed on October 1, 1991, and that the Secretary made her determination that a complaint should be filed on January 15, 1992 (Tr. 7-8). The complaint was received by the Commission on January 31, 1992.

In David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 1984), Aff'd mem. 750 F.2d 1093 (D.C. Cir. 1984) (table), the Commission affirmed a dismissal of a miner's complaint filed six months after his discharge, and stated that "Tardiness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation", 6 FMSHRC 24.

In Joseph W. Herman v. Imco Services, 4 FMSHRC 2135, 2139 (December 1982), the Commission upheld a dismissal of a miner's complaint filed 11 months after the alleged act of discrimination. Although the Commission found no mitigating circumstances excusing the delay, and found that the record was "replete with examples of faded memories as well as the unavailability of potentially relevant evidence ", it also suggested that any mine operator prejudice resulting from lost evidence, faded memories, and witnesses who have disappeared must be balanced against the vindication of a complainant's rights in a particular case.

In Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (January 1984), the Commission found that the miner's filing of his complaint 30-days out of time was excusable because he was unaware of the filing time limitations and the mine operator failed to demonstrate the kind of legal prejudice recognized in Joseph W. Herman v. Imco Services, supra, namely, tangible evidence that has since disappeared, faded memories, or missing witnesses. See also: Bruno v. Cyprus Plateau Mining Corp.,

10 FMSHRC 1649 (November 1988) aff'd., No. 89-9509 (10th Cir., June 5, 1989) (unpublished). I take note of the fact that all of these "time limitation" cases concerned untimely delays by pro se complaining miners, while the instant proceeding involves alleged untimely delay by the Secretary and not by Mr. Nantz.

In Secretary of Labor, MSHA ex rel Donald R. Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (June 1986), the Commission reversed a judge's decision dismissing a Secretarial complaint filed with the Commission more than two years after the miner's complaint was filed with MSHA. Recognizing the fact that the Secretary seriously delayed the filing of the complaint, the Commission nonetheless held that in the absence of any showing that the respondent mine operator was prejudiced by the delay, the complaint should not have been dismissed. In speaking to the requisite time frames found in section 105(c) of the Act, the Commission stated as follows at 6 FMSHRC 908:

> While the language of section 105(c) leaves no doubt that Congress intended these directives to be followed by the Secretary, the pertinent legislative history nevertheless indicates that these time frames are not jurisdictional:
>
> The Secretary must initiate his investigation within 15 days of receipt of the complaint, and immediately file a complaint with the Commission, if he determines that a violation has occurred. The Secretary is also required under section 105(c)(3) to notify the complainant within 90 days whether a violation has occurred. It should be emphasized, however that these time-frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations. (Emphasis added).
>
> S. Rep. No. 181, 95th Cong., 1 Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2 Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978) ("Legis. Hist. "). Plainly, Congress clearly intended to protect innocent miners from losing their causes of action because of delay by the Secretary. (Emphasis added).
>
> Related passages of legislative history make equally clear, however, that Congress was well aware of the due process problems that may be caused by the prosecution of stale claims. See Legis. His. at 64 (discussion of

> 60-day time limit for the filing of miner's discrimi- nation complaint with the Secretary). The fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend against the claim. (Emphasis added).
>
> Accordingly, we hold that the Secretary is to make his determination of whether a violation occurred within 90 days of the filing of the miner's complaint and is to file his complaint on the miner's behalf with the Commission "immediately" thereafter -- i.e., within 30 days of his determination that a violation of section 105(d)(1) occurred. If the Secretary's complaint is late-filed, it is subject to dismissal if the operator demonstrates material legal prejudice attributable to the delay. Cf. David Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 23-25 (January 1984), aff'd. mem., 750 F.2d 1093 (D.C. Cir. 1984) (table); Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8, 12-14 (January 1984).

As noted earlier, the record reflects that Mr. Nantz filed his initial complaint with the Secretary well within the 60-day time frame found in section 105(c)(1) of the Act, and I find no evidence that the Secretary unduly delayed the initiation of an investigation of Mr. Nantz's complaint after it was filed, or that the four months that it took to complete the investigation constituted an unreasonable delay. Further, once the Secretary made a determination on January 15, 1992, that a complaint should be filed, it was filed January 31, 1992, well within the 30 days provided by Commission Rule 41(a).

After careful consideration of the entire record in this case, I find no persuasive evidence to establish that the respondent has been adversely affected or prejudiced by any secretarial delays in this case. Any delays in the case after the case was docketed with the Commission came about as a result of three changes of attorneys representing the respondent, and one hearing continuance granted at the respondent's request due to a change in counsel. Insofar as any prejudice to the respondent as a result of delay by the Secretary in filing the complaint is concerned, I take particular note of the fact that prior to, and up to the day of the commencement of the hearing, none of the attorneys representing the respondent advanced any arguments or claims that the delay prejudiced the respondent's ability to defend itself because of the unavailability of critical witnesses, loss of evidence, or faded memories.

In my view, the respondent's present counsel did a commendable job in defending the discrimination complaint, notwithstanding my denial of his motion for a continuance of the hearing. The hearing transcript record of the testimony of all of the witnesses who had knowledge of all relevant and material facts incident to the complaint, attest to the fact that the respondent's counsel had a full and fair opportunity to present his case, and to test the case made by the Secretary on behalf of Mr. Nantz. Under these circumstances, the respondent's suggestions that it has been prejudiced by the Secretary's delay in filing the complaint ARE REJECTED, and its requests to dismiss the complaint and the proposed civil penalty assessment on this ground ARE LIKEWISE REJECTED AND DENIED.

With regard to the respondent's assertions concerning the delay by the Secretary in filing the amended complaint, I take note of the fact that the complaint was simply amended to include a proposal for a specific amount of the proposed penalty, and to inform the respondent of the particular statutory penalty criteria followed by the Secretary in support of the proposed penalty. The respondent was previously informed by the Secretary in her initial complaint that an amendment would be forthcoming, and it would appear from the record that the amended complaint was unopposed by counsel of record at the time of filing.

It is well-settled that administrative pleadings may be liberally construed and easily amended. National Realty and Construction Company v. Occupational Safety and Health Review Commission, 489 F.2d 1257 (D.C. Cir. 1973); Secretary of Labor v. United States Steel Corporation, 6 FMSHRC 1908, 1916 (August 1984). Further, given the fact that civil penalty assessment proposals by the Secretary are considered de novo by the presiding judge, and the judge is not bound by the Secretary's proposed penalty, I am not persuaded that the respondent has been prejudiced by the amendment in question, and any claims to the contrary ARE REJECTED AND DENIED.

Fact of Violation

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 (2d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511

(November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. .Cir. 1983).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, U.S. , 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Protected Activity

It seems clear that Mr. Nantz had a right to make safety or health complaints about the bulldozer that he was assigned to operate, and that these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him. Secretary of Labor ex rel Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. The miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

Complainant's Safety Complaint Communication to the Respondent

In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate any safety complaints 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); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Simpson v. Kenta Energy,

Inc., 8 FMSHRC 1034, 1038-40 (July 1986:; Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); 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.

Mr. Nantz testified that during the time Mr. Farley served as his foreman, he complained to Mr. Farley at least two or three times about the broken window and the dust and that Mr. Farley assured him that it would be repaired (Tr. 18). Mr. Farley was aware that the dozer had been damaged a day or two before he left the job to take another assignment, but he denied that Mr. Nantz ever complained to him about the broken window or the dusty conditions. Mr. Farley also denied that Mr. Nantz operated the dozer with the rear window completely out during the two days immediately following the damage to the dozer. Mr. Farley stated that he (Farley) operated the dozer for these two days before he left the job, and although he responded "no" to the question "was the glass completely out" (Tr. 234), he went on to explain that "there was one little glass on the side that was there, but the big glass in the back was still out" (Tr. 234). In response to a question concerning the damage sustained by the dozer, Mr. Farley stated "Bent the side of the cab, just a little bit in, and knocked that one glass out" (Tr. 234). He later testified that the side window was knocked out, but "the whole back window was still there. Just might have been a little gap in one corner of it, where the cab was bent" (Tr. 237).

I find Mr. Farley's testimony concerning the condition of the dozer back window after the collision with the truck to be contradictory. Mr. Nantz's testimony that the back window was completely knocked out by the collision is consistent with the testimony that he gave when his prehearing deposition was taken on June 15, 1992. He then testified that "I noticed my window gone" and that the window area "was all open; just gougey glass all around the back where the truck had splattered it when it run into the dozer", and he drew a diagram of the missing back window area and explained it further (Deposition Tr. 22-25; Exhibit #1). All of the other hearing witnesses who knew about the window damage, with the exception of Mr. Farley, did not contradict Mr. Nantz's assertion that the rear window of the dozer was knocked out as a result of a truck backing into it. In fact, they confirmed it.

Mr. Nantz further testified that after Mr. Fisher replaced Mr. Farley as his foreman, he complained to Mr. Fisher about the broken window and his dust problems "on a regular basis every other day or so" (Tr. 20). Mr. Nantz's complaints to Mr. Fisher were corroborated by Mr. Napier and Mr. Belcher, as well as respondent's witness James Cornett, and Mr. Fisher himself. Superintendent Hamilton confirmed that he was informed of

Mr. Nantz's complaint by Mr. Fisher at the time Mr. Nantz initially refused to operate the dozer.

I conclude and find that Mr. Nantz timely communicated his safety complaints to mine management and specifically informed management of his health and safety concerns with respect to the hazardous and dusty working conditions caused by the missing rear window of the dozer which he was assigned to operate, and that management had a reasonable opportunity to address these concerns and take the necessary corrective action. I further conclude and find that Mr. Nantz's safety and health complaint communications to management met the requirements enunciated by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982); Secretary ex rel John Cooley v. Ottowas Silica Company, 6 FMSHRC 516 (March 1984); Gilbert v. Sandy Fork Mining Company, supra; Sammons v. Mine Services Co. 6 FMSHRC 1391 (June 1984).

The Complainant's Work Refusal

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and had communicated this to mine management, such as a foreman, management has a duty and obligation to address the perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard. Secretary v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983); 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'g Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

The focus in work refusal cases is the complaining miner's belief that a hazard exists, and the critical issue is whether or not that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983); Miller v. FMSHRC, 687 f.2D 1984 (7th Cir. 1982). In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. bush v. Union Carbide Corp. 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co. 5 FMSHRC 1529, 1533-34 (September 1983); Haro v. Magma Cooper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (July 1986). The Commission has also explained that "good faith belief simply means honest belief that a hazard exists". Robinette, supra at 810.

The respondent maintains that the Secretary has failed to prove that it caused a work condition which presented an intolerable hazard to Mr. Nantz's health. The respondent asserts

that it repaired the dozer window in a much shorter period of time than claimed by Mr. Nantz at the hearing where he testified that he had to operate the dozer without the back window "going into the fourth week". The respondent asserts that this testimony was virtually parroted, "going into the fourth week", by Mr. Nantz's witnesses, but that when pinned down to the actual sequence of events, Mr. Nantz agreed that in an earlier deposition he had testified that the window was only out two or three days before foreman Farley left the job, and at the hearing he gave vague testimony that the window had been broken over a period ranging from two to seven days.

The respondent further maintains that it has established through the testimony of foreman Farley and company business records that it was two days, Thursday and Friday, April 4 and 5, 1991, that the window was out before Mr. Farley left the job,and that foreman Fisher's first day on the job was Monday, April 8, 1991. Respondent points out that it is undisputed that Mr. Nantz did not work on Friday, April 5, 1991, and that there was no work on the weekend of April 6 and 13, 1991. Under these circumstances, the respondent concludes that Mr. Nantz had to operate the dozer without the back window seven (7) working days, Thursday, April 4, 1991, Monday through Friday, April 8 through 12, 1991, and Monday, April 15, 1991, prior to his leaving work on April 16, 1991. Respondent further argues that it is undisputed that the dozer back window was replaced during the period Thursday, April 18, 1991, through Sunday, April 21, 1991, during which time the job was shut down. Under these circumstances, respondent concludes that Mr. Nantz would have only had to work two more days, Tuesday and Wednesday, April 16 and 17, 1991, with the back window out had he chosen not to leave the job.

The respondent asserts that the broken dozer window was repaired within ten working days of the accident which caused the damage, and that its witnesses explained that its mechanics had to do certain frame work so that a new window would fit, that people from a glass company put the window in, and that this work needed to be done on a weekend when the dozer was not operating.

The respondent argues that it attempted to alleviate the dust problem by offering to put a clear plastic material over the exposed back window to reduce the amount of dust, took measures to keep the fill area where Mr. Nantz worked watered to keep the dust down, and had dust masks available for Mr. Nantz's use while operating the dozer. Respondent also suggested that Mr. Nantz could have avoided the dust by availing himself of alternate methods of operating the dozer to reduce the dust exposure. However, since Mr. Nantz refused the offer of plastic covering, chose not to wear a face mask, and made no attempts to avoid the dust by maneuvering the dozer in different directions away from the dust, or turning on his air conditioning blowers, the

respondent concludes that his refusal to operate the machine was unreasonable and lacking in good faith, and that any health hazard that may have been caused to him as a result of operating the dozer without the back window intact was the result of his own stubborn refusal to attempt to do anything to alleviate the problem.

The respondent is correct in its assertion that Mr. Nantz's testimony concerning the duration of the missing back window was equivocal. However, having viewed Mr. Nantz during the course of the hearing, I find him to be a credible witness and I have no reason to believe that he lied or deliberately attempted to misstate the facts. His deposition testimony reflects that Mr. Nantz has a ninth grade education, and he candidly stated during the hearing that he did not document the specific number of days the dozer window was out and that he was not positive about the number of days which passed from the day the damage occurred and the last day he worked.

The respondent's assertion that Mr. Nantz's witnesses "parroted" his "going into the fourth week" testimony" is not well taken. The only witness who made that statement was Mr. Farler (Tr. 115). Mr. Napier testified that "a couple of weeks or more" passed from the time the window was broken out until the last day Mr. Nantz was on the job (Tr. 98). Mr. Belcher testified that he did not know when the window was knocked out, and was not sure of the elapsed time, but estimated it at "around three weeks or something" (Tr. 130). Mr. Moore did not know when the window was knocked out, had no idea how long it was out before it was repaired, and stated that "it had been out for awhile" (Tr. 145).

Superintendent Henderson did not believe the window was broken for four weeks, but he confirmed that he did not know how long it had been broken (Tr. 219). Mr. Henderson confirmed that he was not involved in the repair of the window, but he explained that the first shift foreman or mechanic would have made the repairs, and the repairs would have entailed the straightening and welding of the frame to keep the window from falling out (Tr. 198). Foreman Farler did not know when the window was repaired, and as stated previously, he testified that it was damaged a couple of days before he left the job (Tr. 241). Foreman Fisher, who reported to the job after the window was damaged, testified that he had no mechanic assigned to his second shift for repairs, but that he spoke to the first shift foreman about fixing the window two or three times, and the foreman told him each time that "We're going to fix it, it's going to be fixed". Mr. Fisher could not remember whether any repair work was being done on the window frame during this time. He confirmed that the mine was on holiday from Thursday, April 18, through Sunday, April 21, 1991, and that the window was replaced

on Thursday and Friday, April 18 and 19, and that it was in when work resumed on Monday, April 22, 1991 (Tr. 272, 282, 284). First shift mechanic Johnnie Moore testified that "a week or so" after Mr. Nantz left the job, his shift foreman (Brock) instructed him to assist "the window people" in installing a new dozer window, and that he and a welder repaired the window frame which had not previously been straightened. Mr. Moore stated that it took "an hour or two" to do the repair work, and an hour to install the window.

After careful consideration of all of the testimony and evidence, I conclude and find that approximately 13 or 14 days passed form the time the dozer window in question was damaged when a truck backed into it on or about April 3 or 4, 1991, until Mr. Nantz left the job site on Tuesday, April 16, and again on Wednesday, April 17, 1991, and that approximately 15 days passed from the time the window was initially damaged until it was ultimately repaired on or about April 18 or 19, 1991. I further conclude and find that during all of this time, little or no work was done to repair the dozer window frame or to replace the missing window.

Although the respondent's assertion that its mechanics had to do certain frame work so that a new window would fit and that people from a glass company put the window in is true, I am not convinced that this work needed to be done on a weekend when the dozer was not operating. As a matter of fact, the mine was down for the weekends of April 6 and 13, 1991, and no work was done to repair the broken window. Under the circumstances, and given the fact that there is no evidence of any repair work to the dozer during at least two successive weekend periods when the mine was down and the dozer was not operating, I find the respondent's assertion that it could only repair the dozer on a weekend when the dozer was not operating to be less than credible. Further, the respondent's suggestion that the repair work necessary to replace the missing window was some monumental task is also lacking in credibility, and the unrebutted and credible testimony of the mechanic who did the work establishes that the repairs were made and the window was replaced in three hours during a normal working shift.

Respondent asserts that all of the other witnesses who were questioned concerning whether, in their opinion, operating this bulldozer without the back window for a limited period of time, even up to a month, would constitute a hazard to a miner's health, unanimously said "no." Respondent suggests that this is relevant to the issue and good faith of Mr. Nantz's belief to the contrary. Respondent further submits that it is also relevant that the dozer operator on the first shift did not complain or see fit to quit, and that Mr. Doolin, who operated the dozer on April 16 and 17, 1991, before it was repaired, testified that he

did not have any problems from the dust because he manuevered the dozer to avoid the dust.

I have carefully reviewed the testimony of all of the witnesses in this case, including the five witnesses called by the respondent (superintendent Hamilton, foremen Farley and Fisher, and dozer operators Cornett and Doolin). Except for Mr. Hamilton and Mr. Farley, none of the other witnesses called by the respondent, or the four witnesses called for Mr. Nantz, were asked or testified about their opinion concerning the operation of a dozer in a dusty environment with the back window missing.

Superintendent Hamilton was of the opinion that a "short term, four to six weeks" exposure to dust while operating a dozer with a missing back window would not cause him a health problem (Tr. 203-204). Foreman Farley did not believe that he would suffer serious consequences from operating a dozer in heavy dust for a period of one month, and although he stated that he would not object to doing so, he indicated that he would not like it (Tr. 244-245). Further, although Mr. Farley stated that he has operated a dozer with an open cab in dust in the past, the confirmed that he had never operated a dozer with a closed cab with the back window broken out (Tr. 246).

The respondent's reliance upon the opinions of Mr. Hamilton and Mr. Fisher in support of its assertion that it is relevant to the question of Mr. Nantz's reasonable good faith refusal to operate the dozer is rejected. The critical question here is whether or not Mr. Nantz reasonably and honestly in good faith believed that the operation of a dozer with a missing back window would be injurious and hazardous to his health and safety because of the dust to which he was subjected and exposed to because of the missing window, and whether or not Mr. Nantz reasonably and in good faith believed that he would be required to operate the dozer with the missing back window at the time of his initial work refusal on Tuesday, April 16, 1991, and his subsequent work refusal of Wednesday, April 17, 1991.

The respondent's suggestions that the use of plastic material is routinely used to keep out cold and dust in dozers with open cabs, that its use does not impair visibility, and that Mr. Nantz's testimony that it does impair his visibility was contradicted by virtually every witness who was questioned about it, must be viewed in context, and I have given it little weight. Except for Mr. Nantz, none of the four witnesses called by the Secretary, which included two endloader operators, a mechanic, and an equipment serviceman, testified about the use of plastic coverings. Dozer operator Cornett, called by the respondent as a witness, said nothing about the use of plastic coverings or whether or not it might impair his visibility.

The only witnesses who testified about the use of the plastic material were superintendent Hamilton, and foremen Farley and Fisher. Mr. Hamilton simply stated that plastic material has been placed on the back window of lifts for protection, and he did not believe that it decreased visibility at night because extra illumination is provided in the shot and fill areas (Tr. 207-208).

Foreman Farley testified that the has used plastic coverings on open cab equipment that he has operated "to keep the air knocked off" in the winter time in order to stay warm, and that his was a common practice for open cab equipment operators (Tr. 247). Mr. Farley conceded that Mr. Nantz would have a dust problem if the front window of his dozer were missing (Tr. 256-257).

Foreman Fisher testified that he used plastic covering while operating open cab dozers during the winter time, and that the plastic was wrapped around the opened cab to keep the heat generated by the radiator inside the cab. When asked if the plastic would keep the dust out, he responded "No, it wouldn't keep it out, but it would help, I mean, I never didn't even think about that dust really. . .if the dust got too bad I always got a rag or something and tie over my mouth, or nose, or get me a dust mask or something". Mr. Fisher did not believe that the plastic impeded his visibility (Tr. 265).

There is no evidence that Mr. Nantz's foreman, or the mine superintendent, offered to show Mr. Nantz how to maneuver his dozer to avoid the dust, nor is there any evidence that the respondent required its personnel to use dust masks while working in dusty areas. Highlift operator Belcher testified that some drill operators use dust masks, and others do not, and that he does not use one because his machine has an enclosed cab . With respect to the use of plastic coverings for equipment with open cabs, I take note of the fact that the dozer that Mr. Nantz was assigned to operate had an enclosed cab, and I believe that it is was not unreasonable for Mr. Nantz to expect such a piece of equipment to be maintained in a serviceable condition, including the timely repair or replacement of a broken window that is obviously intended to maintain the cab area as an enclosed working environment.

I am not persuaded that the use of the plastic covering was routinely used by the respondent as a specific preventive measure against dust exposure. The respondent's testimony reflects that plastic coverings are sometimes used by operators in the winter time to keep their open cab areas warm. Mr. Nantz was operating the dozer during the month of April and it had an enclosed cab area. Nor am I persuaded that the respondent's available water

trucks adequately kept the fill area wet enough to control the dust generated by the trucks working in the fill area where Mr. Nantz was required to operate the dozer with the missing rear window. In the final analysis, had the respondent addressed Mr. Nantz's safety and health complaints concerning the missing window and the resulting dust exposure in a more timely fashion by replacing the window, or taking the dozer out of service until it was repaired, there would be no need for makeshift coverings, dust masks, water trucks, or the maneuvering of the dozer to avoid the dust.

I conclude and find that the respondent failed to reasonably and timely respond to Mr. Nantz's communicated safety and health complaints with respect to the hazardous dust conditions to which he was exposed as a result of the missing rear window of the dozer that he was assigned to operate. Although the evidence clearly establishes that Mr. Nantz communicated his complaints to foreman Fisher, and that Mr. Fisher assured him that the window would be repaired each time Mr. Nantz complained about it, Mr. Fisher reacted by simply speaking to the day shift foreman two or three times about fixing the window. Rather than insuring that repairs were made timely, Mr. Fisher simply accepted the day foreman's assurance that it would be done.

In my view, since Mr. Fisher was Mr. Nantz's first-line supervisor, he had a duty and obligation, as part of his supervisory and managerial responsibilities, to respond in a more positive manner by insuring that the window was promptly repaired, or by tagging or removing the dozer from service until it was repaired. Instead of doing this, Mr. Fisher played a passive role, even though the means of addressing Mr. Nantz's health and safety concerns were directly within his supervisory and managerial control. Under the circumstances, I conclude and find that shifting the burden to Mr. Nantz by expecting him to protect himself from the dust hazards to which I believe he was exposed to, asking him to accept a makeshift plastic covering, expecting him to shake the dust from the covering with his hands while at the controls of his dozer, using his air conditioning blower, wearing a dust mask, or expecting him to maneuver his dozer in different directions to avoid the dust, were unacceptable and unreasonable responses to Mr. Nantz's safety and health concerns.

Although the respondent may not reasonably be expected to provide an absolutely clean working environment free of any dust, on the facts of this case where it seems clear to me that the source of the dusty conditions which Mr. Nantz had to endure while operating the dozer with a missing back window, was within the direct control of the operator, and were easily correctable, I cannot conclude that Mr. Nantz acted unreasonably when he refused to operate the dozer until the window was replaced. In view of all of the foregoing, and after careful consideration of

all of the credible testimony and evidence in this case, I conclude and find that Mr. Nantz's refusal to operate the dozer with the missing back window on the two final days of his employment with the respondent was reasonable, and that his decision in this regard was prompted by his safety and health concerns related to the hazardous exposure to dust resulting from the missing window, and a reasonable good faith belief that to continue to operate the dozer in the condition that it was in would place him at risk. I further conclude and find that Mr. Nantz's work refusals constituted protected work refusals pursuant to the Act.

The Alternate Work Refusal

The respondent argues that inasmuch as Mr. Nantz refused Mr. Fisher's offer to operate a loader in lieu of the dozer with the missing back window on the evening of April 16, 1991, and since Mr. Nantz did not contend that he was unable to operate the loader, or show that the loader was not safe to operate, his refusal to operate the loader was unreasonable. The respondent concludes that Mr. Nantz left work after refusing to operate the loader because he believed that he would have to go back to operating the dozer.

In support of its position, the respondent emphasizes the fact that both Mr. Fisher and Mr. Hamilton testified that had Mr. Nantz agreed to operate the loader he would not have been let go. The respondent points out that Mr. Nantz refused to operate the loader on April 16, 1991, and that when he returned to the mine on April 17, 1991, he simply came back to get his paycheck and find out if the dozer window had been repaired and to leave his phone number so that Mr. Fisher could call him when it was repaired. The respondent asserts that Mr. Nantz made no offer whatsoever to do other work that day and simply left the job site.

Based on Mr. Nantz's refusal to operate the loader on April 16, 1991, and his failure to report for work on April 17, 1991, showing up only to find out if the dozer had been repaired and to leave his phone number, the respondent concludes that it had sufficient reason not to call Mr. Nantz back to work after the window was repaired and to consider that he had voluntarily quit his job. The respondent suggests that since there were two incidents involved in this case, namely, Mr. Nantz's refusal to operate his own dozer, and his refusal to operate the loader offered to him, there may have been a mixed motive situation presented in this case.

The respondent submits that it has met its burden of proving that its failure to call Mr. Nantz back to work was motivated by his total lack of willingness to perform any job that was requested of him, not just the running of his own dozer. The

respondent concludes that it had a legitimate interest in having its operations continue, and that it was not reasonable for Mr. Nantz to refuse to operate the loader so long as it was available to him so that at least the operations could continue rather than refusing to do so and walking off the job. In these circumstances, the respondent further concludes that its refusal to call Mr. Nantz back to work was reasonable and did not constitute a discharge on the basis of protected activity.

I take note of the fact that the Secretary's complaint in this case does not allege that the respondent's failure to call Mr. Nantz back to work after the dozer window was repaired constituted another act of discrimination, and the Secretary's posthearing brief does not address this issue.

Mr. Nantz testified that when he reported for work on April 16, 1991, Mr. Fisher confirmed that the dozer window had not been repaired, and he then informed Mr. Fisher that he did not want to operate the dozer, but would be willing to "run the nine(9) or go out here somewhere and reclaim, out of the dust, and let someone else run the fill til I get my window in. Or, you know, run the sweeper broom or whatever else you got nobody else on so I could run to where I won't have to eat that dust another night, til he got the window in" (Tr. 25).

Mr. Nantz stated that Mr. Fisher informed him that he had no other dozers for him to operate, but there was "a chance" that he could run the loader for an hour or an hour and a half, but that he would then be sent back to the fill to operate the dozer since the loader may be needed in the shot area. Mr. Nantz stated that he did not want to run the loader because he believed that the regular loader operator would get his loader back in an hour and half to start loading coal, and he (Nantz) believed that he would have to go back on the dozer and continue operating it with the missing window in the dust for the rest of the shift (Tr. 84).

Mr. Nantz testified further that when he next returned to the mine on April 17, 1991, Mr. Fisher again confirmed that the dozer window had not been repaired, and told him that he could "either run it like it is or go to the house. You're fired if you don't run it" (Tr. 26-27). Mr. Nantz then picked up his paycheck and went home.

Mr. Napier and Mr. Belcher, both of whom where present on the same work shift with Mr. Nantz on the first evening that Mr. Nantz refused to operate the dozer with the missing window, both testified that they heard Mr. Nantz offer to run any other available equipment so that he would not have to work in the dust with his dozer, and that Mr. Fisher told Mr. Nantz that the had nothing available for him to do that evening (Tr. 101, 133-134, 138).

Mr. Napier had no particular knowledge of the events of the second evening when Mr. Nantz again refused to operate the loader, and he confirmed that he never heard Mr. Fisher offer to let Mr. Nantz run the 980 loader (Tr. 105). Mr. Belcher, the regular loader operator, testified about a conversation he heard between Mr. Fisher and Mr. Nantz which he believed took place on the first evening in question, but was not sure. Mr. Belcher stated that Mr. Fisher offered to let Mr. Nantz run the loader "for awhile", but he did not know if Mr. Nantz informed Mr. Fisher that he did not want to run the loader, or could not run it. Mr. Belcher explained that he ran the loader for a full 10-hour shift most of the time, but that on the evening in question he was going to fill the water truck with water so that Mr. Fisher could water the fill area, and that he would have resumed cleaning coal in the pit later that evening with the loader for the remainder of the shift. Mr. Belcher estimated that he would not need to use the loader for "a couple of hours", but that after he finished with the water truck he would have to use the loader again (Tr. 136-140).

Mr. Hamilton testified that when Mr. Fisher called him the first evening to inform him that Mr. Nantz did not want to run his dozer, Mr. Fisher told him that he had offered the use of the loader to Mr. Nantz, but that Mr. Nantz wanted to run his dozer and have it repaired and that he did not want to run any other equipment (Tr. 200).

Mr. Cornett, who was also present during the Nantz-Fisher conversation on the first evening, confirmed that Mr. Fisher offered the use of the loader to Mr. Nantz, but Mr. Cornett was nor sure whether Mr. Nantz told Mr. Fisher that he would not, or could not, operate the loader (Tr. 225-228).

Mr. Fisher testified that on the first evening of April 16, 1991, he offered to let Mr. Nantz operate the 980 loader, and he informed Mr. Nantz that he intended to use the water truck to settle the dust in the fill area, and that if the loader was needed later that evening for cleaning coal, Mr. Nantz could then return to operating his dozer. Mr. Fisher explained that he told Mr. Nantz that he would let him run the loader all night if there was no coal to be cleaned with the loader, but that if he needed to, he would put Mr. Nantz back on his dozer (Tr. 283). Mr. Fisher stated that Mr. Nantz's response was "No, I'm not running the 980, I'm going home" and told him to have the glass put back in the dozer and to call him when this was done, and that he would then return to work (Tr. 267-268).

Mr. Fisher believed that Mr. Nantz was qualified to operate the loader and Mr. Nantz never told him otherwise. Mr. Fisher also believed that no coal would have been cleaned on the evening of April 16, 1991, and that there was a possibility that Mr. Nantz would have operated the loader for most of the shift

had he accepted his offer. Although Mr. Nantz would have been working in the same fill area with the loader, Mr. Fisher pointed out that the loader had all of its windows intact. Mr. Fisher confirmed that he did not consider assigning Mr. Nantz to drive the water truck, and leaving Mr. Belcher on the loader, because he did not know whether Mr. Nantz could drive the truck, but he admitted that he did not ask Mr. Nantz whether he could operate the truck (Tr. 267-269).

With regard to the events of the second evening of April 17, 1991, Mr. Fisher testified that after he informed Mr. Nantz that his dozer window had not been replaced, Mr. Nantz informed him that he was going home and he asked him to call when the window was replaced and that he would return to work at that time. Mr. Fisher confirmed that he informed Mr. Nantz that he needed to run the dozer and that if he (Nantz) did not run it, he (Fisher) would "get somebody up here that will" (Tr. 271). There is no evidence that Mr. Fisher made any further offers of alternate work on this evening, nor is there any evidence that Mr. Nantz asked for alternate work.

After careful review and consideration of all of the testimony and evidence concerning the alternate work issue, I conclude and find that the respondent's position is not well taken and it is rejected. While it is true that Mr. Fisher offered to allow Mr. Nantz the use of a loader which had all of its windows intact while continuing to work in the dusty fill area where Mr. Nantz had previously been operating his dozer with the missing back window, I am not persuaded that this offer of alternate work, which in the circumstances then presented was equivocal and conditional, constituted an adequate and reasonable response to Mr. Nantz's complaints about the dust to which he was exposed, nor am I convinced that the offer sufficiently quelled Mr. Nantz's concerns about his hazardous exposure to dust.

I conclude and find that Mr. Nantz's refusal to operate the loader was based on a reasonably founded belief that after a brief stint on the loader, he would soon find himself back on the dozer with the missing window operating in the dust again. Mr. Nantz testified that Mr. Fisher informed him that "there was a chance" that he could operate for an hour or so, but that he would have to go back to the dozer because the loader would be needed elsewhere. Mr. Belcher, the regular loader operator, testified that he heard Mr. Fisher offer Mr. Nantz the use of the loader "for awhile", and Mr. Belcher estimated that after two hours, he would again need the loader to resume loading coal in the pit area.

Mr. Fisher initially testified that he did not believe that coal would have been cleaned on the evening of April 16, 1991, and that there was a possibility that Mr. Nantz could have operated the loader for most of the shift. He also testified

that he informed Mr. Nantz that if the loader were needed to clean coal, he (Nantz) would have to resume operating the dozer again (Tr. 267-268). Mr. Fisher reiterated this testimony when he later testified that he would have let Mr. Nantz run the loader all night if he did not have coal to clean, and if he needed to, he would have returned Mr. Nantz back to his dozer later in the shift (Tr. 283).

I find Mr. Fisher's testimony to be rather equivocal and lacking in credibility, and it is contradicted by the credible testimony of loader operator Belcher who seemed confident that he would only give up his loader for approximately two hours before resuming his work in the pit cleaning coal with the loader. It seems to me that if Mr. Fisher truly believed that no coal would be cleaned during the shift in question, thereby freeing up the loader for use by Mr. Nantz for the entire shift, he would have made this clear to Mr. Nantz, particularly since Mr. Nantz had complained to him about the dust and was about to leave the job site and interrupt production. Instead, Mr. Fisher qualified his offer of the use of the loader by making it conditional and placing Mr. Nantz in the position of not knowing how long he might be on the loader before again being required to operate the dozer in a dusty work environment. Under the circumstances, I conclude and find that Mr. Nantz was not unreasonable in refusing to operate the loader, and the fact that he did does not render his refusal unprotected activity.

The Complainant's Termination

Foreman Fisher testified that after he informed superintendent Hamilton on April 16, 1991, that Mr. Nantz refused to operate the dozer Mr. Hamilton instructed him "to do what you have to do", and commented "if they're going to work, they're going to work, ... if they ain't, we're going to have to get someone that will work" (Tr. 269-270). Mr. Fisher confirmed that when Mr. Nantz returned to the mine on April 17, 1991, and found that he dozer was not repaired, he informed him that he would not operate the dozer in that condition. Mr. Fisher stated that he then told Mr. Nantz that if he did not want to run the dozer "I would get somebody up here that will", and that "I have to take it you're quitting your job, and I'll have to get somebody in here in the dozer" (Tr. 271, 286). Mr. Fisher further confirmed that he immediately hired a replacement dozer operator that same evening and that the decision to do so was his (Tr. 271, 286).

Mine Superintendent Hamilton confirmed that after Mr. Fisher called him and informed him that Mr. Nantz had refused to operate the dozer and was going home, he told Mr. Fisher that if Mr. Nantz would not operate the dozer and went home, "we would have to get someone else" (Tr. 200). Mr. Hamilton indicated that Mr. Nantz would not have been "fired", "replaced" or "let go" if he had remained at work and operated the 980 loader (Tr. 201).

Mr. Nantz testified that when he returned to the mine to pick up his pay check the day after he initially refused to operate the dozer and went home, foreman Fisher again confirmed that the window had not been repaired and instructed him to "either run it like it is or go to the house. You're fired if you don't run it" (Tr. 27-28). I find Mr. Nantz's testimony that Mr. Fisher gave him an option of operating the dozer with the missing rear window or "going to the house" to be credible and I believe that this is what Mr. Fisher told him. As noted by the Commission in Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12, 14 (January 1989), the phrase "go to the house" is synonymous with a discharge in the mining industry. See: Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (August 1982), aff'd sub nom. Whitley Development Corp. v. FMSHRC, No. 84-3375, slip op. at 2 (6th Cir., July 31, 1985); Secretary on behalf of Keene v. S&M Coal Co., 10 FMSHRC 1145, 1147 n. 5 (September 1988).

A constructive discharge occurs whenever a miner engaged in protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988) at 461-463. Whether such conditions are so intolerable is a question for the trier of fact. Supra, at 463. See also: Stenson Begay b. Liggett Industries, Inc., 11 FMSHRC 887 (May 1989), aff'd, Liggett Ind. v. FMSHRC, 923 F.2d 150 (10th Cir. 1991) of Secretary ex rel. Harry Ramsey v. Industrial Constructors, Inc., 11 FMSHRC 1585 (August 1989), rev'd, 12 FMSHRC 1587 (August 1990).

I conclude and find that the credible and unrebutted testimony of Mr. Nantz, corroborated by the co-workers who worked with him on the same shift, supports his contention that during the time he was assigned to operate the dozer with the missing rear window, he was exposed to hazardous dust conditions which made it difficult for him to clearly see the trucks operating in the fill area where he was pushing fill with the dozer, and more significantly, caused him personal problems, including choking and breathing problems resulting from the dust coming into his cab area through the missing rear window. I further conclude and find that the adverse health and safety hazards caused by the dusty conditions as described by Mr. Nantz, and which stand unrebutted by the respondent, can reasonably be characterized as "intolerable". In these circumstances, I further conclude and find that Mr. Nantz acted reasonably when he left the job site on April 15, 1991, after refusing to operate the dozer, and again on April 16, 1991. In both instances, the respondent had failed to take timely action to repair the dozer, or to take it out of service so that it could be repaired promptly, and foreman Fisher left Mr. Nantz with little hope of reasonably addressing his safety and health complaints when he gave him the option of operating the dozer with the missing window or going home.

Mr. Hamilton and Mr. Fisher maintained that Mr. Nantz quit his job and that he was not fired. However, they also asserted that Mr. Nantz would not have been let go had he opted to stay at work and operate the loader offered by Mr. Fisher. I fail to see the distinction between a "let go" and a "firing". On the facts of this case, it seems rather obvious to me that after speaking with Mr. Hamilton on April 16, 1991, after Mr. Nantz refused to operate the dozer and went home, Mr. Fisher had the authority "to do what he had to do" if Mr. Nantz continued to refuse to operate the dozer, and that he was prepared to summarily fire Mr. Nantz if he refused to operate the dozer with the missing rear window.

I conclude and find that notwithstanding the offer of the loader by Mr. Fisher to Mr. Nantz, in the circumstances then presented, including the failure by the respondent to reasonably respond to Mr. Nantz's prior complains by seeing to it that the window was promptly replaced, a relatively simple matter which would have corrected the dust conditions, Mr. Nantz acted reasonably when he decided to leave the job site after refusing to operate the dozer or the loader. I further conclude and find that Mr. Nantz had every reason to believe that if he had stayed on the job operating the loader for an hour or two, he would soon find himself back on the dozer for the rest of the shift working in unhealthy and hazardous dust conditions with no reasonable expectation that management would eliminate these conditions. Under all of these circumstances, I conclude and find that Mr. Nantz's departure from the job site was reasonable and justified and constituted a constructive discharge as a result of protective work refusals. Accordingly, I further conclude and find that Mr. Nantz was unlawfully discriminated against in violation of section 105(c) of the Act, and the complaint of discrimination IS SUSTAINED.

Civil Penalty Assessment

It seems clear to me from the statutory language found in section 105(c)(3) of the Act that violations of the discrimination prohibitions found in section 105(c)(1) are subject to the civil penalty assessment sanctions pursuant to section 110(a), and the respondent's arguments to the contrary are rejected. Further, respondent's assertions at pages 42-43 of its posthearing brief that this action has been brought by the Commission and that the Commission failed to advanced any evidence whatsoever as to the appropriateness of any civil penalty assessment are erroneous. This matter has been brought by the Secretary, and the Commission's role is to consider any appeal taken by any party in response to the presiding judge's adjudication of the case.

The burden of presenting evidence to establish an appropriate civil penalty assessment based on the statutory criteria found in section 110(i) of the Act lies with the Secretary. As noted earlier, the presiding judge is not bound by the Secretary's proposed penalty assessment, nor is he bound by MSHA's regulatory

penalty assessment criteria found in Part 100, Title 30, Code of Federal Regulations. Any penalty assessment made by the judge is on a de novo basis, taking into account the record before him and the statutory criteria found in section 110(i) of the Act.

The respondent is correct in its assertion that the Secretary failed to present any hearing testimony or evidence in support of the proposed civil penalty assessment of $8,000, and the Secretary's brief does not address the civil penalty proposal or any of the criteria upon which the Secretary made the determination that $8,000, is an appropriate penalty assessment for the discrimination violation in question. The only information submitted by the Secretary is found in Exhibit "A" of the amended complaint. That information includes the mine and company coal production tonnage for 1990 (203,536 and 856,573), the number of assessed violations for the 24-month period prior to the violation in question (26), the number of inspection days during this period (20), the number of violations per inspection day (1.3), and the number of previously assessed section 105(c) violations (None), and some meaningless and unexplained "points" pursuant to 30 C.F.R. 100.3(b) and (c). Although MSHA special investigator Brock testified in this case, his testimony was mostly limited to an explanation of his backpay computations, and he offered no testimony or evidence concerning any of the civil penalty criteria.

The respondent's suggestion that no civil penalty should be assessed because of Mr. Nantz's contributory negligence for failing to avail himself of the dust protection offers made by the respondent, and failing to taken precautions to avoid the dust, is rejected. I have previously rejected the respondent's attempts to shift the burden of correcting or mitigating the hazardous conditions which prompted the work refusal in this case to Mr. Nantz, and it seems well settled that a mine operator's negligence may not be imputed to the miner, and that the Mine Act is a strict liability statute.

Evaluation of the relevant criteria pursuant to section 110(i) of the Act is necessary to determine an appropriate penalty assessment in this case. I conclude and find that the respondent is a small mine operator with no prior history of section 105(c) violations. I further conclude and find that pursuant to the Act, a mine operator such as the respondent has a high duty of care to correct or prevent conditions or practices hazardous to the health or safety of its miner workforce. In this case, the evidence establishes that Mr. Fisher was well aware of the missing dozer back window, and Mr. Nantz's complaints concerning the dust, yet he chose not to insure that the window was replaced promptly, or to remove the dozer from service. Instead, he gave Mr. Nantz the option of running the dozer with the missing window in the dust, or going home. Under the circumstances, I conclude and find that the violation resulted from a high degree of negligence on the part of foreman Fisher which is imputed to the respondent.

In Consolidation Coal Company, 8 FMSHRC 890, 895-899 (June 1986), the Commission took note of the concern expressed by Congress in eliminating respiratory dust illnesses and other mine occupation-related diseases. Although that case concerned the Secretary's underground respirable dust standards, I find the Commission's observation that prevention of occupational illnesses was among the fundamental purposes underlying the Mine Act to be equally applicable in this case. The fact that Mr. Nantz did not prevail in his pneumoconiosis workers' compensation claim is irrelevant to any gravity finding, and the actual existence of a hazard need not be proved by the miner to establish that he had a reasonable and good faith belief that a hazard existed at the time of the work refusal. On the facts of this case, I have accepted Mr. Nantz's credible and unrebutted testimony with respect to the hazardous and unabated dust conditions to which he was exposed to while operating the dozer with the missing window, and it seems clear to me that his employment termination was the direct result of these conditions. Under the circumstances, I conclude and find that the discrimination violation was serious. Further, given the fact that the respondent failed to reasonably respond to Mr. Nantz's dust complaints, the relatively extended period of time which passed with no corrective action by the respondent, and the fact that repairs were made after Mr. Nantz was forced to leave his job, I cannot conclude that respondent acted in good faith to correct the conditions, or that it rapidly addressed Mr. Nantz's complaints.

I find no credible evidentiary support for the Secretary's proposed civil penalty assessment of $8,000, particularly for a small mine operator with no prior history of discriminatory practices or violations, and the proposed penalty IS REJECTED. However, based on my consideration of the record before me, and my de novo consideration of the criteria found in section 110(i) of the Act, and in the absence of any showing by the respondent that any civil penalty assessment will adversely affect its ability to continue in business, I conclude and find that a penalty assessment of $1,000, is reasonable and appropriate in this case.

Relief and Remedies

The amount of compensation due Mr. Nantz is in dispute. The Secretary has filed a claim of backpay in the amount of $32,355.15, through August 12, 1992 (Exhibit C-1), and Inspector Brock testified with respect to the computations which are reflected in that document. The respondent disputes this amount of backpay and points out that it was computed upon Mr. Nantz's purported working an average of 58 1/2 hours per week, whereas its evidence reflects that Mr. Nantz worked an average of 39.6 hours per week and that there was a layoff to which Mr. Nantz would have been subject from August 14, 1991, until October 1, 1991 (Exhibit R-5, posthearing brief, pgs. 39-40).

I find Mr. Nantz's testimony concerning his normal work week and overtime to be somewhat confusing. He initially testified that he was paid $10.50 per hour straight time and $15.75 per hours overtime, and that he worked five and six days a week, ten hours a day. He confirmed that he worked 40 hours a week at the regular time hourly rate, and that any hours over 40 was overtime (Tr. 14-15). In subsequent responses to certain questions concerning what he may have told Inspector Brock, Mr. Nantz testified that he worked "five days a week, ten hours a day, and a lot on Saturdays, ...maybe eight and one-half hours", and one of the questions asked of him inferred that he may have worked a fifty-hour regular week, and overtime only on Saturdays (Tr. 63-65).

I take note of the fact that a copy of a workers' compensation application executed by Mr. Nantz on June 28, 1991, and submitted by the respondent, contains a statement that Mr. Nantz's wage while employed by the respondent was "$10.50 an hour for 58 hours a week (Item M of application). The respondent has submitted additional information, including copies of payroll and work attendance records in support of its rebuttal to the Secretary's backpay claims based on Inspector Brock's computations. Inspector Brock confirmed that Mr. Nantz's initial complaint stated that he worked 58 hours a week in 1991 (Tr. 172-173). Mr. Hamilton testified that 50 hours a week was a normal work week, and that anything over 40 hours is overtime (Tr. 195).

The respondent further asserts that Mr. Nantz failed to give Inspector Brock any verification of the wages he had earned since his termination or any information concerning his unemployment insurance benefits he had received during this period of time. The parties are in agreement that any reduction of back pay compensation due for unemployment payments is a matter of discretion with the presiding judge, Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). Mr. Nantz testified to a logging job and employment with Clover Fork Mining company after his termination, as well as his unemployment compensation (Tr. 27-30; 57-62). His deposition of June 15, 1982, also makes mention of work with L.C. logging (Tr. 18-19), and other losses he allegedly incurred (Tr. 60-63).

It is incumbent on the parties, not the judge, to evaluate this information and reduce it to specific time periods and dollar amounts, with credible evidentiary support, in support of their respective claims as to precisely what Mr. Nantz may be entitled to in terms of compensation. The parties were specifically advised in the course of the hearing that they were expected to support and "work out" among themselves the remedial compensation due Mr. Nantz in the event he prevailed in this matter (Tr. 166-167).

The record contains several exhibits concerning certain medical expenses incurred by Mr. Nantz pursuant to his employee insurance benefits provided by the respondent (Exhibits C-3 through C-15). During opening arguments, the Secretary's counsel asserted that

Joint Exhibit J-2, contains the stipulated benefit amounts that Mr. Nantz would otherwise be entitled to under the company provided medical insurance policy (Exhibit J-3; Tr. 3-4).

Citing the Commission's decisions in Metric Constructors, Inc., 4 FMSHRC 791 (April 1982 (Judge Lasher), aff'd by the Commission at 6 FMSHRC 226 (February 1984), aff'd, Brock v. Metric Constructors, Inc. 766 F.2d 469 (11th Cir. 1985), and relying on Mr. Nantz's testimony (Tr. 27), that he waited two or three weeks after his termination on April 16, 1991, waiting to see if the respondent would call him back to work, before attempting to find other work, the respondent argues that at least three weeks should be deducted from any back pay award to Mr. Nantz for his failure to immediately seek other employment.

The respondent asserts that since Mr. Nantz made no reasonable efforts to seek reemployment with the respondent, and that he "basically refused to consider any reemployment by the respondent unless he was paid his back pay", he should be denied any back pay in this case. The respondent's suggestion that it made an "offer" of reemployment to Mr. Nantz is unsupported, and I find no evidence that this was the case. The respondent's arguments are rejected.

ORDER

1. The respondent IS ORDERED to reinstate Mr. Nantz to his former position with full backpay and benefits, with interest, from April 16, 1991, to the date of his reinstatement, 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. Interest shall be computed in accordance with the Commission's decision in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (December 1983), and at the adjusted prime rate announced semi-annually by the Internal Revenue Service for the underpayment and overpayment to taxes.

2. The respondent IS ORDERED to compensate Mr. Nantz for all legitatimate medical expenses incurred by him since the date of his termination which would have been covered by any employee medical insurance carried by the respondent for his or his family member's benefit, reimbursement or coverage of which would have been afforded him had he not been terminated.

3. The respondent IS ORDERED to expunge from Mr. Nantz's personnel file and/or company records all references to the circumstances surrounding his employment termination of April 16, 1991.

4. The respondent IS ORDERED to pay a civil penalty assessment of $1,000, for the discriminatory violation which has been sustained.

Counsel for the parties ARE ORDERED to confer with each other during the next fifteen (15) days with respect to the aforesaid remedies due Mr. Nantz, and they are encouraged to reach a mutually agreeable resolution or settlement of these matters, and any stipulations or agreements in this regard shall be filed with me within the next thirty (30) days.

In the event counsel cannot agree, they are to notify me of this within the initial fifteen (15) day period. If there are any disagreements, counsel ARE FURTHER ORDERED to state their respective positions on those compensation issues where they cannot agree, with supporting arguments or specific references to the record in this case, and they shall submit their separate proposals, with supporting arguments and specific proposed dollar amounts for each category of relief (basic backpay, overtime, medical insurance claims, other claims), within thirty (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 remedial aspects of this case are resolved and 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. In addition, payment by the respondent of the civil penalty assessment made by me in this matter is held in abeyance pending a final dispositive order.

George A. Koutras
Administrative Law Judge

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