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J. A. GILBERT (MSHA) V. SANDY FORK MINING  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
June 28, 1990

JOHN A. GILBERT

v.

Docket No. KENT 86-49-D

SANDY FORK MINING COMPANY, INC.

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

v.

Docket No. KENT 86-76-D

SANDY FORK MINING COMPANY, INC.

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

ORDER

BY THE COMMISSION:

This discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) ("Mine Act"), is on remand to the Commission pursuant to an opinion of the United States Court of Appeals for the District of Columbia Circuit reversing and remanding our prior decision in this matter. *John A. Gilbert v. FMSHRC*, 866 F.2d 1433 (1989), rev'd, *John A. Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327 (August 1987). In response to the Court's decision, the Commission resolved at the Commission level all factual issues remanded by the Court in favor of Gilbert. We ordered a remand, however, so that Commission Administrative Law Judge Gary Melick could address remaining remedial issues. 12 FMSHRC 177 (February 1990). *Sandy Fork Mining Company, Inc.*

("Sandy Fork") filed a Petition for Reconsideration requesting that we reconsider our decision entering factual findings at the review level and that we remand to the administrative law judge the issues remanded by the Court concerning the merits of this case. 1/ Mr. Gilbert opposes this motion. For the

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1/ Sandy Fork's Petition for Reconsideration does not question that part of the Commission's decision reinstating Gilbert's individual

reasons set forth below, the Petition for Reconsideration is granted. 2/

The facts and procedural history of this proceeding are set forth in detail in the Commission's prior decisions and will not be repeated here. See 9 FMSHRC 1327 (August 1987) and 12 FMSHRC 177 (February 1990). Following an evidentiary hearing, the administrative law judge determined that Sandy Fork had not violated section 105(c)(1). 8 FMSHRC 1084 (July 1986). The Commission affirmed his decision on substantial evidence grounds. The Court reversed the Commission's decision and remanded the case back to the Commission for further consideration.

The Court raised a number of specific questions to be resolved by the Commission. The Court explained:

On the record as we understand it, it is plain that Gilbert made a good faith attempt to communicate his reasonable fears to management. What is not clear however, is whether management addressed Gilbert's concerns in a way that his fears reasonably should have been quelled. In other words, did management explain to Gilbert that the problems in his work area had been corrected? Or did management indicate to Gilbert that he would be assigned to another area in the mine that was free of safety problems? Or did management indicate to Gilbert that the situation was unsettled, and that he should wait five hours (until the start of his assigned shift) before inquiring further about safety conditions in his area? These questions must be answered by the Commission in order for it to determine whether the management at Sandy Fork reasonably addressed Gilbert's fears on the morning of August 7. If management effectively "stonewalled" Gilbert in responding to his inquiries on the 7th, then his continued fears regarding work hazards were reasonable, and his refusal to return to work cannot be viewed as either unreasonable or in bad faith. On remand, the Commission will be required to make the necessary factual findings to address these issues.

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complaint brought under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). 12 FMSHRC at 182-83. In its original decision, a majority of the Commission had granted the Secretary of Labor's motion to dismiss the complaint brought by Gilbert on his own behalf. The Court reversed this conclusion. In light of the Court's decision, in our February 16,

1990 decision we reinstated Gilbert's private complaint. That aspect of the Commission's decision is not affected by this order.

2/ Sandy Fork petitioned for review of the Commission's February 16, 1990 decision with the U.S. Court of Appeals. Sandy Fork Mining Company, Inc. v. John A. Gilbert, No. 90-1145 (D.C. Cir. filed March 19, 1990). This proceeding has been stayed pending the Commission's consideration of the Petition for Reconsideration.

On remand, the Commission discussed the evidence and concluded that Gilbert's safety concerns were not addressed by Sandy Fork in a manner sufficient to reasonably quell his fears. 12 FMSHRC at 180-81. The Commission determined that given the Court's belief that Gilbert did not act precipitately and its finding that he entertained a good faith, reasonable belief in a hazard, Gilbert's departure from the mine constituted a discriminatory constructive discharge in violation of section 105(c)(1) of the Mine Act. *Id.*

In its Petition for Reconsideration, Sandy Fork argues that, given the nature of the record in this case and the questions posed by the Court, the Commission should have remanded the case to the trier of fact for the "necessary factual findings" ordered by the Court. It suggests that the findings may turn on the demeanor or credibility of the witnesses and that the administrative law judge is in the appropriate position to make such determinations. In addition, it argues that the Commission exceeded the scope of its authority under the Mine Act by engaging in independent fact finding at the review level. In reply, Gilbert argues that the Commission's decision on remand was mandated by the undisputed testimony of record, that it was unnecessary to remand the case to the administrative law judge, and that the Commission was within its authority in making the narrow determinations ordered by the Court.

Further proceedings before the administrative law judge are already necessary pursuant to our remand order of February 16, 1990. Sandy Fork has explained with some force its concern that the administrative law judge, who is familiar with the witnesses and the testimony, was not given an opportunity to "make the necessary factual findings" ordered by the Court's remand. Although we do not agree with Sandy Fork's contention that the Commission was required under the circumstances to remand this issue to the judge, upon reconsideration and in the exercise of our discretion, we believe it is more appropriate to do so in order to assure that all parties are given a full and fair opportunity to respond to the Court's order. Therefore, we grant Sandy Fork's Motion for Reconsideration and remand this proceeding to the judge to respond to the Court's remand on the merits of Gilbert's complaint. To the extent, however, that Sandy Fork is requesting that the record be reopened for the introduction of further evidence in this case, the motion is denied. The record was fully developed in the hearing before the administrative law judge. All that is necessary at this juncture is the entry of further findings.

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For the foregoing reasons, we vacate that portion of our decision of February 16, 1990, resolving the merits of Gilbert's discrimination complaint. We remand this matter to the judge for determination, on the existing record, of the issues raised by the Court on the merits of Gilbert's discrimination complaint, as set forth above, and for determination of any outstanding remedial issues.

#### Distribution

Tony Oppegard, Esq.  
Appalachian Research & Defense  
Fund of Kentucky, Inc.  
P.O. Box 360  
Hazard, Kentucky 41701

Ronald E. Meisburg, Esq.  
Smith, Heenan & Althen  
1110 Vermont Ave., N.W.  
Washington, D.C. 20005

Colleen A. Geraghty, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd.  
Arlington, VA 22204

Administrative Law Judge Gary Melick  
Federal Mine Safety and Health Review Commission  
Two Skyline Place, Suite 1000  
5203 Leesburg Pike  
Falls Church, Virginia 22041