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MSHA (BOBBY KEENE) V. S&M COAL, MULLINS, PRESTIGE COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 26, 1988

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of BOBBY G. KEENE

v. Docket No. VA 86-34-D

S&M COAL COMPANY, INC.,
TOLBERT P. MULLINS, and
PRESTIGE COAL COMPANY, INC.

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

DECISION

BY: Ford, Backley, Doyle and Nelson

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of Bobby G. Keene against S&M Coal Company, Inc. ("S&M"), Tolbert P. Mullins, and Prestige Coal Company, Inc. ("Prestige"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) ("Mine Act"). Following a hearing on the merits, Commission Administrative Law Judge Gary Melick concluded that S&M had discriminated against Keene in violation of section 105(c)(1) of the Mine Act by discharging him for engaging in a protected work refusal, 30 U.S.C. $ 815(c)(1) 1/; that Prestige, as the successor-

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

Discrimination or interference prohibited; complaint; investigation: determination; hearing

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a

in-interest to S&M, is jointly and severally liable for the consequences of this discriminatory discharge; and that subsequent to S&M's discriminatory discharge of Keene, Mullins personally discriminated against Keene in violation of section 105(c)(1) by refusing to reemploy Keene except under illegal and hazardous conditions. 9 FMSHRC 401 (March 1987) (ALJ). We granted the petition for discretionary review filed collectively by S&M, Prestige, and Mullins ("the operators"). For the reasons that follow, we conclude that the judge's finding that S&M discriminatorily discharged Keene for engaging in a protected refusal to work is supported by substantial evidence, but that the judge erred in finding that Prestige was a successor-in-interest to S&M and in finding that Mullins, as an individual, discriminated against Keene. Accordingly, we affirm in part and reverse in part.

I.

From September 1985 through February 13, 1986, Keene was employed by S&M at its No. 4 underground mine in Tookland, Virginia, as a certified electrical repairman and maintenance foreman. Keene's duties included maintaining the electrical equipment in the mine and keeping the electrical examination books for federal and state regulatory purposes. 2/ Prior to his arrival at S&M, Keene held a similar position at Mullins Coal Company until Tolbert Mullins, the president of Mullins Coal as well as S&M, requested that Keene transfer to S&M.

Keene testified that during his employment at S&M he became concerned that "there was too much bridging going on." Dec. 2 Tr. 38. 3/ ("Bridging" or "bridging-out" is the practice of rewiring electrical equipment in order to bypass the equipment's disconnecting devices, usually the circuit breaker, thus rendering the safety features ineffective. Dec. 2 Tr. 38, 164.) According to Keene, two or three weeks prior to February 13, 1986, Mine Superintendent Monroe Nichols asked him on two separate occasions to bridge-out the ground fault monitor systems on the transformer and the continuous mining machine ("continuous miner"). 4/ Keene testified that he refused to bridge-out

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> complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine....

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

2/ 30 C.F.R. $ 75.1804 provides that results of required examinations of electrical equipment be recorded in a book titled "Examination of Electrical Equipment."

3/ The hearing in this matter took place on December 2 and 3, 1986. since the transcripts for each day are separately paginated, transcript references are by date and page number.

4/ According to Larry Brown, an electrical inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"),

the ground fault monitor systems on both occasions and made safety complaints about the use of the procedure to Nichols and Jerry Looney, the section foreman.

At the beginning of the day shift on February 13, 1986, Keene again voiced his concerns about the practice of bridging, this time to the other crew members accompanying him into the mine. He told the miners that the "bridging was going to have to be stopped." Dec. 2 Tr. 44, 116, 140. (One of the miners to whom Keene spoke, Darrell Matney, testified that prior to February 13 he had heard Keene make similar safety complaints and tell Nichols that if the bridging were not stopped "somebody's going to get killed." Dec. 2 Tr. 138-40.) Around 10:30 a.m., after the crew had started to work, the circuit breaker of a continuous miner tripped, thereby rendering the equipment inoperative. Keene repaired the cable leading to the continuous miner and mining was resumed. Shortly thereafter, the circuit breaker at the transformer tripped and the continuous miner again was rendered inoperative. Keene twice attempted to reset the circuit breaker, but to no avail. Keene tested the cables and plugs with a voltmeter and, after determining that the cause of the short circuit was in the cable between a splice and the continuous miner, he informed Looney of his conclusion. According to Keene and Matney, Looney then instructed Keene to bridge-out the ground fault monitor system at the transformer. When Keene refused for safety reasons and insisted on repairing the cable, Looney told Keene to "get [his] bucket and go to the house." Dec. 3 Tr. 11-12; Dec. 2 Tr. 53, 144. Understanding this to be a discharge, Keene left the section. 5/ However, before leaving, Keene told Looney that he planned to report the incident to MSHA. Dec. 3 Tr. 12.

On his way out of the section, Keene met Mine Superintendent Nichols and told him that Looney had fired him for refusing to bridge-out the ground fault monitor system on the continuous miner. According to Keene, Nichols "laughed the matter off" and inquired as to whether Keene was certain there was a problem. Dec. 2 Tr. 55. Keene assured Nichols that there was a problem with the cable and informed him that he would report the matter to MSHA.

The next day, February 14, 1986, Keene filed a complaint with MSHA alleging that he was discriminatorily discharged by S&M in violation of

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the ground fault monitor system is a small closed circuit that monitors the ground wire and is intended to protect miners from contacting electrical current. If a break in the ground occurs, the

system interrupts current to the cable and the electrical equipment. Bridging-out the ground fault monitor system renders it useless as a protective device and potentially subjects anyone coming into contact with the equipment to a fatal electrical shock. Dec. 2 Tr. 162-64; see also id. at 57.58.

5/ Both the Commission and the Sixth Circuit Court of Appeals agree that this language is synonymous with a discharge in the mining industry. See, e.g., Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (August 1982). aff'd sub nom. Whitley Development Corp. v. FMSHRC, No. 84-3375, slip op. at 2 (6th Cir. July 31, 1985).

section 105(c)(1) of the Mine Act. MSHA initiated an investigation of the complaint. Prior to a conclusion by MSHA regarding the merits of the complaint and at the suggestion of MSHA's investigator, Keene telephoned Mullins on February 26, 1986, to discuss a possible resolution of the complaint. After discussing a monetary settlement, Keene and Mullins discussed Keene's returning to work at S&M. Mullins requested that Keene return to work at his previous position as a certified electrical repairman and maintenance foreman. Keene testified that, in response, he explained that he would not return to his old position because he did not want to be "responsible for the electrical [examination] books and conditions that everybody was bridging-out inside the mines." Dec. 2 Tr. 61. Keene further testified that when he requested a second shift job operating a shuttle car, Mullins replied that only Keene's original job as electrician on the day shift was available and that he could not pay electrician's wages to someone not doing an electrician's job. Keene testified that Mullins said that Keene would not have to record everything he saw or found in the examinations books. Keene summed up the conversation as follows: "[Mullins] told me that I would have to come back to my original job under the original circumstances I was working under. ... I told [him] ... that it was too big a hazard for me to come back as electrician on day shift." Dec. 2 Tr. 62-63. Therefore, Keene refused to return to work at S&M under the existing conditions. In May 1986, S&M was shut down due to economic conditions.

Prestige, a surface coal mining operation, commenced mining on November 1, 1986, "in the same hollow, about a mile and a half up [from S&M] ... on the top of the mountain." Dec. 2 Tr. 196-97, 202-03. According to Mullins' testimony, he and his wife own all of S&M and about 55% of Prestige, with the remaining interest being owned by three other unrelated individuals. Prestige had been incorporated for more than a year' awaiting its strip mining permit, before it commenced operations. Dec. 3 Tr. 196. Prestige does not mine on the same lease as that mined by S&M, nor does it utilize any of S&M's equipment. Dec. 3 Tr. 39. All of the equipment at Prestige's operation is diesel, rather than electrical, and a certified electrician is neither required nor employed. Dec. 3 Tr. 36. Of its eight employees, only two were previously employed at S&M. Dec. 3 Tr. 204.

Subsequent to S&M's shutdown, MSHA concluded its investigation of Keene's complaint and determined that Keene had been unlawfully fired by S&M on February 13, 1986. Accordingly, the Secretary filed an action against S&M on Keene's behalf alleging that he was

discharged by S&M for refusing to continue the illegal and unsafe practice of rendering safety features inoperative on electrical equipment. Subsequently, the Secretary moved, on August 4, 1986, for leave to file an amended complaint naming Tolbert Mullins, his wife, Shirley Mullins, and Jewell Smokeless Coal Corporation ("Jewell Smokeless") as additional respondents, alleging that they were liable for damages arising from the February 13, 1986, act of discrimination. The motion was granted but before the hearing Jewell Smokeless reached a settlement with Keene whereby it agreed to require any subsequent operator of the mine where Keene had worked to rehire him. Jewell Smokeless was dismissed from the proceeding.

After a hearing, the administrative law judge concluded that Keene was improperly discharged in violation of the Act when he was given the choice of performing the illegal bridging-out procedure or leaving the section. 9 FMSHRC at 405. The judge found that Keene had a good faith, reasonable belief that the procedure was hazardous and that its inherent dangers "were obvious and admittedly known to both Looney and Nichols," thereby obviating any need for Keene "to further 'communicate' the nature of the hazard to mine management." Id.

The judge also found that Mullins, as a "person" within section 105(c)(1), individually discriminated against Keene when Mullins "refus[ed] to reemploy Keene except under illegal and dangerous conditions." 9 FMSHRC at 405-06.

Finally, the judge found that, within the framework of the criteria set forth by the Commission in Munsey v. Smitty Baker Coal Co., Inc., 2 FMSHRC 3463 (1980), aff'd sub nom. Munsey v. FMSHRC, 595 F.2d 735 (D.C. Cir. 1978), 701 F.2d 976 (D.C. Cir. 1983), cert. denied 464 U.S. 857 (1983), Prestige, which had been added as an additional respondent at the beginning of the hearing, was a successor-in-interest to S&M and was thus jointly and severally liable for S&M's discriminatory actions. 9 FMSHRC at 406.

To remedy the unlawful discrimination, the judge ordered S&M and Prestige, jointly and severally, to pay Keene costs and backpay with interest. The judge also ordered Mullins, jointly and severally with S&M and Prestige, to pay costs and backpay dating from Mullins' subsequent act of discrimination on February 26, 1986. The judge further ordered Prestige to hire Keene in a capacity commensurate with his skills and at no less pay than he was receiving at the time of his discharge. S&M, Prestige, and Mullins, jointly and severally, were ordered to pay a civil penalty of $1,000. 9 FMSHRC at 407.

II.

The principal issues presented on review are whether Keene engaged in a protected work refusal on February 13, 1986, for which he was unlawfully discharged, whether Prestige is a successor-in-interest to S&M and is thereby jointly and severally liable for S&M's obligations to Keene arising from any such discriminatory actions, and whether Mullins, as an individual, discriminated against Keene. On review, the operators assert that the evidence is insufficient to support a finding that S&M and Mullins discriminated against Keene or that Prestige is a successor-in-interest to S&M.

The Commission's role in reviewing a judge's decision is to determine whether his factual findings are supported by substantial evidence and whether the judge correctly applied the law. 30 U.S.C. $ 823(d)(2)(A)(ii). See also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Thurman v. Queen Anne Coal Company, 10 FMSHRC 131, 133 (February 1988). The initial question is whether S&M discriminated against Keene by discharging him on February 13, 1986. 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 protected 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 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 an 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. 1987); 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).

The motivation for Keene's discharge is not disputed. All of the parties agree that Keene refused to perform the bridging-out procedure on February 13, 1986, and was discharged by the section foreman because of that refusal. The primary issue presented, therefore, is whether Keene's work refusal was protected under the Mine Act. If the work refusal was protected, the discharge was unlawful. See, e.g., Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (llth Cir. 1985); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 132 33 (February 1982); Smith v. Reco, Inc., 9 FMSHRC 992, 994-95 (June 1987).

A miner has the right under section 105(c) of the Mine Act to refuse to work if the miner has a good faith, reasonable belief that continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, sun.ra. 3 FMSHRC at 807-12. See also, e.g., Metric Constructors, supra. Where reasonably possible, a miner refusing to work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Reco, supra. 9 FMSHRC at 995; Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also Miller v. Consolidation

Coal Co., 687 F.2d 194, 195-97 (7th Cir. 1982)(approving Dunmire & Estle communication requirement).

Keene testified that he was concerned about the continued practice of bridging-out electrical equipment because anyone touching bridged-out equipment could be electrocuted. MSHA's electrical inspector, Larry Brown, confirmed that individuals who contact bridged-out electrical equipment risk fatal electrical shock. Brown testified without dispute that bridging out is violative of two mandatory safety standards,

30 C.F.R. $ 75.900 and $ 75.902. 6/ There is no suggestion in the record that Keene s fear of bridging-out electrical equipment was not real. Given Keene's testimony about his safety concerns, and the inspector's confirmation that the practice of bridging-out electrical equipment can have serious, even fatal, consequences for miners, we hold that substantial evidence supports the judge's conclusion that Keene "entertained a good faith and reasonable belief that the procedure of 'bridging' was hazardous to himself or to anyone coming into contact with the 'bridged-out' miner." 9 FMSHRC at 405.

We also conclude that Keene met the Act's communication requirement. The judge found that the dangers inherent in bridging-out electrical equipment were obvious and admittedly known to the management of S&M and concluded that under these circumstances there was no need for Keene to "further 'communicate' the nature of the hazard to S&M." 9 FMSHRC at 405. Substantial evidence supports this finding. The testimony of Section Foreman Looney and Mine Superintendent Nichols reveals that mine management had sanctioned a practice it knew to be hazardous and violative of mandatory safety standards. Dec. 3 Tr. 12; Dec. 2 Tr. 227-28. In addition, Keene had previously expressed, but to no avail, his safety concerns regarding the practice. The Mine Act does not require a miner refusing work to communicate his belief in the health or safety hazard at issue if such communication would be futile. Dunmire & Estle, supra, 4 FMSHRC at 133. Thus, we agree with the judge that in the face of such an obvious and admittedly known safety hazard, there was no requirement that Keene further communicate his safety concerns to the operator on February 13, 1986.

We conclude therefore, that there is substantial evidence to support the judge s finding that Keene had a good faith, reasonable belief in a hazardous condition and that he communicated his safety concerns to S&M. As a result, Keene engaged in a protected work

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6/ 30 C.F.R. $ 75.900, which restates 30 U.S.C. $ 869(a), provides:

> Low- and medium-voltage power circuits serving three-phase alternating current equipment shall be protected by suitable circuit breakers of adequate interrupting capacity which are properly tested and maintained as prescribed by the Secretary. Such breakers shall be equipped with devices to provide protection against undervoltage, grounded phase, short circuit, and overcurrent.

30 C.F.R. $ 75.902, which restates 30 U.S.C. $ 869(c), provides in pertinent part:

> [L]ow- and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken....

refusal. See also Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319, 321 (March 1985), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 367 68 (4th Cir. 1986)(Mine Act extends protection against discrimination to miner who refuses to perform an assigned task because such performance would endanger the health or safety of another miner). Therefore, we hold that Keene was discriminatorily discharged by S&M on February 13, 1986.

III.

The next question is whether the judge properly found Prestige to be jointly and severally liable for S&M's unlawful act of discrimination as a successor-in-interest to S&M. The Commission has recognized that in certain cases the imposition of liability on a successor is appropriate. Munsey, supra; Secretary on behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (March 1987), aff'd sub nom. Terco v. FMSHRC, 839 F.2d 236 (6th Cir. 1987).

However, before the appropriateness of imposing liability can be resolved, it is necessary in the first instance to determine whether Prestige is even a successor. In the cases in which the Commission and the courts have found successorship liability there has been some type of transaction (a "transactional element") with respect to the business between the predecessor and the entity against which liability is being asserted and/or there has been a continuation of activity at the predecessor's site. In Munsey, supra, for example, the company that was held liable as a successor had acquired leases and mining equipment from the former employer, substantially replacing the predecessor's operation. Similarly, in Terco, supra, successorship liability attached because there was substantial continuity of business interests at the same site.

Assumption of the predecessor's position by the successor underlies the successorship cases. For example, in Wiley & Sons v. Livingston, 376 U.S. 543 (1964), successorship was found where the predecessor company was merged into the acquiring company, a process that also involved the wholesale transfer of the predecessor's employees to the successor. The Court observed that for an employer to be considered a successor, there must be a substantial continuity in the identity of the business enterprise before and after a change. Wiley, supra, 376 U.S. at 551. Another example of the acquisition element underlying these cases can be found in Golden State Bottling Co. v. NLRB, 414 U.S. 168, (1973) which involved a bona fide purchase of a company that had committed an unfair labor practice. Issuance of a reinstatement and back-pay order was upheld against the acquiring

company, which occupied the site where the unfair practice had occurred.

In this case there has been no transactional element nor has there been a continuation of activity at the same site. Rather, Prestige is a pre-existing company that commenced mining some months later at a different site on a lease owned by a different, unrelated company, using equipment that was not acquired from, nor previously used by, S&M. Thus, Prestige cannot be considered to be a successor and it cannot properly be assessed with successorship liability.

However, even if Prestige had occupied the status of a successor, we would still conclude that it should not be held liable for the consequences of S&M's act of discrimination. In determining whether a successor should be liable to remedy the unlawful discrimination of its predecessor, the Commission has followed the courts and has approved consideration of nine specific factors:

> (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same products.

2 FMSHRC at 3465-66 (restating factors set forth in EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d !086. 1094 (6th Cir. 1974)); see also Terco, supra, 839 F.2d at 238-39. These similar factors have been applied under both the Civil Rights Act of 1964 (e.g., MacMillan Bloedel, supra) and the National Labor Relations Act (e.g., NLRB v. Winco Petroleum Co., 668 F.2d 973, 976 78 (8th Cir. 1982)).

As pointed out in Munsey, supra, 2 FMSHRC at 3467, and Sugartree, supra, 9 FMSHRC at 398, the key factor for determining successorship liability is whether there is a substantial continuity of business operations. This question is fact intensive and must be resolved on a case-by-case basis. Howard Johnson, Inc. v. Detroit Local Joint Executive Board, 417 U.S. 249, 256 (1974). In Sugartree, 9 FMSHRC at 398, the Commission emphasized that factors (3) through (9) provide the framework for analyzing whether there is a continuity of business operations and work force between the successor and its predecessor. Reviewing these factors in the context of this case, we conclude that substantial evidence does not support a finding that a substantial continuity of business operations exists between S&M and Prestige.

Prestige is a surface mining operation whereas S&M was an underground operation. Prestige's mine is located a mile and a half from S&M's mine and Prestige mines under a different coal

lease. Moreover, the judge found that only two of Prestige's eight employees were employed previously by S&M. 9 FMSHRC at 406. (While the judge also found that Monroe Nichols, the supervisor at S&M, is the supervisor at Prestige, the record does not support such a finding. 7/ Therefore, not only do S&M and Prestige have different physical operations, Prestige does not u e the same or substantially the same work force or

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7/ There was no testimony as to Nichols' actual job at Prestige. Tolbert Mullins testified that another individual holds the position of supervisor. Dec 2 Tr. 215.

supervisory personnel as S&M. Furthermore, the judge found that the machinery, equipment, and mining methods of Prestige and S&M are not the same and that the specific jobs differ between the two mining operations. 9 FMSHRC at 406. In spite of this finding, and, in spite of the uncontradicted testimony that a certified electrician was neither required nor employed, the judge concluded that "many of the [job] skills are transferable." Id. The record contains no evidentiary support for this conclusion. 8/

As previously noted, there has been no purchase or any other transaction or activity between Prestige and S&M with respect to S&M's business operations, assets, or stock as is frequently the situation in successorship cases. See, e.g., Howard Johnson, supra (successor was bona fide purchaser of assets of a restaurant and motor lodge); Wiley, supra (predecessor disappeared through a merger); Sugartree, supra (predecessor's leases were acquired). The doctrine of successorship liability was not intended to encompass a situation such as in this case where the record establishes that the alleged successor does not share with the predecessor the same physical plant, substantially the same work force, the same machinery, equipment, or methods of production, the same jobs and job skills, or the same business operations. While our dissenting colleague emphasizes the control that Mullins exercises over both S&M and Prestige and the interrelationship between the two corporations, those factors go not to the issue of successorship but rather to an alter-ego theory of liability in which the corporate veil is pierced in order to reach the controlling shareholder. The Secretary withdrew that theory of liability at the hearing (Dec. 3 Tr. 71), the judge made no finding of fact with respect to it, and it is not before us on review. Accordingly, we reverse the judge's finding that Prestige is a successor-in-interest to S&M and is jointly and severally liable for remedying S&M's illegal act of discrimination.

IV.

The final issue is whether Mullins is individually liable for discriminating against Keene in violation of section 105(c)(1) of the Act. The judge accepted Keene's testimony that during the telephone conversation of February 26, 1986, initiated by Keene at MSHA's suggestion, Mullins told Keene that he could return to work as an electrician and that Keene would not have to report instances of bridged.out electrical equipment in the electrical examination books. 9 FMSHRC at 406. On this basis, the judge found that Mullins, as an individual, was a "person" discriminating against Keene by "refus[ing] to reemploy Keene except under illegal and dangerous conditions."

Id. 9/ We hold that substantial evidence does not support the judge's

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8/ Although Prestige, through Mullins, had notice of the charge of discrimination, and although S&M and Prestige both mine coal, these factors along with S&M's inability to provide relief do not counter-balance a determination that there exists no continuity of business operations between S&M and Prestige.

9/ During closing arguments, in a colloquy concerning the Secretary's

finding that Mullins as a "person" unlawfully discriminated against Keene.

According to Keene, he had. at MSHA's suggestion, approached Mullins to discuss a possible settlement of his discrimination complaint against S&M. When a monetary solution of the complaint could not be reached, the subject of Keene's possible return to work was discussed. Keene's testimony reveals a request by him for a second shift job and a response by Mullins that no second shift jobs were available. Mullins then offered Keene his old job back under the same circumstances and suggested to him that he would not have to record everything that he found. While this offer did not resolve Keene's safety concerns, neither did it suggest any additional adverse action against Keene by Mullins, either in his role as president of S&M or outside of that role. We find no evidence that would cause the conversation to be characterized as anything other than an attempt by Keene and Mullins, in his role as president of S&M, to settle the original discrimination complaint. That their negotiations were unsuccessful does not change their character as settlement negotiations between Keene and S&M. Thus, we view this conversation as an outgrowth of the original illegal discharge by S&M and not as a separate act of unlawful discrimination by Mullins individually. Under these circumstances, we hold that Keene's testimony regarding the crucial aspects of the conversation does not support a finding by the judge of a separate act of discrimination by Mullins individually.

For the reasons stated above, we conclude that Keene was discriminatorily discharged by S&M for engaging in a protected work refusal on February 13, 1986. We also hold that Prestige is not a successor in interest to S&M and is not jointly or severally liable for the consequences of S&M's discriminatory discharge. Finally, we conclude that the judge erred in holding that Mullins personally discriminated against Keene during the telephone conversation of February 26, 1986.

We recognize that our conclusion requires Keene to seek his remedy solely against S&M, which discontinued operations and is without liquid assets. The fact that Mullins, individually, and Prestige may be better able to provide relief does not justify a finding of individual liability against Mullins, where it is not supported by substantial evidence, nor a finding of successorship liability against Prestige where no substantial continuity of business operations exists.

Accordingly, the judge's decision is affirmed in part and

reversed in part. That portion of the judge's order requiring Prestige and Mullins to pay costs, backpay, interest, and a civil penalty for the

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theories of liability, the judge suggested to the Secretary's counsel that the telephone conversation between Mullins and Keene provided a basis for establishing Mullins' personal liability apart from S&M's prior discriminatory actions. Dec. 3 Tr. 64-65. It was during this same colloquy that the Secretary's counsel stated that she was abandoning the claim that Mullins was liable for S&M's discriminatory acts on an alter ego theory. Dec. 3 Tr. 70.

violation of section 105(c) is vacated, as is that portion requiring Prestige to hire Keene.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Lastowka, Commissioner, concurring in part and dissenting in part:

I agree with the majority that substantial evidence supports the factual findings underlying the judge's conclusion that Bobby G. Keene was illegally discharged for engaging in a work refusal protected by the Mine Act. In fact, the evidence in this record concerning the illegal and dangerous practice of bridging out electrical equipment at the S&M Mine is overwhelming. 1/ In refusing to carry out this unsafe and illegal act, Keene acted in a manner consistent with the dictates of the Mine Act. As a consequence, however, he lost his job.

Although the majority upholds the judge's finding of illegal discrimination, Keene's victory proves purely pyrrhic. By vacating the judge's findings that Tolbert Mullins personally discriminated against Keene and that Prestige Coal Company is a successor to S&M, the majority effectively denies Keene any remedy for the wrong they agree he has suffered. In doing so the majority not only usurps the factfinding role of the administrative law judge, but also adopts a far too restrictive view of the reach of the Mine Act's anti-discrimination provision and the remedies available thereunder. Accordingly, I dissent from those parts of the majority decision reversing the decision of the administrative law judge.

I.

The Individual Liability of Tolbert Mullins

In their analysis of the issues presented by this case the majority first resolves a question of remedy, i.e., successorship, before determining the extent of the illegal discrimination suffered by Keene. Before the question of "who owes what" to Keene can be determined, however, it must first be determined who did what" to him. Therefore, I will first

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1/ The judge accurately described the serious nature of the violations as follows:

> I find the acts of discrimination by S&M and Tolbert Mullins to be particularly serious in this case because of the direct impact they had on the safety of miners. Here the practice of bridging-out safety features on electrical equipment continued unabated after the discharge of Mr. Keene and after his discharge it was highly

> unlikely that anyone else would have protested the dangerous practice. In addition Mr. Mullins and the other S&M officials knew that they were requiring Keene to perform illegal and dangerous acts. Their discharge (and refusal to take back) Keene for refusing to perform such tasks was therefore willful.

9 FMSHRC at 407.

address the question of Mullins' personal liability for a separate act of discrimination against Keene. On this issue the judge stated:

> The Complainant in this case also alleges that Tolbert Mullins is individually liable as a "person" unlawfully discriminating against him under section 105(c)(1).... According to Keene, on February 26, 1986, he telephoned Mr. Mullins at the request of the MSHA investigator in efforts to settle the case. Keene says that during the course of this conversation Mullins told him that he could have hisjob back but only as an electrician. Moreover in response to Keene's concerns about the illegal practice at S&M of "bridging-out" electrical equipment Mullins purportedly responded that Keene would not have to report the practice in the electrical inspection books. */ This conversational exchange is not disputed and accordingly I accept Keene's testimony in this regard. This evidence clearly supports a finding that Mullins, as an individual, was a "person" discriminating against Keene in violation of the Act in his refusal to reemploy Keene except under illegal and dangerous conditions. See Munsey v. Smitty Baker Coal Company, Inc., et al, 2 FMSHRC 3463 (1980).
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> */ It is undisputed that Keene as a certified electrician would be legally required to report such violative conditions in the electrical inspection books.

9 FMSHRC at 405-406.

The only challenge to this portion of the judge's decision raised by Mullins in his petition for discretionary review is that Keene's version of the telephone conversation was, in fact, disputed. Testimony by Mullins concerning the telephone conversation is cited as creating a dispute as to its contents. Petition for Review at 3. In his brief on review Mullins simply reiterates this bare-bones factual challenge. Brief at 5.

Thus, Mullins has argued only on the factual basis that, contrary to the judge's finding, the content of the conversation was not as Keene had related. The judge, however, resolved this factual question in favor of Keene. Under the Mine Act credibility determinations are the province of the trier of fact (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986)), and we are bound by a substantial evidence standard of review. 30 U.S.C. $ 823(d)(2)(A)(ii)(I). Donovan on behalf of Chacon v.

Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). Measured against these standards, Mullins has presented no compelling argument for overturning the factual findings of the judge concerning the telephone conversation.

The majority goes further, however, and bases their reversal of the judge's finding that Mullins personally discriminated against Keene on the fact that Mullins' act of discrimination occurred during an attempt to settle Keene's complaint. The majority characterizes Mullins' act as a mere "outgrowth of the original illegal discharge by S&M and not as a separate act of unlawful discrimination by Mullins individually." Slip op. at 11.

Because this argument was never raised by Mullins, the issue is not properly before the Commission. The Mine Act expressly limits the Commission's authority in reviewing administrative law judges' decisions to only those questions raised by a party in its petition for review (30 U.S.C. $$ 823(d)(2)(A)(iii)) unless the Commission itself expressly identifies additional issues for review in accordance with the procedures set forth in 30 U.S.C. $ 823(d)(2)(B). Donovan on behalf of Chacon v. Phelps Dodge Corp., supra, 709 F.2d 86, at 90-92. The Commission did not direct review sua sponte of any additional issues. Therefore, the majority errs in basing their reversal of the judge on an issue not raised by the parties and appearing as an issue for the first time in their decision.

In any event, I cannot agree with their view that because an act of illegal discrimination was committed while Keene was attempting to resolve his safety complaint short of litigation, it falls outside the reach of section 105(c). Given the administrative law judge's supported finding that Keene's return to work was conditioned by Mullins on Keene's not reporting hazardous conditions or illegal activities, surely Mullins' act contravenes section 105(c)'s mandate that "[n]o person shall ... interfere with the exercise of the statutory rights of any miner ... or applicant for employment...." 30 U.S.C. $ 815(c). The legislative history underlying section 105(c) emphasizes that the section "is to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the "[Mine Act]" and that it was Congress' intent "to protect miners against not only the common forms of discrimination ... but also against the more subtle forms of interference...." S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)(emphasis added). Congress further "emphasized that the prohibition against discrimination applies not only to the operator but to any person directly or indirectly involved." Id. (emphasis added). Thus, in view of the intended broad reach of section 105(c), the fact that Mullins' illegal act occurred during the course of a discussion to determine whether a prior illegal act could be remedied out of court can in no way serve as a shield protecting Mullins from the application of section 105(c). Such a result not only controverts section 105(c), but also perverts the Act's settlement process and flies in the face of sound public policy. 2/

In sum, the majority errs in sua sponte interjecting an issue not properly before the Commission and then incorrectly resolving

the issue raised. In the end, the question of Mullins' personal liability for his violation of section 105(c) boils down to nothing more than a substantial evidence question. The judge's conclusion crediting Keene's version of the conversation over Mullins' has support in the record and rests on credibility grounds. The majority therefore errs in substituting its judgment for that of the trier of fact. Donovan on behalf of Chacon v. Phelps Dodge Corp., supra, 709 F.2d at 94.

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2/ Concluding that an illegal act committed during a settlement discussion can form the basis for a separate cause of action does not, as the majority may feel, "chill" the settlement process. Proper settlements can not be conditioned on illegal terms. The practical impact, if any, of refusing to except settlement discussions from the reach of section 105(c) is that proper settlements will go forward, improper settlements will not. That is as it should be.

II.

Prestige Coal Company's Liability

The administrative law judge held Prestige Coal Company jointly and severally liable to Keene for costs, damages and reinstatement as a successor-in-interest to S&M. In reaching this conclusion the judge followed the framework for analysis of successorship issues set forth by the Commission in Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463 (1980), aff'd in relevant part sub nom. Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1981), and Secretary on behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (1987), aff'd sub.nom. Terco v. FMSHRC 839 F.2d 236 (6th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3770 (U.S. April 5, 1988)(No. 87-1808). Specifically, the judge applied the nine-factor successorship test set forth in EEOC v. MacMillan Bloedel Containers, 503 F.2d 1086 (6th Cir. 1974), which the Commission adopted in Munsey and followed in Sugartree and found based on the evidence that Prestige was liable as S&M's successor.

As previously discussed, 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 question of whether Prestige is a successor to S&M is a question of fact subject to review under the substantial evidence standard. See Fall River Dyeing & Finishing Corp. v. NLRB, U.S. , 107 S. Ct. 2225, 2235, 96 L.Ed. 2nd 22, 37 (1987); Terco v. FMSHRC, 839 F.2d at 240. Therefore, the Commission's "task is to determine whether the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" Mid-Continent Resources, 6 FMSHRC 1132, 1137 (May 1984), quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); see also, Donovan on behalf of Chacon v. Phelps Dodge Corp., supra. Measured against this standard, the judge's finding that Prestige was a successor to S&M is supported by substantial evidence and must be affirmed.

The nine-factor test guiding resolution of successorship issues includes consideration of the following: (1) whether the successor company had notice of the charge; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether it uses the same or substantially the same work force; (6) whether it uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether it uses the

same machinery, equipment, and methods of production; and (9) whether it produces the same products. Sugartree, supra, 9 FMSHRC at 397-398.

In the present case the administrative law judge evaluated the evidence, applied this test, and concluded that Prestige should be held liable as a successor to S&M. Specifically, the judge found:

> In this case there is no dispute that Prestige continues to produce the same product as S&M i.e., coal. It is also apparent from the record that Tolbert Mullins as president and part owner of both S&M and Prestige (and

> therefore as agent for both companies) was in a position to have notice on behalf of Prestige of the charges by the Complainant in this case. It is also established that S&M is not able to provide adequate relief to the Complainant in this case. It is no longer in business and has no liquid assets. Moreover its only unpledged assets consist of old mining equipment having but little value as parts and scrap metal and having limited marketability.
>
> Of the eight employees presently working at Prestige only two formerly worked for S&M. However one of the two employees, Monroe Nichols, was a supervisor at S&M and is a supervisor at Prestige. The Prestige mine is a surface mine and S&M was an underground mine. Accordingly the machinery, equipment and methods of production differ. The specific jobs at Prestige are also different but many of the skills are transferable. Within this framework, I find on balance that indeed Prestige is a successor-in-interest to S&M and accordingly is jointly and severally liable for costs, damages, reinstatement and civil penalties.

9 FMSHRC at 406.

The grounds advanced by the majority for reversing the judge's findings for the most part constitute nothing more than an unvarnished reweighing of the evidence. Slip op. at 9-10. Perhaps if the Commission possessed de novo fact finding authority, a finding of nonsuccessorship on these facts could also be justified. In our review capacity, however, we are bound by the narrow substantial evidence standard and the majority's substitution of its findings for those of the judge is erroneous. Donovan v. Phelps Dodge Corp., supra, 709 F.2d at 92.

The majority also expresses concern that there was no direct business transaction transferring the assets or operations of S&M to Prestige. Slip op. at 10. The majority must be aware, however, that in Sugartree the Commission expressly rejected the need for a purchase of assets or stock in successorship situations and that in affirming the Commission the Sixth Circuit stated that "[i]n fact ... the lack of a sale may actually indicate that the predecessor and successor corporations are so closely linked that arms length dealings as usually occur during a sale never occur nor are they necessary."

Terco, 839 F.2d at 239-240; Sugartree, 9 FMSHRC at 399. As detailed below, the lack of any need for arms length dealings between S&M and Prestige is apparent from the present record.

The record makes clear that Tolbert Mullins controls, in fact and in practice, both S&M and Prestige. Mullins is president of both S&M and Prestige. Vol. I Tr. 190, 196. He is the only director of Prestige. Vol. I Tr. at 200. His wife, Shirley Mullins is secretary-treasurer of both S&M and Prestige. Vol. I Tr. 196. They were the sole officers of both companies. Vol. I Tr. 21, 22. Mullins owns 90 percent of the stock of S&M. Vol. I Tr. 190. Shirley Mullins owns the remaining 10 percent. Vol. I Tr. 21. Under questioning, Tolbert Mullins' estimates of

the amount of his stock ownership of Prestige progressively increased from 40 percent, to 45 percent, and appears to have settled at 50 percent. Vol. I Tr. 197, 202. In addition. Shirley Mullins owns 10 percent of Prestige. Vol. I Tr. 199, 206. Mullins' daughter did the payroll for Prestige. Vol. I Tr. 205. At the hearing, when the administrative law judge granted the Secretary's motion to join Prestige as a respondent and suggested that a continuance might be in order, the Mullins, on behalf of Prestige, authorized the hearing to proceed and authorized the attorney representing S&M to also represent Prestige. Vol. I Tr. 23-24.

In Sugartree the Commission observed that "successorship transactions may assume many forms and liability may obtain in a number of business contexts." 9 FMSHRC at 399. Given the degree of Mullins' control of both S&M and Prestige, and the fact that both companies engage in coal mining in very close proximity to each other, the present situation is a strikingly appropriate context for a successorship finding. 3/ Although in most successorship situations a successor succeeds to a predecessor's operation at the same locus, no different result need obtain here where the mine sites are a mile and a half apart. Unlike a manufacturing plant which produces goods or a business which provides services, a mine extracts minerals from an ore body that is present at a specific location in a finite supply. Thus, as a matter of course, mines are projected to open and close as the mining cycle is completed and the ore body is exhausted. As a consequence, the mere fact that Prestige began mining operations at a mining site located a mile and a half from the site where the discriminatory act occurred should not bar a successorship finding.

Courts have emphasized that the successorship test is not meant to be a rigid formula resulting in a preordained result once information concerning each of the variables is plugged in. Rather, the test is intended as an aid for evaluating the facts and circumstances of each case and for balancing the competing interests present in a variety of contexts. Different elements of the test may be more important in different situations, but the primary concern always is to find a fair way for fulfilling a national policy. Successorship principles were developed to address issues arising under the National Labor Relations Act such as whether a successor who was not involved in its predecessor's unfair labor practice should nevertheless be required to provide a remedy. See e.g., Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973). There the Court balanced factors such as the federal policy of avoiding labor strife, the prevention of the chilling of the exercise of protected rights, and the protection of victimized employees against

the costs sought to be imposed on the successor. See also Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974); NLRB v. Burns International Security Services, 406 U.S. 272 (1972). When these basic concepts were later extended to other contexts,

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3/ Contrary to the majority's suggestion, my recounting of the degree of Mullins' control over both S&M and Prestige is not directed at the alter ego theory of liability abandoned by the Secretary. See slip op. at 10. Rather, my quite distinct purpose is to demonstrate that the part of the successorship balancing test that is directed at determining the fairness of the obligation sought to be imposed on an "innocent" successor weighs heavily against Mullins, who himself discriminated against Keene and, by virtue of his control, is in a position to provide full relief through employment at Prestige.

such as employment discrimination cases, the courts have built upon, extended and modified these basic principles to adapt them to the particular circumstances and goals of other national policies. See e.g., Musikiwamba v. ESSI, Inc., 760 F.2d 740, 750 (7th Cir. 1985) (Civil Rights Act of 1866, 42 U.S.C. $ 1981); EEOC v. MacMillan Bloedel Containers, 503 F.2d 1086 (6th Cir. 1974) (Title VII of Civil Rights Act of 1964, 42 U.S.C. $ 2000 et seq.). Thus, the principle of successorship can and should be tailored as needed to advance the goals of the Mine Act, particularly where, as here, an individual's use of "hip-pocket" corporations, not an uncommon occurrence in the coal mining industry, would otherwise allow effective evasion of the Mine Act's regulatory and remedial requirements.

In the end our task in the successorship context is to review the facts and to balance the national policy of protecting the health and safety of miners, the individual interests of the injured miner, and the harm done to and the costs imposed on the successor employer. Here, a blatant violation of the anti-discrimination provision of the Mine Act occurred and no relief is available through the responsible corporate entity. Full relief is available, however, through a company controlled by the same individual, engaged in the same business, in the same locale. Most importantly, Tolbert Mullins comes before us, not as an innocent party, but as a person who himself committed an act of illegal discrimination. In these circumstances, the balancing process can only tilt in favor of a finding of successorship liability.

Finally, assuming for the sake of argument that Prestige were found not to be a successor, a more fundamental basis is available for ordering Prestige to remedy the section 105(c) violation in this case. Section 105(c)(2) of the Mine Act requires a violator of section 105(c) 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." 30 U.S.C. 815(c)(2)(emphasis added). In explaining this broad grant of authority Congress stated:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The

specified relief is only illustrative.

Legis. Hist, supra at 625.

In exercising our authority to fashion appropriate relief, the Commission has stated that "remedies in discrimination cases should be suited to the individual facts of each case and designed to eliminate the effects of illegal discrimination." Munsey, supra, 2 FMSHRC at 3464. In Munsey, the Commission ordered the discriminatee, Glenn Munsey, to be reinstated at a mine different from the mine at which he had been working when he was illegally discharged. The Commission ordered reinstatement at the new mine not on the theory that the mining company was a successor to Munsey's previous employer, but rather because the new mine was owned and operated by an individual who, in his

capacity as general manager at the former mining operation, had illegally discriminated against Munsey. The Commission determined that reinstatement of Munsey at a different mine was "an appropriate remedy [under section 105(c)] in order to fully compensate Munsey for the effects of the illegal discrimination he suffered." 2 FMSHRC 3464. The same rationale for ordering Prestige to provide remedial relief to Keene is available and appropriate here.

For these reasons, I dissent from the majority's decision reversing the judge's findings that Tolbert Mullins is liable for a separate act of discrimination and that Prestige Coal Company is jointly and severally liable for the damages and relief due Bobby G. Keene.

James A. Lastowka, Commissioner

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