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FMSHRC-WDC
August 25, 1987

JOHN A. GILBERT

v. Docket No. KENT 86-49-D

SANDY FORK MINING CO., INC.

SECRETARY OF LABOR, MINE SAFETY
AND HEALTH ADMINISTRATION (MSHA),
on behalf of JOHN A. GILBERT

v. Docket No. KENT 86-76-D

SANDY FORK MINING CO., INC.

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

DECISION

BY: Ford, Chairman; Backley and Lastowka, Commissioners:

This consolidated discrimination proceeding involves two discrimination complaints filed on behalf of John A. Gilbert. Both complaints allege an illegal discharge based on the same circumstances. The first complaint (Docket No. KENT 86-49-D) was filed by Gilbert on his own behalf against Sandy Fork Mining Company, Inc. ("Sandy Fork"). The second complaint (Docket No. KENT 86-76-D) was filed by the Secretary of Labor on behalf of Gilbert against Sandy Fork. The complaints allege that Sandy Fork discharged Gilbert in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), because of his refusal to perform work that he believed to be hazardous. 1/ Commission Administrative Law Judge

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1/ Section 105(c) provides in relevant part:

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or because discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a

Gary Melick issued a decision: (1) denying the Secretary's motion to dismiss the complaint filed by Gilbert on his own behalf; and

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> complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner ... of any statutory right afforded by this [Act].
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> (2) Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may. within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint.... 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 ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... 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. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner ... may present additional evidence on his own behalf during any hearing held pursuant to [t]his paragraph.
>
> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner ... 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

(2) concluding that Sandy Fork Mining Company ("Sandy Fork") had not discriminated against Gilbert in violation of section 105(c)(1) of the Act. 8 FMSHRC 1084 (July)(ALJ). For the reasons below, we affirm on substantial evidence grounds the judge's conclusion that Sandy Fork did not discriminate against Gilbert in violation of the Act, but we reverse the judge's denial of the Secretary's motion to dismiss the complaint Gilbert filed on his own behalf.

I.

Facts and Procedural History

For three and a half years prior to August 1985, Gilbert was employed as a miner at Sandy Fork's No. 12 underground coal mine in Beverly, Kentucky. During the last two and a half years of that period, Gilbert worked as an operator of a continuous mining machine on the second (evening) shift from 3:00 p.m. to 11:00 p.m. During the relevant time Gilbert worked in the 002 section, which consisted of six entries.

For several weeks prior to August 6, 1985, the 002 section had experienced difficult roof conditions caused by "hill seams," encountered when mining operations are conducted near surface outcroppings. 2/ Gilbert testified that during that period rock had fallen on his mining machine and that on August 5, 1985, he and another miner operator, Carmine Dean Caldwell, had left certain work locations because of "working" hill seams -- that is, hill seams emitting creaking

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... 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 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. Proceedings under this section shall be expedited by the

Secretary and the Commission.

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

2/ A "hill seam" is a crack or fault in a mine roof that generally has mud or water emanating from it. Tr. I 30, II 143. See also Shamrock Coal Co., 5 FMSHRC 845, 847 & nn. 3 & 4 (May 1983).

noises indicative of unstable roof conditions. Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1244 (1968).

On the afternoon of August 6, 1985, while travelling to the 002 section, Gilbert and Caldwell expressed their concerns about the roof conditions to Section Foreman Willie Sizemore. Sizemore gave permission for the two to work together operating one mining machine so that they could look out for one another's safety. On the section, Gilbert was told by the miner operator leaving the earlier shift that the roof was bad and breaking up. Gilbert and Caldwell then examined the faces in the section. Gilbert testified and the judge found that the No. 3 entry had a hill seam and a stress crack in the rib and roof and that the crosscut approaching the No. 4 "kickback" had a hill seam and stress cracks. 3/ Sizemore and Darrell Huff, Sandy Fork's chief engineer and acting safety director, also examined the faces on August 6 and 7, 1985. They testified that there were no exposed hill seams in the No. 4 kickback, that a crack and hill seam were present in the No. 3 entry, and that hill seams were present in other areas of the section. The judge found that there was not an exposed hill seam in the No. 4 kickback itself.

After examining.the faces on August 6, Gilbert and Caldwell proceeded to the No. 4 kickback, where one cut of coal remained to be taken before moving to the No. 3 entry. Sizemore testified and the judge found that this final cut in the No. 4 kickback involved about four or five hours of work. Gilbert told Caldwell that he was going to refuse to cut the coal. He then left the face of the No. 4 kickback, located Sizemore and expressed his concerns about the condition of the roof. Sizemore testified and the judge found that Gilbert was referring specifically to roof conditions in the No. 3 entry.

Gilbert testified that Sizemore stated that he would add a few extra "cribs" as support for the roof or stand with the two miners as they cut the coal. Sizemore testified that he told Gilbert that he would have cribs built on both sides of the No. 3 entry, the only area about which Gilbert had expressed concern. After speaking with Sizemore, Gilbert went outside and repeated his concerns to General Mine Foreman Eddie Spurlock. Spurlock told Gilbert that he would not insist that he resume work, but advised Gilbert to go home and return the next day to meet with Mine Superintendent Willie Begley and General Manager Bill Phipps. Gilbert left the mine. After Gilbert left, Sizemore spent the remainder of the shift having cribs built in the No. 3 entry.

That same evening Gilbert went to Mine Superintendent Begley's home to repeat his concerns about the top. Gilbert also asked what Begley was going to do to get him another job. Begley told Gilbert to meet with him the next morning at the mine. During the night, a roof fall occurred in the No. 3 entry and the area was "dangered off."

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3/ A "kickback" is an entry mined in the direction opposite to its normal course because of adverse roof conditions. Tr. I 111; II 140.

On the morning of August 7, 1985, because of Gilbert's statements and because of the roof fall that had occurred in the No. 3 entry, Begley and Phipps went underground to inspect the face areas. Gilbert arrived at the mine office about 9:00 a.m., six hours before his scheduled shift was to begin. While waiting for Begley and Phipps, Gilbert was told by another miner of the roof fall. When the two supervisors returned to the office about 9:30 or 10:00 a.m., Gilbert asked what they intended to do to support the roof. Begley and Phipps responded, in essence, that they were doing all they could to provide adequate support given the roof conditions being encountered. Begley testified and the judge found that Gilbert requested alternate work at any mine other than the No. 12 mine. Begley replied that the only job available for Gilbert was his present position. Gilbert then handed in his safety equipment and left the mine.

When Gilbert left the mine on the morning of August 7, he had not been given a specific assignment as to the work he would be performing later that day when the evening shift began. The judge found that "he could not have known where in the No. 12 mine he would be working." 8 FMSHRC at 1091. According to company records and Phipps' testimony, Gilbert was paid for one hour's work on August 6, and was carried on the company rolls as an "absentee" until August 9, 1985, when the daily report listed him as "quit."

On August 8, 1985, the day after he left the mine, Gilbert filed a section 105(c) discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he had been discriminatorily discharged. The Secretary of Labor timely initiated his investigation of the complaint, pursuant to section 105(c)(2) of the Mine Act. He did not, however, make a determination within 90 days of receipt of Gilbert's complaint, as required by section 105(c)(3) of the Act, as to whether a violation of section 105(c) had occurred. See n. 1 supra.

By letter dated November 15, 1985, the Secretary informed Gilbert that the investigation into his complaint had not yet been completed. The letter also stated: "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." Thereafter, on December 23, 1985, Gilbert filed his own discrimination complaint with the Commission pursuant to Commission Procedural Rule 40(b). 4/ Two

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4/ Commission Procedural Rule 40(b) states:

> 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

months later, on February 24, 1986, the Secretary finally filed with the Commission a section 105(c)(2) discrimination complaint on behalf of Gilbert. The Secretary then proceeded to move to dismiss Gilbert's individual complaint in light of the complaint filed by the Secretary. The administrative law judge deferred ruling on the motion and permitted both complaints to proceed to hearing.

In his decision on the merits the judge denied the Secretary's motion to dismiss. Acknowledging that section 105(c) does not expressly provide a right of action to individual complainants when the Secretary fails to determine within 90 days whether a violation of section 105(c) has occurred, he opined that Congress must have 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 1087. The judge pointed to Commission Procedural Rule 40(b) permitting such complaints in those circumstances. He accordingly determined that he had jurisdiction to entertain both complaints. Id.

With respect to the merits of Gilbert's discrimination claims, the judge treated Gilbert's departure from the No. 4 kickback on the afternoon of August 6 and from the mine premises on the morning of August 7 as two distinct work refusals, and found that neither was reasonable nor made in good faith. 8 FMSHRC at 1090-91. Addressing the events of August 6, the judge found that Gilbert had four to five hours of work left in the No. 4 kickback when he refused to cut coal and that there is "no credible evidence that any unusual hazard did in fact exist in the No. 4 kickback." 8 FMSHRC at 1091. The judge concluded:

> It was clearly premature for Gilbert to have exercised any work refusal for alleged hazards in the No. 3 entry some 4 to 5 hours before he would be expected to work in that entry and before any of the supplemental roof support promised by his section foreman had been erected.... It was incumbent on Gilbert to at least wait and see what additional support would be provided before exercising a work refusal. Accordingly, the work refusal was neither reasonable nor made in good faith.

8 FMSHRC at 1091.

Turning to Gilbert's decision on August 7 to leave the mine, the judge stated:

I also observe that Gilbert had not been discharged and was given the opportunity to return to work on August 7, the day after he refused to work and walked out of the mine. At that time there had already been a roof fall in the No. 3 entry and conditions had significantly changed. Indeed it

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days after the miner complained to the Secretary.

29 C.F.R. $ 2700.40(b).

> appeals that when Gilbert was told on August 7, that he could return to his job in the No. 12 mine as a continuous miner operator he declined and insisted on being transferred to a different mine. At this time he had been given no specific work assignment and could not have known where in the No. 12 mine he would be working. Thus again he could not at this time have entertained a reasonable or a good faith belief that he would have been required to work in a hazardous condition.

8 FMSHRC at 1091.

Noting evidence revealing an interest and request by Gilbert to transfer to a day shift job, the judge questioned Gilbert's good faith in his work refusals: "Thus it appears that Gilbert's refusal to work and his insistence on transferring to another mine may actually have been motivated by a pressing desire to work on a different shift." 8 FMSHRC at 1092. In summary, the judge denied Gilbert's claims on the grounds that his work refusals were not protected activities, that he suffered no adverse action in that he was not discharged, and that he voluntarily quit his job on August 7.

II.

Discrimination Issues

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 Mine Act, a complaining miner bears the burden of production and proof to establish 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 and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra; see also Eastern Assoc. Coal

Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir.); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

The Commission has held that a miner's refusal to perform work is protected under section 105(c)(1) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula,

supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12: Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-36 (February 1982) See also Secretary on behalf of Cameron v. Consolidation Coal Co., v. FMSHRC, 7 FMSHRC 319, 321-24 (March 1985), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 366-68 (4th Cir. 1986); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), aff'd. sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985); Miller v. FMSHRC, 687 F.2d 194, 195-97 (7th Cir. 1982). If an operator takes an adverse action against a miner in any part because of a protected work refusal, a prima facie case of discrimination is established. E.g., Dunmire & Estle, supra, 4 FMSHRC at 132-33: Metric Constructors, supra, 6 FMSHRC at 229-30, aff'd, 766 F.2d at 472-73.

We first consider Gilbert's refusal on August 6 to begin cutting coal in the No. 4 kickback. The judge found that Gilbert's safety concerns related solely to roof conditions in the No. 3 entry, conditions to which he would not have been exposed for several hours, and that his refusal to work was premature and evidenced a lack of required good faith and reasonableness. Counsel for both Gilbert and for the Secretary have presented us with extensive evidentiary challenges to these findings, effectively inviting us to decide the case de novo. Our role, however, is to review the record to determine if substantial evidence supports the judge's findings of fact. 30 U.S.C. $ 823(d)(2)(A)(ii)(I). In any event, we find it unnecessary to specifically address every contested fact in this regard, for we can assume for purposes of our decision that Gilbert engaged in a protected work refusal on August 6 based on a good faith, reasonable belief in hazardous roof conditions. 5/

Under the Mine Act, a protected work refusal itself does not implicate a violation of section 105(c) of the Mine Act if it does not result in an adverse action motivated by that protected activity. When Gilbert refused to cut coal on August 6, he was not ordered to resume work nor was he suspended or discharged. On the contrary, his foreman heard him out and proceeded to address the complaints by erecting support cribbing in the No. 3 entry. Further, Gilbert was able to leave the mine for additional discussion with the general mine foreman, who

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5/ For the sake of clarity, however, we conclude that substantial evidence does not support the judge's finding that Gilbert's concerns on August 6 were limited solely to the No. 3 entry. Rather, his fears regarding roof conditions extended to other work areas as well. Tr. I 23-24, 32, 33, 47, 54. Also, with respect to the events

of August 6, we reject any implication in the judge's decision that a miner cannot exercise a valid work refusal until the precise moment of beginning the work that he reasonably fears poses a hazard. In some circumstances a miner properly could refuse work at some point in time in advance of the start of his hazardous assignment. Such a refusal would still be measured against the standards of good faith and reasonableness. As we make clear in our discussion of Gilbert's actions on August 7, however, his refusal on that date was too anticipatory and premature and, therefore, was unprotected.

allowed Gilbert to go home for the remainder of his shift. Substantial evidence supports the judge's findings -- and indeed it is indisputable on this record -- that Gilbert was not discharged or otherwise subjected to adverse action on August 6 or 7 because of his August 6 work refusal. Therefore, even assuming a protected work refusal on August 6, it did not result in an illegal adverse action against Gilbert.

The disposition of this case turns on the events of the morning of August 7. The record leaves no doubt that Gilbert refused to work as miner operator and left the mine premises several hours before his shift was scheduled to begin. The judge found that when Gilbert confronted mine management on the morning of August 7, the precise conditions that he had observed on the previous day had changed significantly. The judge also found because Gilbert had not received any assignment to a specific area of the mine, "he could not at this time have entertained a reasonable or good faith belief that he would have been required to work in a hazardous condition." 8 FMSHRC at 1091. The judge further found that Gilbert's decision most likely was motivated by his desire to be transferred to the day shift or to another mine, and that he was not discharged but "voluntarily gave up his job on August 7, 1985, at a time when he was not faced with any specific hazard." 8 FMSHRC at 1092. Substantial evidence supports these determinations.

By the morning of August 7, as the judge pointed out, conditions in the mine had changed from the previous day. The No. 3 entry had been closed off and the last cut in the No. 4 kickback apparently had been completed on an earlier shift. Therefore, it appears that Gilbert would not be returning to the areas he had examined a day earlier. In any event, Gilbert's refusal occurred some five hours before he was scheduled to return to work on the evening shift of August 7. We agree with the judge's substantially supported finding that Gilbert could not reasonably have known at that time the specific areas of the mine in which he would be working later. Moreover, and importantly, given the dynamics of mining operations, Gilbert could not have known the actual mining conditions that would be present five hours later -- especially in view of the operator's efforts to address the roof problems. In Dunmire & Estle, supra, the Commission held that a failure to examine personally an allegedly hazardous work area did not necessarily indicate bad faith or lack of reasonable belief. 4 FMSHRC at 137. Unlike the situation in the present case, however, the safety hazards in Dunmire & Estle were located in an existing work area to which the complainants already had been assigned and were about to enter to begin their

assigned work and which had been recently examined first-hand by other miners. 4 FMSHRC at 128-29, 137-38. In short, substantial evidence supports the judge's conclusion that Gilbert refused work unreasonably and prematurely on the morning of August 7 and that his work refusal at that time accordingly lacked the required basis of a good faith, reasonable belief in a hazard exposing him to a danger.

In reaching this conclusion, we also are persuaded by the fact that Sandy Fork's supervisors and managers did not react to Gilbert precipitately or manifest retaliatory intent. As noted, on August 6 management's reaction was supportive and aimed at correcting the roof conditions concerning Gilbert. On the morning of August 7, both Mine

Superintendent Begley and General Manager Phipps inspected underground conditions being encountered. To deem Gilbert's refusal to work on August 7 to be protected would be to deprive the operator of a reasonable opportunity to fully address complained-of hazards before incurring legal liability.

Finally, we affirm the judge's finding that Gilbert failed to prove that he was, in fact, discharged by Sandy Fork. We disagree with the assertion that Gilbert was faced with a "Hobson's choice" of working under unsafe conditions or quitting. In Metric Constructors, supra, the Commission concluded that "Metric's decision that the men could either work under the unsafe conditions or have their employment terminated was equivalent to discharging them for engaging in protected activity." 6 FMSHRC at 229. The same is not true here. The record supports the judge's finding that Gilbert could have returned to work that afternoon on his regular shift. Had he done so and had the conditions then extant necessitated the "Hobson's choice" of working under demonstrably unsafe conditions or being fired we would be faced with a different case.

Based on our examination of the record, we conclude that substantial evidence supports the judge's finding that Gilbert was not discharged but voluntarily gave up his job at a point in time when he was not faced with a hazard justifying a refusal to work at that time. We therefore affirm the judge's conclusion that a violation of section 105(c)11) was not established.

III.

Dismissal of Gilbert's Individual Complaint

We further conclude that the judge erred in denying the Secretary's motion to dismiss the complaint that Gilbert filed on his own behalf. As noted, Gilbert's individual complaint was filed pursuant to the last clause of Commission Procedural Rule 40(b)(n. 4 supra), permitting such actions where the Secretary fails to make any determination as to whether a violation of section 105(c) has occurred within the required 90-day period following the filing of the miner's discrimination complaint.

The obvious intent of this procedural rule was to protect miners from prejudicial delay by the Secretary in filing discrimination complaints and to encourage the Secretary to meet his statutory responsibilities under section 105(c) in a timely manner. For a number of years, the Secretary voiced no opposition to the

procedure set forth in Rule 40(b). Indeed, as the facts of this case illustrate, the Secretary transmitted letters to complainants in situations where his investigation exceeded the statute's 90-day limit, informing complainants that they could file a private action under Commission Rule 40(b). In this litigation, however, the Secretary argues that Rule 40(b)'s authorization of a complaint filed by a miner prior to the Secretary's making a determination as to whether the discrimination has occurred conflicts with the enforcement schemes set forth in section 105(c) of the Mine Act. Oral Arg. Tr. 39-48. Upon re-examination, of the statute and our procedural rule, we concur.

Section 105(c) does not provide that complainants may file complaints on their own behalf if the Secretary has not determined whether a violation has.occurred within 90 days of the filing of the complaint. To the contrary, section 105(c)(3) expressly provides that the complainant may file his private action only after the Secretary informs the complainant of his determination that a violation has not occurred:

> Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated, the complainant shall have the right, within 30 days of the Secretary's determination, to file an action on his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)].

30 U.S.C. $ 815(c)(3)(emphasis added).

Thus, the statute is clear and express concerning the filing of discrimination complaints. The Secretary is required to investigate all initial discrimination complaints under the Act (30 U.S.C. $ 815(c)(2)); if the Secretary determines that the Act has been violated, the Secretary prosecutes a discrimination complaint on the complainant's behalf (id.); if the Secretary finds that the Act was not violated, then the complainant may file a complaint on his own behalf (30 U.S.C. $ 815(c)(3)).

Further, the Mine Act's legislative history is consistent with the plain statutory language. S. Rep. No. 181, 95th Cong., 1st Session 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 624-25 (1978) ("Legis. Hist."). For example, the Senate Report emphasizes that the investigatory time obligations placed on the Secretary by section 105(c)(2) are not intended to be jurisdictional and that "the complainant should not be prejudiced because of the failure of the Government to meet its time obligations." Legis. Hist. 624. This instruction suggests that what Congress had in mind in enacting section 105(c)(2) was that an individual could file a discrimination complaint with the Commission on his own behalf only upon the Secretary's determination not to prosecute the complainant's claim. Had Congress intended otherwise, it would not have focused upon the

prejudice to the complainant because of secretarial inaction, as the self-help remedy of the individual's filing his own complaint would have been available.

Congress has established discrimination enforcement mechanisms in other statutes different from that set forth in section 105(c) of the Mine Act. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. $ 2000e et seq. (1982), provides that where the government has not determined within a prescribed period whether unlawful employment

discrimination has occurred, the charging party is so notified and may file his own complaint. 42 U.S.C. $ 2000e-5(f)(1). More recently, in the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359, Congress expressly provided that where the government fails to determine within a specified period whether unfair immigration-related employment discrimination occurred, the charging person may file his own private action. 8 U.S.C.A. $ 1324b(d)(2)(West Supp. 1987). Hence, Congress has enacted enforcement schemes permitting private actions where the government fails to make the requisite determination of a charged violation within a given period. However, by the express terms of section 105(c) it chose not to do so in the Mine Act. We must respect Congress' choice. See, e.g. UMWA v. Secretary of Labor, 5 FMSHRC 807, 810-16 (May 1983), aff'd mem. sub nom. UMWA v. Donovan, 725 F.2d 126 (D.C. Cir. 1983)(table). See generally Council of Southern Mtns. v. FMSHRC, 6 FMSHRC 206, 213 (February 1984), aff'd sub nom. Council of Southern Mtns. v. FMSHRC, 751 F.2d 1418 (D.C. Cir. 1985).

This Commission already has spoken strongly concerning the importance of the Secretary's making determinations as to violations of section 105(c) within the prescribed 90-day period. Secretary on behalf of Hale v. 4.A Coal Company Inc., 8 FMSHRC 905 (June 1986). As emphasized in Hale (8 FMSHRC at 908) and as noted above, the legislative history indicates that while Congress intended that the 90-day investigation period not be jurisdictional, it was to be respected and followed by the Secretary. Legis. Hist. 624. Under the Mine Act, the Secretary bears enforcement responsibility of investigating all initial discrimination complaints. See Roland v. Secretary of Labor, 7 FMSHRC 630, 634-36 (May 1985), aff'd mem. sub nom. Roland v. FMSHRC, No. 85-1828 (lOth Cir. July 14, 1986). That responsibility is not effectively discharged if the statutory time periods are ignored. At oral argument, counsel for the Secretary represented that the Secretary was undertaking administrative actions to address the problem of investigative delay of discrimination complaints. We welcome all efforts in this regard.

We are aware of potential problems when the Secretary's investigation of initial discrimination complaints is delayed. That concern notwithstanding, the approach suggested by our colleagues usurps the Secretary's primary enforcement responsibility under section 105(c) and cannot be squared with the plain structure and language of that section. Review and redress of continued delays by the Secretary in this crucial area of the Mine Act are more appropriately the subjects of Congressional oversight.

Accordingly, we hereby declare the clause in Commission Procedural Rule 40(b) permitting the filing of individual actions when the Secretary has not made a determination of violation within 90 days to be invalid. A Federal Register notice deleting this clause will appear. Our action here applies prospectively and also to any such individual

discrimination complaints pending presently before the Commission. 6/

IV.

Conclusion

On the foregoing bases, we affirm on substantial evidence grounds the judge's dismissal of the discrimination complaint filed by the Secretary on behalf of Gilbert. We reverse the judge's denial of the Secretary's motion to dismiss the complaint filed by Gilbert in his own behalf.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

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6/ Individual complainants remain free to retain private counsel at any time. However, in Maggard v. Chaney Creek Coal Co., etc., Nos. KENT 86-1-D, slip op. at 8-9, issued this date, we have followed the decision by the United States Court of Appeals for the Fourth Circuit in the absence of contrary judicial authority, disallowing private counsel fees in Mine Act discrimination proceedings except where a complainant has successfully prosecuted a section 105(c)(3) private action following the Secretary's determination not to file a complaint on the complainant's behalf. See Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 644 (4th Cir. 1987).

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

We join in that part of the majority's decision affirming the administrative law judge's dismissal of Mr. Gilbert's discrimination claim. We respectfully dissent, however, from the decision to the extent that it invalidates that portion of the Commission's Rule 40(b) that provided claimants the right to bring their own action if the Secretary of Labor failed to act within the statutory time period. Consequently, we would affirm the judge's denial of the Secretary's Motion to Dismiss the individual complaint filed by Mr. Gilbert.

When Mr. Gilbert filed his individual complaint with the Commission, it appeared clear to all concerned that he had the right to do so based on the Secretary's failure to determine, within ninety days after his receipt of the complaint, whether a violation had occurred. The Commission's position was articulated in its own procedural Rule 40(b), which was promulgated in 1979, and provided:

> 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).

That position was reaffirmed by the Commission as recently as June, 1986. Secretary on behalf of Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905, 907, n. 3.

The Secretary's position was articulated in its letter of November 15, 1985, to the complainant and in similar letters to other complainants whose cases the Secretary had failed to determine within ninety days, 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).

Five weeks after receiving the Secretary's letter, Mr. Gilbert followed the Commission's rule and the Secretary's advice and filed his complaint with the Commission pursuant to section 105(c)(3) of the Mine Act and Rule 40(b). Two months later, the Secretary, having finally made a determination that a violation had occurred, filed his section 105(c)(2) action. He then moved to dismiss Mr. Gilbert's private action, a motion in which the operator did not join and which the administrative law judge denied. Today the Commission has, at the Secretary's urging, reversed the judge's decision and invalidated the portion of Rule 40(b) that permitted a complainant to file his own action if the Secretary failed to act within ninety days after a complaint was filed with the Secretary.

The Secretary's argument to the Commission is twofold: Gilbert's private action was based on an "implied" cause of action and Rule 40(b) conflicts with the enforcement scheme of section 105(c). We find both of these arguments unpersuasive. The action was not based on an implied cause of action but rather on an action explicitly authorized by Rule 40(b). Further, we find no conflict between Rule 40(b) and the enforcement scheme of section 105(c). We believe the rule is a reasonable construction of the Mine Act and see no reason to invalidate it.

The majority bases its decision to invalidate Rule 40(b) on "the plain statutory language" of section 105(c) and states that "the statute is clear and express ..." It should be noted that the language that is today characterized as "clear and express" has now been interpreted by the Commission in two different manners (with its promulgation of Rule 40(b) in 1979 and its reaffirmation in 1986, and today with its finding that the rule is without foundation) and by the Secretary in at least three different manners (that a claimant has the right to bring his own action because the Secretary has not made a determination within ninety days, as set out in the Secretary's letter to Mr. Gilbert, that a private right of action authorized by Rule 40(b) must give way to the Secretary, once he determines that a violation has occurred, as argued in the Secretary's brief to the Commission, Brief for the Secretary of Labor at 11, and that the Secretary has exclusive jurisdiction ad infinitum until he makes a determination, as asserted by the Secretary at oral argument, Record at 72. These various interpretations provide ample evidence that the position enunciated today is not unambiguously expressed in the statute.

While we are in agreement with the majority that section 105(c) does not expressly provide for the filing of a private action by a

complainant when the Secretary fails to make a determination within ninety days, we disagree that section 105(c)(3) expressly provides that private actions can be maintained only after the Secretary informs the complainant of his determination that a violation has not occurred. (In fact, the statutory language is "[i]f the Secretary ..."; it is not "only if the Secretary ..."). We find the statute to be silent as to the consequences of the Secretary's failure to make a determination within the ninety day period. This view is apparently shared by the Secretary who, in support

of his motion' stated that the Mine Act "is silent as to the implications of any delays by the Secretary in completing his investigation within the statutorily prescribed time frame." Secretary's Memorandum in Support of Motion to Dismiss at 4.

While the unambiguously expressed intent of Congress must be given effect, it is a well established rule that where the statute is either silent or ambiguous, an agency has the power to formulate policy and make rules to fill any gap left, implicitly or explicitly, by Congress. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). The Commission, in promulgating Rule 40(b) more than eight years ago, filled the gap left by Congress by providing miners with the right to bring their own action where the Secretary failed to act within the statutory period. This was not only a reasonable construction of the statute, but one that effectuated Congress' intent that Mine Act discrimination complaints be processed expeditiously.

The purpose of section 105(c) of the Mine Act is to afford protection to miners who have been discriminated against in the exercise of their statutory rights. It is clear from the language of section 105(c) that the timely institution, investigation and resolution of discrimination complaints were an important part of Congress' plan with respect to these complaints. By Congressional direction, complaints are to be filed with the Secretary within sixty days after the alleged violation; within fifteen days hereafter the Secretary is to commence an investigation; upon application of the Secretary in certain circumstances the Commission, on an expedited basis, is to order temporary reinstatement; and within 90 days of the receipt of a complaint the Secretary is required to notify the miner of his determination whether a violation has occurred. In those instances where the Secretary concludes upon investigation that a violation has occurred, he is required to immediately file a complaint with the Commission. Where the Secretary makes a negative determination, the miner has the right to pursue his own action with the Commission, but must do so by filing his complaint within thirty days of the Secretary's determination. It is apparent that Congress envisioned prompt action aimed toward rapid resolution of discrimination claims. The Commission's reinterpretation of the statute and consequent invalidation of Rule 40(b) at this time endorses a change in policy that is inconsistent with the mandate of Congress and clearly frustrates its intent.

There are a number of reasons (from both the miner's and the operator's point of view) why cases should not be allowed to

languish, awaiting a determination by the Secretary. Memories fade and witnesses relocate. Cases can be more easily resolved before positions harden and large sums of money are involved. The miner may be unemployed and without other means of support or he may find his case ultimately dismissed if the operator can show that he has been prejudiced by the delay. Hale, 8 FMSHRC at 908. The operator may have been required to temporarily reinstate a miner whose claim, while not frivolous, is ultimately found to be without merit or he may be faced with a damage award that includes

years of back pay rather than months. It is no answer to assert, as the Secretary did at oral argument, that excessive or chronic delays can be remedied by Congressional oversight of the Secretary's investigation and determination process. We doubt that Congress intended the ninety day determination requirement set forth in section 105(c)(3) to serve only as a yardstick against which Congress could measure the Secretary's performance in oversight hearings. Yet the majority's decision leaves miners and mine operators with no other source of relief from delay by the Secretary except to write to their Congressmen.

While finding the statute "clear and express." the majority nevertheless turns to legislative history and bases its decision in part on the section of the history that indicates that the complainant should not be prejudiced because of the government's failure to act in a timely fashion. They opine that this instruction "suggests" that Congress intended individual filing only upon a negative determination by the Secretary, otherwise Congress would not have focused upon the possible prejudice to the complainant arising from delay by the Secretary. This interpretation is somewhat at odds with the position recently expressed by the Commission when it found that due process considerations might necessitate dismissal of a claim where the operator shows material legal prejudice attributable to delay by the Secretary. Hale, 8 FMSHRC at 908. In any event, we do not read the legislative history to countenance the many and extended delays that have occurred over the years.

The majority notes that Title VII of the Civil Rights Act of 1964, 42 U.S.C. $2000e et seq (1982), specifically grants the charging party the right to bring his own action in the event that the Equal Employment Opportunity Commission (the "EEOC") fails to act within a certain period of time. Title VII, however, contains no language requiring the EEOC to act within a specified period. Rather, it indicates that a civil action may be brought by the EEOC under certain circumstances. If the EEOC fails to act within a specified period. the complainant is to be so notified and, if he chooses to bring his own action, the EEOC's further involvement is limited to the status of an intervenor, at the court's discretion. We do not find it remarkable that Congress included express language permitting initiation of a private action where the investigatory agency's action is permissive and did not include such language where the agency's responsibilities are mandatory.

While the more recently enacted Immigration Reform and Control

Act of 1986, Pub. L. 99-603, 100 Stat. 3359, (the "Immigration Act") contains both mandatory language with respect to the time in which the Special Counsel must act and language giving the charging party the right to bring an action if the Counsel fails to act within the required time period, we suspect that this additional language represents a recognition by Congress that at least one investigatory agency now considers time requirements "not as mandatory but rather as 'directory in nature.'" Brock v. Roadway Express, Inc., 55 U.S.L.W. 4530, 4534 (U.S. April 22, 1987) (No. 85-1530). We find it highly unlikely that Congress intended

that discrimination complaints filed under the Mine Act should be prosecuted less expeditiously than those filed under the Immigration Act.

In sum, we find no basis in either the Act or the legislative history to extend the Secretary's exclusive jurisdiction beyond the ninety days in which he is mandated to act and would therefore urge the retention of Rule 40(b), which represented a reasonable interpretation by the Commission of section 105(c). Accordingly, we would affirm the administrative law judge's denial of the Secretary's Motion to Dismiss.

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