CCASE:
CLIFFORD MEEK V. ESSROC
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April 27, 1993

CLIFFORD MEEK	:	
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v.	:	Docket No. LAKE 90-132-DM
	:	
ESSROC CORPORATION	:	
	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY: Holen, Chairman; Doyle and Nelson, Commissioners

This is a discrimination proceeding brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act") by Clifford Meek against Essroc Corporation ("Essroc"). Commission Administrative Law Judge William Fauver concluded that Essroc was the successor corporation of Meek's former employer and that Essroc discriminated against Meek by its failure to hire him at the time of the changeover in ownership. 13 FMSHRC 1970 (December 1991)(ALJ). The Commission granted Essroc's petition for discretionary review, which challenges: (1) whether Essroc is a successor corporation to Meek's former employer; (2) whether the judge's finding of discrimination is supported by substantial evidence; (3) whether the judge erred as to several procedural rulings; (4) whether the judge erred in his calculation of the backpay award, which was not reduced to reflect Meek's unemployment compensation; and (5) whether the judge's attorneys' fee award was erroneous. We affirm the judge's rulings with the exception of the backpay award, which we remand for further findings consistent with this opinion.

I.

Factual and Procedural Background

A. Factual Background

Essroc's cement division, Essroc Materials, Inc.,(Footnote 1) owns and operates a grinding plant in Stark County, Ohio (the "Middlebranch Plant") with approximately 40 employees. The Middlebranch Plant grinds materials, such as

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1 Essroc and its subsidiary, Essroc Materials, Inc., are collectively referred to as "Essroc."

limestone and clay, and stores and ships dry cement. This plant, along with several others, was purchased by Essroc from United States Cement Company ("USC") on or about February 27, 1990. All but two USC hourly employees from the Middlebranch Plant were hired by Essroc: an injured employee who remained with USC, and Clifford Meek whose employment application was denied. 13 FMSHRC at 1970-71.

On January 31, 1990, USC's management requested approximately ten USC hourly employees, including Meek, to attend a safety meeting with Richard L. Jones, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"). During the meeting, Inspector Jones encouraged the employees to discuss their safety and health concerns and assured the confidentiality of their remarks. Meek asked the inspector why the company appeared to know in advance when an inspection would occur. The inspector became angry, apparently interpreting Meek's question as an accusation that he was violating the law. Meek left the meeting shortly after the interchange.

Later that morning, Inspector Jones told Plant Manager Marvin Bragg and Plant Supervisor Dale Lewis that the meeting "went pretty good," with the exception of one employee who had a "bad attitude." Tr. 332. Jones told Lewis and Bragg of Meek's insinuation that management knew beforehand when MSHA was going to inspect the plant.(Footnote 2) Bragg then informed his superior, Mike Roman, USC's Industrial Relations Director, that the inspector was "upset." Tr. 381. Roman became concerned and sent a USC safety director to the Middlebranch Plant to see if he could placate the inspector. Jones' subsequent inspection resulted in the issuance of 15 citations, one of which was a "significant and substantial" citation that shut down a crane for a day and a half.

In mid-February, three Essroc supervisors met with Bragg and Roman to select the hourly employees to be hired by Essroc. 13 FMSHRC at 1973. By that time, Bragg and Roman knew that they were going to assume supervisory positions at Essroc. 13 FMSHRC at 1973-74. Bragg reported that Meek had a poor attitude and had repeatedly stated that he would not work for Bragg. 13 FMSHRC at 1974; Tr. 287. Bragg showed the Essroc supervisors a written evaluation form dated January 26, 1990, which he had filled out for Essroc, as well as four other documents from Meek's personnel file. 13 FMSHRC at 1974;

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2 Inspector Jones was subpoenaed to appear at the hearing but did not comply. At the hearing, Meek introduced into evidence the inspector's non-contemporaneous notes recounting the meeting and his conversation with plant management. 13 FMSHRC at 1972. The judge discredited these notes because they were at variance with some of the witness accounts and were not subject to cross-examination. Id.

Tr. 284-88.(Footnote 3) On Bragg's recommendation, with Roman's support, it was decided that Meek would not be hired. 13 FMSHRC at 1974.

A meeting was held by Bragg on February 27, 1990, announcing to the employees that Essroc was purchasing the Middlebranch Plant and that all employees were terminated as of that date. He advised all those interested in Essroc positions to apply for the jobs they had held at USC and to attend a meeting the next day. Bragg telephoned Meek early the next morning and told him not to bother coming to the meeting because Essroc was not going to approve his job application. Meek attended anyway. Bragg and Roman took him aside and told him that USC had terminated him and that Essroc refused to hire him. Tr. 55-56.

B. Procedural History

Meek filed a discrimination complaint with MSHA on March 30, 1990. MSHA subsequently informed Meek that it had found no discrimination in violation of section 105(c) of the Mine Act, 30 U.S.C. 815(c). On September 27, 1990, Meek filed a discrimination claim on his own behalf with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3). A hearing was scheduled and Essroc filed a motion for summary judgment, which was denied.

At the May 28, 1991, hearing, Essroc moved to dismiss the complaint at the close of Meek's case. The judge took the motion under advisement. On June 6, Meek's counsel moved to reopen the hearing on the basis of newly discovered evidence, i.e., that two separation notices, entered into evidence, might have been altered. Meek's counsel sought to put Andy Coccoli, who had prepared them, on the stand to so testify. Essroc opposed the request to reopen and the judge heard oral argument on the motion during a teleconference on June 25. The judge granted the motion and the hearing was reopened on July 18, 1991.

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3 In the January 26, 1990, evaluation, Bragg gave Meek a "Poor" mark in the category "Attitude Toward Work & Company." He received "Fair" ratings for "Quality of Work" and "Productivity & Quantity of Work." Bragg had also written: "This employee has ability to do a lot but is unwilling, his attitude is very close to being insubordinate, also can't get along with other employees." Ex. R-1. Also presented to Essroc were separation (layoff) notices dated February 13, and April 24, 1987, signed by Andy Coccoli, a former plant manager. The third document was an Employee Evaluation Report dated January 18, 1989, prepared by Bragg and initialed by Lewis, that rated Meek's "Cooperation, Attitude and Initiative" as "Poor." The comments on the report stated: "Must improve. This employee has made statements to other employees that he is not afraid to go to jail for assault" against his supervisors. Ex. R-2. The fourth document was a separation notice dated September 25, 1989, signed by Bragg, that rated Meek's "Conduct and Application" as "Poor." Ex. R-1.

On December 24, 1991, the judge issued a decision solely with respect to liability.(Footnote 4) He found that Essroc, through its subsidiary, Essroc Materials, Inc., was a successor in interest to USC at the Middlebranch Plant. 13 FMSHRC at 1975. The judge determined that "[t]he evidence shows continuity of the business operations of the Middlebranch Plant from USC to Essroc with Essroc's use of the same plant, equipment, and essentially the same work force and supervisory personnel." Id.

The judge also found that Essroc had discriminated against Meek because of activity protected under section 105(c) of the Mine Act. The judge found that Meek's complaint to the MSHA inspector that the operator appeared to have had prior knowledge of inspections qualified as protected activity and that the adverse action was motivated in part by that protected activity. The judge discounted the reasons given by Essroc for not hiring Meek because they were based in large part upon Bragg's and Roman's recommendations. Additionally, the judge determined that the separation documents had been tampered with in an effort to disparage Meek. 13 FMSHRC at 1975.

The judge also concluded that Essroc had failed to raise a successful affirmative defense to Meek's prima facie case because evidence did not show that, "independent of Meek's complaint to Inspector Jones, his application for employment by Essroc would not have been accepted as were the applications from all other USC Middlebranch Plant hourly employees." 13 FMSHRC at 1979-80.

After extensive correspondence and filings by the parties on the issue of backpay, interest and attorneys' fees, the judge's final order awarded Meek backpay and interest amounting to $24,000.00, and attorneys' fees of $17,065.80. 14 FMSHRC 518 (March 1992).

II.

Disposition of Issues

A. Whether Essroc is a successor of USC

Essroc argues that it is not a successor of USC because its upper level management and ownership are different and distinct from those of USC. Essroc, as a large enterprise, produces many more products than USC. Additionally, USC still exists as a business entity because Essroc purchased only 70% of its assets. These factors are insufficient to avoid a finding of successorship under the circumstances presented.

The judge found that Essroc was a successor to USC under the Commission's successorship test first enunciated under the Federal Coal Mine Health and Safety Act of 1969 in Munsey v. Smitty Baker Coal Company, Inc., 2 FMSHRC 3463 (December 1980), aff'd in relevant part sub nom. Munsey v. FMSHRC,

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4 On January 31, 1992, the judge issued a supplemental decision denying Essroc's motion to dismiss, for the reasons set forth in his December 24, 1991, decision.

701 F.2d 976 (D.C. Cir.), cert. den. sub nom. Smitty Baker Coal Co. v. FMSHRC, 464 U.S. 851 (1983), and readopted under the Mine Act in Secretary on behalf of James Corbin et al. v. Sugartree Corp., Terco, Inc. and Randal Lawson, 9 FMSHRC 394, 397-99 (March 1987), aff'd sub nom. Terco, Inc. v. FMSHRC, 839 F.2d 236, 239 (6th Cir. 1987). See also Secretary on behalf of Keene v. Mullins, 888 F.2d 1448, 1453 (D.C. Cir. 1989). Under this test, the successor operator may be found liable for, and responsible for remedying, its predecessor's discriminatory conduct. The factors for determining successorship are: (1) whether the successor company had notice of the underlying charge of possible discrimination; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether he uses the same or substantially the same work force; (6) whether he uses the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the new employer uses the same machinery, equipment and methods of production; and (9) whether he produces the same product. See Terco, 839 F.2d at 239; Mullins, 888 F.2d at 1454.

Substantial evidence supports the judge's decision that, under the Munsey-Terco test, Essroc qualifies as a successor to USC at the Middlebranch Plant. Essroc acquired the entire Middlebranch Plant; it used virtually the entire workforce (except for Meek and an injured employee); it assumed the same supervisory personnel; it produced the same product; there was a substantial continuation of business operations at the Middlebranch Plant between USC and Essroc; Essroc knew of the "charge" involving Meek through Roman, Bragg and Lewis, who became Essroc supervisors. Roman and Bragg were instrumental in the decision not to hire Meek. The judge did not expressly address in his decision the ability of the predecessor to provide relief, but concluded generally that all the relevant criteria were satisfied. Thus, Essroc may be held derivatively liable for the discriminatory acts of USC.

B. Merits of Meek's discrimination case against Essroc

A miner alleging discrimination under the Mine Act establishes a prima facie case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-2800. If the operator cannot rebut the prima facie case, 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, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test).

1. Prima facie case

On review, Essroc does not dispute the judge's finding that Meek engaged in protected activity by raising a safety-related question at the January 31, 1990, meeting of employees. It is also undisputed that Meek suffered an adverse employment action in not being hired by Essroc upon its takeover of the Middlebranch Plant. The issue on review is whether that adverse action was linked to Meek's protected activity. The judge determined that Meek established a causal nexus between the adverse action and his protected activity. We agree.

As the judge noted, "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.... `Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" 13 FMSHRC at 1977, quoting Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (November 1981); see also Bradley v. Belva Coal Company, 4 FMSHRC 982, 992 (June 1982) ("[C]ircumstantial evidence ... and reasonable inferences drawn therefrom may be used to sustain a prima facie case of discrimination.").

It is evident from the record that USC supervisors had knowledge of Meek's protected activity. Plant Manager Bragg, Plant Supervisor Lewis, and Industrial Relations Director Roman all quickly learned of Meek's comment to the MSHA inspector. Inspector Jones reported to Lewis and Bragg that his meeting with USC employees went well, with the exception of Meek, who had a "bad attitude." Roman became concerned enough about the comment that he sent USC's safety director to the Middlebranch plant to placate the inspector. Thus, there is substantial evidence to support the finding that management had knowledge of Meek's activity. As the Commission has noted, "[t]he operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." Chacon, 3 FMSHRC at 2510.

Further, the record shows that USC reacted in a hostile manner to Meek's protected activity. "Hostility towards protected activity -- sometimes referred to as `animus' -- is another circumstantial factor pointing to discriminatory motivation." Chacon, 3 FMSHRC at 2511, citing NLRB v. Superior Sales, Inc., 366 F.2d 229, 233 (8th Cir. 1966). Here, USC employee James Gallentine testified that Plant Supervisor Lewis told him that USC's vice president was upset over Meek's remark to the inspector and wanted Meek fired. Tr. 35. Although Lewis denied making the remark, the judge credited Gallentine's testimony. 13 FMSHRC at 1973, 1979. Therefore, the judge's finding that USC management wanted to fire Meek because of his protected activity is supported by substantial evidence.

The judge made reasoned conclusions in discrediting the reason given by Bragg and Roman for not hiring Meek. Bragg did not testify at the hearing. Essroc submitted affidavits from Bragg and Roman in which they stated that Meek had told Bragg that he would not work for Bragg. However, Meek, after being warned by Gallentine to "watch [his] back," had begun wearing a tape recorder during his conversations with management. Among the conversations recorded and put into evidence were those on February 27 and 28, with Bragg and Roman. In Meek's tapes, he did not say he would not work for Bragg nor

was there an indication that he had made such a statement. 13 FMSHRC at 1978. The other supervisor present at the February 27 conversation did not recall Meek making such a statement. Tr. 365. Thus, there is substantial evidence for the judge's conclusion that Bragg made his allegation so that Essroc would not hire Meek.

Meek's evaluations and Essroc's alleged justification for not hiring him, because he was a poor worker, are also suspect. The February 13, and April 24, 1987, separation notices contain a rating scale by which a supervisor could check off an employee's performance as "Good," "Fair," or "Poor" in various categories. They show that Meek's "Conduct" was rated as "Poor." Exs. C-2-B, C-3-B. However, Coccoli, who had signed the notices, testified that he had not checked those items and, to the contrary, had found Meek to be an excellent employee in all work areas, including skills, performance and attitude. Tr. II 33-35, 38-39.(Footnote 5) Coccoli testified that he had found Meek to be "courteous, honest," and "excellent all the way through," and that, "If I had to open a company today, I would say he would be one [of] the first guys I would hire." Tr. II 33, 34. He stated that if he were to rate Meek's conduct and productivity, given the choices of good, fair or poor, he would check the "good" box. Tr. II 35. Coccoli stated: "I would say he's got a lot of ability. He's a good mechanic. It didn't take long for him to ... learn the jobs in the lab or as a ... crane operator, which is a pretty delicate job. And as a miller, I would rate him excellent...." Tr. II 34. The judge concluded that "tampering" had occurred and "raised a serious cloud over the integrity and credibility of USC's evaluation of Meek." 13 FMSHRC at 1975. The other evaluations of Meek were signed by Plant Manager Bragg.

Apart from the discredited evaluations and affidavits, other record evidence supports the judge's finding. Meek was never presented with any of the alleged poor evaluations during his eight years of employment with USC, nor was he ever disciplined or cautioned. Tr. 26-29. He was always rehired after layoffs and had received promotions and plant-wide pay raises. His attendance record was exemplary, never having missed a day of work in eight years. Tr. 28.

Finally, Essroc's decision not to hire Meek was made in close proximity to the MSHA meeting. That meeting was held on January 30, 1990, and the hiring meeting with Essroc occurred in mid-February. Coincidental timing can be indicative of discriminatory motivation. As the Commission noted in Chacon, "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive...." 3 FMSHRC at 2511.

We conclude that the judge's finding of a prima facie case of discrimination is supported by substantial evidence and is consistent with relevant Commission case law. Accordingly, we affirm that finding.

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5 Tr. II refers to the second hearing in this proceeding held on July 18, 1991.

2. Affirmative defense

Essroc contends that, even if Meek established a prima facie case, it affirmatively defended against that case by proving it would not have hired him in any event. In support, Essroc relies on three earlier unfavorable evaluations of Meek that were prepared by Bragg prior to the MSHA meeting. Essroc also points out that the three Essroc officials who made the hiring decision were not aware of Meek's protected activity.

An operator bears the burden of proving an affirmative defense to a discrimination complaint. Pasula, 2 FMSHRC at 2799-2800; Bradley, 4 FMSHRC at 993. As noted, the evaluations on which Essroc relies are suspect and are insufficient to establish an affirmative defense. While an operator may establish an affirmative defense by proving that the employee received past warnings, prior disciplinary action or unsatisfactory work evaluations (see Bradley, 4 FMSHRC at 993), Essroc's evaluation system does not reflect normal business practices regarding an employee evaluation system.(Footnote 6) Additionally, the testimony of Meek's former supervisor, Coccoli, directly contradicts Bragg's unfavorable evaluations of Meek.

Further, it is immaterial that the three Essroc officials attending the hiring meeting may not have been aware of Meek's protected activity. Essroc qualifies as a successor to USC, and hence is derivatively liable for the actions of USC management who knew of Meek's protected activity.

Thus, Essroc did not establish that its failure to hire Meek was also motivated by unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-20. Therefore, we conclude that substantial evidence supports the judge's determination that Essroc failed in its burden of proof with respect to its affirmative defense.

C. Whether the judge committed procedural error

Essroc argues that the judge made a number of procedural errors at the hearing. We find Essroc's claims to be without merit.

1. Reopening of the hearing

Essroc argues that the judge erred in reopening the hearing to take additional testimony on the basis of newly discovered evidence. Essroc contends that the evidence presented was not "newly discovered" but simply evidence that, with the use of pretrial discovery, could have been presented at the initial hearing. It asserts that the Coccoli testimony should have been

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6 All employees who testified stated that they were unaware that any evaluation system existed at USC. Tr. 26-27, 128, 137, 174. USC did not show Meek any of his evaluations, nor had any disciplinary action been taken against him as a result of the allegedly poor evaluations. Tr. 26, 28.

uncovered before the hearing, and thus was not "newly discovered" under the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").(Footnote 7)

Meek's motion to reopen was made prior to entry of judgment. Commission Procedural Rule 54(a), 29 C.F.R. 2700.54(a), empowers Commission judges to regulate the course of hearings and to dispose of procedural motions. Under this authority, Commission judges may reopen hearings in appropriate cases. See Kerr-McGee Coal Corp., 15 FMSHRC 352, 357 (March 1993). Commission may also properly look for guidance to the Federal Rules of Civil Procedure ("Fed. R. Civ. P.")(29 C.F.R. 2700.1(b)), and precedent thereunder. A motion to reopen the record to submit new evidence is not expressly addressed in the federal rules but, rather, is committed to the sound discretion of the trial judge. See generally, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331 (1971). In general, an abuse of discretion occurs when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for its ruling. See, e.g., In re Coordinated Pretrial Proceedings, etc., 669 F.2d 620, 623 (10th Cir. 1982).

A motion for a new trial under Fed. R. Civ. P. 59 has certain similarities and affords some guidance. See J. Moore, J. Lucas & G. Grother, 6A Moore's Federal Practice 59.04[13](2d ed. 1992)("Moore's"). Generally, in determining whether to grant a motion to reopen, it is appropriate to consider the time when the motion is made, the character of the additional evidence, and the effect of granting the motion. 6A Moore's 59.04[13]

Meek's motion was made on a timely basis, approximately nine days after the hearing and before a decision was issued by the judge. No unnecessary delay occurred. See Carracci v. Brother Int'l Sewing Machine Corp. of L.A., 222 F. Supp. 769, 771 (E.D. La. 1963), aff'd, 341 F.2d 377 (5th Cir. 1968). As to the character of the additional evidence, it was not cumulative of testimony presented at the hearing. Rather, Meek sought to rebut evidence of his poor performance by presenting evidence that the two separation notices had been altered to indicate that he was a "poor" worker. Coccoli, the author of the notices, was to testify that he had not provided such a poor rating. The third factor, the effect of granting the motion, also supports reopening. The testimony involved serious allegations of fraud upon the Commission. See generally Bowles v. Six States Coal Corp., 64 F. Supp. 651, 652 (W.D. Pa. 1946). For these reasons, we conclude that the judge acted within his sound discretion in granting Meek's motion to reopen the hearing and in receiving the additional testimony.

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7 Essroc also contends that Meek should not have been permitted to reopen the hearing to introduce the testimony of former USC Plant Manager Kalman Potter. The judge did not rely on the Potter testimony in any respect in reaching his decision. Therefore, we conclude that no error arose from hearing that testimony.

2. Denial of Essroc's motions for summary decision and for directed verdict

Essroc contends that the judge should have granted Essroc's motion for summary decision prior to the hearing. Applying Commission Procedural Rule 64, 29 C.F.R. 2700.64,(Footnote 8) the judge determined that there were four factual areas in contention: (1) was Essroc a successor in interest to USC?; (2) did MSHA Inspector Jones inform management of his conversation with Meek?; (3) did supervisor Lewis inform miner Gallentine that USC management wanted to fire Meek?; and (4) did Meek inform supervisors Bragg or Roman that he couldn't work with Bragg? Unpublished Order dated May 8, 1991. Summary decision may be entered only when there is no genuine issue as to any material fact. Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981). Here, the record revealed that there were four disputed factual areas that precluded summary decision.

Essroc's reliance on Meek's deposition for failing to establish a discriminatory motive is also misplaced. Meek was under no duty to prove his case during his deposition. On the contrary, at a deposition the opposing party poses particular questions to the deponent and he is required only to answer fully and truthfully the questions posed. Accordingly, Judge Fauver acted within his discretion in denying Essroc's motion.

Similarly, Essroc argues that the judge should have granted its motion for directed verdict made at the close of Meek's case. It was within the judge's discretion to take under advisement Essroc's motion. Fed. R. Civ. P. 52(c), "Judgment on Partial Findings," provides: "If during a trial without a jury a party has been fully heard with respect to an issue ..., the court may enter judgment as a matter of law against that party on any claim ..., or the court may decline to render any judgment until the close of all the evidence." (Emphasis added). The Notes of the Advisory Committee on Rules to Fed. R. Civ. P. 52(c) specify that a court possesses "the discretion to enter no judgment prior to the close of evidence." Here the judge exercised that discretion. Accordingly, we find no error by the judge and affirm his procedural determinations.

E. Backpay award

Essroc contends that the judge erred in his backpay award on two grounds: the judge should have deducted from the award unemployment compensation received by Meek; and, the judge should have used comparable wage

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8 Commission Procedural Rule 64 provides:

> (b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

data from a certain Essroc employee, rather than relying on an estimate of lost wages.

1. Deduction of unemployment compensation

In the proceedings below, Essroc requested that Meek's unemployment compensation be deducted from Meek's backpay. The judge summarily denied Essroc's request without setting forth reasons. Unpublished Order dated February 18, 1992. Although the total unemployment compensation that Meek received has not been established, it appears from the record to be approximately $2,700. For the following reasons, we conclude that Meek's unemployment compensation should be deducted from the backpay award.

The question of whether to deduct unemployment compensation from a backpay award is one of first impression for this Commission. The Mine Act is silent on the question. For guidance, we look to case law interpreting relevant remedial provisions of the National Labor Relations Act, 29 U.S.C. 160 ("NLRA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C 2000e-5(g) ("Title VII") and the Age Discrimination in Employment Act (2 U.S.C. 634 ("ADEA"). The Mine Act's remedial provisions, as well as those of Title VII and the ADEA, are modeled on section 10(c) of the NLRA, as amended, 29 U.S.C. 160(c). See, e.g., Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (February 1982).

In NLRB v. Gullett Gin Co., 340 U.S. 361 (1951), the Supreme Court was presented with the issue of whether the National Labor Relations Board ("NLRB") exceeded its discretion in refusing to deduct unemployment compensation from a backpay award. The NLRB's order allowed deduction of other earnings during the backpay period but did not provide for a deduction of unemployment compensation. In concluding that the NLRB had not abused its discretion, the Court stated: "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion...." 340 U.S. at 363.

Consistent with the Supreme Court's decision in Gullett Gin, courts have held uniformly that similar discretion exists under other labor statutes with remedial provisions patterned on the NLRA. Thus, reviewing courts have determined that, under Title VII and the ADEA, the deduction of unemployment compensation from backpay awards is a matter within the discretion of the trial judge. See, e.g., EEOC v. Enterprise Ass'n Steamfitters, 542 F.2d 579, 591-92 (2d Cir. 1976)(Title VII); EEOC v. Sandia Corp., 639 F.2d 600, 624-26 (10th Cir. 1980)(ADEA); Naton v. Bank of California, 649 F.2d 691, 699-700 (9th Cir. 1981)(ADEA); Hunter v. Allis-Chalmers, 797 F.2d 1417, 1428-29 (7th Cir. 1986)(Title VII); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988)(ADEA). We conclude that, under the Mine Act's remedial scheme, this Commission may exercise its discretion to adopt an appropriate policy concerning the deduction of unemployment compensation.(Footnote 9) See Gullett

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9 We note that in Boich v. FMSHRC, 704 F.2d 275, 286-87 (6th Cir. 1983), the Sixth Circuit concluded that a Commission administrative law judge did not

Gin, 340 U.S. at 363. See also S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1977)("Legis. Hist.").

The Commission endeavors to make miners whole and to return them to their status before illegal discrimination occurred. See Munsey, 2 FMSHRC at 3464; Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2056 (December 1983). "Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." Dunmire, 4 FMSHRC at 143. Monetary relief is awarded "to put an employee into the financial position he would have been in but for the discrimination." Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982). Further, "we endeavor to make our awards as reasonable as possible." Dunmire, 4 FMSHRC at 143. The Commission seeks to fashion relief that is just and does not overcompensate the discriminatee. Id. at 142-43.

A policy of deducting unemployment compensation from a backpay award under the Mine Act does not mean that the miner is less than fully compensated for his lost wages. Rather, as the Second Circuit has stated in a Title VII case, "We see no compelling reason for providing the injured party with double recovery for his lost employment...." Enterprise Ass'n Steamfitters, 542 F.2d at 592. Additionally, failing to deduct unemployment compensation conflicts with the Commission's well established policy of deducting earnings from the backpay award. See, e.g., Dunmire, 4 FMSHRC at 144. If earnings are deducted from backpay, we see no reason why unemployment compensation should not be deducted as well.(Footnote 10)

Deducting unemployment compensation from backpay awards is not inconsistent with the Mine Act's goal of deterring illegal conduct. The employer will still be required to place the victim of unlawful discrimination in the same position he was in but for the unlawful discrimination, providing backpay, reinstatement with full seniority rights and attorneys' fees. The employer should not be required to additionally compensate the miner with backpay for funds already received, if the miner has worked in the interim or

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9(...continued)
abuse his discretion in declining to deduct unemployment compensation from backpay. Boich relied primarily on Gullett Gin to determine that the judge and the agency had such remedial discretion. Id. Boich was not briefed and argued to the Commission, since the Commission had not granted review. 704 F.2d at 278. Therefore, it does not represent Commission policy.

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10 We note that when unemployment compensation and backpay are both received, unemployment compensation must, in many instances, be repaid to the state fund. See Gullett Gin, 340 U.S. at 365 n.1. States may require restitution of unemployment compensation when, as a result of an award of backpay, the worker is rendered not unemployed for the period of the award and the benefits received become overpayments. See generally 42 U.S.C. 503(g) (1988); 26 U.S.C. 3304(a)(4)(1988).

received unemployment compensation.(Footnote 11) Significantly, the Mine Act, unlike the NLRA, Title VII, and the ADEA, authorizes that a separate civil penalty be assessed against an operator who unlawfully discriminates against a miner. 30 U.S.C. 815(c), 820(a). The Commission's recently issued Procedural Rules require the Secretary of Labor to propose a separate civil penalty for a violation of section 105(c). 58 Fed. Reg. 12168 (1993) (to be codified at 29 C.F.R. 2700.44)(effective May 3, 1993).

For the reasons set forth, we conclude that deducting unemployment compensation from a backpay award is a reasonable and sound policy that fully effectuates the Mine Act's goal of making whole miners who have been wrongfully discharged in violation of the Act.

In Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549, 1550-51 (11th Cir. 1983), and Craig v. Y&Y Snacks, 721 F.2d 77, 81-85 (3d Cir. 1983), the Eleventh and Third Circuits, respectively, established a consistent approach to the deductibility of unemployment compensation among the district courts whose decisions those circuit courts review. Both circuits relied on Gullett Gin. The Commission, as did those circuit courts, now adopts a policy for its administrative law judges, in order to ensure equality of treatment of miners and mine operators in Commission decisions. Like the Eleventh Circuit in Brown, we determine that "[a] consistent approach to this legal question seems preferable to a virtually unreviewable discretion which may produce arbitrary and inconsistent results." 715 F.2d at 1551.(Footnote 12)

Thus, we reverse the judge's decision not to deduct Meek's unemployment compensation. We remand to the judge to determine the amount of unemployment compensation received by Meek and to deduct that amount from Meek's backpay in accordance with our opinion.

2. Use of comparable wage data

On March 10, 1992, the judge ordered Essroc to produce copies of the W-2 statements and quarterly gross wages for all its hourly employees at the Middlebranch Plant for the period from February 27, 1990, to March 1, 1992. Essroc submitted wage information pertaining to only three employees, whom it

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11 "All states ... incorporate experience rating as the basis for determining employers' contribution rates." Employment and Training Administration, U.S. Dept of Labor, Unemployment Insurance Program Letter No. 3-92, Experience Rating Index (1991). When an individual receives unemployment compensation, his previous employer is, as a result, taxed at an increased rate, depending upon the degree of experience rating. See 26 U.S.C. 3303(a)(1988).

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12 In a case currently before the Commission, Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc., 15 FMSHRC 237, 241 (February 1993)(ALJ), Administrative Law Judge George A. Koutras determined that unemployment compensation should be subtracted from a backpay award. The Secretary of Labor took no position on the issue "other than to stipulate that it is within the discretion of the presiding judge." Id.

believed were "comparable" to Meek. The judge's final order notes that Essroc had failed to provide certain financial materials relevant to backpay that he had ordered produced. 14 FMSHRC at 518. The judge awarded backpay in the amount of $24,000 based on Meek's estimates.

Essroc contends that the judge should have awarded $22,582.91, based on the wage reports of one of the three Essroc employees concerning whom it had provided data. The judge was not able to determine whether the wages of that employee were comparable because of Essroc's failure to produce relevant wage documentation. Because Essroc did not produce the information ordered by the judge, we are unable to evaluate whether the $1,500 reduction urged by Essroc is appropriate. Accordingly, we conclude that, based on the information before him, the judge acted appropriately by determining Meek's lost wages to be $24,000.

E. Attorneys' fee award

On review, Essroc provides the Commission with no detail supporting its charge of excessive attorneys' fees. An attorneys' fee award in Mine Act discrimination cases lies within the sound discretion of the trial judge. Secretary on behalf of Ribel v. Eastern Assoc. Coal Corp., 7 FMSHRC 2015, 2027 (December 1985), rev'd on other grounds in Eastern Assoc. Coal, 813 F.2d 639. The judge considered extensive documentation from Meek's counsel, including itemized statements, before reaching his determination. We perceive no abuse of discretion. Accordingly, we affirm the judge's award of attorneys' fees.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision in all respects, except for the failure to deduct Meek's unemployment compensation from backpay. We remand the case for further findings on the amount of unemployment compensation Meek received during the backpay period and direct that the sum be deducted from Meek's backpay award in accordance with this decision.(Footnote 13)

Arlene Holen, Chairman

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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13 We note that the judge ordered the interest on backpay computed at the IRS adjusted prime rate under Arkansas-Carbona Company, 5 FMSHRC at 2050-52. 13 FMSHRC 1980 n.4. In Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), the Commission modified the calculation of such interest. We remind the judge that interest should be calculated according to Arkansas-Carbona, as modified by Clinchfield.

Commissioner Backley concurring in part and dissenting in part.

The majority has correctly concluded that under the Mine Act the Commission has the discretion to fashion a policy regarding the effect of unemployment compensation upon the backpay award received by a miner. The Commission however, as with any court or agency, must base its exercise of discretion upon reasoned, rational principles that are not in conflict with binding precedent. Failure to do so amounts to an abuse of that discretion. In this case, examination of the bases upon which the majority concludes that unemployment compensation received shall be deducted from backpay awards constrains me to conclude that the majority has abused its discretion.

Distilled to its core, the majority's rationale is that the failure to deduct unemployment compensation results in a windfall to the miner that is in conflict with the policy to require deductions of earnings from backpay, and that such failure to deduct constitutes an additional expense to the employer.

The foregoing reasoning has long since been considered and rejected by the Supreme Court. Indeed the very same Supreme Court case relied upon by the majority, in support of its conclusion that it has discretion to adopt a policy on this issue, provides a clear prescient rejection of the majority's rationale.

> To decline to deduct state unemployment compensation benefits in computing back pay is not to make employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

NLRB v. Gullett Gin Co., 340 U. S. 361, 364 (1951) (emphasis in original).

Thus, in determining that the NLRB acted properly within its discretion by refusing to deduct unemployment compensation from backpay owed, the Supreme Court clearly differentiated unemployment compensation from earnings. The Court flatly rejected the argument that unemployment compensation was to be treated as earnings.

> In Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253, 87 L ed 744, 63 S Ct 585, this Court held that the benefits received by employees under a state unemployment compensation act were plainly not earnings which, under the Board's order in that case, could be deducted from the back pay awarded.

340 U.S. at 363.

The Gullett Gin Court also rejected the argument that the unemployment compensation payments were to be considered as direct payments from the employer and therefore properly set-off against the backpay award. The Court stated:

> Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.

340 U.S. at 364 (citations omitted).

Although the Commission has the discretion under the Mine Act to establish a policy on this issue, even one that differs from the result reached by the Supreme Court, the Commission does not have the authority to bottom its discretionary policy choice upon standards or reasons which have been rejected by the Supreme Court.

> A lower court, when faced with a factually distinguishable but legally relevant Supreme Court decision, may employ the Supreme Court's method of analysis to render a decision that differs from the Supreme Court's. A lower court, however, may not employ a different standard in analyzing the different facts.

Levine v. Heffernan, 864 F.2d 457, 460 (7th Cir. 1988) (emphasis in original).

In this case the majority has strayed even further than the lower court in Levine. Here the majority has relied upon a rationale which has been rejected by the Supreme Court. 1/ The Commission is required to follow not only the decisions but also the clear implications of Supreme Court decisions. Hendricks County Rural Elec. v. N.L.R.B., 627 F.2d 766, 769, rev. on other grounds, 454 U. S. 170, on remand, 688 F.2d 841. 2/ Unless and until the Supreme Court chooses to depart from its ruling and rationale we must be so guided. Kovacs v. United States, 355 F.2d 349, 351 (9th Cir. 1966).

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1/ "The collateral benefits rationale was one of the bases for the Supreme Court's decision in Gullet Gin." Craig v. Y&Y Snacks, Inc., 721 F.2d 77, 84 (3rd Cir. 1983); see also Kauffman v. Sidereal Corp., 695 F.2d. 343, 346, (9th Cir. 1982).

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2/ The Supreme Court did not disturb the circuit court's conclusions regarding the binding effect of prior Supreme Court decisions and implications thereto. However, the Supreme Court did rule that its own statement, contained in a prior decision and relied upon by the circuit court, was in error.

To the extent that my colleagues attempt to excuse their failure to apply the Supreme Court's rationale on the basis that the above-quoted Gullet Gin statements are merely dicta, and therefore not controlling, they err. Whether dicta or not, the Commission should always be guided by the opinion of the Supreme Court. United States v. Willard, 211 F.Supp. 643, 652 (N. D. Oh. 1962). Moreover, assuming arguendo that the above-quoted rationale is dicta, "it cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court." 627 F.2d at 768 n. 1 (citation omitted). For the foregoing reasons I conclude that the majority has acted arbitrarily and therefore has abused its discretion.

Beyond the foregoing legal basis for my disagreement with the majority, I am eager to disassociate myself from a policy choice which fails to fairly balance the interests of the parties. After reading the majority's opinion on this issue, it would seem necessary to remind the reader that in this case the miner prevailed, i.e., he was the victim of an illegal discharge. This caution is necessary because the majority's expressed concern focuses unduly on avoiding the risk of visiting a windfall recovery upon the miner. Never mind that in pursuing their approach, there seems to be no concern that a reciprocal windfall may inure to employers whose backpay liability will be partially discharged from a public fund not intended for such use.

The deduction or offsetting of unemployment benefits may well result in a windfall to the employer. He finds himself in a position where he is not responsible for the payment of the illegally withheld back pay and then offsetting it with unemployment benefits by the government, which is unjust enrichment except to the extent that employers make contributions to the fund.

EEOC v. Sandia Corp., 639 F.2d 600, 626 (10th Cir. 1980).

Ideally, our goal is to formulate a policy which will result in a windfall to neither party. In seeking to achieve that same goal, the majority of courts have opted to not deduct unemployment compensation from backpay awards. Indeed four Circuit Courts, the Third, Fourth, Ninth and Eleventh have adopted rules which have removed this matter from district court discretion. The rule requires that no deduction of unemployment compensation be made from Title VII backpay awards. 3/ Furthermore, it is settled law within the NLRB that unemployment compensation not be deducted from back pay. 340 U.S. at 365-366; see also Brown v. A. J. Gerrard Mfg. Co., 715 F.2d 1549, 1551 (11th Cir. 1983). The most effective and sensible approach to resolve this issue is rooted in a

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3/ I share the majority's view that case law relating to: Title VII of the Civil Rights Act of 1964; the National Labor Relations Act; and the Age Discrimination in Employment Act is applicable to this issue.

footnote the Supreme Court used to support its opinion that "back pay does not make the employees more than 'whole'." 340 U.S. at 365. The Court observed that "some states permit recoupment of benefits paid." Id. n. 1. This approach has been widely followed. In adopting a rule of non-deductibility of unemployment benefits and rejecting the windfall argument, the Third Circuit reasoned:

> although it appears to provide double recovery, in fact that is not the inevitable result. Often insurers have subrogation rights, and in some circumstances state benefits are recoupable. For example, a recently enacted Pennsylvania statute provides for recoupment of unemployment benefits when back pay has been awarded.

Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 83-84 (3rd Cir. 1983) (citation omitted.); see also Cooper v. Asplundh Tree Expert Co., 836 F.ed 1544, 1555 (10th Cir. 1988), where the court rejected the set-off because Colorado law requires an employee who receives a back pay award to "repay . . . all unemployment benefit payments received."

In affirming the lower court, the Ninth Circuit referred approvingly to the rationale that:

> if Congress did not intend for an employee to receive unemployment benefits in addition to back pay the logical solution is a recoupment of the unemployment benefits by the state employment agency.

Kauffman v. Sideral Corp., 695 F.2d 343, 347 (9th Cir. 1982).

Indeed, even in the Seventh Circuit where the court registered a clear concern and preference that an employee not receive unemployment compensation and overlapping backpay, the court reasoned that the solution was not to allow the employer to "get a deduction for unemployment insurance benefits but that Hunter should have to repay them." Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1429 (7th Cir. 1986). The court went on to observe that if that were not possible "the choice seems to be between conferring a windfall on Allis-Chalmers and a windfall on Hunter. As the victim of Allis-Chalmers' wrongdoing, Hunter is the logical choice." Id.

The court's reasoning in Hunter serves to pinpoint the basic unfairness of the majority's policy choice. The majority concedes that state recoupment of unemployment compensation occurs "in many instances." (Slip op. 12 n. 10), thereby suggesting that the risk of a windfall recovery to the miner is limited. On the other hand the majority also concedes that the risk of any increased employer expense is variable and unknown. Slip op. 13 n. 11. Thus the majority's twin concerns -- miner windfall recovery, and increased employer payment -- are bottomed upon nothing more than vague speculation regarding

the effects of wide state-by-state legal variations. Notwithstanding the foregoing, the majority, in their zeal to ensure only that illegally discharged miners not receive a windfall, has adopted a national policy which will at times provide an employer with a windfall set-off from his backpay obligation. I, as did the court in Hunter, find this choice to be illogical and unfair. Moreover, the majority's policy is directly in conflict with the Gullett Gin Court's expressed rationale which details the basis for its rejection of the employer's argument that under the experience-rating record formula it will be prejudiced.

> We doubt that the validity of a back-pay order ought to hinge on the myriad provisions of state unemployment compensation laws. (citations omitted.) However, even if the Louisiana law has the consequence stated by respondent, which we assume arguendo, this consequence does not take the order without the discretion of the Board to enter. We deem the described injury to be merely an incidental effect of an order which in other respects effectuates the policies of the federal Act. It should be emphasized that any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state law, designed to effectuate a public policy with which it is not the Board's function to concern itself. (citation omitted.)

340 U. S. at 365.

The majority has also concluded that "deducting unemployment compensation from backpay awards is not inconsistent with the Mine Act 's goal of deterring illegal conduct." Slip op. 12.

This leap of logic is too vast to be ignored. In fact, it is correct to state the opposite -- that adoption of a non-deduction policy is consistent with the Mine Act's goal of deterring illegal conduct. There certainly is no deterrent value in establishing a policy whereby a violating operator may be relieved of his obligation to furnish illegally withheld pay from a discharged worker by off-setting his obligation by the use of state funds. In adopting a circuit wide rule of non-deductibility of unemployment benefits, the Third Circuit concluded that "the legislative history and Gullett Gin are persuasive, that the primary prophylactic policy of Title VII would thereby be better served." 721 F.2d at 85. Recognizing that backpay awards, have a prophylactic or deterring effect upon future discrimination the court also concluded: "To the extent that a backpay award is reduced by unemployment benefits, this purpose is diluted." 721 F.2d at 84.

Finally, I find it curious that the majority attempts to support its policy choice 4/ by noting that the Mine Act imposes a civil penalty upon offending operators. Slip op. 13. I see no relevance of this fact to the issue of what constitutes an appropriate, fair backpay award to a miner who has been illegally discharged. In commenting on the wide breadth of relief that the Commission should require under the Mine Act, the Senate Committee on Human Resources expressly stated "the relief provided under Section 10[5](c) is in addition to that provided under sections 10[4](a) and (b) and 10[5] for violations of standards." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623.

For the foregoing reasons I would follow the reasoning of the Supreme Court, and the rule followed by the majority of courts, to not deduct unemployment compensation from backpay awards. I would therefore affirm the administrative law judge.

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RICHARD V. BACKLEY, Commissioner

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4/ In view of the fact that my colleagues have recently taken the unusual step of issuing a Direction for Review, sua sponte in the matter of Secretary of Labor on behalf of Clayton Nantz v. Nally & Hamilton Enterprises, Inc., Docket No. KENT 92-259-D (March 15, 1993) solely in order to review this one narrow issue, I can only presume that they are eager to provide the Secretary of Labor with the opportunity to present his views on this important issue, an opportunity unavailable to him in this matter arising under Section 105(c)(3).

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