FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 5, 1997

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of	:	
JAMES HYLES,	:	Docket Nos. WEST 93-336-DM
	:	WEST 93-436-DM
DOUGLAS MEARS,	:	WEST 93-337-DM
	:	WEST 93-437-DM
DERRICK SOTO,	:	WEST 93-338-DM
	:	WEST 93-438-DM
GREGORY DENNIS,	:	WEST 93-339-DM
Complainants	:	WEST 93-439-DM
	:	WEST 94-21-DM
v.	:	
	:	All American Aggregates
ALL AMERICAN ASPHALT,	:	Mine ID 04-03646
Respondent	:	

DECISION

Before: Judge Cetti

These consolidated cases are before me upon remand by the Commission for further consideration, more specific credibility findings, and analysis consistent with its December 1996 decision, 18 FMSHRC 2096, 2103 (December 1996).

FACTUAL AND PROCEDURAL BACKGROUND

The basic factual framework and procedural background of these cases is set forth in my decision, 16 FMSHRC 2232 (November 1994) and is also more concisely and ably set forth in the Commission's remand decision 18 FMSHRC 2096 as follows:

> AAA is a general contractor in Corona, California that operates an asphalt plant, a quarry, and a plant that produces rock-based aggregates for its own use and sale to other contractors. Tr. 1136-39. In April 1991, AAA was in the process of completing an addition to its rock finishing plant. 16 FMSHRC at 2235. On Thursday, April 18, James Hyles, a leadman on AAA's third or "graveyard" shift, learned that AAA equipment was not in place. Hyles voiced his concern about safety conditions in the plant to Mike Ryan, plant supervisor and

a vice president of AAA. Hyles also spoke to Patrick McGuire, business representative of Local 12 of the International Union of Operating Engineers ("Operating Engineers"), which represented AAA's employees. Id. Thereafter, McGuire visited the plant and saw the plant running without numerous pieces of equipment in place. Id.; Tr. 177-78.

During the weekend of startup operations, Ryan assigned Hyles to work as leadman on a combined second and third shift. 16 FMSHRC at 2236. When Hyles reported to work on Friday, April 19, at 7:00 p.m., he saw equipment lacking guards, ladders, catwalks, decks, handrails and trip cords. Id. at 2235-36. Working under Hyles' supervision in the finish plant area were Greg Dennis, Doug Mears, and Derrick Soto. Hyles warned them to be careful, and they complained to Hyles about conditions in the plant. Later, during the weekend, Hyles videotaped the plant in operation and spoke to Dennis, Mears, and Soto about what he was doing. Id. at 2236. Other employees on the videotape observed Hyles' videotaping, including leadman Gary Richter. Tr. 365-70. On Sunday night, Hyles was involved in a minor accident when he fell through a gap in decking. Tr. 367-70; Govt Ex. 23. Hyles spoke to Dennis, Mears, and Soto about taking the videotape to the field office of the Mine Safety and Health Administration (MSHA). They all agreed that the plant's condition posed dangers to employees and that the tape should be turned in. 16 FMSHRC at 2236; Tr. 370.

On Monday morning, Hyles went to the MSHA field office and turned in the videotape. 16 FMSHRC at 2236; Govt Ex. 54. After viewing the videotape, MSHA inspectors went to the AAA plant and saw it in operation. MSHA issued numerous citations, including 29 unwarrantable failure violations. 16 FMSHRC at 2236. Later that day, Ryan called Hyles at home and told him not to report to work that evening because someone had turned them in and MSHA had shut the plant down. Id.

About a week later on the first day that the plant reopened, Hyles had lunch with Ryan and Gary White, leadman on the maintenance shift. Ryan asked if either man knew who turned him in. Ryan added that he wanted to find out who it was so he could make life so miserable for them that they would be happy to go to work someplace else. Id.; Tr. 375-76. Also after the plant reopened, AAA President William Sisemore stated that he

wanted to find out who turned in the company and make it worth their while to go elsewhere. 16 FMSHRC at 2237, Tr. 391-504.

In June 1991, during a subsequent MSHA investigation, Hyles, Dennis, Mears, and Soto, in addition to other employees, were interviewed in an investigation into Ryan's conduct under 30 U.S.C. ' 820(c). Id. at 2237, Govt Exs. 2, 3, 4, and 5.

In October 1991, Ryan, without explanation, demoted Hyles from his position as leadman. When asked why he was demoting Hyles, Ryan responded that they no longer saw eye-to-eye. 16 FMSHRC at 2237.[1] On July 7, 1992, due to an equipment move, AAA laid off 16 of its 27 employees, including Hyles, Dennis, Mears, and Soto. Over the succeeding weeks, all employees but the four complainants were called back to work, and some employees were working overtime. When Hyles and Soto went to the plant and saw less senior employees working, the four filed grievances under the collective bargaining agreement between AAA and the Operating Engi-neers. The grievants contended that the contract required AAA to conduct a "bumping" meeting prior to layoffs where employ- ees could bid on jobs held by less senior employees and bump those employees out of jobs for which the more senior employee was qualified to perform. Id. at 2238-39. The grievances went to arbitration, and the arbitrator found that AAA had violated the contract by laying off employees without conducting a bumping meeting; however, he concluded that only Hyles was entitled to relief to bump less senior employees, based on his qualifications. 16 FMSHRC at 2238-39, Govt Ex. 51, at 11-14.

In September 1992, Hyles, Dennis, Mears, and Soto filed discrimination complaints with MSHA. Following the institution of temporary reinstatement proceedings, AAA reinstated the four complainants on February 11, 1993. 16 FMSHRC at 2239-40. Upon their reinstatement, they were assigned to production work on the day shift. Id. at 2240.

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[1] The Commission in footnote 3. Id. at 2402 ruled the judge's determination that Hyles demotion did not violate 105(c) of the Mine Act is final since the Secretary did not preserve the demotion issue for review through a timely filed petition, nor did the Commission order sua sponte review of the issue.

In early March 1993, AAA reestablished a third shift as a result of decreased production due to wetness of material that was being processed through the plant. AAA temporarily assigned four of its most senior plant repairmen to perform production work, while paying them at their higher rate of pay as repairmen. It was unusual for senior employees to work the night shift, because the day shift was seen as more desirable and the most senior employees generally bid on it. Id. Three weeks later, on March 23, AAA discontinued the third shift and announced a layoff. Rather than reassigning the four repairmen to their regular positions, AAA required the repairmen to participate in a bumping meeting. Rather than bumping into repairmen positions, they bumped into the production jobs held by Hyles, Dennis, Mears, and Soto. As a result the complainants were the only four employees laid off. AAA discontinued the third shift and announced a layoff. Rather than reassigning the four repairmen to their regular positions, AAA required the repairmen to participate in a bumping meeting. Rather than bumping into repairmen positions, they bumped into the production jobs held by Hyles, Dennis, Mears, and Soto. As a result, the complainants were the only four employees laid off. AAA subsequently hired new employees to fill the vacant repair- men positions. Id. at 2240-41; Tr. 457, 481, 1693.

On March 24, the four complainants were called into the layoff meeting and told that they had been bumped by more senior employees and that they were to bid on jobs held by less senior employees. They were reluctant to exercise their bump- ing rights at the meeting for fear that Ryan would refuse to allow them to bump into other jobs because they were not quali- fied. Hyles and Soto requested that they be given time to consult with counsel from the Solicitor's office because of the pendency of their discrimination complaints. 16 FMSHRC at 2241. Shortly after the meeting, Operating Engineers Business Agent McGuire called Ryan to let him know that Hyles had decided to bump into the plant operator position. Ryan refused the request, stating that it was untimely. AAA refused to accept any of the complainants' subsequent written requests to bump for the same reason. Id.

Following the second layoff, Hyles, Dennis, Mears, and Soto filed a second discrimination complaint, alleging that the March 1993 layoff was in retaliation for their MSHA related safety activity. AAA reinstated the complainants on April 26, 1993. After their reinstatement, the complainants were frequently given reduced working hours. In April 1993, AAA began hir-

ing ten new employees and increased its output of finished material. In August 1993, AAA posted a seniority list indicating that Dennis, Mears and Soto had seniority dates of January 1993. When Mears asked why the list did not reflect his original seniority date, Ryan responded that he had no seniority. Id. at 2242.

The Secretary issued four complaints for each of the two layoffs, and an eight day hearing was held. At the close of the hearing, the judge issued a bench decision granting the complainants temporary reinstatement, and a written decision followed. 16 FMSHRC 31 (January 1994)(ALJ). Thereafter, the judge issued his decision on the merits of the complaints. Initially, the judge dismissed several procedural defenses raised by AAA, including that the complaints were time barred under the Mine Act and that the discrimination complaints were preempted by the National Labor Relations Act, 29 U.S.C. ' 141 et seq. (1994). 16 FMSHRC at 2233-35. On the merits, the judge found that AAA had violated section 105(c) of the Mine Act by laying off the complainants on two occasions in retaliation for their MSHA related safety activity. Id. at 2247-49.

APPLICABLE LAW

The principles governing analysis of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 817-18 (April 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 protected activity. If an operator cannot rebut the prima facie case in this manner, it, nevertheless, may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the 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 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (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).

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11

(November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Simmons v. Mine Services Co., 6 FMSHRC 1381, 1398-99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner or miners includes hostility towards the miner because of his protected activity and disparate treatment of the complaining miner by the operator. Chacon, supra at 2510.

Docket Nos. WEST 93-336-DM, WEST 93-337-DM, WEST 93-338-DM, WEST 93-339-DM

With respect to these four dockets (first set of dockets) for reasons set forth below, I find and conclude that each of the four Complainants in April 1991 engaged in protected activity, that Ryan, the plant supervisor and vice-president, as well as the president, Sisemore, blatantly expressed hostility to the protected activity and a desire to find out who "turned them in" so as to make it so miserable for them they would be glad to seek employment elsewhere. Over a period of time, Respondent was able to determine who the employees were that engaged in the April 1991 protected activity and took adverse discriminatory action against them in retaliation for their having engaged in the protected activity. The adverse action taken included not recalling Complainants back to work for a prolonged period of time after the July 1992 layoff while less senior employees were working and at other times between July 1992 and December 16, 1993, all of which are covered by the back-pay stipulation set forth in the stipulation marked as Exhibit A.[2] This adverse action resulted in a loss of wages (back-pay) for each of the Complainants in the dollar amounts set forth in my decision dated November 2, 1994, 16 FMSHRC 2232, which in turn, is based on the record and the agreed dollar amounts set forth in the stipulation signed and filed by all parties. This stipulation was and is accepted by the undersigned Judge. On the same basis, after consideration of the relevant statutory criteria, I find the appropriate penalty to be assessed for the violations of Section 105(c) found in this first set of four dockets is $14,000.00.

Docket Nos. WEST 93-436-DM, WEST 93-437-DM, WEST 93-438-DM,

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[2] The stipulation signed by all parties is attached to this Decision as Exhibit A.

WEST 439-DM

This second set of dockets, listed above, arose out of the second set of discrimination complaints that the four complainants filed with MSHA in September 1992. With respect to these dockets, Docket Nos. WEST 93-436-DM, WEST 93-437-DM, WEST 93-438-DM and WEST 93-439-DM, I find that each of the Complainants did indeed engage in protected activity which included taking an active part in the Section 110(c) investigation of the plant supervisor, Ryan. It is undisputed that the Respondent was fully aware of the Claimants' protected activity. I find, however, that Respondent took no adverse action against the Complainants that was motivated by the protected activity involved in their participation in the 110(c) investigation or in their filing the second set of discrimination complaints. I find that all the adverse action taken against the Complainants, except for the demotion of Hyles from his leadman position to a journeyman position, was motivated by Respondents' animosity towards Complainants for their April 1991 protected activity, and not motivated by the protected activity involved in the 110(c) investigation. There maybe suspicion but there is no persuasive evidence of a causal nexus between any adverse action and the Complain- ants' protected activity involved in the 110(c) investigation of Ryan.

It is on this basis that I find and concluded the Secretary has not proved there was a violation of Section 105(c) with respect to this second set of dockets. I, therefore, dismiss these dockets and vacate the corresponding proposed $14,000.00 penalty assessments for the alleged violations in the second set of dockets. Likewise, I dismiss Docket No. WEST 94- 21-DM in view of the failure to prosecute and stipulation number four of Ex. A which clearly states "there shall be no penalty in the case bearing Docket No. WEST 94-21-DM."

CREDIBILITY FINDINGS

Having heard and observed the demeanor of the witnesses as they testified at the hearings, I make the following credibility findings:

I credit the testimony of William S. Shillie, particularly his testimony that he heard Respondent's President Sisemore and its Vice-President and Plant Manager Mr. Ryan having a conversation that clearly showed they wanted to find out who filed the hazard complaint with MSHA. He heard them say in a loud voice, as though intending him to hear, that they would like to know who filed the hazard complaint so they could make it worthwhile for them to leave. This was a blatant threat against miners who engaged in statutorily protected activity and clearly showed their intent to retaliate against the miners who engaged in the protected activity.

I credit the testimony of the complainant James Hyles, that Ryan asked him and leadman Gary White if they had any idea who "turned him in" and that Ryan told them he wanted to find out who it was and that he would make it so miserable for them, they would be happy to go to work someplace else. I credit Hyles' testimony that while he was in the office of President Sisemore, he heard Sisemore say he would like to "find out who was causing him all the problems and that he would make it worth their while to seek employment elsewhere."

I credit the testimony of the Complainants, Hyles, Mears, Soto and Dennis, including their testimony as to their training, experience and their job qualifications. In view of Ryan's blatant hostility to the Claimants' protective activity and to his express desire to get rid of those who "turned him in". I do not credit Ryan's testimony as to the job qualifications of the applicants during the relevant time period through the date of the final hearing in this matter December 16, 1993.

I do not credit Ryan's testimony that neither he nor Mr. Sisemore said anything to the effect that they wanted to find out who had made the complaints to MSHA so that they (Management) could make it worth their (Complainants) while to leave. I do not credit Ryan's testimony that he did not find out who "turned in" Respondent to MSHA in April 1991 until MSHA sent him the discrimination complaints filed by the four Complainants.

I credit the testimony of Cathy Ann Matchett, the Special Investigator with Mine Safety and Health Administration who pursuant to her MSHA assignment investigated the complaints of discrimination filed by the Complainants with MSHA. Although much of her testimony consisted of hearsay, I credit her with accurately summarizing the information given to her in the course of her investigation. (See Exhibits G-18, G-19, G-31, G-32). I credit the testimony of Patrick McGuire and Martin Collins, the business representatives for the International Union of Operating Engineers, Local 12. Martin Collins specializes in rock, sand and gravel agreements for Local 12. (Tr. 1084). Collins was called as a witness, respectively, by both Respondent and Complainants.

OPERATOR'S HOSTILITY TO THE PROTECTED ACTIVITY AND THREATS OF RETALIATION

There is strong convincing evidence of the operator's animosity and hostility towards the protected activity and their intention to retaliate against those employees who engaged in the protected activity when they determined their identity. Management's conduct was exacerbated by their making loud vocal threats as to how they were going to retaliate against said employee(s) once they determined who they were. Such blatant expressions of hostility has a chilling effect on all employees. It is an indirect threat of adverse action in retaliation against any employee who dares to engage in protected activity. This blatant intimidating conduct is the antithesis of the very intent and purpose of Section 105(c) of the Mine Act. Such conduct on the part of an operator flies in the face of the purpose and the intent of the Mine Act. The effect and the probable intent of such expression of hostility is to intimidate employees from engaging in protected activity. Such expression of animosity towards the protected activity and the express desire and attempts to find out who "turned them in" with threats of retaliation against those employees once their identity is known followed by adverse action against the Complainants, supports a reasonable inference that Respondent did, in fact, determine the identity of the employees who participated in the protected activity that caused Respondent "so much trouble." Knowledge of the Respondent is reasonably inferred from the established facts and circumstances.

THE ARBITRATOR'S DECISION

Miner's rights under a union contract are different and subservient to the statutory protected rights of a miner under Section 105(c) of the Mine Act. The crucial issues and procedures are different.

The record reveals practically nothing about the arbitrator nor does it demonstrate the adequacy of the record on which arbitrator's conclusions were based. I have never seen the record before the arbitrator and the decision does not appear to name all the witnesses who testified in the arbitration proceeding. Assuming the same witnesses testified in the arbitration proceeding as in these discrimination cases under Section 105(c) of the Mine Act, it is quite clear I have made different credibility findings than the arbitrator. Based upon the record before me I do not give any weight to the arbitrator's decision. In view of Management's blatant hostility to the protected activity of the Claimants and Management's obvious desire to get rid of Claimants, I place very little credence in Ryan's testimony as to the qualifications of the claimants for available jobs, particularly as compared to qualifications of less senior employees who were working or returned to work before the Complainants after the July 1992 layoff. I based my opinion that All American Asphalt violated its collective bargaining agreement in implementing the layoff in July 1992 without conducting a pre-layoff bumping meeting, not on the decision of the arbitrator, but on the provisions of the union contract, the testimony of business agents for Local 12 of the Union of Operating Engineers, and the admission of Ryan at page 2 of Ex. G-7.

PROTECTED ACTIVITY

I find that Ryan, Respondent's vice-president and plant manager, started running the plant in April 1991 with full knowledge that mandatory basic safety equipment such as trip cords, handrails, ladders, catwalks, decks and guards, were not in place. I credit the testimony of James Hyles, the leadman of the combined crew, that he complained to Ryan, to no avail, about running the plant without the basic safety equipment in place. I also credit the testimony of the Complainants that they complained about the unsafe conditions to their leadman Hyles and to leadman Gerald Richter. Hyles' protected activity, in addition to his safety complaint to Ryan, included the making of a video tape of the plant running in its unsafe condition and his turning the video tape over to MSHA after his discussion with the other three Complainants as to the danger involved to employees and as to whether he should take the video tape to MSHA.

The protected activity of Mears, Soto and Dennis consisted of their safety complaints to leadman Hyles and Richter and their discussion with Hyles as to the danger to employees involved in running the plant in its unsafe condition and their support and agreement that the Hyles video tape showing the many violations of mandatory safety standards should be turned over to MSHA.

In the vacated decision, I apparently was willing to go along with Respondent's contention that they had no knowledge of Hyles' protected activity at the time Respondent demoted Hyles in October 1991 from his leadman position to a journeyman. I did this only because there was no direct evidence on this point and, most importantly, because it made no difference as to the legality of the demotion in view of my finding and conclusion that Respondent properly demoted Hyles for his admitted on the job misconduct alone, irrespective of Hyles' protected activity. While the Secretary presented some evidence that the plant had a lax policy for inadvertent falling asleep on the job, there was no evidence that Hyles' degree of misconduct was tolerated in other employees. Hyles' unprotected conduct was clearly unsuitable for an employee in a leadman position and Respondent demoted him for his unprotected conduct alone. I find no disparate treatment in demoting Hyles from a leadman position to a journeyman position.

Although there is no direct evidence as to the exact time Respondent determined the identity of those who "turned them in", based on the reasonable inference to be drawn from the established facts, I find that it was sometime before the July 1992 layoff and recall. First, it is established that Hyles was observed making the video of the plant by many of the employees who worked with Hyles on the weekend just before the Monday MSHA shutdown of the plant. Those who observed Hyles making the video tape of the plant's many hazardous safety violations included leadman Richter. In this connection it is worthy of note, for example that Shillie, a very credible witness, testified he assumed Hyles was the one who turned the company in because Hyles was the one who video taped the plant in its unsafe condition. The other three Complainants worked under Hyles and along with Hyles were exposed to the hazardous work conditions on the weekend before the Monday morning MSHA shutdown of the plant. When the four Complainants were not called back to work following the July 1992 layoff while less senior employees were working, it is reasonable, in view of the established facts, to infer that Respondents had determined that Complainants were the ones

that engaged in the protected activity that caused them so much trouble and for that reason retaliated against them by not calling them back to work.

In addition, it is established that the Plant Manager, Vice-President Ryan and President Sisemore expressed great hostility to the protected activity and a strong desire to know who turned the company in and caused them so much trouble. They threatened to make life so miserable for those who engaged in the protected activity so they would be only too glad to seek employment elsewhere. These facts, plus the fact that the Claimants were clearly subject to disparate treatment by the Respondent not calling them back to work after the July 1992 layoff, while less senior employees were working lends support to a reasonable inference that Respondent had knowledge of the identity of the employees who participated in the protected activity that led to the MSHA shutdown of the plant, the issuance of 29 unwarrantable citations, and the 110(c) investigation of the plant supervisor. It is reasonable to infer from the evidence presented that sometime before the July 1992 layoff and recall, Management determined the identity of the employees who participated in the protected activity that Respondent so deeply resented.

SENIORITY

The Union contract in effect at the relevant time (July 1992 - March 1993) states in Article XIII Section 3 the following:

> Section 3: Seniority Termination. Seniority shall be terminated by ...(3) if the employee performs no work for the Employer within the barganing unit for a period of six months ....

In view of the miners' statutorily protected rights, I find this provision has no effect on the Claimants' seniority at any time relevant to this decision. Any failure of Complainants to perform work for Respondent for any six months or longer period during the relevant time period up through December 16, 1993, was due to Respondent's illegal discrimination against the Claimants. As stated before, the Union agreement is subservient to the miners statutorily protected rights under the Mine Act.

The Respondent's seniority list for the Claimants and other operating engineers under the Local 12 Union contract is as set forth in Government Exhibits 13, 14, and 15. I find Claimants seniority date at all time relevant to this decision, is their date of hire as follows:

Name	Date Hired
Hyles, James	07-09-85
Dennis, Gregory	08-21-86
Mears, Douglas	04-09-87
Soto, Derrick	07-05-88

These dates of hire establish the Claimants seniority through all period of time relevant to this decision i.e. through December 16, 1993, the date of the final hearing in these cases.

FURTHER FINDINGS

1. Respondent refused to recall the Complainants back to work after the July 1992 layoff in retaliation for Complainants having engaged in protected activity which resulted in MSHA issuing many citations and shutting the plant down.

2. Respondent's claim that Claimants were not recalled shortly after the July 1992 layoff because Complainants were not qualified for available work is pretextual.

3. Respondent manipulated the shift and job assignments in March of 1993 for the specific planned purpose of terminating the Claimants employment in retaliation of their protected activity that resulted in the shutdown of the plant, the 29 unwarrantable citations and the 110(c) investigation of Ryan, the plant manager and vice-president of the company.

BACK-PAY AND PENALTY

In the decision of November 2, 1994 (16 FMSHRC 2232) I directed counsel for the parties to confer with each other with respect to the remedies due each of the Claimants and encouraged the parties to reach a mutually agreeable resolution or settlement of these matters.

When the parties finally informed me they could not reach an agreement as to the specific dollar amount, I set the matter for hearing on May 8 - 10, 1995, in Riverside California. Just days prior to the scheduled May 1995 hearing, the parties after conference calls on May 5th and May 8, 1995, notified the Judge that they had reached an agreement on the dollar amounts due. They requested cancellation of the May hearing on the grounds that it would no longer be necessary or productive, in any way, in view of a stipulation reached by the parties. The scheduled hearing was canceled and on May 22, 1995, the parties filed the stipulation, attached hereto as Ex. A.

In the stipulation the parties, assuming liability, agree to certain dollar amounts of back-pay due each Claimant from April 1991 up through the date of the final hearing in these cases, December 16, 1993. The parties stipulate that the interest began to accrue on March 15, 1993, on the entire back-pay award, and that Respondent shall make all legally required payroll deductions and withholdings.

Based on the record and the stipulation attached as Exhibit A, I enter the following:

ORDER

Respondent is ordered to pay the Complainants' back wages and interest for all periods through the date of the final hearing in these cases, December 16, 1993, the following amounts:

Name	Amounts
James Hyles	$20,837.24 plus interest [3]
Derrick Soto	$34,347.10 plus interest
Douglas Mears	$38,656.34 plus interest
Gregory Dennis	$36,159.32 plus interest

It is further ordered the RESPONDENTS PAY a civil penalty of $14,000.00 to the Secretary of Labor for Respondent's violations of Section 105(c) of the Mine Act as charged in Docket Nos. WEST 93-336-DM, WEST 93-337-DM, WEST 93-338-DM and WEST 93-339-DM. All amounts payable by Respondent pursuant to this order shall be paid within 40 days of the date of this decision.

It is further ORDERED that Docket Nos. WEST 93-436-DM, WEST 93-437-DM, WEST 93-438-DM, WEST 93-439-DM and WEST 94-21-DM be DISMISSED and their corresponding proposed penalties VACATED.

August F. Cetti
Administrative Law Judge

[3] Interest shall be computed in accordance with the Commission's decision in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (December 1983), at the adjusted prime rate announced semi-annually by the Internal Revenue Service for the underpayment and overpayment to taxes. Interest shall be computed from March 15, 1993, until the date of payment of back-pay awarded.

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