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MSHA (MICHAEL PRICE, JOE VACHA) AND,
UMWA V. JIM WALTER RESOURCES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 20, 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of MICHAEL L. PRICE
and JOE JOHN VACHA

and

UNITED MINE WORKERS OF AMERICA

v. Docket No. SE 87-128-D

JIM WALTER RESOURCES, INC.

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

DECISION

BY: Backley, Doyle and Nelson, Commissioners

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), involves a discrimination complaint brought by the Secretary of Labor against Jim Walter Resources, Inc. ("JWR"). The complaint alleges that complainants Michael L. Price and Joe John Vacha were discharged in violation of section 105(c) of the Mine Act after they failed to provide urine samples required under section II.E. of JWR's Substance Abuse Rehabilitation and Control Program ("Drug Program").

Commission Administrative Law Judge James A. Broderick concluded that section II.E. of the Drug Program, which applies to certain supervisory and hourly employees, "whose duties, whether by job title or

by reason of elected office, involve safety," is facially discriminatory because the only hourly employees covered are members of the safety committees at JWR's mines. 10 FMSHRC 896 (July 1988) (ALJ). The judge accordingly determined that the discharges of Price and Vacha pursuant to the Drug Program after they failed to provide urine samples were illegal under section 105(c), 30 U.S.C. 815(c), and ordered their reinstatement. The judge further found, however, that section II.E. of the Drug Program had not been discriminatorily applied to Price and

Vacha. The judge issued a supplemental decision awarding back pay and expenses and assessing a civil penalty of $500. 10 FMSHRC 1108 (August 1988)(ALJ). We granted JWR's petition for discretionary review and heard oral argument. For the following reasons, we reverse the judge's determination that the Drug Program is facially discriminatory under section 105(c) of the Mine Act. We also reverse the judge's conclusion that section II.E. was not discriminatorily applied to Price and Vacha, and remand for further findings and analysis as explained below.

I.

Factual Background and Procedural History

JWR operates five underground coal mines, a training facility, and a central shop, all located in Alabama, employing over 2,800 employees, including 2,200 hourly workers represented by the UMWA. Each JWR mine has a local union, all affiliated with District 20 of the UMWA. At all times relevant to this proceeding, the UMWA and JWR were signatories to a collective bargaining agreement governing labor relations in the JWR mines.

The bargaining agreement establishes a Mine Health and Safety Committee at each mine composed of miners "who are qualified by mining experience and training and selected by the local union." The committee is given the right to inspect any portion of a mine and to report any dangerous conditions to management. If the committee believes that an imminent danger exists and recommends that the mine operator remove all employees from the involved area, the operator is required to comply with the recommendation. The judge noted: "Under the Act, the safety committeemen are considered representatives of the miners. They may request MSHA inspections under section 103(g), and normally accompany the MSHA inspector during his physical inspections of the mine." 10 FMSHRC at 902. The safety committeemen are elected by members of the UMWA, and committeemen choose their chairmen and select alternate committee members. Id.

At a meeting held in or around April 1986, JWR representatives and UMWA officials agreed that a significant problem of substance abuse existed among JWR's miners. High discharge, accident and absentee rates were attributed, at least in part, to drug abuse. 10 FMSHRC at 898. The representatives agreed that the problem should be addressed by a joint company-union program. Id. Richard Brooks, JWR's Vice President for Industrial Relations, proposed that the program include education, drug testing, and rehabilitation. The UMWA believed that development of the program should be subject to the collective bargaining process. Id.

Brooks subsequently prepared a proposed draft program, which was submitted to UMWA representatives in July 1986. Brooks received no response to the draft from the UMWA, and JWR distributed copies of its Drug Program to UMWA district and local representatives at a meeting on September 24, 1986. In October 1986, JWR advised UMWA representatives that the Drug Program would take effect on January 1, 1987. By early November 1986, a notice containing a copy of the Drug Program was posted at each mine location and each employee received a copy of the program

with his or her paycheck. !/

The details of the Drug Program are summarized in the judge's decision. See 10 FMSHRC at 809. At issue is section II.E. of the Drug Program, dealing with random drug testing, which states:

> Any employee whose duties, whether by job title or by reason of elected office, involve safety, shall be subject to random testing for substance abuse up to four times per calendar year. Physicals for hoistmen shall also include testing for substance abuse. All provisions of the program shall apply to employees in this category.

The judge accepted Brooks: testimony that, as used in section II.E., the phrase "employee[s] whose duties ... by job title ... involve safety" encompassed safety inspectors, dust and noise control supervisors, and section foremen, all salaried positions. 10 FMSHRC at 899. The only hourly employees covered were union safety committeemen, who came under the phrase "employee[s] whose duties ... by reason of elected office ... involve safety." Id.

At the time the Drug Program was implemented, complainants Michael

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1/ On November 5, 1986, the UMWA filed charges with the National Labor Relations Board ("NLRB"), pursuant to the National Labor Relations Act, 29 U.S.C. 151 et seq. (1982)("NLRA"), challenging JWR's unilateral implementation of the Drug Program. The NLRB deferred to arbitration proceedings, also initiated by the UMWA, premised on the parties' collective bargaining agreement. JWR and the UMWA subsequently reached a settlement before the arbitrator, the terms of which were set out in an Opinion and Award dated January 27, 1987. Under that opinion, JWR would implement its Drug Program and the arbitrator would retain jurisdiction to resolve any grievances arising under the program.

After the first grievances were filed and acted on, the UMWA filed suit in federal district court to vacate the arbitrator's decision, alleging that the union had not agreed to implementation of the Drug Program. The district court granted summary judgment in JWR's favor, and denied the UMWA's motion for reconsideration. On July 27, 1988, the United States Court of Appeals for the Eleventh Circuit summarily affirmed the district court. (By order of October 12, 1988, we permitted JWR to supplement the record in the present proceeding to include therein a copy of the Eleventh Circuit's unpublished order.)

Meanwhile, the UMWA renewed its unfair labor practice charges before the NLRB. In a letter dated August 31, 1988, the NLRB regional director declined to institute an unfair labor practice complaint based on those charges. (This letter is also included in the supplement to the record referred to above.) The Regional Director noted that the district court and Eleventh Circuit had rejected the UMWA's claim that it had not agreed in settling the arbitration to waive objections to implementation of the Drug Program.

L. Price and Joe John Vacha were employed at JWR's No. 4 Mine, an underground coal mine located near Tuscaloosa, Alabama. 2/ Price had worked for JWR for approximately nine years and had been a union safety committeeman for about eight and one-half years. Vacha had also worked for JWR for nine years, and had been a union safety committeeman for approximately six years. Price was classified as a longwall helper and Vacha as a continuous miner operator although, in recent years, he had actually worked on assembling self-contained rescuers.

Vacha had filed from 75 to 100 safety or health complaints with the Secretary under section 103(g)(1) of the Mine Act, 30 U.S.C. 813(g)(1), and had participated in 50 to 75 safety grievances. Price had filed approximately 25 section 103(g)(1) complaints annually and had handled approximately 70 safety grievances. Price and Vacha estimated that they spent approximately 50% of their working time on safety committee duties. Both had been involved in disputes with management over safety-related activities and in 1986 Price had been discharged but reinstated following arbitration.

In late February 1987, Brooks decided to begin random testing of the safety-related employees in all the JWR Mines under section II.E. of the Program. He notified the industrial relations supervisors of this decision and directed them to test all employees covered by section II.E. on March 2, 1987. The record reflects, however, that, for various reasons, the urine samples were obtained from affected employees on March 2, 3, 6, and 9, and on April 8, 1987. In the No. 4 Mine, where Price and Vacha worked, sampling was delegated by the Industrial Relations Supervisor, Rayford Kelly, to Wyatt Andrews, a JWR safety inspector, and Bob Hendricks, a JWR associate safety director. (In the other mines, the samples were taken under the direct supervision of the industrial relations supervisors.)

Price and Vacha worked on the day shift -- 7:00 a.m. to 3:00 p.m. At about 8:00 a.m. on March 2, 1987, Price was informed that he would have to submit a urine sample. Vacha was similarly notified at about 11:30 a.m. At the end of their shift, they went to the office of Rayford Kelly. Complainants went into a bathroom with Andrews but were unable to urinate. Water, coffee and soft drinks were made available, but the requested urine samples were not forthcoming. At about 7:00 p.m. (four hours after completion of their shift), Kelly told Price

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2/ Neither Price nor Vacha testified at the hearing on the merits in this proceeding. The recitation of facts is based on testimony and other evidence incorporated by the judge in his decision (10 FMSHRC at 897) from earlier proceedings concerning their temporary reinstatement.

On July 7, 1987, upon application by the Secretary, the judge ordered that the miners be temporarily reinstated pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. 815(c)(2), and Commission Procedural Rule 44, 29 C.F.R. 2700.44 (1986). We have previously affirmed that order. 9 FMSHRC 1305 (August 1987). JWR appealed the Commission's temporary reinstatement order to the United States Court of Appeals for the Eleventh Circuit, where the matter currently is pending (No. 87-7484, petition for review filed August 7, 1987).

and Vacha that they would be given 30 minutes to provide a sample or they would be disciplined. Price.'s request that they be permitted to return the next morning to provide the samples was refused. At approximately 7:20 p.m., they were given five more minutes to produce a specimen or be discharged. At 7:30 p.m., they were each given formal five-day suspensions with intent to discharge for insubordinate conduct. The following morning, March 3, 1987, Price and Vacha had drug screening tests at the Emergicare Center (JWR's contract physicians) and at the Longview Hospital, respectively. The test results were negative and were submitted to JWR. 10 FMSHRC 900-01, 909-10. 3/

On March 9, 1987, Price and Vacha filed discrimination complaints with the Secretary pursuant to 30 U.S.C. 815(c)(2). As noted, the Secretary's application for temporary reinstatement was granted by the judge and affirmed by the Commission. Subsequently, the Secretary filed a section 105(c)(2) complaint on their behalf and the UMWA intervened on behalf of complainants. A hearing on the merits was held before Judge Broderick.

At the hearing, JWR's Brooks testified that section II.E. of the Drug Program covered all JWR supervisors, safety and associate safety inspectors, dust and noise control supervisors, and section and maintenance foremen. Tr. 65-66. Safety committeemen were also included, he stated, because "they have the highest responsibility for safety of anybody in the coal mine." Tr. 67. See also Tr. 76, 77. Brooks estimated that in carrying out safety-related duties, a safety committeeman spent about 50% of his working time engaged in safety inspections, accompanying MSHA inspectors, and preparing "paper work" in the safety office. Tr. 72-75. Brooks had no specific knowledge about drug problems among present committeemen but, because of their safety-related duties, began randomly testing them. Tr. 83. Under section II.E., he explained, JWR supervisory employees had been tested numerous times, "almost every month," and the committeemen once. Tr. 86. As part of the testing commenced on March 2, 1987, urine samples were taken at the No. 4 Mine from four management safety personnel and the owl shift safety committeeman.

In.his decision, Judge Broderick reviewed the Drug Program and its implementation, the functions of the safety committee, and industry drug abuse programs. 10 FMSHRC at 898-906. He found initially that Price and Vacha "had physical or psychological difficulties in providing the required samples on March 2, 1987, ... [and] did not refuse to submit the urine samples, but were unable to do so under the circumstances present on the evening of March 2 at the ... mine." 10 FMSHRC at 905-06. He also examined JWR's motivation in adopting the Drug Program. He rejected arguments by the Secretary and the UMWA that section II.E.

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3/ Price and Vacha filed grievances over their discharges. On April 13, 1987, the arbitrator issued an opinion sustaining the discharges. See 10 FMSHRC at 901-02. As discussed at some length in Judge Broderick's decision, the judge determined that deference to the arbitrator's findings and conclusions was not appropriate. See 10 FMSHRC at 910-11.

intentionally targeted UMWA safety committeemen out of hostile or discriminatory motivation:

> There is no evidence that Section II.E. or any other part of the plan was motivated in any part by hostility to safety committee members. I accept Mr. Brook[s'] testimony that he included safety committee members in section II.E. because he believed that they had such a high degree of responsibility for safety in the mines.

10 FMSHRC at 904.

Notwithstanding the above finding of nondiscriminatory motivation, the judge concluded that an operator:s policy or program can itself violate the Mine Act, regardless of the operator's motivation in adopting the program. 9 FMSHRC at 906, citing Local Union 1110, UMWA/Robert Carney v. Consolidation Coal Company, 1 FMSHRC 338 (May 1979). According to the judge, enforcement of such a program against a miner or miners' representative can be prohibited under the Mine Act irrespective of the operator's motive. Id.

The Secretary called as witnesses 17 JWR hourly employees who were committeemen or officials of the UMWA. Judge Broderick summarized this body of testimony as follows:

> The evidence establishes that the miners at JWR view mandatory drug testing with varying degrees of hostility: many consider it to be accusatory and believe that it casts suspicion of drug use on persons being tested. They look upon the testing procedures followed by JWR as an invasion of privacy and an affront to their dignity. Further, some of the miners have been exposed to news media reports which cast doubt on the accuracy of the testing procedures. Thus, they expressed fear that they might be erroneously branded as drug users. These suspicions and doubts seem to me to have resulted in part at least from an inadequate education effort on the part of JWR, and from the fact that the program was instituted unilaterally, without the participation of the unions.
>
> The members and potential members of the mine safety committee reacted negatively and hostilely to the provisions of [section] II.E. which they viewed as unfairly singling them out for random testing

four times annually. As a result of this reaction, some committee members have resigned; others have considered resigning (only one test has been conducted to date because of the pending litigation), and further testing may cause further resignations. Still others have refused to accept safety committee positions or to run for election to them.

10 FMSHRC at 907.

The judge then stated:

> Based on this review of the evidence, I conclude that one effect of the drug abuse program has been to severely limit the independence and therefore the effectiveness of the committees. This is true without regard to the motivation of JWR in instituting the plan.

10 FMSHRC at 907. After discussing the importance of the safety committees at JWR's mines, the judge concluded that the effect of the Drug Program was to "diminish" the "rights and responsibilities of the miners' representatives" and that, therefore, Section II.E. was "facially in violation of section 105(c) of the Act." 10 FMSHRC at 907- 08. He further determined that the discharge of Price and Vacha "because they refused to participate in the program" was, accordingly, in violation of section 105(c) of the Act. 10 FMSHRC at 908.

Based on his determination that section 11.E. was facially discriminatory, the judge ordered that complainants be permanently reinstated with back pay and other benefits, that their records be expunged of references to their discharge, and that JWR cease enforcement of section II.E. against safety committee personnel. 10 FMSHRC at 911. In a supplemental remedial decision, the judge awarded specific sums of back pay with interest and expenses and assessed a civil penalty of $500. 10 FMSHRC at 1109"10.

The judge also proceeded to discuss whether, even if section Il.E. is not facially discriminatory, it was discriminatorily applied to Price and Vacha because of their activities as safety committeemen. The judge found that both miners had engaged in protected activity as committeemen. Specifically, he found that Price and Vacha had the reputation of being safety activists, "notorious" for filing safety complaints, and that their numerous safety committee activities were "clearly protected" by the Act. 10 FMSHRC 903, 909.

The judge concluded that the discharge of Price and Vacha was motivated in part because of their protected activity as committeemen and that complainants had established a prima facie case of discrimination. 10 FMSHRC at 909-10. However, he went on to conclude that JWR affirmatively defended by showing that it would have terminated them in any event for the unprotected activity of failing to provide a urine specimen.

We granted JWR's subsequent petition for discretionary review, which essentially raises three assignments of error: (1) the judge erred in holding that JWR's Drug Program violated section 105(c) of the Act, absent proof of any discriminatory motive; (2) the judge erred because he failed to weigh JWR's legitimate safety concerns against the purported adverse effects of the Drug Program on safety committeemen;

and (3) Price and Vacha should not be reinstated because they were not discharged for activities protected by the Mine Act.

In its brief on review, the UMWA replied to the issues raised in JWR's petition for review and, in Part III of its brief, further argued that the judge had erred in concluding that the Drug Program was not discriminatorily applied to Price and Vacha. UMWA Br. 21-27. In response, JWR filed a motion to strike the latter portion of the UMWA's brief as being outside the proper scope of Commission review. Both the UMWA and the Secretary responded in opposition to JWR's motion to strike.

While this proceeding was pending on review, attorneys representing JWR in bankruptcy proceedings (different attorneys from those representing JWR in this proceeding) filed with the Commission a "Notice of Automatic Stay and Notice of Case under Chapter 11 of the United States Bankruptcy Code." This summary notice states that JWR, as a bankruptcy debtor, has filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. 101 et seq. (1982) ("Bankruptcy Code"), in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, Case No. 89-9715-8Pl. The notice recites a portion of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. 362, and implies that the stay applies to this discrimination proceeding.

Subsequently, the Commission issued an order directing the parties to file supplemental memoranda "addressing the question of whether the automatic stay provision of 11 U.S.C. 362(a)(1) applies to this Commission proceeding, with particular reference to the exceptions contained in 11 U.S.C. 362(b)(4) & (5)." The Secretary, the UMWA, and the attorneys representing JWR in this discrimination proceeding have filed responses, all arguing that this discrimination proceeding is excepted from the automatic stay provision of 11 U.S.C. 362(a)(1). The attorneys representing JWR in the bankruptcy proceeding did not file a response to the Commission's order.

II.

Disposition of Issues

A. JWR,s motion to strike and effect of bankruptcy proceedings

We address first the threshold matters of JWR's motion to strike a portion of the UMWA brief and the effect, if any, of JWR's pending bankruptcy petition on this Commission proceeding. With respect to the motion to strike, under the Mine Act "[a]ny person adversely affected or aggrieved" by a decision of a Commission administrative law judge may file

with the Commission a petition for discretionary review of the judge's decision. 30 U.S.C. 823(d)(2)(A)(i)-(iii). See also, Commission Procedural Rule 70(a), 29 C.F.R. 2700.70(a). In general, once such a petition is granted, Commission review is limited to the questions raised by the petition, unless pursuant to the provisions of the Act, the Commission, sua sponte, has directed review of other issues. 30 U.S.C. 823(d)(2)(A)(iii), (B), & (C). See also them run for election

Commission Procedural Rules 70(f) & 71, 29 C.F.R. 2700.70(f) & 71. Here, the Secretary and the UMWA obtained below a favorable judgment awarding complainants the remedial relief sought. Therefore, it is not surprising that, as the prevailing parties, they did not file a petition for discretionary review in this matter objecting to those findings and conclusions of the judge that rejected certain of their positions.

After JWR filed its petition for review, the Secretary and UMWA were not compelled to file cross-petitions for review in order to preserve their right to raise on review certain objections to other portions of the judge's decision. Rather, adopting the general federal rule of appeal, we hold that, in such circumstances, the "appellee" may urge in support of the judgment below any matter or issue appearing in the record, even if it involves an objection to some aspect of the judge's reasoning or issue resolution, so long as the appellee does not seek to attack the judgment itself or to enlarge its rights thereunder, in which case it would be obliged to file a cross-petition for discretionary review. See, e.g., Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970); United States v. American Ry. Exp. Co., 265 U.S. 425, 435-36 (1924); Freeman v. B&B Assoc., 790 F.2d 145, 151 (D.C. Cir. 1986). The UMWA's attack in Part III of its brief on the judge's resolution of the issue involving application of the Drug Program to Price and Vacha is based on matters in the record, is not inconsistent with the judgment of discrimination rendered below and does not seek any greater relief than already granted. Accordingly, upon consideration of JWR's motion to strike and the responses thereto, we deny JWR's motion.

Concerning the effect of the bankruptcy proceeding, we concur with the parties that this matter falls within the exceptions to the automatic stay provisions of the Bankruptcy Code. As a preliminary matter, we hold that we possess jurisdiction in this proceeding to determine tHe effect, if any, of the bankruptcy matter on continuation of this proceeding. See, e.g., Brock v. Morysville Body Wks., Inc., 829 F.2d 383, 385-87 (3rd Cir. 1987); NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 938-39 (6th Cir. 1986).

As pertinent here, section 362 of the Bankruptcy Code provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301 ... of this title ... operates as a stay, applicable to all entities, of--
>
> (1) the commencement or continuation, including the issuance or employment of process, of judicial,

administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title....

> (b) The filing of a petition under section 301 ... of this title ... does not operate as a stay --
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> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> (5) under section (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power....

11 U.S.C. 362(a) & (b).

The term "governmental unit" is defined in the Bankruptcy Code, in relevant part, as the "United States; ... department, agency, or instrumentality of the United States...." 11 U.S.C. 101(26). There is no question that the Secretary, Department of Labor, and Mine Safety and Health Administration are all "governmental units" within the meaning of the Bankruptcy Code. Cf. Edward Cooper Painting, 804 F.2d at 942; NLRB v. Evans Plumbing Co., 639 F.2d 291, 293 (5th Cir. 1981)(concluding that NLRB is a "governmental unit").

The present case was brought by the government, through the Secretary, to effectuate and protect the rights secured by section 105(c)(1) of the Mine Act. This is the kind of "police or regulatory" action covered by the exception to the automatic stay. Cf. EEOC v. Rath Packing Co., 787 F.2d 318, 323 (8th Cir. 1986). See also Morysville Body Wks., 829 F.2d at 388; Edward Cooper Painting, 804 F.2d at 942; Secretary on behalf of George W. Heiney & John Chramm v. Leon's Coal Co., 4 FMSHRC 572, 574-75 (April 1982)(ALJ). Accordingly, we conclude that the present proceeding is not subject to the automatic stay provisions of section 362(a)(1).

Section 362(b)(5) also excepts from automatic stay "enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit:s police or regulatory power...." (Emphasis added.) The courts have recognized that adjudicatory bodies presiding over a governmental "police or regulatory" action may enter a money judgment against a respondent-debtor but may not permit collection of that pecuniary judgment in an enforcement action. E.g., Morysville Body Wks., 829 F.2d at 389; Edward Cooper Painting,

804 F.2d at 942-43; Rath Packing, 787 F.2d at 325-27. See also H.R. No. 595, 95th Cong., 1st Sess. 343 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6299. Here, were a finding of JWR's liability ultimately made judgment could be entered "to fix damages for violation of the law. The enforceability of such a judgment is a matter for other forums.

For the foregoing reasons, we proceed to a disposition of this case.

8. Is section II.E. of JWR's Drug Program Facially Discriminatory?

The general principles applicable to analysis of discrimination issues 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 not motivated in any part 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, e.g., 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).

This is the first discrimination case before the full Commission that involves issues of workplace substance abuse programs and we begin by placing that subject in perspective under the Mine Act.

Nothing in the Mine Act bars a mine operator from adopting a substance abuse control program. The problem of drug abuse in society and the effects of that problem on the workplace are well documented. As the judge noted:

> On September 15, 1986, the President of the United States issued an Executive Order, entitled Drug-Free Federal Workplace, in which he stated that "[D]rug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year." The Senate Commerce Committee in Senate Report 100-43, 1OOth Cong. 1st Sess., to accompany S.

1041 filed April 10, 1987, found that "Drug and alcohol abuse has become an increasing problem in the workplace. Substance abuse leads to impaired memory, lethargy, reduced coordination, and a whole series of changes in heart, brain, and lung functions. These symptoms in

> workers have resulted in lost productivity for American businesses of as much as $100 billion a year, with significant increases in employee accident rates, health care costs, and absenteeism."

10 FMSHRC at 903. Indeed, in the context of the mining occupation, adoption of a reasonable substance abuse program could advance the safety and health goals of the Mine Act. We note also the Secretary's statement that she "is not contending that substance abuse programs are per se unlawful or discriminatory" under the Act and that she "supports the goal of a drug free work place." Sec. Br. 1 & n. 1.

We emphasize, however, that the Commission's jurisdiction to entertain and resolve disputes involving substance abuse programs is limited. As we previously observed: "[T]he Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of JWR's [Drug Program] apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act." 9 FMSHRC at 1307. Our limited purpose is to focus simply on whether the Drug Program or enforcement of some component thereof conflicts with rights protected by the Mine Act.

The judge found section II.E. of the Drug Program to be "facially discriminatory" because it "singled out" safety committeemen from JWR's other hourly employees for mandatory drug testing and because of the reaction of safety committeemen and potential safety committeemen to the program, which limited the safety committees' effectiveness. We disagree with the judge that JWR's Drug Program is facially in violation of section 105(c) of the Mine Act.

The Mine Act broadly defines "miner" as "any individual working in a coal or other mine...." 30 U.S.C. 802(g) (emphasis added). 4/ Section II.E. of the Drug Program applies to a portion of JWR's "miners"; some were salaried or supervisory employees, and some were hourly, nonsupervisory employees -- all are "miners" under the Mine Act. Therefore, the safety committeemen were not the only "miners" subject to mandatory testing under JWR's Drug Program. Stated otherwise, safety committeemen were not "singled out" from all other "miners" at JWR's mines.

The Secretary and the UMWA imply that the inclusion of safety committeemen, alone among JWR's hourly employees, evidences discrimination against them. Not every classification or difference in the treatment of employees, however, amounts to illegal "discrimination," especially where there is sufficient lawful reason for the challenged distinction. We hold that, on this record, JWR advanced adequate and reasonable business

justification for including safety committeemen, along with the other employees whose job duties involved

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4/ It is to be noted that the safety committeemen at JWR's mines derive their offices, not from the Act or the Secretary's implementing standards and regulations, but wholly from the parties' private contractual agreement.

safety matters, in the pool of miners subject to the drug testing provisions of section II.E. The evidence clearly shows that section II.E. was targeted at miners whose duties have a substantial impact on miner safety. The evidence further reflects, and the judge so found, that JWR genuinely believes that a substance abuse problem existed among its employees, that the effects of any such abuse are most dangerously manifested in job functions involving safety, that section II.E. is designed to address this situation, and that it was adopted for non-discriminatory reasons.

There is no dispute that the safety committeemen spent up to 50% of their time engaged in safety matters. Brooks testified that safety committeemen had "the highest responsibility for safety of anybody in the coal mine." Tr. 67. It may be true that other hourly job classifications also have a substantial impact on miner safety. Indeed, from a general perspective, all miners' work activities affect safety. Given that a mine operator may adopt a substance abuse program, however, section 105(c) cannot be read as compelling mandatory drug testing of all miners because testing is to be a part of the program. Absent a showing of discriminatory motivation, nothing in section 105(c) precludes an operator from proceeding in a gradual, incremental, or limited manner, by first targeting for drug testing certain job classifications that are viewed in good faith as being the most safety sensitive positions. Stated otherwise, an operator is not required by the Mine Act to remedy all aspects of a perceived substance abuse problem or none at all. Cf., e.g., Fisher v. Secretary, 522 F.2d 493, 500, 502 (7th Cir. 1975).

We accept the judge's characterization of the testimony of the safety committeemen as showing that many committeemen opposed and disliked implementation of section II.E. However, a miner's opposition or hostility to an operator's business policy is not determinative of the validity of that policy under section 105(c) of the Mine Act. An adverse action under section 105(c) of the Mine Act is not simply any operator action that a miner does not like. Secretary on behalf of Chester Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC 1842, 1848 n. 2 (August 1984). The personal feelings of opposition and hostility to section II.E. held by safety committeeman, as found by the judge, are insufficient to establish that section II.E. was discriminatory. Again, we note that the burdens imposed by section II.E fell equally on JWR's supervisory staff.

Thus, we find that substantial evidence and applicable legal principles do not support the judge's determination that section II.E. was facially discriminatory. Accordingly, we reverse the judge's finding of a violation of section 105(c) under the theory of facial discrimination.

C. The application of section II.E. of JWR's Drug Program to complainants

The judge concluded that section II.E. of JWR's Drug Program had not been discriminatorily applied to Price and Vacha. The judge's findings that Price and Vacha had engaged in protected activities and

that their termination was motivated, at le.st in part, by their protected activities are supported by substantial evidence and are consistent with controlling precedent. Accordingly, we affirm the judge's conclusion that Price and Vacha established a prima facie case of discriminatory discharge.

The judge also found that, although the complainants had made out a prima facie case of discriminatory discharge, JWR had defended affirmatively by showing that it would have fired them in any event for the unprotected activity alone of failing to provide the requested urine specimens. 10 FMSHRC at 909-910. As explained above, an operator proves an affirmative defense pursuant to the Pasula-Robinette test if it shows that (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. As we have explained:

> [T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982). As a corollary to these principles, it follows that an operator does not establish a Pasula-Robinette affirmative defense if a work rule or policy that the miner is alleged to have violated, was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible. In such cases, the claimed "independent" basis for discipline is actually an extension of the operator's discriminatory conduct. Further, pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator:s normal business practices. E.g., Haro, supra, 4 FMSHRC at 1937-38. Ultimately, the operator must show that the justification is credible and would have legitimately moved it to take the adverse action in question. E.g., Haro, 4 FMSHRC at 1938. Here, the judge has entered a number of findings, not fully explained in his analysis of JWR's affirmative defense, that raise these issues.

The judge found that prior to the attempted urine sampling at issue, both Price and Vacha had been subjected to supervisory "joking" concerning their future testing:

> Prior to March 2, there was considerable discussion and joking about the program among union employees and management officials. In the subject mine, much of the joking was directed at Price. In

> November 1986, Price told Wyatt Andrews, the mine safety inspector and Bob Hendricks, associate safety inspector that he had difficulty urinating in front of others. Hendricks laughed and made a vulgar remark to Price. In later November or early December a urine specimen bottle was exhibited on Wyatt Andrews' desk with a label on it reading "Mike Price UMWA." Andrews laughed when Price saw the bottle. It remained in the safety office for at least two days before Rayford Kelly directed that it be removed. Andrews and another safety inspector had on two occasions jokingly thrust an empty ... cannister and an empty coca cola toward Price and Vacha telling them that they were practice piss cups. Later a styrofoam cup with Price's name and the notation "practice cup" written on it was displayed in the safety office. All these incidents took place prior to March 2, 1987.

10 FMSHRC at 900. The judge also determined that the complainants did not refuse to submit urine specimens on March 2 but had genuine "physical or psychological difficulties" in providing the requested samples. 10 FMSHRC at 904-06. He further noted that Price and Vacha had drug screening tests performed at the Emergicare Center (JWR's contract physicians) and at the Longview Hospital, respectively, the next day and submitted the results, which were negative, to JWR. 10 FMSHRC at 901. The judge stated that Price and Vacha "were unable" to provide urine samples under the circumstances present on the evening of March 2 at the subject mine." 10 FMSHRC at 906.

At the other JWR mines, the Industrial Relations supervisor oversaw the urine sampling; at the No. 4 Mine, the supervision of urine collection was delegated to Andrews and Hendricks. 10 FMSHRC at 909. Thus, the actual testing of Price and Vacha was carried out by those who had made the earlier jokes, i.e., Andrews and Hendricks. Id.

> In some of the mines, those supervising the collection did not go into the bathroom with those giving the samples. No accommodation was offered Price and Vacha when they claimed inability to produce urine specimens, though some accommodation was given others involved in the drug screening program.

10 FMSHRC at 909. Similarly, in its brief on review, the UMWA points to evidence in the record showing that the manner of testing Price and Vacha was different from the testing procedures followed at other mines, that JWR

accommodated other miners who experienced difficulty urinating on demand, and that similar discipline was not meted out to those other miners. UMWA Br. 24-25.

We find that the judge did not fully examine and explain, in the context of ruling on JWR's affirmative defense, the impact of the evidence summarized above. If, in fact, Price and Vacha were fired for

failing to comply with discriminatorily applied drug testing procedures or if those procedures were deliberately manipulated to contribute to such failure, a Pasula-Robinette affirmative defense based on those same procedures cannot stand. In other words, a discharge for failure to comply with a discriminatorily implemented work order would not satisfy the affirmative defense requirements of Commission precedent.

Based on the above concerns, we remand this matter to the judge for the narrow purpose of analyzing and explaining the impact of the evidence discussed above on JWR's attempt to establish an affirmative defense. On remand, the judge shall provide all parties with the opportunity to brief the merits of the issues being remanded.

IV.

Conclusion

For the foregoing reasons, we reverse the judge's conclusion that section II.E. of JWR's Drug Program is facially discriminatory in violation of section 105(c) of the Mine Act. With respect to the application of the Drug Program to Price and Vacha, we vacate that portion of the judge's decision in which he concluded that JWR affirmatively defended against the prima facie case of discrimination established by the complainants. We return this case to the judge for further findings and analysis on that subject as explained above. Accordingly, this matter is remanded for further proceedings consistent with this opinion.

Commissioner Lastowka, concurring in part and dissenting in part:

I agree with my colleagues that this matter falls within the exceptions to the automatic stay provisions of the Bankruptcy Code and that the Commission may therefore proceed to a disposition of the proceeding before us. I also concur fully in the conclusion, and the rationale in support thereof, that Section 11. E. of JWR's Drug Program is not facially violative of section 105{c) of the Mine Act. l must respectfully dissent, however, from the majority's denial of JWR's motion to strike that part of intervenor UMWA's brief challenging the judge's conclusion that the specific application of JWR's Drug Program to Price and Vacha did not violate section 105(c). As explained below, JWR s motion to strike is well-founded and should be granted. As further explained, I would remand to the administrative law judge for entry of a final, appealable order concerning the specific application of the drug program.

The statutory procedure governing the raising of issues in review proceedings before the Commission is specific and express. Under section 113{d) of the Mine Act "any person adversely affected or aggrieved" by a decision of a Commission administrative law judge may petition the Commission for discretionary review of the judge's decision. 30 U.S.C. 823(d)(2)(A)(i); 29 C.F.R. 2700.70(a). If such a petition for discretionary review is granted, the Commission's review authority is limited to the issues raised in the petition. 30 U.S.C 823(d)(2)(A)(iii); 29 C.F.R. 2700.70(f); Chaney Creek Coal Corp. v. FMSHRC. 866 F.2d 1121, 1129 (D.C. Cir. 1989); Secretary v. Phelps Dodge Corp., 709 F.2d 51 (D.C.Cir 1983). Additional issues can be considered only if the Commission sua sponte directs such other issues for review within 30 days of the administrative law judge's decision. Chaney Creek: Phelps-Dodge: 30 U.S.C. 823(d)(Z)(B); 29 C.F.R. 2700.71.

Based on this statutory review scheme, JWR has filed a motion to strike a portion of intervenor UMWA's brief. JWR emphasizes that its petition for discretionary review was the sole petition for review filed, and that its petition challenged only the administrative law judge's conclusion that Section II.E. of JWR s Drug Program is facially discriminatory. JWR further notes that neither the, Secretary nor intervenor UMWA petitioned the Commission to review the judge s conclusion that JWR's specific application of the drug program to Price and Vacha did not violate section 105(c). Nor did the Commission sua sponte direct any additional issues for review pursuant to section 113(d)(Z)(B). Therefore, according to JWR, that portion of the UMWA s response brief arguing that the judge erred in concluding that the drug program was not discriminatorily applied raises an issue that was not brought before the Commission in accordance with the governing statutory review scheme.

In opposition to JWR's motion to strike, the UMWA and the Secretary make essentially the same arguments. They note that Price and Vacha prevailed on their claim that Section 11.E. is facially discriminatory. As a result, they assert that Price and Vacha were awarded the full measure of the relief they sought including reinstatement, back pay, expungement of personnel files and the cessation of enforcement of Section II.E. against safety committeemen. Therefore, the Secretary and the UMWA submit, Price and Vacha were not "adversely affected or aggrieved" by the judge's decision within the meaning of section 113(d), and they lacked standing to appeal the judge's denial of the "as applied"

theory of discrimination.

The Secretary and the UMWA further assert that the UMWA's brief properly challenges the judge's findings and conclusions addressing whether Section II.E. was discriminatorily applied to price and Vacha. They argue that under settled principles of appellate review a party "may offer in support of his judgment any argument that is supported by the record, whether it was ignored by the court below or flatly rejected." Sec. Response at 5, citing 9 Moore's Federal Practice. 204.11[3] at 4-45; UMWA Response at 4-6. They submit that the argument in the UMWA's response brief challenging the judge's "as applied" findings simply offers the Commission an allowable alternative ground for affirmance of the judge's decision in favor of Price and Vacha. My colleagues in the majority embrace this theory, "adopting the general federal rule of appeal." Slip op. at 9.

I disagree. As I read section 113(d) of the Mine Act, JWR's motion to strike must be granted. Were the Commission operating within a more traditional appellate review scheme, I would have little hesitation in proceeding to address the additional issue raised in the UMWA's brief. Under the federal rules of procedure and the case law relied on by the Secretary and the UMWA, the filing of a cross-appeal, or the urging of other error the correction of which offers an additional basis for affirmance, would be appropriate vehicles for expanding the scope of the issues on appeal. The problem, however, is that the Commission's review authority differs substantially from that found in the typical appellate review model. The unique statutory review scheme set forth in section 113(d) of the Mine Act more closely constrains the Commission's review authority parties are not free to raise and the Commission is not free to consider issues that have not been directed for review pursuant to section 113(d). 30 U.S.C. 823(d); Chaney Creek Coal Corp., supra; Phelps-Dodge Corp., supra.

I cannot accept the Secretary's and the UMWA's explanation that they are not seeking to have the Commission resolve an "additional" issue, but are offering only an alternative ground in support of the judge's finding of discrimination. Although the "facially violative" and "as applied" theories were both offered to prove that price and Vacha had been discriminated against under section 105(c)(1), the material facts and relevant law bearing on these theories of discrimination are quite separate and distinct. In its petition for discretionary review, JWR challenged only the judge's findings and conclusions bearing on the "facially violative" theory. To nevertheless proceed to review the correctness of the judge's discussion concerning the "as applied" theory, as tempting as it may be in terms of appellate convenience, is to ignore the constraints

of section 113(d). In this regard it is important to note that JWR has identified some of its own disagreements with the judge's discussion concerning the specific application of the drug program to Price and Vacha, but JWR correctly acknowledges that these disagreements were not placed before the Commission through its petition for review. JWR Motion to Strike at 5.

For these reasons I would grant JWR's motion to strike Part III of intervenor UMWA's brief.

ln my view, however, granting the motion to strike would not end the Commission's deliberations concerning the procedural consequences of the judge's statement that the specific application of the drug program to Price and Vacha did not violate section 105(c) of the Mine Act. In its motion to strike JWR asserts that Price and Vacha were "adversely affected or aggrieved" within th+ meaning of section 113(d) by the discussion of the "as applied" theory of discrimination contained in the judge's decision. The implication of JWR's argument is that, because Price and Vacha did not petition for review of the judge's "as applied" discussion, the judge's conclusions in that regard are final and unreviewable. 30 U.S.C. 823(d)(1)

The Secretary and the UMWA counter by arguing that Price and Vacha were not "adversely affected or aggrieved" because, in prevailing on their "facially violative" theory, they had been awarded all of the relief they had sought. They assert that Price and Vacha were fully satisfied by the judge's award, were not injured thereby, and therefore lacked standing under section 113(d) to obtain review of the judge's decision. Sec. Response at 33-4; UMWA Response at: 5-6. I agree.

In the posture of the proceeding before us, the portion of the judge's decision denying Price and Vacha's "as applied" theory of recovery did not constitute a final, adverse disposition against Price and Vacha within the meaning of section 113(d) of the Mine Act. The conclusive, determinative holding by the judge was his conclusion that Price and Vacha had been discriminated against by JWR in violation of section 105(c). It was this holding that formed the basis for his award of remedial relief to Price and Vacha and that caused a party, JWR, to be "adversely affected or aggrieved". In the absence of any appeal of the judge's decision, only JWR, not Price and Vacha, would have been damaged as a result of the judge's decision. The judge's further discussion indicating that he would deny the alternative theory of recovery was not essential to his finding of liability and was unnecessary. Therefore, the judge's comments in this regard did not adversely affect or aggrieve Price and Vacha within the meaning of section 113(d).

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As has been stated:

> [T]he general rube is that a party who has obtained full relief in the court below on a particular theory or ground is not entitled to appeal from the judgment to procure relief on other theories or grounds advanced by him below.

Annotation, Right of Winning Party to Appeal from Judgment Granting him

Full Relief Sought, 69 A.L.R. 2d 701, 736-37 (1960). See also 1 Am. Jur. 2d Appeal and Error 185 (1962).

Accordingly, l would remand this proceeding to the administrative law judge for entry of a final dispositional order concerning the "as applied" theory of discrimination advanced by Price and Vacha. I would direct the judge to allow the parties the opportunity to make any additional arguments either in opposition to or in support of the discussion of the "as applied" theory of discrimination set forth in his prior decision. Any party adversely affected or aggrieved by the entry of the judge's final order on remand could then petition the Commission for review of this aspect of his decision.

For these reasons, I concur in part and dissent in part.

Chairman Ford, concurring in part and dissenting in part:

I join with my colleagues in reversing the judge's determination that Jim Walter Resources' Drug Program is discriminatory on its face and violative of section 105(c) of the Mine Act, 30 U.S.C. 815(c). As to the automatic stay provisions of the Bankruptcy Code and the exceptions thereto, I further concur that the instant proceeding falls within the exceptions set forth in section 362(b) of the Code, 11 U.S.C. 362(b). With respect to the majority's disposition of JWR's motion to strike Part III of the UMWA's reply brief, I am constrained to reluctantly and respectfully dissent in view of the tightly circumscribed scope of Commission review set forth in section 113(d)(2) of the Mine Act, 30 U.S.C. 823(d)(2).

Although general federal appellate procedure may permit an appellee to offer alternative grounds to support an ultimate judgment - even those rejected by the judge below - the Mine Act by its clear terms constricts that option here. Section 113(d)(2) of the Act states that "review shall be limited to the questions raised by the petition" and that "the Commission shall not raise or consider additional issues in such review proceedings" unless it has complied with the procedures and criteria for granting sua sponte review. (Emphasis added). The issue of whether JWR's Drug Program was discriminatorily applied to Price and Vacha was not raised in JWR's petition for discretionary review, nor was it directed for review sua sponte. It arose solely as a component of the UMWA's reply brief filed well outside the 30 day time limit for filing petitions under the Act.

The UMWA and the Secretary argue that they were not "adversely affected or aggrieved by [the] decision" of the judge so that there was no reason for them to file a petition for discretionary review. There is, however, a distinction here between a "judgment", i.e., a favorable outcome for the appellees, and the "decision" itself, and it is the term "decision" to which section 113(d)(2) refers. In this instance the judge's decision is composed of two distinct parts, each involving separate allegations of discriminatory treatment, separate legal theories to support those allegations, and separate modes of analysis to resolve the issues raised. Indeed, one might argue that within the single docket the judge was deciding two discrete cases: one generic case brought in the names of Price and Vacha on behalf of all safety committeemen against the Drug Program as designed (the "facially discriminatory" case), and one brought exclusively by Price and Vacha and involving only their particular relationship to and interaction with JWR and its Drug Program (the "discriminatorily applied" case). In that context it cannot be said that the judge's decision with respect to the latter case was not adverse to Price and Vacha. */

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*/ The two matters were even tried somewhat separately. Price and Vacha did not testify at the hearing on the merits. Testimony at that hearing on behalf of the Secretary and the UMWA was predominately provided by safety committee members or potential members who were not disciplined but who testified to the inhibitive effects of the Drug

Appellees also object .n practical grounds to the filing of "protective" petitions for discretionary review by prevailing parties, characterizing such a requirement as "meaningless", "cumbersome," and "nonsensical." Given the time and treasure expended in this case, the odds of JWR's appealing the "facially discriminatory" issue so as to place the judge's determination thereon at risk were extremely high. In such circumstances a protective petition for discretionary review would not have been meaningless but would have been prudent. Furthermore, the judge's decision was issued on August 26, 1988 and JWR's petition was filed on September 20, 1988, thus leaving the Secretary, the UMWA, or both five days to file a pro forma petition on the "discriminatorily applied" issue. In any event, the procedural fault at issue lies with the restrictive review scheme devised by Congress and both the Commission and the parties are bound by it.

In summary, Part III of the UMWA's brief raises important issues and compelling arguments. Unfortunately, at this juncture, I find no means by which the Commission can resurrect the "discriminatorily applied" charge when the statute limits our consideration to those issues contained within the four corners of the only petition for discretionary review before us. Chaney Creek Coal Comp. v. FMSHRC. 866 F.2d 1424, 1429 (D.C. Cir. 1989).

Accordingly, I would grant the motion to strike and dismiss the proceeding.

Program generally and its impact upon their decisions to continue serving as committeemen or to run for committee office. That testimony went only to the "facially discriminatory" issue. The "discriminatorily applied" issue was tried in the June 29, 1987 hearing on temporary reinstatement wherein Price and Vacha testified to the specific circumstances under which they were subjected to random drug testing under the Drug Program, their history of activism as safety committeemen, and their perceptions of a retaliatory link between the two. Secretary/Price and Vacha v. Jim Walter Resources, Inc., 9 FMSHRC 1305 (August 1987).

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