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SOL (MSHA) V. TANGLEWOOD ENERGY, INC.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of PERRY PODDEY, Complainant, | : | DISCRIMINATION PROCEEDING |
| | : | Docket No. WEVA 93-339-D |
| v. | : | MORG CD 93-01 |
| | : | Coal Bank No. 12 |
| TANGLEWOOD ENERGY, INC., Respondent | : | |

DECISION

Appearances: Heather Bupp-Habuda, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia; for Complainant;
Paul O. Clay, Esq., Conrad & Clay, Fayetteville, West Virginia, for Respondent.

Before: Judge Amchan

FINDINGS OF FACT

Procedural History

On January 12, 1993, Perry Poddey, an underground coal miner, filed a complaint with the Mine Safety and Health Administration (MSHA) alleging that he had been discharged by Respondent on January 6, 1993, in violation of section 105(c) of the Federal Mine Safety and Health Act. Pursuant to an application filed on Mr. Poddey's behalf, I ordered that he be temporarily reinstated by Respondent, effective May 18, 1993. On May 28, 1993, the Secretary of Labor filed his complaint in this

matter, which was later amended to propose a civil penalty. This matter came to hearing in Elkins, West Virginia on September 1 and 2, 1993.(Footnote 1)

Factual Background

Perry Poddey began working for Respondent, Tanglewood Energy, at Coal Bank 12, an underground mine in Randolph County, West Virginia, in approximately December, 1990 (Tr. I: 130). His duties primarily involved the operation and servicing of a 480 S&S scoop, which is a vehicle used to clean coal off the floor of sections which have just been mined by a continuous mining machine (Tr. I: 79 - 83, 153 - 157, II: 83 - 84, Photographic Exhibits A - G). The scoop is operated lying down with the operator's head and knees raised so that the vehicle can maneuver in the 30 - 36 inch high coal seam of Coal Bank 12 (Tr. I: 26, 157, II: 84).

Mr. Poddey was also responsible for supplying the roof bolt operator with bolts, spreading rock dust, and moving the conveyor belts (Tr. I: 79 - 83, 153 - 157, II: 83 - 84). It is undisputed that Mr. Poddey performed his job well (Tr. I: 168, 235, 269, 288 - 290, 309, II: 15 - 16, 56, 115). On one occasion in 1991, he was almost fired due to a disagreement with his supervisors, but management concluded that discharge was not warranted (Tr. I: 145 - 147, 288 - 290, II: 147 - 157, 161 - 163).

There were no further difficulties between Mr. Poddey and Tanglewood management until the late summer of 1992 when Jeff Simmons became his section foreman (Tr. I: 122 - 123, II: 6 - 9).(Footnote 2) Mr. Simmons had been employed by Tanglewood at another mine since April 1991 (Tr. II: 6 - 7). After he was transferred to Coal Bank 12, the mine shut down for a couple of months. When production resumed, a number of the miners working for Mr. Simmons immediately took exception to the way he ran the section (Tr. I: 308, 311 - 313, II: 8, 88 - 91, 109 - 110). In October 1992, the continuous miner operator, "Butch" Davis, asked General Mine Foreman Randy Key, one of the two principals of Tanglewood Energy, to convene a meeting in order to discuss the miners' differences with Mr. Simmons (Tr. I: 103 - 104, 281 - 282, II: 86 - 90, 160).

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1"Tr. I" citations are to the transcript of September 1, 1993; "Tr. II" citations are to the transcript of September 2, 1993.

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2Through January, 1993, Coal Bank 12 was a one-section mine (Tr. I: 280, II: 83). When Mr. Simmons became section foreman he thus became responsible for all production operations at this mine.

This meeting lasted 3 hours and a number of employees voiced their displeasure with Mr. Simmons to Key (Tr. II: 86 - 90). Mr. Davis raised a specific work practice problem that Mr. Key changed (Tr. II: 87 - 88). Mr. Poddey and his friend, Lynn Moore, were particularly vocal regarding their unhappiness with Mr. Simmons. At the conclusion of the meeting, most of the issues were resolved and Mr. Key told the miners that they had to work for Mr. Simmons. He invited the men to inform him of any problems they had with Mr. Simmons in the future (Tr. II: 86 - 91).

According to Mr. Poddey, he and Mr. Simmons got along for about 2 months after the October meeting and then Mr. Simmons started to harass him in order to retaliate for his complaints to Mr. Key at the October meeting (Tr. II: 158 - 160). According to Mr. Simmons, Mr. Poddey and Mr. Moore continued to treat him "hatefully" after the October meeting (Tr. II: 8 - 9).

Perry Poddey's Protected Activity Regarding his Scoop's Parking Brake

On November 3, 1992, MSHA Inspector Kenneth Tenney conducted an inspection of Coal Bank 12, accompanied by Jeff Simmons as management's representative (Tr. I: 23 - 24). During this inspection, he encountered Mr. Poddey operating his 480 S&S scoop. He spoke to Mr. Poddey about the scoop and determined that it was not equipped with an automatic emergency-parking brake (Tr. I: 25, 98).(Footnote 3) Tenney issued a citation to Respondent alleging a violation of 30 C.F.R. 75.523(a) for the absence of the emergency brake (Secretary's Exh. 1).(Footnote 4)

Mr. Tenney believed that the absence of the brake constituted a hazard to miners working in the "low" coal seam. Employees had to regularly load supplies in the bucket of the scoop, which Mr. Tenney believed exposed them to injury if the scoop rolled accidently (Tr. I: 25 - 26). The company had to order the parts to install the parking brake and was completing installation of the brake when Tenney returned to the mine on November 19, 1992 (Tr. I: 29, 171 - 176).

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3The brake or braking system is referred to throughout the transcript as the C.L.A. brake. C.L.A. is apparently the manufacturer of the braking system; S&S is the manufacturer of the scoop.

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4The requirement for an automatic emergency parking brake became effective on May 23, 1991. The regulation was predicated on an MSHA study indicating that 126 out of 540 fatal haulage and machinery accidents between 1966 and 1977 may have been prevented by such a brake. 54 Fed. Reg. 12406, 12407 (March 24, 1989).

Between November 19, 1992 and January 4, 1993, the bolt, by which the emergency brake system was affixed to Mr. Poddey's scoop, worked itself loose on a number of occasions, rendering the emergency brake ineffective (Tr. I: 153). Mr. Poddey reported this problem to Doug McCoy, Respondent's principal mechanic on the day shift, who tightened the bolt with an Allen wrench on several occasions (Tr. I: 187). On January 4, 1993, the bolt was loose again and the C.L.A. brake did not work at all (Tr. I: 145). Mr. Poddey reported this to Jeff Simmons and to Mr. McCoy. Poddey told Simmons and McCoy that he thought that a second bolt needed to be installed in the brake assembly (Tr. I: 177 - 178, II: 12 - 13, 144 - 146). This was reported to the night shift, which did not fix the brake before the morning of January 5 (Tr. I: 189 - 190, II: 13, 144 - 146).(Footnote 5)

On the morning of January 5, 1993, MSHA's Kenneth Tenney conducted another inspection of Coal Bank 12 (Tr. I: 31).(Footnote 6) When Tenney encountered Mr. Poddey and his scoop, the inspector, in the presence of Mr. Simmons, asked Poddey to test the emergency brake (Tr. I: 32 - 33, 92 - 94, II: 13 - 14). When Poddey did so, the scoop drifted (Tr. I: 33). Poddey informed Tenney that the bolt holding the brake assembly was loose, that he'd reported it several days previously, and that it had not been fixed (Tr. I: 33, 92 - 97).(Footnote 7) Mr. Poddey showed the inspector where a second bolt was needed to maintain the brake's effectiveness (Tr. I: 97). Inspector Tenney then issued another citation to Respondent for the automatic emergency-parking brake on Mr. Poddey's scoop (Secretary's Exhibit 2).

After the conclusion of the day shift on January 5, Mr. Simmons installed the second bolt in the maintenance shop at the mine's surface (Tr. II: 14 - 15). In order to install the bolt, Mr. Simmons burned a hole in the metal of the brake assembly with a cutting torch. Mr. Simmons testified that this job took him 15 minutes to complete (Tr. II: 14 - 15). Mr. McCoy, however, believes this task would have taken

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5The night or "Hoot Owl" shift only consisted of maintenance personnel. Coal was mined only by the day shift.

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6This inspection apparently was not made pursuant to a miner's complaint and thus was not expected by either Mr. Poddey or Tanglewood management.

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7Mr. Poddey may have discussed the need for a second bolt with Mr. McCoy a day or two prior to January 4 (Tr. I: 189, II: 144 - 146). I find it necessary only to find that he mentioned it both to Mr. McCoy and to Mr. Simmons before he left work on January 4.

45 minutes to an hour to accomplish (Tr. II: 140 - 141).(Footnote 8)

On the evening of January 5, 1993, Mr. Simmons called Randy Key, his immediate supervisor (Tr. II: 16 - 17). They discussed the MSHA inspection, as well as other matters. When informed of the citation issued for the emergency brake, Mr. Key was upset and wanted to know why it hadn't been fixed (Tr. II: (17 - 18, 29 - 33).

Mr. Simmons said that Mr. Poddey told him about the brake problem the day before the citation for the first time, although he had apparently reported it to others. Simmons explained to Key that he had left written instructions for the night ("hoot owl") shift to install the bolt. He then told Mr. Key that the bolt had not been installed and that Poddey had not told Simmons on the morning of January 5, that the emergency brake had not been repaired (Tr. II: 17 - 18, 96).

Simmons also told Key that Mr. Poddey had a month in which he had the opportunity to fix the problem himself and had not (Tr. II: 30 - 32). Mr. Key asked Mr. Simmons to have Mr. Poddey call him at the beginning of the next workday.

The Telephone Calls and Confrontation of January 6

Almost immediately upon arriving at work on January 6, 1993, Perry Poddey talked to Mine Superintendent Randy Key on the telephone. According to Key, he told Poddey that he was upset about getting a citation for the emergency brake and asked him why he didn't install the second bolt himself (Tr. II: 97 - 99, 102). Key then told Poddey that it was his responsibility to install the bolt (Tr. II: 97 - 99, 102). According to Poddey, Mr. Key also told him he was tired of receiving MSHA fines and that if Poddey didn't stop complaining to MSHA, Key would find himself another scoop operator (Tr. I: 113 - 115).

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8I decline to make any specific finding as to how long it took to perform this work other than it took between 15 minutes to an hour. Obviously Mr. McCoy could not have known how long the repair actually took since he was not present when Mr. Simmons did the work, although he assessed the time it would take him to do the work when Mr. Poddey raised the need for the additional bolt.

It is important to note that Mr. McCoy did not take issue with Mr. Simmons, as he was unaware of Mr. Simmons' testimony. However, I don't know how Mr. Simmons can be so sure that the repair took 15 minutes as opposed to 30 minutes or 45 minutes. There was no reason for him to keep track of the time that it took to install the second bolt. I regard this testimony to be in the nature of an educated guess.

Mr. Key denies threatening or criticizing Poddey for talking to the MSHA inspector (Tr. II: 99). For reasons explained below, I find that Key did chastise Mr. Poddey for complaining to MSHA. Although it is not certain what was said, it is likely that Mr. Key said something to indicate his displeasure about Mr. Poddey complaining to MSHA about something Key believed Poddey should have fixed himself.

After Mr. Poddey hung up the phone, he was visibly upset and started yelling at Mr. Simmons, who at times was 6 inches to 2 feet from him (Tr. I: 116 - 117, 263 - 264, Tr. II: 18 - 21).(Footnote 9) The testimony of Mr. Poddey, Mr. Simmons, and other miners who witnessed this exchange are fairly consistent. Poddey said he told Simmons that he didn't appreciate him telling lies about him (Tr. I: 116 - 117). Simmons recalled Poddey accusing him of telling Key that Poddey had "deliberately" told MSHA about the emergency brake (Tr. II: 19); Simmons responded to Poddey by saying he had not done so (Tr. II: 19 - 20).(Footnote 10) "Butch" Davis recalled Poddey telling Simmons that he didn't appreciate him telling Key that he had talked to MSHA (Tr. I: 263 - 264).

Doug McCoy recalled Poddey blaming Simmons for accusing him of reporting the problems with the scoop emergency brake to an inspector (Tr. I: 184 - 185). Lynn Moore testified that Mr. Poddey denied volunteering information to MSHA, when talking to Randy Key and to Mr. Simmons (Tr. I: 202, 219). In light of these accounts of what clearly seems to have been a spontaneous and impulsive outburst, I think it very unlikely that Mr. Key did not take Mr. Poddey to task for bringing the automatic-emergency parking brake to MSHA's attention--although Key may have sincerely believed that there would have been no violation if Poddey had carried out his responsibilities.

Mr. Poddey stood very close to Mr. Simmons, yelling at him and apparently shook his finger close to Mr. Simmons' face (Tr. I: 273 - 274). Towards the end of the confrontation, Poddey told Simmons that if he (Simmons) had a problem with him (Poddey) they should settle it "outside the gate" (Tr. I: 116, Tr. II: 19). Simmons testified that he interpreted the last remark as an

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9The mine office in which this confrontation took place was rather small and filled with furniture and people. Thus, when Mr. Poddey began yelling at Mr. Simmons, he was, by necessity fairly close to him (Tr. I: 328 - 329, II: 35 - 37).

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10By "deliberately" telling MSHA about the brake, I assume that Poddey was accusing Simmons of telling Key that Poddey had, in bad faith, gone out of his way to point out an MSHA violation which was Poddey's fault.

invitation to fight and thought a fight might start right there in the office (Tr. II: 20 - 21).(Footnote 11)

Mr. Simmons immediately called Mr. Key and told Key that Mr. Poddey "wanted to take him to the gate", or that Poddey "wanted to whip him" (Tr. II: 21, 99 - 100).(Footnote 12) "Butch" Davis got on the phone and asked Mr. Key to come to the mine to resolve the dispute (Tr. I: 118). The incident, including the phone calls, lasted 10 to 15 minutes, after which the day shift crew went to work (Tr. I: 181 - 182, 202, 322 - 323, II: 21 - 23).

Shortly thereafter Mr. Key called his partner, Randy Burke, and the two decided to discharge Mr. Poddey for threatening Mr. Simmons (Tr. II: 101).(Footnote 13) Mr. Key drove to Coal Bank 12 and, at the conclusion of the day shift on January 6, called Poddey, Lynn Moore, and Jeff Simmons into the mine office and fired Poddey and Moore (Tr. II: 23, 103 - 104). After being discharged, Mr. Poddey expressed a desire to "whip" Simmons and even to kill him, which was heard by some of his co-workers, but not by Simmons (Tr. I: 274, 305).(Footnote 14)

By the time of the hearing in this matter, Mr. Poddey had been working for over 3 months for Respondent pursuant to my

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11Mr. Poddey denies that his statement conveyed an invitation to fight off the premises. Doug McCoy testified that the statement does not necessarily constitute such a challenge. Witness Doy Carpenter interpreted the remark as an invitation to fight. I find that the remark was an invitation to fight at an unspecified time--unless Mr. Simmons stopped trying to get him in trouble. As Mr. Key observed, if all Mr. Poddey wanted was a discussion or argument, he and Mr. Simmons were having one in the mine office (Tr. II: 100 - 101)

Both Mr. Poddey and Mr. Simmons appeared to be in their early thirties. Mr. Simmons is 5'6" tall and weighs 175 lbs. Mr. Poddey is 6' tall and weighs 175 lbs.

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12Mr. Key may have regarded "taking him to the gate" as essentially the same thing as a threat to beat up Mr. Simmons off the company premises.

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13They also decided to fire Mr. Poddey's friend and co-worker, Lynn Moore, for threatening to strike. On the morning of January 6, at the conclusion of the confrontation between Poddey and Simmons, the latter told the day shift to go to work. Moore said something like, "maybe there isn't going to be any work today."

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14Simmons made no mention of such threats in his testimony at hearing and I, therefore, conclude that they were not made in his presence (Tr. II: 23).

May 25, 1993 Order of Temporary Reinstatement. During this period, he has been working for foreman Roger Sharp without incident (Tr. I: 113, 123).

## ISSUES OF LAW

### Did Respondent Violate Section 105(c) of the Act?

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any . . . miner because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. 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 Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing 1) that he engaged in protected activity and 2) that an adverse action was motivated in 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 the protected activity. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

In the instant case, there is no controversy regarding the fact that Perry Poddey engaged in protected activity. He engaged in such activity when he reported the malfunction of the automatic emergency-parking (C.L.A.) brake to Respondent's mechanic McCoy, when he reported it to Simmons prior to the

inspection, and when he discussed the problem with the brake and the need for a second bolt with MSHA inspector Tenney on January 5, 1993. Similarly, there is no question that the timing of Mr. Poddey's discharge, a day after his discussions with inspector Tenney, creates an inference that his discharge was motivated in part by his protected activity. Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984). Thus, Complainant has clearly made out a prima facie case that Respondent violated section 105(c) in discharging Mr. Poddey on January 6, 1993.

The first of the difficult issues in this case is whether Respondent has rebutted the prima facie case by showing that it was in no part motivated by Poddey's protected activity. I find that Respondent fired Perry Poddey for what it perceived to be a threat to Foreman Simmons, or at least insubordinate behavior towards Mr. Simmons. A simplistic resolution of this case would be to hold that Respondent has, therefore, rebutted the Secretary's prima facie case and, thus, did not violate section 105(c) in discharging Mr. Poddey.

However, I think this case is more complicated and that a fair resolution, and one that comports with the purposes of section 105(c), requires an inquiry as to whether Poddey's insubordination and protected activity are so intertwined that his discharge violates the Act. See Pogue v. U. S. Department of Labor, 940 F.2d 1287 (9th Cir. 1991). It also requires an inquiry as to whether Mr. Poddey's conduct during the January 6, 1993 confrontation with Simmons, and/or afterwards, was such that he forfeited whatever rights he had under the Act Precision Window Manufacturing Co. v. N.L.R.B., 963 F.2d 1105 (8th Cir. 1992).

In analyzing the instant case, I find most helpful the following discussion by Judge Levin Campbell of the United States Court of Appeals for the First Circuit of a case under the National Labor Relations Act:

> A case of this nature requires balancing the employer's right to run its office as it pleases against the employees' right to act in concert without fear of retaliation. . . On the one hand, section 7 rights are "not a sword with which one may threaten or curse supervisors". . . On the other hand, if an employee's conduct is not egregious there is "some leeway for impulsive behavior". . . And the leeway is greater when the employee's behavior takes place in response to the employer's wrongful provocation. . . Trustees of Boston University v. N.L.R.B., 548 F.2d 391, 393 (1st Cir. 1977).

Perry Poddey was clearly acting in good faith when he reported the condition of his brakes to Mr. McCoy and to Mr. Simmons. While one can understand why Mr. Simmons and Mr. Key were upset at getting a second MSHA citation on account of the C.L.A. brake on Mr. Poddey's scoop, I find that they were not justified in blaming him for not repairing the brake himself and that, in so doing, they did "wrongfully provoke" the outburst on January 6, 1993. While Mr. Poddey's behavior would certainly justify discharge in the absence of his protected activity, I find that it was not of such a nature that it forfeited his rights under the Mine Act.

Possibly the most critical issue in this case is whether Mr. Poddey was at fault for not repairing the C.L.A. brake. If Respondent was correct that he was, Mr. Simmons and Mr. Key were perfectly justified in blaming him for the January 5, 1993 citation and Mr. Poddey was totally unjustified in exploding at Mr. Simmons on January 6. If, on the other hand, Mr. Poddey was not at fault for not repairing the brake, it is at least understandable why he turned on Mr. Simmons and greater leeway should be given to his impulsive behavior.

I find that, although Mr. Poddey may have been capable of installing a second bolt in the emergency brake assembly, it was not his responsibility to do so. Probably the most important evidence in this regard is the testimony of Mr. Simmons. When Mr. Poddey complained to him about the brake on January 4, 1993, Mr. Simmons did not tell Mr. Poddey to fix it himself, he reported it to the night shift (Tr. I: 189 - 190, II: 13, 96, Also see Tr. I: 111 - 112, 183). I regard this as establishing that Mr. Simmons did not consider installation of the bolt to be part of Mr. Poddey's responsibilities. It is also noteworthy that Mr. Simmons did not order Mr. Poddey to install the bolt after the MSHA citation was issued; he performed the installation himself (Tr. II: 14 - 15).

Mr. Poddey's contention that repairing the scoop was not his responsibility is also borne out by other witnesses.(Footnote 15) Terry Bennett, who replaced him as scoop operator, testified that he did no repairs on the vehicle; instead he filled out a report for the maintenance crew on the night shift (Tr. I: 161 - 162). Doug McCoy's testimony also supports Mr. Poddey's position that repairs, as opposed to maintenance and servicing (greasing and oiling the scoop), were performed either by Mr. McCoy or the

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15Mr. Poddey testified that he performed whatever repairs to his scoop that his foreman allowed him (or allowed him time) to do. He contends that after Mr. Simmons became his foreman, he was given additional duties, particularly with regard to belt moves, and was not allowed, or had insufficient time to do any repairs on his vehicle (Tr. I: 101 - 102, 108 - 109, 132 - 135).

night crew, not by the scoop operator (Tr. I: 176, 189 - 190). The testimony of Sam Knotts, still an employee of Respondent, also supports the conclusion that repairs such as installation of the second bolt would be made on the night shift, not by the production personnel on the day shift (Tr. I: 251, 256).

Respondent contends that Mr. Poddey was obligated to do a pre-shift examination and that he failed to do so--as evidenced by the fact that he did not tell Mr. Simmons, on January 5, that the night shift had not installed the second bolt. However, the record does not establish that Mr. Poddey failed to do a pre-shift examination because one cannot draw such a conclusion simply from the fact that he didn't bring the absence of a second bolt to Mr. Simmons' attention (Tr. I: 139, II: 26). It may be that he believed reporting the condition to his supervisor once was sufficient or that he would wait for a few days before raising the subject again.

Moreover, as mechanic Doug McCoy testified, it is not clear that a preshift examination, as performed at Coal Bank 12 in January, 1993, would have alerted Poddey to the fact that the second bolt had not been installed (Tr. I: 190). McCoy testified that he believes he tightened the single bolt on the brake assembly when Poddey complained to him on January 4 (Tr. I: 189). It is possible that the C.L.A. brake was operational at the start of the shift on January 5, and worked itself loose by 12:35 p.m., when inspector Tenney cited it (Tr. I: 190, Secretary's exhibit 3). It is also important to note that Mr. Poddey's preshift examination would normally be performed at the underground charging station with only the light from his cap lamp (Tr. I: 140 - 141, 149).

If Mr. Poddey was not to blame for failing to fix the brake and the January 5 citation, his anger at having the blame placed upon him by Mr. Simmons and Mr. Key is understandable. I draw no conclusions as to who was responsible or most responsible for the pre-existing animosity between Mr. Poddey and Mr. Simmons. I do not impute venality to Mr. Simmons in blaming Mr. Poddey for the citation. Given the friction between Simmons and Poddey, Simmons' understandable frustration at receiving a citation for a condition he could reasonably have thought was corrected, and having to respond to his supervisor's inquiries, I can feel some empathy for Mr. Simmons' placing responsibility for the citation on Mr. Poddey.

Nevertheless, I conclude that, since installation of the bolt was not Mr. Poddey's responsibility, it was a violation of section 105(c) for Mr. Key, after talking to Mr. Simmons, to reprimand Mr. Poddey for causing the citation on January 6. Having found that Mr. Key did to some extent castigate Mr. Poddey for his discussions with Inspector Tenney, I conclude that Respondent violated the Act in so doing. Unjustifiably placing

the blame for a citation on an employee, whose discussions with MSHA contribute to the issuance of the citation, constitutes interference with a miner's rights under the Mine Safety and Health Act.

Indeed, it would be completely contrary to the purposes of the Act to allow an employer to place the blame for a citation on the miner who brings it to MSHA's attention, and reprimand him for it--unless the employer is clearly correct.(Footnote 16) To hold otherwise, would greatly inhibit MSHA's ability to gather information from miners. No miner, even one acting in good faith, would bring health and safety conditions to MSHA's attention if they thought it likely that they would be deemed at fault and subjected to disciplinary action. When an employer lays responsibility for an unsafe condition on an employee who exercises statutory rights in bringing it to MSHA's attention, the employer should be absolved of a section 105(c) violation only if, from an objective standpoint, it is justified in doing so.(Footnote 17)

Did Mr. Poddey's Conduct Forfeit his Protection by the Act?

Having found that Mr. Poddey was justifiably angry at being accused of causing the January 5, 1993 citation and being too forthcoming with MSHA under the circumstances, did he forfeit his protection by yelling in Mr. Simmons' face and suggesting that they take their mutual dislike for each other "outside the gate?" If the answer to this question is negative, there is still an issue of whether Mr. Poddey forfeited his rights under the Act by telling other miners that he was going to "whip" Mr. Simmons or that he would kill or like to kill him.

There is considerable case law for the proposition that an employee whose instantaneous insubordination is provoked by his employer's retaliatory conduct does not automatically forfeit his rights to "whistleblower" protection. NLRB v. Mueller Brass Co.,

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16Senate Report 95-181 indicates that assuring miner involvement in reporting safety and health violations was one of the primary reasons for including section 105(c) in the 1977 Act. The Senate Committee stated that it, "intends [105(c)] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." Legislative History, p. 624.

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17If the violation was clearly the fault of the employee who brought it to MSHA's attention, there might be an issue of whether the employee's protected activity was pursued in good faith. In such a situation, although a reprimand might be a provocation, it would not be a "wrongful provocation" in Judge Campbell's parlance.

501 F.2d. 680 (5th Cir. 1974); NLRB v. M & B Headware, 349 F. 2d 170 (4th Cir. 1965); Crown Central Petroleum v. NLRB, 430 F.2d 724, 729-31 (5th Cir. 1970); Trustees of Boston University v. N. L. R. B., 548 F.2d 391 (1st Cir. 1977); NLRB v. Steinerfilm, Inc., 669 F.2d (1st Cir. 1982); Pogue v. Department of Labor, 940 F.2d 1287 (9th Cir. 1991); NLRB v. Florida Medical Center, 576 F.2d 666 (5th Cir. 1978)Lewis Grocer Co., v. Holloway, 874 F.2d 1008 (5th Cir. 1989); NLRB v. Vought Corp.- MLRS Systems Division, 788 F.2d 1378, 1384 (8th Cir. 1986).

On the other hand, there is case law supporting the proposition that, at some point, the employee's insubordinate reaction will cost him his statutory protection. Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986); Precision Window Manufacturing v. NLRB, 963 F.2d 1105 (8th Cir. 1992); General Teamsters Local No. 162 v. NLRB, 782 F.2d 839 (9th Cir. 1989); NLRB v. Soft Water Laundry, Inc., 346 F.2d 930 (5th Cir. 1965).

It is important, in this case, to look very carefully at what Mr. Poddey said and did. Mr. Poddey's behavior was spontaneous and impulsive and I conclude from the case law cited above that his conduct in angrily yelling at Mr. Simmons after talking to Mr. Key would not forfeit his rights under section 105(c) of the Act.(Footnote 18) The next issue is whether he forfeited these rights by telling Mr. Simmons that if he had a problem with him, they should take it outside the gate.

I find that this statement, in the context in which it occurred, did not forfeit Mr. Poddey's statutory rights to protection from retaliation under section 105(c). Mr. Poddey did not hit Mr. Simmons and did not even threaten to hit him. He did not threaten Simmons that he would beat him up later. I find that Mr. Poddey was clearly inviting Mr. Simmons to fight him off the premises at some unspecified time in the future, unless, as Poddey believed, Mr. Simmons stopped trying to get him in trouble with Mr. Key. What is critical is that Mr. Poddey never followed up on this invitation.(Footnote 19)

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18Mr. Key testified that Mr. Simmons did not place responsibility for the missing bolt on Poddey, he (Key) did so. However, Simmons' testimony, which I credit, is that he (Simmons) did, in talking to Key, blame Poddey for not repairing the brake (Tr. II, 30 - 33).

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19The fact that Mr. Poddey never acted upon his invitation to Simmons to settle their differences outside the gate distinguishes this case from the situation described in Precision Window Manufacturing v. NLRB, 963 F.2d 1105 (8th Cir. 1992). In that case, the discharged employee threatened to kill his supervisor and then returned to the plant. He left the employer's premises pursuant to police orders.

Similarly, I find that the remarks made by Mr. Poddey after he was fired, expressing a desire to kill Mr. Simmons, did not forfeit his rights under the Act. These were also made impulsively and not to Mr. Simmons. As with his invitation to take their problems outside the gate, Mr. Poddey never acted upon these statements and, indeed, there is no indication that he ever repeated them after the initial shock of his discharge.(Footnote 20)

The instant case bears a striking similarity to that described in NLRB v. Steinerfilm, Inc., 669 F.2d 845 (1st Cir. 1982). In that case, an employee named Gazaille, who had engaged in activity protected by the National Labor Relations Act, received a written reprimand, which the Board found unjustified and motivated by his protected activity. Gazaille responded to the reprimand by getting into a heated argument with his plant manager during which he used some offensive and abusive language. During this argument Gazaille offered to "settle things with [the plant manager] out in the cornfield."

Gazaille was fired for his conduct during this argument and his "threat" to the plant manager. The NLRB found that Gazaille's insubordination was an excusable reaction to the unjustified warning he had just received and that no physical threat was made. The Court of Appeals for the First Circuit, in enforcing the Board's order of reinstatement and back pay, found that the Board's conclusions were reasonable.

While fully understanding how Mr. Simmons and Mr. Key, without any venal motive, could react as they did to the January 5 citation, I conclude, as did the NLRB in Steinerfilm, that Mr. Poddey's reaction to the reprimands he received and to his discharge were excusable, and that, therefore, Respondent has failed to rebut the Secretary's prima facie case. Similarly, given the inextricable relationship between the events leading to Mr. Poddey's discharge and his protected activity, I find that Respondent has failed to meet its burden of establishing that Mr. Poddey would have been fired even in the absence of his protected activity. Thus, I conclude that Respondent violated 105(c) of the Act in discharging Perry Poddey on January 6 1993.

## The Civil Penalty

The Secretary has proposed a Civil Penalty of between $2,500 to $3,000 for Respondent's violation of section 105(c). I assess a civil penalty of $100. Applying the criteria set forth in

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20The record indicates that Mr. Poddey was surprised when Mr. Key fired him and may have expected Key to fire Simmons (Tr. I: 187, 282, II: 23, 104 ).

section 110(i) of the Act, I note that Respondent is a small employer with a relatively large number of previous violations of the Act. However, I find that a $100 penalty is appropriate using the criteria of gravity and negligence (which I view as a determination of fault in the discrimination context). Although I find that Mr. Simmons and Mr. Key unjustifiably placed blame on Mr. Poddey for the January 6, 1993 citation and that they provoked the outburst that led to Mr. Poddey's discharge, I find no evidence that they did so with the intention of generally discouraging safety complaints or cooperation with MSHA.

There is no evidence in the record that Respondent had, on any previous occasions, retaliated against employees for exercising their rights under the Act, or tried to inhibit them from so doing. Moreover, there is no indication that Respondent would have so retaliated but for the unusual circumstances of this case. Mr. Simmons' conduct appears to be motivated by the natural desire to avoid being saddled with responsibility for the citation, which he thought was not his fault, and the long-standing animosity between himself and Mr. Poddey.

Mr. Key's conduct was also an understandable reaction to being cited for a condition he thought had been corrected, his understanding of the reason for the violation gained from Mr. Simmons, and his reaction to the behavior of Mr. Poddey towards Mr. Simmons. While I do not find sufficient evidence to conclude that either Mr. Simmons or Mr. Key sought to inhibit employees in exercising their rights under the Act, I believe Mr. Poddey's discharge does tend to do just that (See Tr. 39 - 40, 51 - 52). For that reason, I believe a $100 penalty is warranted.

## ORDER

1. My order of May 18, 1993, requiring Respondent to reinstate Perry Poddey to the position from which he was discharged on January 6, 1993, or to an equivalent position, at the same rate of pay, and with the same or equivalent duties, remains in effect.

I note that good faith compliance with this order may require some effort on the part of Respondent and its agents, as well as Mr. Poddey. Respondent and it agents must not try to subtly settle any scores with Mr. Poddey, or in any way discourage, inhibit or interfere with Mr. Poddey's right to raise good faith safety and health complaints with management, with MSHA, or with state or local safety and health officials. On the other hand, Mr. Poddey is reinstated with the admonition that he will be expected to conduct himself with due respect to Respondent's supervisory personnel, particularly Mr. Simmons. He must recognize that Respondent has a right to choose its supervisory personnel and that these supervisors have, with

narrow exceptions provided by law, wide latitude as to what they may demand of an employee.

2. Respondent IS ORDERED to pay Mr. Poddey full backpay and benefits with interest, less the payments he received in unemployment compensation. Clifford Meek v. Essroc Corporation, 15 FMSHRC 606 (April 1993). Interest should be computed in accordance with the short-term Federal rate applicable to the underpayment of taxes. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988).

3. Respondent IS ORDERED to expunge from Mr. Poddey's personnel file and/or company records all references to the circumstances surrounding his employment termination of January 6, 1993.

4. Respondent IS ORDERED to pay a civil penalty assessment of $100 for its violation of section 105(c) of the Act.

5. Respondent IS ORDERED to inform all its employees verbally and by posting a legible notice in a prominent place at all its properties that miners have a right under the Federal Mine Safety and Health Act to bring to the attention of management, the Mine Safety and Health Administration, and state and local safety officials, any concerns they have with regard to safety and health conditions in their employment. In so informing its employees, Respondent is also ORDERED to inform them that such activities are protected by section 105(c) of the Federal Mine Safety and Health Act.

6. Counsel are directed to confer and file a stipulation or agreement with me within 15 days regarding the amount due Mr. Poddey. In the event that counsel cannot agree on the specific dollar amounts due, they are to notify me within 15 days of this decision and shall submit their separate proposals, with supporting arguments, within 30 days of this decision. I retain jurisdiction in this matter until the remedial aspects of this case are resolved.

Arthur J. Amchan
Administrative Law Judge

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