

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 5, 1996

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
on behalf of JAMES JOHNSON :

and :

UNITED MINE WORKERS OF :  
AMERICA :

Docket No. SE 93-127-D

v. :

JIM WALTER RESOURCES, INC. :

BEFORE: Holen, Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Administrative Law Judge William Fauver found that JimWalter Resources, Inc. (“JWR”) violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c),<sup>2</sup> when it disciplined James Johnson because he refused to remove

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<sup>1</sup> Chairman Jordan has recused herself in this matter. Commissioner Doyle participated in the consideration of this matter but resigned from the Commission before its final disposition. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission.

<sup>2</sup> Section 105(c)(1) provides in part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or

a longwall shearer and install roof support. 15 FMSHRC 2367 (November 1993) (ALJ). For the reasons set forth below, we affirm the finding of discrimination and vacate and reassess the civil penalty.

I.

Factual and Procedural Background

JWR operates the No. 7 mine, an underground coal mine in Brookwood, Alabama. On March 13, 1992, Johnson, a member of the owl shift crew for the No. 1 longwall, was assigned to move an unproductive longwall shearer from the face through Crosscut A and down the No. 3 entry. 15 FMSHRC at 2367-68. The longwall had most recently advanced past Crosscut A, which connected the Nos. 3 and 4 entries. G. Ex. 4. The Department of Labor's Mine Safety and Health Administration ("MSHA") considered "Crosscut A-type" crosscuts to be gob and subject to roof falls because of the substantial pressures exerted by the advancement of the longwall. 15 FMSHRC at 2373-74. MSHA had a policy prohibiting travel through such crosscuts until additional roof support had been installed in accordance with an approved supplemental roof control plan. *Id.* MSHA communicated that policy to union safety committeemen in quarterly safety meetings. *Id.* at 2374; Tr. 19-20.

The normal route for removing the longwall or other large equipment was through Crosscut B. 15 FMSHRC at 2374. The supplemental roof control plan approved by MSHA required installation of additional roof support before longwall machinery was moved through Crosscut B. *Id.*; Tr. 60-61, 94. Moving the longwall shearer through Crosscut A required maneuvering the equipment around a 90 degree turn. Tr. 25. On March 13, however, JWR chose to move the shearer through Crosscut A, notwithstanding the additional difficulty, because the entry to Crosscut B was endangered off. 15 FMSHRC at 2374. As a consequence, cribs installed in Crosscut A during the normal course of mining were removed to allow sufficient space for moving the shearer. *Id.* at 2374-75; Tr. 58-59.

When Johnson arrived at Crosscut A, he overheard Tommy Boyd, a United Mine Workers of America ("UMWA") safety committeeman, ask Danny Watts, the evening supervisor, if there was a plan to correct roof conditions in Crosscut A before miners traveled through the area. 15 FMSHRC at 2368; Tr. 63-64, 84-85. Johnson observed that roof had fallen

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otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this [Act] including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

on the stageloader in the No. 4 entry, roof bolts were missing near the stageloader, there was a brow, a crack near the intersection of Crosscut A and the No. 3 entry, there were no timbers, and two cribs had been removed. 15 FMSHRC at 2368; Tr. 68, 85-86; G. Ex. 4. After observing the roof conditions, Johnson stepped under the No. 1 longwall shield. Tr. 85.<sup>3</sup>

Watts told Boyd that if he had a problem he should call Larry Vines, the longwall manager. 15 FMSHRC at 2368. Boyd replied that, if he called anyone, it would be MSHA. *Id.* Watts then asked the owl shift longwall crew members what they were going to do. Tr. 89. When no one replied, he ordered them to shovel the beltline in the No. 4 entry. *Id.* The miners traveled to the beltline and began shoveling. 15 FMSHRC at 2369; Tr. 90.

Alvin McMeans, the face boss for the No. 1 longwall, called Johnson from the beltline to Crosscut B. 15 FMSHRC at 2369; Tr. 90. McMeans asked Johnson why he thought Crosscut A was unsafe. 15 FMSHRC at 2369; Tr. 66, 90-91. Johnson replied that cribs had been taken down, roof bolts were missing, the area was gob, and that MSHA had previously cited miners for traveling through such crosscuts. 15 FMSHRC at 2369-70. McMeans asked Johnson, “If I asked you to work in the area, what would you say?” *Id.* at 2375; Tr. 67. Johnson replied that he would be afraid to work in the area and that he would have to “withdraw under [his] individual safety rights.”<sup>4</sup> 15 FMSHRC at 2370, 2375. McMeans instructed Johnson to resume shoveling. Tr. 92.

After McMeans questioned each member of the longwall crew, he met with Paul Phillips, the mine manager, and discussed conditions in Crosscut A. 15 FMSHRC at 2370. Phillips then met with Safety Committeeman Boyd at the intersection of Crosscut B and the No. 3 entry and asked Boyd to accompany him to the area the miners thought was unsafe. *Id.*; Tr. 147-48. Boyd

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<sup>3</sup> The condition of the roof in Crosscut A gave rise to a separate action. On March 13, 1992, as a result of an inspection made pursuant to section 103(g) of the Mine Act, 30 U.S.C. § 813(g), JWR received a citation alleging a violation of 30 C.F.R. § 75.202(a) (1995). 15 FMSHRC at 2372. JWR contested the citation and the matter proceeded to hearing before Judge Fauver. Finding that the roof conditions in Crosscut A were hazardous and required additional support, the judge affirmed the citation. 15 FMSHRC 432, 434 (March 1993) (ALJ). JWR filed a petition for review of the judge’s decision, which the Commission denied. Accordingly, the judge’s decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). The record of that proceeding before the judge was incorporated by reference into the record of this proceeding. 15 FMSHRC at 2372. The transcript of that hearing is referred to as “Roof Tr.”

<sup>4</sup> Section (i) of the labor agreement in force at the mine, entitled “Preservation of Individual Safety Rights,” provides in part: “No Employee will be required to work under conditions he has reasonable grounds to believe to be abnormally or immediately dangerous to himself . . . .” R. Ex. 1, at 1.

stated that he would travel through the No. 4 entry but not the No. 3 entry. 15 FMSHRC at 2370; Tr. 148. Entry No. 3 had been dangerous off the previous day because some timbers were missing. 15 FMSHRC at 2368; Tr. 88-89. Phillips explained that they could not travel through the No. 4 entry because the head gate drive had been “shoved against the rib,” roof bolts were missing, and there was no travelway. 15 FMSHRC at 2370; Tr. 148. Approximately 75 feet of the No. 4 entry had been dangerous off. 15 FMSHRC at 2373.

The other crew members then joined Boyd and Phillips. Tr. 149. Phillips told the miners they would build cribs, set timbers in two different locations, and hang curtains from the inby pillar in Crosscut A to the No. 1 longwall shield. 15 FMSHRC at 2371; Tr. 149-50. Boyd stated that they did not have a plan to do that work. 15 FMSHRC at 2371. Phillips instructed McMeans to bring the miners to the No. 4 beltline to shovel and then to bring each miner to meet with him individually. Tr. 151-52.

Johnson testified that Phillips asked him, “If I asked how to make that place safe, what are you going to do?” and that he had replied, “How do you make gob safe?” 15 FMSHRC at 2371, 2375; Tr. 92. Phillips told Johnson to go to work and “make the area safe.” 15 FMSHRC at 2375; Tr. 173. When Johnson refused, Phillips ordered him to get on a bus to go to another area to work. 15 FMSHRC at 2375-76; Tr. 155.

On the following day, Johnson was charged with insubordinate conduct and given notice of a five-day suspension with intent to discharge. 15 FMSHRC at 2372. After a meeting between management and union representatives, that action was modified to a two-day suspension. *Id.* Johnson filed a discrimination complaint with MSHA and the Secretary filed the present complaint on Johnson’s behalf, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C.

§ 815(c)(2).<sup>5</sup> The Secretary proposed that a civil penalty be assessed against JWR in the range of \$2,000 to \$2,500. The UMWA intervened in support of the Secretary's position.

The judge found that Johnson's work refusal constituted protected activity under section 105(c) of the Mine Act. 15 FMSHRC at 2376. He concluded that Johnson had a reasonable and good faith belief that Crosscut A was unsafe, that an MSHA-approved supplemental roof control plan was required to make the area safe, and that Johnson had given reasonable and sufficient notice of his safety concerns to management. *Id.* The judge concluded that JWR had taken adverse action against Johnson by giving him a five-day notice of suspension with intent to discharge, suspending him for two days, and twice isolating and interrogating him, and that such action amounted to discrimination in violation of the Act. *Id.* at 2376-77. The judge assessed a civil penalty of \$5,000, noting that JWR had "a substantial history of violations of § 105(c) of the Act," accumulating \$5,286 in delinquent civil penalties in the 24-month period preceding the instant violation. *Id.* at 2378.

The Commission granted JWR's petition for discretionary review, which challenged the judge's finding that Johnson had engaged in a protected work refusal and the judge's civil penalty assessment. The Commission subsequently heard oral argument.

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<sup>5</sup> Section 105(c)(2) provides in part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination or interference and propose an order granting appropriate relief.

## II.

### Disposition

#### A. Protected Work Refusal

A miner alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by proving 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, 2797-800 (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). 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 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it is also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Mine Act grants miners the right to complain of a safety or health danger but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger. *See Secretary on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 812. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.*; *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Id.*

JWR claims the judge erred in finding that Johnson had engaged in a protected work refusal. JWR Br. at 5. JWR contends the judge mischaracterized Johnson's work refusal as his refusal to move the shearer rather than his refusal to install roof support. *Id.* at 7, 10. It asserts that Johnson's refusal to install roof support was unreasonable and unprotected because hazards are inherent to mining and he was adequately qualified to perform the work. *Id.* at 7-10. JWR argues that, even if the refusal were protected, it lost that status when management took action to determine the nature of the hazards and to direct miners who routinely installed roof support to

correct them. *Id.* at 5. The Secretary claims the work of installing roof support was connected to removing the shearer and that the judge analyzed whether Johnson's refusal to enter Crosscut A to install roof support was protected. S. Br. at 9 n.4. He also contends that substantial evidence supports the judge's determinations that Johnson had a reasonable, good faith belief that Crosscut A was unsafe to work in, that Johnson adequately communicated that belief, and that JWR did not adequately address Johnson's safety concerns.<sup>6</sup> *Id.* at 10-18.

We conclude substantial evidence supports the judge's determination that Johnson's work refusal was protected. Preliminarily, the judge did not fail to recognize the work refusal at issue was Johnson's refusal to install roof support. In finding that the work refusal was protected, the judge (quoting Phillips' order to Johnson to make the area safe by installing roof support) stated, "Johnson, on reasonable, good faith grounds, believed Crosscut A was unsafe to work in, and that an MSHA-approved plan was needed 'to make it safe.'" 15 FMSHRC at 2376. The judge also considered evidence relevant to Johnson's refusal to install roof support, noting that Johnson was not a roof control expert, did not know exactly how to make the area safe, and had reasonable grounds to rely on his safety committeeman's opinion that a plan was needed. *Id.*

Moreover, substantial evidence supports the judge's determination that Johnson's refusal to install roof support was based on a reasonable and good faith belief that Crosscut A was unsafe and that an approved plan was necessary to make it safe. Johnson testified that, although he installed roof support in normal conditions, he considered the conditions in Crosscut A to be dangerous and abnormal, and that he did not know how to support the roof safely or "whether [management] knew how to support the top." Tr. 95-96, 106-08, 118, 121-22. Johnson heard the roof popping and "taking weight." Roof Tr. 71. He observed that roof bolts were missing, roof had fallen and cribs had been removed. Tr. 85-86. He could see there was a crack as well as a brow in the roof and that there were no timbers. *Id.* On many occasions, Johnson had witnessed roof falls in other forward crosscuts, sometimes extending to the No. 1 longwall shield. Roof Tr. 76. Johnson knew that MSHA considered a forward crosscut to be gob and had cited miners who traveled through such an area. 15 FMSHRC at 2373; Tr. 66-67, 91. Johnson's concerns were confirmed and shared by his safety committeeman, who believed that an approved

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<sup>6</sup> The UMWA did not file a brief before the Commission.

supplemental roof control plan was necessary before work could proceed in the area.<sup>7</sup> 15 FMSHRC at 2373; Tr. 84-85, 151.

Johnson was not a roof control expert. 15 FMSHRC at 2376; Tr. 136-37. In addition, he had reason to doubt whether management knew how to support the roof, given the unusual circumstances of moving a large piece of equipment through an area of gob and the conflicting opinions of his immediate supervisor, who believed the area was safe enough to work in, and Phillips, who believed that additional support was necessary. 15 FMSHRC at 2374-75; Tr. 69-70, 146-47.

Furthermore, substantial evidence supports the judge's determination that Johnson adequately communicated his safety concerns to JWR. 15 FMSHRC at 2376. When Foreman McMeans asked Johnson why he believed the area was unsafe, he replied that the crosscut was in the gob, cribs had been removed, roof bolts were missing, and he knew that MSHA had cited miners for traveling through a forward crosscut. Tr. 65-67, 85, 91. Johnson told Phillips that he did not know how to make the area safe. 15 FMSHRC at 2375; Tr. 92.

Once a determination is made that a miner expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 997-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff'd*, 866 F.2d 431 (6th Cir. 1989); *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460, 2463-64 (December 1993). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate his fears or ensure safety. *Bush*, 5 FMSHRC at 998-99.

Substantial evidence supports the judge's determination that JWR failed to adequately address Johnson's reasonable safety concerns. As the judge found, in response to Johnson's statement that he did not know how to make the area safe, Phillips "did not give Johnson specific

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<sup>7</sup> JWR argues that the judge erred in finding that Johnson had reasonably relied on Boyd's opinion that a plan was necessary because Johnson testified that he did not have a personal opinion on whether a plan was required. JWR Br. at 9-10. Substantial evidence supports the judge's determination. Under the labor agreement in force at the mine, when an employee and management disagree on whether a condition is hazardous, at least one safety committeeman is required to review the condition. R. Ex. 1, Art. III, Sec. (i), ¶ (2). If the safety committeeman agrees with management that hazardous conditions do not exist, the miner is required to perform the work. *Id.* If the safety committeeman and management disagree and the matter involves an issue of federal mandatory health or safety regulations, the appropriate federal agency is contacted to settle the dispute. *Id.* at ¶ 3. Thus, in resolving disputes involving allegedly hazardous conditions, miners were required to defer to the opinions of their safety committeemen.



orders as to how the roof should be supported.” 15 FMSHRC at 2375. Rather, Phillips only stated, “I am telling you to go and make the place safe.” Tr. 153-54, 173. Phillips had a prior discussion with Johnson and other crew members regarding installation of additional support in Crosscut A. 15 FMSHRC at 2371. No supplemental written plan for supporting the area, however, had been prepared by JWR’s engineers. *Id.* at 2373; Tr. 160-61, 177-78, 180-81. Moreover, that discussion did not address Johnson’s concern that miners had previously been cited for traveling through a forward crosscut and that a plan approved by MSHA was necessary to make the area safe. Nor did JWR make an effort to contact MSHA to determine whether an approved plan was necessary. 15 FMSHRC at 2376-77; Tr. 187-88.

In sum, substantial evidence supports the judge’s determination that Johnson’s work refusal was protected and that JWR discriminated against Johnson in violation of section 105(c) of the Act.

#### B. Assessment of Civil Penalty

JWR argues that the judge erred in assessing a civil penalty of \$5,000. JWR Br. at 10. It contends the judge failed to set forth sufficient findings supporting his conclusion that JWR had a “substantial history” of violations of section 105(c) and that, in any event, he should have only considered past violations of section 105(c) involving similar factual circumstances. *Id.* JWR also asserts the judge erred in basing the assessment on his finding that, in the preceding 24-month period, JWR had accumulated \$5,286 in delinquent penalties. *Id.* at 11. JWR submits there is no evidence of delinquent penalties in the record and that it is aware of no such penalties. *Id.* The Secretary argues the judge properly considered JWR’s complete history of violations, including previous violations of section 105(c), but acknowledges that he did not allege that JWR had delinquent penalties. S. Br. at 22-26 & n.17.

The Commission’s judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). The Commission has cautioned, however, that the exercise of such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Id.*, citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Assessments “lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . .” *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). The judge must make findings of fact on 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 Stone*, 5 FMSHRC at 292-93.

We conclude that JWR received adequate notice of the judge’s consideration of its history of previous violations as well as his basis for doing so and that we have been provided with a sufficient foundation for review. Although the judge did not specifically indicate which

violations of section 105(c) he relied upon, the record contains a complete 24-month citation history, submitted in response to the judge's request, as well as a list of section 105(c) cases that were brought to the judge's attention in the parties' post-hearing briefs and correspondence. Tr. 210; S. Post-Hrg Br. at 14-15; G. Ex. 6; JWR Post-Hrg Br. at 23-24 & Attach. JWR-3; letters dated September 2 and 7, 1993.

Furthermore, the judge did not abuse his discretion by considering JWR's entire violation history, rather than limiting his consideration to only those violations of section 105(c) involving similar factual circumstances. Section 110(i) provides in part that in assessing civil penalties, "the Commission shall consider the operator's history of previous violations . . . ." 30 U.S.C.

§ 820(i). As the Commission held in *Secretary on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 557 (April 1996), the language of section 110(i) does not limit the judge's consideration of an operator's history of violations to factually similar violations. The Commission has explained that "section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of *all* safety and health standards are considered for this component." *Id.*, quoting *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added). Thus, the judge did not err in his consideration of JWR's history of previous violations.

The judge abused his discretion, however, in basing the assessment, in part, upon JWR's alleged delinquency in the payment of penalties. An operator's delinquency in payment of penalties is not one of the criteria set forth in section 110(i) of the Mine Act for consideration in the assessment of penalties. Accordingly, we vacate the civil penalty assessed by the judge. *See Dolese Bros. Co.*, 16 FMSHRC 689, 695 (April 1994); *Turner Bros. Inc.*, 6 FMSHRC 805, 806 (April 1984).

In the circumstances of this case and in the interest of judicial economy, we reassess the penalty. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1465-67 (August 1982); *Westmoreland*, 8 FMSHRC at 492-93. JWR did not dispute the judge's findings on the other statutory penalty criteria. Based upon those findings and upon our holdings, including that consideration of an alleged delinquency in the payment of penalties is incorrect, we conclude that a civil penalty of \$2,500 is warranted.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that JWR discriminated against Johnson in violation of section 105(c) of the Mine Act, vacate the civil penalty, and order JWR to pay a penalty of \$2,500.

Arlene Holen, Commissioner

James C. Riley, Commissioner

Marc Lincoln Marks, Commissioner