FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 29, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RICHARD E. GLOVER and LEON KEHRER	:	
v.	:	Docket No. LAKE 95-78-D
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is whether Administrative Law Judge Gary Melick properly found that Consolidation Coal Company (AConsol@) violated section 105(c)(1) of the Mine Act, 30 U.S.C. ' 815(c)(1),[1] when it transferred mine representatives Richard Glover and Leon Kehrer from their positions as Ascooter barn@ mechanics to positions as underground mechanics. 17 FMSHRC 957 (June 1995) (ALJ). The Commission granted Consol=s petition for discretionary review challenging the judge=s holding. The National Mining Association (ANMA@) and the United Mine Workers of America (AUMWA@) sought and were granted amicus status in this proceeding, and an oral argument was held. For the reasons

[1] Section 105(c)(1) provides in pertinent part:

> 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, [or] representative of miners . . . because of the exercise by such miner, [or] representative of miners . . . of any statutory right afforded by this [Act].

that follow, we affirm the finding of violation but remand for further analysis as to the civil penalty.

I.

Factual and Procedural Background

Glover and Kehrer had worked as scooter barn mechanics at Consol=s Rend Lake Mine for many years. 17 FMSHRC at 959. The scooter barn is located underground and, on June 21, 1994, was situated about 150 feet from the bottom of the AB@ shaft. *Id.* It is a shop area that measures 18 feet by 70 feet with rock walls, a beamed ceiling, and a cement floor containing equipment including welders, drill presses, and grinders. *Id.* The mechanics in the scooter barn repair diesel and battery-operated mantrips and other rubber-tired equipment, such as tractors and scoops. *Id.*; Tr. 24, 84-86. Consol assigned one mechanic for each of three shifts to work in the scooter barn. 17 FMSHRC at 959; Tr. 11, 56. The three shifts rotated every 2 weeks; the rotations were designated as A, B, and C turns. Tr. 16.

Glover had worked at the mine for 25 years and for 17 of those years he was a scooter barn mechanic. 17 FMSHRC at 959. He worked the A turn and, for 5 or 6 years, had been the alternate walkaround representative for the shift. *Id*. at 958-59; Tr. 16, 42, 155. Before that, he had been a union safety committeeman. Tr. 42. Kehrer had worked at the mine for 21 years, and was the scooter barn mechanic and walkaround representative for the C turn. 17 FMSHRC at 959; Tr. 103-04, 155. When Glover and Kehrer worked the day shift rotation, walkaround duties consumed approximately two-thirds of their time.[2] 17 FMSHRC at 959; Tr. 43, 50-51, 55. During their absence, other mechanics filled in as replacements in the scooter barn. Tr. 155-57.

Assistant master mechanic Johnny Robert Moore and mine superintendent Joseph Wetzel testified that on June 11, 1994, a meeting of supervisory personnel was held to discuss various problems at the mine. Tr. 173-74, 208. Inadequate transportation and mantrip availability were identified as major problems and management decided to station a mechanic in the scooter barn on a 24-hour basis. 17 FMSHRC at 960-61; Tr. 173-74, 208-09.

On Friday, June 21, 1994, the maintenance foreman on the A turn, Vernell Burton, informed Glover that he was being transferred to a working section because he was acting as

[2] The judge found that the Complainants spent 4 out of 5 days on walkaround during the day shift. 17 FMSHRC at 959. However, the record testimony establishes that they did not walk around all day; on each of the days they walked around, Glover and Kehrer returned to the scooter barn with approximately 1 **2** hours remaining in their shift. Tr. 51.

representative of miners and walking with the state and federal inspectors. 17 FMSHRC at 959; Tr. 27, 151. Burton told him that there was a possibility that if Glover stopped his walkaround duties he could remain in the scooter barn. 17 FMSHRC at 959; Tr. 28.

That same day, assistant master mechanic Moore announced to Kehrer that he was being removed from the scooter barn because he was a walkaround with the state and federal authorities. 17 FMSHRC at 959-61; Tr. 76-77, 181. Moore told Kehrer that if he relinquished his walkaround responsibilities he could remain in the scooter barn. 17 FMSHRC at 960; Tr. 76. Billy R. Sanders, an inspector with the State of Illinois, Department of Mines and Minerals, was present for and testified to this conversation. 17 FMSHRC at 959-60; Tr. 76-77.

Kehrer then spoke to Scott Wamsley, maintenance superintendent, who repeated that Kehrer was being removed because of his walkaround duties and that he either had to quit his walkaround duties or lose his job as scooter barn mechanic. Tr. 90. Kehrer also spoke with mine superintendent Wetzel, who stated that the transfer was not because he was a walkaround but because Consol wanted to make the scooter barn more productive. Tr. 91-92.

On Monday, June 24, Burton instructed Glover to report to working section 1-G as a maintenance mechanic. 17 FMSHRC at 959; Tr. 20. At the end of the shift, Glover and Kehrer went to see Wetzel and Wamsley. 17 FMSHRC at 959. Wetzel informed them that the Aofficial@ reason for the transfer was to make the scooter barn more productive and that they did not have the option of quitting their walkaround duties to stay in the scooter barn. 17 FMSHRC at 959; Tr. 31, 95.

The transfers did not result in a change in job classification or salary rate. Tr. 23, 33, 219. Glover and Kehrer were transferred as mechanics to the working sections, where they worked high voltage electrical equipment and were exposed to hazards such as dust, methane, and roof falls. 17 FMSHRC at 959-60; Tr. 24, 105. The miners were not given any additional training after the transfers. Tr. 24, 97-98. Not feeling safe in his new assignment, Glover subsequently bid on a motorman job, taking a pay cut of $1.00 per hour and, because that shift already had a walkaround representative, relinquishing those responsibilities as a result. 17 FMSHRC at 959; Tr. 20, 26, 70-71.

Glover and Kehrer filed a complaint alleging discrimination under the Mine Act with the Secretary of Labor who filed a complaint on their behalf. Consol contested the complaint and the proceeding was assigned to Judge Melick for a hearing.

The judge concluded that Consol violated section 105(c)(1) by transferring the Complainants from the scooter barn, and gave three alternative rationales for his determination. First, the judge found that the operator=s Apolicy,@ i.e., the transfer, was Afacially discriminatory@ because it A*effectively*@ barred miners= representatives from becoming or remaining scooter barn mechanics, discouraged miners who might wish to work as scooter barn mechanics from becoming miners= representatives, and restricted miners= rights to select whom they wished to

represent them. 17 FMSHRC at 963 (emphasis added). Second, the judge found the transfers discriminatory under the Commission=s test enunciated in *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (October 1980), *rev=d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981) (A*Pasula-Robinette*@ analysis), because Glover and Kehrer were members of a protected class who had engaged in protected activity prior to the transfer, and the transfer was motivated solely by their protected activity. 17 FMSHRC at 963-64. Third, the judge stated that, assuming *arguendo,* the Amixed motive@ analysis under *Pasula-Robinette* was applicable, Consol=s business justification of transferring the Complainants to secure 24-hour coverage in the scooter barn did not outweigh Congressional intent to protect miners exercising their walkaround rights under the Act. *Id*. at 964-65. The judge ordered Consol to reinstate the miners to their previously-held positions and assessed a $10,000 civil penalty against Consol. *Id*. at 965.

II.

Disposition

Consol argues that the judge erred in reaching a conclusion that will require operators to engage in major restructuring of their workforces and provide accommodation for walkaround representatives that work undue hardship on production activities. PDR at 6-13.[3] Consol contends that the judge=s decision is not supported by substantial evidence because the totality of circumstances demonstrates that Complainants= transfer was not unlawfully motivated but motivated by the operator=s legitimate business need to have mechanics in the scooter barn on a regular basis. *Id*. at 13-14, 20. Consol stresses that the evidence established that the operator wanted the miners to continue their walkaround duties, and that the Secretary failed to prove that the transfer discouraged or interfered with walkaround rights at the mine. *Id*. at 14-15. Consol further asserts that the transfers were not facially discriminatory and, even if they were, the judge erred in concluding that Aan operator may not raise as a defense the lack of discriminatory motivation or valid business purpose@ in cases of facial discrimination. *Id*. at 15-19 (quoting 17 FMSHRC at 962).

In support of Consol=s position, amicus NMA adds that the facial discrimination analysis in *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201 (February 1994), does not apply to this case. NMA Br. at 3-10. Even if the analysis were to apply, NMA asks the Commission to revisit its holding in *Swift*. *Id*. at 7-8 & n.2, 11-17. NMA further argues that, in accordance with

[3] Consol designated its PDR as its brief.

Congressional intent, Consol was entitled to exercise its legitimate management rights to accommodate allegedly pervasive inspections conducted by the Department of Labor=s Mine Safety and Health Administration (AMSHA@). *Id*. at 1-2 & n.1, 17-22.

The Secretary responds that the judge properly concluded that the transfers violated section 105(c) under either a facial discrimination or *Pasula-Robinette* analysis. S. Br. at 8-11. The Secretary additionally argues that Consol=s policy impermissibly interfered with the exercise of the walkaround right protected under Mine Act section 103(f), 30 U.S.C. ' 813(f). *Id*. at 8-31. The Secretary disagrees with Consol=s assertion that the transfers were due to the miners= absences, pointing to the statements of the miners= immediate supervisors that the transfers were based on their status as walkaround representatives. *Id*. at 22. The Secretary contends that the transfers constituted an adverse action, noting that the scooter barn had fewer dangers than the working sections and asserting that the scooter barn was a more desirable position than those to which the miners were transferred. *Id*. at 26-28. She asserts that Consol=s transfer had the effect of chilling the miners= right to choose their walkaround representative. *Id*. at 28-29.

In support of the Secretary, amicus UMWA asserts that Consol=s primary defense, that operators should not be required to engage in a Amajor restructuring@ in order to comply with the Act, is incorrect because an operator must comply with the provision of the Mine Act in order to operate a mine and is not at liberty to choose only those provisions that are easy or inexpensive to satisfy. UMWA Br. at 9. UMWA contends that the Secretary did not dictate any restructuring, but rather Consol chose a solution to its transportation difficulties that impermissibly infringed on miners= rights under section 103(f) of the Mine Act. *Id*. at 10-12.

1. Discrimination

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. 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. *Robinette*, 3 FMSHRC at 818 n.20. If the 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 alone. *Id*. at 817-18; *Pasula*, 2 FMSHRC at 2799; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The judge determined that the Aspecific action by Consol in transferring the Complainants in this case for their activities as miners= representatives@ was Adiscriminatory under the customary analysis applied to discrimination cases.@ 17 FMSHRC at 963. As the judge found, there is Ano dispute@ that both Glover and Kehrer, as miners= representatives, Awere members of a protected class and had engaged in protected activity prior to their transfer.@ *Id*. at 963-64. The protected

activity consisted of Complainants= service as walkaround representatives pursuant to Mine Act section 103(f), which provides that Aa representative authorized by his miners shall be given an opportunity to accompany the Secretary . . . during the physical inspection of any coal or other mine. . . .@ 30 U.S.C. ' 813(f). Accordingly, we conclude that the judge correctly determined that the Secretary proved the element of protected activity.[4]

[4] Substantial evidence establishes that, in June 1994, Glover and Kehrer were serving terms as alternate safety committeeman and safety committeeman, respectfully, having been appointed by union officials and their appointments confirmed by vote of local union membership composed of Rend Lake miners. Tr. 16, 238, 241-45. This method of designation satisfies 30 C.F.R. ' 40.2(b), which states A[m]iners or their representative organization may appoint or designate different persons to represent them . . . .@ Thus, we reject the suggestion of NMA and Consol that the Complainants were not properly designated miners= representatives.

The judge concluded that Consol=s transfer of the miners from the scooter barn to the section mechanic job satisfied the second element of the *Pasula-Robinette* prima facie case, adverse action. 17 FMSHRC at 964. The judge reasoned that the section mechanic position was Aless desirable and more hazardous work.@ *Id.* at 961. Substantial evidence supports this finding.[5] Glover and Kehrer testified that working in the sections exposed miners to hazards, such as dust, methane and roof falls, that were not present in the scooter barn, an enclosed underground shop area constructed of concrete floor, block walls, and beam ceiling. Tr. 11, 26, 105. Both Complainants testified that the section equipment consisted of high voltage machines that were far more dangerous than the machinery they worked on in the scooter barn. Tr. 20, 24, 105. Section work also involved heavy lifting whereas the scooter barn did not. Tr. 105. Consol conceded that the Ascooter barn is fraught with fewer dangers than is a working section.@ PDR at 5 (citing Tr. 26-27, 45). Both Glover and Kehrer had worked in the scooter barn for many years (17 FMSHRC at 959), and neither miner was given additional training after the transfer, increasing the danger of their new positions. Tr. 24, 97-99. Glover testified that he bid out of the section job because he had not performed that job in 17 years and felt unsafe. Tr. 20. The distinct nature of and qualifications for the two jobs was confirmed by mine superintendent Wetzel. Tr. 219, 230. Although the Commission has never directly addressed the issue, transfers to more arduous or difficult work have been held to be discriminatory under the National Labor Relations Act, 29 U.S.C. ' 151 et seq. (1994) (ANLRA@). *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1320-21 (5th Cir. 1994); *Manufacturing Services Inc.*, 295 NLRB No. 31, 131 LRRM 1501 (June 1989).[6] Likewise, we conclude that the judge correctly determined that the transfer of these two longstanding scooter barn mechanics to a more dangerous assignment on the section was adverse. 17 FMSHRC at 961, 964.[7]

Because the record established that work on the sections was more dangerous, we reject NMA=s assertion that the transfer was merely an action that the miners disliked. *Compare Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1533 (August 1990) (adverse action Ais not simply any operator action that a miner does

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[5] Under the Mine Act, an administrative law judge=s findings of fact are to be affirmed if they are supported by substantial evidence. 30 U.S.C. ' 823(d)(2)(A)(ii)(I); *Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (September 1992).

[6] The Commission has looked for guidance to case law interpreting similar provisions of the NLRA in resolving questions arising under the Mine Act. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (December 1990).

[7] The Secretary sought to introduce supplemental authorities on this point by a letter dated June 2, 1997. Consol, by its letter dated June 4, 1997, opposed and requested that the authorities be stricken from the record. We do not address Consol=s request because our conclusion does not rely on the Secretary=s supplemental authorities. As a consequence, Consol=s request to strike those authorities is denied as moot.

not like@). Further, NMA=s contention that, although the scooter barn was safer, Glover and Kehrer were exposed to dangerous section conditions while on walkaround, misses the point. The transfer to the working sections meant that the Complainants would be spending nearly *all* their working time in the more dangerous position. By contrast, because Glover and Kehrer were not on walkaround when on the second and third shift rotations, the Complainants, prior to the transfers, spent more than two-thirds of their working time in the safer environment of the scooter barn. Tr. 50-51.[8]

[8] On May 16, 1997, the Commission granted the Secretary=s motion to strike certain portions of Consol=s response to the brief of amicus curiae UMWA. We reasoned that, pursuant to 30 U.S.C. ' ' 823(d)(2)(A)(iii) & 823(d)(2)(c), the disputed materials, consisting of an affidavit and two attached exhibits that were not part of the evidentiary record before the judge, were not properly subject to our review. Consol filed a motion requesting the Commission to reconsider its May 16 order or, alternatively, for the Commission to remand and reopen to consider the disputed materials. For the reasons set forth in the May 16 order, we also deny Consol=s petition for reconsideration and motion to remand. Moreover, the materials Consol seeks to introduce in its petition and motion are not probative of the discrimination issue. That Complainants may have moved to non-section jobs after reinstatement, as Consol asserts, does not pertain to the relevant comparison **C** between the section and scooter barn mechanic jobs **C** in measuring the adverse nature of the transfer. In addition, our finding of discrimination does not rest on the ground that Consol=s petition and motion were attempting to refute, i.e., that a discriminatory effect was shown because Glover took a lower-paying job and gave up his walkaround responsibilities. *See* Pet. for Recons. and Mot. to Remand at 4.

Substantial evidence also establishes that the adverse action was motivated by the protected activity. We agree with the judge that, Ait cannot be disputed that the adverse action was solely motivated by the fact that the Complainants were performing their duties as representatives of miners.@ 17 FMSHRC at 964. In *Pasula*, the Commission noted that section 105(c) proscribes adverse action Abecause@ a miner engages in a protected activity, whereas the comparable provision of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976) (A1969 Coal Act@) used the term Aby reason of the fact that.@ 2 FMSHRC at 2798. We explained the change by reference to the report of the Senate Committee that drafted section 105(c)(1), which states A[w]henever protected activity is *in any manner* a contributing factor to the retaliatory conduct, a finding of discrimination should be made.@ *Id*. (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977) (AS. Rep.@), *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 624 (1978) (A*Legis. Hist*.@) (emphasis added)). Here, the protected walkaround duties contributed not just A*in any manner*@ to the transfers, they were the *sole* motivating factor behind the adverse transfers.[9]

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[9] Commissioner Verheggen further notes that Supervisors Burton and Moore expressly told Glover and Kehrer at the time of their transfer that the transfer was because they were walkaround representatives. 17 FMSHRC at 959-61. Faced with an argument similar to Consol=s here that the statements of lower-level supervisors were inartful and should not be held violative of the NLRA, the D.C. Circuit observed:

> A rough and ready point made by a supervisor in overalls, the kind of supervisor who is really more naturally engaged in conversation with the workers, may be far more credible and influential so far as the ordinary worker is concerned than a necessarily more formal,

We are unpersuaded by Consol=s attempt to treat Glover=s and Kehrer=s absences from the scooter barn (as opposed to the exercise of their walkaround rights) as the motivating reason for their transfer. The absences resulted from, and were inextricably intertwined with the Complainants= exercise of walkaround rights, which are statutorily protected under the Mine Act. Thus, we agree with the judge that the adverse action, in the form of the transfers, was taken as a result of the inevitable consequences of engaging in this protected activity.

The Commission has previously recognized the link between walkaround rights and absenteeism. In *Secretary of Labor on behalf of Truex v. Consolidation Coal Co.*, 8 FMSHRC 1293 (September 1986), we noted that, in enacting the walkaround right, Congress recognized Athat an operator would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights.@ *Id*. at 1299. Consequently, we must consider the protected activity=s inescapable result (absenteeism) in applying the Amotivation@ prong of the *Pasula* test in this case. Accordingly, we conclude that, under *Pasula*, the judge properly found that the transfers were motivated by the Complainants= protected activity, and that the Secretary made a prima facie case of discrimination under section 105(c).

An operator can rebut a prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Alternatively, an operator can establish an affirmative defense by showing that it was also motivated by a miner=s unprotected activity, and that it would have taken the adverse action in any event for the unprotected activity alone. *Id*. at 817-18; *Pasula*, 2 FMSHRC at 2799.

Because the absences stemmed solely from the exercise of the walkaround right, they cannot be considered unprotected activity, and therefore do not establish the basis for an affirmative defense. *See Price and Vacha*, 14 FMSHRC at 1556 (affirmative defense was not

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structured and purposeful statement of a high-ranking executive.

International Brotherhood of Teamsters v. NLRB, 435 F.2d 416, 417 (D. C. Cir. 1970). Commissioner Verheggen believes that Consol=s post hoc explanations fail to obscure the initial Arough and ready point@ expressed so forcefully by Burton and Moore. These statements are central to Commissioner Verheggen=s finding that the adverse transfers were motivated by the exercise of protected walkaround rights.

available when two miner representatives were discharged for not complying with a discriminatorily applied policy). Further, because all of the miners= activity in this case was protected, the Commission cases cited by Consol (PDR at 12), such as *Mooney v. SOHIO Western Mining Co.*, 6 FMSHRC 510 (March 1984) and *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8 (January 1984), which found that employers legitimately discharged miners for excessive absences, are inapposite. In those cases, unlike the case at bar, the employees= absences did not arise from their participation in protected activity. *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891 (May 1987), relied upon by the NMA, (NMA Br. at 12-15), is likewise distinguishable. There the Commission found that a Part 90 miner did not engage in protected activity when seeking a particular job. 9 FMSHRC at 900. In the present case, substantial evidence supports the judge=s finding that walkaround representatives Glover and Kehrer engaged in protected activity.

Consol=s and NMA=s additional arguments also lack merit. Consol contends that, because employers are only required to Areasonably accommodate@ qualified persons under the Americans with Disabilities Act of 1990, 42 U.S.C. ' 12101 et seq. (1994) (AADA@) and the Rehabilitation Act of 1973, 29 U.S.C. ' 701 et seq. (1994) (ARehabilitation Act@), by analogy, only reasonable accommodation of an employee=s protected walkaround activities is required under the Mine Act. PDR at 8. However, under the ADA and the Rehabilitation Act, unlike the Mine Act, Congress imposed a reasonable accommodation requirement on employers to accommodate covered persons. 42 U.S.C. ' 12111(9); 42 U.S.C. ' 12112(b)(5) (ADA); *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979) (Court found an obligation of reasonable accommodation under discrimination provision of the Rehabilitation Act); *Alexander v. Choate*, 469 U.S. 287, 300 n.20 (1985) (same). The Mine Act contains no reasonable accommodation language, nor have the Commission or the courts construed the Act to adopt a reasonable accommodation approach. On the contrary, the Mine Act=s legislative history has led the Commission and courts to conclude that section 105(c) is to be construed Aexpansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the [Act].@ S. Rep. at 36, *Legis. Hist.* at 624 (quoted in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (August 1982), and *Pasula*, 2 FMSHRC at 2791); *see also Secretary of Labor v. Cannelton Industries*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (Congress intended Mine Act to be liberally construed). We also reject NMA=s assertions that, because of MSHA=s Apervasive@ inspections, an operator need only reasonably accommodate Complainants= exercise of their rights under section 103(f). NMA Br. at 2, 21-22.[10]

In sum, we affirm the judge=s determination that Consol=s transfer of walkaround representatives Glover and Kehrer violated section 105(c) of the Mine Act.[11]

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[10] Because we reject NMA=s argument that MSHA=s inspection presence calls for reasonable accommodation, we do not address its accompanying request that the Commission take judicial notice of statistics pertaining to the number of coal mines and MSHA inspectors in the years 1975-1995. NMA Br. at 2 n.1.

[11] In light of our disposition, the Commission does not address whether the transfers were

B. Penalty

Consol argues that the imposition of a $10,000 penalty is unwarranted given the lack of affirmative evidence of discriminatory intent and the existence of no final section 105(c) violations at the mine in the past 10 years. PDR at 21-22. The Secretary asserts that, while a $10,000 penalty is appropriate in this case, remand is necessary because the judge failed to discuss the six penalty criteria under section 110(i), 30 U.S.C. ' 820(i). S. Br. at 31-32.

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facially discriminatory under the analysis of *Swift*, 16 FMSHRC 201, nor whether that case need be revisited, as the operators assert.

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Act.[12] *Id*. (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984)). In reviewing a judge=s penalty assessment, the Commission must determine whether the judge=s findings with regard to the penalty criteria are supported by substantial evidence. The judge must make A[f]indings of fact on each of the criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.@ *Sellersburg*, 5 FMSHRC at 292-93.

It does not appear that the judge considered all of the statutory criteria in determining an appropriate penalty for Consol=s discrimination violation. The judge did not separately discuss facts relating to any of the criteria. Instead, the judge stated that A[c]onsidering the serious impact Consol=s actions herein would have on the willingness of persons to serve as miners= representatives and the intentional and obvious discriminatory nature of the actions,@ a $10,000 penalty was warranted. 17 FMSHRC at 965. This statement does not satisfy the requirements we set out in *Sellersburg*.

Accordingly, we vacate the judge=s penalty assessment and remand for entry of detailed findings as to each of the six section 110(i) criteria, and assessment of an appropriate penalty. In

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[12] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator=s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator=s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

particular, we instruct the judge to explain his finding that the Anature@ of Consol=s action was Aintentional@ in relation to the negligence criterion. *See Thunder Basin Coal Co.*, 19 FMSHRC ___, slip op. at 9, No. WEST 94-370 (September 5, 1997). Although we do not address Consol=s overall contention that the penalty amount is too high, we reject its assertion that the absence of any final section 105(c) determinations at the mine should mitigate the penalty. As we explained in *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552 (April 1996), Asection 110(i) requires the judge to consider the operator=s general history of previous violations . . . [including] [p]ast violations of *all* safety and health standards. . . .@ *Id*. at 557 (quoting *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added)). Accordingly, on remand, the judge should consider Consol=s general history of violations at the mine, not only its prior section 105(c) violations.

III.

Conclusion

For the foregoing reasons, we affirm the judge=s finding of violation, but vacate the penalty assessment and remand for reassessment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner