FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 11, 2015

SCOTT D. MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

DECISION GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION AND DECISION ON LIABILITY

Before: Judge Feldman

This matter is before me based on a Complaint of Discrimination brought by Scott D. McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act").[1] Under 30 C.F.R Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without a loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3"). 30 C.F.R. §§ 90.1, 90.3; *Goff v. Youghiogheny & Ohio Coal Co.*, 8 FMSHRC 1860 (Dec. 1986). The issue in this proceeding is whether Dominion violated section 105(c)(1) by preempting McGlothlin's statutory right to Part 90 protection.

[1] McGlothlin's complaint, which serves as the jurisdictional basis for this matter, was filed with the Secretary of Labor (the "Secretary") on August 5, 2013, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). McGlothlin's complaint was investigated by the Mine Safety and Health Administration ("MSHA"). On November 14, 2013, MSHA advised McGlothlin that it did not believe that there was sufficient evidence to establish, by a preponderance of the evidence, that a violation of section 105(c) had occurred. On April 2, 2014, McGlothlin filed his discrimination complaint with this Commission, which is the subject of this proceeding.

Section 105(c)(1) provides, in relevant part:

> No person shall . . . in any manner discriminate . . . or cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101* . . . .

30 U.S.C. § 815(c)(1) (emphasis added).

McGlothlin, who remains employed at Dominion's No. 7 mine, was permanently reassigned on June 3, 2013, from his position as a continuous miner operator at a rate of pay of $35.00 per hour to a position as a scoop operator in less-dusty outby areas of the mine at a pay rate of $25.67 per hour. McGlothlin's complaint alleges that Dominion violated section 105(c)(1) of the Act by interfering with the safe pay protection afforded to him under 30 C.F.R. Part 90 of the Secretary's regulations as a miner afflicted with pneumoconiosis pursuing Part 90 protection. Dominion denied McGlothlin the opportunity to work in a less-dusty area of the mine without suffering a loss in pay. Dominion, in effect, asserts that it unwittingly, but permissibly, circumvented McGlothlin's Part 90 safe pay protection rights when it transferred him to work as a scoop operator at a lower rate of pay before McGlothlin could exercise his Part 90 option because a determination of his eligibility under Part 90 was still pending.

The parties have filed cross-motions for summary decision. For the reasons that follow, construing the facts in a light most favorable to Dominion, McGlothlin's motion for summary decision and discrimination complaint shall be granted.

I. Background

a. *Statutory and Regulatory Framework*

Section 203(b)(1) of the Act provides:

> [A]ny miner who, in the judgment of the Secretary of Health and Human Services based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 2.0 milligrams of dust per cubic meter of air.

30 U.S.C. § 843(b)(1). Section 203(b)(3) provides that a miner transferred based upon his development of pneumoconiosis shall be paid his regular rate of pay immediately received by him prior to his transfer. 30 U.S.C. § 843(b)(1).

Section 101(a) of the Act, 30 U.S.C. § 811(a), delegates the Secretary with the authority to promulgate regulations implementing the protections afforded to miners afflicted with pneumoconiosis under section 203(b) of the Act. In this regard, section 101(a) provides, in pertinent part:

> The Secretary shall by rule in accordance with procedures set forth in [the Administrative Procedure Act] develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

30 U.S.C. § 811(a).

Consistent with this statutory authority, the Secretary promulgated Part 90 of his regulations to supersede section 203(b) of the Act to provide miners suffering with pneumoconiosis the opportunity to transfer to a less-dusty occupation without a loss in pay. 30 C.F.R. § 90.1. As such, the Secretary promulgated section 90.103(a), essentially repeating the statutory language in section 203(b)(3) of the Act. Section 90.103(a) states:

> The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner *immediately before* exercising [his rights under Part 90].

30 C.F.R. § 90.103(a) (emphasis added).

b. *Part 90 Application Procedure*

Eligibility for Part 90 pay protection rights requires the National Institute for Occupational Safety and Health ("NIOSH"), a component of the Department of Health and Human Services ("HHS"), to determine that an applicant miner has pneumoconiosis. According to HHS regulations, a qualifying diagnosis of pneumoconiosis must be made by at least two physicians certified by NIOSH based on objective clinical x-ray findings. 42 C.F.R. §§ 37.52, 37.53, 37.102. If the first two physicians disagree about the presence or classification of pneumoconiosis, NIOSH will obtain a third opinion. 42 C.F.R. § 37.53. If two of the three physicians agree on a pneumoconiosis diagnosis, their agreement constitutes a "final determination" for the purposes of Part 90 eligibility. *Id.*

After obtaining a "final determination," NIOSH will notify the applicant miner of his eligibility to exercise his Part 90 transfer and safe pay protection rights. A miner electing Part 90 protection exercises his option "by signing and dating the Exercise of Option Form and mailing the form to [MSHA]." 30 C.F.R. § 90.3(d). A miner does not have to immediately exercise his Part 90 option after being informed of his eligibility. *See Rochester & Pittsburgh Coal Co.*, 10 FMSHRC 1313 (Sept. 1988) (ALJ), (affirming a delay in a miner's exercise of his Part 90 rights that occurred March 1988, although the miner was initially notified of his Part 90 eligibility in August 1979), *aff'd* 12 FMSHRC 189 (Feb. 1990). Rather, a miner qualified for Part 90

eligibility retains the option to exercise his rights under Part 90 unless he waives his right to Part 90 protection.[2]

II. Findings of Fact

McGlothlin began working for Dominion on August 16, 2001, as a continuous miner operator in Dominion's No. 36 mine. *Complainant's Mot. for Summ. Dec.*, at 2 ("*Comp. Mot.*"). While employed at the No. 36 mine, on January 21, 2013, McGlothlin sought treatment from Dr. Christopher Morris for a persistent cough. *Id.*, Ex. A. On January 22, 2013, Dr. Perry D. Jerrigan interpreted a chest x-ray taken by Dr. Morris as consistent with pneumoconiosis. *Comp. Mot.* at 2.

On February 11, 2013, following the closure of the No. 36 mine, McGlothlin was transferred to Dominion's No. 7 mine in Buchanan County, Virginia, at which time McGlothlin continued to work as a continuous miner operator earning $35.00 per hour. *Id.*; *Dominion's Resp. and Cross-Mot. for Summ. Dec.*, at 3 ("*Dom. Resp.*"). On March 7, 2013, during his continued tenure as a continuous miner operator at the No. 7 mine, McGlothlin underwent a follow-up CT scan, which confirmed that McGlothlin had interstitial lung disease, as evidenced by progressive massive fibrosis, a serious form of pneumoconiosis. *Comp. Mot.* at 2, Ex. B.

Following his pneumoconiosis diagnosis, beginning on May 1, 2013, McGlothlin began pursuing his Part 90 eligibility by seeking a NIOSH determination of his respiratory condition based on an evaluation of his chest x-ray findings. *Id.* at 3-4, Exs. C, D, E. During the pendency of McGlothlin's NIOSH evaluation process, beginning June 3, 2013, McGlothlin was reassigned to an outby scoop operator position at a rate of pay of $25.67 per hour, a reduction from the $35.00 hourly pay rate he had been receiving as a continuous miner operator.[3] *Dom. Resp.* at 4.

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[2] A miner can waive his Part 90 protection: by filing a written waiver with MSHA; by accepting a position that exposes him to higher dust concentrations; or by rejecting an offer to transfer to work in a less dusty environment. 30 C.F.R. §90.104(a).

[3] Upon being transferred to the No. 7 mine, McGlothlin worked as a continuous miner from February 11 until March 31, 2013, when he was temporarily reassigned to outby duties in areas of the mine where there was less concentration of coal dust. *Dom. Resp.* at 3. Despite his reassignment, Dominion's employment records reflect that McGlothlin maintained the job title "miner operator" and continued to receive the continuous miner operator hourly pay of $35.00 per hour until June 1, 2013. *Id.* at 4. On June 7, 2013, McGlothlin's received his regular $35.00 hourly pay rate for the pay period from May 19 to June 1, 2013. *Comp. Mot.* at 4, Ex. F. However, Dominion did not inform McGlothlin that he was permanently reassigned as a scoop operator until a June 10, 2013, meeting between McGlothlin and Dominion management. *Id.* at 4-5; *Dom. Resp.* at 4-5. Dominion asserts that McGlothlin was advised that his rate of pay had been reduced from $35.00 to $25.67 per hour at the June 10, 2013, meeting. *Comp. Mot.* at 5. On June 20, 2013, McGlothlin again met with Dominion management to discuss his reduction in pay. *Id.* at 6-7; *Dom. Resp.* at 5-6. As a concession for failing to inform McGlothlin of his

Dominion agrees that June 3, 2013, is the first date that Dominion's employment records reflect McGlothlin's reduction in pay. *Dominion's Reply*, at 6-7 ("*Dom. Reply*").

NIOSH's evaluation of McGlothlin culminated on June 6, 2013, three days after McGlothlin's formal pay reduction, when NIOSH made a "final determination" that McGlothlin's condition constituted category one pneumoconiosis. *Comp. Mot.* at 6, Ex. E. On June 12, 2013, NIOSH sent McGlothlin a blank Exercise of Option to Transfer Form ("Exercise Form") with instructions that McGlothlin was to "sign and date the enclosed form ... [and m]ail the signed form in the enclosed postage-paid envelope" to MSHA to exercise his Part 90 rights. *Comp. Mot.* at 5, Ex. H; *see* 30 C.F.R. § 90.3(d). McGlothlin received the Exercise Form in the mail on June 14, 2013. *Comp. Mot.* at 5. McGlothlin alleges that an executed Exercise Form was mailed to MSHA on the same day, on June 14, 2013.[4] *Id.*, Ex. I.

On June 19, 2013, McGlothlin's wife accessed McGlothlin's online pay stub for the pay period from June 2 to June 15, 2013. *Id.* at 5-6. This pay stub reflected an hourly rate of $25.67 for the entire pay period. *Id.*, Ex. J. Apparently concerned about the reduction in pay for work performed during the pay period ending June 15, 2013, upon learning of the reduction, Mrs. McGlothlin's emailed MSHA on June 19, 2013, to inquire about the Exercise Form that was allegedly mailed to MSHA on June 14, 2013. *Id.* at 6, Ex. K. The following day, on June 20, 2013, an MSHA representative, responding to Mrs. McGlothlin's email, informed her that the Exercise Form she allegedly mailed to MSHA on June 14, 2013, had not been received. *Id.* The MSHA representative suggested that McGlothlin could email MSHA a signed form to expedite the process of notifying Dominion of McGlothlin's exercise of his Part 90 rights. *Comp. Mot.* at 6, Ex. K. She did so and an Exercise Form executed by McGlothlin was, in effect, received by MSHA on June 21, 2013.[5] *Id.* at 7, Ex. K. Dominion asserts that June 21, 2013, is the earliest controlling date of record of McGlothlin's exercise of his Part 90 rights. *Dom. Resp.* at 10.

(fn. 3 cont'd) reassignment until June 10, 2013, Dominion management agreed to retroactively equitably adjust McGlothlin's pay to $35.00 per hour for the pay period from June 2 to June 15, 2013. *Dom. Resp.* at 5-6; *Comp. Mot.*, Ex. L. Thereafter, beginning on June 16, 2013, McGlothlin was regularly paid the lower scoop operator rate of $25.67 per hour. *See Comp. Mot.*, Ex. Q.

[4] The evidence of record does not support McGlothlin's assertion that an executed Exercise Form was mailed to MSHA on June 14, 2013. Rather, the evidence reflects that McGlothlin's executed Exercise Form was initially received by MSHA through regular mail on August 14, 2013. *Comp. Mot.* at 9, Ex. I. Regardless, as discussed *infra*, the operative date of McGlothlin's Part 90 exercise is June 21, 2013, the date McGlothlin's wife emailed an executed Exercise Form to MSHA. *Id.* at 7, Ex. K.

[5] The email containing McGlothlin's Exercise Form was not opened by MSHA until June 24, 2013. *Comp. Mot.* at 7, Ex. J. However, Dominion concedes that the Exercise Form was effectively received by MSHA on June 21, 2013. *Dom. Resp.* at 10.

Thereafter, on June 24, 2013, MSHA sent a letter to Dominion, informing it that McGlothlin had executed his Part 90 rights. *Comp. Mot.* at 8, Ex. N. The letter stated:

> Among other specified requirements, Part 90 requires that each Part 90 miner be compensated at not less than the regular rate of pay received by that miner immediately before exercising his or her option, or when transferred, at not less than the regular rate of pay before the transfer.

Id. On June 26, 2013, Dominion received MSHA's letter notifying it that McGlothlin had executed his Part 90 rights. *Id.* Dominion alleges it did not have knowledge of McGlothlin's medical status or Part 90 application prior to June 26, 2013. *Dom. Resp.* at 21. Therefore, Dominion relies on its assertion that it transferred and reduced McGlothlin's pay on June 3, 2013, before McGlothlin exercised his Part 90 option by email on June 21, 2013.

III. Operative Dates

As a preliminary matter, there are three dates that are dispositive of the outcome of this case: **(1)** The period during which McGlothlin was "the subject of medical evaluations [by NIOSH] and potential transfer under [Part 90]" (30 U.S.C. § 815(c)(1)); **(2)** the effective date that McGlothlin's pay was reduced from $35.00 to $25.67 per hour; and **(3)** the date McGlothlin exercised his Part 90 option.

1. *The period during which McGlothlin was the subject of medical evaluations by NIOSH and potential transfer under Part 90*

The undisputed documentary evidence demonstrates that McGlothlin's chest x-rays were undergoing NIOSH evaluation during the period April 30 to June 6, 2013. *See Comp. Mot.*, Exs. C, D, E.

2. *Operative pay reduction date*

McGlothlin asserts that his hourly rate of pay was reduced from $35.00 to $25.67 per hour effective June 16, 2013, after he received an equitable retroactive pay adjustment for the pay period June 2 to June 15, 2013. *Id.* at 15-18. Despite the retroactive equitable pay adjustment, Dominion asserts that the effective date that McGlothlin's hourly pay was reduced was June 3, 2013, when Dominion's payroll records reflect that McGlothlin was permanently reassigned to a scoop operator position. *Dom. Reply* at 6-7.

Here, the dispositive issue is the effective date of the reduction of McGlothlin's hourly rate of pay. Dominion contends that the equitable adjustment was not paid to McGlothlin for services rendered or as a "regular rate of pay," but rather as an equitable concession for its failure to timely notify McGlothlin of his reassignment and reduction in pay. *Dom. Resp.* at 15-16. "Regular rate of pay," as contemplated by Part 90, "is the dollar rate—the rate at which the miner was actually remunerated for the work he did—irrespective of his job classification."

Mullins v. Andrus, 664 F.2d 297, 299 (D.C. Cir. 1980). Thus, the term "regular rate of pay" in Part 90 contemplates payment for services rendered, not equitable compensation.

Dominion's payroll records reflect that he was formally assigned to a scoop operator position and would thereafter be paid at the scoop operator rate effective June 3, 2013. *Dom. Resp.* at 4, Ex. J. The equitable adjustment to McGlothlin's paycheck for the period June 2 to June 15, 2013, does not govern because it was neither a "regular" rate of pay, nor remuneration for work performed. In any event, whether the pay reduction was effective June 3, 2013, or June 15, 2013, is not material because in either case it was made during McGlothlin's Part 90 application process.[6]

3. *Operative Part 90 Exercise Date*

Although McGlothlin alleges that an Exercise Form was initially mailed to MSHA on June 14, 2013, the first documented evidence of McGlothlin's election having been received by MSHA is June 21, 2013, when McGlothlin emailed his Exercise Form to MSHA.[7] *Comp. Mot.* at 7, Ex. K. Consequently, the record supports June 21, 2013, as the effective date of McGlothlin's exercise of his Part 90 rights. In this regard, Dominion also asserts that the record reflects that June 21, 2013, is the date that McGlothlin exercised his Part 90 rights. *Dom. Resp.* at 10.

IV. Analysis

a. *Extension of Safe Pay Protection During Part 90 Application Process*

As a threshold matter, the parties' focus on section 90.103(a) is misplaced. As previously noted, section 90.103(a) provides:

> The operator shall compensate each Part 90 miner at not less than the *regular rate of pay* received by that miner *immediately before* exercising [his rights under Part 90].

30 C.F.R. § 90.103(a) (emphasis added).

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[6] The Part 90 application process consists of the period during which McGlothlin was subject to medical evaluation by NIOSH and a reasonable period of time thereafter during which time McGlothlin can exercise his Part 90 option.

[7] The parties disagree over whether Part 90 rights vest when an eligible miner signs, dates, and mails his Exercise Form to MSHA, as McGlothlin argues, or whether Part 90 rights vest when MSHA receives the executed Exercise Form, as Dominion argues. For the purposes of this case, this distinction is irrelevant, for McGlothlin's pay protection rights vested on April 30, 2013, when McGlothlin submitted his x-ray findings for NIOSH evaluation, well before his exercise of his Part 90 option.

Thus, section 90.103(a) applies only to transfers and reductions in pay of miners who have *both* been qualified by NIOSH for Part 90 protection *and* who have exercised their Part 90 rights, neither of which applies in this case. The record reflects, as Dominion asserts, that McGlothlin's transfer to a scoop operator and resultant reduction in his hourly rate of pay from $35.00 to $25.67 was effective June 3, 2013. NIOSH determined that McGlothlin was eligible for Part 90 status on June 6, 2013, and McGlothlin received notice of his eligibility on June 14, 2013. The documented evidence also reflects, as Dominion asserts, that McGlothlin exercised his Part 90 option on June 21, 2013. Thus, this case concerns McGlothlin's transfer and reduction in pay *before* he was approved by NIOSH and, most importantly, *before* he exercised his Part 90 option.

It is section 105(c)(1) of the Act, the basis for this discrimination proceeding, that addresses the propriety of a transfer and reduction in pay made between the time a miner initiates the NIOSH approval process for his Part 90 eligibility and his timely exercise of his Part 90 option thereafter. The anti-interference provisions of section 105(c)(1) provide, in relevant part:

> No person shall . . . in any manner discriminate . . . or cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101* . . . .

30 U.S.C. § 815(c)(1) (emphasis added).[8]

The plain language of section 105(c)(1) protects the rights of prospective Part 90 miners whose x-ray findings are subject to medical evaluation by NIOSH during the period required to determine whether such miners are eligible for Part 90 status. To protect a miner's statutory right to the safe pay provisions of section 90.103, Part 90 miners must be protected from pay reductions during the application process provided in section 90.3 to avoid rendering Part 90 pay protection meaningless. When Congress drafted section 105(c)(1) to include protections for miners who are "the subject of medical evaluations and potential transfer," surely they intended to provide rights for miners—like McGlothlin—who were in the process of seeking Part 90 eligibility. Concluding otherwise would permit mine operators to evade their Part 90 obligations with impunity by circumventing Part 90 through transfers and pay reductions during a prospective Part 90 miner's application process, preempting a meaningful exercise of a miner's Part 90 option.

[8] Part 90 was promulgated pursuant to section 101 of the Act. 30 C.F.R. § 90.1.

Thus, in the present case, the operable time period during which time NIOSH was evaluating McGlothlin's x-rays is between April 30 and June 6, 2013. McGlothlin's Part 90 protection extends until June 21, 2013, when McGlothlin exercised his Part 90 option shortly after NIOSH notified him of his eligibility for Part 90 benefits on June 14, 2013.[9] During this period, Dominion was precluded by section 105(c)(1) from any preemptory transfer of McGlothlin that circumvented its obligation to provide McGlothlin with Part 90 protection. Having transferred McGlothlin with a reduction in his hourly rate of pay during this period, effective June 3, 2013, Dominion violated section 105(c)(1).

b. *Section 105(c)(1) Interference*

The evidence reflects that McGlothlin was an experienced continuous miner operator, having previously been employed as such beginning in August 2001 at Dominion's No. 36 mine. *Comp. Mot.* at 2. McGlothlin continued to work as a continuous miner operator when he was transferred to Dominion's No. 7 mine in February 2013, until March 31, 2013, when McGlothlin's continuous miner duties were assigned to Josh Robinette. *Id.*; *Dom. Resp.* at 3. At that time, McGlothlin was reassigned to outby duties in areas of the mine where there was less concentration of coal dust, although McGlothlin continued to retain the job title and pay rate of a continuous miner operator. *Dom. Resp.* at 3-4. Dominion contends that Robinette was a superior continuous miner operator in that he was capable of achieving greater coal production. *Dom. Reply* at 15-16.

Dominion seeks to escape liability by asserting that it had no knowledge that McGlothlin was undergoing NIOSH evaluation when it selected Robinette as its permanent continuous miner operator and ultimately reduced McGlothlin's pay, effective June 3, 2013. As noted, Dominion claims that the first time it received notice of McGlothlin's Part 90 application was June 26, 2013, when MSHA notified it of McGlothlin's Part 90 status. *Dom. Resp.* at 21.

The Commission has noted that direct evidence of a discriminatory motive is rare. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Consequently, Dominion's asserted lack of knowledge of McGlothlin's Part 90 application, particularly in view of the coincidence in time and preemptory nature of Dominion's reduction in McGlothlin's pay during the application process, is entitled to little weight. However, irrespective of Dominion's self-serving characterization of its lack of knowledge of McGlothlin's Part 90 application, a miner may demonstrate interference under section 105(c)(1) *without* the need to demonstrate proof of a discriminatory motive.

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[9] As Part 90 protects miners during the period of time they are subject to medical evaluation by NIOSH, the protection must be extended for a reasonable period of time to enable a miner to exercise his Part 90 option after NIOSH's notification of the miner's Part 90 eligibility. Here, McGlothlin exercised his Part 90 option on June 21, 2013, within reasonable period of time after he received notification of his Part 90 eligibility on June 14, 2013.

UMWA ex rel. Franks v. Emerald Coal Res. LP, 36 FMSHRC 2088, 2107, 2113 (Aug. 2014) (separate opinion) (citing *Sec'y of Labor ex rel. Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (2005)).[10] Therefore, whether Dominion had knowledge of McGlothlin's Part 90 application is immaterial.

In distinguishing the interference analysis from the routine discrimination analysis in *Pasula-Robinette* and its progeny, the Commission has adopted a two-prong test for section 105(c)(1) interference cases:

(1) Whether a mine operator's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and;

(2) Whether the person fails to justify the action with a legitimate and *substantial reason whose importance outweighs the harm* caused to the exercise of protected rights.

See Emerald Coal, 36 FMSHRC at 2108 (separate opinion) (emphasis added).

Obviously, with respect to the first criteria, McGlothlin is a member of the protected class of prospective Part 90 miners that section 105(c)(1) seeks to protect. To give effect to Dominion's pay reduction during the period when McGlothlin was undergoing medical evaluation to determine his eligibility for Part 90 would eviscerate, contrary to legislative intent, the protections afforded to miners with pneumoconiosis under Part 90.

With respect to the second criteria, absent a discriminatory motive, a mine operator is always free to exercise its business judgment with respect to the reassignment of miners to different occupations within any area of the mine. However, when the reassigned miner is entitled to Part 90 pay protection, a mine operator is absolutely liable to compensate that miner at no less than the regular rate of pay received by that miner immediately before his Part 90 pay protection rights vested. In this case, McGlothlin's Part 90 pay protection became effective as of April 30, 2013, when NIOSH began its x-ray evaluation to determine the extent of McGlothlin's respiratory condition.

Commission Rule 67(b) provides that a motion for summary decision shall be granted if there is no genuine issue as to any material fact, and the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b); *see also Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 8-9 (Jan. 2007) (citations omitted). Moreover, in determining if a motion

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[10] *Emerald Coal* involved discrimination complaints regarding miners' rights to confidentiality. Four Commissioners affirmed the complaints, two of which were expressed in a separate opinion. The separate opinion held that a miner may prevail in a complaint of unjustified interference with the exercise of a protected right, separate and apart from intentional discrimination claims adjudicated under the traditional *Pasula-Robinette* framework. *Emerald Coal*, 36 FMSRHC at 2105 (separate opinion).

for summary decision should be granted, the court must construe the undisputed material facts in a light most favorable to the opposing party. *Hanson*, 29 FMSRHC at 9.

Construing the evidence in a light most favorable to Dominion by adopting Dominion's assertion that June 3, 2013, is the date of McGlothlin's pay reduction, and that June 21, 2013, is the date of McGlothlin's exercise of his Part 90 rights, does not alter the inescapable conclusion that McGlothlin's pay was reduced during the period between NIOSH's evaluation of his respiratory condition and McGlothlin's exercise of Part 90 status shortly thereafter. Consequently, McGlothlin's motion for summary decision, seeking the grant of his 105(c) discrimination complaint based on Dominion's *interference* with the rights afforded to him under Part 90, shall be granted.

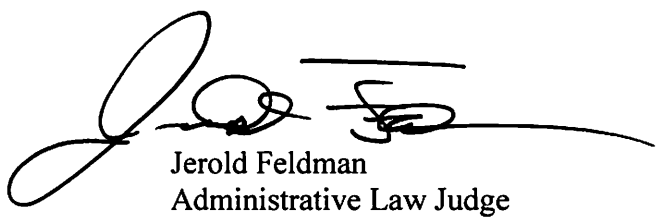
ORDER

In view of the above **IT IS ORDERED** that Scott D. McGlothlin's motion for summary decision and discrimination complaint **ARE GRANTED.**

This Decision on Liability is an interim decision. It does not become final until a Decision on Relief is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer in an attempt to reach an agreement on the specific relief to be awarded. Consideration should be given to the difference in the compensation paid to McGlothlin and the compensation that he is entitled to as a Part 90 miner, plus interest, reasonable attorney's fees, and reimbursement for any other relevant incidental expenditures. If the parties agree to stipulate to the appropriate relief to be awarded they shall file a Joint Stipulation on Relief **on or before July 29, 2015.** An agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on the relief to be awarded, the parties **ARE FURTHER ORDERED** to file, **on or before August 19, 2015**, Proposals for Relief specifying the appropriate relief to be awarded. If the parties cannot reach a joint stipulation, the parties should furnish documentation, such as payroll records, pay stubs or tax returns, to support their relief calculation. After Petitions for Relief are filed, I will confer with the parties to determine if there are disputed factual issues that require an evidentiary hearing.

Finally, Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act. Consequently, the Secretary shall be provided with a copy of this decision so that he may file a petition for assessment of civil penalty with this Commission.



Jerold Feldman
Administrative Law Judge

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