CCASE:
ODELL MAGGARD V. CHANEY CREEK COAL,
MSHA V. DOLLAR BRANCH COAL AND CHANEY CREEK COAL
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FMSHRC-WDC
August 25, 1987

ODELL MAGGARD

v. Docket No. KENT 86-1-D

CHANEY CREEK COAL COMPANY

and

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of ODELL MAGGARD

v. Docket No. KENT 86.51-D

DOLLAR BRANCH COAL CORPORATION
and CHANEY CREEK COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY: Ford, Chairman; Backley and Lastowka, Commissioners

This consolidated proceeding involves two discrimination complaints filed on behalf of Odell Maggard. Both complaints allege an illegal discharge based on the same circumstances. The first complaint (Docket No. KENT 86-1-D) was brought by Odell Maggard in his own behalf against Chaney Creek Coal Company. The second complaint (KENT 86-51-D) was brought by the Secretary of Labor ("Secretary") on behalf of Odell Maggard against Chaney Creek Coal Co. ("Chaney Creek") and Dollar Branch Coal Corporation ("Dollar Branch"). The complaints allege that Chaney Creek and

Dollar Branch (collectively, "operators") discharged Maggard in violation of section 105(c)(1) of the Federal Mine Safety and Health Act, 30 U.S.C. $ 815(c)(1)("Mine Act"), because of his refusal to

perform certain work that he believed to be hazardous. 1/ Commission Administrative Law Judge Gary Melick concluded that the termination of Maggard's employment was discriminatory, ordered that Maggard be reinstated at the same rate of pay, and assessed a civil penalty of $1,000 for the violation of section 105(c)(1). 8 FMSHRC 806 (May 1986)(ALJ). In a supplemental decision, the judge awarded Maggard back pay and attorney's fees, and assessed an additional civil penalty because of the operators' continuing failure to reinstate Maggard. 8 FMSHRC 966 (June 1986)(ALJ).

We granted the operators' petition for discretionary review, which questioned whether the judge's decision upholding Maggard's complaint of discrimination was supported by substantial evidence, whether the judge was biased, and whether the judge's award of attorney's fees was proper. 2/ On the bases explained below, we affirm the judge's finding of a discriminatory discharge, conclude the judge was not biased, and vacate the award of attorney's fees.

I.

In September 1984, Chaney Creek owned and operated the Dollar Creek No. 3 Mine, an underground coal mine located in southeastern Kentucky. Maggard worked at the mine as a shuttle car driver. On January 10, 1985, Maggard was advised by Howard Muncy, the section foreman, that Maggard was to work as a miner-helper. In this capacity Maggard was to keep the continuous mining machine's trailing cable from being run over when the machine backed up. 3/

1/ Section 105(c)(1) of the Mine Act provides in part as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... in any coal or other mine ... because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this [Act.]

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

2/ After their petition for review was granted by the Commission, the operators filed a motion to dismiss Dollar Branch as a party to the proceeding on the ground that Dollar Branch's records showed no direct relationship between Dollar Branch and Maggard. Section 113(d)(2) (A)(iii) of the Mine Act limits the Commission's review

authority to only those issues raised in petitions for discretionary review. 30 U.S.C. $ 813(d)(2)(A)(iii). Accord, 29 C.F.R. $ 2700.70(f). No issue concerning Dollar Branch's party status was raised by Dollar Branch or Chaney Creek in their petition for review. Consequently, the operators' motion to dismiss Dollar Branch must be denied.

3/ Coal is extracted at the mine by a continuous mining machine that

According to Maggard, on January 10 he was shocked twice while handling the trailing cable. Maggard testified that on both occasions he told Muncy that he had been shocked and asked that Muncy fix the cable, but Muncy refused. Maggard further testified that he asked Muncy for alternative work, but Muncy told him to "pull cable or else." Tr. 43. As a result, Maggard left the mine.

On June 11, 1985, Maggard filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"). 4/ In September 1985, the Secretary advised Maggard by letter that he had not yet made the determination required to be made within 90 days of the filing of a complaint as to whether Maggard had been discriminated against. 5/ The Secretary further informed Maggard that,

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receives its operating power through a 500-foot long, 480-volt cable that trails behind it.

4/ Section 105(c)(2) provides that the miner file a complaint within 60 days after the act of discrimination occurs. Congress, however, intended that the time limit not be jurisdictional and that delays be allowed "under justifiable circumstances." 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). No issue concerning the timeliness of Maggard's initial complaint has been preserved on review.

5/ 30 U.S.C. $ 105(c)(3) states in relevant part:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, 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. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been

pursuant to the Act and Commission Procedural Rule 40(b), Maggard had the right to file a complaint on his own behalf with this Commission. The Secretary also informed Maggard, however, that the Secretary's investigation was on-going and in the event it was determined that a violation of section 105(c) had occurred, the Secretary would file a complaint on Maggard's behalf.

On October 1, 1985, Maggard, through private counsel, filed a discrimination complaint asserting jurisdiction under section 105(c)(3) of the Act and Commission Rule 40(b), 29 C.F.R. $ 2700.40(b). 6/ On December 14, 1985, the Secretary informed Maggard that the Secretary had determined that a violation of section 105(c) had occurred and on December 26 the Secretary filed a complaint on Maggard's behalf pursuant to section 105(c)(2) of the Act. 30 U.S.C. $ 815(c)(2). 7/ The Secretary thereafter moved the judge to dismiss the complaint that Maggard had filed in his own behalf. The judge reserved decision on the

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> reasonably incurred by the miner, applicant for employment or representative of miners 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).

6/ Commission Procedural Rule 40(b) stated:

> A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

7/ Section 105(c)(2) states in relevant part:

> If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order

> granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief.

30 U.S.C. $ 815(c)(2).

Secretary's dismissal motion and consolidated the two complaints for hearing.

After an evidentiary hearing, the judge found that Maggard suffered serious electrical shock while handling the cable and that Maggard had a good faith, reasonable belief that continuing to handle the cable would be hazardous. 8 FMSHRC at 815.16. The judge also found that Maggard had communicated his concern to the operators and had been denied alternative work. 8 FMSHRC at 816. Consequently, the judge held that Maggard was the subject of a discriminatory discharge, concluding that Maggard engaged in a protected work refusal when he left the mine rather than handle the cable. 8 FMSHRC at 818. The judge denied the Secretary's Motion to Dismiss Maggard's individual complaint, stating: "It is clear ... that Congress intended that the miner have the right to file a complaint on his own upon the failure of the Secretary to act within the prescribed 90-day period." 8 FMSHRC at 809. He further found that Commission Procedural Rule 40(b) implemented that intent. Id.

The judge awarded Maggard back pay and interest through June 1, 1986, totaling $33,660.19. In awarding attorney's fees and expenses of $16,456.22, the judge rejected the operators' argument that Maggard would have been sufficiently represented by the Secretary and that retention of private counsel was unnecessary and unreasonable. The judge concluded that although Maggard's individual complaint paralleled the Secretary's complaint, it was independent of it. The judge noted that Maggard's private counsel took an active role in trying the case and that the Secretary did not file his complaint until twenty days prior to the hearing that had been scheduled on Maggard's individual complaint. 8 FMSHRC at 967.

II.

In reviewing an administrative law judge's findings of fact, the Mine Act imposes on the Commission a substantial evidence standard of review. 30 U.S.C. $ 823(d)(2)(A)(ii)(I). The operators assert that the judge's factual findings underlying his conclusion of illegal discrimination are not supported by substantial evidence. They argue that Maggard did not believe reasonably and in good faith that handling the cable was hazardous and that Maggard was not fired, but quit voluntarily because he was assigned a job he found onerous. On review, our task in deciding substantial evidence questions is to determine whether there is "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Applying

this standard, we conclude that the challenged findings of fact are supported by substantial evidence.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary 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 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone and would have taken the adverse action in any event for the unprotected activity. Pasula, supra; see also Eastern Assoc. Coal Corp. v. FMSHRC. 813 F.2d 639, 642 (4th Cir. 1987); Robinette, supra: Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983)(approving nearly identical test under National Labor Relations Act).

With respect to the first element of a prima facie case, the Commission has held that a miner's work refusal is protected under section 105(c) of the Mine Act if the miner has a reasonable, good faith belief in a hazardous condition. Pasula, 2 FMSHRC at 2793, 2796; Robinette, 3 FMSHRC at 807-12. See also Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982). The judge found that Maggard's allegation that he was shocked by the cable was corroborated by the continuous mining machine operator and three other witnesses. 8 FMSHRC at 816; Tr. 107-110, 113, 121-23, 130, 134-138. While the operators' witnesses testified that the trailing cable was in good condition and that it did not shock those who handled it, the judge found this testimony to be undercut by prior conflicting statements by those witnesses. 8 FMSHRC at 817.

The judge stated that witness credibility was critical to resolution of the case and he found "[Maggard] and his supporting witnesses to be more credible." 8 FMSHRC at 815. We have recognized that a "judge's credibility findings and resolution of disputed testimony should not be overturned lightly." Robinette, 3 FMSHRC at 813. See also Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 999 (June 1983). Accord, Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984). We have reviewed carefully the operators' allegations regarding the condition of the trailing cable and the alleged shock suffered by Maggard. We conclude that the operators have not provided evidence so compelling to justify the extraordinary step of overturning the findings of a

trier of fact resting on credibility determinations. Thus, we conclude that substantial evidence supports the judge's finding that Maggard had a good faith, reasonable belief that handling the cable was hazardous.

Where reasonably possible, a miner refusing work ordinarily must communicate to a representative of the operator his belief that a safety or health hazard exists. Dillard Smith v. Reco, Inc., 9 FMSHRC , Docket No. VA 86-9-D, slip op. at 4 (June 30, 1987); Simpson v. Kenta Energy, Inc. and Roy Dan Jackson, 8 FMSHRC 1034, 1038.39 (July 1986), appeal docketed sub nom. Simpson v. FMSHRC, No. 86-1441 (D.C. Cir. August 7, 1986); Secretary on behalf of Dunmire and Estle v. Northern

Coal Co., 4 FMSHRC 126, 133 (February 1982). Such communication accords with the requirement that the work refusal be premised on a good faith, reasonable belief in the hazard. Maggard stated that he told Section Foreman Howard Muncy he had been shocked, that he asked Muncy to repair the cable and report the accident, and that when Muncy refused he asked for other work. Muncy stated that Maggard did not tell him he had been shocked nor ask that the accident be reported. The judge found Maggard's version, which was corroborated in part by the continuous mining machine operator, to be more credible and logically consistent. 8 FMSRHC at 816. Again, we conclude that there is not a sufficient basis in the record for us to overturn the judge's credibility determination, and we conclude that substantial evidence supports the judge's finding that Maggard communicated his safety concerns to Muncy at the time of the work refusal.

With respect to the second element of a prima facie case, that the adverse action complained of was motivated in any part by the protected activity, there is nothing in the record to suggest that prior to Maggard's discharge the operators were dissatisfied with his work. The operators argue that there was no adverse action and that Maggard was not discharged, but rather quit because he was angry at being assigned the job of miner-helper. The judge noted that Maggard did not complain when assigned to pull cable prior to January 10 and similarly that he did not complain when assigned the task on January 10. The judge concluded that it was "highly unlikely that Maggard would have quit ... but for some extraordinary reason such as unsafe working conditions." 8 FMSHRC at 817. Although the operators presented witnesses who testified that Maggard told them that he quit because he was assigned to pull cable, the judge did not credit their testimony. We conclude that the evidence is not so compelling that we can overturn the judge's finding that Maggard was discharged because of his protected work refusal.

Accordingly, we affirm the judge's conclusion that the operator's termination of Maggard's employment violated section 105(c)(1) of the Act.

III.

On the final day of the hearing, private counsel for Odell Maggard called Jerry Maggard, Odell Maggard's cousin, as a rebuttal witness. The previous evening, a group composed of private counsel, counsel for the Secretary, Odell Maggard, and W.F. Taylor, another Department of Labor attorney, had travelled to Jerry Maggard's residence to serve on him a subpoena requiring his attendance and

testimony at the hearing which had been continued until the following morning. At the hearing, Jerry Maggard testified that he worked with Odell Maggard on January 10, 1985, but that he could not recall the details of the events of that day. Upon completion of Jerry Maggard's testimony, private counsel for Odell Maggard called W.F. Taylor to testify, over the objection of counsel for the operators, concerning statements that Jerry Maggard had made while being served with the subpoena the previous evening, which statements conflicted with his testimony at the hearing. Taylor testified that Jerry Maggard had stated the previous evening that he had

seen Odell Maggard throw the cable and jump, and that Odell had told him that he was leaving because he had been shocked. The operators argue a denial of due process resulting from Taylor's testimony on a number of grounds. We conclude, however, that the judge did not err in permitting Taylor's testimony.

Although Taylor was not listed as a witness in Maggard's pretrial submissions, the judge, in his discretion, permitted both parties to call witnesses not identified previously. In addition, Taylor was called solely to impeach Jerry Maggard's testimony. Although Taylor, unlike the other witnesses, was not sequestered during the hearing, he was not present in the hearing room during Jerry Maggard's testimony. Further, Taylor's testimony regarding what he was told by Jerry Maggard was both material and relevant, and therefore admissible. Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-36 (May 1984). Although Taylor was called to testify after Jerry Maggard had left the courthouse, the operators made no effort to have Jerry Maggard recalled or to have him testify at a later date.

We also find no basis for the operators' assertion that the judge's treatment of Taylor's testimony establishes that the judge was biased against the operators. The judge noted that Taylor's testimony regarding Jerry Maggard's out of court statements corroborated the testimony of Odell Maggard and the continuous mining machine operator. 8 FMSHRC at 815. This is not an impermissible characterization of the testimony and does not indicate that the judge was predisposed to decide the case in Maggard's favor. Further, the judge's comment at a continued hearing that he had always found Taylor's conduct "above board" and "highly ethical" was based upon Taylor's previous appearances before the judge and relates only to Taylor's character and not to the merits of the case. Tr. 2-4 (May 20, 1986). 8/ We conclude that the circumstances surrounding Taylor's testimony and its consideration by the judge in no way affected the judge's ability to rule impartially on the case. 9/

IV.

Maggard filed his individual complaint of.discrimination asserting jurisdiction under section 105(c)(3) and citing Commission Rule 40(b), 29 C.F.R. $ 2700.40(b), when the Secretary failed to determine within 90 days of Maggard's initial complaint to the Secretary whether Maggard was the subject of prohibited discrimination. Approximately three months

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8/ The comment was made in the context of a discussion as to the propriety of Taylor having testified on Maggard's behalf.

9/ While this case has been pending, counsel for Maggard filed two procedural motions regarding the issue of Taylor's testimony and the alleged bias of the judge. In view of our conclusion that Taylor's testimony was heard properly by the judge and that the record does not support a finding that the judge was biased or prejudiced, the motions are denied.

after Maggard filed on his own behalf, the Secretary filed a discrimination complaint on Maggard's behalf pursuant to section 105(c)(2) of the Act. The Secretary then moved to dismiss Maggard's individual complaint arguing that it lacked a jurisdictional base since the Secretary had filed a complaint on Maggard's behalf under section 105(c)(2). The judge denied the Secretary's motion, holding that a complainant had the right to file on his own behalf upon the failure of the Secretary to make a determination within 90 days. He also noted that Commission Procedural Rule 40(b) provides for such a procedure. 8 FMSHRC at 808-09.

In awarding attorney's fees totaling $16,452.22 to Maggard, the judge noted that the Secretary had filed his complaint with the Commission nearly two months after the hearing had been scheduled on Maggard's complaint and that Maggard's attorney had taken the lead role in the prosecution of the complaint. Under such circumstances, he found that attorney's fees were expenses "reasonably incurred by the miner" within the meaning of section 105(c)(3) of the Act. 8 FMSHRC at 967.

In another decision issued today, we have concluded that section 105(c)(3) of the Mine Act does not grant complainants the right to initiate an action on.their own behalf prior to the Secretary's determination as to whether a violation of section 105(c) has occurred. Concomitantly we have invalidated the part of Commission Procedural Rule 40(b) that provides for such a procedure. John A. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC , Docket Nos. KENT 86-49-D and KENT 86-76-D, slip op. at 10-13 (August 25, 1987). Because Maggard filed his complaint alleging jurisdiction under section 105(c)(3) prior to the Secretary's determination as to whether a violation occurred, Maggard's individual complaint under section 105(c)(3) must be dismissed.

Moreover, attorney's fees are no longer awardable to Maggard under our decision in Secretary on behalf of Ribel v. Eastern Associated Coal Corp., 7 FMSHRC 2015 (December 1985), rev'd in part sub nom. Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639 (4th Cir. 1987). In Ribel, we held that in an action initiated by the Secretary under section 105(c)(2) the complainant was entitled to reimbursement for private attorney's fees as long as the services rendered were non-duplicative of the Secretary's efforts and contributed substantially to the successful litigation of the claim. 7 FMSHRC at 2025. The U.S. Court of Appeals for the Fourth Circuit has disagreed with our conclusion and held that an award of attorney's fees under the Mine Act is not authorized in cases where the Secretary

has found a violation and has filed a complaint as the representative of the complainant pursuant to section 105(c)(2). Eastern Assoc. Coal Corp., supra., 813 F.2d at 644. Although the court of appeals in Eastern reversed our contrary conclusion on this issue and this case does not arise in the Fourth Circuit, we will follow the court's holding in the absence of contrary judicial authority.

Therefore, in accordance with the decision of the Fourth Circuit in Eastern, no attorney's fees may be awarded to Maggard since the Secretary prosecuted his complaint pursuant to section 105(c)(2).

Accordingly, we vacate the judge's award of attorney's fees. 10/

V.

In sum, we hold that the judge's findings of fact underlying his conclusion that Maggard was discharged in violation of section 105(c)(1) of the Mine Act are supported by substantial evidence. We also find no error in his treatment of the testimony of W.F. Taylor. We further hold that the judge erred in awarding attorney's fees to Maggard in view of the Secretary's prosecution of his complaint. Accordingly, the judge's decision on the merits is affirmed as is his order of reinstatement, the award of backpay and interest through June 1, 1986, totaling $33,660.19, and his imposition of penalties. The award of attorney's fees is vacated.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

10/ Also, the motion of counsel for Maggard for additional attorney's fees for time spent to prepare a reply to a motion by Chaney Creek is denied.

Commissioner Doyle and Commissioner Nelson, concurring in part and dissenting in part:

Applying the substantial evidence standard of review imposed by the Mine Act, we concur with the majority in affirming the judge's finding of discrimination and we also concur that the judge did not err with respect to the testimony of W.F. Taylor. We respectfully dissent, however, from the decision to the extent that it dismisses Mr. Maggard's individual complaint and vacates the award of attorneys' fees in their entirety. The majority's action comes as a result of their decision issued today in another case in which they conclude that the Mine Act does not grant a miner a right of individual action until the Secretary of Labor makes a determination that no discrimination has occurred. On that basis, the majority invalidated that portion of the Commission's Rule 40(b) that provided claimants the right to bring their own action if the Secretary failed to act within the statutory time period. John A. Gilbert v. Sandy Fork Mining Co., 9 FMSHRC , Docket Nos. KENT 86-49-D and KENT 86-76-D, slip op. at (August . 1987).

Rule 40(b) read, in pertinent part, as follows:

> A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

29 C.F.R. $2700.40(b)(1986) (emphasis added).

Thus, under Rule 40(b), if the Secretary failed to act within ninety days after his receipt of a complaint, his exclusive jurisdiction to prosecute discrimination complaints arising under the Mine Act ended at that time. In this case the Secretary failed to take action within ninety days and so advised Mr. Maggard in an undated letter that reads, in pertinent part, as follows:

> By the terms of the Act and the Federal Mine Safety and Health Review Commission's procedural rules, you have a right to file your own complaint with the Commission because the Secretary has not completed his consideration within 90 days. Should you desire to

> file a complaint of discrimination directly with the Commission, it should be addressed ... (emphasis added).

Mr. Maggard followed the Commission's Rule 40(b) and the Secretary's advice and commenced his own action. Three months later the Secretary commenced an action under section 105(c)(2) and subsequently moved to

dismiss Mr. Maggard's action on the grounds that it lacked a jurisdictional basis. The operator did not join in the motion or otherwise move to have one or the other of the actions dismissed. 1/ After a consolidated hearing, the judge denied the motion, finding that the Secretary lacked standing to file such a motion in Mr. Maggard's private action and that, in any event, section 105(c)(3) and the Commission's Rule 40(b) provided a jurisdictional basis for Mr. Maggard's individual complaint. After finding for Mr. Maggard, he awarded attorneys' fees in the amount of $16,456.22.

For the reasons stated in our dissent in Gilbert 9 FMSHRC , we are of the opinion that the Commission's Rule 40(b) was a reasonable construction of the Mine Act and, as such, should remain in effect. Chevron, U.S.A., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Accordingly, we cannot join with the majority's action in invalidating Rule 40(b). As a consequence, we would affirm the administrative law judge's denial of the Secretary's Motion to Dismiss Mr. Maggard's individual complaint. We would also affirm the award of attorneys' fees in the individual action to the extent that they were incurred in instituting and prosecuting Mr. Maggard's discrimination claim, as provided in section 105(c)(3). We would disallow such fees to :he extent that they were incurred in relation to the jurisdictional issue or in coordinating the prosecution of the two cases.

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

1/ In its response to the statement of attorneys' fees filed after the hearing and in its brief on review to the Commission, the operator argued that fees should not be awarded after the date on which the Secretary commences representation of the complainant and, alternatively, that the fees should be reduced for time spent on peripheral issues. Respondent's Response to Statement of Attorney's Fees and Expenses at 2-3, Reply Brief for Respondent at 14-15.

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