FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 23, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LONNIE BOWLING, Complainant v. MOUNTAIN TOP TRUCKING CO., INC., ELMO MAYES; WILLIAM DAVID RILEY; ANTHONY CURTIS MAYES; and MAYES TRUCKING COMPANY, INC., Respondents	:	DISCRIMINATION PROCEEDING Docket No. KENT 95-604-D MSHA Case No. BARB CD 95-11 Mine ID No. 15-17234-NCX Huff Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of EVERETT DARRELL BALL, Complainant v. MOUNTAIN TOP TRUCKING CO., INC. ELMO MAYES; WILLIAM DAVID RILEY; ANTHONY CURTIS MAYES; and MAYES TRUCKING COMPANY, INC., Respondents	:	DISCRIMINATION PROCEEDING Docket No. KENT 95-605-D MSHA Case No. BARB CD 95-11 Mine ID No. 15-17234-NCX Huff Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of WALTER JACKSON Complainant v. MOUNTAIN TOP TRUCKING CO., INC., ELMO MAYES; and MAYES TRUCKING COMPANY, INC., Respondents	:	DISCRIMINATION PROCEEDING Docket No. KENT 95-613-D MSHA Case No. BARB CD 95-13 Huff Creek Mine

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DAVID FAGAN, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 95-615-D MSHA Case No. BARB CD 95-14
v.	:	Huff Creek Mine[1]
MOUNTAIN TOP TRUCKING CO., INC., ELMO MAYES; WILLLIAM DAVID RILEY ANTHONY CURTIS MAYES; and MAYES TRUCKING COMPANY, INC.,	:	
Respondents	:	

DECISION ON LIABILITY

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainants;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research & Defense Fund of Kentucky, Inc., Lexington, Kentucky, for the Complainants;
Edward M. Dooley, Esq., Harrogate, Tennessee, for the Respondents.

Before: Judge Feldman

These consolidated discrimination proceedings are before me as a result of complaints filed by the Secretary on behalf of Lonnie Bowling, Darrell Ball, Walter Jackson and David Fagan, pursuant to section 105(c)(2) of the Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 815(c)(2). The complaints were filed against the captioned Respondents, Mountain Top Trucking Company, Inc., (Mountain Top), Mayes Trucking Company, Inc.,

[1] The Huff Creek mine and the Darby Fork mine are essentially adjacent mine sites located along State Road 38. Previous captions in these proceedings noted Darby Fork as the mine site. The caption has been corrected to reflect the complainants were engaged in hauling coal from the Huff Creek facility.

(Mayes Trucking), Elmo Mayes (Elmo), Anthony Curtis Mayes (Tony); and William David Riley (David Riley). Also before me are amended discrimination complaints, filed by the Secretary on September 15, 1995, seeking to impose total civil penalties of $9,000 on the respondents, consisting of a $3,000 civil penalty for each of the three alleged violations of section 105(c) that are the subject of these proceedings.

On October 5, 1995, I issued a Decision ordering Mayes Trucking, as the successor of Mountain Top, to temporarily reinstate Bowling to his former position as a haulage truck driver at the same rate of pay and with the same work hours as the other truck drivers at the Huff Creek mine site.[2] 17 FMSHRC 1695, 1709. Bowling was never reinstated and the Secretary brought no action in his behalf to enforce the temporary reinstatement decision.[3]

The reinstatement decision determined that Mayes Trucking was a proper party to these proceedings. As discussed herein, the reinstatement decision also determined that Mayes Trucking was the successor to Mountain Top Trucking, and, as successor, Mayes Trucking is liable for the discriminatory conduct of Mountain Top. The temporary reinstatement decision was not timely appealed and has become final. Mayes Trucking Co. v. Secretary of Labor and FMSHRC, No. 95-4170 (6th Cir. April 19, 1996).

Although these discrimination complaints were brought on behalf of the complainants pursuant to section 105(c)(2) of the Act, Tony Oppegard appeared on behalf of the complainants as their personal counsel. Commission Order, 18 FMSHRC 487 (April 1986). Edward M. Dooley appeared on behalf of all of the respondents in these proceedings.

These discrimination cases were consolidated for hearing by Order dated February 6, 1996. The hearing was convened on three

[2] Mayes Trucking was also ordered to reinstate Fagan. However, the underlying discrimination complaint filed by Fagan has been withdrawn. The Secretary withdrew the application for temporary reinstatement filed on behalf of Jackson. Ball did not seek temporary reinstatement.

[3] The transcript and exhibits in the temporary reinstatement proceedings conducted on August 23 and August 24, 1995, are incorporated by reference and have been considered in the disposition of these discrimination matters.

separate occasions in June, July and August 1996.[4] On June 11, 1996, the initial hearing day, the Secretary and Mr. Oppegard moved to withdraw the discrimination complaint of David Fagan. The motion to withdraw was granted on the record and Fagan=s complaint docketed as KENT 95-615-D shall be dismissed. (I, 35-37).

The hearing in the Bowling and Ball complaints was held on June 11 through June 14, 1996, and July 16 through July 18, 1996. The hearing in the Jackson complaint was held on August 7 and August 8, 1996. During the course of these proceedings, to avoid the repetition of evidence, I ruled that any pertinent evidence adduced during the Bowling and Ball hearing was applicable to Jackson and vice-versa. (III, 299-300).

The parties have filed thorough post-hearing proposed findings and conclusions, and replies. These post-hearing filings have been considered in my disposition of the issues raised in these proceedings.

Statement of the Case

Bowling and Ball assert that Riley and Mountain Top discharged them on March 7, 1995, in violation of section 105(c) of the Act because of their good faith, reasonable refusal to continue driving their coal trucks after they became exhausted and fatigued as a result of working excessive and unsafe hours.

Bowling and Ball were subsequently called back to work by Mountain Top after they filed discrimination complaints with the Mine Safety and Health Administration (MSHA) as a result of their March 7, 1995, discharges. Ball argues that after having been briefly reinstated to his truck driving job by Mountain Top, he was constructively discharged on March 28, 1995, when he was compelled to quit because of intolerable working conditions imposed upon him by the company.

Bowling contends that, although he agreed to return to work after he had filed his discrimination complaint, he was never actually reinstated because Mountain Top would not provide him with a safe truck to operate. Thus, Bowling argues that the respondents are liable under section 105(c) as a result of his unlawful discharge on March 7, 1995. In the alternative, Bowling

[4] The hearing transcripts for June, July and August are cited as Volumes I, II and III, respectively.

argues, he too was constructively discharged on March 28, 1995, in violation of section 105(c), when he was compelled to quit because of intolerable working conditions.

Jackson maintains that Elmo Mayes and Mountain Top Trucking discharged him on February 17, 1995, in violation of the anti-discrimination provisions of section 105(c) of the Act after he refused to continue operating a coal truck that he reasonably and in good faith believed was unsafe to drive.

The discrimination complaints of Bowling and Ball are factually similar and involve contemporaneous events. The alleged discrimination suffered by Jackson occurred at a different time and involves circumstances and issues that are distinguishable from the Bowling and Ball cases. Thus, the Bowling and Ball complaints will be addressed separately from the complaint filed by Jackson.

Findings of Fact

Mountain Top is incorporated in the State of West Virginia. Its corporate officers are Tommy C. (Kip) Bays, President, and his son, Tommy Bays, Jr. Mayes Trucking is also incorporated in the State of West Virginia. Tony Mayes is the corporate President and his wife, Mary Mayes, is the Secretary. Mountain Top and Mayes Trucking leased their haulage trucks from E&T Trucking, a sole proprietorship owned and operated by Elmo Mayes, Tony=s father. E&T Trucking has approximately 40 trucks registered to it in the name of Elmo Mayes, d/b/a E&T Trucking. E&T Trucking is the registered operator in the State of Kentucky for fuel tax purposes. Mountain Top and Mayes Trucking do not own any trucks.

From 1991 until 1993 Mountain Top hauled coal in Mount Carbon, West Virginia from the Cypress Mine at Armstrong Creek. Mayes Trucking also hauled coal from the Cypress mine site during this period. The trucks operated by Mountain Top and Mayes Trucking were leased from Elmo Mayes.

On July 12, 1993, Mountain Top contracted with Lone Mountain Processing, Inc., (Lone Mountain) to haul coal from Lone Mountain=s Huff Creek mine, an underground mine located immediately off State Road 38 at Holmes Mill in Harlan County, Kentucky, to Lone Mountain=s processing plant at St. Charles in Lee County, Virginia. Mountain Top operated approximately 30 trucks to haul Lone Mountain=s coal from the Huff Creek mine. Mountain Top continued to lease its trucks from Elmo Mayes.

Helen Mayes, Elmo=s wife, signed and issued the pay checks for Mountain Top=s employees.

Mountain Top=s truck lot, where trucks are parked for the night, and where trucks are repaired, is located off the haul road directly across from the scale house at Lone Mountain=s processing plant. Each morning the truck drivers depart from the truck lot for Huff Creek to begin haulage operations.

The Huff Creek facility is approximately 7**2** to 8 miles from the processing plant. Upon arriving at the mine, the trucks would line up to be loaded. After loading, the haulage truck drivers drove the first 2**2** miles on Route 38, a 2-lane public road maintained by the State of Kentucky. The drivers then exited the state road onto a gravel haulage road maintained by Lone Mountain. The drivers traveled this haulage road up and over a mountain down to the dumping point in Virginia, a distance of approximately 6 miles. The haulage road had steep grades and sharp curves. There were areas called Aswitchbacks@ where the road was only wide enough for the passage of one truck.

There were usually 35-40 coal trucks driving simultaneously on the haul road, which consisted of 20-30 trucks operated by Mountain Top as well as 10-12 trucks operated by Hillis Breese, another haulage contractor.[5] (I, 403). Lone Mountain used a grader to smooth out bumps and potholes on its haulage road. (I, 403).

Upon approaching the dump site destination, the trucks would line up to be weighed at Lone Mountain=s scale house which was located approximately .3 mile from the dump site. After being weighed, the drivers would proceed to the dump site. The waiting time for loading, weighing and unloading varied. For example, Ball stated waiting time for loading varied from 2 to 8 minutes. (I, 155-56). There were presumably similar waiting times during the weighing and unloading process. The entire round trip from Huff Creek to the dump site, including the loading and unloading process, took approximately 1 hour and 15 minutes. Truck drivers communicated with each other, with Mountain Top management, and with the scale house, via CB radio.

[5] The trucks operated by Hillis Breese hauled coal from Lone Mountain=s Darby Fork mine, located along Route 38, approximately 1 mile from the Huff Creek mine. The Breese trucks were weighed at the same scale house and they unloaded their coal at the same dump site as the Mountain Top trucks.

The haulage hours were determined by Lone Mountain based on its scale house operating hours. The scale house hours were determined by Craig Mullen, Lone Mountain=s preparation plant manager. The scale house always opened at 6:00 a.m. Mullen would convey the cutoff time to Bruce Kelly, Lone Mountain=s scale man. Kelly stated that normal cutoff time was between 5:00 and 6:00 p.m. The same cutoff time applied to Mountain Top and Hillis Breese trucks. (III, 131).

The Acutoff@ time does not refer to the drivers= quitting time. Rather, it is the time when a cutoff truck is designated to make the last round trip to load and unload a truck of coal. For example, if the cutoff time is 5:00 p.m., the truck passing the scale house at 5:00 p.m. must return to the mine for the last load of coal. This cutoff truck will return to the scale house at approximately 6:15 p.m. All truck drivers passing the scale house after 5:00 p.m. that are behind the designated cutoff truck proceed to the truck lot to end their workday.

Kelly would designate the cutoff truck according to the cutoff schedule established by Mullen. Kelly experienced resentment from truck drivers who were designated as cutoff. Therefore, Kelly began communicating the cutoff time to David Riley, Mountain Top=s truck boss, so that Riley could select and inform the cutoff driver.

In the fall of 1994, Mountain Top truck drivers generally reported to the truck lot between 5:00 and 5:30 a.m so as to return to the scales when they opened at 6:00 a.m. As previously noted, the Acutoff@ time, established by Lone Mountain, was between 4:00 and 6:00 p.m. Mountain Top paid truck drivers $13.00 per load of coal. Drivers were paid $6.00 per hour for down periods when trucks were being repaired.

Lone Mountain was dissatisfied with Mountain Top=s haulage production. Consequently, Mountain Top=s contract was extended for only six months on October 12, 1994. This relatively brief contract extension apparently placed additional pressure on Mountain Top to satisfy Lone Mountain=s haulage requirements.

Near the end of December 1994, David Riley had a meeting with the truck drivers and informed them that from that point starting time was promptly at 5:00 a.m. However, there was no change in the normal 6:00 a.m. opening of Lone Mountain=s scales.

In late January or early February 1995, Lone Mountain opened a new section of the Huff Creek mine. Contemporaneous with the opening of this new section, inclement snowy and icy conditions

interfered with Mountain Top=s normal haulage operations. Consequently, Lone Mountain=s coal stockpile increased substantially.

Lone Mountain pressured Mountain Top to increase haulage in order to reduce its stockpile. In order to comply with Lone Mountain=s demand, Mountain Top=s truck drivers were required to haul more loads per day. Thus the cutoff time got progressively later: from 6:00 to 8:00 p.m. During February 1995, it was not unusual for Mountain Top=s drivers to work 15 to 16 hours per day 6 days per week. Kelly testified he recalled some evenings in February 1995 when the last load passed the scales as late as 10:30 p.m. These long work hours continued into mid to late March. As spring approached and the stockpile receded the normal cutoff time was moved back to between 4:00 and 6:00 p.m.[6] The complaints of Bowling and Ball must be viewed in the context of this factual background.

[6] Kelly testified the average cutoff time during the previous two years was between 4:00 and 6:00 p.m. (I, 554-55).

The Bowling and Ball Discrimination Complaints

Everett Darrell Ball was hired by Mountain Top trucking in July 1994. Lonnie Bowling was hired by Mountain Top in August 1994.

Shortly after Ball was hired, his assigned truck was taken out of service for repair. After a week of reporting to work with nothing to drive, Ball asked Riley for a Alay off slip.@ Ball returned to work for Mountain Top approximately two months later.

When Ball returned to work in November or December 1994, he testified there was no particular set starting time, although truck drivers routinely reported in the early morning hours. Bowling testified the normal starting time was 5:00 a.m. Consistent with the testimony of scale man Kelly, Ball and Bowling testified that the normal cutoff time, prior to the onset of bad winter weather and the increase in the size of the stockpiled coal, was between 4:00 and 6:00 p.m. Ball estimated the normal cutoff was Aprobably five o=clock, on average.@ (I, 215-16, 405, 467).

Bowling and Ball=s duties included general preshift inspections and minor maintenance such as Akeeping the tires and the wheels tight and the oil levels checked and the water fluids.@ (II, 71). Truck drivers routinely completed checkoff slips noting any truck defects or other maintenance problems experienced during the shift. Each driver submitted his checkoff slip detailing his truck=s condition at the end of each workday when the truck was parked in the truck lot.

Bowling and Ball testified about the challenging nature of the haulage trip. They related that route 38 is narrow and winding. They described Lone Mountain=s haulage road as very steep with an almost continuous up or down grade. Ball stated Ait was one of the roughest hauls I=ve ever been on in my life, I think.@ (II, 75). Bowling stated the haul road was in Areal bad shape@ in February and March 1995. Bowling and Ball did not work for three days in February 1995 because of snow.

Bowling and Ball routinely drove to work together. They arrived at the truck lot at approximately 5:00 a.m. They would preshift their trucks and start them to allow for warm-up and to let the air build up. They would then drive the trucks across the mountain to Huff Creek where they would load for the first return trip. They would continue to make return trips until the 4:00 to 6:00 p.m cutoff.

Ball stated it took between 30 to 40 minutes after the last scale reading to finish work. During this time, Ball dumped his last load, drove to the truck lot, spent approximately 20 minutes fueling his truck, completed his checkoff list, and turned in his time sheets.

As discussed above, Bowling and Ball testified about the significant increase in the length of the workday beginning in February 1995. They stated it was not uncommon to work 14 to 16 hours per day from February until early March. Ball stated in February and early March 1995, Big Dave (David Riley) was the boss if he was alone. Riley deferred to Tony Mayes if Tony was at the job site. Both Riley and Tony Mayes deferred to Elmo Mayes if he was present at the mine site. Elmo Mayes had a two-way radio at his home that was capable of communicating with Riley in his truck. Both Riley and Kip Bays had worked for Elmo Mayes in the past.

Beginning in February 1995, Bowling and Ball periodically complained to David Riley, Tony Mayes and Bill Lefevers, the loader man, about the long hours and the road conditions.[7] In fact, most drivers complained about the extremely long workday that was required during this catch-up period. Riley responded that when they got Acaught-up@ the company would do what it could to cut back the hours - but the cutoff time would still be between 5:00 and 6:00 p.m. (I, 115).

Bowling and Ball discussed the long hours. They decided to call the State Of Kentucky=s Division of Motor Vehicle Enforcement to complain about the long working hours at Mountain Top Trucking. Major Michael Maffett testified that he received calls from Bowling and Ball. Ball=s telephone records reflect calls to Maffett on February 21 and March 2, 1995. Bowling and Ball complained that Mountain Top=s long hours Awould cause somebody to get killed.@ (I, 90). As an initial matter, Maffett determined Mountain Top Trucking had no Kentucky Fuel Tax License. Maffett determined that Mountain Top was operating

[7] Driving on narrow, winding roads with steep grades was a normal condition of the complainants= employment. There is no evidence of any complaints concerning road conditions that are relevant to these proceedings.

under the Fuel Tax License issued to Elmo Mayes d/b/a E&T Trucking. (I, 287).

Maffett told Bowling and Ball there were Federal and State laws that governed how many hours truck drivers could drive. For example, Maffett advised them of 49 C.F.R. Part 395 of the Department of Transportation (DOT) regulations concerning 10 hour, 15 hour, and 60/70 hour service hour limitations. Maffett explained a truck driver cannot drive after having driven ten hours, without an eight hour qualifying break. A driver cannot drive after having been on duty 15 hours. If a company operates six days per week, drivers cannot drive after having been on duty 60 hours in seven days. Similarly, if a company operates seven days a week, a driver cannot drive after having been on duty 70 hours in eight days. (I, 292; Gov. Ex. 1; 49 C.F.R. ' 395.1).

Although not a DOT official, Maffett opined that the ten hours driving limitation was determined based upon the period a truck was in gear. Maffett was uncertain about the applicability of this DOT regulation to situations where drivers wait to load and unload throughout the day. However, the applicable DOT regulations provide all time spent loading and unloading a vehicle as Aon-duty time@ rather than actual Adriving time.@ 49 C.F.R. ' 395.2.

Moreover, the record is unclear with regard to DOT=s application of this regulation to the 8**2** mile trip in this case, which is comprised of 6 miles over a private road. The complainants did not call a DOT official to testify in these proceedings to explain how its Part 395 Hours of Service regulations impact on short haulage operations with frequent loading and unloading throughout the day.

Maffett considered their complaint to be a Alabor@ issue because Ball expressed the opinion that he would be terminated if he refused to drive. Maffett recommended that Bowling and Ball contact the Occupational Safety and Health Administration in Atlanta, Georgia. Maffett also recommended that they file a written complaint with the Federal Highway Administration=s Office of Motor Carriers located in Frankfort, Kentucky. No one from Maffett=s office investigated Bowling and Ball=s complaint. (I, 296). To the best of Maffett=s knowledge, the respondents were never cited by any state or federal authorities for any violations related to excessive working or driving hours.

On the morning of March 7, 1995, Bowling and Ball decided to confront management about the excessive hours. Later that day, they heard over the CB radio that cutoff time was 7:00 o=clock.

At approximately 5:30 p.m., Ball pulled into the truck lot to talk to Riley. Ball was followed into the truck lot by trucks driven by Bowling and Leonard McKnight. Ball and Bowling told Riley they couldn=t continue working these hours because they were exhausted and it was unsafe. They informed Riley they had contacted DOT and that they had been advised about a ten hour workday rule.

Ball testified that Riley was sympathetic until Elmo Mayes pulled into the truck lot. They informed Elmo of their concerns. Elmo responded Athe cutoff time tonight is 7:00 o=clock, you get your ass back out there and haul coal.@ They informed Riley and Elmo Mayes that they had called DOT and that DOT said they were not supposed to be hauling such long hours. Ball stated Riley said he Adidn=t give a shit what the DOT said@ because they worked for him. Ball further testified Riley told them if they couldn=t work the hours they were supposed to work, Athat they didn=t need us and to get our ass to the house.@ (I, 116).

Bowling asked Riley, Aif I park up, am I fired?@ Riley replied, AI can=t make it any plainer, you work when I tell you to work or I don=t need you.@ Although McKnight supported Bowling and Ball=s concerns, he decided to return to work to avoid losing his job. (I, 118, 241).

Bowling and Ball turned in their time sheets. Ball testified Elmo Mayes Ahollered and told us both, said, don=t bring your ass back.@ (I, 120).

Bowling and Ball filed discrimination complaints with MSHA on March 9, 1995. Their discrimination complaints sought the following:

> Back-pay for all lost wages, jobs back with regulated 10 hour work days with required breaks and lunch periods for all employees and we request our regular trucks back, Bowling truck #144 and Ball truck #147. We also request that load sheets be required to reflect starting and stopping times. (Gov. Ex 9).

Bowling and Ball=s complaints were investigated by MSHA investigator Gary Harris. On March 22, 1995, following Harris= interviews with company personnel, Tony Mayes telephoned Harris. Tony Mayes explained to Harris that everyone at Mountain Top was under a lot of pressure because of the backed up coal. Tony Mayes conceded that everyone had been complaining about the long hours. He informed Harris that Bowling and Ball were Agood truck

drivers@ and he expressed a willingness to work things out. (III, 473-75).

Shortly after talking to Harris on Wednesday, March 22, 1995, Tony Mayes called Bowling and Ball to offer them their jobs back. Tony Mayes called Bowling at home first. Bowling stated he thought he was unjustly fired. Tony Mayes told him he was trying to get him back to work so that things could be worked out. Bowling agreed to return to work the following day on Thursday, March 23, 1995.

Tony Mayes then called Ball and left a message with Ball=s wife. Ball was not home because he was traveling to Bowling=s house. When Ball arrived at Bowling=s house, Bowling informed him that Tony Mayes had just called to offer their jobs back. Ball returned to his home to return Mayes= call. Ball agreed to return to work. (I, 121). There is conflicting testimony concerning on which day Ball agreed to return. Tony Mayes and Riley testified Ball agreed to return to work on Friday, March 24, 1995. (II, 331, 477; Ex. R-4). Ball testified he did not agree to return to work until Monday, March 27, 1995, because he Adidn=t have any money for gasoline, and [he] had an appointment to get [his] CDL license upgraded in Somerset and I already borrowed a truck to do so.@ (I, 121).

Bowling had 20 years experience as a truck driver. He was somewhat familiar with the Federal regulations concerning driving hours and time. (I, 452). Bowling concluded, based on the information provided by Major Maffett, that upon his return to work, he would work Aten hours, not one minute longer.@ (I, 414, 419, 456). Thus, Bowling believed that an appropriate quitting time was 3:00 p.m. on days when he began driving at 5:00 a.m. without significant out-of-service interruptions. (I, 490). Ball also was unwilling to work significantly more than ten hours per day. (I, 126).

Bowling reported to work at approximately 5:00 a.m. on Thursday, March 23, 1995. Tony Mayes and Riley testified that they informed Bowling he would be driving truck #139. Prior to Bowling=s March 7, 1995, discharge he generally drove truck #144 which was a newer 1989 model in better condition. (I, 426, 663). Bowling asked Mayes why he couldn=t have his regular truck back. Mayes responded that he didn=t want to cause any conflict with his drivers. (I, 426).

Bowling testified he told Tony Mayes truck #139 Aprobably wouldn=t pass inspection@ because he didn=t think it was tagged (had license plates).@ (I, 427). Bowling contends he was

concerned about the truck=s wipers and lights. Bowling also was concerned about a broken wheel stud on the rear wheel. Mountain Top truck mechanic William Bennett testified he did not discuss the operational condition of truck #139 with Bowling on the morning of March 23, 1995. (I, 657). In this regard, Bowling conceded he never inspected #139 on the morning of March 23. His objections to driving it were based on Ahis previous experience with the truck.@ (I, 448-49).

Riley and Mayes indicated Bowling left the site shortly after his arrival at 5:00 a.m. Bowling testified he left the truck lot at approximately 7:30 to 8:00 a.m., after having waited for Tony Mayes to arrive at work. (I, 428). When Bowling departed, Mayes and Riley testified that Bowling informed them that he would not drive truck #139, and that he would wait on MSHA=s investigative decision. (II, 331, 477-78).

Tony Mayes testified that he called investigator Harris after Bowling left on March 23 to inform him of the situation. Harris told Mayes he would talk to Bowling. (II, 479).

Mayes and Riley indicated Bowling did not report to work or otherwise contact them on Friday, March 24, 1995. Bowling also testified he did not show up for work on March 24. Bowling stated on that morning he Acalled in sick to the guard shack because that was the quickest way to get in touch with David Riley.@ (I, 429). There is no evidence that Bowling ever spoke directly to Tony Mayes or Riley to provide an explanation for his absence on March 24, 1995.

Although Tony Mayes testified that Ball had agreed to return to work on Friday, March 24, 1995, Ball also did not report to work on that day. Mayes testified that Ball left a telephone message on March 24 with someone at the mine indicating he would not come to work because he was waiting on a check, and he had no gas money. Ball denies making this telephone call because he maintains that he did not agree to return to work until Monday, March 27, 1995. However, Ball does attribute the delay in his return to work to a lack of gas money.

Both Bowling and Tony Mayes testified that, at approximately 6:00 a.m. on Monday, March 27, 1995, Bowling telephoned Mayes to ask if he could come back to work. Mayes told him that the job offer from the previous week still stood. (I, 430; II, 481). Bowling reported to work at approximately 8:00 a.m. but he found that the wheel stud on #139 was still broken. Bowling complained to mechanic Bennett about the wheel stud. (II, 335). Bowling also complained to Bennett about a recapped tire on the front

wheel. Bennett told Bowling the recapped tire was permissible and would not be changed. Bennett told Bowling he could not replace the wheel stud because there was no welder available to remove it. (I, 657, 659-61). Bennett indicated the lights on #139 and Aother stuff@ had been worked on. (I, 664).

The haulage trucks driven by the complainants were Model RD 800, manufactured by Mack Truck. Each truck is equipped with two front tires and eight rear tires. The rear tires consist four rear pairs of tires, with two pairs of tires on each side of the rear axles. There are a total of 24 rear wheel studs comprised of six wheel studs on each rear set of wheels. The wheel studs consist of a lug nut and bolt with a spacer placed between each double set of rear tires. The wheel studs hold the double wheels together on the axle.

The broken stud in issue had a missing lug nut. The shaft of the stud remained in the wheel and could be removed by welding a fitting on the end of the shaft to enable the shaft to be unscrewed from the wheel axle. Both Hank Villadsen, a Service Manager for Mack Trucks, and Bennett testified that broken wheel studs are not uncommon. Villadsen opined that it is not necessary to immediately remove a truck from service with one broken and five intact wheel studs. (III, 301-07). Bennett stated one broken wheel stud Awouldn=t really make a whole lot of difference.@ (I, 671). In an effort to moderate his initial opinion, Bennett went on to state that 60 percent of drivers would not consider such a condition hazardous and that 40 percent of drivers would consider it a hazard. (I, 672). MSHA inspector Adron Wilson opined that one broken wheel stud puts additional pressure on the five remaining wheel studs. He concluded that there was a danger that the wheel could come off if an additional wheel stud on the same wheel broke.[8] (II, 610).

Bowling testified that he Aconcluded my truck was not going to get fixed that day unless I was to stand around there all day long and see to it myself .... I told Bill Bennett to have my truck fixed by five o@clock the next morning, I would be back to work. (I, 436). Bowling then went home approximately 1**2** hours

[8] As discussed infra, Bowling=s refusal to drive #139 because of the broken wheel stud was protected activity under the Act if made in good faith. However, there is conflicting evidence regarding whether one broken wheel stud on one set of rear wheels, that could only be removed with welding, constituted an out-of-service defect.

after he arrived. Bowling was paid $9.00 for the 1**2** hours down time on March 27, 1995. (II, 335-36).

Ball returned to work at 5:45 a.m. on Monday, March 27, 1995. (Resp. Ex. 6). Tony Mayes told Ball truck #147, previously driven by Ball, was not available. Mayes gave Ball a choice between truck #134 and #139. Ball chose #134. Ball told Mayes he would preshift #134 and that he Awould work a ten-hour shift and that was all I was going to work.@ (I, 126; II, 184). Mayes told Ball he didn=t want to hear anymore about Aany ten hour bullshit.@ Mayes told Ball if everyone parked at 4:00 p.m. he would need 30 trucks to haul the coal. (II, 126). Ball=s operator checklist for March 27 reflects he completed 7 round trips from 5:45 a.m. until approximately 4:00 p.m., with 45 minutes down time. Mayes testified the cutoff time on that day was between 5:00 and 6:00 p.m. Mayes inquired about Ball and was told he had left at approximately 4:00 p.m. Parking at 4:00 p.m. would indicate that Ball last loaded at Huff Creek at approximately 3:00 p.m.

Ball indicated that he parked about 4:00 p.m. At approximately 4:15 p.m., before leaving the truck lot, Ball told mechanic Lee Payne there was a loose U-joint that caused truck #134 to Awander real bad@ whenever it hit a hole. Lee Payne did not testify in these proceedings. Tony Mayes testified that, upon learning of Ball=s complaint, he and Riley checked the U-joint and found nothing wrong with it. (II, 495).

At approximately 5:00 a.m. on Tuesday, March 28, 1995, Bowling and Ball arrived at the truck lot together in Bowling=s pickup truck. Mayes told Bowling the wheel stud on #139 had not been fixed. Bennett testified he could not fix the wheel stud because the diesel powered welding tool required to remove the stud was not working. (I, 661, 665-66). Bowling stated he would not drive #139 in that condition. Mayes asked Bowling to get out of his pickup so they could discuss the situation. Bowling remained in his pickup.

Ball asked Riley if he was fired because he left at 4:00 p.m. the previous day. Riley answered, AI never said that, did I.@ Ball said he would not drive #134 until the U-joint was replaced. Tony Mayes told Ball to drive #147, his former truck. Ball testified he told Tony Mayes he would preshift the truck. Ball testified Tony Mayes called Ball a Acry-ass@ who wanted to Apreshift everything in the damn lot.@ Ball also stated that Mayes called him a Asorry ass@ and accused him of just wanting to find some Abullshit@ because he Awasn=t interested in working.@

(I, 146). Ball stated he told Mayes he was not going to allow himself to be Acussed@ and he turned to leave.

Mayes denies that Ball wanted to preshift #147. Mayes testified that when he told Ball he could drive #147, Ball said he wanted to see if he had a ride home. Mayes alleges Ball got in Bowling=s pickup and they both left without saying anything further.

Tony Mayes telephoned Bowling and Ball on the morning of Wednesday, March 29, 1995. Bowling told Mayes he had a meeting with the Ainvestigator.@ When Mayes asked Bowling if that was why he wasn=t coming to work, Bowling replied he wasn=t coming to work because he was sick. (II, 487). Bowling=s version of events is that Mayes called him on March 29 and accused him of Anitpicking shit about this wheel stud.@ Bowling reported that he hung up on Mayes.

Mayes then called Ball on March 29, 1995. Ball told Mayes he felt like he was getting the run around. Mayes told him he had several trucks without drivers and asked Ball to come to work. Ball said that he would, but he never returned. (II, 487-88). Ball, on the other hand, testified he told Mayes he could not return because of all the cussing and friction the last two days. (I, 147, 181). Mayes called investigator Harris to advise him of the situation.

As a result of the Bowling and Ball complaints, DOT conducted a compliance review of Mayes Trucking between May and July 1995. (Gov. Ex. 7). During this review, DOT cited Mayes Trucking for a May 10, 1995, violation involving the failure of truck driver Colen Kelly, who had worked 12**2** hours, to keep a record of duty status. Significantly, there is no evidence that DOT considered Kelly=s 12**2** hour workday to be a violation of its ten hour driving restriction. Although Mayes Trucking was not cited for any pertinent violation of DOT=s Hours of Service limitations, it did recommend that Mayes Trucking establish a system to control drivers= hours of service and it cautioned Mayes Trucking to Anot allow drivers to exceed the 10, 15 and 60/70 hour limits@ in Part 395 of its regulations.

The Jackson Discrimination Complaint

Walter Jackson was hired by Mountain Top Trucking approximately nine months prior to his discharge on February 17, 1995. Jackson had no prior experience as a truck driver. He was hired by Riley after he drove a test run with Riley from Huff Creek to the processing plant. To gain experience, Riley secured

Elmo Mayes= approval to have Jackson drive a **3** mile route hauling mud from the refuge pile at the tipple to a dump site. After approximately two weeks of hauling mud, Jackson assumed the normal driver=s duties hauling coal from Huff Creek.

On the date of his discharge, Jackson began hauling coal at approximately 5:30 a.m. Jackson was driving truck #139. Truck #139 was one of the slower trucks in Mountain Top=s fleet. Jackson stated that he had been driving this truck for six or seven months, and that it had previously had a new transmission installed. (III, 69).

At approximately 9:15 p.m., Jackson was in the process of completing his tenth load. Jackson stopped at the top of the mountain on the haulage road and exited the truck to urinate. Jackson returned to the truck and put it in gear. However, all of the trucks= functions were reversed. When Jackson put the truck in first gear it went in reverse. When the truck was placed in reverse gear, it went forward. Jackson noticed blue smoke coming from the passenger side through the headlight beams. Jackson also noticed the truck did not have any oil pressure.

Hank Villadsen, a Mack Truck Service Manager, explained the problem experienced by Jackson. When a loaded haul truck is on a hill, if the driver lets out the clutch and permits the truck to roll backwards in forward gear, or, permits the truck to roll forward in reverse gear, the engine will turn in the opposite direction that it was designed to rotate. Engine oil pressure drops, and the gears and the exhaust system reverse. Consequently, air is taken in through the exhaust system and oil and smoke are vented through the air filter housing located on the front passenger side of the truck. The phenomenon of the reversed exhaust system accounted for the blue smoke observed by Jackson. Villadsen stated the remedy for Aa truck running backwards@ is to shut the truck off for a few minutes so that oil pressure can be restored and the oil can drain back into the pan.

Villadsen stated that drivers experiencing this problem frequently Adon=t know what=s happening.@ (III, 293). He further opined, Aits scary. It scared me the first time it ever happened to me.@ (III, 315).

Jackson observed Riley, who was also hauling coal that evening, pass him on the haulage road. Jackson radioed ahead to Riley and described the problem. Riley responded over the radio advising Jackson to turn off the truck and wait until Riley could return to check it out. Jackson turned the engine off. After a few minutes, Jackson restarted the truck and determined it was

operating normally. Jackson informed Riley who instructed him to Aease@ the truck down the mountain so that it could be checked out in the truck lot. Jackson interpreted the word Aease@ as an instruction by Riley to be careful.

During the time Jackson was talking to Riley, Elmo Mayes was in the scale house with Kelly. Elmo Mayes overheard the radio transmissions between Jackson and Riley. Elmo Mayes became upset and radioed to Riley to determine what the problem was. Kelly told Elmo Mayes that it was cutoff time. Elmo Mayes asked Kelly which driver was due at the scales next. Kelly told Mayes that Mud Puppy was due. Mud Puppy is Jackson=s CB handle. Elmo Mayes instructed Kelly to make Mud Puppy the cutoff driver. Elmo Mayes testified that he did not know Mud Puppy was the driver communicating with Riley when he selected him as cutoff.

Upon Jackson=s arrival at the scales, Jackson noticed Elmo Mayes= pickup parked outside the scale house. Kelly informed Jackson that Elmo Mayes had designated him as cutoff driver. Jackson told Kelly he was willing to be the cutoff driver. However, Jackson informed Kelly that he was going to drive to the truck lot after dumping his load in order to meet Riley who had agreed to check out his truck.

When he arrived at the truck lot, Jackson shut off his truck and opened the hood. As Riley jumped on the hood, Elmo Mayes pulled up in his pickup and told Riley, Athe damn truck had oil in it,@ and to put Jackson=s Aass@ back in the truck so that he could go across the hill to get the last load.

Riley did nothing further to check the truck. Elmo Mayes told Jackson he was tired of drivers Apussy footing@ around, and that they were going to work when he said they should work or else he would send them to the house. Jackson told Mayes he would return for the last load as soon as it was determined that the truck was safe. Mayes objected to any further delay and told Jackson if he didn=t go back for another load, he was fired. Jackson told Mayes the best thing he could do would be to give him his check. Jackson was given his check and Mayes told him to get his things out of the truck.

Jackson testified that after he left his job, a fellow truck driver, Benny Ray Carver, told him that Tony Mayes said he could have his job back if he apologized. There is no credible evidence that Jackson was ever contacted by Tony Mayes or anyone else from Mountain Top about his return to work.

Jackson filed his discrimination complaint with MSHA on March 14, 1995. Jackson=s complaint stated:

> I feel like I was discriminated against due to me being fired for refusing to operate an unsafe truck after being in that truck for 16 hours already, on February 17, 1995. In recourse, I request my job back, with back pay, regulated working hours, and regulated breaks and lunch breaks. (Gov. Ex. 34).

Disposition of Issues

Discriminatory Discharge

The purpose of section 105(c) of the Act is to protect and encourage miners Ato play an active part in the enforcement of the Act@ recognizing that, Aif miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.@ S. Rep. No. 95-181, 95th Cong., 2d sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

A miner alleging to be a victim of prohibited retaliatory conduct bears the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, a miner must establish that he engaged in protected activity, and, that the adverse action complained of, was motivated in some part by that protected activity. See Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

An operator may rebut a *prima facie* case by demonstrating either that no protected activity occurred or that the adverse action was in no part motivated by 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 also was motivated by the miner=s unprotected activity and would have taken the adverse action for the unprotected activity alone. Id.; Robinette, 3 FMSHRC at 817-18; See also Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

An operator must carry the burden of establishing an affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935, 1937 (November 1982). However, the ultimate burden of persuasion remains with the complainants in these proceedings.

Protected Activity

It is axiomatic that miners have an absolute right to make good faith safety or health related complaints about mine practices or conditions when the miner believes such circumstances pose hazards. Secretary of Labor 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 (3rd Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). This statutory right is afforded to miners who bring to the attention of mine management conditions or circumstances that pose hazards to fellow employees as well as to themselves. See Secretary on behalf of Cameron v. Consolidation Coal Company, 7 FMSHRC 319 (March 1985).

Communication of potential health or safety hazards, and responses thereto, are the means by which the Act's purposes are achieved. Once a reasonable, good faith concern is expressed by a miner, an operator, usually acting through on-the-scene management personnel, has an obligation to address the perceived danger. Boswell v. National Cement Co., 14 FMSHRC 253, 258 (February 1992); Secretary o.b.o. Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985).

Further Findings and Conclusions

As a threshold matter, I note that whether Jackson, Bowling, or Ball, initially quit or were fired is not material in the resolution of these cases. The February 17, 1995, termination of Jackson and the March 7, 1995, discharges of Bowling and Ball, were clearly adverse actions resulting from the complainants: work refusals. The issues to be determined are whether these work refusals warrant the statutory protection provided by section 105(c) of the Act.

Although the Act grants miners the right to express safety and health related concerns, it does not expressly grant the right to refuse to work under such circumstances. Nevertheless,

the Commission and the Courts have recognized the right to refuse to work in the face of perceived dangers. See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516, 519-21 (March 1984), aff=d mem., 780 F.2d 1022 (6th Cir. 1985); Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). In order to be protected, work refusals must be based upon the miner=s Agood faith, reasonable belief in a hazardous condition.@ Id.; Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). The purpose of the Agood faith@ belief requirement is to Aremove from the Act=s protection work refusals involving frauds or other forms of deception.@ Robinette, 3 FMSHRC at 810.

For a work refusal to be protected under the Mine Act, a miner should first communicate his safety concerns to some representative of the operator. Secretary of Labor on behalf of Dunmire v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982). If the miner expresses a reasonable, good faith fear concerning safety, the operator has a duty to address the perceived danger. Metric Constructors, Inc. 6 FMSHRC at 230; Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983).

Jackson=s February 17, 1995, complaint to Elmo Mayes and Riley concerning his continued use of his backward running truck, particularly over mountainous terrain, evidenced a good faith reasonable belief that a hazard existed. Similarly, Bowling and Ball=s March 7, 1995, complaints concerning their fatigue as a consequence of their excessive work hours, communicated to Elmo Mayes and Riley, were also reasonably expressed safety related concerns.

Having communicated these good faith, reasonable concerns about safety, the analysis shifts to an evaluation of whether the respondents addressed these concerns in a way that should have alleviated the complainants= fears. Gilbert, 866 F.2d at 1441; see also Bush, 5 FMSHRC at 997-99; Thurman v. Queen Anne Coal Co., 10 FMSHRC 131, 135 (February 1988), aff=d mem., 866 F.2d 431 (6th Cir. 1989). For a miner=s continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. Bush, 5 FMSHRC at 998-99.

Elmo Mayes= refusal to permit the inspection of Jackson=s truck in the truck lot immediately following the malfunctioning

incident on the mountain failed to address Jackson=s reasonable concerns for his personal safety. So too, Riley=s promise of the resumption of Anormal@ work hours when the stockpiles were reduced was not responsive to Bowling and Ball=s immediate concerns of fatigue. Thus, the respondents provoked the complainants= initial work refusals by taking no meaningful actions to address their fears. The reasonableness of the complainants= work refusals are further discussed below.

Jackson=s February 17, 1995, Work Refusal

With respect to Jackson, the reasonableness of his reluctance to resume driving late in the evening on February 17, 1995, is self evident. Jackson was an inexperienced truck driver. Even the respondents= witness Hank Villadsen, a Mack Truck Service Manager, admitted a truck running backwards is Ascary.@ A miner must communicate his safety complaint to an operator. I credit the testimony of Kelly, over Elmo Mayes= denial, that Elmo Mayes was aware of Jackson=s troubles when he designated Jackson as cutoff driver on February 17, 1995. In this regard, Kelly provided a statement to MSHA investigators shortly after this incident reflecting that Elmo Mayes selected Jackson as cutoff specifically because he had overheard Jackson complain about the malfunction at the top of the mountain. (I, 713-14). Moreover, Riley was certainly aware of Jackson=s concerns, which he acknowledged by instructing Jackson to Aease@ the truck down the mountain.

Simply stated, can anyone seriously question the propriety of Jackson=s refusal to continue to drive his truck at 9:00 p.m. on a winter evening, over mountainous terrain, after having worked approximately 16 hours and experiencing this Ascary@ situation? As noted above, the Mine Act imposes an obligation on operators to reasonably address a miner=s fears. Gilbert, 866 F. 2d at 1441. Elmo Mayes= response to Jackson=s reasonable concerns was retaliatory in nature and precisely the type of conduct the Act seeks to dissuade.

Accordingly, the respondents= failure to address Jackson=s fears is actionable. Thus, Jackson=s February 17, 1995, refusal to act as the cutoff driver until his truck was adequately inspected for defects was reasonable, and constitutes protected activity under section 105(c) of the Act. Consequently, Jackson=s discrimination complaint shall be granted.

Bowling and Ball=s March 7, 1995, Work Refusal

With respect to Bowling and Ball=s March 7, 1995, work refusal, it is necessary to determine what constitutes unreasonable work hours that would justify a work refusal protected by section 105(c). As these are discrimination complaints brought pursuant to the Mine Act, whether Mountain Top violated any provision of the DOT regulations governing permissible truck driver working hours is beyond the scope of these proceedings. In fact, MSHA investigator Harris stated that he was not familiar with DOT=s regulations and they were not considered during the course of his investigation. (I, 743). Whether Mountain Top violated any other state or federal regulation related to wages and hours is also not the subject of these proceedings. The issues in these proceedings are limited to what relief, if any, is available to Bowling and Ball under the Mine Act.

Thus, in assessing the propriety of Bowling and Ball=s March 7, 1995, work refusal, it is necessary to distinguish Mountain Top=s Anormal@ work hours from excessive work hours. The overwhelming evidence, including Bowling and Ball=s own testimony, reflects they accepted positions with Mountain Top knowing that the workday consisted of an approximate 5:00 a.m. starting time, with cutoff times varying between 4:00 p.m. and 6:00 p.m.[9] These working hours were out of the control of Mountain Top as they were established by Lone Mountain. These work hours also applied to Hillis Breese, Lone Mountain=s other haulage contractor. Consequently, the record reflects that, in resolving the matters in issue, the applicable normal working hours are from 5:00 a.m. until a cutoff time as late as 6:00 p.m.

Using an average cutoff time of 5:00 p.m., it is helpful to quantify the miles driven during a Anormal@ 12 hour workday.

[9] Virtually every Mountain Top driver called in these matters, as well as Lone Mountain scale man Kelly, testified normal cutoff times varied between 4:00 and 6:00 p.m.

With respect to Mountain Top, assuming an approximate 13 hour round trip from Huff Creek and an average of a 5:00 p.m. cutoff time, a truck driver would complete approximately nine round trips.[10] Nine round trips would constitute driving a total of 45 miles over state road 38, and 108 miles over Lone Mountain=s haul road. Under these circumstances, Bowling and Ball, having accepted the working conditions and hours of employment, have failed to establish that a 4:00 to 6:00 p.m. cutoff time is unlawful, or otherwise unreasonable.

However, from early February 1995 until Bowling and Ball=s March 7, 1995, discharge, the required work hours were considerably longer than the customary 6:00 p.m. cutoff limit. Kelly testified that cutoffs were as late as 9:00 to 10:00 p.m. Even a 9:00 p.m cutoff would require the cutoff driver to work past 10:00 p.m., a 17 hour work day. Moreover, the extended workdays during this period are not in dispute. Tony Mayes has conceded throughout these proceedings that mistakes were made with regard to Mountain Top=s insensitivity to the drivers safety related complaints regarding these excessive work hours. (I, 713; II, 295-96, 526; III, 473-74).

Under these conditions, it was reasonable for Bowling and Ball to refuse to continue working on March 7, 1995, past a 6:00 p.m. cutoff because of their belief that their fatigue, caused by working excessive hours, posed a risk to their continued safe operation of their vehicles. The hazards associated with the complainants= fatigue were accentuated by the necessity for them to drive multi-ton haul vehicles over mountainous terrain on narrow and winding roads. Consequently, Bowling and Ball=s March 7, 1995, work refusals were protected under section 105(c) of the Act.

Bowling and Ball=s Alleged Constructive Discharge

A constructive discharge occurs if the operator attempts to thwart a miner=s rights under the Act by retaliating against a miner=s protected activity by maintaining intolerable working conditions in order to force the miner to quit. Thus, the doctrine of constructive discharge extends liability to operators that indirectly effect a discharge that is forbidden by the Act if done directly. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2210 (November 1994), citing Simpson v. FMSHRC 813 F.2d

[10] Nine round trips during a 12 hour day is consistent with Ball=s completion of seven round trips on March 27, 1995, during his ten hour workday. (Resp. Ex. 6).

639, 642 (4th Cir. 1987). In this regard, section 105(c) of the Act seeks to protect miners from not only common forms of discrimination, such as discharge or demotion, but also more subtle forms of interference such as threats of reprisal or harassment. Elias Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1478 (August 1982) quoting Pasula, 2 FMSHRC at 2790. To this end, the remedial goal of section 105(c) is to Arestore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination.@ Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 142 (February 1992).

Disposition of a constructive discharge allegation is a delicate issue because of the potential for abuses by operators, as well as complainants, that undermine the Mine Act=s fundamental purpose of encouraging the legitimate free exercise of miners= rights that is so Aessential to the achievement of safe and healthful mines@. Elias Moses, 4 FMSHRC at 1478. The Mine Act is a remedial statute. It seeks to discourage discriminatory conduct and make victims of discrimination whole through back pay and reinstatement.

In addressing whether a constructive discharge occurred in these cases, I am keenly aware that direct evidence of discriminatory motive is rare and that discriminatory intent may be established through circumstantial evidence. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev=d on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir 1983). However, in cases such as these, where complainants have been called back to work after a discriminatory discharge, an operator=s defense that a constructive discharge claim is disingenuous, because the complainants were not interested in returning to work, must also be established by circumstantial evidence.

In the instant cases, Bowling and Ball contend they were the victims of constructive discharges upon their return to work after Tony Mayes had offered their jobs back on March 22, 1995. Thus, Bowling and Ball have the burden of establishing that they were forced to endure the requisite intolerable working conditions that forced them to quit their jobs on March 29, 1995. An analysis of the circumstantial evidence surrounding the alleged intolerable working conditions during the period in issue follows.

Wednesday, March 22, 1995

Following Bowling and Ball=s March 7, 1995, discriminatory discharge, Tony Mayes telephoned both complainants on March 22, 1995. As a result of Tony Mayes= phone calls, Bowling agreed to return to work on Thursday, March 23, 1995.

Mayes stated Ball agreed to return to work on Friday, March 24, 1995. Ball maintains he agreed to return to work on Monday, March 27, 1995, because he did not have money for gas and he had an appointment to upgrade his commercial driver=s license.

Both Mayes and Ball agree that Ball did not intend to return to work immediately. I credit Mayes testimony that Ball indicated he would return to work on Friday, March 24, 1995, over Ball=s testimony. Mayes= testimony is consistent with the testimony of Bowling and Ball with respect to other details of these conversations. Moreover, contemporaneous notes made by the respondents reflect that Ball was due back to work on March 24. (Resp. Ex 4). Finally, Ball=s contention that he could not return to work until the following Monday because he lacked gas money is unavailing since he routinely rode with Bowling, and, he knew Bowling was scheduled to return to work as of March 23. Ball=s failure to return to work immediately undermines his asserted interest in returning to his job.

Thursday, March 23, 1995

Ball did not report to work on March 23, 1995. Bowling reported to work at 5:00 a.m. He refused to drive truck #139 based on Ahis previous experience with the truck.@ There is no evidence that he spoke to truck mechanic Bennett about the condition of #139 on March 23, or, that he took any action to secure the repairs he claimed the truck needed. Bowling left the truck lot in the early morning hours of March 23. The respondents claim Bowling left after one hour and that he stated he would wait for the results of MSHA=s investigation. I credit Mayes testimony in this regard as it is undisputed that Bowling did not return to work the next day and Bowling has not provided a credible explanation for his absence.

Friday, March 24, 1995

Significantly, neither Bowling nor Ball reported to work on Friday, March 24, 1995. Bowling testified that he Acalled in sick to the guard shack.@ There is no corroborating evidence that Bowling called in sick. Nor is there any evidence about the details of his reported illness. Finally, Bowling=s purported call reporting his illness to Mountain Top on March 24 is belied

by his admission that he called Mayes at approximately 6:00 a.m. on Monday, March 27 to ask if he still had a job.

As noted, Ball also did not report to work on Friday, March 24, 1995. I credit Tony Mayes= testimony that Ball called in on May 24 to state he had no gas money, although Ball maintains he did not agree to return to work until March 27. The failure of both Bowling and Ball to report to work as expected on March 24, without adequate reasons for their absence, further undermines their claims of constructive discharge.

Monday, March 27, 1995

Bowling returned to work on Monday, March 27 after telephoning Mayes earlier that morning to inquire if he still had a job. Bowling still objected to driving #139. He had numerous complaints about #139, including a recap on the front tire that had apparently been on the truck for some time. Mechanic Bennett informed him the lights on the truck had been checked out and that the recap on the front tire was permissible. Bowling refused to drive the truck because of the broken wheel stud. Mayes did not order Bowling to drive #139 before the wheel stud was fixed. Bowling testified that he Aconcluded my truck was not going to get fixed that day unless I was to stand there all day long and see to it myself.@ Bowling was entitled to $6.00 per hour down time while his truck was being fixed. Bowling left work after 1**2** and was paid $9.00 down time. Bowling=s decision not @to stand around all day,@ although he was entitled to compensation for down time, further undermines his allegations of a constructive discharge.

Ball reported for work on Monday, March 27, 1995. Mayes gave him the choice to select #139, which Bowling refused to drive, or #134. Ball selected #134 and told Tony Mayes he would only drive ten hours. This remark was made as a non-negotiable ultimatum. It was apparently intended to provoke Mayes as normal cutoff times had routinely been as late as 6:00 p.m. since Ball had worked for Mountain Top. The cutoff time on March 27 was between 5:00 and 6:00 p.m.

Ball drove 7 round trips between 5:45 a.m. and 4:00 p.m. At approximately 4:00 p.m., Riley saw Ball in his car leaving the haul road. Ball testified Riley approached him and asked Awhere in the hell are you going?@ (I, 138). Ball replied he was going home because he was Aonly required to drive ten hours a day, and that=s what I=ve been told is the safe and legal limit, and that=s all I=m going to operate your truck.@ Id. Thus, Ball left work without the approval of Mountain Top management.

Before leaving Ball reportedly complained to Lee Payne, a truck mechanic who was not called as a witness, about the condition of his truck. Ball alleged the U-joint on #134 was loose and made the truck Awander real bad.@ Tony Mayes stated the U-joint was checked and it was determined that it was not defective.

Tuesday, March 28, 1995

Bowling and Ball drove to work together on Tuesday, March 28, 1995. Upon arriving at work Ball asked Riley if he was fired Abecause of the incident yesterday afternoon.@ Riley told him he had not been fired. Bowling made a similar inquiry the previous morning when he asked Tony Mayes if he was fired. Bowling refused to drive #139 because the wheel stud had not been fixed. Bowling=s testimony does not reflect that he made any significant effort to inquire about driving an alternative truck. (I, 444-45, 476). Similarly, Ball refused to drive #134 because of the claimed loose U-joint.

Tony Mayes then offered Ball truck #147, the truck Ball had driven prior to his March 7 discharge. Ball said he would only drive the truck after he preshifted it. Tony Mayes accused him of being a Acry-ass@ who Awanted to preshift everything in the damn lot.@ As discussed below, Mayes= remarks, when viewed in context, do not constitute a constructive discharge. Ball did not preshift #147. Rather, he and Bowling left the truck lot together in Bowling=s pickup.

Wednesday, March 29, 1995

Tony Mayes called Bowling and Ball about returning to work. Both Bowling and Ball testified that they declined to return to work because of all the Acussing@ that had gone on.

Additional Findings and Conclusions

A review of the above events reflects that Bowling and Ball acted in concert. They both failed to report to work on Friday, March 24 without providing a credible reason. Their absence from work on March 24, coupled with Bowling=s statement on March 23 that he would wait for the results of MSHA=s investigation, fails to support their contention that they truly desired to return to their jobs. Bowling and Ball=s inquiries into whether they had been Afired,@ when they had not been told they were fired, were manipulative, and are additional indications that they were not interested in returning to work.

With regard to the condition of the trucks in issue, I note these vehicles are haulage trucks used to transport multi-ton loads over unpaved mountain roads. While these trucks must be maintained in safe operating condition, reasonable people may differ over when a component part requires replacement. Although mine operators are subject to civil penalties for unsafe equipment, the Mine Act does not strip operators of their authority to determine when equipment should be repaired, or removed from service. In this regard, the respondents= records for the period March 22 through March 29, 1995, reflect that trucks were frequently removed from service for repair. (Resp. Ex. 4).

Ball=s assertion that #134 had a loose U-joint is self-serving and uncorroborated. For example, there is no evidence of similar U-joint complaints by any driver who used #134 immediately prior to Ball. More significantly, Ball operated #134 for 10 hours on March 27, 1995, without removing the truck from service. By his own admission, Ball stopped driving at 4:00 p.m. on March 27 because he was Aonly required to drive ten hours a day,@ not because #134 was unsafe to drive. Thus, his refusal to drive the truck the following morning, purportedly for reasons of safety, is inconsistent with his uninterrupted operation of the truck the previous day. Moreover, the respondents= records reflect truck #134 was repaired as recently as Wednesday, March 22, 1995, when the rear end was serviced by replacing the ring gear and pinion, spur shaft, and bullgear with a new axle gear kit. (Resp. Ex. 4).

It is noteworthy that Ball demonstrated little enthusiasm for driving truck #147 on March 28, 1995, although his March 9, 1995, discrimination complaint specifically requested reassignment to #147. Ball=s conduct in insisting on preshifting #147, when viewed in context, was provocative and calculated to antagonize. Obviously, preshifts are required. However, Mountain Top=s policy called for drivers to mark checkoff sheets throughout the day detailing maintenance problems that occurred as the shift progressed. The checkoff sheets, annotated with maintenance problems, were turned in at the truck lot at the end of the day. Thus, the trucks, in fact, had been preshifted in that the previous driver had evaluated the trucks at the end of the previous day. Moreover, Ball could have taken #147 out of service if he experienced a significant problem before exiting the truck lot.

With respect to Bowling, he repeatedly left work shortly after reporting and made no attempt to stay at work, compensated

for down time, to ensure that his truck was repaired, or, to wait for another truck to be assigned. Upon returning to work, Bowling was at work approximately 1**2** hours on Thursday, March 23; he did not report to work on Friday, March 24; he was at work 1**2** hours on Monday, March 27; he reported to work but did not get out of his pickup on Tuesday, March 28; and he refused to return to work on Wednesday, March 29.

With respect to the condition of truck #139, obviously, being required to drive an unsafe truck is an intolerable condition. While the evidence is equivocal concerning whether one rear broken wheel stud justifies a truck=s immediate removal form service, Bowling=s refusal to drive #139 with a broken wheel stud is protected activity if it was made in good faith. However, as discussed herein, the credible evidence reflects his complaint was pretextual in nature given Bowling=s other provocative conduct and his refusal to work past 3:00 p.m. Moreover, even if Bowling=s refusal to drive #139 was protected, there is no evidence that his refusal resulted in his discharge.

Turning to the complainants= truck assignments, the Commission has stated that its jurisdiction is limited to ensuring that miners= rights under the Act are protected. The Commission=s function is not to pass on the wisdom or fairness of the asserted business justifications for a particular business decision, but rather, to determine if such justifications are credible, and, if so, whether they would have motivated the operator as claimed. Bradley v. Belva, 4 FMSHRC 982, 993 (June 1982). Here, Tony Mayes expressly asked investigator Harris whether he could assign Bowling and Ball to any truck if he rehired them. Harris replied that Mayes could assign them to any truck as long as it was safe and preshifts were done. (I, 735). Mayes testified that his inquiry was motivated by his desire to prevent resentment from other truck drivers over truck reassignments. This is a reasonable business concern.

Moreover, even if Mayes= failure to assign Bowling and Ball to their former trucks was motivated by their protected activity, the Mine Act does not sanction work refusals for adverse personnel actions that do not create intolerable conditions. Under such circumstances miners can file discrimination complaints to remedy the adverse personnel action. The fact that #134 or #139 may not have been as desirable as Bowling and Ball=s former trucks, because they were older models, does not constitute intolerable working conditions.

Finally, the asserted safety problems as the motivation for Bowling and Ball=s refusals to drive #134 or #139, are

inconsistent with their predisposition, expressed in their March 9, 1995, MSHA discrimination complaints, to drive only trucks #144 and #147. (Gov. Ex. 9). It is worth noting that it was not uncommon for Bowling and Ball to be assigned trucks other than #144 and #147. For example, Bowling drove #134 on February 11, 1995, and #150 on March 6 and March 7, 1995. (Miner=s Ex. 10). Ball drove #134 on February 3, February 6, February 10, and February 13 through 16, 1995, and #138 on February 12, 1995. (Miner=s Ex. 9).

Bowling and Ball allegedly refused to return to work because they were offended by the respondents= language. Remarks such as accusing Bowling of Anitpicking shit,@ or Ball of being a Acry-ass,@ do not constitute intolerable working conditions under these circumstances. There is no evidence of any personal threats. Passions run high in labor disputes and epithets and accusations, particularly by truck drivers, are not uncommon in such instances. Crown Central Petroleum Corporation v. NLRB, 430 F.2d 724, 731 (5th Cir. 1970).

The Reliance on DOT Regulations

Finally, and most importantly, Bowling and Ball=s refusal to work Aa minute@ more than ten hours per day, although they had routinely worked as long as 12 hour days, was unreasonable. According to Bowling=s interpretation of DOT=s ten-hour rule, it was Aillegal@ for him to drive Aone minute@ past 3:00 p.m. if he began work at the routine 5:00 a.m. starting time. (I, 456-59). Bowling=s interpretation of the DOT regulations would require his last load to occur prior to 2:00 p.m. For example, if Bowling last loaded at Huff Creek at 1:50 p.m., he could not complete another 1**3** hour round trip to return to Huff Creek for another load before 3:00 p.m. These work day limitations would destroy Mountain Top=s ability to fulfill its contractual obligations with Lone Mountain. Consequently, Bowling and Ball=s adherence to their interpretation of DOT=s ten-hour rule, regardless of their sincerity, was unreasonable and provided an independent justification for their termination. 4 FMSHRC at 993.

Ironically, Bowling and Ball took it upon themselves to enforce DOT=s Aten-hour rule@ even though DOT=s investigation failed to confirm Mountain Top=s alleged non-compliance. In this regard, the fact that drivers routinely worked from 5:00 a.m. until as late as 6:00 p.m. cutoffs was easily ascertainable and presumably known to DOT investigators. In fact, DOT failed to conclude that Mayes Trucking=s Colen Kelly had violated the ten hour rule although it was aware Kelly had

worked as a truck driver for a 12**2** hour workday. (Gov. Ex 7).

DOT=s failure to cite Mayes Trucking for violating the ten hour rule, a rule that is intended to restrict driving hours for long haul interstate trucking, is not surprising given Mountain Top=s short truck route. The trip from the Huff Creek facility to the processing plant was approximately 8 miles, consisting of approximately 6 miles on a private haulage road and only 2 miles on state road 38. Moreover, it is difficult to apply the ten hour standard to the facts in these cases because it is difficult to determine how many work hours constitute driving more than ten hours. A total of 40 trucks, including those operated by Hillis Breese, were traveling this 8 mile route. Driving time for the 1**3** hour round trip was diminished by the varying times for waiting in line to load, weigh at the scale house, and unload at the dump site.

Additionally, while there was a disincentive to stop for extended lunch periods because drivers were paid by the load, Geraldine Perkins, who operated a snack shop on state road 38, testified most drivers stopped daily for varying periods of time. (II, 455). For example, she estimated that Bowling and Ball patronized her snack shop two to three times per day. (II, 455).

Even if Bowling and Ball misapplied DOT=s ten hour rule, they argue that their work refusal is still protected because it was reasonable and made in good faith. However, as discussed below, the complainants= argument fails because their work refusal lacks the fundamental condition precedent, i.e., fear of a discrete hazard.

Section 105(c) confers on a miner the right to refuse to work if he sincerely believes his working conditions expose him to an identifiable danger. Thus, the right to refuse work is personal to the miner who fears a perceived danger. Although objective proof that an actual hazard existed is not necessary to support a protected work refusal, the miner must demonstrate a reasonable basis for concluding that he was exposed to an actual risk. Secretary of Labor on behalf of Hogan v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (July 1996), aff=d mem., 829 F.2d 31 (3rd cir. 1987). In this regard, good faith complaints by Bowling or Ball of personal illness or fatigue posing a discrete safety hazard during a workday, regardless of how many hours they had worked that day, would be protected activity. In other words, it is the actual personal illness or fatigue, not the number of hours worked, that creates the protected, reasonable basis for the perceived hazard.

As an illustration of this concept, it is helpful to contrast two cases previously brought before this Commission. In Walter A. Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (January 1984), the Commission concluded that a miner=s unexcused early departure from work, in a situation where the operator had a policy requiring employees to work overtime each day, was not protected by the Act. In Lizza, there was no showing that Schulte=s early departure was necessitated by specific concerns for his personal safety. However, in James Eldridge v. Sunfire Coal Company, 5 FMSHRC 408, 464 (March 1983), Judge Koutras found Eldridge=s work refusal was protected when he refused to work beyond his normal shift because of his communicated concerns that he was Atoo tired and exhausted@ to continue working on a pillar section until the entire pillar was extracted.

Thus, the Commission=s framework for a protected work refusal requires Aa direct nexus between performance of the refusing miner=s work assignment and the feared resulting injury to [himself or] another miner.@ Cameron, 7 FMSHRC at 324. Here, Bowling and Ball=s work refusal is predicated on their disinclination to drive more than ten hours as a matter of policy, rather than being motivated by their fear of a discrete safety hazard brought about by their physical condition. Thus, in the final analysis, their refusal to Adrive@ more than ten hours per day lacked the requisite nexus to any identifiable discrete safety hazard. Consequently, their work refusal, with respect to limiting the hours they were willing to work, is not protected activity under the Act.

The complainants assert that the respondents= actions from March 22 through March 29, 1995, must not be viewed in isolation. Thus, they argue the circumstances surrounding their March 29, 1995, terminations were intimately connected to their earlier protected activities, i.e., their March 7 complaints about long work hours and the filing of their discrimination complaints on March 9. Consequently, it is alleged the respondents had a Apredisposition@ to get rid of Bowling and Ball whom the company believed were Atroublemakers.@ (Complainants= Findings at 39-40).

The Complainants miss the point. The March 7 complaints concerning excessive work hours, and the filing of their discrimination complaints based on those long workdays, were protected activities that serve as the basis for their March 7 protected work refusal. However, the complainants= expressed refusals to Adrive@ more than 10 hours per day after they were called back to work by Tony Mayes constituted unprotected and

potentially disruptive activity. The Mine Act does not confer on miners the unilateral authority to determine their own work hours. Their work refusals provide an independent basis for their discharge. AUnreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection....@ Robinette, 3 FMSHRC at 811.

Ultimate Findings and Conclusions

It is undisputed that Bowling and Ball refused Tony Mayes= March 29, 1995, telephone offer to return to work. The complainants have the burden of demonstrating that their refusal to return to work was reasonable, and protected activity under the constructive discharge doctrine. However, Bowling and Ball have not demonstrated that they were forced to endure intolerable working conditions that forced them to refuse to return to work. Rather, their actions during the period March 22 through March 29, 1995, were provocative in nature and evidenced attempts to provoke their discharge for the apparent purpose of preserving their pending discrimination complaints. But cf. Hogan, 8 FMSHRC at 1072 (two miners= work refusals were protected where each miner Aacted individually, without knowledge of the intentions of the other,@ and there was no evidence Asuggesting a likelihood of pretext or ulterior motive for their actions@).

Moreover, their refusals to work more than ten hour days, conditions they had previously accepted, provided an independent and unprotected basis for their termination. Consequently, the discrimination complaints of Bowling and Ball only entitle them to the protections and relief available under section 105(c) from March 8, 1995, the day following their discriminatory discharges, through March 22, 1995, the day they were offered reinstatement.

Liability

Successorship Liability

The related temporary reinstatement decision in these matters established that Mayes Trucking is liable in these discrimination proceedings as the successor corporation of Mountain Top. That decision noted the Commission's successorship standard in discrimination cases is well settled. Secretary on behalf of James Corbin et al. v. Sugartree Corp., Terco, Inc., and Randal Lawson, 9 FMSHRC 394, 397-399 (March 1987), aff'd sub nom. Terco Inc. v. FMSHRC, 839 F.2d 236, 239 (6th Cir. 1987). See also Secretary on behalf of Keene v. Mullins, 888 F.2d 1448, 1453 (D.C. Cir. 1989). Under this standard, the successor operator may be found liable for, and responsible for remedying,

it's predecessor's discriminatory conduct. The indicia of successorship are:

> (1) whether the purported successor company had notice of the underlying charge of possible discrimination; (2) the ability of the purported successor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the purported successor uses the same plant; (5) whether the purported successor employs the same work force; (6) whether the purported successor uses the same supervisory personnel; (7) whether the same job exists under substantially the same working conditions; (8) whether the purported successor uses the same machinery, equipment and methods of production; and (9) whether the purported successor produces the same product. See Terco, 839 F.2d at 239; Mullins, 888 F.2d at 1454.

The temporary reinstatement decision noted Acompelling evidence@ of successorship. 17 FMSHRC at 1708-09. With regard to notice, Tony Mayes, President of Mayes Trucking, clearly had knowledge of the alleged discriminatory conduct. Turning to the other criteria of successorship, the temporary reinstatement decision noted:

> (1) Mayes Trucking employs Riley, the same truck foreman; (2) to supervise the same drivers; (3) to drive the same trucks; (4) to haul coal from the same mine site to the same processing plant; (5) over the same route; precisely as Mountain Top had done. 17 FMSHRC at 1709.

Thus, Mayes Trucking was determined to be the successor to Mountain Top. Consequently, Mayes Trucking and Mountain Top are jointly and severally liable for the relief awarded in these proceedings.

Personal Liability

In addition to Mayes Trucking=s liability as a successor of Mountain Top, the complainants assert that David Riley, Elmo Mayes and Tony Mayes are personally liable under section 105(c). Section 105(c)(1) provides, in pertinent part, that Ano person shall discharge or in any manner discriminate against ...any miner...[who] has filed or made [a safety related] complaint under or related to this Act....@ (Emphasis added).

Section 3(d) of the Act, 30 U.S.C. ' 802(d), defines Aoperator@ as Aany ...person who operates, controls, or supervises a coal or other mine or any independent contractor performing services ...at such mine.@ (Emphasis added).

Section 3(f) of the Act, 30 U.S.C. ' 802(f), defines Aperson@ as Aany individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.@ (Emphasis added). Significantly, section 3(f) does not include Aagents@ of these business entities within the meaning of Aperson.@[11] Rather, liability as a 105(c) Aperson@ generally only attaches if there is a proprietary interest.

Thus, the term Aperson@ under section 105(c), when read in conjunction with sections 3(d) and 3(f) of the Act, includes any business entity, regardless of its structure, that operates a mine, or that performs independent contractor services at a mine. Although operators can be held accountable for violations of section 105(c) committed by Aagents,@ such agents are not individually liable under section 105(c) of the Act, for only operators are capable of providing the back pay and reinstatement relief contemplated under section 105(c). To make an agent jointly and severally liable with an operator under section 105(c) is to elevate an agent to the status of a principal.

There may be instances where an individual, without a cognizable proprietary interest, exercises complete de facto control. In such instances, 105(c) liability may be predicated on this individual=s status as an Aoperator@ given his total control of the mine. For example, in Glenn Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463 (December 1980), relied upon by the complainants, Ralph Baker, the manager who was responsible for the day to day operations of the Smitty Coal Company mine, was ordered to reinstate the complainant, Munsey, after Baker had incorporated a new company, Mason Coal Company, and refused to rehire him. However, in addition to being the mine manager, Ralph Baker, along with Smitty Baker, apparently was also a principal in the corporate respondent. See Glenn Munsey v.

[11] The term Aagent@ as defined in section 3(e), 30 U.S.C. ' 802(e), includes Aany person charged with...the supervision@ of miners.

Smitty Baker Coal Co., Inc., Ralph Baker, Smitty Baker, and P&P Coal Company, 8 IBMA 43 (June 30, 1977).

The conclusion that only Aoperators@ are liable under 105(c) is consistent with Commission precedent. In Robert Simpson v. Kenta Energy, Inc., & Roy Dan Jackson, 11 FMSHRC 770 (May 1989) the Commission determined that Jackson, Kenta=s President, was personally liable for back pay and reinstatement under section 105(c) because:

> Jackson was the real Aoperator,@ the real Aperson@ in control of the personnel actions at the mine. The point of this approach was to show that Jackson should not be permitted to Ahide@ behind the corporate veil. 11 FMSHRC at 780.

By contrast, Riley was not a corporate officer of Mountain Top or Mayes Trucking. Rather, Riley was an Aagent@ who answered to, and sought the approval of, Elmo and Tony Mayes. The notion that ordinary supervisors, such as Riley, can be held jointly or severally liable with their employers in discrimination cases under 105(c) for back pay and reinstatement is lacking in foundation. After all, a condition precedent to liability under 105(c) is the ability to provide the requested relief, i.e., the relief required to make victims of discrimination whole. 2 FMSHRC at 3466. Rank-and-file supervisors are not capable of providing such relief.

Although agents are not personally liable under 105(c), a corporate agent Awho knowingly authorized, ordered, or carried out . . . [a] violation@ committed by a corporate operator may be subject to individual liability for civil penalties under section 110(c) of the Mine Act, 30 U.S.C. ' 820(c). The proper legal standard for the purpose of determining 110(c) liability is whether the corporate agent Aknew or had reason to know@ of a violative condition. See Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992) citing Secretary v. Roy Glenn, 6 FMSHRC 1583, 1586 (July 1984) and Kenny Richardson, 3 FMSHRC 8, 16 (January 1981). The Commission has consistently held that a Aknowing@ violation under section 110(c) involves aggravated conduct, not ordinary negligence. Id., citing Emery Mining Corporation, 9 FMSHRC 1997, 2003-04 (December 1987).

Although Riley, as a truck foreman, is not personally liable as an Aagent@ under 105(c), he may be subject to the civil penalty provisions of section 110(c) for acts committed in violation of any provision of the Act. However, the Secretary

has not brought a 110(c) civil penalty proceeding alleging that Riley Aknowingly@ violated section 105(c).

Even if the Secretary had brought a 110(c) case against Riley, whether the Secretary could prevail on the Aknowingly@ violated standard in section 110(c) is uncertain. With respect to Jackson, it was Elmo Mayes, not Riley, that created the circumstances behind Jackson=s protected work refusal. With regard to Bowling and Ball, Riley=s conduct demonstrated no disparate treatment. Riley was requiring Bowling and Ball to work the extra hours required of all Mountain Top and Hillis Breese truck drivers. While Bowling and Ball=s initial work refusal was protected, the issue of whether Riley Aknowingly@ violated section 105(c) on March 7, 1995, remains in doubt.

Accordingly, the discrimination complaints filed pursuant to section 105(c) of the Act against David Riley shall be dismissed. Similarly, the Secretary=s amended discrimination complaints seeking to impose civil penalties on Riley under section 105(c), filed on September 15, 1995, shall also be dismissed.[12]

Liability under section 105(c) with respect to Elmo and/or Tony Mayes is based on whether the complainants have demonstrated they were the Areal operators@ in that they were the Areal persons@ in control of the personnel decisions at the mine. 11 FMSHRC at 780. Resolution of this issue hinges upon whether they exercised the requisite Acontrol@ over the haulage operations at Huff Creek.

There is ample evidence demonstrating that Elmo Mayes= relationship with Mountain Top was not an arms length equipment leasing arrangement. Elmo Mayes received ten percent of Mountain Top=s net profits from its hauling operations. Mountain Top operated under a Fuel Tax License issued by the State of Kentucky to Elmo Mayes, d/b/a E&T trucking. In addition to owning Mountain Top=s trucks, Helen Mayes, Elmo=s wife, signed and issued the pay checks for Mountain Top=s drivers. Elmo Mayes brought

[12] The Secretary=s September 15, 1995, amended discrimination complaints seeking to impose civil penalties against Elmo and Tony Mayes uunder section 105(c) are consistent with Commission Rule 44, 29 C.F.R. ' 2700.44. Rule 44 authorizes the Secretary to seek civil penalties against parties in a 105(c) proceeding that are consistent with the penalty criteria in section 110(i), 30 U.S.C. ' 820(i). Riley, however, is not a proper party in this matter.

the payroll checks to the job site and sometimes distributed them to Mountain Top=s drivers.

Riley had previously worked for Elmo Mayes as an E&T truck driver for nine years. Kip Bays was also previously employed by Elmo Mayes. Elmo Mayes had a two-way radio in his home that he used to communicate with Riley in his truck. Bays and Riley deferred to Elmo Mayes= management decisions. For example, it was Elmo Mayes who selected Jackson as the cutoff truck on February 17, 1995, without any concurrence from Riley or Bays.

Riley kept Elmo Mayes informed of the number of loads hauled and the number of trucks running. Sometimes Elmo Mayes was on the job site three or four days a week if there were problems. Elmo Mayes occasionally rode with drivers on the haul route to check on the condition of trucks. He retained the authority to remove a truck from service.

Elmo Mayes had an input in job assignments and he had the authority to fire Mountain Top employees. In this regard, Elmo Mayes approved Jackson=s mud haulage assignment so that Jackson could acquire experience as a truck driver. When Jackson asked Riley for time off to attend a computer class, Riley sought approval from Elmo Mayes. Elmo Mayes unilaterally fired Jackson on February 17, 1995, and Bowling and Ball on March 7, 1995. In fact, Kip Bays was unaware of the circumstances surrounding Bowling and Ball=s March 7 terminations, and he was not familiar with the facts concerning their subsequent return to work.

Significantly, numerous non-party witnesses testified regarding the control exercised by Elmo and Tony Mayes over virtually every aspect of Mountain Top=s operations. For example, Billy Jack Lefevers, Mountain Top=s loader operator, stated that he considered Tony his boss. When he asked Riley for a raise he was told Ayou need to talk to Tony or Elmo.@ (I, 389). In response to his inquiry Elmo told Lefevers, Alet me run the numbers, see how things work out.@ (I, 390). Kelly, Lone Mountain=s scale man, testified drivers respected and obeyed Elmo Mayes when he designated them as cutoff driver. As a further reflection of the commonality of interests between Elmo Mayes, Tony Mayes and Mayes Trucking, Billy Joe Earl, a former Mountain Top driver, testified he was given farm work by Elmo Mayes for approximately six months beginning in June 1995, although he continued to receive his paycheck from Mayes Trucking, after he was suspended by Lone Mountain for passing a truck on its haulage road.

Finally, Elmo Mayes was aware that drivers were working extremely long hours during the winter of 1995. He opined that Aa man is human@ and that the amount of work hours that could be tolerated safely Adepends on the driver.@ (II, 293). In this regard Elmo Mayes explained, AI never asked a man to do anything I wouldn=t do myself.@ (II, 291). Thus, Elmo Mayes supported the extended working hours in the winter of 1995 that gave rise to the discrimination complaints in these proceedings.

Thus, the evidence, when viewed in its entirety, reflects Elmo Mayes exercised unfettered control of Mountain Top=s haulage operations. His total control, without any need for approval from Bays, Tony Mayes or Riley, provides an adequate basis for concluding that he was an Aoperator@ as contemplated by section 3(d) of the Act at the time of the subject discriminatory acts in February and March 1995. As such, Elmo Mayes is a responsible party liable under section 105(c) of the Act.

The evidence establishing operator status for Tony Mayes is equally convincing. Tony Mayes was at the Huff Creek site since October 1994. Kip Bays testified he transferred all control of operations to Tony Mayes in February 1995 so that Bays could tend to his ailing mother. This testimony alone supports the conclusion that Tony Mayes was a person in control.

Tony Mayes control was demonstrated by his assignment of drivers to trucks. Truck mechanics needed his approval for repairs. The record reflects Tony Mayes also supervised foreman Riley. Significantly, Tony Mayes represented Mountain Top in its dealings with MSHA investigator Harris. Finally, it was Tony Mayes who recalled Bowling and Ball to work. It was also Tony Mayes who told Carver, a Mountain Top truck driver, that Jackson could have his job back if he apologized, although their is no credible evidence that Jackson was ever offered re-employment. Thus, Tony Mayes is also a proper party in these proceedings.

ORDER

Accordingly, the Secretary=s request to withdraw the discrimination complaint filed by David Fagan in Docket No. KENT 95-615-D **IS GRANTED**. Consequently, Docket No. KENT 95-615-D **IS DISMISSED** with prejudice. In addition, as discussed herein, William David Riley is not a proper party to these 105(c) proceedings. Therefore, the discrimination complaints in these matters as they pertain to Riley **ARE DISMISSED**.

For the reasons set forth above, Walter Jackson=s February 17, 1995, work refusal was reasonable, and therefore protected activity under section 105(c) of the Act. Accordingly, Jackson=s discrimination complaint **IS GRANTED**. Similarly, the initial March 7, 1995, work refusals of Lonnie Bowling and Everett Darrell Ball were also reasonable, and therefore entitled to statutory protection under the provisions of section 105(c). Therefore, Bowling and Ball=s March 9, 1995, discrimination complaints **ARE GRANTED IN PART**.

However, Bowling and Ball have failed to establish they were the victims of a constructive discharge after they were offered reinstatement on March 22, 1995. Moreover, their refusal, upon their return to work, to accept cutoff times as late as 6:00 p.m., which was the cutoff time required of all other drivers, and, which was the cutoff time they had originally accepted upon being hired, was unreasonable and unprotected by the Act. Consequently, their refusal to work the hours required of them provided an independent and unprotected basis for the termination of their employment. Therefore, Bowling and Ball=s discrimination complaints with respect to their refusals to return to work on March 29, 1995, **ARE DENIED**.

The period for which relief awarded to Jackson under section 105(c) shall be calculated from February 18, 1995, the day following his protected work refusal, to the present time. The period for which relief under section 105(c) shall be awarded to Bowling and Ball is from March 8, 1995, the day following their protected initial work refusals, through March 22, 1995, the day they were offered reinstatement.

For the reasons discussed above, **IT IS ORDERED** that Mountain Top Trucking, Inc., Mayes Trucking, Inc., Anthony Curtis Mayes and Elmo Mayes, are jointly and severally liable for the relief that shall be awarded to Jackson, Bowling and Ball in these discrimination matters.

Consequently, **IT IS FURTHER ORDERED** that:

1. Within 21 days of the date of this decision, the parties shall confer in person or by telephone for the purposes of:

(a) with respect to Bowling and Ball, stipulating to the amount of back pay and interest computed from March 8, 1995, through March 22, 1995, less earnings from other employment, if any, during this period;

(b) with respect to Bowling and Ball, stipulating to any other reasonable and related economic losses or relevant litigation costs incurred as a result their March 7, 1995, termination;

(c) with respect to Jackson, stipulating to a suitable position and salary, if any, to which Jackson should be reinstated as an employee of any of the named respondents who are liable in these proceedings, or, in the alternative, agreeing on economic reinstatement terms (i.e., a lump sum agreed upon payment in lieu of reinstatement);

(d) with respect to Jackson, stipulating to the amount of back pay and interest computed from February 18, 1995, to the present, less deductions for earnings from other employment, or deductions for periods when Jackson was not available for employment, if any;

(e) stipulating to any other reasonable and related economic losses or relevant litigation costs incurred as a result of Jackson=s February 17, 1995, discharge.

2. If the parties are able to stipulate to the appropriate relief, they shall file with the judge, within 30 days of the date of this decision, a Proposed Order for Relief. The respondents= stipulation of any matter regarding relief shall not waive or lessen their right to seek review of this decision on liability or relief.

3. If the parties are unable to stipulate to the relief, the complainants shall file with the judge and serve on opposing counsel, within 30 days of the date of this decision, Proposed Orders for Relief. The complainants= proposed orders must be supported by documentation such as check stubs from prior or current employment, if any, tax returns and W-2 forms, and bills and receipts to support any other losses or expenses claimed. In addition, Jackson=s Proposed Order for Relief should explain why he withdrew his application for temporary reinstatement in this matter.

4. If the complainants file Proposed Orders for Relief, the respondents shall have 14 days to reply. If issues on relief are raised, a separate hearing on relief will be scheduled.

5. This decision shall not constitute the judge's final decision in this matter until a final Decision on Relief is

entered. The final Decision will address the issue of what civil penalties, if any, should be imposed in these matters.

Jerold Feldman
Administrative Law Judge

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