FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 12, 2003

JAMES WOMACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 2002-138-DM
	:	WE MD 01-17
GRAYMONT WESTERN US INC.,	:	
Respondent	:	Tacoma Plant
	:	Mine ID 45-03290

DECISION ON LIABILITY

Appearances: James Womack, *pro se*, Tacoma, Washington, for the Complainant; Robert Leinwand, Esq., Stole Rives, LLP, Portland, Oregon, for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on December 14, 2001, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(3) (1994). The complaint was filed by James Womack against Graymont Western US Inc. ("Graymont") previously known as Continental Lime.[1] (Rep. Br. at p.5, n.4). Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides, in pertinent part:

> No person shall discharge or in any manner discriminate against . . . 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 in a coal or other mine . . . *or because such miner . . . instituted any proceeding under or related to this Act* . . . .

[1] Womack's complaint which serves as the jurisdictional basis for this matter was filed with the Secretary of Labor (the "Secretary") on August 29, 2001, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Womack's complaint was investigated by the Mine Safety and Health Administration (MSHA). On November 30, 2001, MSHA advised Womack that its investigation did not disclose any section 105(c) violations. On December 14, 2001, Womack filed his discrimination complaint with this Commission which is the subject of this proceeding.

(Emphasis added). Section 105(c) of the Act seeks to protect miners from not only common forms of discrimination, such as discharge or demotion, but also subtle forms of retribution. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (August 1982).

The hearing in this matter was conducted in Seattle, Washington on October 2 and October 3, 2002. At the time of the hearing, Womack had been suspended without pay for over one year, although he had not been terminated. (Tr. 524). Womack had been seeking reinstatement since July 18, 2002. The record was left open to permit Graymont to respond to Womack's reinstatement request. Graymont terminated Womack on October 22, 2002. The record was closed on January 17, 2003. The parties filed post-hearing briefs and Womack filed a reply brief.

Womack asserts that he is the victim of a series of adverse actions motivated by his protected activity: two reprimand letters, a five day suspension following his union grievance of the reprimands, and a suspension without pay beginning September 21, 2001. These disciplinary actions were investigated by MSHA during the course of its consideration of Womack's discrimination complaint.

Womack now contends that Graymont's post-hearing decision to terminate his employment is in retaliation for his protected activity. Womack's October 22, 2002, termination occurred after MSHA completed its discrimination investigation, and after Womack filed his December 14, 2001, complaint with this Commission. However, as discussed herein, Womack may amend his discrimination complaint to include his termination. As such, his termination is a proper subject of this section 105(c)(3) proceeding.

I. <u>Statement of the Case</u>

Womack sustained a back injury while working as a kiln operator in July and August 1999. Graymont accommodated Womack by permitting him to perform light duty until September 21, 2001, when it concluded Womack's medication precluded him from safely performing his job. At that time, Graymont placed Womack on extended leave without pay. Womack was awarded workers compensation from the State of Washington Department of Labor and Industries (L&I) as of September 21, 2001.

Womack's eligibility for L&I compensation ended on July 8, 2002, after L&I learned Womack was no longer taking medication. At the hearing, Graymont stated that it was unable to determine if Womack was capable of returning to his job because it had not received adequate information from Womack's physician. (Tr. 524-25). The record was left open for Womack to provide Graymont with additional information. Graymont received a statement from Womack's physician on October 7, 2002. (Memorandum of Gary Henriksen, M.D., Oct. 7, 2002).[2]

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[2] Both parties are in possession of the post-hearing documentation concerning Womack's termination that was proffered before the record was closed. Consequently, these documents will be identified by author and date but not as exhibits of either party.

On October 18, 2002, Graymont concluded that Womack could not perform the essential elements of his kiln operator job with or without a reasonable accommodation. Consequently, Womack's employment was terminated effective October 22, 2002. (Letter from Dennis Wakin to James Womack, Oct. 18, 2002). The record was closed on January 17, 2003, after Womack and Graymont furnished additional medical and L&I records in response to a November 21, 2002, Order the parties to submit additional documentation.[3] Prior to closing the record, during a January 15, 2003, telephone conference, the parties stated they did not desire to present additional testimony.

For the reasons discussed below, Womack's discrimination complaint with respect to his disciplinary letters, his five day suspension and his extended leave is denied. However, the evidence reflect's Graymont's decision to terminate Womack, rather than provide him with a reasonable accommodation, as it had done in the past, was motivated, at least in part, by Womack's protected activity. Accordingly, Womack's discrimination complaint with respect to Graymont's refusal to reinstate him shall be granted.

II. Preliminary Findings Of Fact

a. Background

Graymont's Tacoma, Washington facility produces quick lime, also known as calcium oxide. Limestone is transported to the plant on a barge from Canada where it is off-loaded onto conveyor belts and separated. The stone is then screened and stockpiled. The material ultimately is conveyed into a coal-fired rotary kiln that reaches approximately 1,840 degrees Fahrenheit. At that temperature, lime loses its calcium dioxide and becomes calcium oxide. The finished lime falls through bars onto a plate below called the "grizzly" where it is cooled and then conveyed to product silos. It is later removed from the silos, screened, and prepared to customer's specifications. Quick lime is used in both the pulp and paper, and steel industries.

Graymont's facility is operated 24 hours per day, seven days per week. The work day is divided into three eight hour shifts: 6:00 a.m.-2:00 p.m.; 2:00 p.m.-10:00 p.m.; and 10:00 p.m.-6:00 a.m. Personnel work on rotating shifts each week. There are approximately 35 employees assigned to the Tacoma plant, nine of which are assigned to work in the kiln department. These nine employees consist of four kiln operators, four stonemen, and one bagman. There is a kiln operator and stoneman on each of the three shifts. The extra kiln operator and stoneman fill in for the teams of kiln operators and stonemen on their days off. There is one bagman who works only the 6:00 a.m.-2:00 p.m. shift. The remaining employees work in and around the crushing and screening plant.

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[3] The parties agreed that the documentation furnished in response to the November 21, 2002, Order shall be admitted in evidence. Consequently, these documents will only be identified by author and date as both parties posses these documents.

The kiln operator is responsible for monitoring the kiln from a control room. The kiln operator is seated during a portion of each shift, depending on the frequency of problems arising in the kiln. Monitoring consists of ensuring the coal is properly burned to maintain the correct kiln temperature, and periodically testing the lime product. Working around the outside of the kiln exposes the kiln operator to extreme temperatures reaching as high as 800 degrees Fahrenheit.

The kiln operator's job duties include raking out (pushing or pulling) large chunks of unburned coal ash, called "clinkers" or "ash balls," that can weigh more than 200 pounds. The ash balls are removed by pushing or pulling them with long rods, or pokers, that are passed through an opening in the hot furnace. Clearing the kiln of ash balls requires crouching, pulling, pushing and bending. The job also occasionally requires reaching above the head to loosen lumps of coal from the silo which feeds the coal to the kiln. Finally, the kiln operator is required to lift approximately 80 pounds or more occasionally, 40 pounds frequently, and 20 pounds continuously.[4] (Job Analysis by Catherine Parker, CRC, Oct. 9, 2002).

The stoneman, also known as the kiln operator's assistant, feeds limestone into the kiln, and assists the kiln operator in cleaning and maintaining the kiln. The bagman works at the baghouse Monday through Friday packaging the finished product.

Medical records reflect James Womack is "a very strongly-built" 54 year old. He is 6 feet 2 inches tall and he weighs approximately 270 pounds. (Letter from William J. Morris, M.D., to Gary Henriksen, M.D., at p.2, Mar. 12, 2001). Womack began working for Graymont at the stacker conveyor in 1987. Thereafter, he worked in the baghouse for approximately three years before becoming a stoneman. In 1995, Womack replaced Mike Moats as a kiln operator after Moats left to accept other employment.

b. <u>Womack's August 1999 MSHA Complaint</u>

Womack sustained a lower back sprain on Monday, July 26, 1999, as a consequence of ". . . pulling large chunks of ash over a week period . . . ." (Comp. Ex. 1). Womack's back injury was reported to MSHA on August 8, 1999, on an Accident, Injury and Illness Report

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[4] The degree of exertion required of a kiln operator varies from day to day. Estimations regarding the maximum weight a kiln operator was required to lift, pull, or push on a given day varied greatly throughout this proceeding. For example, there was testimony that ash balls can weigh as much as 200 to 500 pounds. (Tr. 386). The exact weight is not material as it is undisputed that Womack's back condition precludes him from performing the full exertional range of activities. Nevertheless, Graymont accommodated Womack from July 1999 until September 2001, during which time Womack worked as a kiln operator despite being on light duty.

Form 7000-1 completed by Dan Hudson, a Graymont foreman. *Id.* Immediately following his back injury, Womack's regular days off were July 27 and July 28, 1999. Womack was on vacation from July 29 through August 1, 1999.

Womack returned to work on August 2, 1999. At 3:00 p.m. on August 4, 1999, Womack suffered burns to his neck, face, back and arms from exposure to heat and dust while attempting to remove a chunk of hot ash from the side kiln door. This incident also was the subject of an MSHA accident report completed by Hudson on August 8, 1999. (Comp. Ex. 2). At the time of Womack's August 4, 1999, burns, Womack also reported his back condition had been exacerbated. On April 12, 2000, L&I assigned Womack a monetary award for his burns consisting of a residual 9% permanent skin impairment. (Letter from Dorie Laubsher, L&I Claims Manager, to James Womack, April 12, 2000). This L&I determination denied Womack's claim for a monetary award for his back condition. *Id.*

Shortly after sustaining his burns, Womack contacted the local MSHA office to complain that Graymont was not providing adequate protective clothing. MSHA responded by inspecting Graymont's kiln facility on August 17, 1999. As a result of its inspection, MSHA issued 104(d)(1) Citation No. 7979030 citing a violation of the mandatory standard in section 56.15006, 30 C.F.R. § 56.15006. This safety standard requires protective clothing and equipment to be worn to prevent exposure to chemical hazards or irritants. (Comp. Ex. 3). While not identifying Womack by name, Citation No. 7979030 noted it was issued because of the burn injuries that occurred over a two day period on August 3 and August 4, 1999. The violation was attributed to Graymont's unwarrantable failure because Plant Manager Ron Eccles and Hudson allegedly "allowed the employee to be placed in harm's way" despite awareness of the potential burn hazard.[5] (Comp. Ex. 3).

In addition to the citation concerning Womack's injuries, 104(d)(1) Order No. 7979031 was issued citing an additional violation of section 56.15006, because Roy Tucker, Womack's stoneman, was observed working near the kiln without wearing protective clothing despite Graymont's knowledge of Womack's recent burns. The violation also was attributed to Graymont's unwarrantable failure. (Comp. Ex. 4). Womack testified that Graymont provided kiln workers with long blue coats, protective gloves and face shields as a consequence of his August 1999 complaint. (Tr. 90-91).

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[5] The term "unwarrantable failure" is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emory Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence.

c. The July 2001 Reprimands

On June 2, 2000, Womack wrote "I am gay" on the hard hat of a fellow employee. Womack testified that Tucker also participated in this "prank." Womack described his behavior as a joke that was not intended to offend. However, Womack conceded it was a "bad joke" and that he would never do it again. (Tr.110). Womack admitted to Hudson and Scott Mork, who was Graymont's production supervisor, that he had written on the hard hat. Womack apologized to the subject employee. Although Womack was admonished by Mork, Womack was not given a written warning at that time.

On July 20, 2000, L&I denied Womack's reconsideration of its April 12, 2000, decision denying a monetary award for Womack's back. (Resp. Ex. 1). Womack sought to reopen his claim by relying on an exacerbation he reportedly suffered on August 1, 2000. (Tr. 132; Resp. Ex. 1). An L&I claim form signed by Womack noted he suffered a sore back on August 1, 2000, although no accident was reported. (L&I Claim # X445116, received Sept. 11, 2000). Womack did not report to work from August 1 through August 3, 2000, on the advice of his doctor. (Henriksen workability report, Aug. 1, 2000). Womack was cleared to return to full duty effective August 21, 2000. (Henriksen workability report, Aug. 11, 2000). Womack's attempt to reopen his claim for a job-related permanent partial disability rating for his back was opposed by Graymont, and it ultimately was denied by L&I.

Womack testified that "everything went pretty much smoothly along" until he received two letters of reprimand in July 2001. (Tr. 95-96). Since hurting his back in July 1999, Womack had been taking Naproxin, Daypro or Flexeril, as needed, for pain, and Hytrin for high blood pressure. Womack asserted his medicine did not interfere with the performance of his job. In this regard, Womack stated he did not experience any fatigue or dizziness. (Tr. 99-100, 104-05). Mork indicated Womack was performing his regular job within his 40 pound exertional restrictions. (Tr. 498-99).

Womack began his regular weekly shift on June 28, 2001. He worked six consecutive days from June 28 through July 3, 2001, working 12 hour shifts the first three days, and 8 hour shifts the next three days. Womack was scheduled to work on July 4, 2001. However, he failed to report to work on the fourth of July holiday. Womack stated that on July 3, 2001, he told kiln operators Howard Smith and Duane Givens that "[he] didn't think [he] would be in on the fourth of July." (Tr. 122). Womack testified he did not tell Smith or Givens why he decided he was not coming to work. (Tr. 122).

Womack explained, unconvincingly, "[b]ecause my back was flared up and it was kind of sore, so I figured, you know, what the heck, I'll just take the fourth of July off." (Tr. 122). Womack felt it was not necessary for him to go to work because the kiln had been dismantled for repairs. Mork testified that on July 4, 2001, a new burner management system was being installed by outside contractors. Mork stated it was particularly important for kiln operators to be present during this installation so the kiln could be monitored as it was turned on and off. (Tr. 454).

Womack stated that he asked his wife to call Graymont on July 4, 2001, to notify it that he was taking sick leave. Womack stated his wife telephoned but the call was not answered. Mork testified Womack told him his wife forgot to call in. (Tr. 454, 456). The kiln is staffed 24 hours per day. It is company policy for employees to telephone the main office number when no one answers the telephone in the kiln operator's control room. If the main office telephone is not answered, the call is transferred to a paging service where a message can be left. (Tr. 451-52). It is important for kiln operators to call in sick prior to their shift so their shift can be covered by another kiln operator. (Tr. 461).

Womack had a scheduled day off on July 5, 2001. Womack returned to work on July 6 and worked through July 9, 2001, without incident. After completing his shift on July 9, 2001, Womack was directed to Hudson's office where he met Mork, and union shop steward Steve Charest. Mork informed Womack that he was going to receive two letters of reprimand. However, since Plant Manager Ron Eccles was on vacation, the two reprimand letters were not given to Womack formally until July 23, 2001. (Tr. 139-40).

The first reprimand was dated June 9, 2000. (Comp. Ex. 7). It concerned the June 2, 2000, "I am gay" hard hat incident. It cautioned Womack against any further incidents of graffiti or harassment of fellow employees. Graymont asserts the reprimand was placed in Womack's file on June 9, 2000, although it was not given to Womack until one year later due to an oversight.

The second reprimand, dated July 5, 2001, concerned Womack's July 4, 2001, absence. (Comp. Ex. 6). It noted Womack did not notify plant supervision that he would not be working on the fourth of July although Womack admitted he had decided in advance not to work on the fourth of July holiday.[6]

At the hearing, in support of his discrimination complaint, Womack contended the reprimand letters were motivated by his August 1999 hazard complaints. Womack also asserted his reported aggravation of his back condition in August 2000 was an additional motivating factor because Graymont opposed Womack's L&I claim for a permanent partial disability rating. (Tr. 130-138). However, Womack failed to identify any protected activity that occurred within a reasonable time period of the July 2001 reprimand letters.

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[6] The July 5, 2001, reprimand also noted Womack was absent from work on March 21 and March 22, 2001, without approval. (Comp. Ex. 6). At the hearing, Graymont stipulated that it would expunge all reference to Womack's March 2001 absences from Womack's personnel records. (Tr. 113-16, 400).

d. <u>Womack's August 3, 2001, Grievance</u>

On August 3, 2001, Womack filed a grievance with Local No. 599 of the Teamsters Union challenging his two reprimand letters. (Resp. Ex. 2). In his grievance, Womack alleged his wife attempted to call the kiln department on the fourth of July, but no one answered the telephone. At the hearing, Womack conceded it was his responsibility to contact Graymont if he was not reporting to work, and that Graymont was not contacted. (Tr. 281).

Despite admitting at trial that he told co-workers he did not intend to work on the fourth of July, in his written grievance Womack alleged:

> . . . On the 4th of July 2001 my neck and back [were] flared-up from working four twelve hour shifts. I took my medic[ine] as p[res]cribed by my doctor for pain. (Darvocet, Musc[le] Relaxers, Darpro) *The medication made me drows (sic), and unable to perform[ ] my duties. . . .*

(Emphasis added). (Tr. 122; Resp. Ex. 2). Although Womack complained during medical examinations that his physical limitations interfered with his job performance, the written grievance was the first time Womack specifically alleged experiencing side effects that prevented him from reporting to work.

Womack's attempt to mitigate his unauthorized absence by claiming he was drowsy is notable for its transparency. Mork, who has worked with Womack since May 1999, testified there was no evidence that medication had impaired Womack's ability to perform his job. (Tr. 475, 498). Womack never received written warnings for his job performance and, with the exception of Womack's absence for several weeks for job-related injuries in 1999, Womack's attendance in 1999, 2000 and 2001 was very good. (Tr. 53; Comp. Exs. 5, 8, 22). In this regard, Graymont's Counsel represented ". . . there was nothing that indicated [to Graymont officials] that [Womack's] drugs had any effect . . . ." (Tr. 490).

Moreover, the company knew Womack's excuse was not credible. In its July 5, 2001, reprimand, the company stated, "[y]ou also said you knew in advance you would not come [to work] and did not request leave on that day." (Comp. Ex. 6). Mork testified that Womack had admitted during the July 9, 2001, meeting that ". . . Womack knew a year before that [he] wasn't going to be working on the fourth of July." (Tr. 456). Several other kiln operators also told Mork that Womack had told them he was not planning on working on July 4th. (Tr. 458; Comp. Ex 17). Fellow kiln operator, Harold Givens, testified Womack told him "two or three days" before the fourth of July that he was not planning on working that day. (Tr. 409).

Succinctly put, Mork testified, "[we] just didn't believe him." (Tr.458). Yet, this transparent excuse, that medication made Womack drowsy *only* on the fourth of July holiday when Womack was required to work, has set in motion a series of events that has "spun out of control."[7]

III. Further Findings Of Fact - Womack's Suspension and Termination

a. The Five Day Suspension

Despite having received L&I reports identifying Womack's medicine, Graymont contends that it initially became aware that Womack was on medication on August 3, 2001, after it received his grievance. On August 7, 2001, Dennis Wakin, Graymont's Assistant Plant Manager, requested Womack to identify his medicine. Womack did not comply.

Wakin repeated his request on August 8, 2001. Womack again was unresponsive. On August 29, 2001, Eccles, citing the company's workplace safety drug policy,[8] informed Womack that he would be suspended without pay effective August 31, 2001, if he did not identify his medication. On August 31, 2001, Womack refused to comply until he could obtain "the correct information" from his doctor. (Tr. 144; Letter from Womack to Eccles, Aug. 31, 2001). As a result of his failure to comply, Womack was suspended without pay for five days from August 31 through September 4, 2001.

On September 5, 2001, Womack provided a statement from Gary Henriksen, his treating physician. Henriksen stated Womack was taking Flexeril Tabs, 10 mg., throughout the day, and Darvocet-N 100 Tabs at night for neck and back pain. Henriksen opined:

> The Flexeril may cause some drowsiness if he requires them frequently. The Darvocet may also cause drowsiness, but this should not persist past his usual sleep period.

(Comp. Ex. 9).

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[7] At the outset of his opening statement, Graymont's counsel insightfully stated:

> I want to give an outline of the time lines and things that went on in this case. We're here because two warnings, deservedly given, were presented to Mr. Womack, and since then this thing has spun out of control.

(Tr. 37).

[8] Section 4.1 of the company's workplace safety guidelines provides that employees who are adversely affected by their use of legal prescription or non-prescription drugs are prohibited from performing their jobs. (Resp. Ex. 10).

Having received Henriksen's statement, Eccles advised Womack that he could temporarily return to work at 10:00 p.m. on September 5, 2001. Womack's return was "subject to the [medication] list being reviewed by a qualified doctor assigned by the company." (Resp. Ex. 12). Significantly, Womack's return was conditioned solely on a review of his medication, rather than on an evaluation of his physical condition.

b. Womack's August 7, 2001 MSHA Complaint

Section 103(g)(1) of the Act, 30 U.S.C. § 813(g)(1), enables a miner to request an immediate MSHA inspection if he believes that a violation of a mandatory health or safety standard has occurred. Section 103(g)(1) further provides that the mine operator shall be notified that a hazard complaint has been filed no later than at the time of the inspection.

On August 7, 2001, Romona Womack, James Womack's wife, filed a section 103(g) hazard complaint on behalf of her husband.[9] Mrs. Womack indicated that her husband received second degree burns from lime, and she wanted to know if limestone exposed him to chemical hazards or carcinogens. (Comp. Exs. 13, 14, 19). The complaint was filed approximately two weeks after Womack was reprimanded. It is not clear whether the complaint was communicated before Graymont first insisted that Womack identify his medication.

In response to Womack's complaint, MSHA conducted a hazard investigation from August 21 through August 30, 2001, during which time 21 health samples were taken and two citations were issued. (Comp. Ex. 19). As a consequence of the investigation, Citation No. 7999440 was issued on August 28, 2001, citing a non-significant and substantial (non-S&S) violation of the provisions of section 56.20011, 30 C.F.R. § 56.20011, because hazard signs were not posted to warn of asbestos materials on the baghouse piping in the mill area. (Comp. Ex. 11). A violation is designated as non-S&S if it is unlikely that the violation will contribute to an illness or injury. *Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In addition, Citation No. 7999442 was issued for an alleged violation of section 103(a) of the Act, 30 U.S.C. § 813(a), after MSHA inspectors learned Mork had reassigned a worker from his normal duties to prevent an adverse dust sampling result during the investigation. (Tr. 509; Comp. Ex. 12). Section 103(a) prohibits mine operators from interfering with an MSHA inspection or investigation.

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[9] Graymont asserts Romona Womack's August 7, 2001, hazard complaint is not protected activity because it was not communicated directly to MSHA by James Womack. (Resp. Br. at p.25, fn.25). Section 105(c)(1) prohibits a mine operator from discriminating against a miner because ". . . such miner, [or] representative . . . has filed or made a complaint under or related to this Act . . . ." Obviously, Mrs. Womack was acting in a representative capacity when she complained to MSHA on behalf of her husband. Consequently, her complaint is deemed to be the protected activity of James Womack. Hereinafter, Mrs. Womack's complaint also will be referred to as "Womack's complaint."

c. Womack's September 21, 2001 Suspension

After providing his list of medications, Graymont permitted Womack to work from September 5 through September 20, 2001. On September 21, 2001, Womack attended a meeting with Wakin, Tom Wakefield, who was Wakin's superior, and Charest. Womack was advised that he was suspended immediately because his medication prevented him from safely performing his job duties. Womack was told that the suspension was for an indefinite period until Womack changed his drug regimen. (Tr. 144).

In a letter dated September 21, 2001, Eccles formally advised Womack that he was suspended without pay because Dr. William Carr, a physician selected by the company, had evaluated the medication list furnished by Henriksen and determined it was "not appropriate" for Womack to perform four work activities required by his job. Carr concluded it was inappropriate for Womack to: (1) work around rotating equipment in a high temperature environment; (2) work with acids; (3) walk up a spiral staircase; and (4) pull ash balls from the kiln grizzly using an 8 to 10 foot poker. (Comp. Ex. 10). Eccles noted the suspension would remain in effect "until this situation can be resolved." *Id.*

On September 24, 2001, Womack advised Eccles that Henriksen refused to take him off his prescribed medication. (Resp. Ex. 13). Rather than use sick leave, Womack filed for L&I compensation that was awarded effective September 21, 2001. (Tr. 145).

d. Womack's October 22, 2002, Termination

Womack received L&I compensation for the period September 21, 2001, through July 8, 2002, when L&I terminated his benefits after it learned he was no longer taking medication. (Resp. Ex. 9). On July 18, 2002, Womack informed Graymont that he had been released from Henriksen's care and that he was no longer taking muscle relaxants. (Resp. Ex. 18, p.1). Womack attached a July 16, 2002, statement from Henriksen that Womack was last prescribed a muscle relaxant on April 9, 2002. Womack also provided a medical release clearing him for light duty. (Resp. Ex. 18, p.2). However, it is not clear whether the medical release was current because it was undated and referenced a previous workability report dated July 12, 2001. (Resp. Ex. 18, p.3).

On July 29, 2002, Wayne J. Wagner, Graymont's Vice President and General Manager, acknowledged receipt of Womack's July 18, 2002, request for reinstatement. However, Wagner noted Womack had failed to provide a current workability report. To determine if the company could offer Womack an accommodation, Wagner requested Womack to provide Wakin with a detailed physician's description of Womack's current work restrictions. (Resp. Ex. 19).

On August 13, 2002, Womack's union representative provided Wakin with Henriksen's August 9, 2002, workability report. The report provided diagnoses of lumbosacral spondylosis, and cervical, thoracic, and lumbosacral disc degeneration. These diagnoses were consistent with

the diagnoses provided to the company since Womack initially injured his back in July 1999. Henriksen's report stated that Womack " . . . is on NO medications that will impair his balance, judgement, or reaction time." The report also indicated that Womack was restricted from frequent changes of position as well as kneeling, squatting or crawling. Finally, Henriksen indicated Womack was limited to lifting, pulling or pushing no more than 35 pounds. (Comp. Ex. 20).

Wakin responded to the August 9, 2002, workability report on September 4, 2002. Wakin stated he needed "more specificity about the nature and possibility of modifications that may be required to allow [Womack] to perform the essential functions of [his] position." (Comp. Ex. 21, p.1). Wakin attached a description of the essential functions of the kiln operator job for Womack's physician to consider. The essential functions included pulling or pushing "ash balls" weighing up to 150 pounds from the kiln using 8 to 10 foot pokers weighing 20 pounds, and lifting upwards of 80 pounds. (Comp. Ex. 21, p.3).

Upon completion of the hearing on October 3, 2002, Womack had not responded to the company's September 4, 2002, request for a more detailed physical assessment. Despite having Henriksen's July 16, 2002, statement and his August 9, 2002, workability report, Graymont continued to maintain that the information provided by Henriksen was insufficient. The record was left open for Womack to provide Graymont with additional information.

Womack provided an additional statement from Henriksen dated October 7, 2002. (Henriksen memorandum, Oct. 7, 2002). Henriksen opined that Womack was capable of performing moderate exertional activity. Consistent with the medical reports Henriksen previously had provided to Graymont, he recommended that Womack should not lift, pull or push more than 35 pounds. Henriksen expressed concern if Womack were required to push or pull a 150 pound ash ball with a 10 foot poker weighing 20 pounds, an activity Graymont described as an essential function of the kiln operator job. Henriksen opined that using a poker for such an activity would make Womack's cervical and thoracic spine the "pivot point," "dramatically exceed[ing] the 'Moderate' activity level." *Id.*

Graymont asserts that, to assist it in determining whether to reinstate Womack, it contracted with a certified rehabilitation counselor to analyze and identify the essential functions of the kiln operator position. The required exertional activities identified in the job analysis included removing ash balls from the kiln weighing up to 200 pounds and lifting 80 pounds or more occasionally, 40 pounds frequently and 20 pounds continuously. (Job Analysis by Catherine Parker, CRC, Oct. 9, 2002).

Based on the job analysis, Graymont concluded that Womack could not perform the essential functions of his job "with or without a reasonable accommodation." Consequently, Womack was advised that he was administratively separated from his employment effective October 22, 2002. (Letter from Wakin to Womack, Oct.18, 2002).

IV. Further Findings and Conclusions

a. The Jurisdictional Issue

Section 105(c) of the Act provides that a discrimination complaint can be prosecuted before this Commission by the Secretary on behalf of the complaining miner under section 105(c)(2), or it can be brought directly by the miner under section 105(c)(3). A condition precedent to a miner's right to prosecute his complaint on his own under section 105(c)(3) is that the Secretary must determine, upon her investigation, that the provisions of section 105(c) have not been violated.

MSHA's November 8, 2001, investigation report reflects the Secretary considered adverse actions complained of by Womack during the period July 2001, when his disciplinary letters were received, through September 21, 2001, when he was placed on extended leave without pay. (Comp. Ex. 19). However, MSHA's investigation did not address Womack's October 22, 2002, termination as it occurred almost one year after its investigation was completed. Womack's termination also occurred ten months after Womack filed his December 14, 2001, complaint with this Commission.

Although a jurisdictional objection has not been raised, jurisdiction is always in issue. The question arises whether the statutory prerequisites in section 105(c)(3) have been met to permit Womack to amend his discrimination complaint to include his termination, even though his termination was not investigated by the Secretary.

The Commission has noted that Congress intended section 105(c) to be broadly construed to provide maximum protection for miners exercising their rights under the Act. *Sec'y of Labor on behalf of Dixon v. Ponticki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997), citing *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (February 1994) ("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.'") (quoting S. Rep. No. 95-181, at 36 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)). Thus, discrimination complaints must be allowed to encompass all related aggrieved actions in an efficient, rather than piecemeal, fashion. In this regard, the Commission has concluded that "it is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit" of the Commission's jurisdiction. *Ponticki,* 19 FMSHRC at 1017.

In the instant case, Womack's five day suspension and his September 21, 2001, indefinite suspension were considered during the Secretary's investigation although they occurred *after Womack filed his initial discrimination complaint* on August 29, 2001. These adverse actions were proper subjects of the Secretary's investigation since they allegedly were motivated by Womack's August 7, 2001, hazard complaint, the principal protected activity underlying Womack's discrimination complaint.

Womack alleges his October 22, 2002, termination also was motivated by his August 7, 2001, MSHA complaint. (Tr. 559). A continuing series of post-complaint adverse actions alleged to have been motivated by protected activity previously investigated by the Secretary is a proper subject in a 105(c)(3) proceeding. 19 FMSHRC at 1017. Any other interpretation would result in endless litigation, not to mention interminable MSHA investigations. Because Womack's protected activity was investigated by the Secretary pursuant to section 105(c), any adverse actions allegedly stemming from that protected activity come within "the permissible ambit" of the Commission's jurisdiction. *Id.*

Finally, Womack's termination cannot be disassociated from his September 21, 2001, suspension that was a subject of the Secretary's discrimination investigation. Accordingly, Womack's December 14, 2001, Commission complaint may be amended to include his October 22, 2002, termination.

b. Analytical Framework

Section 105(c) of the Act prohibits discriminating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted* in Senate Subcomm. on Labor, Committee on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). It is Congress' intent that, "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

Womack, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Womack must establish that he engaged in protected activity, and the aggrieved action was motivated, in some part, by that protected activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Graymont may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Graymont may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. 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).

In determining whether a mine operator's disciplinary actions run afoul of the statutory protection accorded to miners, the scope of a discrimination proceeding is limited to whether the operator's reported rationale for the adverse action is a pretext to mask prohibited retaliation for protected activity. In this regard, the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification.

> 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 mere pretext seized upon to cloak the discriminatory motive.
>
> 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. 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 judgement our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516-17 (November 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission subsequently further explained its analysis as follows:

> [T]he reference in Chacon to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgement or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed."

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

c. Graymont's Knowledge of Womack's Protected Activity

The relevant protected activities are Womack's August 1999 and August 2001 hazard complaints and the filing and prosecution of Womack's discrimination complaint. Graymont denies any knowledge of Womack's protected activities until September 4, 2001, when MSHA advised Graymont that Womack's discrimination complaint had been filed.

Shortly after sustaining significant burns to his neck, back and arms on August 4, 1999, Womack complained to MSHA that Graymont was not providing protective clothing to employees working near the kiln. As a consequence of Womack's complaint, MSHA investigated Graymont's kiln procedures. On August 17, 1999, MSHA issued Citation No. 7979030 and Order No. 7979031 charging Graymont for its failure to provide protective clothing to Womack and Tucker, respectively. (Comp. Exs. 3, 4). Both citations made reference to Womack's August 4, 1999, burn injuries. Citation No. 7979030 noted the foreman "was aware of the potential burn hazard on August 4, 1999, and allowed the victim [Womack] to be placed in harm's way." (Comp. Ex. 3). Both citations charged Eccles and Hudson with unwarrantable conduct because of their reported longstanding failure to take remedial action despite "previous similar experiences over many years." *Id.*

There are nine employees assigned to the kiln department. The Commission has held that the small size of a mine supports an inference that an operator was aware of a miner's protected activity. *Morgan v. Arch of Ill.*, 21 FMSHRC 1381, 1391 (December 1999) (citations omitted). Moreover, the information in the citations about a history of exposure to burn hazards, and that the burn victim was allowed to remain in harm's way in the days preceding his injuries, obviously was provided by Womack. (Comp. Ex. 3).

Nevertheless, Mork testified he was unaware that Womack had complained to MSHA. Mork asserted he believed the inspection occurred as a result of the accident report the company filed with MSHA. (Tr. 448). Accident reports involving injuries only result in inspections if there is a fatality, or, if there is a reasonable likelihood that the victim will succumb to his injuries. 30 C.F.R. §§ 50.2(h), 50.10. Consequently, Mork's assertion that he was unaware that Womack had complained simply is not credible. Graymont is thus charged with knowledge of Womack's August 1999 complaint.

On August 3, 2001, Graymont received Womack's union grievance. Womack claimed Graymont had violated MSHA rules. Womack's grievance contained the vague assertion that, "I have been discriminated and retaliated and harnessed (sic) for being a WHISEL (sic) BLOWER!" (Resp. Ex. 2, p.3).

On August 7, 2001, Mrs. Womack communicated her safety concerns about her husband's work environment to MSHA. Her complaint resulted in a hazard investigation that began on August 21, 2001. The investigation was conducted under section 103 (g)(1) of the Act. Section 103(g)(1) requires MSHA to notify the mine operator, no later than the beginning of the inspection, that a complaint has been filed. Moreover Citation No. 7999442, issued

on August 30, 2001, explicitly stated that MSHA was "conducting a hazard complaint investigation." (Tr. 157-58; Comp. Ex. 12). Despite Wakin's assertion that Graymont did not know the inspection was generated by a complaint, the evidence demonstrates Graymont knew that a complaint had been filed as early as August 21, 2001. (Tr. 527-28).

Like Womack's August 1999 complaint, the August 2001 complaint resulted in serious charges against management. Mork was charged with interfering with MSHA's investigation because he allegedly reassigned an employee to avoid adverse dust samples. While Graymont had reason to suspect Womack was the informant in view of Womack's recent admission of whistle blowing in his grievance, the evidence suggests Graymont was uncertain. (Tr. 450, 525-26). On August 29, 2001, Mork asked MSHA inspector Gary Tallman to identify the complainant, but he refused. On September 4, 2001, during the close-out conference, Mork again sought to ascertain the name of the informant. (Tr. 478-80; Comp. Ex. 15). Once again, MSHA explained that the complainant's identity was confidential. (Tr. 450).

Wakin admitted Graymont ultimately learned Womack was the informant on September 4, 2001, shortly after the close-out conference, when MSHA advised Graymont that Womack had filed a discrimination complaint. (Tr. 526-28; Comp. Ex. 17). Thus, on balance, the evidence reflects Graymont is charged with knowledge of Mrs. Womack's hazard complaint, as well as Womack's discrimination complaint, as of September 4, 2001.

d. The Disciplinary Letters

Womack alleges his July 2001 reprimands were motivated by his August 1999 MSHA complaints. The Commission has stated that an indicia of discriminatory intent is a coincidence in time between the alleged protected activity and the adverse action. *Chacon*, 3 FMSHRC at 2510. Womack's 1999 MSHA complaints are too remote in time to have motivated Graymont's discipline almost two years later.

Moreover, participation in protected activity, and management's knowledge of such activity, does not insulate a miner from the consequences of his own misconduct. Womack's July 4th absence was unauthorized and his conduct was inexcusable. Womack knew in advance that he intended to take the fourth of July holiday off, yet he did not seek the company's approval. It is reasonable to infer that Womack believed Graymont would deny leave because it would be unable to cover his shift with other personnel on the holiday.

Womack's litany of excuses - that he thought he wasn't needed because the kiln was being repaired, that his wife was supposed to call but she forgot, that his wife did call but no one answered the telephone, and, finally, the belated excuse that he was too drowsy to come to work because of his medicine - are lacking in credibility. Womack was absent without leave on July 4, 2001. The business justification for enforcing the company's policy against unauthorized absence is self-evident. Under such circumstances, Womack has failed to demonstrate that his reprimand for his unauthorized leave was, in any part, motivated by his protected activity. Therefore, **Womack's discrimination complaint concerning the July 5, 2001, reprimand letter is denied**.

Similarly, the hard hat incident that resulted in the embarrassment, if not the harassment, of a fellow employee was likewise inexcusable. The disparate treatment charged by Womack because a co-conspirator was not disciplined by Graymont, even if true, does not absolve or otherwise mitigate Womack's conduct.

Graymont's failure to provide Womack with a written disciplinary letter for more than one year after the incident also does not excuse Womack's conduct. A company has a legitimate interest in ensuring that its employees are not harassed by fellow workers. While the one year delay may raise procedural issues for resolution in a union grievance, such issues are beyond the scope of this proceeding. Accordingly, Womack's has failed to demonstrate that the reprimand dated July 9, 2000, belatedly given to him on July 23, 2001, was motivated, in any part, by his protected activity. Accordingly, **Womack's discrimination complaint regarding the reprimand letter dated July 9, 2000, is denied**.

e. The Five Day Suspension - Womack's Medication

Graymont's contention that Womack's "revelation" that he was taking pain medication raised serious safety concerns is suspect. (Resp. Br. at p.10). It is difficult to imagine that Graymont did not realize Womack was taking pain medication or muscle relaxers until August 2001. Graymont knew Womack was on "restricted duty" that limited him to lifting no more than 40 pounds. (Tr. 499). Graymont also knew Womack was entitled to L&I benefits for reimbursement of medical expenses. It is undisputed that Graymont routinely received L&I notices identifying Womack's medication. In this regard, Mork testified that after Womack filed his grievance, ". . . we went back and looked through the L&I records to find out what kind of medication he was on." (Tr. 486-87). Moreover, Eccles provided a list of prescribed medications obtained from Womack's personnel records for review by a company physician. (Chart Review from William Carr, M.D., Sept. 14, 2001, at p.1).[10]

The sincerity of Graymont's alleged serious safety concerns is further eroded by its own admissions and conduct. Graymont had never known Womack to have been dizzy or otherwise adversely affected by medication while at work. (Tr. 483, 490, 498-500). Graymont did not believe Womack had been adversely affected by medication on the fourth of July. (Tr. 458). Most perplexing, Graymont allowed Womack to work three consecutive 12 hour shifts, from August 23 through August 25, 2001, during a period when it reportedly had serious concerns regarding the potential hazard posed by Womack's medication. (Comp. Ex. 8).

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[10] Dr. Carr's September 14, 2001, Chart Review was proffered by Graymont and marked for identification as Resp. Ex. 21. Womack objected to its admission because of Carr's references to medications other than Flexeril and Darvocet, the only medicine identified by Henriksen. Counsel for Graymont withdrew the exhibit. (Tr. 541-46). Both Womack and Graymont submitted Carr's Chart Review in response to the post-hearing November 21, 2002, Order. Therefore, it is part of the evidentiary record. *See* fn.3 *infra*.

Despite its disbelief that Womack had suffered from drowsiness on the fourth of July, an absence of any known history of side affects, and Womack's 12 hour shifts, Graymont continued to press Womack for full disclosure. Womack continued to refuse to identify his medication because he feared Graymont's motives. On September 4, 2001, Womack sought Henriksen's advice. Henriksen noted:

> Told Patient that it was up to him whether or not the medication he was taking were known to his supervisor, but that the law requires his claims manager to have access to this data in any event, that there was nothing particularly embarassing (sic) or immoral or anything in his use of these medications, and *I really didn't see any harm in the release of that info*, but the choice of course was his.

(Emphasis added). (Henriksen encounter notes, September 4, 2001). At that time, Henriksen also noted Womack was "cleared for light duty." *Id.*

Having failed to respond to Graymont's repeated requests, Womack was suspended without pay from August 31 through September 4, 2001. After furnishing the requested information from his physician, Womack was reinstated on September 5, 2001, subject to further review of Womack's medication by a company doctor. (Comp. Ex. 9).

In resolving whether the five day suspension was motivated by protected activity, it is significant that the medication list was initially requested on August 7, 2001, *before* any knowledge of relevant protected activity can be attributed to Graymont. Womack's 1999 MSHA complaints were too remote in time to have motivated Graymont. Given the totality of circumstances, it is likely that Graymont's suspension was influenced more by the lack of candor and other accusations lodged against the company in Womack's union grievance, than by a concern for his safety.[11] Although retaliation in response to Womack's union grievance is not actionable under the Act, a history of retaliatory conduct is relevant when adverse actions, such as Womack's long term suspension and termination, closely follow protected activities.

Regardless of whether Graymont was motivated by a desire to retaliate, or a sincere concern for Womack's well being, it was Womack who raised the issue of side effects. The company's workplace safety guidelines prohibit employees who are adversely affected by their medication from performing their jobs. (Resp. Ex. 10). In the final analysis, Womack was suspended for refusing to respond to the company's request that he identify his medication, not because of the effects of his medication. While Graymont's subsequent actions validate Womack's reluctance to cooperate, his failure to accede to the company's repeated requests, at that time, provided an independent business justification for the company's disciplinary action. Consequently, in the absence of any temporal protected activity, **Womack's discrimination complaint with respect to his five day suspension shall be denied**.

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[11] Womack's grievance included charges of harassment, defamation of character and civil rights violations. (Resp. Ex. 2).

f. **The September 21, 2001, Suspension - Potential vs. Actual Side Effects**

As noted above, the evidence reflects this litigation was spawned by Womack's August 3, 2001, union grievance and the repercussions that followed. As suggested by Graymont, Mrs. Womack's MSHA complaint may have been in retaliation for her husband's disciplinary letters. (Resp. Br. at p.8). However, the focus in this proceeding is on whether Graymont's adverse actions were in response to Mrs. Womack's complaint. Retaliatory conduct by a mine operator is relevant in determining whether the mine operator's asserted motivation for the challenged actions is as claimed. Womack was suspended only two weeks after Graymont admittedly learned of Womack's recent protected activity. Womack was terminated only two weeks after the hearing.

Thus, Womack's September 21, 2001, suspension must be analyzed to determine if it was, in any part, in retaliation for Womack's protected activity. If the protected activity was a contributing factor, Graymont can affirmatively defend by demonstrating that it was also motivated by considerations unrelated to protected activity, and, that it would have taken the adverse action for these independent considerations alone. *Robinette*, 3 FMSHRC at 818 n.20.

Womack was temporarily reinstated on September 5, 2001, after he provided his physician's statement concerning Flexeril and Darvocet. In assessing the potential side effects, Henriksen stated, "[t]he Flexeril *may* cause *some* drowsiness *if* he requires them frequently (emphasis added)." Henriksen also stated, "[t]he Darvocet *may* also cause drowsiness, *but* this *should not persist* past his usual sleep period (emphasis added)." (Comp. Ex. 9).

Henriksen's reference to potential side effects, regardless of their likelihood, reportedly concerned Graymont. On September 5, 2001, Eccles advised Womack that he could return to work "subject to [Womack's medication] list being reviewed by a qualified doctor assigned by the company." (Resp. Ex. 12). Significantly, Eccles concerns were limited to the effects of Womack's medication. By allowing Womack to return to work pending review of his medication, without regard to his physical condition, Graymont implicitly admitted that Womack's back condition did not preclude him from performing his duties. In fact, Graymont did not assert Womack's exertional limitations precluded him from performing his duties until his October 22, 2002, termination.

On September 14, 2001, Henriksen's information was reviewed by William Carr, an orthopedic surgeon selected by Graymont. (Carr Chart Review). Carr noted that pain medication "can affect different people in different manners but definitely has been known to cause mild to moderate dizziness in patients." (Carr Chart Review, at p.2). As an illustration, Carr explained that the *Physician's Desk Reference* (PDR) notes that Hytrin can cause fainting. Hytrin commonly is prescribed for high blood pressure and prostate conditions. According to Carr, the PDR notes that, "21% of the patients [on Hytrin] experienced one or more of the following: dizziness, hypotension, postural hypotension, syncope and vertigo." *Id.* On September 14, 2001, Womack was not taking Hytrin, although it previously had been prescribed.

On September 21, 2001, Eccles advised Womack that Carr had evaluated Womack's medication and determined it was "not appropriate" for Womack to work around a hot kiln. (Comp. Ex. 10). Apparently, Carr's opinion was based on Womack's use of Flexeril, as Henriksen opined Darvocet would not affect Womack "past his usual sleep period." (Comp. Ex. 9). Although Flexeril can cause drowsiness, no medical evidence has been presented regarding the nature, extent or frequency of the side effects caused by Flexeril. Womack was advised that his suspension would remain in effect "until this situation can be resolved." (Comp. Ex. 10). Despite this representation, Womack has been terminated although he is no longer on medication.

Obviously, precautions should be taken when employees who operate hazardous equipment are prescribed medication. However, in suspending Womack, Graymont, in effect, *presumes* that *all employees* who operate machinery while taking medication with *potential* side effects are incapable of safely performing their jobs. The implausible nature of Graymont's presumption is illustrated by Carr's Hytrin example from which it can be it can be deduced that 79% of people taking Hytrin do not experience dizziness or other serious side effects. (*See* Carr Chart Review, at p.2).

Moreover, the workplace safety rule Graymont relies on only prohibits "*employees adversely affected* in their use of any legally obtained drug" from performing their regular job. (Emphasis added). (Resp Ex. 10). Even this workplace rule recognizes that employment decisions involving potential side effects should be made individually, based on whether the employee *actually is* experiencing adverse side effects.

As previously emphasized, Garymont was unaware of any relevant history of adverse side effects. Graymont did not believe Womack experienced adverse side effects on July 4, 2001. Finally, Graymont did not seek to determine whether Womack was currently experiencing adverse side effects. It even allowed Womack to work overtime while it was "reviewing" his medications. In this context, in the absence of evidence of actual side effects, Graymont is left with Carr's report that Flexeril "certainly affects different people in different manners" as its justification for Womack's suspension. (*See* Carr Chart Review, at p.1). It is highly unlikely that Graymont heavily relied on Carr's Chart Review of Womack's medication as claimed.

It is noteworthy that while Graymont was considering the impact of Womack's medication on his ability to work, it learned that Womack was charging the company with discrimination under the Act. Womack's discrimination complaint noted that he was responsible for MSHA's unwarrantable failure charges against Eccles and Hudson in August 1999, and MSHA's interference charges against Mork in August 2001. In view of Womack's recent discrimination complaint, it is unreasonable to conclude that the company was compelled to suspend Womack based solely on the superficial information provided by Carr. Rather, the credible evidence strongly suggests that Womack's September 21, 2001, suspension was at least partially in retaliation for the numerous charges Womack had brought against the company that by now included Womack's protected discrimination complaint.

However, the analysis does not stop there. The company maintains that even if it was motivated by Womack's protected activity, there was a medical basis for the suspension. It is not surprising that after Womack was suspended, he was awarded L&I compensation based on Graymont's decision that the treatment of Womack's job-related back injury prevented him from working. Despite Graymont's questionable rationale, a medical finding that Womack was incapable of performing his job duties provides an independent business justification for Womack's September 21, 2001, suspension, regardless of his protected activity. Accordingly, **Womack's discrimination complaint with respect to his September 21, 2001, indefinite suspension shall be denied**.

g. Womack's Back Condition

Womack initially sprained his back after pulling large chunks of ash during the week ending on July 26, 1999. Womack suffered burn injuries at work on August 4, 1999. At that time, Womack complained of exacerbating his back sprain. Following the August 4, 1999, incident, Womack was absent from work and eligible for L&I benefits for approximately seven weeks from August 4 through September 11, 1999. (Tr. 92; Comp. Ex 5). L&I ultimately rated Womack's burns as a 9% permanent skin impairment. Unlike his burn injuries, L&I has declined to rate Womack's back condition as a job-related permanent partial disability. (Tr. 132; Resp. Ex. 1).

Womack was initially seen by Dr. Arthur Moritz on July 26, 1999, with complaints of progressive right upper back pain of one month's duration. Womack attributed the pain to a poor grade of coal that caused him to rake ash from the kiln more frequently with greater exertion. Womack denied any history of a lower back injury, although he reported a prior cervical strain. (Moritz examination notes, July 26, 1999). A follow-up examination on August 5, 1999, noted mild degenerative back disease. However, there was no evidence of superimposed acute bony changes as current X-rays were consistent with past films. The examination findings were consistent with a lumbago/lumbar ligamentous strain. (Moritz memorandum, Aug. 5, 1999). At that time, Womack reported Naprosyn and Flexeril had provided some relief. (Moritz examination notes, Aug. 5, 1999). Moritz noted, although Womack stated he was feeling better, Womack's "wife is worried about the wear and tear he has received and the fact that he still has pain on lifting." *Id.* Womack was subsequently seen on August 12, 1999, at which time Moritz expressed optimism that Womack would make a full recovery within two to four weeks. (Moritz memorandum, Aug. 12, 1999). The diagnosis was lumbosacral sprain. *Id.*

On August 26, 1999, Moritz noted Womack had suffered a set back with a recurrence of pain during physical therapy. Moritz ordered a CT scan and diagnostic work up. (Moritz memorandum, Aug. 26, 1999). The diagnostic radiographic studies "failed to show serious lumbosacral disc disease . . . ." although underlying degenerative joint disease was identified. (Moritz memorandum, Sept. 2, 1999). Moritz released Womack for light duty with restrictions including lifting no more than 30 pounds. Moritz anticipated the restrictions would last for two months. *Id.* Womack was prescribed Hytrin for a mildly elevated PSA. (Moritz progress notes,

Sept. 24, 1999). On October 8, 1999, Plant Manager Ron Eccles advised L&I that benefits should cease because Womack returned to "full duty" on September 13, 1999. (Letter from Eccles to L&I, Oct. 8, 1999).

X-rays of the lumbar spine obtained during a March 17, 2000, orthopedic and neurological examination were negative with the exception of borderline narrowing at L4-L5. X-rays of the thoracic spine showed hypertrophic spurring without significant changes from films taken on November 20, 1998. The diagnosis was history of lumbosacral sprain related to an industrial injury of July 26, 1999. It was noted that "no further treatment measures are necessary to resolve the residual effects of this injury." (Examination report of Robert Chambers, M.D., and J. Michael Egglin, M.D., Mar. 17, 2000). A subsequent orthopedic and neurological examination on July 8, 2000, was unremarkable in that it disclosed no significant muscle atrophy, limitation of motion or sensory loss. (Examination report of John Lipon, D.O., and Eugene Wong, M.D., July 8, 2000). At that time, it was noted that Womack was not taking medication for his back condition. The diagnosis again was lumbar strain. The physicians concluded Womack's condition was medically fixed and stable and that no further curative measures were necessary. *Id.*

Womack first visited Dr. Gary Henriksen on August 1, 2000, complaining of an exacerbation of his back condition. Henriksen recommended that Womack should not return to work until August 4, 2000. Womack was returned to light duty with a 40 pound lifting restriction. (Letter from H.R. Johnson, M.D. to Nate D Mannakee, Esq., Oct. 12, 2001).

A January 31, 2001, cervical MRI revealed mild cervical degenerative changes consisting of mild narrowing at the C5-C6 and C6-C7 levels and neuroforaminal narrowing to a mild degree at the C4-C5 level bilaterally. There was no evidence of focal unilateral disc herniation. (MRI report of Robert R. Livingston, M.D., Jan. 31, 2001).

The 40 pound weight lifting restriction remained in effect from August 2000 until Womack's September 21, 2001, suspension. *Id.* In this regard, Henriksen's workability reports furnished to Graymont on December 12, 2000, July 12, 2001, September 4, 2001, September 24, 2001, and October 9, 2001, all reflect restrictions for lifting, pulling and pushing of no more than 40 pounds.

Mork testified that, "of course" he was aware of Womack's physical limitations. (Tr.483). Mork understood that Womack's work releases restricted him from pushing or bending. (Tr. 485). However, he noted that the company was "working with [Womack] on . . . [his] work restrictions." (Tr. 483). Despite Womack's restrictions, Mork opined that Womack's impairment did not prevent him from performing his job duties. (Tr.498-500). Wakin testified that he assumed Womack was off all medication that would hinder him from performing his job after he ". . . was released to come back to work for light duty . . . ." (Tr. 529-30).

Mork explained that whenever it was necessary to remove heavy material from the kiln, the company accommodated Womack by providing him with an assistant. (Tr. 507). The company similarly accommodated Harold Givens, a Graymont kiln operator for over 15 years. Unlike Womack who has a large build, Givens is thin and considerably shorter than Womack. Givens testified that the older he gets, the more trouble he has pulling ash balls and lifting over 80 pounds. Givens indicated that the stoneman assists him when the exertional demands of the job are too extreme. (Tr. 387, 398).

In support of Womack's termination, Graymont relies on Henriksen's advice that Womack should consider seeking alternative non-physical work that will not, over the long term, adversely affect his back condition. In this regard, during an August 1, 2000, examination, Henriksen opined:

> Manipulating heavy objects at the end of a 6-8 foot [rod] places rather enormous torque on the cervical, thoracic, and lumbar spine. While Mr. Womack is an exceptionally strong individual (if a little overweight) the CT from a year ago and c-spine from today clearly indicated the effects of this repeated heavy work with poor ergonomics. While I realize that this is rather good paying work compared to other jobs he may qualify for, I doubt seriously that he will be able to do this for another 15 years, and I think eventual vocational change will have to be made.

(Henriksen encounter notes, Aug. 1, 2000). In October 2001, when Womack was 52 years old, Henriksen noted Womack could return to his JOI (job of injury) on light duty, but Henriksen repeated he ". . . doubt[ed] that [Womack] can continue his current (very heavy work) job to age 65." (Henriksen encounter notes, Oct. 9, 2001). On May 31, 2002, Henriksen recommended that Womack return to "permanent modified duty." Henriksen imposed lifting restrictions of 50 pounds, and pushing/pulling restrictions of 50 pounds with no more than 100 foot-pounds of torque. Henriksen noted that maximum medical improvement had been attained and that further follow-up was not required. (Henriksen workability report, May 31, 2002).

Womack returned to Henriksen on August 9, 2002. Henriksen noted:

> SUBJECTIVE: Patient indicates that he MAY be able to go back to light duty if he gets a WorkAbility form that defines restrictions. This would be under the preferred worker program. He states his clinical symptoms are no different, and he still has 6/10 right sided neck pain.

> ASSESSMENT: *I have always indicated that he could return to work.* I provided him with copies of the two IMEs suggested work restrictions, one specifying "medium" work, one limiting him to 25#. The reality is that he has multilevel cervical, thoracic, and lumbar DDD, and the greater the lifting he does the greater the chance of further degeneration.
>
> PLAN: Will provide letter *clearing for light to medium duty* as per IME.

(Emphasis added). (Henriksen encounter notes, Aug. 9, 2002).

Obviously, physical labor becomes more difficult with advancing age. As Givens responded when asked if he has problems performing his kiln operator job - - "I do, yeah. The older I get." (Tr. 387). Henriksen's speculation that Womack may not be physically able to do his job until age 65 is not medical evidence that Womack currently is unable to return to his former position within the limits of his exertional limitations.

In sum, the evidence reflects Womack sustained a job-related back sprain with periods of exacerbation. The discomfort from Womack's back sprain is secondary to his underlying mild to moderate degenerative back impairment. There is no objective clinical CT scan or MRI evidence of a superimposed traumatic injury that requires surgical intervention.

Significantly, Graymont asserts its decision to place Womack on extended leave in September 2001 was based solely on the hazards posed by Womack's medication. (*See* Resp. Ex. 12). Prior to its October 18, 2002, decision to terminate Womack, Graymont *did not* contend the severity of Womack's back condition prevented him from performing his job. On the contrary, Graymont admits Womack was capable of performing his job with a reasonable accommodation. (Tr. 483, 498-500).

Finally, I am cognizant of Graymont's reliance on various statements in Womack's L&I records concerning Womack's reported physical limitations and his reported difficulties in performing his job. Such statements must be viewed in context. They were made in furtherance of Womack's claim for L&I benefits. For example, in a July 17, 2001, appeal of L&I's decision denying his claim for a monetary award, filed during a period when Womack was working without incident, Womack stated:

> I have received the order to closed (sic) my claim with a permanent skin impairment of 9%. But my back has been rated a category 1 which does not contain a monetary award. I am appealing the back claim . . . Many times I have to take the medications for pain even though I have to work, and drive. The medications: Daypro 600mg 2xper day for swelling; Naproxen 500mg 1 to 2 times per

> day for PAIN; Flexeril for muscle 10mg 1 pill 3 times per day. I have suffered two (neck and back) permanent unresolved injuries that the Department of Labor and Industries want (sic) to bring to a close. The pain and burden falls on me, and eventually my productivity, and ability to work . . . . My claim is being closed based on information given by YOUR doctors who examined me in about an hours time.

(Resp. Ex. 1). Womack is no longer qualified for L&I compensation. He is no longer taking medication. Womack now maintains he is capable of returning to work.[12] His physician states he can perform moderate activity.

h. Womack's Termination

After losing his L&I eligibility, Womack sought reinstatement on July 18, 2002. Womack attached a July 16, 2002, statement from Henriksen that Womack was last prescribed a muscle relaxant on April 9, 2002.

On July 29, 2002, Graymont requested Womack to provide more detailed medical information. On August 13, 2002, Womack provided Henriksen's August 9, 2002, workability report. Consistent with Womack's 30 pound exertional restriction first imposed by Dr. Moritz in September 1999, that essentially remained in effect until Womack's September 21, 2001, suspension, Henriksen restricted lifting, pulling and pushing to no more than 35 pounds.[13] Most importantly, Henriksen stated Womack was "on NO medications that will impair [Womack's] balance, judgement, or reaction time." (Comp. Ex 20).

On September 4, 2002, Graymont sought an additional opinion from Henriksen concerning Womack's ability to perform the essential functions of the kiln operator job. It is instructive that Graymont did not seek to determine if Henriksen believed Womack was capable of returning to the light duty he had performed prior to his suspension. (Tr. 483, 498-500).

The hearing was conducted on October 2 and October 3, 2002, at which time Womack had not responded to Graymont's September 4, 2002, request. At the end of the hearing, Graymont continued to assert that it had not received sufficient medical information. Graymont continued to insist that Henriksen evaluate whether Womack could perform the essential

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[12] Womack now represents his L&I claim for his back condition is closed. (Womack Reply Br. at p.15). Any further significant exacerbations reported by Womack after he returns to work may reflect that he is unable to perform his job.

[13] Womack had a 40 pound exertional limitation during a substantial part of his two year accommodation. (Tr. 483). The company does not allege that Womack's current 35 pound limitation is materially less than his prior restrictions.

elements (the full exertional range) of his job, including lifting upwards of 80 pounds and pushing “ash balls” weighing up to 150 pounds with an 8 to 10 foot poker weighing 20 pounds. (Comp. Ex. 21, p.3). Graymont’s request is odd given Womack’s exertional limitation of 35 pounds.

Henriksen responded to Graymont On October 7, 2002. Stating the obvious, Henriksen opined that, pulling or pushing a 150 pound ball with a long poker “dramatically exceed[s]” Womack’s ability to perform no more than moderate activity. (Letter from Henriksen concerning Womack’s restricted duties, Oct. 7, 2002).

Armed with this information, Graymont contracted the services of a certified rehabilitation counselor to perform a job analysis to determine the essential elements of the kiln operator job. The rehabilitation counselor concluded the kiln operator job required lifting as much as 80 pounds. The analysis also noted the job required pushing, pulling and dragging ash balls weighing over 200 pounds with the assistance of another person. (Job Analysis by Catherine Parker, CRC, Oct. 9, 2002).

On October 18, 2002, Graymont, purportedly relying on the job analysis, concluded that “[Womack] cannot perform the essential functions of [his] position with or without a reasonable accommodation . . . .” (Letter from Wakin to Womack, Oct.18, 2002). Graymont did not explain why Womack’s previous accommodation was not possible. Consequently, Womack was administratively separated effective October 22, 2002.

In analyzing whether the motivation for Womack’s termination is as claimed, the Commission has emphasized that:

> . . . direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . ‘Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.’

Chacon, 3 FMSHRC at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965). Some of the more common circumstantial indicia of discriminatory intent are knowledge of the protected activity, hostility or animus towards it, coincidence in time between the adverse action and the protected activity, and disparate treatment of the complainant. *Id.*

Graymont admits knowledge of Womack’s protected activity. Graymont suspended Womack approximately two weeks after it learned of his protected activity on September 4, 2001. Womack’s termination occurred approximately two weeks after Womack’s participation in this hearing. Thus, *there is a coincidence in time* between Womack’s protected activities and the adverse actions that evidences a pattern of retaliatory conduct.

The record provides *ample evidence of hostility or animus* towards Womack's protected activities. Surely Graymont did not appreciate the unwarrantable failure and interference charges resulting from Womack's complaints. In this regard, Mork repeatedly attempted to determine the identity of MSHA's informant, requesting MSHA to name its informant on August 29, 2001, and again during the MSHA close-out conference on September 4, 2001. (Tr. 478-79; Comp. Ex. 8). Attempts to determine the identity of a complainant constitute evidence of retaliatory intent.

Although not asserted as a justification for Womack's termination, Graymont objects to "a barrage of litigation and baseless complaints from Womack in every conceivable forum" that followed Womack's disciplinary letters. (Resp. Br. at p.2). In this regard, in addition to the claims filed against the company with the union, L&I, MSHA and this Commission, Womack has brought charges before the Equal Employment Opportunity Commission (EEOC), and the Tacoma Human Rights and Services Department.[14] Graymont's general hostility towards Womack's numerous regulatory complaints includes hostility directed toward Womack's protected activity as well.

In addition, Graymont's conduct reveals a pattern of behavior undertaken to mask its retaliatory intent. With respect to the suspension, Graymont conceded it had no reason to believe Womack suffered from any adverse side effects at work. Although Graymont received L&I reports since September 1999 identifying Womack's medication, it denies having read them. While Womack was on light duty and Graymont knew L&I was reimbursing Womack for his medical treatment, Graymont asserts it was surprised to learn Womack was taking medication. Assuming Graymont was unaware of Womack's medicine, Graymont's reported surprise that Womack was treated with medication is a further reflection of an absence of side effects at work. (Tr. 532). Finally, although Womack relied on alleged side effects in his grievance, Graymont concedes it did not believe him. *Thus, in suspending Womack, Graymont insisted on obtaining a list of medications that was already in its possession because of reported side effects that it did not believe occurred.*

To support Womack's termination, Graymont enlisted the services of a rehabilitation counselor in an attempt to justify its "determination" that Womack's 35 pound exertional restriction precludes him from performing the essential elements of his job. This pretext further evidences a hidden retaliatory agenda as it is clear that Womack cannot work as a kiln operator without an accommodation.

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[14] Womack also has filed an ergonomics complaint and an asbestos complaint with L&I. (Letter from Don Lofgren, Industrial Hygiene Regional Supervisor to Womack, January 2, 2003; Womack Reply Br. at p.15). The asbestos complaint apparently followed a citation that identified a confined area of asbestos in the company's mill area which was unlikely to cause illness. As these complaints were filed after the hearing, the merits of these actions have not been considered in this proceeding. I note parenthetically, however, that abuse of process, as evidenced by a continuing stream of non-meritorious claims, may provide an independent justification for adverse action.

Graymont relied on Womack's prescription regimen as the sole basis for imposition of the leave of absence. Nevertheless, Graymont concluded the cessation of Womack's medication cleared the way for his termination rather than for his reinstatement.[15] Such an implausible decision is further evidence of a discriminatory motive.

Finally, with respect to *disparate treatment*, Givens continues to be employed as kiln operator although it is apparent that he cannot perform the full range of the essential elements identified in the job analysis. Yet Womack's inability to perform these same essential functions purportedly justify Womack's termination.

Simply put, the record reflects:

> Q. (By Mr. Womack) Mr. Wakin, from 1999 to 2001, did you ever have any problem with me as an employee?
>
> A. (By Mr. Wakin) No.

(Tr. 539).

Participation in a discrimination hearing before this Commission is sacrosanct. When Graymont elects to terminate Womack immediately following this hearing, reportedly because Womack is not able to work with a reasonable accommodation, despite previously accommodating Womack for two years, it does so at its own risk. Accordingly, **the evidence reflects Graymont's decision to terminate Womack effective October 22, 2002, is motivated, at least in part, by Womack's protected activity**.

In rejecting Graymont's asserted justification as a pretext, I stress I am not substituting my business judgement to resolve whether Womack's impairment is amenable to a reasonable accommodation. On the contrary, it was Graymont who determined Womack could perform his job with an accommodation. There are no objective diagnostic findings demonstrating that Womack's back condition has deteriorated since he last worked in September 2001. Nor has Graymont alleged any material change in Womack's impairment or exertional limitations. It was only after Womack's intervening discrimination complaint and his participation in this proceeding, that Graymont concluded Womack could no longer be accommodated.

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[15] On September 21, 2001, Womack was advised the company was "temporarily curtailing [his] work activities" because he "cannot be allowed to perform [his job] while taking [his] drugs." Womack was informed he would "remain suspended without pay until this situation can be resolved." (*See* Comp. Ex. 10).

I. Entitlement Date to Back Pay

The remaining issue concerns the appropriate effective date of back pay for computational purposes. Although Womack's initial July 18, 2002, request for reinstatement informed Graymont that he was no longer on medication, it did not include an acceptable current physician's statement outlining his exertional limitations. On August 13, 2002, Womack provided Graymont with Henriksen's August 9, 2002, workability report.

Graymont's subsequent requests for additional information, when viewed in context, were insincere. These requests sought Henriksen's opinion as to whether Womack could perform the essential functions of his job although Graymont knew Womack's physical activities were significantly restricted. Performance of an independent job analysis, and Graymont's request for additional medical information after August 13, 2002, only served to postpone disclosure of the inevitable, *i.e.*, that Graymont long ago decided to terminate Womack's employment. Accordingly, **Womack is entitled to relief as of August 13, 2002,** when Graymont received adequate relevant information concerning Womack's current exertional limitations.

ORDER

In view of the above **IT IS ORDERED** that James Womack's discrimination complaint concerning his reprimands, his five day suspension, and his suspension from September 21, 2001 through August 12, 2002, **IS DENIED**. Womack's discrimination complaint with respect to the termination of his employment **IS GRANTED** with appropriate relief to be awarded as of August 13, 2002.

This Decision on Liability is an interim decision. It does not become final until a Decision on Relief is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer **before May 28, 2003**, in an attempt to reach an agreement on the specific relief to be awarded. The relief may consist of back pay as off August 13, 2002, and reinstatement to the job position and duties Womack last performed on September 20, 2001, with equivalent pay and benefits. Alternatively, the parties may agree to back pay as of August 13, 2002, plus monetary damages representing economic reinstatement in lieu of re-employment. If the parties agree to stipulate to the appropriate relief to be awarded they shall file a Joint Stipulation on Relief **on or before June 18, 2003.** An agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on the relief to be awarded, the parties **ARE FURTHER ORDERED** to file, **on or before June 18, 2003**, Proposals for Relief specifying the appropriate relief to be awarded. For the purposes of calculating back pay, the parties are encouraged to stipulate to an average weekly salary, including overtime. If the parties cannot reach a joint

stipulation, the parties should furnish documentation such as payroll records, pay subs or tax returns to support their average weekly back pay calculation. **IT IS FURTHER ORDERED** that each party should propose an appropriate lump sum monetary economic reinstatement in lieu of re-employment in this matter. After Petitions for Relief are filed, I will confer with the parties to determine if there are disputed factual issues that require an evidentiary hearing.

Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act. Consequently, the Secretary shall be provided with a copy of this decision so that she may file a petition for assessment of civil penalty with this Commission.

Jerold Feldman
Administrative Law Judge

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