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L. SWIFT, M SNYDER & R. CUNNINGHAM V. CONSOLIDATION COAL
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February 14, 1994

LARRY E. SWIFT, MARK SNYDER, and RANDY CUNNINGHAM	:	
v.	:	Docket No. PENN 91-1038-D
CONSOLIDATION COAL COMPANY	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners(Footnote 1)

DECISION

BY: Holen, Chairman; and Backley, Commissioner

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"), Larry E. Swift, Mark Snyder and Randy Cunningham, miners who were employed by Consolidation Coal Company ("Consol"), charged that Consol's Program for High Risk Employees ("the Program") violated section 105(c)(1) of the Mine Act. 30 U.S.C. 815(c)(1). Administrative Law Judge Gary Melick concluded that the Program was facially discriminatory under the Act and ordered Consol to cease implementation of the Program. 14 FMSHRC 361 (February 1992)(ALJ).

The case raises four issues: (1) whether the reporting of injuries under the Program constitutes protected activity under section 105(c)(1); (2) whether the Program is facially, or per se, discriminatory in violation of section 105(c)(1); (3) whether the Program was instituted for discriminatory reasons; and (4) whether the Program was applied to miners in violation of section 105(c)(1). For the following reasons, we affirm the judge's conclusion that injury reporting constitutes protected activity; we reverse the judge's finding that the Program was facially discriminatory; and we remand for consideration of the third and fourth issues, which the judge did not reach.

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1 Commissioner Nelson participated in the disposition of this case. He passed away before the decision was issued. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

I.

Factual Background and Procedural History

Consol operates the Dilworth Mine, an underground coal mine in Greene County, Pennsylvania. On January 1, 1990, the Dilworth Mine initiated the Program, which is attached as an appendix to the judge's decision. 14 FMSHRC at 365-67, App. A. The Program directs that each employee report to management any incident resulting in personal injury.(Footnote 2) The Mine's previously adopted safety rules also require employees to report all injuries.(Footnote 3)

Step I of the Program consists of designating as "High Risk" any employee who experiences four injuries in 18 working months. Such an employee receives counseling from Consol's management. If the employee at Step I works 12 months without experiencing an additional injury, he clears his record and leaves the Program; the employee reaches Step II if he incurs an additional injury within the 12 months. The employee at Step II is counseled, suspended from work for two days without pay, and required to attend a special awareness session. That employee leaves the Program if he works 12 months without experiencing further injury; if the employee experiences an injury within the 12 months, he reaches Step III. At Step III, the employee is suspended with intent to discharge. 14 FMSHRC at 365-66, App. A 3-5.

On January 23, 1990, Dilworth employees Larry Swift, Randy Cunningham and Mark Snyder, who were members of the United Mine Workers of America ("UMWA") and safety committeemen at the mine, filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that implementation of the Program penalized miners and restricted them from reporting all accidents. See 30 U.S.C. 815(c)(2). Following its investigation, MSHA determined that Consol had not violated the Mine Act and the Secretary of Labor declined to prosecute. Swift, Snyder and Cunningham pursued their claim with private counsel. They filed a discrimination complaint on behalf of themselves and all Dilworth employees with the Commission on July 20, 1990, pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. 815(c)(3). At the hearing before Judge Melick, the miners argued that the Program violated section 105(c)(1) of the Mine Act on its face, in its motivation, and as it was applied.

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2 The Program provides at paragraph 2:

> Each employee continues to be obligated to report to Management any work related incident which results in personal injury to the employee and to complete a Report of Personal Injury (RPI) for each such injury.

14 FMSHRC at 365, App. A 2.

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3 The Dilworth Mine safety rules provide at paragraph 28: "All employees must report to management, each day, any injury that has occurred on mine property." Ex. R-2.

The judge found that reporting mine injuries is a protected right under the Mine Act. 14 FMSHRC at 363. The judge concluded that the Program was discriminatory on its face. He determined that, by subjecting Consol's employees to suspension and discharge based upon the filing of reports of personal injury, the Program inhibited the reporting of mine injuries and, in so doing, constituted illegal interference with such protected activity. Id. Given this ruling, the judge did not consider complainants' alternate theories of violation. He ordered Consol to "cease and desist from implementation of any disciplinary action" under the Program and to expunge from all records any references to disciplinary action taken under the Program. Id. at 364.

The Commission granted Consol's petition for discretionary review, permitted Peabody Coal Company ("Peabody") to participate as amicus curiae, and heard oral argument in the matter.

II.

Disposition of Issues

A. Parties' Arguments

On review, Consol argues that the Program is consistent with the safety purposes of the Mine Act. Consol asserts that the judge erred in finding a violation in the absence of any discriminatory motivation. Consol contends that, even if it could have violated the Act absent unlawful intent, the judge failed to consider legitimate safety interests in accident prevention that motivated Consol to adopt the Program. Consol argues that the judge failed to consider its affirmative defense -- that it would have taken the actions at issue for reasons unrelated to protected activity. Consol also asserts that the judge made no finding that any of the accident reports under the Program involved protected activity under section 105(c)(1) of the Mine Act.

Amicus Peabody argues that the judge's decision is contrary to the purposes of the Mine Act, which makes safety a primary concern and imposes the responsibility to abate unsafe conditions on both operators and miners. Peabody contends that the judge's analysis is inconsistent with the Commission's case law, under which a showing of improper motivation is required to sustain a discrimination complaint.(Footnote 4)

The complainants argue generally in support of the judge's decision. They argue that the Program violates section 105(c)(1) because it interferes with accident reporting. They further assert that the Program was discriminatorily motivated to inhibit reporting of accidents and that it was instituted in response to the safety committee's complaints.

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4 In discussing the arguments of Consol and Peabody on review, we refer to them collectively as "the operators." Amicus Peabody contends in its supplemental memorandum that the judge's decision conflicts with state laws that decertify unsafe miners. We do not reach this issue because it is outside the scope of Consol's petition for review and was not first presented before the judge. 30 U.S.C. 823(d)(2)(A)(iii).

B. Overview

We first consider whether a miner's reporting of injuries to an operator constitutes protected activity and whether the Program is facially discriminatory, apart from its motivation. Next, we address the issues of motivation for establishing the Program and the Program's application to individual miners.

C. Protected Activity

The Mine Act prohibits discrimination against miners for exercising any protected right including filing a complaint, testifying in a Mine Act proceeding and instituting a proceeding under the Act.(Footnote 5) The general principles applicable to analysis of discrimination under section 105(c) of the Mine Act, formulated primarily for analysis of particular acts of discrimination against individuals, are well settled and have become known as the "Pasula-Robinette" test. See Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (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). In order to establish a prima facie case of discrimination under that analysis, 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

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Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

protected activity. Id.

We affirm the judge's conclusion that a miner's reporting of injuries to an operator constitutes protected activity. Section 2(e) of the Act provides that "operators of ... mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." 30 U.S.C. 801(e). In order to carry out this responsibility, mine operators need to know about unsafe conditions that cause accidents and injuries. Further, accurate information must be gathered by operators in order to comply with the Secretary's regulations at 30 C.F.R. Part 50 (1993), requiring operators to file with MSHA reports of all accidents and injuries that occur at mines. Operators can be fully informed about accidents and injuries only with the cooperation of miners. Therefore, taking adverse actions against miners for their reporting of injuries would restrict the free flow of information and compromise accurate reporting and mine safety.

We reject the operators' contention that the act of reporting a personal injury would qualify as protected activity only if the report contains a safety complaint; this approach takes too narrow a view of such reports. The legislative history of the Act makes clear the intent of Congress that protected rights are to be construed expansively. See S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) ("Legis. Hist.").

The right to report injuries, however, carries with it a corresponding responsibility that miners report injuries and accidents. The legislative history of the Act shows that Congress provided protection to miners against discrimination in order to encourage their active role in enhancing mine safety:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.... [I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

Legis. Hist. at 623. Moreover, the right to report injuries does not include a protected right to incur or cause injury.

D. Whether the Program is Facially Discriminatory

1. Introduction

Central to proving a case of discrimination under section 105(c)(1) is the determination of unlawful motive. The Mine Act prohibits retaliatory conduct or discrimination that is motivated by a miner's exercising any protected right. Nevertheless, rare situations have arisen in which proof

that adverse action was improperly motivated has not been required. The Supreme Court has permitted a showing of facial discrimination under section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(3): "Some conduct ... is so `inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive." NLRB v. Great Dane Trailers, 388 U.S. 26, 33 (1967)(citations omitted). The Commission found in UMWA and Carney v. Consolidation Coal Co., 1 FMSHRC 338, 341 (May 1979), that an operator's business policy was facially discriminatory. There, the Commission found that, under section 110(b) of the Coal Act (30 U.S.C. 820(b)(1976)(amended 1977)), the predecessor to section 105(c), a company policy requiring union safety committeemen to obtain permission from management before leaving work to perform safety duties was unlawful because it impeded a miner's ability to inform the Secretary of alleged safety violations. See also Simpson v. FMSHRC, 842 F.2d 453, 462-63 (D.C. Cir. 1988)(when mine conditions intolerable, operator motive need not be proven to establish constructive discharge). Cf. Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521, 1532-33 (August 1990)(held that operator's policy was not facially discriminatory).

To establish that a business policy is discriminatory on its face, a complainant must show that the explicit terms of the policy, apart from motivation or any particular application, plainly interfere with Mine Act rights or discriminate against a protected class. See Price and Vacha, 12 FMSHRC at 1532. Once a policy is found to be discriminatory on its face, an operator may not raise as a defense lack of discriminatory motivation or valid business purpose in instituting the policy. Compare Price and Vacha, 12 FMSHRC at 1532-33 with Price and Vacha, 10 FMSHRC 896, 907-08 (July 1988)(ALJ).

When reviewing a claim of facial discrimination, the Commission has stated:

> "The Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of [a challenged business program or policy] apart from the scope and focus appropriate to analysis under section 105(c) of the Mine Act." Our limited purpose is to focus simply on whether the [program] or enforcement of some component thereof conflicts with rights protected by the Mine Act.

Price and Vacha, 12 FMSHRC at 1532 (citation omitted).

2. Facial Analysis of the Program

We address the issue of whether the Program, as alleged by the complainants, was "facially discriminatory to themselves and to all other miners" (14 FMSHRC at 362), and therefore interfered with Mine Act rights. The Program explicitly requires the reporting of personal injuries and the Dilworth Mine safety rules additionally require employees to report all injuries. These requirements, on their face, are consistent with the Mine

Act's goals of encouraging miners to report accidents and injuries. Under the legislative history of the Act, the reporting of an injury is equally the miner's responsibility as it is his right. The Program does not, as asserted by complainants, impose or threaten discipline for reporting injuries. Rather, it imposes discipline for incurring a number of injuries. Further, all miners at Dilworth are subject to the Program; it does not single out for special treatment particular workers or classes of workers. Thus, the Program's terms on their face do not discriminate against miners who report injuries, nor do they interfere with miners' rights to report injuries.

The judge concluded that the Program interferes with Mine Act rights by "creat[ing] an obvious and persuasive disincentive to report injuries." 14 FMSHRC at 364. The judge reasoned that "[s]ustaining an injury and the reporting of the injury are ... inextricably interrelated." Id. As a matter of law, we reject the judge's legal inference and ultimate conclusion.(Footnote 6) Reporting and sustaining injuries, in general and under the Program, are distinct events and can involve different individuals. Indeed, the judge recognized that sustaining injuries is not protected activity under the Mine Act. Id. As noted earlier, the Program continued the requirement under the company's rules that all injuries be reported.

Under the judge's reasoning, any program that penalizes injuries sustained, even a program that is based on fault, would chill accident reporting. See 14 FMSHRC at 363-64.(Footnote 7) The complainants, however, effectively concede that, absent inclusion of blameless accidents, the Program may be facially lawful. See Oral Arg. Tr. 52-53. Nevertheless, the complainants have not shown that the inclusion of no-fault injuries in the Program specifically contravenes the Mine Act.(Footnote 8)

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6 The judge's analysis is based on the express terms of the Program; he did not base his conclusion that the Program interfered with Mine Act rights on any factual findings nor discuss any evidence in the record as to whether reporting was encouraged or discouraged under the Program. The judge, consistent with Commission precedent (see Price and Vacha, 12 FMSHRC at 1533; Carney, 1 FMSHRC at 341), did not consider the subjective testimony of individual miners to determine whether the allegedly discriminatory employment action interfered with Mine Act rights.

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7 The Program is virtually no-fault, i.e., a miner is charged with an injury even if blameless in the causation of the accident. In paragraph No. 8, however, management reserves the right to exclude injuries in the "rare situation" when management determines that there was "absolutely no culpability on the part of the injured employee" and when such exclusion appears "to be in the best interest of attaining a safe working environment for all employees at the mine." 14 FMSHRC at 367, App. A 8.

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8 The parties disagree on the merits of a no-fault injury reduction program. This issue is appropriately resolved in collective bargaining and the grievance/arbitration process. See, e.g., UMWA on behalf of James Rowe v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (September 1985), aff'd sub nom. Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987).

In Secretary on behalf of Pack v. Maynard Branch Dredging Co., 11 FMSHRC 168, 172 (February 1989), aff'd, 896 F.2d 599 (D.C. Cir. 1990), the Commission rejected a similar argument as to the chilling of reporting, raised against a company policy that required employees to report dangerous conditions to the company. The Secretary asserted that such a policy would intimidate miners from exercising their rights under sections 103(g) or 105(c) of the Act. Id. at 172-73. The Commission held that the operator was entitled to initiate such a policy that called for miner participation in the maintenance of safety. Id. As Commissioner Backley stated in Pack, a "fundamental goal of the Act [is] to ensure that every miner does all that he can to make the work environment safe." Id. at 174 (concurring in part and dissenting in part). Making the work environment safe requires the accurate reporting of injuries.

For the reasons set forth above, we hold that Consol's Program, on its face, does not violate the Mine Act.

E. Issues Remanded

The foregoing conclusion does not dispose of the case. Because the judge did not reach the issues of whether the initiation of the Program was discriminatorily motivated and whether the Program was subsequently applied in a discriminatory manner, we remand for his consideration of these issues. We provide the following guidance for the judge and parties.

1. Motivation for Instituting the Program

In Price and Vacha, the Commission indicated that discriminatory motive would invalidate a policy that is otherwise facially lawful. 12 FMSHRC at 1532-33. The Pasula-Robinette test provides the appropriate framework for analyzing the reasons for Consol's adoption of the Program. See Pasula, 2 FMSHRC at 2797-800; Robinette, 3 FMSHRC at 817-18.

Under the Pasula-Robinette test, an operator may rebut a prima facie case of discrimination by showing either that no protected activity occurred or that an 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. Id. 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, 398-403 (1983)(approving nearly identical test under National Labor Relations Act).

The judge did not make express findings as to Consol's motivation for

initiating the Program -- whether it was to reduce the high injury rate, to discourage accident reporting, or to retaliate against the mine safety committeemen's filing of safety complaints. We direct the judge to make findings and conclusions as to whether the initiation of the Program was, even in part, discriminatorily motivated.

If the judge finds unlawful motivation, he shall further analyze whether Consol, nevertheless, presented a successful Pasula-Robinette affirmative defense -- i.e., showed that it also initiated the Program to help reduce accidents and would have done so in any event for safety purposes alone.(Footnote 9)

If Consol fails to sustain its affirmative defense, a violation is proven. If the judge finds no evidence of discriminatory motivation in the establishment of the Program or if Consol sustains its affirmative defense, he shall proceed to address whether the Program was applied in a discriminatory manner.

2. Application of the Program

The question before the judge will be whether the Program was specifically applied in a disparate way to individual miners or classes of miners in contravention of the Mine Act. See Price and Vacha, 12 FMSHRC at 1533-36. (An example of such treatment would be exclusion from the Program of an injury to one miner and inclusion of similar injuries to another miner.) We note that, by itself, hostility of miners to the Program is not sufficient to prove the existence of a violation. Id. at 1533. The judge shall make all findings necessary to dispose of application issues within the Pasula-Robinette framework.

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9 We note the judge's finding that, during the 1980's, before the adoption of the Program, the Dilworth Mine had the worst safety record of Consol's Eastern Division. 14 FMSHRC at 362. Consol refers to evidence in the record that it asserts represents a decline in the frequency and severity of injuries at Dilworth. C. Br. at 10-11. To the extent that the judge can infer motivation from the effect of the Program, he should consider this evidence. Counsel for complainants at oral argument attributed the improved safety record, in part, to extra care taken by employees as a result of the Program. Oral Arg. Tr. 47-48.

III.

Conclusion

For the reasons set forth above, we reverse the judge's determination that the Program was facially unlawful. We remand for his consideration of whether Consol was improperly motivated in instituting the Program and, if so, whether it sustained its affirmative defense. If the judge finds no discriminatory motivation or if Consol sustains its affirmative defense, he shall address whether Consol applied the Program in a discriminatory manner. Accordingly, this matter is remanded for further proceedings on this record consistent with this opinion.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Commissioner Doyle, concurring in part and dissenting in part:

I concur with my colleagues in affirming the administrative law judge's determination that the complainants engaged in activity protected under the Mine Act when they reported injuries to their employer, Consolidation Coal Company ("Consol"). Slip op. at 4-5. I must, however, respectfully dissent from their determination that Consol's Program for High Risk Employees (the "Program") is not discriminatory on its face. I would also affirm the judge's decision on the basis that the Program inhibits the exercise of Mine Act rights in violation of section 105(c).

Under the Mine Act, operators are required to report all accidents and occupational injuries, as those terms are defined at 30 C.F.R. 50.2, to the Mine Safety and Health Administration ("MSHA"). To fulfill that obligation, operators rely, to a great extent, on reports from their employees of such occurrences. It is that reporting to Consol of miners' injuries that is the "protected activity" underlying this complaint of discrimination.

Consol's Program requires each employee to report to management each work related incident that results in his injury and to also file a "Report of Personal Injury." 14 FMSHRC 365-66, App. A 2. An employee experiencing four injuries in eighteen months is designated a "High Risk Employee" and is enrolled in the Program. Id. at 3. Another injury within twelve months subjects the employee to suspension. Id. at 4. If an additional injury is suffered within the following twelve months, the employee is subject to suspension with intent to discharge. Id. at 5. Those causing accidents or injuries are not placed in the program unless they, too, are injured. Oral Arg. Tr. at 9-12, 67.

The Complainants, filing on their own behalf and on behalf of all miners subject to the Program, claimed, among other things, that the Program was initiated to inhibit the accident reporting required by 30 C.F.R. Part 50 and that it was per se violative of section 105(c). Complainants' Post Hearing Br. at 5. The judge found that the Program, by subjecting miners to suspension and discharge, created an obvious disincentive to report injuries and inhibited and interfered with that reporting. 14 FMSHRC at 363-64. Further, he found that the Program was discriminatory on its face in violation of section 105(c). Id. at 364.

As noted by the majority, a program or policy is discriminatory on its face if its explicit terms, apart from motivation or particular application, interfere with Mine Act rights or discriminate against a protected class. Slip op. at 6. Thus, if the Program provided that those engaged in the protected activity of reporting their injuries were subject to adverse action, it would be, without question, discriminatory on its face. The Program, albeit less

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1 Their other claims were: (1) that the program was initiated in retaliation for, and to counteract the effects of, actions by the mine safety committee to force proper accident and injury reporting to MSHA by Consol; and (2) that each application of the Program crated and individual violation of section 105(C). The judge did not reach these issues.

blatantly, achieves the very same result by requiring each employee to report his injuries and, on the basis of those injuries, designates him a "High Risk Employee." He is then placed in the Program.

The judge found that sustaining and reporting injuries were so "inextricably interrelated" that the two activities could not be separated. 14 FMSHRC at 364. My colleagues, in reversing the judge, characterize this finding as a "legal inference and ultimate conclusion," which, "[a]s a matter of law, [they] reject." Slip op. at 7. They state that "[r]eporting and sustaining injuries, in general and under the Program, are distinct events and can involve different individuals." Id. While others may also report accidents, that does not diminish the fact that the Program itself, at paragraph 2, states that each individual sustaining an injury must report that injury to management and "complete a Report of Personal Injury." 14 FMSHRC at 365, App. 2. Thus, the Program itself, on its face, inextricably links the sustaining and reporting of injuries. That being the case, I agree with the judge that, on its face, the Program violates section 105(c) of the Mine Act.

Not only is the Program discriminatory on its face in that it provides for adverse action against those engaged in protected activity but, as the judge found, its effect is to inhibit the exercise of reporting rights. Congress, in passing the Mine Act, recognized in section 2(c) the need for more effective means of preventing death and serious injuries in the nation's mines. 30 U.S.C. 801(c). In furtherance of that goal, and to encourage a more active role by miners, it provided the anti-discrimination provisions of section 105(c), which protect miners from adverse actions as a result of the exercise of rights provided under the Mine Act. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (1978) ("Legis. Hist.") at 623. The Senate report stressed that the anti-discrimination section should be construed "expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." Legis. Hist. at 624.

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2 Citing Oral Arg. Tr. at 52-53, the majority states that Complainants "effectively concede that, absent inclusion of blameless accidents, the program may be facially lawful." Slip op at 7. A review of those pages indicates that Complainants made no such concession. They stated they would not be troubled by a program that dealt with those enclude blameless accidents.

3 My colleagues note, but do not follow, the factually similar UMWA & Carney v. Consolidation Coald Co., 1 FMSHRC 338 (May 1979), in which the Commission found discriminatory the operator's policy of requiring miners to obtain company permission to perform union safety duties. In reaching its conclusion, the Commission reasoned that the operator's policy effectively impeded a miner's ability to exercise his Mine Act rights. Id. at 341.

The majority, in reversing the judge, dismisses out of hand his finding that the Program inhibits and interferes with the exercise of Mine Act rights. 14 FMSHRC 363; Slip op. at 6-7. That finding is, however, supported by substantial evidence and, under the terms of the Mine Act, must be affirmed. 30 U.S.C. 823(d)(2)(A)(ii)(I). Complainant Swift testified that numerous employees had told him that, because of the Program, they would not report accidents if they could avoid it. Tr. at 230, 231. He testified further that he knew of four accidents that had not been reported because of the Program. Tr. at 232. One employee who injured his back was afraid to report it for fear of losing his job. Tr. at 224-25. Another employee who required stitches had to be convinced by Swift to report the accident because he feared going into the Program. Tr. at 231. Complainant Cunningham testified that, because he has experienced four accidents, he is now in the Program, although he lost no time as a result of the incidents. Tr. at 22, 29. He now feels inhibited about filing accident reports for fear of losing his job and, if he sustains another injury, he intends to leave the mine without reporting the accident and see his own doctor. Tr. 28, 31-32.

The Program's inhibiting effect on injury reporting is uncontradicted in this record. Thus, because the Program interferes with protected activity, precisely what section 105(c) was designed to prevent, it is discriminatory.
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4 Contrary to the majority's assertion, the Commission did not reject a similary argument in Pack v. Maynard Branch Dredging Co., 11 FMSHRC 168 (February 1989). Slip or. at 8. Rather, it found that the record evidence did not support the argument. 11 FMSHRC at 173. In Pack, the company policy required employees to report all unsafe condition to their supervisors. There was no discipline or other adverse action taken against those who followed the policy. It was Pack's failure to report that caused his dismissal. The Commission found that "miners being intimdated from exercising their rights under ... the Mine Act simply is not presented by thie case." Id. Here, the judge found that miners were inhibited from exercising their Mine Act right to report (14 FMSHRC at 363-64) and adverse action was taken against those who did report.

5 In one instance, Cunningham was struck by an elevator door as he attempted to exit the elevator. His foreman was operating the controls at the time. Tr. at 23-24. In a second accident, Cunningham was told to enter a scoop care to assist in locating an oil leak. After pulling levers as instructed, he was hit in the face by spraying oil and, although he was wearing safety glasses, oil had to be flushed from his eye. Tr. at 24-25.

6 In Price & Vacha v. Jim Walter Resources., Inc., 12 FMSHRC 1521 (August 1990), miners opposed an operator's drug testing program because they believed it cast suspicion of drug use on those being tested and because they saw it as an invasion of their privacy and an afforont to their dignity. Id. at 1525. The Commission found that "a miner's opposition or hostility" was not determinative of a program's validity and that adverse action was "not simply any operator action that a miner does not like. " Id. at 1533. Here, the Pogram is not simply one that miners oppose or dislike. The Program interferes with and punishes their exercise of Mine Act rights.

In the majority's opinion, the inhibiting effect on Mine Act reporting rights is apparently irrelevant. Under their analysis, Complainants must prove either that the Program was discriminatorily motivated or was discriminatorily applied to individual miners or classes of miners. Slip op. at 7-9. "Some conduct, however, is so `inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive." NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967) (citations omitted).

Thus, on the basis that the Program is discriminatory on its face, as well as on the basis that, on the undisputed record, it has inhibited Consol's employees in the exercise of their protected right to report injuries, I would affirm the administrative law judge.

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Joyce A. Doyle, Commissioner

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7 The majority states that "under the judge's reasoning, any program that penalizes injuries sustained, even a program based on fault, would chill accident reporting." Slip op. at 7. They misconstrue the judge's decision. Applying his reasoning, only programs that require a miner to report his injuries, and also provide for adverse action against him based on that report alone, would be found to inhibit reporting. fault-based programs focusing on those causing accidents and injuries, rather than on those sustaining or reporting tem, would not be proscribed. This would be true even if, in some instances, the individual causing an injury were also the one reporting it, because the driving force of such a program would be unsafe conduct, not injury reporting. Apparently the program of Amicus Curiae, Peabody Coal Company, is based on unsafe conduct, not on injuries sustained. Oral Arg. Tr. at 27-29, 33, 36, Peabody Reply Br. at 3. Under the judge's reasoning, such a program would not chill reporting nor would it be discriminatory on its face.