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WILFRED BRYANT V. DINGESS MINE, WINCHESTER COALS, MULLINS COAL, J&J DINGESS
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 29, 1988
WILFRED BRYANT
v. Docket No. WEVA 85-43-D
DINGESS MINE SERVICE,
WINCHESTER COALS, INC.,
MULLINS COAL COMPANY,
JOE DINGESS and
JOHNNY DINGESS

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners
DECISION
BY: Ford, Backley, Lastowka and Nelson
This proceeding involves a discrimination complaint brought by Wilfred Bryant against Dingess Mine Service ("Dingess"), Mullins Coal Co. ("Mullins"), Winchester Coals, Inc. ("Winchester"), Joe Dingess, and Johnny Dingess 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 James A. Broderick concluded that Dingess had discriminated against Bryant 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 Mullins and

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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 complaint under or related to this [Act], including a complaint notifying the operator or the operator's
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Winchester were not liable under section 105(c)(1) for Dingess'

discriminatory action; and that the adverse activity complained of was terminated when Bryant refused an offer of reemployment and resigned from his job. 9 FMSHRC 336 (February 1987)(ALJ). After the judge issued a supplemental decision granting Bryant back pay with interest and attorneys' fees (9 FMSHRC 940 (May 1987)(ALJ)), we granted Bryant's petition for discretionary review and heard oral argument. Bryant asserts on review that the judge erred: (1) in finding that Mullins and Winchester are not liable for Dingess' discriminatory act, and (2) in finding that Dingess' adverse action was terminated as a result of Bryant's refusal of reemployment and resignation. For the reasons that follow, we agree that the judge erred in not holding Mullins and Winchester liable under section 105(c)(1) for Dingess' discriminatory act, but we conclude that substantial evidence supports the judge's finding regarding the termination of the adverse action. Accordingly, we reverse in part and affirm in part.

I.

This case arises out of events occurring at an underground coal mine located in Logan County, West Virginia. On July 20, 1982, Mullins, the lessee of the coal at the mine, entered into a renewable one.year contract with Dingess Mine Service, a company solely owned by Joe Dingess and Johnny Dingess ("Dingess brothers"), whereby Dingess agreed to mine coal and deliver it to Mullins for a specified sum per ton. Prior to this agreement, Dingess had not operated an underground coal mine. Mullins' decision to contract with the Dingess brothers was influenced by their satisfactory performance of electrical work in 1981-82 pursuant to a contract with Mullins' sister corporation, Winchester. 2/ (While doing work for Winchester, the Dingess brothers had operated under the name of Dingess Line Service.)

The contract to operate the mine provided that Dingess would be responsible for the hiring, employment, and working conditions of its employees and that the work force would be under the jurisdiction of the United Mine Workers of America ("UMWA") and governed by the current UMWA wage agreement (the "Wage Agreement"). The contract further provided that Dingess would "keep and maintain all mining equipment in good working order, condition and repair...." R. Ex. 5 at 2. Dingess also agreed to comply with all applicable federal, state, and local laws and regulations. For its part, Mullins reserved the right to enter and inspect the mine for the "purpose of assuring Owner that Contractor is performing all of its covenants and agreements hereunder." R. Ex. 5 at 12. Mullins also retained the right to approve mining plans

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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/ Both Mullins and Winchester are wholly-owned subsidiaries of Imperial Pacific Investments. Donald Cooper, the president of both Mullins and Winchester, is Mullins' only employee.
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developed by Dingess.
Concurrently with its contract with Mullins to operate the mine, Dingess entered into an agreement with Winchester by which Dingess leased the mining equipment and machinery necessary to operate the mine. Dingess also agreed "to keep all of the [equipment] in good order and repair." R. Ex. 6 at 2.
In the latter part of 1983 and early 1984, management for Mullins and Winchester became aware that Joe Dingess was drinking liquor at the mine and that Dingess was not making payments as required under the contract, including UMWA royalties, federal and state taxes, and worker's compensation fund payments. Tr. 96, 205-06. Following the issuance of a number of citations by West Virginia's Department of Natural Resources for Dingess' failure to comply with surface drainage requirements at the mine, it was necessary for Mullins to take direct action to correct surface drainage problems in order to protect its mining permit. Tr. 206 07.
Commensurate with its operational problems with Dingess, Mullins deducted rental payments due Winchester under the equipment lease from amounts which Mullins owed Dingess under the mining contract. In addition, money was advanced to Dingess against coal produced by Dingess but not yet delivered to Mullins, and Winchester made payments on Dingess' behalf to cover debt obligations to third parties, such as suppliers, trucking companies, and repair companies. Further, Mullins worked with Dingess in other ways in order to help Dingess meet its production requirements. Specifically, in the summer of 1984, Mullins suggested that Dingess develop a second mining section at the mine and Winchester assisted Dingess in its development. Winchester also leased additional equipment to Dingess to mine the new section. Tr. 210 12.
The individual chiefly responsible for monitoring Dingess' performance under its contract with Mullins was Winchester's mine manager, Roger Cook. Tr. 86.88. Cook testified that he inspected the mine by going underground two or three times each week in order to ensure that mining plans were being followed and to check on production. Tr. 97a. On occasion he also took responsibility for dust control and correcting surface drainage problems. Tr. 97b-97c, 117. In conjunction with an employee of Winchester, Cook developed the plans for opening the second section at the mine and saw to it

that the plans were carried out. Tr. 99. Cook also testified that no one at Dingess consulted with him about the hiring or laying off of employees, nor did any of Dingess' employees complain to him about any of the equipment being unsafe. Tr. 109-10.

On October 22, 1984, Mullins terminated its mining contract with Dingess on various grounds, including the failure of Dingess to pay its employees and to comply with the Mine Act and its regulations. R. Ex. 7. Also, Winchester's equipment lease with Dingess was terminated in February 1985, for the latter's failure to make the required minimum payments. Id.

Some six months prior to the termination of the contract between

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Mullins and Dingess, on April 23, 1984, the complainant, Wilfred Bryant, had been hired by the mine foreman, Aaron Browning, to work as a shuttle car driver on the second shift. Bryant testified that the shuttle car that he was assigned to operate was hard to steer and was covered with mud and debris. In addition, it had defective brakes on one side, no lights, and a defective tram mechanism. When Bryant pointed out these mechanical problems to Browning and Kevin Atkins, the section foreman, Bryant was told to do the best he could with the car. Tr. 27.

Bryant testified that by his third day at the mine, his arms were so stiff from steering the shuttle car that he refused to operate it further. The next day, after informing Atkins that he would not operate the shuttle car, Browning assigned him to other work. On the following day, Friday, April 27, 1984, Browning called Bryant at home and told him that the entire second shift was being laid off due to flooding in the mine. Bryant went to the mine to obtain a lay-off slip, only to learn that the mine was not flooded and that miners with less seniority were in fact working at the mine. Browning refused to issue a lay-off slip and told Bryant that he no longer had a job. Tr. 25-26, 32-34

Bryant responded to the discharge by filing a grievance with the local UMWA office. The grievance did not allege a safety violation by the operator, but focused on Bryant's lay-off and Browning's continued employment of men less senior to Bryant. Following the union representatives' negotiations on Bryant's behalf, Browning agreed to put Bryant on a panel for recall. 3/ Bryant refused the proposed settlement because he did not believe Browning and because Browning did not agree to fix the shuttle car. Tr. 51, 67, 308-09. Stanley Wells, the mine's safety committeeman and one of those representing Bryant, was present during the negotiations. Wells, in his testimony, confirmed that Browning offered to put Bryant on a panel. He testified that a union representative subsequently discussed the offer with Bryant and encouraged Bryant to accept it.

He stated that Bryant did not agree because "he felt he was done wrong." Tr. 165.

Mine Foreman Browning testified that he was never employed by Mullins or Winchester and that he received all his instructions for directing the operation of the mine from the Dingess brothers. Tr. 270-71, 274. At the time he hired Bryant as a shuttle car driver on the second shift, he did not confer with anyone at Mullins or Winchester. Tr. 275. Browning stated that he decided to lay off Bryant because of a oral safety complaint from the loading machine operator about Bryant's operation of the shuttle car. Browning did not consult with anyone at Mullins or Winchester about his decision. Tr. 291, 294-95. Browning testified that he intended to call Bryant back after a couple of days, but not as a shuttle car driver. Tr. 278-79.

On May 1, 1984, Bryant filed a discrimination complaint with the

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3/ A recall panel is a procedure under the Wage Agreement whereby the name of a miner who has been laid off is placed on a list by the operator for recall to work as positions become available. Miners are listed in order of seniority. See Tr. 52-54, 164, 308-09.

Department of Labor's Mine Safety and Health Administration ("MSHA"). On May 9, 1984, following negotiations regarding his grievance and rejection of Browning's offer, Bryant formally terminated his employment with Dingess. After investigating the complaint, MSHA determined that a violation of the Mine Act had not occurred and declined to file a complaint on Bryant's behalf. 30 U.S.C. $ 815(c)(2) & (3). Bryant then filed a complaint on his own behalf before this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. $ 815(c)(3). According to the judge, a default judgment was entered against Dingess and the Dingess brothers for failure to show cause why an appearance had not been entered or an answer filed. The judgment was not conclusive on the issue of discrimination as against Mullins, Winchester, or any successor employer.

Following a two-day evidentiary hearing, the judge issued his decision concluding that Bryant had engaged in a protected activity when he refused to operate the shuttle car and that his reason for refusing was communicated to the operator. 9 FMSHRC at 342. The judge found that Bryant "was 'laid off' on April 27, 1984, following his refusal," and he characterized this lay off as an adverse action. Id. However, because Bryant refused the offer by the mine superintendent to be put on a recall panel, the judge concluded "that he was not discharged and that the adverse action terminated when he

refused the offer to be called back and resigned his job." Id.
The judge characterized Dingess as the "production-operator under a contract with the owner of the coal." 9 FMSHRC at 344. He found that Mullins and Winchester had a "continuing presence" at the mine and knew or should have known of Dingess' increasing incompetence to operate the mine at the time of Bryant's employment. 9 FMSHRC at 343. He inferred from Roger Cook's regular presence at the mine that Mullins and Winchester were aware of the shuttle car's defective condition. The judge also found that Mullins and Winchester were "involved in overseeing Dingess' work ... [and] actually performed some of the work involved in the production of coal (engineering projections, installation of overcasts)" 9 FMSHRC at 344. However, because Mullins and Winchester were not involved in hiring Bryant, did not direct his work activity, and were not involved in the decision to fire him, the judge concluded that Mullins and Winchester were not liable for discrimination under section 105(c)(1) of the Mine Act. 9 FMSHRC at 343-44.
The judge dismissed Bryant's complaint with respect to Mullins and Winchester, but ordered Dingess to pay Bryant back pay with interest from April 27, 1984 (the date of the lay-off) to May 9, 1984 (the date of Bryant's resignation) with interest thereon and to reimburse him for attorney's fees and costs. 4/ 9 FMSHRC 940, 942-43 (May 1987)(ALJ).

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4/ During the course of the hearing, Bryant moved the judge to add New River Fuels to the complaint as a successor-in-interest to Dingess. (The license to operate the mine had been transferred to New River Fuels after it was recovered from Dingess. See 9 FMSHRC at 339.) Because the judge concluded that the adverse action complained of terminated on

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II.

On review Bryant first argues that the judge erroneously concluded that Winchester and Mullins were not liable for his wrongful discharge. Bryant relies on theories of strict liability and agency to assert error because, as the judge concluded, Mullins and Winchester were "inter. changeable" (9 FMSHRC at 339) and had a "continuing presence at the mine." Id. at 343. Bryant asserts that by permitting Dingess to operate the mine after becoming aware of its incompetence, Mullins and Winchester contributed to the unlawful discrimination.
In determining that Mullins and Winchester should not be held liable under section 105(c)(1) of the Mine Act, the judge viewed Dingess as an independent contractor and concluded that Mullins and Winchester as the mine owners were not liable without regard to fault

for Dingess' discriminatory act. We find, however, that given the facts of this case, Dingess actually functioned as a manager and supervisor on behalf of the operators, Mullins and Winchester, rather than as an independent contractor responsible for the operation of the mine. We conclude that Dingess was acting as a supervisory agent in a working environment where the operation of the mine was effectively controlled and directed by Mullins and Winchester and, consequently, that Mullins and Winchester are liable for Dingess' discriminatory act. 5/

Our disposition turns upon an examination of the true nature of the relationship existing between the parties. Although the contract between Mullins and Winchester designated Dingess as an "independent contractor,' it is the conduct of the parties and not the terminology of the contract which determines the nature of the relationship. See, e.g., Board of Trade of Chicago v. Hammond Elevator Co., 198 U.S. 424 (1904); Burris v. Texaco, Inc., 361 F.2d 169 (4th Cir. 1966). Due to Mullins' and Winchester's substantial control over the most significant aspects of the operation of the mine, the relationship between the parties in this instance was that of principal and agent similar to the typical arrangement where a mine operator employs supervisory personnel to assist in the operation of a mine. See 30 U.S.C. $ 802(e)(defining "agent" as "any person charged with the responsibility for the operation of all or part of a coal or other mine or the supervision of the miners...").

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Bryant's resignation and before the license was recovered from Dingess, the judge denied the motion. 9 FMSHRC at 344. On appeal, Bryant requested permission to put on evidence concerning the successor liability of New River Fuels in the event the Commission determined that his backpay should not have terminated at the time he rejected the offer to be placed on the recall panel. In light of our decision affirming the judge's disposition of the backpay issue, the question of New River's successorship liability need not be pursued.

5/ In light of our agreement with Bryant's theory of liability based on agency principles, we do not reach his alternative argument based on strict liability in the context of section 105(c).

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Although the judge did not expressly find that Dingess was acting as an agent, the factual findings that he did make lead inevitably to this conclusion. Although in its contract with Mullins, Dingess was charged with being wholly responsible for the work force and the operation of the mine, in fact, neither Joe Dingess nor Johnny Dingess had ever operated an underground mine. 9 FMSHRC at 337. Thus, Mullins should have been aware at the outset that Dingess did

not have the technical expertise that must be expected of an independent contractor operating a mine. Other findings relate to Mullins' and Winchester's close supervision of the manner in which mining was carried out. The contract provided that Mullins would retain the right to approve mining plans as developed by Dingess and, as the judge found, Mullins participated in the actual development of plans by hiring an engineering firm to prepare maps and to perform ventilation calculations. 9 FMSHRC at 338. Roger Cook, Winchester's mine manager, testified without dispute that he and Winchester's mine foreman were instrumental in having Dingess develop a second mining section at the mine. Tr. 99. This testimony is consistent with the judge's finding that Mullins and Winchester were involved not only in overseeing Dingess' work, but also in actually performing some of the work involved in the production of coal. 9 FMSHRC at 344.

Further, as the judge stated, Mullins and Winchester had a "continuing presence at the mine." 9 FMSHRC at 343. Cook inspected the mine on a regular basis by going underground two or three times a week. During the course of these inspections, Cook's primary duty was to ensure that Dingess complied with the means and methods of production generally set forth in the mining plans prepared at Mullins' and Winchester's behest. Cook described this duty as "[m]aking sure [Dingess] was following our procedures we set up on retreat mining, or projections that we set forth for them, to make sure that they wouldn't destroy the reserves." Tr. 97. In this regard, he inspected the ventilation and the roof, had problems corrected, and was involved with surface drainage and underground dust control. Tr. 97a-97b. He also stated that he had to "get on" the Dingess brothers to correct problems with surface dust control. Tr. 97b. When Dingess did not correct such a problem, Cook sent Winchester's employees to correct it. Tr. 97b, 11;. On several occasions, Cook instructed Dingess on how to comply with state environmental requirements. Tr 118. Since he was concerned with the amount of coal produced, he reminded Dingess every few days to increase production.

The judge also detailed Mullins' and Winchester's handling of numerous financial transactions involving Dingess' debt payments including payments on Dingess' behalf to suppliers, trucking companies, and repair companies, and cash advances by Mullins and Winchester to Dingess. 9 FMSHRC at 338.

Considered together, these findings establish that Mullins and Winchester were in actual control of the mine at which Bryant worked. 6/

6/ Although the evidence indicates that Dingess exercised control over the hiring, discharging, and laying off of employees at the mine,

As a result, this case is not unlike the more typical situation where a mine foreman or supervisor is endowed with a certain degree of responsibility in the operation of a mine, but whose sphere of control is always subject to the operator's ultimate right to direct the supervisor's work performance in order to ensure compliance with the requirements of the Mine Act. Within this latter framework, it has been consistently held that mine operators are liable for the discriminatory acts of their agents under section 105(c)(1) of the Act. See, e.x., Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 776 F.2d 469 (llth Cir. 1985) (mine construction subcontractor held liable for superintendent's illegal discharge of employees following their protected work refusal); Moses v. Whitley Development Corp., 4 FMSHRC 1475 (1982) aff'd sub nom. Whitley Development Corp. v. FMSHRC, 770 F.2d 168 (6th Cir. 1985)(operator held liable for foreman's illegal discharge of miner); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981) (operator held liable for mine superintendent's illegal discharge of miners engaged in protected work refusal).

Under these circumstances, we hold that the record establishes that Dingess' status as an independent contractor was in name only and that in fact the nature of its relationship with Mullins and Winchester was akin to its being an on-site, supervisory agent for Mullins and Winchester. Therefore, Mullins and Winchester, as operators of the mine at issue, are liable under section 105(c)(1) of the Mine Act for Dingess' discriminatory acts.

III.

The final issue is whether the judge erred in concluding that Bryant's refusal to be placed on the recall panel and his subsequent resignation tolled Bryant's right to back pay. The judge found that following Bryant's discriminatory lay off on April 27, 1984, Aaron Browning offered to place Bryant on a panel for recall to work "in a couple of days at most" (Tr. 278), and that on May 9, 1984, Bryant refused Browning's offer by resigning. 9 FMSHRC at 342. The judge concluded that "the adverse action terminated when [Bryant] refused the offer to be called back" and, therefore, that Bryant was only entitled to back pay with interest for the period of April 27 to May 9. 9 FMSHRC at 342, 344. Bryant argues that Browning's offer of reemployment was insufficient to cut off Mullins' and Winchester's liability for back pay and interest.

Generally, when a discriminatee is unconditionally and in a bona fide fashion offered reinstatement, the running of back pay is tolled. B. Schiel and P. Grossman, Employment Discrimination Law, at 1432 2d ed. (1983); at 279-80 (2d ed. 1983-84 Supp. 1985); see Munsey

v. Smitty Baker Coal Company, Inc., 2 FMSHRC 3463, 3464 (December 1984)(suitable job offer tolls back pay due discriminatee). The Supreme Court has

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such control of personnel decisions is not inconsistent with Dingess' status as an agent, but rather describes the degree of authority granted to Dingess in this particular area of responsibility.
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emphasized that only in "exceptional" circumstances will a discriminatee's rejection of an unqualified job offer not end the back pay period. Ford Motor Co. v. KFOC, 458 U.S. 219, 238 39 n.27 (1982). In light of these principles, we hold that the judge did not err in determining the period for which Bryant is entitled to back pay and interest.
The undisputed testimony of Browning and of Stanley Wells, the union's safety committeeman and Bryant's representative in negotiations with Browning, is that the offer to place Bryant on the recall panel was made without restrictions. Thus, the question is whether the offer was in fact a bona fide offer of reemployment. The contract between Dingess and Mullins specified that the procedure for returning laid off miners to work was through the recall panel process. The bargaining between Browning and Bryant, during which Browning offered to place Bryant on the recall panel. was part of Bryant's contractual grievance negotiations, but Bryant's discrimination complaint and Bryant's grievance arose out of the same circumstances.
Browning testified that once Bryant was on the panel, Browning intended to recall Bryant to work as a helper or a laborer. Bryant does not argue that these jobs were not comparable with his former position as a shuttle car driver. Rather, he argues that Browning's job offer was nothing more than an empty promise. Bryant relies on the fact that when the offer was made, a recall panel did not exist and, in fact, never had been used at the mine. However, the record contains no evidence of events that would have given rise to the creation of a panel prior to this time. Further, the testimony of Wells establishes that Bryant had assurances that the panel procedure would be instituted and that he would be recalled to a job within a matter of days. Wells stated that Browning told him and the union representative that Bryant would be given a "place on the panel" and that Browning "guaranteed ... that he would have Bryant back to work within two or three days." Tr. 165, 167. When asked if he had communicated these assurances to Bryant, Wells replied that he had. Id. 7/
The judge credited Wells' testimony that Browning had

"guaranteed" that Bryant would be called back to work within two or three days and that Bryant knew this when he refused the offer. 9 FMSHRC at 340. Credibility is an issue for the judge to decide. As the Commission often has stated, a judge's credibility resolutions cannot be overturned lightly (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629 (November 1986)) and we discern nothing in the present record that would justify us taking this extraordinary step. Therefore, we conclude that substantial evidence supports the judge's finding that Browning agreed to place Bryant on a recall panel and that Browning guaranteed that Bryant would be called back to work within two or three days. Given

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7/ While Bryant testified 'hat nothing was communicated to him about a job offer, he admitted that he knew that the union had agreed on his behalf to settle the grievance by having him placed on a recall panel and that he knew at the time of his resignation that Browning had offered to put him on a recall panel. Tr. 308, 311.

these findings, we hold that Browning's offer, which Bryant refused, was more than a "mere promise" of a job.

The judge did not explicitly find that Bryant's rejection of Browning's offer was unreasonable, but his conclusion that Bryant's refusal of the offer and his resignation terminated the back pay period implies that it was. The fact that a recall panel had not been previously implemented does not mean that one would not be instituted in an effort to resolve the present dispute. Indeed, Bryant's representatives who had negotiated directly with Browning believed that Browning intended to do as he promised and the record supports the judge's finding that this belief was conveyed to Bryant. We especially note that at the time he rejected the offer and resigned Bryant had little to lose by accepting the offer. Had Bryant agreed he would have been put on a recall panel, with Browning's guarantee that he would have been reemployed. Thereafter, if Browning had failed to recall Bryant to work, Bryant would have had a clear basis for further relief. 8/

IV.

Accordingly, we hold that Mullins and Winchester are liable under section 105(c)(1) of the Mine Act for the discriminatory act of their agent, Dingess. Furthermore, we hold that Bryant's refusal to accept the offer to be placed on the recall panel and his subsequent resignation terminated his right to back pay beyond May 9, 1984. Therefore, the decision of the judge is reversed in part and affirmed in part. The judge, however, reduced the amount of attorneys' fees awarded to Bryant's attorneys by one-third, concluding in part that they had spent a large portion of their time

attempting to establish the liability of Mullins and Winchester, a theory which he had rejected. 9 FMSHRC at 942. The judge also noted that the damages recovered were limited to nine days backpay without reinstatement. The judge did not specify to what extent these two separate considerations individually contributed to his one-third reduction in the attorneys' fees awarded. In view of our reversal of the judge on the issue of the liability of Mullins and Winchester, and our affirmance on the issue of backpay, we therefore find it necessary to remand this proceeding to the judge for a redetermination of the attorneys' fees award.

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8/ Bryant alleges that during the discussions with Browning no mention was made regarding the correction of safety hazards on the shuttle car. Tr. 309. Bryant argues that accepting the job offer without an agreement to correct the safety hazards of which he complained would allow Dingess to avoid compliance with mine safety standards. PDR 26. This argument misses the mark. Bryant was not to be recalled as a shuttle car operator. Also, should Bryant have returned to work and have found working conditions that he, in good faith, believed to be hazardous, he had the right, to request an inspection by MSHA or to engage in another protected work refusal. 30 U.S.C. $ 813(g).

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Accordingly, the judge's decision is affirmed in part, reversed in part and remanded for further proceedings consistent with this decision.

Ford B. Ford, Chairman
Richard V. Backley, Commissioner
James A. Lastowka, Commissioner
L. Clair Nelson, Commissioner

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

I concur with the majority that substantial evidence supports the judge's decision that the adverse action against Bryant terminated when Bryant refused reemployment and resigned. I respectfully dissent, however, from the majority's legal determination that Mullins and Winchester exerted substantial control over the most significant aspects of the mine's operation and that, thus, Dingess was their agent. Based on this determination, the majority found that Mullins and Winchester were liable for Dingess' discriminatory action against Bryant. I disagree.

While acknowledging that the judge did not find that Dingess was an agent, the majority bases its decision that Dingess was not an independent contractor on four specific fact determinations made by the administrative law judge, which, they believe, lead to the conclusion that Dingess was, in fact, an agent.

The first fact on which the majority relies is that Dingess never previously operated an underground mine. While there is no dispute that the Dingess brothers had not themselves previously operated a mine, Mullins had "direct knowledge of the work history of Joe and Johnny Dingess in deep mine operations, to the extent that [they] felt comfortable that they were familiar with coal mining operations." Tr. 197. See also Tr. 93-94. Mullins' decision to hire Dingess was also based on its eight months experience with the Dingess brothers during which they served as an electrical contractor for Mullins/Winchester. They were found to be hard working, diligent, straightforward, knowledgeable and reputable and they had delivered quality work, on schedule, within budget. Tr. 199. Whether it was reasonable or unreasonable, wise or unwise, for Mullins to hire Dingess as an underground mining contractor is a question of fact and could turn on other factors, such as the technical expertise of those Dingess planned to hire, of which we have no evidence of record. But whatever those factors might show, they have no bearing on the issue of control, which the majority observes is determinative in deciding whether Dingess was an independent contractor or the agent of Mullins.

The second factor on which the majority relies is what they characterize as "close supervision" of the manner in which mining was carried out. Mullins retained the right to approve Dingess' mining plans and the judge found that Mullins hired an engineering firm to prepare mine maps and to perform some ventilation calculations, and were instrumental in having Dingess develop a second section. I do not find any of these actions to be indicative of the type of control that differentiates an independent contractor from an agent. Retaining the right to approve mining plans is standard in the coal mining industry, required by owners, lessors and production operators alike in order to assure that the reserves are not robbed by an operator seeking 'o mine what can be

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obtained quickly and cheaply and leaving what is difficult and expensive. Neither the preparation of maps to reflect the mine plans nor the performance of ventilation calculations reflect control or anything more than assistance in performing specific tasks required to fulfill an operator's obligations under the Mine Act. In addition, it is unrealistic to think that, whatever the relationship between production operator and contract miner, a second section would be developed without consultation and negotiation between them, if only to assure that the additional coal could be processed and sold.

The third finding of fact on which the majority relies in concluding that an agency relationship exists, is that Mullins and Winchester had a "continuing presence at the mine." There is no dispute that Cook inspected the mine frequently to insure compliance

with mine plans, to inspect roof and dust control and to monitor surface drainage. Tr. 97a-97b. He had to "get on" Dingess about surface dust control and he instructed them on compliance with state environmental requirements. Tr. 97b. In essence, Cook tried to assure that Dingess obeyed federal and state laws and regulations. As the U.S. Court of Appeals for the D.C. Circuit noted in Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 875: "Government regulations constitute supervision not by the employer but by the state." The court went on to state:

> Thus, to the extent that the government regulation of a particular occupation is more extensive, the control by a putative employer becomes less extensive because the employer cannot evade the law either and in requiring compliance with the law he is not controlling the [independent contractor]. It is the law that controls the [independent contractor]. Thus requiring [independent contractors] to obey the law is no more control by the lessor than would be a routine insistence upon the lawfulness of the conduct of those persons with whom one does business.

603 F.2d 875. The court found :his to be a far cry from the restrictions alluded to in the Restatement (Second) of Agency, $220, in which a person's physical activities and his time are surrendered to the control of a master. I find the behavior here of Cook in attempting to assure Dingess' compliance with laws, regulations and permit restrictions, even if done only to protect Mullins/Winchester from citations, penalties and permit revocations on account of Dingess' behavior, to be simply that, and not evidence that Mullins/Winchester were exerting substantial control over Dingess. See also Moushey v. United States Steel Corporation, 374 F.2d 561, 568 (3rd Cir. 1967).

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The last fact on which the majority relies is Mullins' and Winchester's handling of numerous financial transactions on behalf of Dingess regarding its debt payments and their making cash advances to Dingess. While I do not see that cash advances bear at all on the issue of control, the other transactions may, in fact, indicate an element of control, depending to some extent on whether Dingess authorized the procedure, agreed to it, or merely acquiesced in it. which :he record does not make clear. They should be weighed along with any other record evidence of those factors that actually reflect on an agency versus independent contractor relationship. Although "[a]11 of the circumstances" are to be examined in determining whether one is an employee or an independent contractor, Frito-Lay, Inc. v. NLRB, 385 F.2d 180, 187 (7th Cir. 1967); NLRB v. A.S. Abell Co , 327 F.2d 1, 4 (4th Cir. 1964), the most important

element is the extent of the actual supervision exercised by the putative employer over the "means and manner" of the worker's performance. Lodge 1858 v. Webb U.S. D.C., 188 U.S. App. D.C. 233, 241-245, 580 F.2d at 504-508 (1978); Independent Owners-Operators, Inc. v. NLRB, 407 F.2d 1383, 1385 (9th Cir. 1969). While the majority concludes that "Dingess was acting as a supervisory agent in a working environment where the operation of the mine was effectively controlled and directed by Mullins and Winchester" (Slip op. at 6), the record reflects otherwise. Complainant's own witness, Stanley Wells, testified that Roger Cook never told him to do anything in the mine, that he wouldn't have done it anyway, and that he (Cook) "didn't have nothing to do with the mines." Tr. 151, 152. He testified further that he never observed Cook directing any of the other miners. Tr. 152. Donnie Adams never saw Roger Cook or any other Winchester employee at the mines. Tr. 133. Browning hired Bryant without checking with anyone else. Tr. 46-47. He told him to shoot coal rather than run the shuttle car when Bryant complained about its condition. Tr. 25. He settled Bryant's union grievance, Tr. 36. Reed Peyton was hired by Joe Dingess and told to report to Browning. Tr. 81. Donnie Adams was hired by Aaron Browning, and considered him to be the boss. Tr. 126, 130. In addition, the judge specifically found that no miner complained to Cook about unsafe equipment and that Dingess, and not Mullins/Winchester, hired Bryant, directed his work activity and laid him off. 9 FMSHRC 339, 343. He further found that Mullins/Winchester were in no way involved in the adverse action against Bryant. 9 FMSHRC 343.

It is also clear from the record that Mullins/Winchester did not control the Dingess brothers. Mullins/Winchester had to follow up and do things that Dingess failed to do. Tr. 97(c), Tr. 117. Joe and Johnny Dingess were never around the mines, nobody knew where they were. Tr. 111, 112. The Dingesses failed to comply with DNR requirements even though urged to do so by Mullins/Winchester, they simply didn't do it. Tr. 118. Sometimes Roger Cook would notify Dingess about rock dusting and "sometimes they would do it and sometimes they wouldn't." Tr. 143.

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I find nothing in either the judge's findings of fact or in the record which, on balance, leads me to conclude that Dingess was the agent of Mullins/Winchester rather than an independent contractor. Rather, I find that the record shows the contrary. Mullins/Winchester hired a contractor that they thought was competent. As time went on, Dingess' performance deteriorated in terms of both coal production and in performance of its obligations under their contract and under federal and state mining laws and regulations. Mullins/Winchester did not stand idly by in the face of Dingess' deteriorating performance

and the majority concludes that these efforts, many of them aimed toward compliance with the Mine Act, destroyed Dingess' status as an independent contractor. I disagree. I do not believe that Mullins/Winchester's actions exhibited the type or degree of control necessary to destroy the independent status of Dingess. Further, I am of the opinion that owners should be encouraged to monitor compliance by their contractors rather than discouraged from doing so. Accordingly, I would find that Mullins/Winchester were not liable under section 105(c)(1) of the Mine Act for Dingess' discriminatory acts under the Complainant's agency theory. Thus, in my opinion, Mullins/Winchester's liability or lack thereof would turn on the Complainant's strict liability theory, a matter not reached by the majority.

Joyce A. Doyle, Commissioner

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