FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 24, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On behalf of WILLIAM KACZMARCZYK, Complainant	:	DISCRIMINATION PROCEEDING Docket No. PENN 95-1-D MSHA Case No. WILK CD 94-01
v.	:	Ellangowan Refuse Bank
READING ANTHRACITE COMPANY, Respondent	:	

DECISION

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., Pottsville, Pennsylvania, for Respondent.

Before: Judge Amchan

Procedural Background

On September 12, 1994, I ordered Respondent, Reading Anthracite Company, to temporarily reinstate Complainant, William Kaczmarczyk, to his light duty position following an evidentiary hearing on the Secretary's application for such relief (Docket No. PENN 94-417-D, 16 FMSHRC 1941). On September 30, 1994, the Secretary then filed a discrimination complaint on Mr. Kaczmarczyk's behalf. A hearing on the merits of this complaint was held on March 14, 1995, in Pottsville, Pennsylvania. The record of the temporary

reinstatement hearing has been incorporated into the record of the discrimination proceeding (Tr. II: 6-7[1]).

Factual Background

William Kaczmarczyk began working for Respondent in December 1976 (Tr. I: 21-22). He became an electrician with the company in 1985, working at the St. Nicholas Breaker and the Ellangowan Refuse Bank (Tr. I: 23-25). In October 1989, Kaczmarczyk injured his back while moving a 300-pound motor with a bar (Tr. I: 43). He was on workers compensation from October 1989 to January 1992, except for 4-1/2 weeks in February 1991, when he unsuccessfully tried to return to work (Tr. I: 46-49). On January 8, 1992, after undergoing a cervical spinal fusion four months earlier, Kaczmarczyk returned to work on light duty (Tr. I: 49).

Complainant worked on light duty from January 8, 1992 until October 15, 1993, when he was placed back on workers compensation status (Tr. I: 52-53). Prior to October 1993, Kaczmarczyk was the treasurer of Local 7226 of the United Mine Workers of America (UMWA). He was also a mine committeeman and safetyman for his local, which represented Respondent's employees at the St. Nicholas Breaker (Tr. I: 33-35). Another UMWA local, No. 807, represented employees at the Ellangowan Refuse Bank (Tr. I: 34). [2]

Protected Activity

[1]I will refer to the transcript of the September 1, 1994 temporary reinstatement proceeding as Tr. I and the transcript of the March 14, 1995 hearing as Tr. II.

[2]Complainant performed electrical work at Ellangowan (Tr. I: 27-28). Prior to October 1993, Local No. 807 did not represent any electricians (Tr. I: 173). Since that time Local 807 has assumed jurisdiction over all Respondent's miners at the Ellangowan Refuse Bank and the St. Nicholas Breaker (Tr. II: 46).

Complainant served as employee walkaround representative for an MSHA inspection conducted between September 15 and 17, 1993 (Tr. I: 90-93, Sec. Exh. 1). He was also the walkaround representative for an MSHA electrical inspection that was conducted on October 4, 12, and 14, 1993, at the Ellangowan Refuse Bank (Tr. I: 105-08). On the last day of the October inspection, Respondent's safety director, David Wolfe, questioned the need for Mr. Kaczmarczyk's presence during the inspection since Michael Ploxa, President of Local 807, was also serving as a walkaround representative (Tr. I: 107-13, 268-69).

The next day, October 15, 1993, Complainant was informed that he was being put back on workers compensation (Tr. I: 52-53, 122-23). He alleges that this was done in retaliation for his activities as walkaround representative during the October 1993 inspection, which resulted in nine citations being issued to Respondent (Exhibit B to the Secretary of Labor's Application for Temporary Reinstatement, Sec. Exh. 3).

Respondent's Position

Respondent contends that Complainant's return to workers compensation status was non-retaliatory. On October 14, 1993, Safety Director David Wolfe received a telephone call from Andrea Antolick, a nurse and field service representative for Comprehensive Rehabilitation Associates. Ms. Antolick over-sees Mr. Kaczmarczyk's rehabilitation program for Respondent's workers compensation insurer (Joint Exh. 1-DP, pp. 6-8, 21). She informed Wolfe that the results of a September 30, 1993 functional capacity evaluation (FCE) of Kaczmarczyk were invalid because Complainant did not put forth his maximum effort to complete the test (Joint Exh. 1-DP, pp. 23-24).

On the morning of October 15, Antolick met with Wolfe for about an hour (Joint Exh. 1-DP, pp. 27-32). Mr. Kaczmarczyk's case was discussed for about 15 minutes (Ibid. p. 29). Antolick again discussed with Wolfe the invalidity of the functional capacity test (Ibid. p. 27) and her opinion that Comprehensive Rehabilitation did not have a current assessment of Mr. Kaczmarczyk's physical capabilities[3].

[3]"Invalidity" appears to be a term of art and indicates a lack of good faith effort on the part of the individual being tested (Joint Exh 1-DP, p. 19).

Wolfe contends that his October 14 conversation with Antolick precipitated the decision to return Kaczmarczyk to compensation status that was totally independent of Kaczmarczyk's activities as a walkaround representative (Tr. I: 254-55, 311-16). General Manager Frank Derrick, however, testified that the report that Complainant failed to complete the functional capacity test was "coincidental" to his return to workers compensation status (Tr. I: 349-50). Derrick contends that recurring reports from supervisors that Mr. Kaczmarczyk was not performing assigned duties led to this decision (Tr. I: 350).

Evaluation of the Evidence

Did Respondent Violate Section 105(c) of the Act?

Section 105(c)(1) of the Federal Mine Safety and Health Act provides that:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any ... miner because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. 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 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission

held that a complainant establishes a prima facie case of discrimination by showing (1) that he engaged in protected activity and (2) that an adverse action was motivated in part by the protected activity.

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. If the operator cannot thus rebut the prima facie case, it may still defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

The timing of Complainant's return to workers compensation and evidence of safety-related animus

The timing of Mr. Kaczmarczyk's return to workers compensation status, one day after his protected activities as an employee walkaround representative, establishes a prima facie case. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C. Cir. 1984); Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2511 (November 1981). Additionally, I conclude that Safety Director Wolfe did harbor some degree of animus towards Kaczmarczyk due to his participation in the October MSHA inspection.

Mr. Wolfe was not happy to see Kaczmarczyk participating in the inspection on October 14, 1993, and challenged the necessity of his presence. In view of the fact that Michael Ploxa, President of UMWA Local 807, was also acting as employee walkaround representative, and the fact that other electricians were available, Wolfe considered Kaczmarczyk's participation unnecessary (Tr. I: 175-76, 308).

The nexus between the October inspection and Complainant's return to workers compensation is not overwhelming. Although the October 1993 MSHA electrical inspection was initiated by an employee complaint, Kaczmarczyk did not file the complaint (Tr. I: 97-98, 178).[4]

Additionally, there is nothing in this record to suggest that anything that Mr. Kaczmarczyk did as walkaround representative on October 4, 12, and 14, 1993, aroused Respondent's ire. Although Respondent received nine citations as a result of this inspection, there is no indication that Complainant's conduct as a walkaround representative was responsible for any of these citations (Tr. I: 277, 301). In summary, there is virtually nothing in the record to indicate that Respondent would have any reason to retaliate against Complainant solely for his role in the October 1993 inspection.

Nevertheless, I conclude that Complainant would not have been returned to workers compensation status but for the cumulative effect of his activities as a walkaround representative during MSHA inspections. I regard the statements and conduct of Safety Director Wolfe at Kaczmarczyk's October 18, 1993, grievance hearing to be determinative on this issue.

The statements and conduct of Safety Director David Wolfe at the October 18, 1993 grievance meeting

Kaczmarczyk filed a grievance over his return to workers compensation status. It is uncontroverted that at a meeting

[4]Although Foreman Vince Devine asked Kaczmarczyk who made the complaint that led to the October inspection, Kaczmarczyk told Devine it was not him (Tr. I: 100-105). There is no reason to believe Devine suspected it was Kaczmarczyk who complained about the presence of water near electrical components in the steam genny house, which was the subject of the complaint (Tr. I: 16-17, 178-79). Devine was present during the inspection in which this concern was raised and Kaczmarczyk was not (Tr. I: 97, Secretary's Exhibit 2).

on the grievance on October 18, 1993, Wolfe and Kaczmarczyk got into a heated argument over the reasons for this personnel action. It is also undisputed that during this argument Wolfe went into another room, obtained a stack of MSHA citations issued to Respondent and threw, or placed them, on the table (Tr. I: 128-29, 191-93, 274-75, 283-93).

According to Kaczmarczyk and Jay Berger, the UMWA district representative present, whose testimony I credit, Wolfe said something to the effect that these citations were another reason why Kaczmarczyk was being placed on compensation (Tr. I: 128-29, 191-93)[5]. I regard Wolfe's statement as an admission that Complainant's protected activities were a significant factor in Respondent's decision to return him to workers compensation.

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[5]Wolfe testified that he never told Kaczmarczyk that he was being placed back on workers compensation because he participated in a walkaround inspection (Tr I: 275), which is not a direct contradiction of the testimony of Kaczmarczyk and Berger. He also testified that when he put the citations down he said to Kaczmarczyk, "[t]his is why you can't perform your job duties" (Tr. I: 287). However, Wolfe's continued explanation provides sufficient reason for the undersigned not to credit his testimony on this issue.

Q. ... What's the connection between putting those [citations] down on the table and telling Mr. Kaczmarczyk he couldn't do his job?...

A. I really don't know.

(Tr. I: 287-88).

The alternative explanations offered by Respondent for Wolfe's actions and statement are unpersuasive. Wolfe testified that the citations he placed on the table were not those issued in September or October, 1993, but were citations issued in August 1992 which were largely the fault of Mr. Kaczmarczyk (Tr. I: 274-278)[6]. At the temporary reinstatement hearing, Wolfe testified that he put the citations on the table "out of frustration" (Tr. I: 275), and to emphasize that Respondent would not get as many citations as it was receiving if all its employees were capable of doing their jobs (Tr. I: 274-75).

I cannot credit Wolfe's testimony that he was agitated about August 1992 citations in October, 1993, but not about the 14 citations Respondent had received in the preceding month (Sec. Exhibits 1, 2, and 3). This is particularly hard to believe in view of the fact that the October 1993 inspection was the first time that Respondent had received as many as nine citations from an MSHA electrical inspection (Tr. I: 186). Further, the credibility of this testimony is greatly undermined by the fact that at a grievance proceeding on November 22, 1993, Wolfe could not remember which citations he placed on the table on October 18, 1993 (Tr. I: 291-93).

Similarly unconvincing is Wolfe's testimony at the temporary reinstatement hearing that his actions and statements at the October 18, 1993 grievance meeting were an indication of his frustration with Complainant's failure to perform work assignments which caused the August 1992 citations (Tr. I: 274-278). At the temporary reinstatement proceeding Wolfe testified that some of the conditions leading to the August 1992 citations would

[6]The credibility of Wolfe's testimony is undermined by its inconsistency in several regards. For example, he testified at the temporary reinstatement proceeding that he did not hold Kaczmarczyk responsible for the October 1993 citations (Tr. I: 276-78). At the discrimination hearing, however, he testified

fn. 6 (continued)

that some of the citations were due to Complainant's failure to do electrical inspections properly (Tr. II: 196-198).

not have existed if Kaczmarczyk had been able to fully perform his job (Tr. I: 276-77, but also see Tr. I: 287). However, at the discrimination hearing he testified that Complainant was not disciplined because he accepted Kaczmarczyk's assertion that he had reported the violative conditions to his foreman, who failed to take corrective action (Tr. II: 175).

Complainant's failure to complete a functional capacity evaluation

Safety Director Wolfe explains the timing of Complainant's return to compensation status as due to the receipt of information on October 14, 1993, that Kaczmarczyk refused to make a good faith effort to complete a functional capacity evaluation (FCE) on September 30, 1993 (Tr. I: 253-55, Exh. R-10). However, General Manager Frank Derrick indicated that Kaczmarczyk's alleged refusal to take the FCE had little to do with Respondent's decision to put him back on workers compensation (Tr. I: 349-50).

Derrick characterized that information as "coincidental" to his decision (Tr. I: 350). The inconsistency in the testimony of the two witnesses who decided to transfer Complainant to workers compensation itself suggests discriminatory motives, N.L.R.B. v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984); Hall v. N.L.R.B., 941 F.2d 684 688 (8th Cir. 1991).

Even if I disregard this inconsistency, the extremely rapid response of Mr. Wolfe to this information, considered in the context of Kaczmarczyk's recent protected activity, and Wolfe's statements at grievance proceeding, leads me to conclude that his receipt of information regarding the functional capacity evaluation is not an intervening event that rebuts Complainant's prima facie case, or establishes a legitimate affirmative defense.

The record shows that Mr. Wolfe received a call from Andrea Antolick, a nurse employed as a field service representative, on October 14, 1993. Antolick reported that Kaczmarczyk had not put forth maximum effort when failing to complete the functional capacity evaluation (Tr. I: 311, Joint Exh.-1-DP, p. 21-23, 35, Sec. Exh. 3-DP, 4-DP, & 5-DP)[7].

On the morning of October 15, 1993, Ms. Antolick had a

[7]I credit Antolick's testimony that the first report to Respondent regarding the functional capacity report was made on October 14, 1993, rather than October 12.

meeting with Mr. Wolfe, at his office, which lasted about an hour (Joint Exh-1-DP, p. 26-32). Approximately 15 minutes was spent discussing Complainant (Ibid., p. 29-30). Antolick and Wolfe discussed her understanding that Kaczmarczyk's test results were invalid and she indicated that she was going to attempt to obtain an opinion regarding his physical capabilities from his physician, Dr. Keith Kuhlengal, a neurosurgeon (Id., p. 27).

Although Wolfe knew Antolick had no first-hand knowledge regarding the FCE, he decided to return Kaczmarczyk to workers compensation without making any sort of inquiry of Complainant or the individuals who conducted the test (Tr. I: 312-16)[8]. Absent other factors, it is not implausible that an employer would react immediately to information indicating malingering on the part of one of it employees. However, in the instant case, given the fact that Kaczmarczyk had been on light duty for 21 months, I conclude that the rapid response to Antolick's report, if it in fact was a factor in Wolfe's decision, was not made independently of his animus towards Complainant's safety-related activities.

Was Complainant returned to workers compensation status as the result of a non-discriminatory application of Respondent's light-duty program?

Respondent also argues that Mr. Kaczmarczyk's return to compensation status was the result of a non-discriminatory application of its light-duty program. The decision to return Complainant to compensation was made by General Manager Frank Derrick, in consultation with Safety Manager David Wolfe (Tr. I: 338, 344, 349-50).

While both Wolfe and Derrick point to a number of instances in which Kaczmarczyk was unable to do work assigned to him while on light duty, they are able to conclusively establish only one which occurred in the two and a half months prior to the decision to return him to compensation (Tr. I: 66-67, 75-76, 203, 238, 322, Tr. II: 125-130, 134, 138-139, 148-150, 153-154). The record indicates that Complainant had been unable to do job

[8]I do not infer from Wolfe's testimony at Tr. I: 315-16 that he sought input from Kaczmarczyk before Respondent decided to return Complainant to workers compensation status (See Tr. I: 123).

assignments throughout his 21 months on light duty and does not conclusively establish non-retaliatory reasons for which the company made an issue of Kaczmarczyk's restricted abilities in October 1993. Indeed, Complainant was unable to do much more work in 1992 and during the previous winter than in the fall of 1993 (Tr. I: 222-23).

Respondent asks, at page 3 of its post-trial brief, that this decision carefully account for the nature and purpose of its light-duty program, and not disrupt the company's legitimate purposes in providing such a program and administering it in a flexible manner. Of course, nothing in the Federal Mine Safety and Health Act prohibits Respondent from administering its light duty program in a non-discriminatory way, including non-retaliatory transfers from light-duty back to workers compensation.

On the other hand, a transfer from light-duty to workers compensation that would not have occurred but for activity protected by the Act is prohibited by section 105(c). Given Complainant's prima facie case, Respondent falls far short of showing that his return to workers compensation was the result of a non-discriminatory application of its light-duty program.

Respondent has satisfied me that there are many other miners that have been on light duty who also were put back on workers compensation (Tr. I: 246, 264-66, 336-37, 354-57). However, it has not established that prior to the instant case there was any company policy that light-duty assignments are temporary, or intended to be in the nature of a work-hardening program, as it now contends. The only written evidence of the policy, Exhibit R-8, says nothing of the sort. Further, Secretary's Exhibit 2-DP strongly suggests that prior to Complainant's transfer there was no such hard and fast rule. Nurse Antolick, in a report dated July 14, 1993, stated:

> Vocational Implications: I spoke with Dave Wolfe of Reading Anthracite. Mr. Wolfe stated that Mr. Kaczmarczyk has been working well in his light-duty position and requested I not contact him. I explained my attempting to obtain a consent through Mr. Kaczmarczyk's attorney and that I will be only contacting his physician. **Mr. Wolfe did state that client could remain in present job indefinitely.** I did obtain a job analysis on client's pre-injury job (emphasis added).

Moreover, even if the program was intended to be temporary, the issue in this case is the **timing** of the decision to put

Complainant back on workers compensation. The question is not whether Respondent at some time could have returned Mr. Kaczmarczyk to workers compensation because of lack of work or lack of improvement in his physical condition. The issue before me is whether it changed his status on October 15, 1993, for non-discriminatory reasons, or whether that transfer would not have been made but for his protected activity.

The list of miners who also were returned to workers compensation from light-duty does not help Respondent's case at all. For starters, although its brief repeats the assertion made by Mr. Wolfe (Tr. II: 192) that no employee spent more time on light duty than Mr. Kaczmarczyk, Exhibit R-1-DP indicates that is not so. On October 15, 1993, Complainant had been on light duty for approximately 21 months. Respondent's exhibit indicates that David Eckert was on light duty from December 31, 1991 to March 3, 1994 (26 months). It lists Joseph Holland as having been on light duty from February 25, 1992 to February 24, 1994 (24 months). Keith Mielke was on light duty from June 10, 1991 to June 14, 1993 (24 months). Russel Sadusky was on light duty from January 13, 1992 to June 3, 1994 (28 months).

Evidence of Malingering

General Manager Derrick testified that Complainant was doing less work than he was capable of doing (Tr. I: 346-47). There is substantial testimony to the contrary (Tr. II: 124-130, 134, 148-150, 152, Sec, Exh. 1-DP and 2-DP). While other evidence also suggests that Mr. Kaczmarczyk's physical capacity was not as limited as he contends (Joint Exh-1-DP, pp. 35-39, Exhs. R-6, R-10, R-11), I need not decide whether Complainant exaggerated his limitations because the record does not support a finding that Respondent returned him to workers compensation for this reason.

Respondent has established only one instance in the two and a half months prior to October 15, 1993, when Kaczmarczyk's supervisors reported to Wolfe or Derrick that Complainant had declined to perform a task (Tr. I: 238, II: 124-130, 134, 138, 148-150). This occurred on September 24, 1993, when Kaczmarczyk told his foreman that he could not continue cutting weeds (Tr. II: 124-30).

There is also little concrete evidence regarding such refusals in 1993. Complainant's principal foreman, Vince Devine, maintained a daily log in 1993. After checking this log for the period January 1, 1993 through October 15, 1993, Devine could find no recorded instance in which Kaczmarczyk declined to complete a task due to his physical condition other than the weed cutting incident (Tr. II: 125-138)[9].

Claire Yarnell, the electrical foreman who occasionally supervised Kaczmarczyk, is only aware of two or three instances in 1993 in which Complainant declined to complete tasks due to his back. One is the aforementioned weed cutting incident and another was an occasion in the summer of 1993 in which Kaczmarczyk said he could not continue to help other employees roll up wire (Tr. I: 200-204, II: 150, 153-54).

Thus, there is no basis for finding that Complainant's job performance was a bona-fide nondiscriminatory reason for his return to workers compensation. In so concluding, I weigh the evidence adverse to Complainant in the context of his protected activity, the indications of Mr. Wolfe's safety-related animus, and the paucity of information available to Wolfe and Derrick that Kaczmarczyk was declining to perform tasks, or that his work was deteriorating.

I also consider that Respondent's supervisors presented something less than a united front on the issue of Kaczmarczyk's work performance. Claire Yarnell described Complainant as an excellent worker, who did whatever was asked of him (Tr. II: 148-9, 152). Even Safety Director Wolfe described Kaczmarczyk's work as sometimes "excellent" (Tr. II: 166-67; also see Wolfe's characterizations of Complainant's work in Sec. Exh. 1-DP and 2-DP).

[9]Devine's log for September 24, 1993, states, "Billy K told by Dave to cut weeds, he said his back is hurting him" (Tr. II: 134).

Was Complainant put back on workers compensation in a non-discriminatory manner due to lack of work?

At the temporary reinstatement hearing, General Manager Derrick testified, to the surprise of Respondent's counsel, that there was not sufficient light-duty work to keep Complainant busy both at the time of the hearing and on October 15, 1993 (Tr. I: 339-344). As the Secretary notes in his brief, this contention was not mentioned in Mr. Derrick's Affidavit that was attached to Respondent's Response to the Application for Temporary Reinstatement.

Moreover, I conclude that there is no credible evidence that Complainant was put back on workers compensation due to lack of work. Mr. Wolfe told Ms. Antolick in July, 1993, that Mr. Kaczmarczyk could stay on his light duty job indefinitely (Sec. Exh. 2-DP). There is no evidence of any relevant change of circumstances prior to October 15, 1993. Although Respondent introduced evidence regarding changes at its worksite since October 15, 1993, there is nothing in the record that would indicate that these changes had anything to do with its decision to put Complainant back on workers compensation on October 15.

Conclusion

The record as a whole establishes a prima facie case of discrimination in violation of section 105(c) of the Act, which is not adequately rebutted by Respondent. I find that but for Mr. Kaczmarczyk's participation in the MSHA inspections of September and October 1993, he would not have been placed back on workers compensation status on October 15, 1993. In so deciding, there are three considerations that stand out from the others. First is the timing of personnel action. Second is Safety Director Wolfe's irritation at seeing Complainant on the MSHA walkaround on October 14. Last are the statements made by Wolfe on October 18, which I construe as an admission by Respondent that Kaczmarczyk's protected activity and his return to workers compensation status were related.

ORDER

Respondent is ordered to reinstate Complainant to the position he held prior to October 15, 1993. The parties are to confer and advise the undersigned within 30 days of this decision as to whether they are able to stipulate to the damages sustained by Complainant due to Respondent's violation of section 105(c) of the Act, and an appropriate civil penalty. If the parties are unable to so stipulate, they may either submit written arguments on these issues or request a supplemental hearing.

As agreed to by the parties, I retain jurisdiction over this matter to issue a decision on the Secretary's Motion to Enforce the Order of Temporary Reinstatement. A hearing on this motion was held on May 19, 1995, after which the parties have been provided an opportunity to file written closing arguments.

Arthur J. Amchan
Administrative Law Judge

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