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DAVID HOLLIS V. CONSOLICATION COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 9, 1984
DAVID HOLLIS

v. Docket No. WEVA 81-480-D

CONSOLIDATION COAL COMPANY

DECISION

This case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. V 1981). In his decision below, the Commission's administrative law judge dismissed the miner's discrimination complaint on the grounds that it had been untimely filed and that the discharge of the miner by Consolidation Coal Company ("Consol") did not violate the Mine Act. 4 FMSHRC 1974 (November 1982)(ALJ). We affirm the judge's decision on both grounds.

The complaining miner, David Hollis, was employed at Consol's Osage No. 3 Mine, an underground coal mine located near Morgantown, West Virginia. Hollis was active in safety matters and in the affairs of Local Union 4043, United Mine Workers of America, which represented miners at the mine. In April 1980, Hollis was elected to the union safety committee. The President of the UMWA Local appointed him chairman of the committee, and he served in that capacity until his discharge on September 29, 1980.

The circumstances leading to Hollis' discharge occurred on September 26, 1980. At the end of the afternoon shift that day, Hollis and another miner, William Coburn, were waiting to take an elevator out of the mine. Hollis confronted Coburn for attempting to leave work early and an altercation ensued. The evidence shows that Hollis was the instigator, or at best the more aggressive of the two, in the incident. At some point, Hollis either struck or grabbed Coburn. While riding up in the elevator with a number of other miners, Hollis had to be restrained on several occasions from grappling with Coburn. At the time of the altercation, Consol's mine rules proscribed fighting and described it as a dischargeable offense. On September 29, 1980, Consol discharged Hollis and Coburn for fighting. Both miners then filed grievances under the collective bargaining agreement in effect at the mine. The arbitrator in Coburn's case ordered Coburn reinstated on the grounds that Coburn

was the victim in the fight and that he had acted in self-defense. The arbitrator in Hollis' case issued a decision on October 20, 1980, upholding Hollis' discharge for fighting.

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On October 15, 1980, five days before the arbitrator's decision concerning his grievance, Hollis filed complaints with respect to his discharge with the National Labor Relations Board and the West Virginia Human Rights Commission. The specific nature and outcome of his NLRB complaint are not disclosed by the record. His complaint to the Human Rights Commission alleged that his discharge was racially discriminatory. The record does not show the outcome of this complaint. Following the arbitrator's decision, Hollis discussed appealing the decision with the union personnel who had represented him before the arbitrator. Hollis decided not to appeal, and was subsequently advised by a law professor whom he consulted to retain a labor lawyer. Hollis did not do so for some time.

Hollis testified that in late March 1981, he was gathering information, which he believed might be relevant to his Human Rights Commission case, at the Morgantown office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Hollis also testified that it was at this point he first learned of his right to file a complaint of discriminatory discharge under section 105(c) of the Mine Act, 30 U.S.C. $ 815(c)(Supp. V. 1981). On April 7, 1981, Hollis filed his initial section 105(c) complaint with MSHA.

After investigating Hollis' complaint, MSHA made an administrative determination that his discharge did not violate the Mine Act and declined to file a complaint with this independent Commission on his behalf. Hollis then filed his own discrimination complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. $ 815(c)(3). At the ensuing hearing before the Commission's administrative law judge, Consol moved to dismiss the case on the grounds that Hollis' initial complaint under the Mine Act, filed April 7, 1981, was untimely.

The Commission's judge concluded that Hollis' complaint was untimely under the 60-day time limit set forth in section 105(c)(2) of the Mine Act, 30 U.S.C. $ 815(c)(2). 4 FMSHRC at 1974-77. 1/ The judge discredited Hollis' testimony that he had been ignorant of his rights under the Mine Act until his March 1981 visit to the Morgantown MSHA office. 4 FMSHRC at 1976-77. The judge found instead that Hollis had known of his Mine Act remedies during the 60-day period following his discharge but had deliberately chosen to pursue other avenues of relief before filing his

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1/ Section 105(c)(2) states in pertinent part:

Any miner ... who believes that he has been

discharged, interfered with, or otherwise
discriminated against by any person in
violation of [section 105(c)] may, within
60 days after such violation occurs, file a
complaint with the Secretary [of Labor]
alleging such discrimination....
30 U.S.C. $ 815(c)(2)(emphasis added).
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section 105(c) complaint over four months past the Act's 60-day time limit. Id. Relying in part on the arbitrator's detailed findings, the judge also concluded that Hollis was discharged entirely because of his unprotected conduct in the fighting incident, and not because of his protected activities. 4 FMSHRC at 1978-96. The judge further concluded, however, that even if Hollis' termination were motivated in some part by his protected activities, the operator would have discharged him in any event for the fighting incident alone. 4 FMSHRC at 1996. We agree with the judge's conclusions.

We first address the timeliness of Hollis' initial section 105(c) discrimination complaint. In relevant part, section 105(c)(1) of the Mine Act prohibits the discharge of a miner, or other discrimination against him, because of his exercise of any statutory right afforded by the Act. 2/ If a miner believes that he has been discharged in violation of the Mine Act and wishes to invoke his remedies under the Act, he must file his initial discrimination complaint with the Secretary of Labor within 60 days after the alleged violation. 30 U.S.C. $ 815(c)(2). 3/

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2/ Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 [30 U.S.C. $ 811 (Supp. V 1981)] or because such miner, representative of miners or applicant for employment has instituted or caused to be

instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. $ 815(c)(1).

3/ After investigation of the miner's complaint, the Secretary is required to file a discrimination complaint with this independent Commission on the miner's behalf if the Secretary determines that the Act was violated. 30 U.S.C. $ 815(c)(2). If the Secretary determines that the Act was not violated, he shall so inform the miner, and the miner may then file his own complaint with the Commission. 30 U.S.C. $ 815(c)(3).

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We have held previously that the purpose of the 60-day time limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (December 1982). The Mine Act's legislative history relevant to the 60-day time limit states:

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

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)(emphasis added). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each situation.

In the present case, there is no dispute that Hollis was discharged on September 29, 1980, but did not file a complaint of discrimination with the Secretary until April 7, 1981, more than four months after the statutory deadline for filing such a complaint. The judge did not find Hollis' claimed ignorance of his rights under the Act to be credible. 4 FMSHRC at 1977. Rather, the judge concluded that Hollis knew of his section 105(c) remedies within the 60-day period following his discharge but deliberately elected to seek other avenues of

relief. The judge based these determinations, in part, upon the following findings:

It is not disputed that [Hollis] had been an active, if not militant, chairman of the Safety Committee since his appointment by the local union in April 1980, and that in that capacity he frequently met with state and Federal (MSHA) safety officials. He had access to copies of the Federal law and Hollis himself asserts that he "knew the law" and had more knowledge of the Federal Mine Safety law than any other member of the Safety Committee. Moreover, the successor chairman of the Safety Committee, Edward Pugh, acknowledged that it was one of the duties of that position to advise miners of their rights under section 105(c) of the Act. The fact that Hollis has also achieved a high level of education, having completed two years of college, also reflects on his ability to have understood and waived his rights.

4 FMSHRC at 1977.

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The judge also found that even if Hollis had not known of his Mine Act rights initially, the arbitration decision provided adequate notice of these rights at a time when more than half of the statutory filing period remained. The relevant portion of the arbitration decision stated: "In both the Mine Health and Safety Act and the National Labor Relations Act, there are prohibitions against an employer taking disciplinary action against an employee for making charges or filing claims under the particular legislation."

Operator's Exhibit 15, at p. 37.

When reviewing a judge's credibility resolutions, as here, our role is necessarily limited. The judge observed Hollis as a witness and did not believe his testimony of ignorance concerning his Mine Act rights. We discern nothing in the record that would justify our taking the extraordinary step of overturning this credibility resolution.

Furthermore, apart from Hollis' discredited testimony, substantial evidence supports the judge's inference that Hollis did know of his Mine Act rights during the 60-day time period. The record shows that Hollis was an aggressive safety committee member. He asserted that he "knew the law." During Hollis' tenure as safety committee chairman, he had filed over 30 safety complaints and had met frequently with federal and state officials on his own time to discuss safety matters. The inference from this evidence that Hollis knew of his section

105(c) remedy is convincing. Additionally, we are not prepared to say that the further inference of notice, which the judge drew from the arbitrator's decision, was impermissible.

We are cognizant of the fact that Hollis filed complaints with other agencies within 60 days from the date of his discharge. We conclude, however, as did the judge, that he pursued these alternate avenues of relief with knowledge of his section 105(c) rights. We do not believe that Congress, in the passage of legislative history quoted above, intended for us to excuse a miner's late-filing where the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act.

In sum, the record affords ample support for the judge's findings that Hollis knew of his Mine Act rights but failed to exercise them within the statutory time restriction set forth in section 105(c)(2) of the Act. We therefore conclude that "justifiable circumstances" are not present to excuse Hollis' serious delay in filing.

Moreover, even assuming the timeliness of Hollis' discrimination complaint, we also conclude that substantial evidence supports the judge's determination that Hollis was discharged for non-discriminatory reasons.

We first established the general principles for analyzing discrimination cases in Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, we held that a complainant, in order to establish a prima facie case of discrimination, bears the burden of production and proof to show (1) that he engaged in protected activity and (2) that an adverse action was taken against him motivated in any part by the protected activity. In order to

rebut a prima facie case, an operator must show 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 may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears an intermediate burden of production and proof with regard to these elements of defense. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant.

Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 200. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983)(approving the Commission's Pasula-Robinette test).

In this case, there is no dispute that Hollis engaged in protected activity, largely in the form of making safety complaints, prior to his termination. The judge concluded, however, that Hollis was discharged solely for his unprotected conduct in the fighting incident. On review, Hollis argues that the judge erred in relying to some extent on the arbitrator's findings concerning the fight and Consol's reasons for firing him. Hollis also asserts that the judge erred in his analysis of Consol's motivation for the discharge. We find these contentions lacking in merit.

In Secretary on behalf of Pasula v. Consolidation Coal Co., supra, we held that in discrimination cases our judges may admit arbitral decisions and accord them such weight as may be appropriate. 2 FMSHRC at 2794-96. 4/ We indicated that according weight to the findings of arbitrators may aid the Commission's judges in finding facts under our Act, '"especially ... where the issue is solely one of fact, specifically addressed by the parties, and decided by the arbitrator on the basis of an adequate record."' 2 FMSHRC at 2795, quoting Gardner v. Alexander-Denver Co., 415 U.S. 36, 60 n.21 (1974)(emphasis added).

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4/ In line with the Supreme Court's analogous approach in Alexander v. Gardner-Denver, 415 U.S. 36 (1979), we declined to enunciate rigid standards governing the weight that should be accorded arbitral findings. We indicated, however, that relevant factors for determining the appropriate weight included such considerations as whether the arbitrator had addressed the miner's Mine Act rights; the similarity, if any, between relevant rights under the collective bargaining agreement and the Act; whether the findings in question were factual in nature; the adequacy of the arbitral record; the procedural fairness of the arbitral proceedings; and the special competency of the arbitrator. 2 FMSHRC at 2795-96.

The only aspects of the arbitral decision relied upon by the judge are the factual findings regarding the fight and Consol's reasons for discharging Hollis. Both subjects were thoroughly tried and argued before the arbitrator. The judge carefully applied the Pasula criteria in making use of these findings (4 FMSHRC at 1980-81 & n. 5), and we agree with him that the criteria are satisfied. We perceive no

error in the judge's reliance on the arbitrator's decision concerning the factual issues of the fight and Consol's reasons for discharge. Moreover, the judge himself reviewed the record de novo and arrived at the same conclusions reached by the arbitrator. 4 FMSHRC at 1981. 5/

With respect to the merits of the discrimination case, it is clear that Hollis was the instigator of the fight with Coburn on September 26, 1980. The judge incorporated the arbitrator's detailed findings on this point (4 FMSHRC at 1981-88), which included Hollis' admission that the confrontation got out of hand and that his conduct set a bad example. 4 FMSHRC at 1985. Moreover, in Coburn's arbitration proceeding, the UMWA Local representing Hollis argued that Hollis was the aggressor in the fight and Coburn, the victim. The arbitrator of the Coburn grievance agreed.

The judge also found that Hollis, prior to September 26, 1980, had notice of the operator's rules of conduct, and that one of the rules stated that "fighting is a dischargeable offense." Operator's Exhibit 6. Hollis argues that the operator did not strictly enforce the rules of conduct until the fighting incident. The record discloses, however, that following a raucous 1979 Christmas party, the union requested mine management to do something about the fighting at the mine. Tr. 813, 944. The mine superintendent replied that something would be done, and thereafter the rules were tightened and fighting was expressly labeled a dischargeable offense. Tr. 65-66. We conclude, as did the judge and arbitrator, that management was impelled to enforce strictly the fighting rules because the union wanted the fighting at the mine stopped. We also concur with the judge that Hollis' fight with Coburn "was a serious breach of the known rules of conduct of a severity

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5/ Hollis claims that certain evidence adduced at the hearing before the judge had not been introduced at the arbitration hearing and, accordingly, should have been considered by the judge in deciding the issues surrounding the discipline over the fighting incident. The judge did take this evidence into account:

> While the evidence developed at the hearing before me provided some greater detail than was available to the arbitrator, there is nothing in that additional evidence that would warrant any change in the analysis and conclusions of these incidents made by the arbitrator.

4 FMSHRC at 1995.

far beyond that of any other incident cited [by Hollis to prove discriminatory discipline.]" 4 FMSHRC at 1996. 6/

Accordingly, we conclude that substantial evidence supports the

judge's finding that Hollis was discharged solely for his unprotected conduct in the fighting incident. Thus, Hollis failed to establish a prima facie case of discriminatory discharge. We are mindful, as was the judge, that some evidence exists that could support an inference of a nexus between Hollis' safety complaints and his discharge. Even had a prima facie case of discrimination been made out, however, we find that substantial evidence supports the judge's further finding that Consol affirmatively defended by proving that Hollis would have been fired anyway solely on the basis of the fighting incident.

For the foregoing reasons, we affirm the judge's dismissal of the discrimination complaint. 7/

Rosemary M.
Collyer, Chairman

Richard V. Backley,
Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

6/ Pointing to Coburn's reinstatement, Hollis also maintains that he was the victim of disparate treatment. In the Hollis arbitration decision, the arbitrator found that "[t]here was nothing in the record to raise any inference that the employer prosecuted the case against Mr. Coburn with any less vigor than it has this case." Operator Exhibit 15, at p. 34. After reviewing the record, we agree.

7/ Certain exhibits, introduced and received into evidence before the judge, were not contained in the record before us on review. Accordingly, we issued an order directing the parties to submit these exhibits so that the record could be made complete. The parties did so, and we have accepted the exhibits and made them part of the record.

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Commissioner Lawson concurring and dissenting:

I concur in the result reached by the majority, and agree that substantial evidence supports the judge's finding that Hollis was discharged solely for his unprotected conduct in the fight out of which this case arose. I disagree with their conclusion that the complaint was untimely filed. The majority has determined that Hollis "knew of his section 105(c) remedy", because "he had filed over 30 safety complaints and had met frequently with federal and state officials on his own time to discuss safety matters, and "...was knowingly sleeping on his rights." They found "convincing" the inference from this evidence that Hollis knew of his Mine Act rights, and credited the "further inference of notice which the judge drew from the arbitrator's decision". Slip op. at 5.

The difficulty with this double inference analysis is that the

only evidence of record on the question of Hollis knowledge of 105(c) is the unshaken denial thereof by the complainant. Nor did any witnesses testify to the contrary. Tr. 668, 701-704. The record thus confirms that complainant was unaware of his 105(c) rights until a few days before he actually filed the complaint. TR. 666, 668. 4 FMSHRC 1975. This is unsurprising, given Hollis' short tenure as a member of the safety committee, and the uncontroverted testimony that no 105(c) cases had ever arisen at this mine, either during Hollis' committee service, or in the seventeen years preceding Hollis' discharge. Tr. 891, 904. There is no dispute that filing was promptly had, once, as complainant testified, he became aware of his 105(c) rights. No reason appears evident why a miner as "aggressive" as Hollis would not have filed under 105(c) if he were aware of such: the logical inference would appear to be to the contrary.

Indeed, counsel for the operator conceded that Consol "...cannot bring forth any direct evidence that he (Hollis) did have knowledge (of his 105(c) rights) but...it is reasonable to assume that he would know section 105(c)". Tr. 6.

In Schulte v. Lizza Industries, Inc.,_____ FMSHRC_____ (issued today), my colleagues agreed with me that the miner's testimony that he was ignorant of 105(c)'s timeliness strictures, conceded by the operator in that case also, was a consideration sufficient to excuse a (31-day) delay in filing the complaint. In the instant litigation, however, identical ignorance is found by the majority to be insufficient, notwithstanding this operator's admitted inability to present any contrary evidence.

Our standard of review is the familiar one of "substantial evidence", required in most federal administrative proceedings. Section 113(d)(2)(A)(ii). Substantial evidence has been defined as "more than a mere scintilla...mere uncorroborated hearsay or rumor does not constitute substantial evidence"; "it must do more than create a suspicion of the fact to be established". The record may not be "wholly barren of evidence". Universal Camera v. National Labor Relations Board, 340 U.S. 474, 477 (1951)(citing Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197, 229 (1938)).

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Here, given the uncontradicted testimony of the complainant, and the admitted inability of this operator to adduce any evidence to the contrary, other than the contention that it would be "reasonable to assume" knowledge by this miner of section 105(c), the finding of the judge, affirmed by the majority, is subscintilla. The record is, indeed, "wholly barren of evidence", and fails to meet the test of substantial evidence.

The language of the Act as to time limits, of course, is precatory, not mandatory: "Any miner ... who believes that he has been ...

discriminated against by any person in violation of the subsection may, within 60 days after such violation occurs, file a complaint with the Secretary...." Section 105(c)(2). (Emphasis added.) This language is obviously not accidental, as the majority concedes, the judge below acknowledged, and the legislative history makes evident. Slip op. at 4.

This operator was unable to demonstrate any prejudice it suffered because of the fact that miner Hollis did not file his complaint within 60 days. Tr. 815-822. Nor, as the record reveals, was Consol able to show that any instruction was ever given by it to Mr. Hollis concerning the time limits for filing claims under section 105(c). Tr. 863. There is no dispute that Hollis had brought his complaint to the attention of not only his employer, through the contractual grievance procedure, but to the West Virginia Human Rights Commission, and the National Labor Relations Board as well.

This miner had thus indisputably met at least two of the three tests enumerated in the legislative history (slip op. at 4), either of which would have been sufficient under the guidelines set forth in the legislative history. As we noted in the analogous decision of UMWA v. Consolidation Coal, 1 FMSHRC 1300, 1302 (September 1979): 1/

> In interpreting remedial safety and health legislation, "[i]t is so obvious as to be beyond dispute that ... narrow or limited construction is to be eschewed ... [L]iberal construction in light of the prime purpose of the legislation is to be employed." St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). We believe that a liberal construction of the 30-day filing period for compensation claims requires

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1/ Herman v. Imco Service is inapposite (slip op. at 4). There the miner took no action of any sort until eleven months after his discharge, when he filed a complaint with a state (Nevada) employment agency. That decision correctly reflected that record, and that the miner's failure to file a complaint "until eleven months after his discharge was simply because he did not want to do so". 4 FMSHRC 2138.

a conclusion that the period may be extended in appropriate circumstances. See, Dartt v. Shell, 539 F.2d 1256, 1260 (lOth Cir. 1976), aff'd by equally divided court, 434 U.S. 99 (1977); Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978); Moses

v. Falstaff Brewing Corporation, 525 F.2d 92 (8th Cir. 1975).

Furthermore, while section 111 of the 1977 Act does not specify a time limit for the filing of compensation claims, the Act's discrimination provisions contain analogous time limits.

The majority's approval of the judge's further reliance on the arbitrator's minimal mention of the Act, (as well as the National Labor Relations Act, to which this miner had already resorted), is even less explicable. On its face that decision provides no notice of either section 105(c) or the time limits thereunder, and obviously makes no reference to remedies under the Act. Slip op. at 5. In any event, many of the Act's prohibitions are enforceable only by the Secretary, not by an individual miner (see e.g., sections 104, 108, 109 and 110). 2/ Further, contrary to the judge's finding, the arbitrator did not reject Hollis "claim that he had been fired for activities protected by the Act". 3/ The only section of the Act referred to by the arbitrator was section 103(g), which has no bearing on the issue here disputed. Dec. at 4. Obviously, the arbitrator had no authority or jurisdiction to rule either for or against this miner on any issue over which the Commission has jurisdiction. Imputing knowledge of 105(c) to this, or any other, miner thus has no precedential support, and is contrary to both the spirit of the Act and its legislative history. The latter, and not by inference, clearly sanctions filing 105(c) complaints even though 60 days may have passed. Slip. op. at 4.

The majority's upholding the judge's finding of Hollis knowledge consequently only affirms judicial speculation, not record evidence. It is, under the rationale adopted here today, apparently insufficient now for a miner to present uncontroverted evidence that he or she had no knowledge of section 105(c). The trier of fact may henceforth find knowledge, notwithstanding the absence not only of affirmative testimony, but the existence of testimony to the contrary. This error is especially egregious here, given the assertion that the miner "should have known" of his rights, and the judge's failure to comment on Hollis' demeanor, or to find him to be unpersuasive or untrustworthy. Hollis' "access to copies of the Federal law ... his safety committee chairman successor's

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2/ The judge, without explanation, asserts that the arbitrator's decision "clearly advised (Hollis) of those rights" (emphasis added). (Dec. at 4). I fail to find either advice or clarity in that language, nor is there any explanation of "those rights" elsewhere in the decision.

3/ Hollis was discharged pursuant to the collective bargaining

agreement. (Oper. Exh. 13). As the arbitration decision noted: "The question presented is whether just cause has been established for the discharge of the Grievant for fighting underground and on the cage on September 26. 1980". The Award of the arbitrator found that "the Employer has established just cause for the discharge of the Grievant." Oper. Exh. 15 at 1 & 42.

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"acknowledge[ment]" that one of Hollis' duties was to advise miners of their rights under 105(c) ... his "high" level of education" (slip op. at 4), could equally persuasively lead a disinterested observer to the conclusion that this miner was, in truth, ignorant of 105(c), or perhaps even neglectful of his duties as a union representative. More importantly, acceptance of the majority's rationale subverts the burden of proof allocations so carefully constructed in Pasula and Robinette, supra, and their requirement that the employer must justify disciplinary action. See also National Labor Relations Board v. Transportation Management Corp., 51 U.S.L.W. 476 (June 15, 1983). The majority's ready acceptance of the judge's "inference" that Hollis "knew" of his section 105(c) remedy, and additional "inference" of notice drawn from an arbitrator's decision such as this, thus impermissibly eases an operator's duty to present the evidence necessary to establish a non-discriminatory motive for any discharge or other discipline it chooses to impose.

Mere assertion that this miner "should have known of his rights under the Act to file complaints", supra, (Dec. at 4), is not evidence, much less substantial evidence. Although the judge and the majority here seek to frame the issue in credibility terms, there is no escaping the fact that this record is devoid of any evidence Hollis knew of the existence of section 105(c), much less its time filing requirements.

I therefore dissent from the majority's holding that the filing hereunder was untimely, but concur in the dismissal of the complaint.

A. E. Lawson, Commissioner

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