CCASE:
RICHARD BJES V. CONSOLIDATION COAL
DDATE:
19840615
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
JUNE 15, 1984

RICHARD E. BJES

v.

Docket No. PENN 82-26-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. (1982), and involves the discharge, subsequently converted to a 30-day suspension, of Richard Bjes for refusing to operate a low profile shuttle car. The Commission's administrative law judge sustained Bjes' discrimination complaint against Consolidation Coal Company ("Consol"), concluding that Bjes' work refusal constituted protected activity under the Mine Act. 4 FMSHRC 2043 (November 1982)(ALJ). The judge ordered that Consol compensate Bjes "for the period of his thirty-day suspension by paying him in full the salary which he would have received had he not been disciplined." 4 FMSHRC at 2068. The judge did not award Bjes interest on the back pay, hearing expenses, or attorney's fees. For the reasons that follow, we affirm the judge's finding that Consol's discipline of Bjes violated the Mine Act. However, as discussed below, we remand to afford the parties the opportunity to present further evidence and argument, consistent with our decision, with respect to a complete and appropriate remedy.

Consol operates the Laurel Mine, an underground coal mine located near Central City, Pennsylvania. Bjes had worked at this mine for six and a half years prior to the incidents at issue in this proceeding. For most of the first six months of 1981, Bjes operated a scoop during retreat mining operations in the mine. During this period Bjes was classified as a scoop operator, but also occasionally operated, on a fill-in basis, the high profile No. 4 high shuttle car. High profile cars were higher and had more comfortable cabs (or "kitchens") for the operator than low profile cars. Bjes, who is 6'

1" tall and weighs 195 lbs., experienced no difficulty in operating the No. 4 shuttle.

In July 1981, the regular continuous miner operator in Bjes' work crew, Cecil Wall, was recovering from an injury and his vacancy resulted in each crew member being "bumped" into a more senior temporary position. When this realignment occurred, Bjes was permitted upon his request to operate the high profile No. 4 shuttle car. Bjes earned the same income as a shuttle operator as he had as a scoop operator.

On Monday, July 27, 1981, Wall, the regular continuous miner operator, returned to Bjes' crew. When Wall resumed his duties, the other crew members were bumped back into less senior positions. Bjes was directed to operate the No. 9 shuttle car, a standard low profile shuttle. Like all other shuttle cars used in the mine, the No. 9 shuttle contained two operator's seats in its cab, one facing the inby end of the car used when driving the shuttle inby ("the outby seat"), and one facing the outby end of the car used when driving the shuttle outby ("the inby seat"). In the standard configuration of the No. 9 shuttle, the outby seat (used when driving inby) was on the right side of the cab, the cab's single steering wheel was to the driver's left, and the brake pedal was also to the driver's left in line with, and beyond and below, the steering wheel. The distance from the outby seat to the brake pedal was three feet. (When seated in the inby seat driving outby, the cab's steering wheel was to the driver's right and the other brake pedal used when driving outby was to his left.)

On Tuesday, July 28, during the afternoon shift, Bjes told his section foreman, Wayne Ross, that he was having trouble with the No. 9 shuttle and was running it in low gear. Bjes testified that when he sat in the outby seat, the position of the steering wheel on the left side of the car in front of the brake made it difficult for him to reach the brake pedal with his left leg and that his leg was in the way of his reaching the steering wheel. Bjes also experienced difficulty getting into and out of the shuttle cab and in changing seat positions. Primarily because of his problems in reaching the brake and in steering, Bjes believed that it would be safer for him to operate the No. 9 shuttle at a slow speed in low gear. Later during that same shift, shift foreman Bill Ross (the brother of Wayne Ross) visited the section where Bjes was working and was informed by Wayne Ross that Bjes was operating the shuttle in low gear. Bill Ross flagged Bjes down and asked him what the problem was. Bjes responded that he could not run the shuttle in second gear. By moving his feet,.Bjes attempted to demonstrate to the section foreman his problem in reaching the brake. Later in the shift, the No. 9 shuttle was taken out of service for repairs because its hydraulic hoses had been severed. The cause of the severance is in dispute. Bjes testified that because he "could not get the wheel turned correctly," he drove the shuttle car too close to the rib and the hoses were cut when they caught on the corner of the rib.

On Wednesday, July 29, prior to the afternoon shift, Wayne Ross met with the acting mine superintendent, Tom Hofrichter, and informed him of the incidents involving Bjes on the previous day. Shortly thereafter, Bjes met with Hofrichter in the latter's office. Bjes

explained that he was having difficulty reaching the brake on the No. 9 shuttle and asked if there were anything Hofrichter could do to alleviate the problem. John Adams, a safety committeeman of Local Union 1979, District 2, United Mine Workers of America (UMWA), which represented the Laurel Mine miners for collective bargaining and Mine Act safety and health purposes, was present at the meeting. Hofrichter also called in Bill Young, the mine's master mechanic, to join the meeting. The four discussed possible modifications to the No. 9 shuttle. Hofrichter testified that he told Bjes that he would look into possible solutions to the situation. Bjes testified that at this meeting Hofrichter authorized him to operate the high profile No. 4 shuttle car. Hofrichter testified that he did not authorize such a change.

Later that day, at the beginning of the afternoon shift, section foreman Wayne Ross noticed that the No. 4 and No. 9 shuttles were not in operation. Ross asked Bjes and Tim Peterman, the operator of the No. 4 shuttle, what had happened. Bjes responded that he would not operate the No. 9 shuttle because his inability to work the brake pedal made his operation of the shuttle unsafe. Bjes stated that he was invoking his safety rights under the collective bargaining agreement between the UMWA and Consol. 1/ For the rest of the shift, Bjes was permitted to operate the No. 4 high profile shuttle car.

Prior to the afternoon shift on Thursday, July 30, Wayne Ross advised mine superintendent Hofrichter that Bjes had refused to operate the No. 9 shuttle on the previous day. Hofrichter called a meeting with Bjes. Bill Ross, Wayne Ross, and Carson Bruening, a union representative, attended. Hofrichter stated to those present that he had not authorized a switch in assignments during his July 29 meeting with Bjes, but had said only that he would look into possibilities for resolving the situation. Bjes again announced that he would not operate the No. 9 shuttle because it was unsafe, and that he was invoking his safety rights under the collective bargaining agreement. Bruening stated that an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) would be contacted in an effort to solve the problem. Bjes was temporarily assigned laborer's work.

Around 6:00 p.m. that day, Hofrichter, accompanied by safety committeeman Adams and the maintenance foreman, met with Bjes in his working section. Hofrichter instructed Bjes to it in the shuttle and demonstrate the problems he had operating the shuttle. Bjes got into the shuttle car and, sitting in the outby seat, simulated the operational problems he had when driving it in the inby direction. Bjes also sat in the inby seat and stated that he did not have an operational problem driving the car outby, because when seated in that position the other brake pedal was not under the steering wheel and he had more leg room. Hofrichter testified that neither he nor safety committeeman Adams believed that Bjes' operation of the shuttle presented an "imminent danger" within the meaning of the collective bargaining agreement (n. 1 supra).

At about this time, MSHA inspector Charles Burke arrived. Another meeting occurred, involving Bjes, Hofrichter, Burke, Bill Ross, Wayne Ross, Consol safety supervisor Jeff Kazura, Adams, and another safety committeeman, Rick Borella. Inspector Burke sat in the shuttle and then had Bjes sit in it to demonstrate the problem he had operating the controls. While neither Inspector Burke nor safety

committeeman Borella thought that Bjes' operation of the shuttle car constituted an "imminent danger," they both told Hofrichter that they perceived some hazards in Bjes' operation of the No. 9 shuttle.

_____

1/ Consol and the UMWA were signatories to the National Bituminous Coal Wae Agreement of 1981 ("the collective bargaining agreement" or "the agreement"). Complainant's Exh. No. 2. The agreement permitted a miner to refuse work "under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." Id., Art. III(i)(1)(p. 15).

Those present then discussed possible shuttle modifications, including raising the canopy and moving the seats and/or the brake pedal. Hofrichter decided that because Bjes previously had operated the No. 9 shuttle and Hofrichter had not observed "anything that was abnormally hazardous to him in operating that car," Bjes could continue to operate it "until such a t..= that we could look at the possibility of making it more comfortable for him by making these changes." Tr. 181. Concluding that it was "safe for ... Bjes to run that car," Hofrichter instructed Bjes to run the shuttle. Id. Bjes replied that operating the shuttle would be unsafe and that he was not going to run it. Adams and Borella asked Hofrichter if he intended to suspend Bjes with intent to discharge him, and Hofrichter replied in the affirmative. Borella, acting in his capacity as a safety committeeman, recommended that Bjes not operate the No. 9 shuttle.

At a subsequent meeting held outside the mine that day, Hofrichter told Bjes that if he did not operate the shuttle, he would be suspended with intent to discharge. Bjes refused and the meeting broke up. In a July 31, 1981 letter to Bjes, Hofrichter stated that Bjes was suspended with intent to discharge for breach of Consol's Employee Conduct Rule 4--"Refusal to perform work assigned or to comply with a supervisor's directive."

Bjes filed a grievance over Consol's action and his case went to arbitration pursuant to the collective bargaining agreement. (The transcript of testimony presented at the arbitration hearing was not entered into evidence in the present proceeding.) On August 25, 1981, the arbitrator issued a written award which directed that the discharge be converted to a 30-day suspension. In mid-August, shortly before issuance of the arbitrator's decision, Bjes filed a discrimination complaint with MSHA, pursuant to section 105(c) of the Mine Act. 30 U.S.C. 815(c). Bjes' complaint stated:

I was removed from the mine ... on July 30, 1981, and informed that I was being suspended with intent to discharge effective immediately for refusing to run a shuttle car, that in the opinions of the mine safety committee, Federal Inspector Charles Burke and myself was a hazard to myself and members of my crew. The problem was caused by my size and the lack of room in the car. ... I feel that my individual safety rights were violated and that I was disciplined illegally under Federal law protecting my right to a safe working place.

On September 14, 1981, while MSHA's investigation of Bjes'

complaint was proceeding, Bjes returned to work after his 30-day suspension and was directed to operate the No. 9 shuttle again. Section foreman Wayne Ross testified that after two to three hours of work on the shift, Wall, the continuous miner operator, complained to him that Bjes was not operating the shuttle safely. (Bjes denied at the hearing that Wall had complained about the safety of his operation of the shuttle; Wall did not testify at the hearing.) Ross removed Bjes from the No. 9 shuttle and assigned him

to shoveling coal. Bjes testified that before he was removed from the shuttle he had injured his left knee by striking it against the shuttle steering wheel while trying to reach the brake pedal. Bjes testified that he noticed a swelling in his knee about five minutes after he began shoveling coal, and that the pain eventually forced him to sit down. Bjes was subsequently carried out of the mine on a stretcher and taken to a hospital emergency room. Bjes' workman's compensation form states that the nature of the injury was "soft tissue injury with possible ligament damage--left knee." Complainant's Exh. No. C-3. Consol does not dispute the fact that Bjes sustained an injury of some degree to his knee, but contests the credibility of Bjes' explanation of the manner of his injury.

In October 1981, following his injury, Bjes received a letter from MSHA informing him that MSHA's investigation of his discrimination complaint had not uncovered a violation of section 105(c) of the Mine Act. On November 23, 1981, Bjes filed his own discrimination complaint with this independent Commission pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. 815(c)(3). 2/ Bjes underwent an operation for his injury and was absent from work for five months recuperating. When he returned to work, Bjes found that his work crew had again undergone another realignment. This resulted in his attaining higher seniority and being permitted to operate a different shuttle car.

In his decision, the administrative law judge found that Bjes had a good faith, reasonable belief that his operation of the low profile No. 9 shuttle car was hazardous to himself and others, and that he had communicated his safety concerns in this respect to management. 4 FMSHRC at 2063-66. The judge "accept[ed] ... Bjes' testimony that the configuration of the machine, coupled with its operational limitations, restricted his movements while seated at the controls, thereby contributing significantly to his inability to reach the brake pedals." 4 FMSHRC at 2066. The judge rejected Consol's defense that Bjes' work refusal stemmed not from safety concerns, but from "his dislike for a machine which he found to be uncomfortable." 4 FMSHRC at 2067-68. The judge resolved a number of credibility disputes in Bjes' favor and stated, "Having viewed ... Bjes on the stand during the course of the hearing ... I find him to be a straightforward and credible witness." 4 FMSHRC at 2064. Pursuant to his findings, the judge concluded that Bjes' refusal to operate the No. 9 shuttle was a protected work refusal under the Mine Act and, accordingly, Consol's discipline of Bjes for the refusal was in violation of section 105(c) of the Act. 4 FMSHRC at 2067.

2/ At the subsequent hearing before the Commission's administrative law judge, Bjes was represented by UMWA representative Carson Bruening, who is not a lawyer.

In his post-hearing arguments, Bjes' lay representative, Bruening, requested the following remedies: (1) reimbursement of all wages lost as a result of Bjes' suspension; (2) deletion from Bjes' personnel file of all record of discipline for the work refusal; and (3) an order that Bjes not be required to operate the No. 9 shuttle in the future. 4 FMSHRC at 2068. The judge ordered Consol to compensate Bjes for the period of his suspension "by paying him in full the salary which he would have received had he not been disciplined." 4 FMSHRC at 2068. The judge stated, "The rate of pay should be at the rate of pay Bjes was earning when he was suspended, and [the parties] are directed to confer ... for the purpose of calculating the amount due ... Bjes ...." Id. The judge also ordered Consol to purge Bjes' personnel file of any record of this event, but denied Bjes' request to direct Consol not to require Bjes to operate the No. 9 shuttle in the future. Id. The judge did not award interest on the back pay, hearing expenses, or attorney's fees.

On review Consol contends that, as a general proposition, a miner's work refusal may not be based upon an alleged hazard attributable to the miner's own physical condition or limitations. Consol also argues that substantial evidence does not support the judge's findings and credibility resolutions that Bjes' work refusal was made in good faith and based on a reasonable belief that it was hazardous for him to operate the No. 9 shuttle. 3/ The UMWA, which has filed a brief on Bjes' behalf, contests Consol's arguments and also maintains that the judge erred in not awarding interest on back pay, hearing costs, or attorney's fees. The issues before us are whether substantial evidence supports the judge's findings that Consol violated section 105(c) of the Mine Act by disciplining Bjes for engaging in a protected work refusal and, if so, whether the judge awarded remedies consistent with the Mine Act's remedial provisions and goals.

We first address the substantive issues pertaining to the violation. The crucial question is whether Bjes engaged in a protected work refusal. At the outset, we are met with Consol's contention that even if Bjes had a good faith, reasonable belief in a hazard, his work refusal was outside the protection of the Mine Act because the perceived hazard, if any, resulted from his own physical idiosyncracies and not from any safety defect in Consol's equipment or in the physical environment of the mine. The UMWA objects to our consideration of this issue on the ground that Consol failed to present this argument to the judge and is therefore barred by section 113(d) of the Mine Act from raising it for the first time on review. See 30 U.S.C. 823(d)(2)(A)(iii).

_____

3/ On review, Consol does not contest the judge's finding that Bjes communicated his safety concerns to management.

Determinations as to whether the judge was "afforded an opportunity to pass" on questions of law or fact (30 U.S.C. 113(d)(2)(A)(ii)) must be decided on a case-by-case basis. W agree with the UMWA that the legal challenge in question was not expressly developed below by Consol. Nevertheless, this case poses the question of whether Bjes' work refusal, which was premised in part on his own physical limitations, enjoyed the Act's protection. Nearly every work refusal consideration addressed by the judge touches on or implicates this larger question. Therefore, we are satisfied that the issue was before the judge, notwithstanding Consol's failure to articulate this defense more clearly. Further, the issue, as addressed by Consol on review, is a legal one, and the UMWA has responded fully to it.

We conclude that, under appropriate circumstances, such as here presented, a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations. In our previous decisions we have recognized the right to refuse work but have not had occasion to decide this specific issue. Our determination today is founded both on the broad protective purpose of section 105(c) and on the underlying mandate of the Mine Act that operators, with the assistance of miners, strive to create safe working conditions in the mine. Safety in particular mining contexts may be affected by a miner's physical condition or limitations. The mine is an interactive environment involving human beings, equipment, and the mine's physical setting itself. The human factor cannot be ignored in the evaluation of hazards. A significant physical limitation or condition may affect a miner's ability to perform his normal work tasks and create a hazard justifying a refusal to work.

In this case, the judge determined that the Bjes' physical attributes (6' 1" tall, 195 pounds in weight) in association with the "cramped shuttle car kitchen" (4 FMSHRC at 2064) and the configuration of the controls prevented Bjes from safely applying the shuttle's brake when driving inby. The record supports the judge's finding that a hazard was created by Bjes' operation of the shuttle. We note that the hazard in this case was not solely attributable to Bjes' body build, but arose also from the configuration of the equipment that he was required to operate. The hazardous situation resulting from this interaction of human and technical factors was not the result of any questionable conduct on Bjes' part. We conclude that, in the circumstances of this case, Bjes' work refusal did not lose its claim to protection under the Act merely because the hazard resulted in part from factors intrinsic to Bjes himself.

A miner's work refusal is protected under section 105(c) of the Mine Act if the miner has a good faith, reasonable belief in a hazardous condition. See Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 807-12 (April 1981). Good faith in this context simply means an honest belief that the hazard exists. Accompanying the good faith requirement is the additional requirement that the belief in a hazard be a reasonable one under the circumstances.

The judge found that Bjes had "an honest belief" that a hazard existed. The judge's finding is premised on his credibility resolution, noted above, that Bjes was a "straightforward and credible witness." 4 FMSHRC at 2064. The judge stated that Bjes was "sincere when he initially complained about the cramped shuttle car kitchen and the fact that he had problems reaching some of the controls." Id. When reviewing a judge's credibility resolutions our role is necessarily limited. We have carefully reviewed Consol's "bad faith" allegations, and conclude that Consol has not offered evidence so compelling that we should take the exceptional step of overturning findings resting on credibility resolutions.

In evaluating the judge's findings concerning good faith, we are mindful of the testimony of mine superintendent Hofrichter that during the July 30 meeting in the mine, when Bjes demonstrated his problems with the shuttle and also announced his work refusal, both Inspector Burke and safety committeeman Borella stated that they perceived hazards in Bjes' operation of the shuttle. Indeed, Hofrichter's own willingness at the time to consider modifications to the No. 9 shuttle bespeaks some recognition of an operational problem.

The evidence on which Consol relies to demonstrate bad faith is not persuasive. Consol argues that other miners, as large or nearly as large as Bjes, had operated the No. 9 shuttle without complaint. As the judge noted, these other miners did not testify. Therefore, like the judge we cannot attribute weight to Consol's bare allegation concerning others' experiences or beliefs. Further, other miners' experience with the shuttle may not have been identical to Bjes' and their failure to vocalize a complaint to management, without further explanation, does not prove that Bjes acted in bad faith.

Consol also notes that at the hearing Bjes offered to drive another low profile shuttle car, the No. 10 shuttle. Consol argues that there were no significant differences between the two low profile cars, and that this consideration demonstrates the insincerity of Bjes' refusal to drive the No. 9 shuttle. The judge analyzed this

contention and concluded that there were operational differences between the two cars. 4 FMSHRC at 2067. There is substantial record support for this finding. Unlike the standard No. 9 car, the No. 10 shuttle was off-standard in design. When driven inby, the No. 10 car's steering wheel and brake were on opposite sides of the cab. While the record lacks some detail on this point, both Borella and Bjes

we find no reason to disturb the judge's finding that Bjes acted in good faith.

With regard to the reasonableness of Bjes' belief in the hazard, the evidentiary considerations discussed above also establish the required reasonableness. The judge found, and we agree, that the evidence showed that there was a hazard presented by Bjes' operation of the shuttle. While there is no requirement under our precedent that a miner's belief be objectively verified, when such verification is demonstrated it constitutes additional persuasive evidence. See Robinette, 3 FMSHRC at 811-12. We again note that two participants in the July 30 meeting in the mine believed that hazards were associated with Bjes' operation of the shuttle. The judge also credited Bjes' testimony that upon his return to work in September 1981, he seriously injured his left knee when he struck it against the shuttle's steering wheel while experiencing difficulty in reaching the brake. The judge found that this accident "bolster[ed] [Bjes'] argument that requiring him to operate the shuttle car while he was cramped into the operator's kitchen ... presented a real safety hazard." 4 FMSHRC at 2066. Consol attacks the judge's credibility resolution, but has presented no controverting evidence that would warrant our reversal on this point. Cf Robinette, 3 FMSHRC at 813-14. 4/

We thus affirm the judge's findings that Bjes had a good faith, reasonable belief in the existence of a hazard and that his refusal to work, based on that belief, was protected by the Mine Act. There is no dispute that Consol disciplined Bjes solely for engaging in the work refusal. Because the refusal was protected, the discipline was done in violation of section 105(c) of the Mine Act. See, for example, Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Metric Constructors, Inc., 6 FMSHRC 226, 230-31 (February 1984). To the extent that Consol has argued that the discipline was legitimate because Bjes' concern rested on his comfort rather than safety, that contention is rejected.

We turn to the question of remedy. Section 105(c)(3) of the Mine Act expressly requires that if the Commission sustains the discrimination complaint of a miner proceeding on his own behalf, the Commission:

shall issue an order ... granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.... Whenever an order is issued

sustaining the complainant's charges under [section 105(c)(3)] a sum equal to the aggregate amount of all costs and expenses (including attorney's

_____

4/ Consol also contends that on July 28 Bjes did not accidentally sever the shuttle's hydraulic hoses as a result of a steering problem, but rather severed them as a result of running over a large rock. The judge did not resolve the conflict in testimony on this point. Regardless of the reason for this accident, it would not affect our conclusions in this case.

fees) as reasonably incurred by the miner ... for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation....

30 U.S.C. 815(c)(3). As our cases have emphasized, our statutory mandate requires us to restore victims of discrimination to the status they would have occupied but for the discrimination. However, we may not unjustly enrich a discriminatee. See Secretary of Labor on behalf of Cooley v. Ottawa Silica Company, 6 FMSHRC 516 523-25 (March 1984); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 231-34 (February 1984); Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Company, 5 FMSHRC 2042, 2049-56 (December 1983); Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142-44 (February 1982). These principles dictate remand.

In holding that Bjes was entitled to back pay during the period of his 30-day suspension, the judge did not specify what job classification or pay rate applied for calculation of the award. Any remedial relief due to Bjes must be determined, however, on the basis of whatever non-discriminatory status he would have occupied, during the 30-day period of time following his work refusal, had he not been disciplined. See Secretary on behalf of Cooley v. Ottawa Silica Co., 5 FMSHRC at 522-23. The record in this case suggests that Consol, in accord with the collective bargaining agreement, its past practice in analogous situations, and its normal business policies, had available and might have adopted any of a variety of options, e.g., assigning Bjes to operate a different shuttle car; reassigning him to scoop work; or assigning him totally different work. Other legitimate options may have been available, as indicated by Hofrichter's initial willingness to consider modifications to the shuttle. 5/ We remand so that the parties may stipulate or offer additional evidence and argument, and so that the judge may make appropriate findings, as to what Bjes' status would have been following his refusal to work had he not been discriminatorily disciplined.

As noted, the judge did not award Bjes interest on his back pay award, hearing expenses, or attorney's fees. Unless compelling reasons point to the contrary, all should be recovered by a discriminatee. The failure of Bjes' lay representative to request such relief cannot serve as a bar to its recovery. See for example, Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC at 144. Accordingly, on remand, the judge shall award interest on any back pay award pursuant to the principles enunciated

in our decision in Secretary on behalf of Bailey v. Arkansas-Carbona Co., supra. See Secretary on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC at 523. The judge shall also permit the parties to offer stipulation, evidence, and/or argument as to the amount, if any, of the hearing expenses, including expenses in the nature of attorney's fees, incurred by Bjes. See Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC at 233-34.

_____

5/ Because of this initial willingness to consider modification, and because there may have been a number of alternatives available to this operator, we need not and do not decide whether the operator would be required under the Mine Act to modify the equipment, which was otherwise in full compliance with applicable regulations, as a matter of last resort.

Accordingly, for the foregoing reasons, we rm e s conclusion that Consol violated the Mine Act. We remand the case to the judge for expeditious proceedings to determine appropriate relief due Bjes in accordance with the principles enunciated in this decision.

~1422
Distribution

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Jerry F. Palmer, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Administrative Law Judge George Koutras
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041