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SOL (MSHA) AND (UMWA) V. JIM WALTER RESOURCES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On Behalf of JAMES JOHNSON, Complainant	DISCRIMINATION PROCEEDING
	Docket No. SE 93-127-D
	Mine ID 01-01401
and	No. 7 Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	
v.	
JIM WALTER RESOURCES, INCORPORATED, Respondent	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Complainant;
David M. Smith, Esq., Mark Strength, Esq., and R. Stanley Morrow, Esq., Birmingham, Alabama, for the Respondent.

Before: Judge Fauver

The Secretary brought this case on behalf of James Johnson, alleging discrimination in violation of 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and Further Findings in the Discussion below:

FINDINGS OF FACT

1. Jim Walter Resources operates an underground coal mine, known as Mine No. 7, which produces coal for sale or use in or substantially affecting interstate commerce.

2. During the night shift of March 13, 1992, the No. 1 longwall crew was assigned to remove an unproductive shearer from the longwall face through a crosscut (Ex. G-4, "Crosscut A") and

down the No. 3 entry. James Johnson, Complainant, a member of the crew, had been employed by Jim Walter Resources for 11 years as a general inside laborer, roof bolt construction worker, a shearer operator, and a longwall helper (6 years on the longwall).

3. Johnson heard UMWA Safety Committeeman Tommy Boyd, who was also the stageloader operator on the section, tell Danny Watts, the longwall face foreman on the previous shift, and Alvin McMeans, the owl shift longwall face foreman, that there was a problem with the shearer removal because there was no approved plan to correct the roof conditions before traveling through Crosscut A. Johnson looked up and saw that roof conditions in and near Crosscut A area were bad so he stepped under the No. 1 shield. Johnson observed that some roof had fallen on the stageloader in the adjacent No. 4 entry, some roof bolts were out, there was a brow and a crack in the No. 3 entry, and there were no cribs or timbers in Crosscut A. Foreman Watts told Boyd that if he had a problem, he needed to call Larry Vines, the longwall manager. Boyd replied that if he had to call someone, it would be MSHA.

4. Johnson had previously participated in the removal of the entire longwall unit, but never in the removal of a shearer by itself. Usually, when an entire longwall was removed, the longwall face advanced to "Crosscut B" in line with the track area (where the longwall equipment can be moved into the track area without a 90 degree turn). The longwall equipment was then removed in accordance with the MSHA-approved roof control plan, which required additional roof support in Crosscut B (timbers were usually set out to the track, cribs set in the No. 3 entry on both sides of the crosscut, timbers set in Crosscut B, additional roof bolts installed in Crosscut B, and the entire face meshed all the way to the tailgate). As the longwall advanced to Crosscut B, cribs were usually installed in Crosscut A to support the roof.

5. On the previous day, March 12, Johnson had observed two cribs supporting the roof in Crosscut A. However, on March 13, the cribs had been removed to enable removal of the shearer, and no additional roof support had been installed in Crosscut A. On March 12, Johnson had traveled up the No. 4 entry because the No. 3 entry was dangered off. On March 13, the No. 4 entry was dangered off.

6. Johnson knew that MSHA considered Crosscut A to be gob because the face had advanced outby the inby pillar. Consistent with this, he had seen roof falls in such crosscuts after they reached the gob stage. He also knew that MSHA had "written up" management personnel for traveling through a crosscut, like Crosscut A, after the longwall face had advanced outby the crosscut, because MSHA considered it to be gob exposing them to the hazards of a roof that might fall at any time. Johnson

routinely installed roof supports according to the roof-control plan, but he was not a roof-control expert and did not know how to make Crosscut A "safe" without a plan prepared by a roof expert. He considered the area to be gob and dangerous, and believed that MSHA should be called to review a plan to make the crosscut safe.

7. After Safety Committeeman Boyd raised the issue of a lack of a supplemental roof-control plan, Foreman Watts called Vines who then called Paul Phillips, a general mine foreman responsible for the entire operation of the mine on the owl shift. Meanwhile, the longwall crew was moved from Crosscut A to No. 4 entry to shovel on the belt line. Miners did not remain in Crosscut A to remove the shearer.

8. Phillips called Foreman McMeans, Johnson's immediate supervisor, who said that the crew questioned the safety of traveling through Crosscut A to remove the shearer. Phillips told McMeans to take each crew member aside and tell him to make the area safe, and if he refused, get input on what he thought should be done to make it safe. If crew members withdrew under their contract safety rights,(Footnote 1) McMeans was to contact Phillips and he would enter the mine.

9. McMeans isolated the miners and questioned them individually. McMeans called Johnson to Crosscut B and asked him what he thought was wrong with Crosscut A. Johnson told McMeans that Crosscut A was in the gob, the cribs had been taken down and

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1 The labor agreement provides in part (Ex. R.-1, Sec. i):

(1) If the employee reasonably believes a condition is abnormally or immediately dangerous, he shall notify his supervisor of the specific condition, and if management agrees that the condition is dangerous, immediate correction or prevention of exposure to the condition shall occur, using all necessary employees, including the involved employee.

(2) If management disagrees that the condition is dangerous, the employee shall have the right to be relieved from the assignment in dispute, and management shall assign and the employee shall accept other available work. A member of the health and safety committee shall review the disputed condition with management, and if they agree that the condition is not dangerous, the employee shall immediately return.

(3) If the health and safety committee member and management disagree that the condition is dangerous, and the dispute involves an issue of federal or state mine safety laws or mandatory health or safety regulations, the appropriate federal or state inspection agency shall settle the dispute the basis of the findings of the inspector.

roof bolts were missing, and he knew that MSHA had cited people for traveling through such crosscuts because they were in the gob. (Johnson knew from Carroll Johnson, Chairman of the Safety Committee, that Sanders had been written up). Johnson knew that MSHA considered Crosscut A to be gob. He had seen such crosscuts dangered off in the past and had seen the roof cave in in such crosscuts after they became gob. McMeans told Johnson, "If I asked you to work in the area, what would you say?" Johnson replied, "I would be afraid to work in that area." Tr. 67. Johnson said that he would have to withdraw under his individual safety rights. McMeans did not give Johnson a direct order to work in Crosscut A.

10. McMeans isolated the other members of the longwall crew and questioned them individually about the safety of Crosscut A and asked each miner what he would say if McMeans asked him to work in the area. Safety Committeeman Tommy Boyd told the foreman that MSHA would have to approve Crosscut A before he would work in it. Other miners told McMeans that Crosscut A was in the gob, two men had been written up by MSHA for traveling through this type crosscut (referring to a May 20, 1991, citation(Footnote 2)), there was no roof support of any kind in Crosscut A, cribs were needed, and roof bolts were out. One crew member said that he would make Crosscut A safe and then go to work. Another said that he would have to withdraw under his individual safety rights. Another said that Crosscut A would have to be approved by MSHA before he would work in it.

11. Phillips entered the mine, looked at Crosscut A, and then talked to McMeans. Phillips saw the roof-fall on the stageloader, the crack in the roof, and the brow in the No. 3 entry. He observed there were no cribs to support Crosscut A. Phillips believed additional roof support was needed in Crosscut A. He discussed with McMeans what could be done to improve the roof support, e.g., building cribs, setting timbers, and hanging curtains.

12. Then Phillips met with Safety Committeeman Boyd in No. 3 entry at Crosscut B. Phillips said, "Let's go up there and look at the area that y'all feel is unsafe." Tr. 148. Boyd said he would go up No. 4 entry, but not No. 3 entry. Phillips told him that they could not go up No. 4 entry because the head gate drive had been shoved against the rib, there were some roof bolts missing, and there was no travelway. Phillips said they would go up No. 3 entry but Boyd refused to go with him. Phillips told Boyd it was his job to go with him and look at the affected area. Boyd told Phillips that if the area could not be looked at from where they stood, it would not be looked at. At the end of that conversation, the crew members arrived and they had a brief

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2 The citation was issued because Larry Vines, the longwall manager, and Kevin Sanders, the deputy mine manager, traveled through a "Crosscut A" type crosscut.

discussion about Crosscut A regarding missing rib and roof bolts over the stageloader. Phillips told the crew that he wanted them to build cribs, set timbers, and hang a curtain from the inby pillar of Crosscut A and extend it over to Shield No. 1. Boyd said they did not have an MSHA-approved plan, supplemental to the roof control plan, to correct the area and one was needed. Phillips told Boyd that an MSHA-approved plan was not required to make an area safe. This became an impasse between Phillips and Boyd, who was serving as the miners' Safety Committeeman.

13. About 2:00 a.m., Phillips isolated the crew members and questioned them individually. Phillips told McMeans to bring the men in one at a time to No. 3 entry at Crosscut B.

14. When he reached Johnson, Phillips stated, "If I asked how to make that place safe, what are you going to do?" Tr. 92, see also Tr. 127, 131, and 173 ("I am telling you to go up there and make the area safe."). Johnson answered, "How do you make gob safe?" Tr. 92, 127. Phillips said "that's not what I asked you." Tr. 92 - 93, see also Tr. 127 Johnson said that he would have to withdraw under his individual safety rights. Phillips told Johnson to get on the bus. Johnson asked Phillips about other available work and Phillips said that he was going to give him other work. There were two or three other miners already on the bus, and they were all taken by another foreman to shovel a belt for the remainder of the shift.

15. Phillips isolated the other members of the longwall crew and told each of them to go to work and make Crosscut A "safe." One crew member asked if he went, whether there would be any repercussions and Phillips told him no. So he went to work. The others withdrew under their individual contract rights, and were sent to the bus to be taken to do other work.

16. Pursuant to the labor agreement, if a dangerous condition exists, Jim Walter Resources has the right to use available personnel to correct it. If a miner thinks there is a hazard that is abnormal, he is supposed to report the problem to management, and if Jim Walter Resources agrees that corrective safety work is needed, the miner may be assigned work to correct the hazard. When there is a dispute whether work is hazardous, the contract provides that the miner is to be given other available work. If the miners' Safety Committeeman disagrees with management's view that an area or work assignment is safe, the contract provides that MSHA is to be called in and the parties will abide by the findings of the MSHA inspector. Phillips declined to call MSHA to resolve this safety dispute.

17. Phillips testified that he gave the miners direct orders to work in Crosscut A because he wanted to follow the labor agreement "to the tee." Tr. 202. Johnson testified that

he knew when Phillips was talking to him that Phillips wanted him to go to work in Crosscut A to "make it safe." Phillips had told McMeans to give such orders, but McMeans used hypothetical language. Phillips felt he had to make the point clear.

18. The following day, March 14, Johnson and several other crew members were charged with insubordinate conduct for refusing to make Crosscut A safe. Each was given a 5-day suspension with intention to discharge. Under the labor contract, the miners were entitled to a meeting with the mine manager. Following this meeting, the discipline was reduced to a 2-day suspension. Johnson objected to this penalty, and filed a discrimination complaint under 105(c) of the Mine Act.

19. The trial record of Jim Walter Resources, Inc. v. Secretary of Labor, 15 FMSHRC 432 (March 1993), was incorporated by reference at the hearing. The prior case involved a citation issued at 8:45 a.m., on March 13, 1992, arising from the same safety dispute involved in this case. When Phillips ordered the miners to work in Crosscut A without an MSHA-approved plan, the miners' representative contacted MSHA and requested an inspection of Crosscut A pursuant to 103(g) of the Mine Act. MSHA found a violation, and issued a citation stating that miners in the No. 1 longwall section were required to travel through the gob to remove a shearer, and citing a number of unsafe roof conditions in and near Crosscut A. The citation was contested and, after a hearing, the citation was affirmed (by this judge) with a finding that Crosscut A was hazardous and required further roof support to comply with 30 C.F.R. 75.202(a).

DISCUSSION, FURTHER
FINDINGS AND CONCLUSIONS

To establish a prima facie case of discrimination under 105(c) of the Act, a miner has the burden of proving that (1 he or she engaged in protected activity and (2) the adverse action complained of was motivated "in any part" by the protected activity. The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817 (1981).

A miner's refusal to work is protected under 105(c) if (1) it is based upon a reasonable, good faith belief that the work involves a hazard or a violation of the Act or a safety or health standard promulgated under the Act and (2) the miner gives reasonable notice to management. Secretary on behalf of Pratt v. Red River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (1983).

I find that Johnson believed in good faith that Crosscut A was in the gob and dangerous to work in because, among other things, (1) MSHA considered this type crosscut to be in the gob and dangerous and had cited personnel traveling through such crosscuts, (2) his UMWA Safety Committeeman believed the area was dangerous and required an approved supplemental roof-control plan to make the area safe, and (3) Johnson personally observed dangerous roof conditions in and near Crosscut A.

Johnson's concern for his safety was confirmed when the miners' representative called MSHA for an inspection under 103(g) of the Act. MSHA found that Crosscut A was part of th gob and cited a number of unsafe roof conditions. In this inspection, on March 13, 1992, before Johnson was disciplined, Federal Mine Inspector Bill Deason observed that the operator had dangered off approximately 75 feet of the travelway in the No. 4 entry because of bad roof (beginning at the forward crosscut), that roof had fallen near Crosscut A, that there was a roof crack across the entry and a brow, and that unsafe roof conditions in Crosscut A constituted a hazard to miners in violation of 30 C.F.R. 75.202. This regulation provides that "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

When Inspector Deason issued the citation on March 13, the company promptly submitted a supplement to its roof control plan, providing for additional roof and rib support in Crosscut A. Specifically, it proposed to support the area by installing additional timbers on five foot centers in the No. 3 entry to a point outby the brow, and to install additional cribbing on five foot centers from the ribline to the shields in the No. 3 entry (as shown in Ex. G-3). The plan was promptly approved by MSHA and the citation was terminated. The supplemental plan, although acknowledging that it was "submitted as a result of the conditions being experienced," was submitted under protest by the company, which stated in the plan: "No. 7 Mine does not agree with the necessity of the plan and is only doing so to abate the citation issued .... " Ex. G-3.

Advancement of the longwall put stress on the roof across Crosscut A as evidenced by the conditions observed by Inspector Deason. Additional roof support was needed to protect the miners who worked in or traveled through the crosscut. The roof support provided in the approved supplemental roof-control plan was greater and far more detailed and specific than the roof support earlier indicated by Foreman Phillips.

In the early 1980's, the local MSHA Subdistrict Manager (Mr. Weekly) adopted an enforcement policy to cite a violation if the forward longwall crosscut was used as a travelway without additional roof support or safeguards. Mr. Weekly's concern was that roof pressures created by advancing the longwall exerted

substantial pressures on the forward crosscut and that, as a regular occurrence, the roof in that crosscut would deteriorate and present a hazard of falling without warning. Jim Walter Resources, Inc., 15 FMSHRC at 433, 434.

The enforcement position taken by Mr. Weekly was not a formal MSHA policy, nor was it reduced to writing. Rather, it was a local MSHA office directive that was communicated to the inspectors in an informal manner. Mr. Kenneth Ely, a supervisor in MSHA's plan group, testified that the enforcement policy was routinely discussed with operators and members of the UMWA at local safety training meetings.

UMWA Safety Committeeman Boyd was aware of the local MSHA enforcement policy. During the owl shift on March 13, 1992, when management ordered the miners to remove the longwall shearer through Crosscut A, Boyd was concerned that management had not submitted a plan for MSHA to approve the installation of roof support structures prior to working in or traveling through the area. Boyd's request for a plan was reasonable in light of the local MSHA policy, the roof conditions in Crosscut A, and in light of the citation that MSHA had previously issued because management personnel traveled through this type crosscut.

Johnson's concern for his safety was also underscored by the nature of the work to be performed. The removal of a longwall shearer is a rare event at this mine. Johnson had never participated in the removal of a shearer by itself, nor had the foreman. Johnson did have experience in removing the entire longwall unit from the section, and in those instances management continued to mine the coal face until the longwall was in line with Crosscut B (Ex. G-4) which goes out to the track area. Management then removed the entire longwall unit through Crosscut B under the provisions of the MSHA-approved roof-control plan.

In such moves, management installed additional roof supports and safeguards, such as additional roof bolts or double-bolting in Crosscut B, set additional timbers throughout the crosscut entry leading to the track and set cribs on both sides of the crosscut. With these additional roof support structures in place, management then transported the entire longwall unit off the section and out to the track.

No such safeguards or additional measures were taken in preparing to remove the shearer through Crosscut A. Indeed, rather than install additional roof support in the crosscut, management removed the only two cribs in Crosscut A that had supported the roof in an area which MSHA later found needed additional support.

Crosscut B was the normal and desired route to remove the longwall or any large equipment. On March 13, management chose to remove the shearer through Crosscut A because the entry to Crosscut B was dangered off. Because of the difficulty of maneuvering large equipment through Crosscut A, management

removed the cribs from Crosscut A. When General Mine Foreman Phillips arrived he observed that rib bolts and roof bolts were missing in Crosscut A and that the roof had fallen from around the bolts, and there were no cribs supporting the roof. Phillips believed additional roof support was needed in Crosscut A. In contrast, the section foreman (McMeans) considered the area "was safe enough to work in" (Tr. 69, 70), despite the deteriorating roof, despite the fact that the two cribs had been taken down, and despite the fact that MSHA considered this to be a gob and had cited management personnel for traveling through such crosscuts.

Johnson knew that his Safety Committeeman objected to working in Crosscut A without an approved supplemental roof-control plan. He was also aware that the cribs had been taken down and that the roof was deteriorating. Also, on other occasions he had seen the entire roof fall in areas such as Crosscut A, and was aware that MSHA considered the area to be gob and had cited personnel for traveling through the crosscut.

When Foreman McMeans isolated Johnson and questioned why he considered Crosscut A unsafe, Johnson pointed out that the cribs had been taken down, roof bolts were missing, the area was "in the gob" and Kevin Sanders, the deputy mine manager, had been written up by MSHA for traveling through such a crosscut because it was in the gob. The foreman then asked, "If I asked you to work in the area, what would you say?" Johnson replied, "I would be afraid to work in that area" and "I guess I'd have to withdraw under my individual safety rights." Tr. 67, 91.

As instructed by Phillips, McMeans also isolated and questioned the other crew members individually. (1) Safety Committeeman Boyd considered the area "gob" and believed the area should be approved by MSHA before they worked in it. (2) Terry Acker understood the area to be "gob," knew that two men had been written up for going through this type crosscut, and wanted MSHA to make a determination as to what it would take to make the area safe. (3) Charlie Boyd told the foreman that people had been written up for walking through the crosscut. (4) Charlie Reed told the foreman that the area was "in the gob" and must first be approved by the "federal." (5) Matt Smith told him that pins (roof bolts) were out over the stageloader, the area needed some cribs and other steps to make the area safe.

When Phillips arrived, he also isolated the miners and questioned then individually. Johnson told him that the crosscut was in the gob and the roof conditions were abnormal (Tr. 106), he did not know what it would take to make the area safe (Tr. 122), and explained his position by stating "How do you make gob safe?" Tr. 92, 121, 127, 131. Phillips did not give Johnson specific orders as to how the roof should be supported. He simply said, "I am telling you to go and make the place safe." Tr. 173. Johnson exercised his withdrawal rights under the

contract, and was given other available work for the remainder of the shift. The next shift, Johnson was instructed to go to the office where he was informed he was being given a 5-day suspension with intention to discharge for insubordinate conduct. The discipline was later reduced to a 2-day suspension.

I find that management was given ample notice by the complaints of Safety Committeeman Boyd, Johnson, and other miners that they believed Crosscut A was in the gob, the roof was abnormal, the area was dangerous to work in, an MSHA-approved supplemental roof-control plan was needed before performing work there and MSHA had cited personnel for traveling through such crosscuts because they were in the gob. Johnson, on reasonable, good faith grounds, believed Crosscut A was unsafe to work in, and that an MSHA-approved plan was needed to "make it safe." He was not a roof-control expert, and did not know exactly how to make the area safe. He had reasonable grounds to rely upon the opinion of his Safety Committeeman in refusing to work there without an approved plan. In addition, he personally observed dangerous roof conditions in Crosscut A. He gave reasonable and sufficient notice of his safety concerns to management.

Johnson's work refusal was a protected activity under 105(c) of the Act. The operator's discipline o Johnson therefore violated his safety-complaint rights under 105(c) of the Act

I find that this violation involved serious and aggravated discrimination and interference with Johnson's rights under 105(c)

Respondent's adverse action against Complainant involved more than a 2-day suspension. It included a disciplinary notice of a 5-day suspension with an intention to discharge. Threats of loss of pay and discharge directed at a miner exercising a protected safety-complaint right constitute discrimination and unlawful interference under 105(c) of the Act. See, e.g., Denu v. Amax Coal Company, 11 FMSHRC 317, 322 (1989), (Judge Melick); Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (1982); and Secretary on behalf of Carson v. Jim Walter Resources, Inc., 15 FMSHRC 1993, 1996-1997 (1993) (Judge Maurer).

Respondent's method of isolating miners from their UMWA Safety Committeeman and interrogating them individually to explain why they believed Crosscut A was unsafe was an intimidating and harassing tactic, especially when coupled with an implied threat of loss of pay and even discharge. The collective bargaining agreement plainly provided that, "if the health and safety committee member and management disagree that the condition is dangerous, and the dispute involves an issue of federal or state mine safety laws or mandatory health or safety regulations, the appropriate federal or state inspection agency shall settle the dispute on the basis of the findings of the inspector." Ex. R-l, Sec. i(3). Respondent refused to address the safety concerns of the miners by complying with this contract provision, i.e., by calling in MSHA to inspect Crosscut A and to

resolve the question of whether an approved supplemental roof control plan was required to provide additional roof supports there to remove the shearer.

The Commission stated in Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (1982) that: "[C]oercive interrogation and harassment over the exercise of protected rights is prohibited by 105(c)(1) of the Mine Act." 105(c)(1) states that "no person shall discharge or in any manner discriminate against. . . or otherwise interfere with the exercise of the statutory right of any miner." (Emphasis added.)

In reaching this conclusion, the Commission was guided by the legislative history of the Mine Act which referred to "the more subtle forms of interference, such as promises of benefit or threats of reprisal." Moses, supra, at 1478, citing Legislative History at 624. The Commission observed that a "natural result" of such subtle forms of interference "may be to instill in the minds of employees fear of reprisal or discrimination." Moses, supra, 1478. In Phillips v. Interior Board of Mine Operators Appeals, 500 F.2d 772, 778 (D.C. Cir. 1974), the Court observed that "safety costs money" and "miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or top management."

In Denu v. Amax Coal Company, 11 FMSHRC 317, 322, (1989) (Judge Melick), a supervisor repeatedly asked a miner if he knew the consequences of his actions and told him that those consequences included discharge. Although the miner was told that he would receive no disciplinary action, the judge concluded that the questioning itself constituted unlawful interference:

> I find however that threats of disciplinary action and discharge directed to a miner exercising a protected right clearly constitute unlawful interference under 105(c)(1), whether or not those threats are later carried out. Such threats place the miner under a cloud of fear of losing his job. In addition, while under such threats, a miner would be even less likely to exercise his protected rights when future situations might clearly warrant such an exercise.

Taken as a whole, I find that Respondent's conduct in isolating Johnson from his Safety Committeeman and twice interrogating him (by his section foreman and then by the general mine foreman) with an implied threat of losing pay and even his job, and acting on such threat with a 5-day suspension with intention to discharge, later reduced to a 2-day suspension, constituted aggravated, unlawful discrimination and interference with Johnson's safety-complaint rights under 105(c) of the Act.

Respondent has a substantial history of violations of 105(c) of the Act. Also, in the 24-month period before th violation in this case, Respondent accumulated $5,286.00 in delinquent civil penalties for violations of federal safety standards. These penalties were not contested by Respondent, and became final orders of the Commission. Failure to comply with such orders is an adverse factor in Respondent's compliance history under the Act.

Considering all the circumstances of this case and the criteria in 110(i) of the Act, I find that a civil penalty of $5,000.00 is appropriate for the violation found above.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.

2. Respondent violated 105(c) of the Act by discriminating against James Johnson and interfering with his safety-complaint rights under the Act.

ORDER

WHEREFORE, IT IS ORDERED that, within 30 days of the date of this Decision, Respondent shall:

1. Compensate James Johnson for any loss of pay or other monetary benefits related to his work refusal on March 13, 1992, with retroactive interest computed in accordance with the Commission's decisions on interest.

2. Restore James Johnson to the same seniority, pay, status, benefits, and job conditions that would apply to his employment had he not been disciplined concerning the events of March 13, 1992.

3. Expunge from James Johnson's personnel record all references to its discipline or evaluation of him concerning the events of March 13, 1992; and Respondent shall not refer to such discipline or evaluation of him concerning any future employment inquiry or reference.

4. Pay to the Secretary of Labor a civil penalty of $5,000.00.

5. Post a copy of this Decision, unobstructed and protected from the weather, on a bulletin board at subject mine that is available to all employees; and it shall remain there for at least 60 consecutive days.

I retain jurisdiction of this case pending a final order on damages. If the parties are unable to stipulate damages and interest due under paragraph 1, the Secretary is directed to file a proposed Order on Damages not later than December 1, 1993. Respondent shall then have 10 days to respond and, if appropriate, a hearing will be held on damages.

William Fauver
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 150, 100 Centerview Drive, Chambers Building, Highpoint Office Center, Birmingham, Alabama 35203 (Certified Mail)

David M. Smith, Esq. and Mark Strength, Esq., Maynard, Cooper & Gale, 1901 Sixth Avenue, North, 2400 AmSouth, Harbert Plaza, Birmingham, Alabama 35203-2602 (Certified Mail)

/efw