

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 Pennsylvania Avenue NW, Suite 520N  
Washington, D.C. 20004

February 23, 2015

SCOTT 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

**ORDER OF CONTINUANCE**  
**AND**  
**ORDER ESTABLISHING FILING SCHEDULE**

This discrimination proceeding was previously scheduled for hearing on February 24, 2015, in Pikeville, Kentucky. During telephone conferences with the parties conducted on February 10 and February 11, 2015, Scott McLothlin’s counsel represented that he intends to file a motion for summary decision. As discussed below, a preliminary review of the facts reflects that disposition through summary decision may be appropriate as it is not readily apparent that there are disputed issues of material fact. Accordingly, the previously-scheduled hearing shall be continued to permit consideration of McGlothlin’s motion for summary decision and any opposition filed by Dominion Coal Corporation (“Dominion”).

**I. Procedural Background**

Section 101 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 811 (2006) (“the Act”), authorizes the Secretary to promulgate, consistent with the provisions of section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, “mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.” Part 90 of the Secretary’s regulations was “promulgated pursuant to section 101 of the Act.” 30 C.F.R. § 90.1. Under 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 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<sup>3</sup>”). 30 C.F.R. §§ 90.1, 90.3; *see also Goff v. Youghiogeny & Ohio Coal Co.*, 8 FMSHRC 1860 (Dec. 1986).

The anti-discrimination provisions of section 105(c) of the Act provide, in relevant part, that “[n]o 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).

In February 2013, McGlothlin was an hourly employee at the Dominion No. 7 Mine who was assigned to operate a continuous miner at a rate of pay ranging from approximately \$33.00 to \$35.00 per hour. Based on representations made by the parties during the February 10 and February 11, 2015, telephone conferences, it appears that McGlothlin was granted Part 90 status in June 2013 based on his medical condition. The parties further represented that McGlothlin’s pay was reduced to approximately \$25.00 per hour, also in June 2013, after he was transferred to less dusty occupations, including scoop operator and other job duties performed in outby areas of the mine.

Section 90.103 requires a mine operator to “compensate each [P]art 90 miner at not less than the regular rate of pay received by that miner *immediately before* exercising the option under § 90.3 (Part 90 option; notice of eligibility; exercise of option).” 30 C.F.R. § 90.103 (emphasis added). A fair reading of sections 101 and 105(c)(1) of the Act, as well as 90.103 of the Secretary’s regulations, reflects that the issue in this proceeding is whether McGlothlin’s reduction in pay is a violation of section 105(c) of the Act because it interfered with transfer rights and pay protection accorded to McGlothlin under section 90.103—a regulation promulgated pursuant to section 101 of the Act.

## **II. Parameters for Summary Decision**

Commission Rule 67 provides that a motion for summary decision shall be granted if: “(1) There is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). The issue in this proceeding is whether McGlothlin’s reduction in pay violated section 90.103 of the Secretary’s regulations. **Given the “immediately before” provision in section 90.103, the material facts necessary for resolving this matter through summary decision are whether there was, in fact, a coincidence in time between McGlothlin’s exercise of Part 90 status and his reduction in pay, and, if so, whether this coincidence in time precluded Dominion from reducing McGlothlin’s hourly pay.** The material dates of McGlothlin’s exercise of Part 90 protection, and the effective date of the reduction in his hourly rate of pay, are readily ascertainable and should not be in dispute.

McGlothlin’s motion for summary decision should be limited to the merits of his discrimination complaint. McGlothlin will have the opportunity to submit a proposal for relief if Dominion is deemed to be liable. In support of his motion for summary decision McGlothlin should provide reports of relevant medical evaluations and diagnoses, as well as relevant reports of objective clinical findings based on, but not limited to, radiographic, MRI, or pulmonary function studies. McGlothlin should also provide evidence of the date of his exercise of Part 90

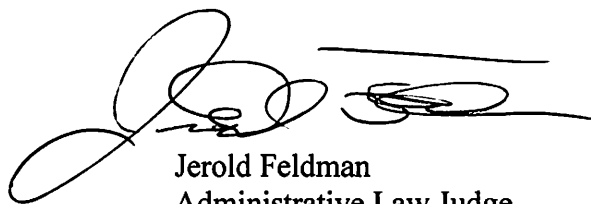
status through relevant copies of his “exercise of option form,” filed pursuant to section 90.3. 30 C.F.R. § 90.3. To support his alleged pay reduction, McGlothlin should provide relevant pay stubs reflecting the date and change of his hourly rate of pay.

Any dispute regarding the documentation provided in support of McGlothlin’s motion for summary decision may be addressed in Dominion’s opposition. In addition, Dominion may address whether the chronological evidence in this matter satisfies the “immediately before” provision in section 90.103. Finally, Dominion should address whether the “immediately before” provision imposes strict liability for any such reduction in pay, or whether McGlothlin must demonstrate that the reduction was motivated by, or made in contemplation of, his exercise of Part 90 status.

During the February 11, 2015, telephone conference, the following filing schedule was established: A motion for summary decision on behalf of McGlothlin must be filed on or before **March 18, 2015**; any opposition by Dominion must be filed on or before **April 17, 2015**; thereafter, the parties may simultaneously file reply briefs on **May 1, 2015**.

**ORDER**

In view of the above, as the parties have been previously informed, **IT IS ORDERED** that the February 24, 2015, hearing in this matter **IS CONTINUED** without date. **IT IS FURTHER ORDERED** that the parties shall abide by the above filing schedule for the motion for summary decision and the opposition, and replies, if any.



Handwritten signature of Jerold Feldman in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a smaller signature.

Jerold Feldman  
Administrative Law Judge

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