FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 13, 2010

CHARLES SCOTT HOWARD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2008-736-D
v.	:	BARB CD 2007-11
	:	
	:	
CUMBERLAND RIVER COAL COMPANY,	:	Mine ID 15-18705
Respondent	:	Band Mill No. 2 Mine

DECISION

Appearances: Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Complainant; Timothy M. Biddle, Esq., and Willa B. Perlmutter, Esq., Crowell & Moring LLP, Washington, D.C., for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Charles Scott Howard against Cumberland River Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). A trial was held in Whitesburg, Kentucky. For the reasons set forth below, I find that the Complainant was discriminated against because he engaged in activities protected by the Act.

Background

On April 20, 2007, Charles Scott Howard, an employee of Cumberland River Coal Company, took video footage of seals at Cumberland's Band Mill No. 2 Mine. A few months later, on July 12, the video was shown as part of Howard's testimony at a Mine Safety and Health Administration (MSHA) public hearing regarding an emergency temporary standard on mine seals. Almost immediately after the video was shown, MSHA inspectors visited the Band Mill No. 2 Mine. One day later, MSHA issued a citation to the company for an alleged failure to conduct a preshift examination of the seals prior to beginning work. On July 19, a second citation was issued for Cumberland's alleged failure to maintain the seals. On July 27, a written warning of disciplinary action was given to Howard for taking a non-permissible video camera underground.

Averring that the written warning was given to him for engaging in activity protected

under the Act, Howard filed a discrimination complaint with MSHA, under section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on August 3, 2007.[1] On February 12, 2008, MSHA informed him that, on the basis of a review of the information gathered during its investigation, "MSHA has determined that the facts disclosed during the investigation do not constitute a violation of Section [*sic*] 105(c)." On March 19, 2008, Howard then instituted this proceeding with the Commission, under section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

Cumberland maintains that the written warning of disciplinary action was not an adverse action and, even if it were, it was issued solely because Howard created an unsafe condition, in violation of company policy, and not because he engaged in protected activity. I find that the warning was issued as the result of Howard's protected activity, that the warning was an adverse action and that the company's claim that it was issued only because he violated company policy is a pretext.

Findings of Fact

Cumberland River Coal Company, a division of Arch Coal, operates the Band Mill No. 2 Mine in Letcher County, Kentucky. Howard was employed by Cumberland as a "beltman" at the mine. His job responsibilities included performing preshift examinations of the beltlines and seals for hazardous conditions. (Tr. 419.) During the performance of his duties in March and April 2007, Howard noted in the examination book that numerous seals at Band Mill were "leaking water." (Comp. Ex. 8.) Howard also expressed his concern over the conditions of the seals to many mine foremen including John Scarbro, Terry Mullins, Bob Kilbourne, Ronnie Adams, and James Turner. (Tr. 420.)

Besides Howard, at least one other preshift examiner had brought the leaking seals to the attention of management. (Tr. 118.) As the water that had built up behind the seals subsided, Cumberland began to repair them. (Tr. 120.) This included a method known as "block-bonding" (plastering) over the leaks. (Tr. 478.) The repair process lasted approximately two to three months. (Tr. 120.)

On April 20, 2007, Howard took video footage of a number of seals at the mine. (Tr. 423, 445, 470.) Management had not given him permission to take a camera underground.

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[1] Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

On May 22, 2007, MSHA published Sealing of Abandoned Areas, 72 Fed. Reg. 28798 (2007). A public hearing regarding this rule was held on July 12, 2007, in Lexington, Kentucky. Howard testified at the hearing and, as part of his testimony, showed the video with the audio off. (Tr. 41-43.) He did not tell the audience that the video was of the Band Mill mine. Up until this point, Howard had never shown the video to anyone other than his lawyer. (Tr. 467.)

Ronnie Biggerstaff, the Manager of Safety at Lone Mountain Processing, another facility owned by Arch Coal, attended the MSHA hearing. He observed Howard's testimony and witnessed the video of seals displaying water seepage. (Tr. 43.) Biggerstaff suspected that the video was of seals in a Cumberland River mine. (Tr. 44.)

After seeing the video, Biggerstaff called his manager at Lone Mountain, Thurman Holcomb. (Tr. 44.) Holcomb had formerly been the General Manger at Cumberland River. (Tr. 44.) Biggerstaff informed Holcomb of the video he witnessed at the public hearing and anticipated that it would probably be on the evening news. (Tr. 44-45, 47.) In response, Holcomb called the current General Manager of Cumberland River, Gaither Frazier. (Tr. 58.) Frazier left a management meeting to take Holcomb's phone call. (Tr. 58.) When he returned to the meeting, Frazier informed the other members of management that he had been advised that Howard had shown a video of leaking seals at the MSHA public hearing. (Tr. 59.) As a result, they realized that "MSHA and the state" would be coming to the property. (Tr. 59.)

Approximately thirty minutes after this phone call, MSHA inspectors arrived at the mine. (Tr. 61.) Scarbro, Superintendent at the Band Mill mine, went underground with the inspectors to check on the seals. (Tr. 61.) State and federal inspectors were frequently at the mine in the following weeks. Between July 12 and July 27 inspectors were on the property during 16 different shifts. (Tr. 66-67.) On July 13, an MSHA inspector issued Citation No. 6665554 for an alleged failure to perform preshift examinations of the seals in violation of section 75.360(b)(5), 30 C.F.R. § 75.360(b)(5). (Comp. Ex. 3.) Additionally, Citation No. 7502210 was issued by MSHA on July 19, for an alleged failure to maintain the seals for their intended purpose in violation of section 75.333(h), 30 C.F.R. § 75.333(h). (Comp. Ex. 4.)

The day after the public hearing, July 13, Frazier spoke with Scarbro, Valerie Lee, Human Resources Manager, and Leroy Mullins, Safety Manager, about disciplining Howard. (Tr. 72, 484.) Consequently, on July 27, Howard was issued a written warning of disciplinary action. The letter, which serves to put an employee on notice of the potential of further discipline, was placed in Howard's personnel file. (Tr. 485.) After one year, July 27, 2008, the letter was removed. (Tr. 232, 485.) The disciplinary letter stated:

> On April 20, 2007 you potentially created an unsafe work environment at the Band Mill # 2 mine by using a non permissible [*sic*] video camera underground. This action is not only an unsafe mining practice, but it is a violation of company policy to take photos or video tape at any active site on company property

> without the prior written approval from the General Manager.
>
> Based on your disregard for safety precautions in a potentially hazardous situation, and violation of company policy you are hereby given a written warning of disciplinary action.

(Comp. Ex. 7.)

Cumberland's policy on photography was initially established in an e-mail authored by Holcomb. The e-mail was sent to Cumberland management personnel on August 25, 2004.[3] Approximately one year later, a letter regarding the photography policy was distributed to Cumberland employees in their pay envelopes. It stated: "No one is allowed to take photos or shoot video on any of the active sites on company property without prior, written approval from the General Manager." (Comp. Ex. 6.)

Despite Cumberland's dissemination of its policy on photography, the totality of the testimony by both employees and managers was that the photography policy was not enforced during the period relevant to this proceeding.[4] Both employees and managers testified that photographs were taken on Cumberland property and that some were even publically posted or otherwise circulated. No employee or manager testified that he or she had received written permission from the General Manager, before taking a photograph. No employee or manager, other than Howard, was disciplined for violating this policy.

Photographs taken by managers

Numerous managers for Cumberland testified that they had taken photographs without the written consent of the General Manager. Scarbro took photographs underground, using a

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[3] The e-mail stated, in pertinent part:

> In response to a recent fatality in the area, we should establish a policy regarding video or photography on the property. Effective immediately, no one is allowed to take photos or shoot video on any of the active sites on company property without **written** approval from the General Manager. In eastern Kentucky recently an employee decided to video a pillar fall underground, and he was fatally injured when the roof collapsed.

(Comp. Ex. 5.)

[4] The relevant period for this proceeding begins at the creation of the photography policy (August 25, 2004) until the issuance of the disciplinary letter for a violation of the policy on July 27, 2007.

non-permissible camera, four or five times. (Tr. 76, 79.) Although he believed that he had permission to take photographs underground, it was not written permission. (Tr. 79, 90.) Several photos were taken beyond the last open cross cut. (Tr. 91-92, 96-97, Comp. Ex. 9.) Photography beyond the last open cross cut with a non-permissible camera is against MSHA regulations. (Tr. 93.)

Keith Pinson, Load Out Plant Manager at the Preparation Load Out Facility, took photographs on Cumberland property 40 to 50 times without written permission. (Tr. 308, 310.) Lee also took photographs on company property and three were published in the mine newsletter, *Miner News,* Vol. III, No. 1. (Comp. Ex. 15 at p. CRCC 0605, Tr. 190.) She did not have written permission to take the photos. (Tr. 191.)

Mullins took about 16 photographs at various times in various location at the mine. (Comp. Ex. 18, Tr. 292-296.) Mullins had verbal rather than written approval. (Tr. 269-272.) Danny Webb, Mine Manager at Blue Ridge Surface and Highwall Miners for Cumberland River, took about 12 photographs, during the relevant period, without written permission. (Tr. 302-306.)

Holcomb was the General Manager at Band Mill from August 2004 to August 2006. (Tr. 326.) During that time he asked managers to take photographs for business related purposes. (Tr. 334-35.) According to him, managers had implied permission to take photographs and cameras were provided by the company. (Tr. 346.) He also claimed to have issued and denied permission slips in response to employees' requests to take photographs, although the only one he could remember was for Mike Yates, the Belt Portal manager. (Tr. 336, 344-45.) It turned out, however, that the incidence with Yates occurred after Howard was disciplined and a year after Holcomb had moved on to Lone Mountain. (Tr. 501.)

Photographs taken by employees

Employees of Cumberland also testified that they had taken photographs on company property without the written consent of the General Manager. For example, at Lee's request, Catina Ridings, Payroll and Human Resources Clerk, took about 20 photographs with a company camera at an awards banquet held on Cumberland property. (Tr. 141, 156.) On another occasion Pinson asked Ridings to take pictures at a retirement celebration. (Tr. 142.) The photographs were taken in the parking lot, and later published in the company newsletter. (Tr. 142-43.) She did not have written permission from the General Manager, but instead had verbal permission from her immediate boss. (Tr. 154-55.)

Terry Price, Maintenance Planner, testified that he took photographs on company property from July 2005 to July 2007. (Tr. 364, 367.). Since a camera was issued to him and taking photographs was an important part of his job, he did not believe that the policy applied to him. (Tr. 374.)

Further Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). 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. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Protected Activity

Cumberland does not "dispute that [Howard] showing the video o[r] participating in the MSHA hearing was protected activity." (Tr. 26.) Instead, Cumberland maintains that the Mine Act does not protect Howard's act of videotaping underground without the General Manager's permission. (Resp. Br. at 15.) Cumberland alleges that "[t]here is a difference between communicating a complaint about an allegedly hazardous condition, which is a protected activity, and merely taking a picture of it, which is not." (Resp. Br. at 15.) Cumberland further asserts that Howard did not make the video to ensure that the leaks were fixed, because he did not show it to MSHA or the company until long after they had been repaired. (Resp. Br. at 16.)

As the courts have noted, the purpose of the Mine Act is "to protect the health and safety of miners." *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982). The anti-discrimination provision is to be interpreted expansively to effect this purpose. *See Brock on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469, 472 (11th Cir. 1985); *Sec'y of Labor on behalf of Keene v. Mullins*, 888 F.2d 1448, 1452 (D.C. Cir 1989). Accordingly, I find that Howard's videotaping of the condition of the seals was protected activity.

The video camera was the method Howard used to document his safety concerns. He then used the videotape to communicate those concerns to MSHA and the public at a hearing on that very topic. Cumberland's assertion that it is protected activity to observe an unsafe condition and tell someone about it, but not protected activity to take a picture of it and show it unless one has the written permission of the General Manager is disingenuous. While the failure to obtain written permission may have provided an independent basis for disciplining Howard, it does not remove his videotaping of leaking seals from being protected activity, anymore than his not wearing a hard hat while taking the video would make the videotaping unprotected. The company does not argue that videotaping can never be protected activity, only that it is not if done without written permission.

Nor is the operator's argument that Howard was not engaging in protected activity when he videotaped the leaking seals, because he did not show it to anyone, other than his attorney, until three months later, persuasive. He had already notified mine authorities of his concerns about the seals when he recorded his observations in the preshift book and spoken to his supervisors. It would make little sense for him to subsequently videotape the leaking seals if he did not still have those concerns and believe that they were not being addressed.

Consequently, I conclude that Howard engaged in protected activity when he made the videotape and when he showed the videotape at the MSHA hearing.

Adverse Action

The Commission has held that an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or to a detriment in his employment relationship. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). Cumberland maintains that Howard suffered no adverse action when he was given the written warning of disciplinary action and it was placed in his personnel file. I find that the written warning of disciplinary action was adverse.

Cumberland's position is based on the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). In that case, the court held that for an action to be adverse under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, the complainant "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[5] *Id.* at 68 (citations omitted).

[5] Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), states that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has

Based on this, the company maintains that Howard suffered no adverse consequence because the letter in his file did not deter him from making further discrimination claims.

Interestingly, the Complainant also cites the case in support of his claim. In describing actions that were *not* materially adverse, the court said that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* Howard argues that the letter was not such a petty slight or minor annoyance.

At the outset, it should be noted that it is not clear whether *Burlington Northern* even applies to section 105(c) cases. The Sixth Circuit Court of Appeals specifically declined to find that the case applied to the Mine Act, holding that such "[a] fundamental change in Mine Act jurisprudence . . . ought first to be considered by the Secretary and the Commission, neither of whom is an active litigant here." *Pendley v. FMSHRC*, 601 F.3d 417, 428-29 (6th Cir. 2010). The Secretary is not a litigant in this proceeding either.

However, it is not necessary to decide whether the *Burlington Northern* definition of adverse action applies to Mine Act cases. I find that the warning of disciplinary action was adverse both under existing law or under the Supreme Court's definition.

The disciplinary letter was a discrete act of discipline, issued for an alleged violation of Cumberland's policy on photography. The issuance of a letter, rather than a verbal warning, is a more severe form of discipline at Band Mill.[6] (Tr. 485.) It served to put Howard on notice that further action could be taken. (Tr. 485.) It wasn't until one year later that the letter was removed from his personnel file. Therefore, the letter had potential consequences that remained long after its issuance.

A reasonable miner, in a similar situation, might well be apprehensive about exercising protected rights under Section 105(c) for fear of future more severe disciplinary action. The letter could have had a potential chilling effect on further documentation of hazardous conditions by Howard or by other miners aware of the disciplinary action. Thus, the fact that Howard apparently was not deterred does not mean that the action was not adverse. Accordingly, I

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fn. 5 (continued)

> opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[6] The company has a three step disciplinary process–verbal warning, written warning or discharge. (Tr. 484.)

conclude that the issuance of the disciplinary letter was an adverse action.

Motivated by Protected Activity

The pertinent question in this case is whether the "adverse action" was motivated in any part by protected activity. The Commission has recognized that direct evidence of motivation is rarely encountered; more often, the only available evidence is indirect. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has identified several circumstantial indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and adverse action. *Id.*

Cumberland learned that Howard had shown a videotape of leaking seals in the Band Mill mine at a public hearing on seals held by MSHA on July 12. The next day, Scarbro, Frazier, Lee and Mullins began having discussions about disciplining him. (Tr. 72.) At that time, no one in management had seen the video or talked to Howard about it. (Tr. 74-75, 484.) Obviously, they were reacting to the fact that the mine's leaking seals were going to be in the news and that MSHA had already been to the mine to inspect the seals. They did not even know for sure that Howard was the one who had taken the videotape; all they knew was that he had shown it.

It is apparent that, almost immediately after gaining knowledge of the videotape showing, management decided to discipline Howard. The fact that they did not actually issue the letter until two weeks later because they were discussing the exact type of discipline and clearing the language in the letter with counsel does not diminish the close coincidence in time between the protected activity and the adverse action. Further, there can be little doubt that as a result of their displeasure with Howard's actions that subjected the mine to MSHA and public scrutiny, management decided to respond by disciplining him. Consequently, I have no trouble concluding that, at a minimum, the issuance of the written warning of discipline was motivated, in part, by Howard's protected activities.

The Operator's Affirmative Defense

Cumberland River has failed to show that no protected activity occurred or that the adverse action was in not motivated by the protected activity. It has attempted to show, however, that it also was motivated by the Howard's violation of the camera policy and would have taken the adverse action for that unprotected activity alone. I find that it has failed to establish that assertion.

In *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982), the Commission enunciated several indica of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules

or practices forbidding the conduct in question. *Id.* The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.,* 12 FMSHRC 1521, 1534 (Aug. 1990).

I find that enforcement of the video policy with Howard was a pretext for disciplining him for his protected activities. Although the camera policy stated that *no one* could take photos or shoot videos *without the prior, written approval of the General Manager*, it is well established that other employees of Cumberland routinely failed to abide by the photography policy.[7] Some of the violations of the policy were open and obvious. Scarbro even admitted to taking photographs, with a non-permissible camera, beyond the last open cross cut (in violation of MSHA regulations).[8] Additionally, other members of the managerial staff routinely failed to abide by the policy or instruct employees to abide by the policy. Indeed, prior to Howard, there is no evidence that anyone had ever complied with the policy, much less been disciplined for not following it.

The company argues that the managers who violated the policy had implied permission to take photographs. Yet the written policy contains no exceptions. If all of the managers and employees who testified about taking pictures had implied permission to take photographs then there really was no policy. It is obvious that the only reason the company decided to enforce the policy with Howard was to contrive a basis for disciplining him that ostensibly did not involve his protected activities.

Conclusion

Charles Scott Howard, while performing his job as a preshift examiner, made numerous entries in the preshift examination book about leaking seals in the Band Mill No. 2 Mine. When action had not been taken to his satisfaction to correct the situation, he made a videotape of the leaking seals. Three months later he showed the videotape at an MSHA public hearing on improving seals in mines. When the company learned of his protected activities, it decided to discipline him. As a result, a written warning of disciplinary action was placed in his file for

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[7] The same policy memo provided that cell phones could not be used on the job, but if they had to be used, employees had to "clear the call with his or her *immediate supervisor*." (Comp Ex. 6.) (emphasis added.) It is apparent that the company was aware of how to provide for exceptions in the photography policy if that was the intention.

[8] Howard's videotape was not made beyond the last open cross cut and, therefore, he was not in an area of the mine where permissible equipment was required. (Tr. 283-84.)

failing to get the written permission of the general manager before making the videotape and for using a non-permissible camera in the mine. As the photography policy had never been adhered to or enforced prior to its use with Howard, it clearly was used by the company to cover its disciplining of him for engaging in protected activity. Consequently, I conclude that Howard was discriminated against for engaging in protected activities in violation of section 105(c) of the Act.

Order

Having determined that Howard was discriminated against unlawfully, it follows that he is entitled to the relief sought in his complaint. Accordingly, it is **ORDERED** that the Respondent:

1. **Expunge** from Howard's personnel file all references to the unlawful issuance of the written warning of disciplinary action, and to expunge such references from any other records maintained by the company.[9]

2. **Reimburse** Howard for all reasonable and related economic losses or expenses incurred in the institution and litigation of this case, including reasonable attorney's fees.

3. **Post** this decision at all of its mining properties in Letcher County, Kentucky, in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days.

The parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that the Respondent will undertake to carry out the remedies set out above. If an agreement is reached, it shall be submitted with **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the parties should so state.

In accordance with Commission Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this

[9] The letter itself was removed from Howard's file one year after its issuance. (Tr. 231-32.) However, there also may be pending lawsuits between Howard and the company which reference the letter. (Tr. 243.) As long as those lawsuits, if any, are pending, the company may maintain references to the letter in its litigation files.

decision will be sent to the Regional Solicitor having responsibility for the Commonwealth of Kentucky so that the Secretary may take the actions required by that rule.

The judge, or his duly appointed successor, retains jurisdiction in this matter until the specific remedies to which Howard is entitled are resolved and finalized. Accordingly, **this decision will not become final** until an order granting specific relief and awarding monetary damages has been entered.

T. Todd Hodgdon
Senior Administrative Law Judge

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