FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

October 21, 2005

SECRETARY OF LABOR, MSHA,	:	DISCRIMINATION PROCEEDINGS
ON BEHALF OF WENDELL McCLAIN,	:	
COY McCLAIN, WADE DAMRON,	:	Docket No. KENT 2005-96-D
AND GARY CONWAY,	:	PIKE CD 2004-07
Complainants	:	
	:	Docket No. KENT 2005-97-D
v.	:	PIKE CD 2004-08
	:	PIKE CD 2004-12
	:	PIKE CD 2005-01
	:	
MISTY MOUNTAIN MINING, INC.,	:	Docket No. KENT 2005-98-D
STANLEY OSBORNE AND	:	PIKE CD 2004-09
SIMON RATLIFF,	:	
Respondents	:	Docket No. KENT 2005-99-D
	:	PIKE CD 2004-10
	:	
	:	Mine ID 15-18663

DECISION

Appearances: Marybeth Zamer Bernui, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Complainants;
Wes Addington, Esq., Appalachian Citizens Law Center, Inc., Prestonsburg, Kentucky, for Miner Complainants;
Stanley Osborne, Vice President, Misty Mountain Mining, Inc., Jonancy, Kentucky, *Pro Se* and for Misty Mountain Mining, Inc.;
Simon Ratliff, Lookout, Kentucky, *Pro Se*.

Before: Judge Hodgdon

This case is before me on Discrimination Complaints brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Wendell McClain, Coy McClain, Wade Damron and Gary Conway against Misty Mountain Mining, Inc., Stanley Osborne and Simon Ratliff pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A trial was held in Pikeville, Kentucky. For the reasons set forth below, I find that the Complainants were discharged by Misty Mountain Mining because they engaged in activities protected under the Act.

Background

Misty Mountain Mining, Inc., owned and operated Mine No. 5, located near Jenkins in Letcher County, Kentucky, from July until November 13, 2004. Misty Mountain Mining, Inc., is owned by Stanley Osborne. From July through October 14 the Mine Superintendent was Simon Ratliff, who was in charge of the day-to-day operation of the mine. During the time the mine was open, entries were mined through three lines of breaks and 8,297 tons of raw coal, resulting in 2,883 tons of clean coal, were produced.

Gary Conway was hired by Ratliff as an equipment operator on August 1, 2004. After three days of operating a shuttle car, he was reassigned to operate a roof bolter. Wade Damron was hired in mid-August to assist Conway on the roof bolter. Coy McClain was hired in mid-August to operate a shuttle car and scoop. His brother, Wendell McClain, was hired a week later to operate a shuttle car.

On August 30, 2004, Ratliff removed Conway and Damron from the roof bolter and assigned Coy and Wendell McClain to operate it. Damron was told to operate the scoop. When the roof bolter became stuck in the No. 3 entry, Damron brought the scoop into the mine to try to free the roof bolter. As he was going down an incline in the No. 3 entry, the scoop began "freewheeling" and Damron was not able to stop it with the brakes. He began yelling "no brakes, no brakes" and shaking his helmet light to warn Ratliff, Coy and Wendell McClain, who were standing in the entry, of his problem. Damron was finally able to stop the scoop by steering it into the rib about 20 feet from where the three were standing. Wendell McClain exclaimed to Ratliff that someone was going to be killed if they did not get the brakes on the scoop fixed.

Ratliff responded that he was not going to let anyone disrespect him like that and told Wendell that he would not be needing him anymore. He told Coy to go with him. Wendell and Coy understood this to mean that they were fired.

That same afternoon, Ratliff told Damron and Conway that they were "deadbeats" and to get their buckets and leave. Damron and Conway understood this to mean that they were fired.

Coy and Wendell McClain filed discrimination complaints with MSHA on August 30, 2004. In his complaint, Wendell stated that: "I was discharged on August 30, 2004, by Simon Ratliff, Supt., because I complained about the battery scoop not having brakes. I was told I was no longer needed and fired." (Govt. Ex. 7.) Coy said: "I was discharged on August 30, 2004, because my brother complained about the battery scoop not having brakes. Simon Ratliff, Supt., discharged me because he said he wasn't going to put up with my brother complaining about safety concerns." (Govt. Ex. 5.)

Damron and Conway filed discrimination complaints with MSHA on August 31, 2004. Conway stated that: "I was discharged on August 30, 2004, by Simon Ratliff, Supt., because I was operating a scoop which had bad brakes. I had complained about the brakes being bad for

several days prior." (Govt. Ex. 1.) Damron asserted that: "I was discharged on August 30, 2004, by Simon Ratliff, Supt.[,] because I complained about the bad brakes on the battery scoop I was operating. I had complained for several days." (Govt. Ex. 3.)

Coy McClain returned to the mine on August 31 and was permitted to continue working. The Secretary, on behalf of Conway, Damron and Wendell McClain, filed applications for the miners' temporary reinstatement on September 27, 2005.[1] Rather than holding a hearing on the applications, the parties agreed that the three complainants would be reinstated on October 4, 2004, at the same rate of pay and with the same or equivalent duties assigned to them. Wendell returned to work on October 4, but Conway and Damron did not return until October 11.

The four miners were only permitted to work a few hours each day before Ratliff would send them home for the day. At the same time, other employees remained working at the mine.

On October 14, 2004, Ratliff told the four complainants that he could not work with them anymore. Believing that they had been fired again, the four left the mine. Ratliff quit the same day and the mine was closed until October 25, 2004, while Osborne hired a new superintendent.

The Secretary filed an Application for Temporary Reinstatement on behalf of Coy McClain on October 22, 2004. Wendell McClain returned to work at the mine when it reopened on October 25 and continued to work there until the mine closed on November 14, 2004. When the mine closed, Osborne offered Wendell a job at the Misty Mountain Mining Mine No. 2, but he declined the offer claiming that it was too far from his home and that he had no money for gas to drive there.

Osborne told Rick Hamilton, the MSHA Special Investigator investigating the discrimination complaints, on October 22, that Coy McClain, Conway and Damron could return to work on the 25th when the mine reopened. Coy called Osborne at home on October 24 and told him that he had another job. Neither Conway or Damron returned on October 25. On October 26 and 27, Osborne told Hamilton that he could place one of the miners at another mine. On October 28, he was advised by Hamilton's secretary that both men had other jobs. On November 16, the Secretary moved to dismiss Coy McClain's temporary reinstatement application because he was working at another mine.[2]

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[1] Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides, in pertinent part, that when the Secretary receives a discrimination complaint she will begin an investigation of the complaint within 15 days, "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint."

[2] Docket No. KENT 2005-28-D, Unpublished Order (December 6, 2004).

Discrimination Complaints were filed on behalf of the four miners on December 3, 2004. The miners seek reinstatement, back pay and other ancillary damages. The Secretary also seeks civil penalties totaling $20,000.00 against Misty Mountain Mining, $10,000.00 against Stanley Osborne and $10,000.00 against Simon Ratliff.

Findings of Fact and Conclusions of Law

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

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated, at least partially, by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The evidence, as discussed below, establishes that the Complainants engaged in protected activity and that they were discharged as a result of the protected activity. For this violation of their rights under the Act, they are entitled to limited back pay, but not to reinstatement or other monetary damages. Misty Mountain Mining, Inc., and Stanley Osborne are jointly and severally liable for these damages. However, contrary to the proposal of the Complainants, neither Simon Ratliff nor Midguard Mining Company have any responsibility regarding damages in these cases.

Protected Activity

There is no doubt that all four complainants engaged in protected activity while working at Mine No. 5. Conway testified that he complained about the lack of brakes on the shuttle car, the fact that the dust filter on the roof bolter did not work and the failure of the automatic

temporary roof support (ATRS) on the roof bolter to reach the roof. (Tr. 25-26, 29-31, 35-36, 58-60.) Damron reported to Ratliff that the dust filter on the roof bolter did not work and told him, after having to stop it by driving it into the rib, that the scoop did not have any brakes and he was not going to drive it anymore. (Tr. 69, 77, 90-91.) Coy McClain complained about the lack of brakes on both the scoop and the shuttle car and the failure of the ATRS to reach the roof in some places. (Tr. 111-113, 116-117.) Finally, Wendell McClain testified that he informed Ratliff that the shuttle car did not have any brakes and that the ATRS did not reach the roof. (Tr. 191-92, 195-96.) He also made the statement in the presence of Ratliff, when Damron drove the scoop into the rib, that "somebody's going to get killed if Simon and them don't get some brakes fixed on the scoop." (Tr. 32-33, 76, 120, 201.)

Ratliff admitted that the men raised issues about the equipment. (Tr. 494-98.) He called it making a "report," however, and maintained that there was "a difference in complaining and getting a report." (Tr. 494.) Whatever they are called, the four miners raised safety issues which are clearly protected under the Act. Accordingly, I conclude that Damron, Conway, and both McClains engaged in protected activity.

Adverse Action

The miners claim that they were discharged on August 30, 2004, as a result of their complaints. Osborne and Ratliff maintain in their briefs that only Wendell McClain was fired, that Damron and Conway quit and that Coy McClain was not fired. (Osborne Br. at 4-5, Ratliff Br. at 1.) The preponderance of the evidence supports a conclusion that all four were fired.

There is no dispute that Wendell McClain was discharged. After making his statement about the brakes on the scoop, he testified that Ratliff told him "to get my bucket and that I was fired. He said because nobody's going to come in my mines [*sic*] and tell me that somebody's going to get hurt with a piece of my equipment." (Tr. 202.) Ratliff testified that Wendell said "you stupid SOBs are going to get somebody killed" and that "I told Wendell that I wouldn't be needing him anymore, that I wasn't going to let him cuss me and disrespect me and try to destroy the name I had as a miner." (Tr. 477.) Damron, Conway and Coy corroborated Wendell's version of the event. (Tr. 32, 76, 121.)

Despite Ratliff's testimony that he told Wendell that he was not going to let Wendell "cuss" him and "disrespect" him, neither Ratliff nor Osborne assert in their briefs that that was the reason Wendell was fired. Further, if that were the reason, neither of the Respondents has shown that Misty Mountain had a policy prohibiting swearing, had previously admonished Wendell about swearing or had fired other miners for similar statements. *Sec. of Labor on behalf of Cooley v. Ottowa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984). Rather, I find that Ratliff's testimony was an after the fact attempt to justify his firing Wendell, and that Wendell was clearly fired for his remarks about the lack of brakes on the scoop.

With regard to Coy McClain, he testified that after Ratliff fired Wendell, Ratliff told him to get his bucket and go home with his brother, which he took to mean he was also fired. (Tr. 121.) Conway, Damron and Wendell likewise thought Coy had been fired. (Tr. 34, 76-77, 202-03.) Ratliff testified that when he fired Wendell, Coy "was standing there and Coy had rode to work with Wendell that day and I told him, I said, get your bucket and go home with your brother and be back out in the morning at 6:00." (Tr. 477.) Coy testified that he did return to the mine the next day and "asked Mr. Ratliff, could I have my job back." (Tr. 126.)

I conclude that Coy McClain was discharged on August 30. I base this finding on these facts: (1) he filed a complaint with MSHA the same day that he was fired; (2) the other three miners believed that he had been fired; and, (3) the phrase "get your bucket and go home" or "go to the house" is commonly used in the coal fields as a synonym for "you're fired." (Tr. 541.) *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982). Furthermore, Ratliff's testimony that he told Coy to return the next morning is self serving and, given the heat of the moment, incredible. He implicitly admitted that he fired Coy when he testified concerning Coy's return the next day, that: "Coy had said he mistakenly thought he was fired, went over there and told them he thought he'd been fired. And when he came back out to work the next morning, I asked him if he was going to take care of the complaint that he had made against me." (Tr. 506.)

Concerning the other two Complainants, Conway testified that on the afternoon of August 30, he was having trouble keeping the parked scoop from rolling back on an aluminum cable because the parking brakes did not work. (Tr. 36.) He related that Ratliff, on observing the scoop parked on the cable, said "we was a bunch of deadbeats." (Tr. 36.) Conway further testified that he responded "is that really what you think of us? [W]e're deadbeats [?]" (Tr. 36.) He said that Ratliff replied: "[Y]eah, I do. [Y]ou boys get your buckets and get off the hill." (Tr. 36.) Conway stated that he understood this to mean he had been fired. Damron, who was also present, believed that he had been fired too. (Tr. 78.)

Ratliff's version of the incident was as follows:

> I told him that I wasn't going to put up with people not helping us work, deadbeats. I wasn't going to work with no deadbeats. I wasn't going to put up with that. So what time I was talking to Wade, Gary spoke up and said, is that what you think about us, Simon? And I wasn't talking to Gary at this time. And I said, well, yeah, I guess it is, Gary. So Gary instructed Wade to get their buckets and they left at that time.

(Tr. 478-79.)

Mike Childress, the mine foreman, was also present during this exchange. He testified that:

We quit at 2:00, at five minutes 'til 2:00. And me and Wade was walking past the head drive and Simon hollered out and said, called them knuckleheads or something like that. I thought he was kidding around and joking, you know, he's all the time doing stuff like that. And anyway, me and Wade walked up to the office and Gary jumped up and said, is that what you think of us, Simon, and he said yeah. And Gary said something else about, you know, didn't have to take that or what, something like that and said, come on, Wade, let's go.

Q. And what did Simon say?

A. He said, well, just go home. Just get your buckets then and go on.

Q. Okay. And what did you think that meant?

A. Fired.

Q. They were fired?

A. Yeah. To me, that would mean that.

Q. And why did you think they were fired?

A. Well, just by the — get you clothes, you know, if you ain't going to do nothing, just get your buckets and go to the house.

Q. Is that term commonly used in the mining industry when someone's fired?

A. Yeah, pretty much.

(Tr. 540-41.) Childress later reiterated that based on the events, he "took it as they was fired, yeah." (Tr. 544.) However, when asked by Osborne if Conway and Damron quit before Ratliff told them to go, he answered, "possibly, yeah." (Tr. 545.)

Based on a preponderance of the evidence, I conclude that Conway and Damron were fired. Childress plainly testified that he thought they had been fired. The fact that he later equivocated under pressure from the examination of his employer does not render his direct testimony unreliable. Furthermore, Conway and Damron's subsequent going to MSHA to file a complaint for being fired is consistent with their belief that that was what had happened.

Adverse Action - the Result of Protected Activity

Having concluded that the miners suffered the adverse action of being discharged, the next issue is whether they were discharged because of their safety complaints. Resolution of that question rests with Ratliff's intent or motivation. As it is obviously hard to discern what a person is thinking, the Commission has set out some guidelines for determining motivation. Thus, it has stated:

> We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.*

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

In these cases, all of the circumstantial indicia lead to the conclusion that the four miners' discharge was motivated by their safety complaints. First, the safety complaints were made directly to Ratliff, an agent of the company. Indeed, as noted above, he admitted that he was aware of them. Thus, he had knowledge of the protected activity.

Second, Ratliff showed hostility toward the protected activity. For instance: (1) He acknowledged that when Conway asked him for a filter for the roof bolter's dust collection system he told Conway that he was saving the filters for when the inspectors came, although he claimed he was just joking. (Tr. 498.) (2) When Conway and Damron asked for crib blocks to place between the roof and the roof bolter's ATRS because the ATRS would not reach the roof, Ratliff refused and told them to keep bolting. (Tr. 30.) (3) After the incident where Damron had to run into the rib to stop the scoop, when Conway tried to discuss the lack of brakes on the equipment with Ratliff, Ratliff told Conway that it was not his concern, that he was the one making the calls. (Tr. 34-35.) (4) When Conway explained that the scoop had come to a stop on an aluminum cable because the parking brakes did not work, he said that Conway and Damron were a bunch of "deadbeats." (Tr. 36, 78.)

Third, the protected activity and the adverse action occurred one right after the other. Ratliff fired Coy and Wendell McClain as a direct result of Wendell's exclamation. He fired Conway and Damron at the end of a day on which he had fired the McClains, had received several safety complaints and almost directly after Conway told him the parking brakes on the scoop did not work.

Accordingly, I conclude that Conway, Damron, Coy and Wendell McClain were discharged because of their protected activity in violation of the Act.

The Second Discharge

After the miners had filed discrimination complaints with MSHA, Conway, Damron and Wendell McClain filed applications for temporary reinstatement. The parties settled the applications for temporary reinstatement by agreeing that the miners would return to work on October 4 at the same, or similar positions, and at the same pay. Docket Nos. KENT 2005-2-D, KENT 2005-3-D and KENT 2005-4-D, Unpublished Order (October 13, 2004). Wendell returned to work on the 4th, but Conway and Damron, for unexplained reasons, did not return until the 11th.

During the week of October 11, the Complainants were sent home each day after working only a few hours, even though other miners continued working. (Tr. 42-43, 82-83, 128, 208-10.) On October 14, Ratliff called all of the employees into the office and, according to Wendell,

> he had set up on the table there and there was some wasps a-flying around. And he started, you know, a-killing them. He said I can kill these SOBs, but I can't the men that brought this complaint on me. And he said, you boys, he said, I'm not going to work with you[']ns and you all might as well get your stuff and go on home.

(Tr. 211-12.) Ratliff testified that what he meant was that he was quitting, "that I couldn't work with them boys no more and I had to quit." (Tr. 481.) The complainants, however, all thought that they had been fired again. (Tr. 44, 85, 131, 212.)

I find that the four miners reasonably believed that they had been fired again. Furthermore, there is no evidence that anyone told them to come back when they left or tried to explain to them that they had misunderstood Ratliff. Consequently, I conclude that the Complainants were fired a second time. Since the second discharge was the result of their discrimination complaints, I conclude that it was also in violation of section 105(c) of the Act.

Remedies

In their complaints, the Complainants request the following remedies: (1) reinstatement to the same, or similar, position at the same rate of pay; (2) back wages with interest until the date of payment; (3) the value of all employment benefits, all medical and hospital expenses and

all other damages incurred as a result of the discharges; and (4) expungement from their employment records of all references to the discriminatory discharges. As detailed below, I conclude that the Complainants are entitled to back pay, but not to reinstatement or other damages.

Reinstatement

At the trial, the Complainants all maintained that they desired to be reinstated. (Tr. 45, 88-89, 131, 214.) Conway, Damron and Coy McClain all answered "yes," without elaboration, when asked if they would "have accepted transfer to another Misty Mountain Mine." (Tr. 45, 88, 131.) The facts, however, contradict those answers. All four were offered a chance to return to Mine No. 5 or to transfer to other Misty Mountain mines and all four turned them down.

The mine was shut down from October 15 until October 25 so that Osborne could hire a new superintendent. Wendell McClain returned to work at the mine on October 25 and continued working there until the mine was finally closed on November 13. When the mine closed, Osborne offered to transfer him to another Misty Mountain mine. (Tr. 212.) Wendell told Osborne that he would take the job, but did not report for work. He claimed that he could not take the job because it was two and one half hours from his home and he did not have money for gas. (Tr. 213.) He maintained that he did not have money for gas because he did not have a job. (Tr. 213.) Nonetheless, he averred that if he did have money for gas he would have driven to the job. (Tr. 214.)

His excuses are inconsistent and nonsensical. In the first place, he would have had a job and, therefore, money for gas if he had gone to work. Furthermore, the mine shut down November 13, a Saturday, and his new job was to start on the following Monday, so he was only out of work for one day (Sunday). (Tr. 241-42.) In the second place, his estimate that the mine was two and one half hours from his house is not credible. When questioned about it, he refused to even guess how many miles the trip would be and, indeed, indicated he had no idea how far away the mine was. (Tr. 242-43.) Finally, and most significantly, Osborne gave Wendell $800.00 on November 13, but Wendell claimed that he could not use it for gas because he was "discharged from my job" and had to use the money for his children's Christmas gifts that he had on lay away. (Tr. 244.) As has already been noted, he was only out of work, if it can be called that, for a Sunday and if he had used the money for gas, he would have had a job to pay for the gifts. Therefore, I conclude that Wendell McClain's failure to report to work at Mine No. 2 was not justified.

With regard to the other three Complainants, Osborne testified that: "On October 22nd, I told all four employees that there will be work for them on Monday morning at 7:00 a.m." (Tr. 528.) He stated that he did not tell the miners directly, but told them through Hamilton and their attorney. (Tr. 529.) While he was not sure of the date, Hamilton testified that Osborne and he had a conversation "about the guys coming back to work." (Tr. 403.) Accordingly, I find that such an offer was made.

Osborne further testified that:

> On the 24th, Coy McClain called my home and told me that he had a better job, that he was quitting and wanted me to meet him at the mine site to get his training papers and his — any other thing else he had there. Of course, you have to have that to go to another job. And I did that. On October the 25th, Wendell was the only employee that showed up for work.

(Tr. 529.) Coy professed not to recall this incident and, in fact, was very evasive when questioned about it. (Tr. 173-75.) Hamilton, however, recalled that Osborne told him that Coy had quit because he got a better job. (Tr. 397-98.) In addition, the evidence shows that Coy worked at McPeaks Energy from October 17 through November 12 at $17.00 per hour, more than the $14.00 per hour he was making at Misty Mountain. (Govt. Ex. 24.)

Concerning Conway and Damron, Osborne further testified that on October 25: "I talked to Rick and he told me that Gary and Wade told [their attorney] that they were going to find another job . . . ." (Tr. 529.) He went on to state that:

> On October the 26th, I called Joan, Rick's Secretary, and I told her that I could place one of these two men if they wanted a job. . . . She said she would call Rick and tell him what I said . . . . On October 27th, Joan called me and told me that Rick said if I wanted to place those men at another mine site that I could get in touch with them. [I] called Joan back, she told me that Gary and Wade both had gotten a job, they were not interested in going back to work Rick had told her.

(Tr. 529-30.) While this testimony contains a great deal of hearsay, it was not disputed by the other parties involved, nor was Osborne cross examined about it. Furthermore, the testimony was corroborated by Hamilton, who testified that: "I'm not sure of the dates, but I do remember these conversations taking place, that you had called Joan to relay the information to me and I gave her an answer to give back to you that you could have placed the guys at another mine. And I also remember that the guys had found another job." (Tr. 402.)

The Commission has held that: "If a suitable offer [of reinstatement] was made and refused, then the need to offer reinstatement now is moot." *Munsey v. Smitty Baker Coal Co., Inc.*, 2 FMSHRC 3463, 3464 (Dec. 1980). I find that Osborne made a suitable offer of reinstatement to the four Complainants. In this connection, the fact that the offer was first made to settle the temporary reinstatement applications does not mean the offer was not suitable. The miners went back to work in the same positions and at the same pay as they originally had. When they were fired a second time, Osborne made it known to them that they could return to Mine No. 5 or to other mines that he operated. Furthermore, after October 14, Ratliff, who seems to have

been the catalyst for all of the problems at the mine, had resigned. Instead of accepting the offers, Coy McClain, Conway and Damron opted to get other jobs. Wendell McClain worked at Mine No. 5 until it closed and then chose not to accept the offer of work at another mine without articulating a legitimate reason for doing so.

Since Osborne made all of the miners suitable offers of reinstatement, which they elected not to accept, I conclude that they are not now entitled to reinstatement.[3]

Back Pay

Turning next to the issue of back pay, the Commission has stated that:

> Generally, when a discriminatee is unconditionally and in a bona fide fashion offered reinstatement, the running of back pay is tolled. B. Schiel and P. Grossman, *Employment Discrimination Law*, at 1432 2d ed. (1983); at 279-80 (2d ed. 1983-84 Supp. 1985); *see Munsey v. Smitty Baker Coal Company, Inc.*, 2 FMSHRC 3463, 3464 (December 1984) (suitable job offer tolls back pay due discriminatee).

Bryant v. Dingess Mine Service, 10 FMSHRC 1173, 1180 (Sept. 1988). Consequently, for the same reason that the Complainants are not entitled to reinstatement, I conclude that they are only entitled to back pay up to the time that they refused reinstatement.

Coy McClain, although fired on August 30, actually worked at the mine from August 31 until he was discharged again on October 14, a Thursday. His pay record shows that he was paid $238.00 for 17 hours work that week. (Govt. Ex. 18.) However, the evidence is that he was sent home early every day that week. The pay record of Gordon Stanley was put into evidence and used by the Secretary as a guide to determine the number of hours worked at the mine on a given week. (Gt. Ex. 20, Tr. 408-09.) Stanley's pay stub for the week of October 10-16 shows that he worked 34 hours. Therefore, I find that Coy McClain is entitled to another 17 hours of pay for that week, or $238.00. Coy went to work for McPeak's Energy on October 17 and told Osborne on October 24 that he was quitting because he had found a better job. Thus, he is not entitled to

[3] The Complainants' statements that they desire to be reinstated appear somewhat disingenuous inasmuch as after leaving Misty Mountain they all got jobs paying $17.00 per hour, as opposed to the $14.00 per hour they received at Misty Mountain, Mine No. 5 is closed, Misty Mountain Mining has gone out of business and they testified that Mine No. 5 was a very unsafe mine. All of the miners have work histories that can only be described as sporadic and they were apparently not working at the time of the trial. However, the fact that they were discriminated against does not afford them lifetime re-employments rights with Misty Mountain any time they are fired, get laid-off, or quit a job. Once they refuse reinstatement, they are not again entitled to it.

any other back pay. I conclude that Coy McClain is due back pay of $238.00 plus interest until the date of payment.

Wendell McClain was fired on August 30 and returned to work on October 4. He was fired again on October 14. The mine was closed from October 15 until October 25, at which time he returned to work and worked until the mine closed for good on November 13. He turned down, by not showing up, Osborne's offer of work at another mine beginning on November 15. Therefore, he is entitled to back pay from August 31 until October 3 and for an additional 17 hours for the week of October 10-16.

Wendell's brother, Coy, earned $560.00 for 40 hours work the week of August 29 through September 4, $462.00 for 33 hours work the week of September 5 through September 11, $448.00 for 32 hours work the week of September 12 through September 18, $504.00 for 36 hours work the week of September 19 through September 25, and $448.00 for 32 hours work the week of September 26 through October 2. (Govt. Ex. 18.) Unlike the Secretary, I find Coy McClain's hours more representative of what Wendell would have worked during that period than the hours put in by Gordon Stanley, who was clearly a senior employee, while the McClains were very new. Therefore, I conclude that Wendell McClain is entitled to back pay of $2,422.00 for the period from August 30 through October 3 and $238.00 for the week of October 10 through October 16, for a total of $2,660.00.

This $2,660.00 must be offset by the $800.00 given to Wendell McClain by Osborne on November 13. On November 19, 2004, Wendell McClain and his wife, Cynthia, entered into a written agreement with Stanley and Wayne Osborne which states:

> I, Wendell McClain, in exchange for the sum of $800.00 paid in full by check number 6541 hereby agree to drop any and all litigation brought through the U.S. Department of Labor and brought personally against Stanley Osborne, Wayne Osborne and Misty Mountain Mining, Inc. regarding my employment at Misty Mountain Mining, Inc. I also affirm that neither I nor any of my dependents have any further claims against Stanley Osborne, Wayne Osborne, or Misty Mountain Mining, Inc.

(Resp. Ex. A.) Wendell claimed that he just glanced over the document and did not know what he was signing. (Tr. 250.) He asserted that he thought he was signing for money that Osborne owed him. (Tr. 258.) His testimony on what he thought this document was for was evasive and inconsistent at best. (Tr. 250-60.) However, since he did not consult an attorney, since he is only entitled to back pay through October 16 and since this case was brought by the Secretary, who was not advised of the transaction at the time, I will give him the benefit of the doubt that he did not understand what he was signing and hold that the $800.00 and the document will only be considered to offset any back pay he is due. Accordingly, I conclude that Wendell McClain is entitled to back pay of $1,860.00 plus interest until date of payment.

Gary Conway and Wade Damron were fired on August 30 and did not return to work, for reasons of their own, until October 11. They were discharged again on October 14 and turned down Osborne's offer of work on October 25. Therefore, they are entitled to back pay from August 31 through October 3, but not for the week of October 4-8 since their failure to work was voluntary on their part, and for an additional 17 hours for the week of October 10-16. As with Wendell McClain, I find that they would have worked the same hours as Coy McClain. Therefore, I conclude that Gary Conway and Wade Damron are each entitled to back pay of $2,660.00 plus interest until the date of payment.

Employment Benefits, Medical Expenses and Other Damages

The only evidence of other damages offered at the trial was Coy McClain's claim that he lost his house as a result of his discharge. The amount of damages he is claiming was not specified. Coy testified that he was purchasing a home on a rent-to-buy contract in July 2004. (Tr. 152-53.) He said that the monthly payment was $350.00. (Tr. 137.) He testified that he was up to date with his payments until October 2004 at which time he missed a payment. (Tr. 137.) He offered into evidence an undated statement from his landlord, Diane Addington, which stated: "Coy McClain intered [*sic*] in a rent to own land contract for the amount of 17,000.00[,] paying the amount of 350 per month in July of 2004 and was evicted Nov. of 2004[.] Left owing 850 still due and payable now. The contract was void due to non payment of rent." (Comp. Ex. 1.)

Coy could not explain how, if he had made the July, August and September payments, he owed $850.00 when he was evicted in November. (Tr. 154-55.) His testimony was inconsistent and evasive on the issue of losing the house. Furthermore, the evidence is that he was working at least through November 12 and, at most, was not paid $238.00 he would have earned for the week of October 10-16. Therefore, I conclude that Coy may indeed have lost his house, but if he did, it was not because of his discharges. Accordingly, I will not award him damages for the loss of his house.

Liability

Misty Mountain Mining, Inc., is a Kentucky corporation. (Govt. Ex. 21.) The MSHA Legal ID Report for Mine No. 2 shows that Misty Mountain's President is Wayne Osborne and Stanley Osborne is listed as Vice-President. (Govt. Ex. 21.) Wayne Osborne is apparently Stanley Osborne's son. (Tr. 334.) Stanley Osborne testified that he owned three Misty Mountain mines, none of which were in operation on the date of the trial. (Tr. 329.) However, the Secretary has put into evidence Assessed Violation History Reports for four Misty Mountain mines, No. 1, No. 2, No. 4 and No. 5. (Govt. Ex. 9.) Those documents show that Misty Mountain's ownership of the mines was as follows: (1) Mine No. 1 from May 8, 2003, until July 20, 2004; (2) Mine No. 2 from May 8, 2003, until April 10, 2005; (3) Mine No. 4 from March 9,

2004, until December 31, 9999;[4] and (4) Mine No. 5 from June 29, 2004, until January 17, 2005.

Stanley Osborne also testified that he owns Sister Bear Mining. (Tr. 339.) Further, there is some indication that Sister Bear Mining owned the Misty Mountain Mines before Misty Mountain. (Tr. 348.) However, no further evidence was adduced or offered about Sister Bear Mining.

Finally, Stanley Osborne testified that his son, Josh Osborne, owns Midgard Mining Company which operates two mines, No. 1 and No. 2, and that the No. 2 mine is the former Misty Mountain No. 2 mine. (Tr. 337, 342.) Stanley Osborne further testified that Misty Mountain owned Mine No. 2 until December 1, 2004, "after that it was owned by Foggy Mountain Mining before it was owned by Josh." (Tr. 342.) The MSHA Legal ID Report for Mine No. 2 shows that Midgard Mining Company is a limited liability corporation. (Govt. Ex. 22.)

The Secretary asserts that the Complainants should be reinstated and paid back pay by Midgard Mining Company, as a successor operator to Misty Mountain Mining. She bases this proposition on *Terco, Inc. v. FMSHRC*, 839 F.2d 236 (6th Cir. 1987), wherein the Sixth Circuit Court of Appeals upheld the Commission's nine factor test for establishing successor liability. While the Sixth Circuit did indeed approve the Commission's nine factor test, the Secretary has neglected to show how it applies in this case.

Moreover, the Complainants have a bigger problem than applying the test. In every case in which the nine factor test has been used to establish successor liability, the successor has been a party to the proceeding. *See, e.g. Meek v. Essroc Corp.*, 15 FMSHRC 606 (Apr. 1993)*; Secretary on behalf of Corbin et al v. Sugartree Corp., Terco Inc. and Randal Lawson*, 9 FMSHRC 394 (Mar. 1987); *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980). In this case, neither Midgard Mining Company nor Josh Osborne were made parties to the proceeding and given a chance to defend themselves against the claims. Furthermore, I am not aware of any authority I have to order a company or an individual *not before me* to pay the Complainants back pay or put them to work.

Accordingly, I conclude that Misty Mountain Mining, Inc., is liable for the Complainants back pay, but decline to follow the Complainants' suggestion that Midguard Mining also be held liable. I also hold that Stanley Osborne is jointly and severally liable for the Complainants' back pay. All of the evidence, including his own testimony, shows that he was the operator of the mine, the person in control, and he cannot avoid liability by hiding behind the "corporate veil." *Simpson v. Kenta Energy, Inc. and Jackson*, 11 FMSHRC 770, 780 (May 1989).

On the other hand, I do not find Simon Ratliff liable since he was merely an agent of the

[4] I take this to mean that the mine was still in operation on April 18, 2005, the date the report was requested, although the most recent citation listed in it was issued on June 29, 2004.

corporation and not a *de facto* operator. There is no evidence he had any ownership interest in the company. Nor is there any evidence that he was acting outside the scope of his authority as superintendent when he fired the Complainants.

Credibility of Witnesses

On the whole, I found the main protagonists in this episode, Simon Ratliff, the McClains, Conway and Damron, to be of doubtful credibility. Not only did they have obvious interests in the outcome of these cases, but their testimony, in addition to the specific instances already noted, was characterized by selective memory, inconsistencies and self-serving statements. I have tried to rely on their testimony only when it was supported or corroborated by other evidence.

Conclusion

I find that the Complainants were fired on August 30, 2004, because they complained about the lack of safety at the mine and were fired on October 14, 2004, because they had filed discrimination complaints. Thus, they were discriminated against in violation of section 105(c) of the Act. They are entitled to back pay up until the time that they turned down reinstatement, but not thereafter. They are not entitled to reinstatement having once declined it, nor are any of them entitled to any special damages. Misty Mountain Mining, Inc. and Stanley Osborne are jointly and severally liable to the Complainants for their back pay, but there is no basis on which to hold any other entity or individual so liable.

Civil Penalty Assessment

_____The Secretary has proposed penalties of $20,000.00 against Misty Mountain Mining and $10,000.00 each against Stanley Osborne and Simon Ratliff. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

Section 105(c)(3), 30 U.S.C. § 815(c)(3), states that: "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)." Section 108, 30 U.S.C. § 818, has to do with obtaining injunctions and is not applicable to this proceeding. Section 110(a), 30 U.S.C. § 820(a), provides that: "The operator of a coal . . . mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty . . . ." Thus, Misty Mountain Mining and Stanley Osborne, as the "real operator" of the mine, are jointly and severally subject to a civil penalty for these violations of the Act.

Notwithstanding, that Stanley Osborne is subject to a penalty as an operator, he is not also

subject to an additional penalty as an individual. Simon Ratliff is also not subject to a civil penalty. The only way that Osborne or Ratliff could be personally liable would be under section 110(c) of the Act, 30 U.S.C. § 820(c). That section provides that:

> Whenever a corporate operator *violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act*, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties . . . that may be imposed upon a person under subsections (a) and (d).

(Emphasis added.) Clearly, as shown by the italicized text, this provision only involves violations of mandatory health or safety standards or violations of orders issued under the Act. This case involves a violation of the Act, not of a mandatory health or safety standard or an order issued under the Act. Therefore, section 110(c) does not provide a basis for assessing civil penalties against Osborne or Ratliff.

I am not aware of any other authority in the Act upon which Osborne or Ratliff can be individually subjected to a civil penalty. Accordingly, no civil penalty will be assessed against either as an individual.

Turning to Misty Mountain Mining and Osborne, as the operator, I make the following findings under section 110(i). There is no evidence of any previous violations of section 105(c) by either Misty Mountain Mining or Stanley Osborne. Misty Mountain Mining and Stanley Osborne are, or were, a very small business. The operator was negligent in not monitoring the actions of Simon Ratliff, particularly after the discrimination complaints were filed. There is no evidence that the assessment of a civil penalty will have any effect on Misty Mountain Mining or Stanley Osborne continuing in business.[5] These violations were very serious in that they reflect a disregard of the safety complaints of miners, an opposite reaction to such complaints than the one envisioned by the Act and a reaction which would tend to have a chilling affect on other miners making safety complaints. On the one hand, the operator demonstrated good faith in attempting to abate the violations by agreeing to temporary reinstatement and offering other job opportunities. On the other hand, he took no action against Simon Ratliff after learning of the violations and the problem was not resolved until Ratliff quit.

Taking all of these factors into consideration, I conclude that a $10,000.00 civil penalty against Misty Mountain Mining and Stanley Osborne is appropriate.

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[5] Misty Mountain Mining is apparently no longer in business and Stanley Osborne is apparently not operating any other mines.

Order

Having found that Gary Conway, Wade Damron, Coy McClain and Wendell McClain were discharged by Misty Mountain Mining, Inc. and Stanley Osborne in violation of section 105(c) of the Act, and that Misty Mountain Mining, Inc., and Stanley Osborne are **JOINTLY AND SEVERALLY LIABLE** for each of the following, it is **ORDERED** that:

1. Misty Mountain Mining, Inc., and Stanley Osborne **EXPUNGE** from Gary Conway's, Wade Damron's, Coy McClain's and Wendell McClain's personnel files and company records the discharges and all references to the circumstances involved in them.

2. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** Gary Conway back pay of **$2,660.00** plus interest until the date of payment.[6]

3. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** Wade Damron back pay of **$2,660.00** plus interest until the date of payment.[6]

4. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** Coy McClain back pay of **$238.00** plus interest until the date of payment.[6]

5. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** Wendell McClain back pay of **$1,860.00** plus interest until the date of payment.[6]

6. That Misty Mountain Mining, Inc., and Stanley Osborne **PAY** a civil penalty of **$10,000.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Marybeth Zamer Bernui, Esq, Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37215

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[6] The proper method of calculating interest on back pay is: *Amount of interest = the quarter's net back pay x number of accrued days of interest* (from the last day of that quarter to the date of payment) *x the short-term federal underpayment rate. Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (Nov. 1988).

Mr. Stanley Osborne, VP, Misty Mountain Mining, Inc., P.O. Box 165, Jonancy, KY 41538

Mr. Simon Ratliff, P.O. Box 343, Lookout, KY 41542

Wes Addington, Esq., Appalachian Citizens Law Center, Inc., 207 W. Court Street, Suite 202, Petersonburg, KY 41653