FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 23, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-184-D
on behalf of BENNARD SMITH,	:	BIRM CD 98-02
Complainant	:	
v.	:	
	:	No. 3 Mine
JIM WALTER RESOURCES INCORPORATED,	:	Mine ID No. 01-00758
Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, on behalf of Complainant;
David M. Smith, Esq., and James P. Naftel, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, and Guy W. Hensley, Esq., Jim Walter Resources, Inc., on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor, on behalf of Bennard Smith, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq*., the AAct.@ The Secretary alleges that Jim Walter Resources, Inc. (JWR) twice violated Section 105(c)(1) of the Act, when it transferred Mr. Smith, a longwall helper, from the No. 2 Longwall to the No. 1 Longwall on October 28, 1996, and again on October 24, 1997.[1]

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[1] Section 105(c)(1) of the Act provides as follows:

> 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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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

because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

Respondent maintains preliminarily that the Complaint herein as to the October 28, 1996, transfer should be dismissed for untimely filing. It is undisputed that the Complainant was first transferred from the No. 2 Longwall to the No. 1 Longwall on October 28, 1996, and that he did not file his complaint with the Secretary alleging that this transfer was in violation of the Act until almost a year later, on October 22, 1997 (Gov. Exh. No. 1). Section 105(c)(1) of the Act prohibits discrimination against miners for engaging in certain protected activities. If the miner believes that he has suffered discrimination in violation of the Act, and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation in accordance with section 105(c)(2) of the Act.

The Commission has held that the purpose of the 60-day limit is to avoid stale claims but that a miner=s late filing may be excused on the basis of justifiable circumstances. *Hollis* v. *Consolidation Coal Company*, 6 FMSHRC 21 (January 1984); *Herman* v. *IMCO Services*, 4 FMSHRC 2935 (December 1992). In those decisions, the Commission cited the Act=s legislative history relevant to the 60-day time limit:

> While this time limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time limited would include a case where the miner within a 60-day period brings the complaint to the attention of another agency or his employer or where the miner fails to meet the time limit because he is misled as to, or misunderstands his rights under the Act.

The Commission noted accordingly that timeliness questions must be resolved on a case-by-case basis taking into account the unique circumstances of each situation.

Smith testified at hearing that he first learned of "Section 105(c)" following a meeting in late July or early August 1997, when the local union president, Buddy Humphreys, told him that since the company had denied his grievance and refused to return him to the No. 2 Longwall, he might as well file a A105(c).@ In a statement to MSHA Smith claimed that this event occurred on August 21, 1997. This is contradicted, however, by the fact that his letter to safety committee chairman James Woods, requesting an MSHA investigation, was dated August 17. Smith maintains that he also asked Woods about the procedures to file a ASection 105(c).@ In any event, according to Smith, Woods later obtained a complaint form from MSHA and advised him that he had 30 days to return the form. Smith maintains that he did in fact return the form to Woods within 30 days.

James Woods had been a member of the Union Safety Committee for nine years and its chairman for six years. According to Woods, Smith asked him about a "105(c)" for the reason that he felt he was being transferred from the No. 2 Longwall because of his "race and younger people with less seniority was still on that wall, and because he had made several safety suggestions or what have you" (Tr. 12-13). Smith later provided Woods with a written statement (Gov=t Exh. No. 8). Smith apparently also filed a copy of this statement with MSHA on August

19, 1999 (Tr. 18). Woods testified that he then obtained a "complaint form" from MSHA which Smith completed and returned to him. Woods then hand delivered this form to MSHA.

Within this framework of evidence it is apparent that Smith knew as early as August 17, 1997, (Gov=t Exh. No. 8) that he had the right to file a complaint of discrimination with MSHA and that the actual complaint was not filed until October 22, 1997, (Gov=t Exh. No. 1). The Respondent has not provided sufficient credible evidence that Mr. Smith was aware of his rights under Section 105(c) of the Act prior to August 17, 1997. Accordingly, Smith=s delay in filing a complaint with MSHA may be excused. Smith=s delays may also be excused in part because of delays attributable to mine safety committee chairman James Woods. Considering the evidence that Smith only learned of his rights on August 17, 1997, this delay was in any event not more than five days beyond the 60-day time limit. Under the circumstances Respondent=s motion to dismiss for untimeliness is denied.

The Merits

Bennard Smith alleges two acts of discrimination in retaliation for activities protected under the Act. The first act of discrimination purportedly occurred on October 28, 1996, when Smith was transferred from the No. 2 Longwall to the No. 1 Longwall. In particular, in his complaint to the Secretary (Gov=t Exh. No. 1) Mr. Smith alleges as follows:

> In December 1996, I was transferred from No. 2 Longwall (full-time helper) to part-time Longwall helper and part-time other classification. This was done without regard to seniority or experience. The longwall foreman who initiated this action was Mr. Oscar Owens. Several reasons were given for the move, they are as follows:
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> > 1. I was too "safety conscious" and posed a threat to shut down the Longwall operations if safety standards were not met. 2. Not doing my job (although no verbal or written warnings have ever been issued). 3. Mr. Owens also expressed a total dislike for my "attitude."[2]

Smith has been employed by JWR since 1976 primarily in coal production on continuous mining and longwall sections. Since May 1983 Smith has worked almost exclusively as a longwall machine operator helper or as a shear operator. The record shows that in April 1996, an MSHA representative met with JWR officials at the No. 3 Mine regarding its violation and accident history. As a result of this meeting, JWR implemented a plan which included disciplinary action to be taken against miners involved in any two accidents during a

[2] It was stipulated at trial that Smith=s transfer actually occurred on October 28, 1996, and not in December as stated in his complaint.

twelve-month period. JWR officials thereafter met with individual miners to explain this plan. Smith met with industrial relations specialist Mike Johnson. Johnson told him he had had too many accidents and could be disciplined for future accidents. Smith maintains that he was therefore particularly concerned about accidents from unsafe work conditions. Sometime later, Smith was advancing the longwall shields by dragging them with a chain. Smith maintains that this was an unsafe procedure and that he therefore presented his foreman, Oscar Owens, with an ultimatum "either get [the] chain off of [the] shield by the next evening," or else he "would file a first step safety grievance against him running that wall like that."

The longwall shields provide roof support for the longwall. The shields are normally advanced by hydraulicly activated relay bars. On this occasion one of the shields was broken and was being dragged with a chain. Smith maintains that he had seen such chains break and was aware of the dangers involved. He therefore complained to Owens. Record evidence indeed shows that employee Harold Oglesby had previously been seriously injured when a chain broke while used in the same manner Smith was protesting. Oglesby was struck in the face and suffered a contusion, laceration and puncture. He also lost twelve days work.

It is not disputed that the filing of a safety grievance could have required that Oscar Owens immediately address the matter. If Owens disagreed with the complaint, the union safety committee would be called to the area and then, if necessary, an MSHA inspector. Since the longwall was idled in this case for reasons unrelated to the defective shield, the longwall was not then shut down. Owens instructed Smith and another miner to repair the broken shield. The Secretary maintains that Smith=s demand to have the shield repaired by the next evening was protected activity.

Five months later, on October 28, 1996, foreman Owens removed Smith from the No. 2 (production) Longwall and transferred him to the No. 1 (idle) Longwall. The No. 1 Longwall was then an idle section on which maintenance and repair work was performed rather than coal production. According to Smith, the work at the No. 1 Longwall was more demanding and arduous than that of coal production on the No. 2 Longwall. In addition, it is undisputed that miners working at the No. 2 Longwall received more overtime pay for the longer trip to and from the surface than at the No. 1 Longwall.

Smith maintains that he asked Owens for an explanation for his transfer and Owens only responded that he did not know why Smith was being moved and that he had nothing to do with it. Smith claims that he also approached other management officials, including mine superintendent Fred Kozell, but apparently got no explanation. However, when Owens later asked longwall coordinator Grizzelle who decided to move him, Grizzelle gestured towards Oscar Owens. Smith understood this gesture to mean that Owens was the person responsible for his move.

Smith testified that when he was first removed from the production wall, he did not know whether his complaints about dragging the shield with a chain had played a role in Owens=

decision to move him. Smith claims that he thought Owens= actions were racially motivated. Smith and Roy Milton were the only two members of the No. 2 production wall who were moved. Smith and Milton are black and were two of the more senior members on the longwall crew. Oscar Owens replaced them with two more junior employees, both of whom were white. Since the third shield puller on the No. 2 wall was also white, Owens had assembled an all-white shield-pulling crew.

Smith=s efforts to resolve the matter with management were unsuccessful and he filed a grievance with the union in March 1997. Smith claims that at a later meeting with management Owens stated that Smith=s complaints about dragging the shield with a chain played a role in his decision to remove him from the production wall. Since Smith maintains that he was then unaware of the remedies afforded by Section 105(c) of the Act, he continued to seek a remedy through the grievance proceedings. As previously noted, when it became apparent that JWR would not return Smith to the No. 2 Longwall, the local UMWA president purportedly advised Smith to contact his safety committeeman about the procedures for filing a discrimination complaint under the Act. According to Smith he then contacted safety committee chairman James Woods regarding the procedures to file a complaint with MSHA. Woods later visited MSHA investigator Bob Everett. Woods inquired if he could complete a complaint form on behalf of Mr. Smith, but was informed that it would be necessary for Smith to personally sign the complaint. As previously noted, Smith later completed the complaint form and it was hand delivered by Woods to the MSHA office on October 22, 1997.

Five days before his discrimination complaint was filed with MSHA, Smith was returned to the No. 2 Longwall. He maintains that he then engaged in two additional protected activities. On his return to the No. 2 Longwall he was assigned to pull the tailgate shields and had difficulty ramming over the tailgate. According to Smith the delay in ramming the tailgate placed him more than 20 feet downwind of the shearer in an area more exposed to coal dust. On October 21, Smith complained to Oscar Owens about the problem he was having ramming over the tailgate. Smith maintains that he was concerned that "in the long run, staying down there in that dust is not good for your health when you=re in all that dust." Owens purportedly responded that he had already talked to Grizzelle who decided that they were not purchasing any more jacks for the tailgate. The next day, however, Owens reassigned Smith to pull the mid-face set of shields, thereby removing him from the dusty conditions in the tailgate area.

Smith maintains that two days later, on October 23rd, he engaged in a third protected safety complaint after observing that a water spray known as the crescent spray had broken off the longwall shearer. Smith testified that he had experienced methane ignitions in the past and believed the crescent spray was essential to settle the coal dust. The crescent spray was, in fact, designed to suppress coal dust by dissipating water over the coal face. Smith understood that the water spray would be replaced prior to the commencement of coal production, so he proceeded down the longwall face to his duty station on the mid-face shields. Shortly thereafter, the longwall shearer began moving toward the tailgate. Smith testified that he then observed that the crescent spray had not been replaced. He then filed a first step safety grievance with foreman Oscar Owens for not repairing the crescent spray.

Oscar Owens did not know if the water spray was required to be on the shearer, nor did safety committeeman Woods. Woods called another safety committeeman who was also

uncertain as to the necessity of the spray. Smith eventually spoke to longwall coordinator Ken Grizzelle who told him the spray was not required under the existing dust control plan. Smith doubted Grizzelle=s representation but after speaking again with the union safety committee, Smith was apparently satisfied that the spray was not required. He then told Owens that he had no objection to the resumption of production with the shearer. JWR nevertheless opted to replace the water spray before resuming production. The following day, on October 25, 1997, Smith was again transferred from No. 2 Longwall to the No. 1 Longwall. An oral complaint about this transfer was made to an MSHA investigator on October 30, 1997. The Secretary filed her complaint of discrimination with the Commission on July 27, 1998, and Smith returned to the No. 2 Longwall on August 25, 1998.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev=d on grounds, *sub nom*. *Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (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. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner=s unprotected activity alone. *Pasula, supra; Robinette, supra*. See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission=s *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

The second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission noted in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), rev=d on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action or disparate treatment. In examining these indicia the Commission noted that the operator=s knowledge of the miner=s protected activity is "probably the single most important aspect of the circumstantial case."

October 28, 1996, Transfer

There is no dispute that if Smith in fact made a complaint to his foreman, Oscar Owens, regarding the use of chains to drag the longwall shields, it was a protected activity. Since Owens himself acknowledged that Smith made such a complaint, that element of a *prima facie* case has been established. Furthermore, I have no difficulty finding that Smith=s transfer from the No. 1 (production) Longwall to the No. 2 (idle) Longwall was an adverse action. As a result of the transfer Smith was denied overtime pay for the additional travel time to the No. 2 Longwall. The

work on the No. 1 Longwall was also clearly of a more arduous nature.[3]

The Complainant maintains that there is in this case both direct and indirect evidence of motivation evidencing discriminatory intent. As direct evidence she cites the testimony of Bennard Smith himself that, at a meeting with Owens, Grizzelle and Evans following the second step grievance meeting, Evans asked Owens why Smith had been transferred. According to Smith, Owens stated it was because he had complained about pulling a shield with a chain, that he did not like Smith=s attitude and that Smith was not doing his job. This meeting purportedly occurred in March of 1997. For several reasons however, I cannot accept Smith=s testimony that Owens in essence admitted at this meeting to violating the Act by transferring Smith for his safety complaints.

In this regard I note that the other participants at this meeting, Owens, Evans and Grizzelle all denied under the oath that Owens ever mentioned the use of chains to pull shields or any safety complaints at this meeting. It would also be quite unusual for anyone in management to admit to retaliating against an employee because of a safety complaint. I further note that in his discrimination complaint filed with MSHA Smith never mentioned that he had been transferred because of his complaints about pulling a shield with a chain. He alleged only in a general way that he had been "too safety conscious." Finally, Smith=s allegations herein are seriously undermined by his own assertions under oath in a complaint to the Equal Employment Opportunity Commission (EEOC) on December 22, 1997, two months after he filed his complaint with MSHA. In that affidavit Smith declared under penalty of perjury that, "I was removed from my position solely because of race." (Exh. R-5). This affidavit is inconsistent with Smith=s claims that he was told by his foreman that his transfer was based on his prior safety complaint about pulling the shields with a chain and with Smith=s complaint herein that he was transferred because of that safety complaint. Given these inconsistencies and contradictions, I am unable to conclude that Owens ever in fact stated that he transferred Smith because of Smith=s complaints about dragging the shields with a chain. The Secretary=s claim that there is direct evidence of motivation is accordingly not supported by credible evidence.

The Secretary next cites as circumstantial evidence of discriminatory intent illustrations of what she maintains is evasive and inconsistent testimony by William Owens, who was Smith=s foreman and the person responsible for Smith=s transfer. It is indeed true that Owens did testify inconsistently in some respects with regard to his reasons for transferring Smith off the No. 2 Longwall. His testimony that he transferred Smith at least in part because of Smith=s excessive use of the mine telephone and his failure to wash down the longwall shields appears to be contradicted by his deposition testimony. These contradictions may indeed raise suspicions as to the credibility of those alleged non-protected reasons and suggests that those reasons were merely

[3] Indeed Respondent seems to acknowledge that Smith lost overtime pay due to the shorter travel time to the No. 1 Longwall and that the work at the No. 1 Longwall was more physical. The evidence is clearly sufficient to show that Smith=s transfer was adverse.

pretextual. However, that inconsistent testimony could equally suggest a pretext for a racially motivated discriminatory transfer. Indeed, there is evidence in this case to suggest that the transfer may in fact have been racially motivated and Smith himself, as already noted, has filed a complaint with the EEOC alleging that his race was the sole motivation for his transfer (Resp.=s Exh. No. 5). Under these unique circumstances none of the inconsistencies in themselves support a conclusion that the reasons given by Owens were a pretext for safety related discrimination against Smith.

Indeed, even aside from the evidence that Smith=s transfer was racially motivated, I find from the totality of the evidence that Smith=s transfer in this case was not motivated by his safety complaint. In this regard I note that Owens was not evasive and did not deny that Smith in fact had once complained to him about dragging the shields with a chain, and that Smith intimated he would file a first step safety grievance if the shield was not repaired. I also note however, that this event occurred in May 1996 and Smith=s transfer did not occur until October 28, 1996. Such a lapse of time certainly negates a strong connection between the events. Owens also provided other non-protected and uncontradicted reasons for Smith=s transfer to the idle longwall including his maintenance skills, the belief that Smith did not want to work for him, and that Smith "was unsatisfied with the change in supervisors and griping about everything" (Tr. 703). Under all the circumstances I do not find direct or circumstantial evidence sufficient to sustain the Secretary=s burden of proving that Mr. Smith was transferred on October 28, 1996, in violation of the Act.

October 24, 1997 Transfer

It is undisputed that Smith complained on October 21 and 22, 1997, of practices and defects that could reasonably have been considered unhealthy, i.e., his exposure to coal dust because of his difficulty in ramming over the tailgate shields and from a broken crescent spray on the longwall shearer. Accordingly, Smith=s complaints in this regard constituted protected activity. His transfer only a few days later, on October 24, 1997, to the No. 1 Longwall was, for the reasons previously stated, also clearly an adverse action.

Following his October 28, 1996 transfer, Smith was reassigned to the No. 2 Longwall on October 17, 1997. He worked there for only five shifts and was sent back to the No. 1 Longwall on October 24. As previously noted, during the interim he had complained to Oscar Owens on October 21, about the difficulty ramming over the tailgate shields and on October 23, asserted his safety rights under the collective bargaining agreement over the missing crescent water spray. The issue here to be decided then, is whether his reassignment was improperly motivated by these protected activities in violation of Section 105(c). In this regard, it is undisputed that at the time Smith was removed from the production longwall in October 1997, JWR was aware that Smith had complained about his problems in ramming over the tailgate shields and the missing crescent water spray (Tr. 816-817). Moreover, after Smith filed a first step grievance against foreman Owens on the day after Smith had raised the second of his two health complaints, he was removed from the production longwall and placed back on the idle longwall. JWR management therefore knew of Smith=s protected activity and took adverse action against him almost immediately following the second of his two protected complaints. Hostility towards those complaints and unlawful motivation may be inferred from this prompt action. I find that

the Secretary has accordingly met her burden of proving that Smith=s transfer from the production longwall on October 24, 1997, was motivated at least in part by his protected activity.

JWR maintains however, that it would have removed Smith from the No. 2 Longwall, in any event, based on a business justification and Smith=s unprotected activity alone. This argument addresses the affirmative defense under the ***Pasula*** analysis. In ***Chacon*** the Commission explained the proper criteria for analyzing an operator=s business justification for an adverse action:

> Commission judges must often analyze the merits of an operator=s alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
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> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. *Cf.* *Youngstown Mines Corp.*, 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator=s business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." *Cf.* *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, ((1st Cir. 1979). The proper focus, pursuant to ***Pasula***, is on whether a credible justification figures into motivation and, if it did, whether it would have led to the adverse action apart from the miner=s protected activities. If a proferred justification survives pretext analysis . . . . , then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge=s or our sense of fairness or enlightened business practices. rather, the narrow statutory question is whether the reason was enough to have legitimately moved that the operator to have disciplined the miner. *Cf.* *R-W Service System Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

In this regard I note JWR=s evidence that Smith was planning to cause Oscar Owens problems and "set him up." Ken Grizzelle told Babe Evans, who made the transfer decision, that "there was some trouble brewing on 2 Longwall; that some people had come to him and told him that Bennard was going to set Oscar Owens up" (Tr. 795). Grizzelle testified that he obtained his information from two miners, i.e., Jesse Buffet and Red Parra. Buffet told him that "Smitty was trying to set Oscar up and causing trouble" (Tr. 776). Grizzelle explained that he understood from these reports that Smith planned on "just keeping the crew in an uproar, lunches and meal tickets, working two hours overforce and dragging around the force two hours overtime." (Tr. 778). Evans also testified that Parra told him to "move Smitty back down on that wall, he=s causing trouble again." (Tr. 797). Evans did not know however and did not inquire what kind of "trouble" was suspected. Evans acknowledged that it could indeed have involved health or safety matters.

Thus, even assuming, *arguendo*, that credible information had been received by JWR management, that Smith was trying to set up Owens and was "causing trouble" on the No. 2 Longwall, that information alone is far too ambiguous to support the proposed affirmative

defense. Indeed, based on the reported information, the "trouble" Smith was about to cause may very well have been the same protected health complaints asserted herein to be the basis for Smith=s unlawful transfer.

Under all the circumstances I find that not only was Smith=s transfer on October 24, 1997, from the No. 2 Longwall to the No. 1 Longwall motivated by Smith=s protected activity, I find that JWR has failed to sustain its burden of proving by credible evidence that it would have transferred Mr. Smith in any event for non-protected reasons alone and that it has accordingly failed to establish its proposed affirmative defense.

ORDER

The Complaint with respect to the October 28, 1996 transfer of Bennard Smith is hereby denied. The Complaint with respect to the October 24, 1997 transfer of Bennard Smith is affirmed. Accordingly the parties hereto are directed to confer with respect to a civil penalty and damages and to attempt to resolve these issues by stipulation or settlement on or before April 16, 1999. If the parties are unable to reach an agreement on these issues the undersigned must be notified on or before April 16, 1999, of that fact and hearings on these issues will then proceed on Thursday, May 13, 1999, at 9:00 a.m., in Birmingham, Alabama. The assigned courtroom will be designated at a later date.

Gary Melick
Administrative Law Judge

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