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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT L. WEST, COMPLAINANT	Discrimination Complaint Docket No. NORT 78-382 Elkins No. 6 Mine
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v.

ELKINS ENERGY CORPORATION,
RESPONDENT

DECISION

Appearances: Robert A. Cohen, Esq., and Ann Rosenthal, Attorney,
Department of Labor, for Complainant
Buddy H. Wallen, Esq., and Gerald L. Gray, Esq.,
Clintwood, Virginia, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a written order dated November 27, 1978, as amended December 1 and 11, 1978, a hearing in the above-entitled proceeding was held on January 16 through January 18, 1979, in Wise, Virginia, under section 105(c) of the Federal Mine Safety and Health Act of 1977.

The discrimination complaint in this proceeding was filed on September 29, 1978, alleging that complainant, Robert L. West, had been discharged on April 4, 1978, by respondent in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977. Complainant was reinstated on July 10, 1978, under an order of temporary reinstatement issued July 3, 1978. The discrimination complaint was amended on November 15, 1978, to allege that complainant had again been unlawfully discharged on September 28, 1978. The Secretary made no finding under section 105(c)(2) as to whether the discrimination complaint with respect to the second discharge was frivolously brought. Therefore, complainant was not temporarily reinstated after the second discharge and consequently has been without work since September 28, 1978, the date of the second discharge.

Issues

Counsel for complainant filed a posthearing brief on May 4, 1979, and counsel for respondent filed a reply brief on May 29, 1979. Both briefs agree that the complaint raises the following two issues:

1. Whether complainant Robert L. West was discriminated against in violation of section 105(c) of the Act when he was "laid off" on April 4, 1978.

2. Whether complainant Robert L. West was discriminated against when he was fired by Elkins Energy on September 28, 1978.

Findings of Fact

I am listing below the findings of fact on which I shall base my decision in this proceeding. Nearly every fact in this case was the subject of testimony by two or more witnesses. Therefore, my findings of fact necessarily involve some credibility determinations. In my discussion of the parties' arguments I shall refer to various findings of fact and, if those findings are based on credibility determinations, I shall hereinafter explain why I have elected to accept the testimony of one witness as being more credible than that of another witness.

1. Elkins Energy Corporation, the respondent in this proceeding, owns four underground coal mines at the present time (Tr. 442). The Elkins No. 6 Mine is the only one directly involved in this proceeding. The No. 6 Mine produced an average monthly quantity of 15,766 tons of clean coal for the months of September, October, and November 1977 (Tr. 10). A miners' strike occurred on December 6, 1977, and lasted through March 26, 1978 (Tr. 211). After the strike, the No. 6 Mine produced an average monthly quantity of 11,000 tons of clean coal for the months of April, May, and June 1978 (Tr. 11). Elkins Energy is owned by William Ridley Elkins, Hershel Elkins, and Dale Meade. Ridley Elkins is vice president and part owner; Dale Meade is a partner and chief electrician; and Hershel Elkins is a partner and supervisor of insurance, labor relations, and union arbitrations (Tr. 441; 444; 453). Other persons apparently own varying interests in Elkins Energy, but their names are not given in the record (Tr. 461).

2. Robert L. West, the complainant in this proceeding, began to work for Elkins Energy at the No. 6 Mine on November 16, 1977. For 3 days after November 16, 1977, West was shown around the mine and given an opportunity to familiarize himself with its methods of operation. At the end of 3 days, West was assigned to be the section foreman on the night shift which worked from 3 p.m. to 11 p.m. on Monday through Friday of each week (Tr. 17; 19; 179). West was paid a monthly salary of \$1,925 (Tr. 19; 181) until the week following the miners' strike (March 27, 1978) when his salary was raised to \$2,100 per month (Tr. 215-216).

3. During the strike, that is, from December 6, 1977, to March 26, 1978, only four men worked at the No. 6 Mine. One of those men was Douglas Shelton who was superintendent of the No. 6 Mine.

The other three men were West, John Ed Mullins, and Morrell Mullins. John Ed Mullins had been an electrician at the No. 6 Mine and Morrell Mullins had been the day-shift section foreman at the No. 6 Mine prior to the strike (Tr. 144-146; 556-557). The duties of all men during the strike were to preshift the mine, to keep the ventilation in good condition, and to maintain the equipment (Tr. 45; 185). During the strike, the four men were paid only half of the salary which they normally received when the mine was actually producing coal (Tr. 355).

4. On February 28, 1978, while the strike was still in progress, West was working with John Ed Mullins at the belt feeder when a rock fell on West's head and shoulders (Tr. 47). John Ed rendered first aid and Morrell and John Ed succeeded in transporting West out of the mine on the conveyor belt (Tr. 176). John Ed took West to the hospital in Wise, Virginia, which is about 20 miles from the No. 6 Mine (Tr. 175). No one was on duty on the surface of the mine when West was injured although Doug Shelton, the superintendent, normally remained on the surface when the other three men were underground (Tr. 159; 389; 568). Doug Shelton had called on the telephone before the three men went into the mine on February 28 to advise them that he would be coming to the mine at a subsequent time (Tr. 168; 357; 568). After the accident, West told Doug Shelton that he would thereafter go underground only when someone had been assigned to remain on the surface of the mine (Tr. 49; 150; 390).

5. The strike ended on March 26, 1978, and on the next day, March 27, 1978, West resumed the duties of section foreman on the night shift. West worked for 6 days, or until April 4, 1978, when, at about 9:30 a.m., West received a call from the superintendent of the mine, Doug Shelton, advising West that Ridley Elkins had asked Doug to lay off all the men on the night shift because the No. 6 Mine was not producing enough coal to justify retention of the night shift (Tr. 58; 405).

6. West went to the No. 6 Mine about 2:30 p.m. on April 4, 1978, to collect his personal belongings and found that the miners on his shift were dressed in their working clothes and were waiting outside the mine preparatory to entering the mine to work the night shift. West went into the mine office and asked Doug Shelton why the men on the night shift had reported for work if the night shift had been discontinued. Doug explained to West that between 9:30 a.m. and the time that West had come to pick up his personal equipment, Doug had received another call from Ridley Elkins retracting his orders to lay off the second shift and modifying his instructions so as to have Doug lay off only those men who had originally been hired to work on a third shift which would begin at 11 p.m. and end at 7 a.m. (Tr. 60; 407).

7. Doug then reminded West that West and a repairman named Hugh Stidham had originally been hired to work on the third shift and

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that West and Stidham were being laid off until such time as management might determine whether a third shift would be economically advantageous (Tr. 61; 391; 409). Although Doug could not recall their names, he had tentatively hired two miners who lived at Clintwood, Virginia, to work on the third shift. Doug also called those two men on April 4, 1978, and told them that they would not be needed. They had expected to report for work at 11 p.m. on the night of April 4, 1978, to begin working on the third shift and on the basis of that expectation had resigned their jobs at another mine (Tr. 391; 429). They were fortunately able to return to the mine where they had been working after Doug had advised them that they would not be needed at the No. 6 Mine for the third shift (Tr. 391; 429). Doug waited until after Stidham had reported for work on April 4, 1978, to lay him off (Tr. 128), but Stidham was rehired as a belt man a few days later. Stidham's substitute job as a belt man required him to crawl around on the wet mine floor which caused Stidham's arthritis to react so painfully that he was forced to stop working for Elkins Energy (Tr. 126; 130).

8. Ridley Elkins and Doug Shelton had conferred before the strike and had tentatively decided to start a third shift as soon as the strike had ended. The third shift was planned as a maintenance shift. The men on the maintenance shift would do the kinds of work which were difficult to accomplish while coal was being produced. Work on the maintenance shift would consist of applying rock dust, hanging ventilation curtains, installing roof bolts, hauling supplies into the mine, and preparing belt structures for advancement of the belt to keep pace with production at the faces (Tr. 268; 346; 457). The third shift was not instituted immediately after the strike because a lot of equipment broke down soon after the strike which had an adverse effect on production (Tr. 56; 126; 153; 303-304; 360; 445; 449). Both Ridley Elkins and Doug Shelton stated that the third shift was not actually begun until production after the strike had been built back up to the quantity that had been produced before the strike (Tr. 359; 361; 444; 457).

9. Despite management's claim that the third shift was not begun until post-strike production reached pre-strike levels, the facts show that the third shift was begun on or about May 1, 1978, but post-strike production through June 1978 was only 11,000 tons per month as compared with 15,766 tons before the strike (Tr. 266-268; 448).

10. Qualified section foremen are difficult to find. Therefore, when Doug Shelton and Ridley Elkins tentatively decided before the strike to institute a third shift after the strike, Doug began looking for a section foreman so that he could hire one before the strike and have him available to take over supervision of a third shift if conditions existing after the strike warranted commencement of a third shift. Since West was hired as the prospective third-shift foreman

on November 16, 1977, and the miners' contract did not expire until December 6, 1977, it was necessary to utilize West as a section foreman on the second shift until such time as a new contract could be negotiated. West's assumption of the position of section foreman on the second shift brought about a change in assignment of existing mine personnel because Don Shelton, who was acting as the second-shift section foreman when West became second-shift section foreman, had to be reassigned to the position of helper to the operator of the continuous-mining machine. Don, who was a brother of Doug Shelton, the mine's superintendent, was a foreman-trainee at the time West was hired and Don did not obtain his papers as a mine foreman until January 10, 1978 (Tr. 17-18; 307; 346; 376; 379; 457; 565).

11. The strike lasted longer than Doug Shelton or Ridley Elkins expected (Tr. 429). By the end of the strike, Elkins Energy was in difficult financial circumstances because it had received little or no income during the strike and the legislation pertaining to strip mining had forced Elkins Energy to close its surface mines and lay off approximately 300 miners (Tr. 458-459; 461;). When production at the No. 6 Mine continued to lag below pre-strike levels, Ridley Elkins decided to postpone the institution of a third shift at the No. 6 Mine. In an effort to economize, Ridley instructed Doug Shelton to lay off any miners who had been hired for the third shift (Tr. 391; 427). The only miners on Ridley's payroll who had been hired for the third shift were West and Stidham (Tr. 391).

12. On April 4, 1978, the day West was laid off, it was necessary for Doug to reinstate his brother, Don Shelton, as the section foreman on the second shift (Tr. 362; 407). Don Shelton had been working as the helper for the operator of the continuous-mining machine (Tr. 20). Another person had to be obtained to fill Don's position as helper to the operator of the continuous-mining machine. Randall Goins was transferred from another of Elkins' mines to be the section foreman on the third shift which was initiated on or about May 1, 1978 (Tr. 267; 362; 449). Not long after Goins had been assigned as section foreman on the third shift, Don Shelton elected to resume his union job of helper for the operator of the continuous-mining machine and Goins was moved from the third shift to fill the position of section foreman on the second shift which had been left vacant when Don Shelton resumed his union job (Tr. 268). Consequently, there was no net economic benefit to Elkins Energy in laying off West because vacancies were merely created which had to be filled by the hiring of a new section foreman or the transfer of miners from one place to another. Also see Finding No. 27, *infra*.

13. On April 5, 1978, the day after his discharge, West went to Norton, Virginia, and filed a discrimination complaint with the Mine Safety and Health Administration alleging that he had been discharged for diligently trying to uphold the Federal and state mining laws (Exh. 2; Tr. 68). On the afternoon of the same day on which the

complaint had been filed, Doug Shelton called West on the phone and asked him if he would be willing to accept a position at another mine owned by Elkins Energy. West stated that he would be willing to accept a substitute position and Doug told West that he would see what could be done. During the conversation, Doug asked West if West had filed a discrimination complaint against him and West confirmed that he had (Tr. 69; 251; 369-370; 399; 404).

14. West's complaint of April 5, 1978, alleges that during his employment by Elkins Energy he had advised his crew that if he remained their section foreman, he would (1) restore ventilation, (2) stop cutting into auger holes on the return side in No. 6 entry, (3) stop miners from smoking in the mine, and (4) make sure that someone was always on the surface when men were underground (Exh. 2). In his direct testimony at the hearing, West repeated that he had brought the four items listed above to the attention of the mine superintendent, Doug Shelton. Additionally, West stated at the hearing that he had complained to Doug about the failure of the miners on the first shift to install temporary supports in all places from which coal had been removed and West also objected to Doug's failure to have an up-to-date mine map showing the location of auger holes (Tr. 21). West stated that he actually had a list of 27 items about which he had complained, but no one at the hearing asked him to identify any complaints besides the ones enumerated above (Tr. 27). Finally, West stated at the hearing that Doug had ridden a gasoline-powered dune buggy in the No. 6 Mine during the strike and West had told Doug that riding the dune buggy in the mine was a violation of law and dangerous because the engine on the dune buggy created noxious fumes in the mine and might cause an explosion (Tr. 42; 401).

15. Several witnesses were called in support of West's claim that he had complained about safety violations to Doug Shelton, the superintendent of the No. 6 Mine. Hugh Stidham, a former repairman at the No. 6 Mine, testified that he had heard West complain to Doug about ventilation curtains being knocked down by the first shift, about the failure of the miners on the first shift to install temporary supports, and about the auger holes which had been encountered (Tr. 110; 113-114).

16. James Falin, a former mechanic at the No. 6 Mine, supported West's statements with respect to smoking in the mines by testifying that he had seen the men smoking in the mine when West was not in their vicinity (Tr. 135).

17. John Ed Mullins, a former electrician at the No. 6 Mine, supported West's claims that he had complained about safety. John Ed stated that he had heard West complain to Doug (1) about West's claim that fly curtains were needed in the mine, (2) about West's intention of stopping the men from smoking in the mine,

(3) about West's position that no men should be allowed to go underground unless there was a person on the surface who would be able to hear the mine phone, and (4) about West's objection to Doug's having ridden the dune buggy into the mine during the strike (Tr. 148-150). John Ed stated that he had not personally made any complaints about safety at the No. 6 Mine and that West had made more complaints about safety than the day-shift section foreman, Morrell Mullins (Tr. 167-172).

18. Robert Hilton, a former roof bolter on the second shift at the No. 6 Mine, testified that West tried to get fly curtains at the No. 6 Mine but was unable to do so. Hilton said that the other curtains were often torn down by the shuttle cars and were kept rolled up most of the time. Hilton said that if men were accustomed to smoking out of the mine, they continued to do so when they were underground working in the mine. Hilton said that he heard West say that he was going to have a talk with Doug about the fact that the men were smoking in the mine because West could not allow the men to smoke. Hilton, who worked on West's shift, stated that temporary supports were supposed to be installed but that they did not practice following the law. Hilton said they did not have timbers underground for use as temporary supports and that none were brought underground for that purpose. Hilton found the roof unsupported when he went to each place to install roof bolts and no temporary supports were ever installed until he and his helper went into a place to install roof bolts (Tr. 298-302). The roof-control plan for the No. 6 Mine requires that roof bolts be installed within 5 minutes after the continuous-mining machine completes loading coal from a given working place (Tr. 248).

19. The detailed complaint which West made about the ventilation curtains was that they were completely down every afternoon when he went in to start his shift at 3 p.m. He said that a period of from 30 minutes to an hour was required every afternoon to rehang the curtains and that his insistence that ventilation be properly maintained was a hindrance to production which management could not tolerate (Tr. 188; 237; Exh. 2). West conceded during cross-examination that if management had laid him off because he was a hindrance to production, that production should have increased after West was laid off on April 4, 1978 (Tr. 193). The evidence shows, however, that production did not decrease after West was hired and did not increase after he was discharged (Tr. 10-11; Finding No. 1, supra).

20. Before the strike, when West was section foreman on the second shift, he was not required under 30 CFR 75.303 to make a preshift examination on his shift because no production followed the second shift (Tr. 250; 589). Despite the fact that West was not required to make a preshift examination, he stated that he made such an examination any way and that he would make an entry in the onshift reporting book if he found that any place needed scooping or bolting

(Tr. 54). West stated on cross-examination, however, that he corrected the violations he observed and that it was unnecessary to report in the book the violations which he had corrected (Tr. 199). West later stated that he made at least one entry in the preshift and onshift book pertaining to lack of proper ventilation (Tr. 205). West first stated that miners had smoked in his presence in the mine until he told them not to do so (Tr. 26). Later West said that he did not report the miners' smoking in the book because he did not personally see them smoking (Tr. 200). West eventually justified his failure to make entries in the book by stating that Doug Shelton told him not to write down every violation he saw in the preshift book so that the inspectors would not read the entries in the book regarding the violations and then check to see if the violations had been corrected when they made their examination of the mine (Tr. 233).

21. West said that he started to search the miners for smokers' articles one or two times, but about 4 days after he began to work at the No. 6 Mine, Doug told him not to bother with searching the men for smokers' articles because they resented it and were inclined to slack off on production if they were searched (Tr. 235; 254). Robert Hilton, who was a roof bolter on West's shift, stated that he had never been searched for smokers' articles at the No. 6 Mine and had never seen anyone else searched for smokers' articles (Tr. 316).

22. Although West said that the roof-control plan required temporary supports to be set within 5 minutes after the coal was removed unless the roof bolters were ready to enter the work place to bolt, West did not have temporary supports set on his own shift in places left unsupported by the preceding shift. The foregoing conclusion is supported by the testimony of at least two miners who worked on West's shifts. Robert Hilton, who worked on West's shift before the strike, stated that temporary supports were rarely set in any of the places before he entered them to bolt (Tr. 248; 301). Earl Houseright, who worked on West's third shift after West's temporary reinstatement, said that most of the time there were no supports in the places when he entered them to bolt. Thus, West left his men exposed to roof falls until such time as they bolted the roof despite the fact that the temporary supports are required to be installed within 5 minutes after the coal has been removed. Houseright also said that he would set from four to eight temporary supports, depending on the condition of the roof, but he said that he did not know how many were required by the law or roof-control plan (Tr. 652). West stated twice during the hearing that he did not know whether the roof-control plan required installation of six or eight temporary supports (Tr. 39; 248). West also said that he had to send outside the mine to get timbers for making temporary supports when the miners on his own production shift removed coal from working places at a faster rate than the roof bolters could enter the working places to install roof bolts (Tr. 255).

23. Jackson Sturgill, a former section foreman on the third shift at the No. 6 Mine, supported West's position by stating that the men on the second shift failed to install temporary supports after removing coal from working places and that he often found as many as eight places in need of bolting where no temporary supports had been erected (Tr. 290). At the time Sturgill testified, the second shift was supervised by Randall Goins who was not working at the No. 6 Mine at the time West made his complaints to Doug about the failure of the men on the first shift to install temporary supports. Sturgill, however, did not support West's claims that Doug was indifferent about men smoking in the mine. Sturgill testified that he searched the men for smoking articles and that Doug approved of the searches and that Doug personally told the men not to smoke in the mine (Tr. 292). Doug testified that he violated Federal law by failing to search the men for smoking articles because he believed that the miners resented it and that the searches caused them to believe that the superintendent did not trust them; nevertheless, Doug was opposed to smoking in the mine and warned the men of the dangers inherent in smoking in the mine (Tr. 422-425).

24. Doug Shelton also admitted during his testimony that West talked to him about ventilation curtains being down at the face and Doug agreed that he had refused to buy the kind of fly curtains that West wanted him to get because he believed they were unnecessary when the ventilation curtains were installed in accordance with the ventilation plan for the No. 6 Mine (Tr. 350; 371; 373-374; 383; Exh. A). Doug further admitted that the miners on neither the first nor second shift were installing temporary supports after they had cleaned up the coal and he agreed that this was a problem which West discussed with him (Tr. 354). Doug also agreed that it was a violation of the law for him to ride the dune buggy in the mine and he further agreed that he did not always have a man on the outside of the mine when men were underground and that he recognized that failure to do so was a violation of the law (Tr. 388; 401).

25. Doug, on the other hand, denied that West had discussed the problem of mining into auger holes with him, but Doug conceded that the continuous-mining machine had cut into auger holes because the mine map did not correctly show their location. Doug stated that MSHA cited the mine for violating the requirement that the mine map show the location of the auger holes and that the map had to be updated for that purpose (Tr. 351; 353). Doug said there was a drill on the back of the scoop which was available for testing the coal in advance of mining to determine whether an auger hole or an abandoned mine might be in the vicinity of active mining operations, but Doug noted that the drill could be detached from the scoop and that it was usually necessary to hunt for the drill when it was needed (Tr. 352; 385). Doug denied West's claim that the drill was not used to search for dangerous conditions in advance of the cutting operations of the continuous-mining machine (Tr. 386; 425-426).

26. Ridley Elkins testified that it was his decision to lay off the miners who had been hired to work on the third shift, but he denied that he gave instructions to lay off West by name (Tr. 442; 444). Ridley stated that section foremen should make their complaints to the superintendent who is hired for that purpose because Ridley expects the superintendent either to take action on complaints or inform him about the complaints (Tr. 444).

27. Ridley Elkins had a detailed knowledge of everything that happened at the No. 6 Mine. He knew precisely what equipment had broken down at the mine after the strike and readily enumerated the motors, etc., that had to be replaced (Tr. 448-449). Ridley knew that the shuttle cars were alternatively taken from the mine for the purpose of being rebuilt and he knew how long the mine operated with only one shuttle car before a small shuttle car was brought in to assist the remaining large one in maintaining production while one large car was out of the mine for repair (Tr. 448). Ridley personally brought in a section foreman to work on the third shift when the third shift was instituted and Ridley personally transferred the foreman to the No. 6 Mine from another mine because the foreman liked Ridley and wanted to work in a mine where he would often see Ridley (Tr. 450). Ridley knew of two men at Clintwood, Virginia, who could be hired for the third shift when it was instituted and he had advised Doug of their availability (Tr. 429-430). Doug discussed the minute details of the operation of the mine with Ridley in that Doug stated that Ridley "knew from day to day what was going on, and he would tell me" what to do (Tr. 390).

28. At the time of the hearing, Doug Shelton no longer worked as superintendent of the No. 6 Mine because Doug had personally gone into the coal business after forming Shelton Coal Company (Tr. 343). Morrell Mullins, who had worked at the No. 6 Mine as section foreman on the first shift, had accepted the position of superintendent at the coal company owned by Doug Shelton. Morrell was, therefore, extremely supportive of Doug Shelton's position in this proceeding to the extent that he understood Doug's position. For example, he stated that West might have found the ventilation down at times when West reported for work at 3 p.m. on the second shift, but Morrell said that he also found the curtains down nearly every morning after the men on West's second shift had completed their work (Tr. 558; 571). Morrell said that it was just about "an every morning thing" that Doug was "onto him" about preventing the men from smoking in the mine, although he said that their search policy for smokers' articles was not as stringent as it could have been (Tr. 560). Morrell stated that the men on his shift did not install temporary supports as they should have, but he claimed that the men on West's shift also failed to install temporary supports (Tr. 564). Morrell stated that West's entries in the preshift and onshift book were just a repetition of the word "None", meaning that West had reported no hazardous conditions. Morrell said that West might enter something different

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once in a while just to vary the appearance of the report, but Morrell said that West never did report a significant safety violation in the books (Tr. 570).

29. Morrell was present when Doug Shelton rode the dune buggy into the mine during the strike and he personally did not tell Doug that his doing so was a violation of the law (Tr. 573). Morrell stated that he had seen men smoking in the mine, but that he had not reported them to Doug or made an entry of that fact in the preshift or onshift book (Tr. 574). Morrell did not make an entry in the book about the fact that he found on a daily basis that temporary supports were not being installed (Tr. 588). Likewise, although Morrell found the ventilation curtains were constantly torn down and lying in the mud, he did not make any entries in the book about that either (Tr. 588).

30. West stated that he made a round of the faces every 20 to 25 minutes and tested for methane if there was machinery in the face area either extracting coal or bolting the roof (Tr. 55). Robert Hilton, who was a roof bolter on West's shift, stated that West could not have made a check for methane in his working place without his seeing West do so, but he said that in all the time that West worked in the mine, he had seen West make only one methane test (Tr. 310).

31. Chief Administrative Law Judge James A. Broderick issued an order of temporary reinstatement on July 3, 1978, requiring that Elkins Energy reinstate West to the position of section foreman at the rate of pay and with work duties equivalent to those which had been assigned to him immediately prior to his discharge on April 4, 1978. After the reinstatement order had been issued, Doug Shelton and Ridley Elkins conferred about the matter and concluded that West should be assigned to work on the third shift since that was the shift for which he had originally been hired (Tr. 410). When Doug called West on Saturday, July 8, 1978, and advised him that the only place they could use him was on the third shift, West agreed to work on that shift. West reported for work on Monday, July 10, 1978 (Tr. 70). The working hours on the third shift were from 11 p.m. to 7 a.m. and the third shift was a maintenance shift during which the miners performed duties such as rock dusting, roof bolting, rehangng or extending ventilation curtains, and making repairs to equipment (Tr. 71).

32. Jackson Sturgill had been hired on May 1, 1978, to be the section foreman on the third shift (Tr. 266). The reinstatement of West meant that two section foreman would be working on the third shift. Therefore, Doug advised Sturgill that he was being promoted to the position of mine foreman on the third shift and that Sturgill should use West as an ordinary workman. Under Doug's instructions, West would be required to act as an ordinary laborer because Sturgill was told to assign West various tasks which could best be done by

two men, but since West was to be given only one man to assist in performing the tasks, West would be required to do the work of an ordinary laborer (Tr. 72; 268-269). After West had done the work of a laborer for a few days, he complained to Sturgill about being assigned a laborer's work instead of a supervisor's duties. Sturgill agreed with West that West was being utilized in an improper manner and thereafter assigned at least two men to do any tasks delegated to West. The assignment of at least two miners to assist West in performing each job enabled West to work in the capacity of a supervisor. Sturgill stated that although he stopped treating West as an ordinary laborer, his doing so was contrary to the instructions which had been given to him by Doug (Tr. 74; 291-292).

33. After West had been reinstated for about 1-1/2 months, Doug told Sturgill that they could no longer afford to pay two section foremen to work on the third shift and Sturgill was laid off (Tr. 279; 416; 422; 439-440; 458). About 2 weeks after West was reinstated, Doug Shelton resigned as superintendent of the No. 6 Mine and began to operate his own coal business under the name of Shelton Coal Company (Tr. 416-417; 446-447). The name of the new superintendent hired by Ridley Elkins was Donnie Short (Tr. 80; 446; 671). [NOTE: West stated that Doug left about 2 weeks after West was reinstated (Tr. 79), but if that were correct, Sturgill would have been laid off by Doug's successor, Donnie Short, whereas both Sturgill and Doug agreed that Doug was superintendent when Sturgill was laid off (Tr. 279; 439-440). The actual date that Doug left is immaterial to the real issues in this proceeding.]

34. West first stated that he only complained to Short about three things: (1) the condition of the roadway on the surface leading to the No. 2 portal, (2) the condition of the intake haulageway, and (3) the disparity in West's and Sturgill's pay, that is, West said that he only received his regular salary after reinstatement of \$2,100 per month regardless of the number of weekends he worked, whereas every time Sturgill worked on Saturday, he was paid \$100 in addition to his regular salary (Tr. 217). At a subsequent time in his testimony, West stated that he also complained to Short about the fact that the ventilation curtains were down at the face each day and that temporary supports were not being set (Tr. 239). Short denied that West had made any safety complaints to him (Tr. 681). Short also denied that any foreman had complained to him about curtains being down on a daily basis (Tr. 697).

35. Ridley Elkins on September 28, 1978, discharged West for having failed to perform his duties and for having been found asleep on the third shift which began at 11 p.m. on September 27, 1978, and ended at 7 a.m. on September 28 (Tr. 451-452). West denied that he was asleep (Tr. 91), but he did admit that he had failed to make any methane checks in the mine after approximately 5:30 a.m. even though four miners were roof bolting in two different headings up to about

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7 a.m. (Tr. 84-85; 623; 647; Leland Maggard's Deposition, pp. 19-20). West said that his failure to make the methane checks did not expose the miners to any danger because no methane had ever been detected in the No. 6 Mine and there was no likelihood that methane would be released unless actual production was in progress, and the only activity at the time he failed to check for methane, was roof bolting (Tr. 92; 223).

36. Based on credibility determinations hereinafter explained, I have made findings of fact for the events which occurred on the third shift beginning on September 27, 1978. The facts set forth in these findings of fact are based on the testimony of all the men who worked on the third shift, namely, Robert L. West (Tr. 81-101; 219-253), Donnie L. Dockery (Tr. 596-615), H. Doyle Phipps (Tr. 618-636), Earl Houseright (Tr. 638-653), James Kelly (Tr. 654-669), and the deposition of Leland B. Maggard. Leland Maggard's deposition will hereinafter be cited as "Dep., p. ÅÅÅ".

(1) The third shift was a maintenance shift on which no coal was produced. The sole function of the maintenance shift was to get the mine in proper condition for producing coal when the day shift reported for work at 7 a.m. On the night of September 27, 1978, the primary work which needed to be done was roof bolting and preparation of materials for advancement of the conveyor belt (Tr. 81-82). Therefore, all five of the men on West's crew worked on the surface of the mine for about an hour. They loaded supplies and prepared a new section of conveyor belt. Around midnight, West sent four of the men underground to install roof bolts. There were two roof-bolting machines in the mine. Leland Maggard ran one of the machines and Earl Houseright acted as his helper. Doyle Phipps operated the other roof-bolting machine and James Kelly was his helper (Tr. 619-621; 638-639; 648; 655-656; Dep., p. 6).

(2) Donnie Dockery was what is known as the "outside man." Generally, it was his responsibility to stay near the mine office so that he could be of assistance in case of an emergency. He also performed odd jobs such as sharpening bits. On the night of September 27, West asked Dockery to accompany him and the other men on his crew to the portal of the mine so that Dockery could splice the belt which was going to be used in advancing the belt conveyor. Dockery could perform his duties as outside man while splicing the belt because there was a telephone at the portal as well as one in the mine office. Dockery was inexperienced at splicing belts so West elected to remain on the outside of the mine to explain belt splicing to Dockery instead of going into the mine either to check the faces before the men began roof bolting or to make the methane tests which are required to be made every 20 minutes when equipment is operating at the face (Tr. 599; 620; 622; 639; 643; 657; Dep., p. 10).

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(3) West remained on the outside of the mine with Dockery until 5 a.m. at which time he told Dockery that he was going into the mine to obtain the scoop so that the belt they had prepared could be taken into the mine for use in advancing the belt conveyor. While he was underground, West went to the heading in which Maggard and Houseright were installing roof bolts. At that time, West observed that Maggard's cap light had become quite dim. West exchanged lights with Maggard so that Maggard could continue roof bolting. West then was unable to find an extra cap light underground, so he went to the heading where Phipps and Kelly were installing roof bolts and asked that Kelly accompany him outside because West's light had become so dim by that time that he could not travel without the additional illumination provided by Kelly's light. For some reason not articulated in the record, West determined not to take the scoop out of the mine, and therefore Kelly and West walked out of the mine. If West had taken the scoop of the mine, he would have found on the scoop an extra cap light which was fully charged and usable (Tr. 597; 599; 616; 622; 640; 657; Dep. p. 11).

(4) It was about 5:55 a.m. when West and Kelly emerged from the mine. Kelly immediately went back into the mine to continue roof bolting and West told Dockery that Dockery could return to the mine office since the task of splicing the belt had been completed. West found himself without a usable cap light. Since it was about 6 a.m. when Dockery was allowed to return to the mine office and since it takes only about 20 minutes to walk to the mine office, West could have gone with Dockery to the mine office where he could have obtained a fresh cap light. He could then have returned to the portal by 6:40 a.m. If he had done so, he could have made final methane tests and could have performed a preshift examination preparatory for the day shift's entering the mine at 7 a.m. A period of only 5 minutes is required to walk from the portal to the places where the miners were installing roof bolts (Tr. 600; 631; 657; 661).

(5) At the time West told Dockery that Dockery could go to the mine office, West stated that he was going to get into Phipps' Jeep where it was warm. Phipps had parked his Jeep near the portal before he went into the mine to install roof bolts. West had given Phipps permission to leave early for personal reasons and West was expecting Phipps and Kelly to come out of the mine about 6:40 a.m. It was Kelly's practice to ride to and from work with Phipps. Therefore, Phipps' leaving early required that Kelly also leave early. As it turned out, Phipps and Kelly did not finish bolting the heading where they were working until nearly 7 a.m. Consequently, Phipps and Kelly did not come out of the mine until 6:50 a.m. They did not see West when they first came out of the mine, but when they reached Phipps' Jeep and started to open the doors, they found that West was asleep on the back seat of the Jeep with his feet stretched out between the two front bucket seats (Tr. 600; 617; 623; 625; 650; 658-659).

(6) Maggard and Houseright came out of the mine about 7 a.m. They do not now recall how they returned to the mine office on that particular morning (Tr. 647-650; Dep., p. 20). West went to the mine office, turned in his cap light, and filled out the preshift book (Tr. 95).

37. Donnie Short, the superintendent of the mine on September 27 and 28, 1978, was asked by Ridley Elkins to interview Phipps and Kelly and to make a recommendation as to what disciplinary action should be taken with respect to West's actions on the third shift which began at 11 p.m. on September 27, 1978. After Short had heard their accounts of what had happened on the third shift, he recommended that West be discharged because he said that West had failed to look after the health and safety of the miners since he had failed to go underground in order to make methane tests and had failed to perform a preshift examination. Short said that performance of the aforementioned duties is necessary to assure that the mine is in a safe condition. Short stated that if an emergency or an accident had occurred, West would have been in serious trouble for having stayed on the surface of the mine instead of doing his duties underground. Therefore, Short recommended to Ridley that West be discharged for being asleep and for having failed to perform his duties (Tr. 678-680).

38. On September 28, 1978, the day after he had been discharged for the second time, West went to the MSHA office in Norton, Virginia, and filed a second discrimination complaint against Elkins Energy (Exh. 3). The discrimination complaint stated that Ridley Elkins had discharged West for allegedly failing to perform his duties and for sleeping on the job. The complaint alleged that the discriminatory action was that West had been discharged on the basis of a frame-up deal because West had asked about vacation pay and extra pay for the weekends he had worked and because management could find no fault with the way he had performed his job after his reinstatement (Exh. 3). At the hearing, West claimed that his discharge was merely a culmination of the harrassment which he had received after his reinstatement (Tr. 102).

39. The discrimination complaint filed by West on September 29, 1978, requested a cash settlement without reinstatement. At the hearing, West stated that since Donnie Short had now become the superintendent of the No. 6 Mine, he would like to be reinstated in addition to receiving the salary he would have earned if he had not been unlawfully discharged. West stated that he was now asking for reinstatement because he felt that he could work with Short and be permitted to comply with the health and safety regulations, whereas he could not have done so if Doug Shelton had continued to be superintendent of the No. 6 Mine (Tr. 103). The complaint in this proceeding was amended at the hearing to conform with the evidence (Tr. 323-325).

Consideration of Parties' Arguments

West's Complaints About Safety

Respondent's brief (p. 2) argues one primary point, namely, that for complainant to prevail in this proceeding, the preponderance of the evidence must show that complainant was discharged because he made safety complaints. Respondent contends, however, that when complainant's testimony is read in light of the testimony of other witnesses, it will be seen that complainant did not carry his burden of proof because every major contention made by complainant is contradicted by the testimony of other witnesses. As I indicated in the paragraph preceding my 39 findings of fact, *supra*, many of the witnesses disagreed with each other with respect to various facts, but several witnesses supported West's claim that he had made complaints about safety (Finding Nos. 15-18, *supra*). Since respondent's brief relies almost exclusively on the witnesses' contradictions for its argument that complainant failed to prove that he was discharged for complaining about safety, I shall hereinafter consider each of the factual contradictions set forth in respondent's brief.

Smoking. Respondent's brief (p. 4) states that Patrick Sturgill, who was the third-shift section foreman when West was reinstated, testified that Doug Shelton, the mine superintendent, approved of Sturgill's searching the men for smokers' articles and that Doug told Sturgill not to allow the men to smoke. Respondent correctly cites the only transcript reference which shows that Doug approved of having men searched for smokers' articles. I have, however, found that Sturgill's testimony as to searches for smokers' articles is not necessarily in Doug's favor. It must be realized that Sturgill was not hired by Doug until after West had filed his first discrimination complaint. A copy of the discrimination complaint (Exh. 2) was served on Doug and Doug therefore knew that one of the safety issues West had raised in the complaint was the fact that West intended to stop the men from smoking in the mine. Doug's own testimony shows that he was opposed to searching the men for smokers' articles and that he deliberately failed to follow the law with respect to searching the men for smokers' articles (Tr. 424-425). Doug did, however, urge the men not to smoke in the mine (Tr. 415; 422).

The fact that Doug stated unequivocally in his own testimony that he did not approve of searching the miners for smokers' articles gives strong support to West's claim that Doug had instructed West not to make searches for smokers' articles (Finding No. 21, *supra*). Therefore, I find that it was not inconsistent for Doug to change his position with respect to searching the men for smokers' articles after West made that an issue in his discrimination complaint.

Inasmuch as three different witnesses supported West's claim that he complained about the miners' being allowed to smoke in the

mine, I find that West did complain to Doug about the fact that the miners were smoking in the mine (Findings Nos. 16 through 18, supra). I am aware that Doug denied that West had complained to him about smoking (Tr. 351). I conclude that Doug's testimony to that effect lacks credibility for several reasons. First, other men stated that smoking was being done in the mine and they agreed that West was opposed to it. Second, one of the miners stated that he had never seen anyone make a search for smokers' articles while he was working at the mine (Finding No. 21, supra). Third, Doug could hardly admit that West had complained about smoking to him because that was a violation which he said that he knowingly had committed. If he had admitted that West complained to him about smoking, Doug would have given West enough corroboration to prove one of the allegations in his discrimination complaint.

I do not think that transcript page 300, cited on page 4 of respondent's brief, supports respondent's claim that West "had been on probation at another time for allowing men to smoke." The testimony at page 300 of the transcript states that West disallowed smoking at another mine where he worked, but that the superintendent at that mine also had told him to let them smoke. The witness at page 300 specifically stated that West had told him that West could not "put up" with smoking in the mine (Tr. 300, line 4).

The reliance in respondent's brief (p. 4) on the testimony of Morrell Mullins is misplaced because Morrell Mullins must be given a very low credibility rating. As I have indicated in Finding Nos. 28 and 29, supra, Morrell Mullins is now working as mine foreman in a coal mine which is now owned by Doug. Morrell's testimony shows that his statements were intended to support Doug's testimony in every respect and Morrell's testimony is so full of exaggerations as to make it suspect on its face. For example, Morrell's claim that Doug was "onto him" nearly every morning about the miners' smoking is a great distortion of Doug's own testimony and is completely contrary to John Ed Mullins' testimony to the effect that Doug did not often talk to the miners about smoking and that no searches for smokers' articles were made (Tr. 167).

Auger holes. The preponderance of the evidence shows that West did complain about having driven into an auger hole (Finding Nos. 14 and 15, supra). Respondent's brief (p. 5) correctly notes that Doug and Morrell testified that there was a drill on the back of the scoop which could be used to drill in advance of mining to test for the existence of auger holes. Doug's testimony, however, shows that the drill was used for anchoring tailpieces and he said that they had to hunt for it every time they wanted it (Finding No. 25, supra). The fact that they had to hunt for the drill supports a finding that it was not used to drill in advance of mining with the regularity claimed by Morrell Mullins. Moreover, the fact that Doug received a notice of violation for failing to have the auger holes identified on the

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mine map is another indication that the drill was not being used because there would have been no point in using it unless they had reason to believe that the auger holes were fairly close to the place where they were mining coal.

Here again, I find that Doug's denial of West's having mentioned the auger hole lacks credibility because Doug had been given a notice of violation for failure to show the auger holes on his mine map. If Doug had admitted that West discussed auger holes with him, he would have been providing a great deal of corroboration to West's claim that he had been discharged for complaining about safety.

Providing a Man on the Surface. The preponderance of the evidence supports the claim in respondent's brief (p. 5) that West went underground on at least one occasion without a person being on the surface who could have summoned help in an emergency situation. As Finding No. 4, supra, shows, West did tell Doug that a person should be on the surface when miners are underground, but West did not take that position until after he was injured by a rock falling on him on February 28, 1978. On that day, West and two other miners, John Ed Mullins and Morrell Mullins, had gone underground at a time when no one was on the surface. West claims that Doug was on the surface when he and the other two miners went underground on February 28, but Doug, Morrell, and John Ed all testified that Doug was still at home when they went underground on February 28.

I have detected nothing in John Ed Mullins' motivations which indicates that his testimony lacks credibility. Moreover, his testimony is consistent throughout. Therefore, I find that John Ed's, Morrell's, and Doug's testimony is more credible than West's for the fact that West did go underground on February 28, 1978, when there was no one on the surface (Tr. 159; 356; 568). West did not take a firm position about having a person on the surface until after he was injured (Tr. 49; 150). Since Doug agreed after West's accident that a person should be on the surface at all times when miners were underground (Tr. 390), I find that West did not make a complaint about safety with respect to having a person on the surface which was any different from management's position regarding the stationing of a person on the surface while men are underground. Finding 36(2), supra, for example, shows that it was management's practice to have a man on the surface when coal was being produced. The failure of management to have a man on the surface at the time West was injured occurred at a time when the mine was inoperative during the miners' strike (Finding No. 4, supra). After West's accident, management agreed that a man should thereafter be stationed on the surface when men were underground regardless of whether coal was being produced or not.

Ventilation. Respondent's brief (pp. 6-7) correctly argues that while West may have complained to Doug about the failure of the

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miners to maintain ventilation curtains, West's shift was just as guilty of failing to maintain the curtains as the section foreman on the first shift was. There is ample support in the record for making the foregoing conclusion. Robert Hilton, who operated a roof-bolting machine on West's shift, stated that the ventilation curtains on West's shift were constantly knocked down by the shuttle cars and that the curtains were kept rolled up most of the time (Tr. 298). Doug stated that the day shift complained about the night shift knocking the curtains down and the night shift complained about the day shift knocking the curtains down (Tr. 415). Morrell, who was the day-shift foreman, agreed that the miners on his shift allowed the curtains to fall, but he also claimed that the miners on West's evening shift were just as bad about knocking the curtains down as the miners were on his day shift (Tr. 558; 571; 586). As I have previously indicated, I believe that Morrell Mullins' testimony should be given a very low credibility rating, but since Robert Hilton also testified that the miners on West's shift allowed the curtains to lie on the mine floor or rolled them up to the roof, there is corroboration in the record to support Morrell's statements as to the ventilation curtains.

Respondent's brief (p. 6), inappropriately cites John Ed Mullins' testimony to support a claim that Elkins Energy supplied fly curtains when West asked for them. I believe that John Ed answered the question about fly curtains at transcript page 159 in a generic sense because ventilation curtains were supplied in ample quantity, but fly curtains were never provided at all. Doug himself agreed that he had refused to provide fly curtains on two grounds, the first being that they were not needed, and the second being that their cost was excessive (Tr. 371). Robert Hilton testified that he heard West complain about the need for fly curtains, but he said that no fly curtains were ever provided (Tr. 298). Finally, West himself stated that fly curtains could be dispensed with so long as ordinary curtains were made available and were properly used (Tr. 25).

In addition to the testimony cited above, Hugh Stidham and John Ed Mullins testified that they had heard West complain to Doug about the lack of proper ventilation (Tr. 113; 148). Despite the evidence showing that West failed to provide proper ventilation on his own working shift, the fact remains that West did complain about the inadequate ventilation which constantly existed in the mine. The superintendent had been a former Federal inspector and knew that the miners were being exposed on a continual basis to respirable dust. He knew, or should have known, that constant exposure to respirable dust could cause the miners to contract pneumoconiosis, but he did nothing to correct the deplorable ventilation conditions which had been called to his attention. It is, therefore, not surprising that West did not succeed in restoring adequate ventilation on his own shift when the mine superintendent gave him no support in seeing that the miners maintained the curtains in proper position. Inasmuch as

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Doug was indifferent about providing proper ventilation (Tr. 309), I conclude that he would have resented West's complaints about ventilation and would have wanted to free himself of a section foreman who kept discussing a subject which Doug did not want to hear about (Finding Nos. 14, 15, 17-20, 24, and 28, supra).

Failure to Install Temporary Supports. Respondent's brief (p. 7) correctly states that West failed to have temporary supports erected on his own shift. Even though West did discuss with Doug the failure of the miners on the first shift to install temporary supports, West failed to protect the miners from roof falls on his own shift because he did not require that temporary supports be erected on his shift. The most damaging testimony with respect to West's performance as a section foreman came from Robert Hilton who was a roof bolter on West's evening shift. He testified that temporary supports were supposed to be installed but that they did not practice following the law. Hilton said that they did not have timbers underground to use for roof support and that no timbers were brought in for that purpose. Hilton stated that the roof was never supported until such time as he entered a place to install roof bolts. Hilton testified that he had to install jacks in each place before he bolted (Tr. 301-302).

Since the roof-control plan for the No. 6 Mine required that temporary supports be installed within 5 minutes after the coal was removed, it was essential that temporary supports be installed rapidly (Finding No. 22, supra). Donnie Short, who replaced Doug as mine superintendent at the No. 6 Mine, stated that once the slate has separated from the roof, it is better to pry the slate down or let it fall than try to install temporary supports under the loose slate (Tr. 699). Therefore, the miners were unprotected day after day in the No. 6 Mine because no effort was being made to install temporary supports. Additionally, Earl Houseright, a miner on West's third shift after West's reinstatement, testified that no supports were installed in the working places until he placed temporary supports in the places just prior to installing roof bolts (Tr. 652). Houseright's testimony shows that the miners were continuing to ignore the requirement that temporary supports be installed.

Another serious shortcoming in the miners' failure to follow the provisions of the roof-control plan was that the mine superintendent and the section foremen were obligated to explain the provisions of the roof-control plan to the miners. Yet, West stated twice that he did not know whether six or eight temporary supports were required to be installed and Houseright stated that he did not know how many temporary supports were required (Tr. 39; 248; 652). It was Doug's duty as superintendent to know the provisions of the roof-control plan and to explain the plan to the section foremen and the miners so that the plan would be followed. Additionally, West claimed that he had to send outside the mine for a supply of timbers when he did want

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to support the working places (Tr. 255). Section 75.202 provides that a supply of timbers shall be kept underground near the working faces and Doug should have insisted that timbers be kept underground at all times.

Despite West's shortcomings in following the provisions of the roof-control plan, Doug's own testimony shows that West did complain to him about the failure of the miners to install temporary supports (Finding No. 24, supra). Nothing exposed the miners to greater danger than the failure to set temporary supports, yet Doug took no action to see that the roof-control plan was complied with. It is not surprising that West failed to see that the provisions of the roof-control plan were complied with on his own shift when he found that the mine superintendent was indifferent about seeing that the provisions of the roof-control plan were enforced. In such circumstances, I conclude that Doug would have been motivated to free himself of a section foreman who kept reminding him that the roof-control plan was not being followed.

Hindrance to Production. Respondent's brief (p. 7) correctly argues that the evidence fails to support West's claim that he was discharged, in part, because his insistence on following safety regulations was a hindrance to production. West said that his following the safety regulations resulted in less coal production on his shift than was achieved on the day shift. Finding No. 19, supra, summarizes the evidence with respect to West's claim about his being a hindrance to production and shows that there is no merit to his claim that he was discharged because he was a hindrance to production.

Dune Buggy Episode. Respondent's brief does not discuss West's claim that he advised Doug that it was a violation of the safety standards for Doug to have ridden a gasoline-powered dune buggy into the mine (Finding Nos. 14, 17, 24, and 29, supra). I find that West must be given considerable credit for having had the courage to tell the mine superintendent that the superintendent was violating the law when he rode a dune buggy into the mine. Doug, John Ed Mullins, and Morrell Mullins all agreed that Doug had ridden the dune buggy into the mine. John Ed stated that he heard West tell Doug that he ought not to have ridden the dune buggy in the mine. Morrell personally did not say anything to Doug about having ridden the dune buggy in the mine. I find that West's criticism of the mine superintendent for riding the dune buggy in the mine may well have been the type of complaint which would have made the superintendent want to discharge a section foreman who had the audacity to suggest to the superintendent that his actions were unsafe.

The preponderance of the evidence supports the claim in MSHA's brief (pp. 3-4) that West made safety complaints to Doug, the mine superintendent. As the preceding discussion has shown, West complained about miners' smoking in the mine, about the failure of the

miners to drill in advance of mining operations so as to discover auger holes before the continuous-mining machine cut into them, about the miners' allowing the ventilation curtains to fall to the ground so that adequate ventilation was not provided at the working faces, about the miners' failure to install temporary supports after cuts of coal had been removed, and about the mine superintendent's having driven a gasoline-powered dune buggy into the mine. It should be noted, however, that MSHA's brief incorrectly states at the top of page 4 that West overruled other management personnel who wanted to cut around old auger holes (Tr. 301). The testimony at page 301 shows that West disagreed with other personnel about the timing of cutting a breakthrough. That incident had nothing to do with auger holes.

Reasons Given by Respondent for Laying Off West on April 4, 1978

Respondent's brief (p. 2) contends that West can prevail in this proceeding only if the preponderance of the evidence shows that West was fired because he complained about safety. Respondent also claims that West must succeed on the strength of his own case and cannot win upon any weaknesses in respondent's case. I have already found in the preceding discussion that West did complain about safety, but as respondent notes, West can win only if the evidence shows that West was laid off because he complained about safety. One is not likely to find a contested discrimination case in which the respondent agrees that it laid off or discharged an employee for engaging in an activity which is protected under the Act. Therefore, respondent is not entirely correct in arguing that West's ability to prove his case may not to some extent depend on the weakness of respondent's case.

In Finding Nos. 4 through 12, *supra*, I have given the reasons which were advanced by respondent for laying West off on April 4, 1978. Respondent first claimed that West was being discharged because Ridley Elkins had determined to lay off all the miners on the second shift, but when West reported to the mine to pick up his personal belongings, he found that all the miners who normally worked on the second shift were present at the mine and ready to work the second shift except for West and one repairman who had been laid off. West was then advised that only the men who had been hired to work on the third shift were being laid off. A few days later the repairman was reemployed as a belt man, but West was not offered a job in any substitute capacity. The reason given at the hearing for laying off West was that respondent had suffered financial losses and needed to cut expenses through discharging West and the repairman. Respondent did not demonstrate any savings through the discharge of the repairman because he was reemployed a few days later to work as a belt man. While the repairman was not reemployed in the same capacity, the saving to respondent was insignificant because the only saving from discharging the repairman and rehiring him was the small differential in pay which he received as a repairman as compared with the salary he received as a belt man.

The laying off of West saved respondent no money because Don Shelton, who was the mine superintendent's brother, was working as a helper for the operator of the continuous-mining machine. Don had obtained section foreman's papers on January 10, 1978, and Doug, the mine superintendent, promoted his brother to the position of section foreman to fill the section foreman's position which was left vacant when West was laid off. Of course, when Don Shelton was made section foreman, it was necessary to obtain another employee to take Don's place as helper for the operator of the continuous-mining machine. Therefore, the net saving to respondent from laying off West was zero because Don Shelton had to be paid the same salary West was receiving before West was discharged and the person who took Don's position as helper for the operator of the continuous-mining machine had to be paid the same salary which Don had been receiving in the helper's position.

Don Shelton ultimately resumed his job as helper to the operator of the continuous-mining machine and a section foreman had to be transferred from another of Elkins Energy's mines in order to fill the vacancy that had been created when Don returned to his former job. In view of the circumstances described above, respondent's claim that West was laid off because of a lack of work is simply not supported by the preponderance of the evidence in this proceeding.

There is support in the testimony of Robert Hilton for respondent's claim that West was hired for the third shift (Tr. 307) and I am willing to accept respondent's claim to that effect. The evidence shows, however, that respondent started the third shift within less than a month after West was laid off (Tr. 448). Although West had been advised when he was laid off, that he would be called if a vacancy occurred, he was not offered the position as section foreman on the third shift when that shift was begun. Doug explained that he did not offer the position to West because by that time West had made a number of statements about him that were untrue and he did not think that he and West would be able to work together harmoniously after those statements had been made (Tr. 397). Although Doug referred to West's complaints about having been paid only at half his regular salary during the strike and to West's attempts to get two other section foreman who worked during the strike to join him in a suit against respondent to collect the back wages allegedly due, the evidence shows that such activity by West had ceased at the time the strike ended (Tr. 490). Therefore, I conclude that the primary reason for Doug's failure to offer West a job as section foreman on the third shift was that West had filed a discrimination complaint against respondent on April 5, 1978, or the day after West was laid off (Tr. 404).

It is true that Doug claims to have offered West an alternative job at another mine owned by Elkins Energy, but West claims Doug only asked if West would consider taking another job and West claims that

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he agreed to accept an alternative position, but West says that Doug never did follow up the inquiry with a specific job offer. As to the two different stories told by West and Doug with respect to a job offer, I find for two reasons that West's version is more credible than Doug's. First, at the time Doug called West with the alleged offer of another job, Doug also asked West if West had filed a discrimination complaint against him. An appropriate excuse for calling West would have been to ask if West would consider taking another job. It would not have been logical for Doug to have offered West a specific job at a time when Doug was ascertaining whether West had filed a discrimination complaint. Second, Doug claimed that West declined the job which Doug offered him and Doug testified that one of the reasons West gave for turning down the job offer was that West said there was no point in his accepting a substitute job as section foreman at a mine other than the No. 6 Mine when the conditions at the alternate mine were less desirable than they were at the place where West was then working (Tr. 370). West would have had no reason to decline an alternate position by saying that the alternate job was less desirable than the position he then had when West was then without any job at all as the phone call from Doug had occurred on April 5, 1978, or the day after West had been laid off by Doug.

There are other aspects of respondent's evidence which do not support respondent's claim that West was laid off on April 4, 1978, because of respondent's decision that a third shift would not be instituted at the No. 6 Mine until coal production after the strike increased to the quantity of coal which was being produced before the strike (Tr. 361; 430; 457). The evidence shows that respondent claims to have discharged West on April 4, 1978, because Ridley Elkins had decided that he would be unable to start a third shift because of the economic problems which faced him after the strike (Findings No. 11, supra). The facts show, however, that Ridley did institute a third shift on or about May 1, 1978, and that the third shift was begun long before production at the No. 6 Mine had regained the tonnage which had been maintained before the strike (Finding Nos. 1 and 9, supra).

Reasons for Concluding that West was Laid Off on April 4, 1978,
Because of a Protected Activity

Section 105(c) of the Act provides that no person shall discharge or in any manner discriminate against a miner because such miner has made a complaint under or related to the Act to an operator or an operator's agent of an alleged danger or safety or health violation in a coal mine. As the findings of fact and the discussion above have shown, West did make complaints about safety with respect to the miners' smoking underground, with respect to respondent's failure to see that drilling was done in advance of mining to determine whether auger holes might constitute a hazard, and with respect to West's telling the mine superintendent that it was a violation of the law

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for the superintendent to ride a dune buggy in the mine. The record shows that West also discussed with the mine superintendent the fact that ventilation curtains were not being used properly and that temporary supports were not being installed as required by the roof-control plan.

While I believe that Ridley Elkins knew that West was making safety complaints to the mine superintendent (Finding Nos. 26 and 27, supra) the Act does not require that West prove that he complained to the operator. Under the Act, West only has to prove that he complained to the operator's agent. Ridley personally testified that he expected the miners to make their complaints to his mine superintendent and that the superintendent was responsible for acting on the complaints (Tr. 444). Thus, there is no doubt but that West made safety complaints and made them to the person to whom complaints are required to be made under section 105(c).

If the reasons given by respondent for laying West off on April 4, 1978, had been supported by the facts, I would have had to have found that West was discharged for reasons which are not protected by section 105(c) of the Act. As I have demonstrated in the discussion above with respect to the reasons given by respondent for discharging West, those reasons will not stand close examination without revealing that the reasons given for laying West off are flimsy and unconvincing. In the absence of any convincing reasons for discharging West, I am required to scrutinize the evidence to determine if the real reason for discharging him resulted from his complaints about safety.

While it is true that West accomplished little in changing the mine superintendent's indifferent attitude with respect to ventilation and roof support, the fact remains that he did try to improve safety conditions at the No. 6 Mine at a time when Doug Shelton, the mine superintendent, was blatantly disregarding the mining laws. As has been shown above, Doug admitted that he violated the mining laws by failing to see that the miners were searched for smoking articles, by deliberately not coming to work on February 28, 1978, so as to be on the surface when he knew that miners had gone underground, and by deliberately driving a dune buggy in the mine when he knew that he was creating a hazard by doing so. The fact that Doug knew the ventilation curtains were not being used properly and knew that temporary supports were not being installed and did nothing about it is an additional reason to conclude that Doug was not upholding the mandatory health and safety standards in any way, except for his claim that he did tell the miners that they ought not to smoke underground.

Since the evidence shows that Doug was not following the mandatory health and safety standards, I conclude that Doug would resent having a mine foreman on the premises who kept reminding him of the fact that he was not carrying out his responsibilities. Since Doug had been a Federal inspector before he became superintendent at the

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No. 6 Mine, it is reasonable to conclude that he was aware of the discriminatory provisions of the Act. Therefore, he knew that he would have to give justifiable reasons for discharging West. If he had been able to support his claim that West was laid off because of Ridley Elkins' decision to postpone instituting a third shift until production after the strike reached pre-strike levels, I would have been able to find that West was discharged for reasons other than West's having engaged in protected activities. Since the facts do not support the reasons given by Doug for discharging or laying West off on April 4, 1978, I must find and conclude that West was actually discharged because of his complaints about safety.

As my discussion above shows, I am in general agreement with the arguments set forth in MSHA's brief on pages 4 to 7, but the evidence does not support some of the factual allegations made in that portion of MSHA's brief. For example, West stated that Don Shelton worked as a helper for the operator of the continuous-mining machine (Tr. 20; 173)--not as the operator of the continuous-mining machine, as is stated on page 4 of MSHA's brief. It is doubtful that Don could have vacillated between the job of section foreman and his union job if he had been the operator of the continuous-mining machine because two skilled operators of the continuous-mining machine would not likely have been available at the mine, but it is quite likely that more than one miner could act as the helper to the operator of the continuous-mining machine.

MSHA's Claim that West was Not Reinstated to the Same Position

I disagree with the claim in MSHA's brief (p. 7) that West was not reinstated to the same position which he occupied prior to his being laid off on April 4, 1978. As I have demonstrated in my prior discussion, there is corroborating evidence that West was hired for the third shift. His being reinstated as a section foreman on the third shift was therefore in compliance with the order of reinstatement. Moreover, the order of reinstatement provided that West should be reinstated "to the position of section foreman at the rate of pay and the same or equivalent work duties" (Finding No. 31, supra). Although West was not at first given duties equivalent to those which he had prior to his discharge, that discrepancy in his reinstatement was eliminated after Patrick Sturgill, the section foreman on the third shift at the time West was reinstated, was laid off. Since West had originally been hired to work on the third shift and was reinstated as third-shift section foreman, I find that respondent complied with the provisions of the reinstatement order. It is certain that West was working as the sole section foreman on the third shift on September 28, 1978, when he was discharged for the second time.

The harassment which West claims to have experienced after he was reinstated as section foreman was the result of respondent's

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having to utilize two section foreman on the same shift and I think respondent should be given some consideration for having to deal with a difficult situation without being unduly precipitous in laying off Sturgill so that West could be the sole section foreman working on the third shift.

Failure to Pay West for Working on Saturday

MSHA's brief (p. 8) correctly states that respondent paid its other section foremen when they worked on Saturdays, but did not pay West when he worked on Saturdays. Doug, the mine superintendent, admitted that he did not pay West for working on Saturday, but Doug endeavored to justify his failure to pay West by saying that Saturday pay was given only to miners who showed outstanding diligence. For example, Doug said that he paid John Ed Mullins for working on Saturday because John Ed was so devoted to seeing that the mine was in good condition that he would voluntarily come to the mine and work on Saturday and Sunday just to make sure that the equipment was in good condition (Tr. 436). John Ed was an electrician--not a foreman--and John Ed stopped working for respondent because he found a job that paid more money elsewhere (Tr. 163). Consequently, the loyalty attributed to John Ed may have been exaggerated by Doug. Although Doug stated that he had paid Morrell Mullins for working on Saturday, the record does not show what outstanding contribution Morrell made in return for the extra pay he received for working on Saturday (Tr. 413). Additionally, Patrick Sturgill testified that he received \$100 for each Saturday he worked. Doug justified the extra pay in Sturgill's case by saying that Sturgill did a better job in completing all of the duties assigned for the third shift than any other section foreman he had ever had (Tr. 436). MSHA's brief (p. 9) correctly notes other evidence in the record showing that Doug was not particularly pleased with Sturgill's performance and that Doug threatened to lay off Sturgill and everyone on his third shift if the miners did not work more conscientiously than they had been (Tr. 279; 285).

Moreover, the testimony of Ridley Elkins shows that he had given Doug authority to determine when men should be paid for working on Saturday, whereas Doug claimed that Ridley made the determinations as to which men should be paid for working on Saturday (Tr. 19; 365; 458). It is true that not everyone who worked on a weekend received extra pay. For example, Doug himself did not receive extra pay for working on Saturday, and neither did Dale Meade, but neither of them was a section foreman and Meade was a part owner of the mine (Tr. 348; 413), so the fact that they were not paid for working on Saturday hardly explains why West was not paid for working on Saturday while other section foremen were paid for working on Saturday. If payment for working on Saturday had been based solely on merit, there would have been no reason for Doug to have asked Sturgill not to tell West that Sturgill was being paid extra to work on Saturday while West was not receiving extra pay for Saturday work (Tr. 276).

I conclude that respondent did not justify its failure to pay West for working on Saturday. Such failure to pay West for working on Saturday was part of the pattern of discrimination shown toward West and respondent will hereinafter be ordered to pay West for the Saturdays he worked during his temporary reinstatement.

Sufficient Grounds Were Shown for West's Discharge on September 28, 1978

MSHA's brief (pp. 9-10) argues that Elkins Energy had insufficient grounds for discharging West on September 28, 1978. West was discharged for sleeping on the surface of the mine and for failing to do his duties as section foreman on the third shift which ran from 11 p.m. on September 27 to 7 a.m. on September 28, 1978. MSHA's brief alleges that West was not allowed to tell his side of the events which occurred on that third shift, but West stated in his discrimination complaint that "I explained to Ridley Elkins in every detail the happenings of my shift" (Exh. 3 p. 2). West further stated in his discrimination complaint that after he had finished his explanation, Ridley asked him (1) why he did not get a replacement light, (2) why he did not take his outside man's light, and (3) whether he knew that someone on his shift was drinking beer (Exh. 3, pp. 4-5). Therefore, West's own admissions clearly show that West was not only permitted to tell "his side" of the events, but was asked questions about several aspects of his description of the events which occurred on September 27 and 28.

MSHA's brief (pp. 9-10) also contends that the testimony of the five men who worked on West's shift is so contradictory as to be almost meaningless. As examples of the contradictory testimony, MSHA's brief refers to the fact that Kelly was of the opinion that he and Phipps operated the only roof-bolting machine which was used that night, whereas two other miners (Maggard and Houseright) said that they were operating a second roof-bolting machine. Kelly testified that the continuous-mining machine has to be serviced each night. Men on the second shift usually work over into the third shift to take care of servicing the continuous-mining machine and they are generally assisted in that work by Houseright. After the servicing of the continuous-mining machine has been completed, which is around 2:30 a.m., Houseright does other work. Kelly's testimony clearly shows that he did not specifically recall what Maggard and Houseright did on the night of September 27 and that his statement about the use of only one roof-bolting machine on the night of September 27 was based on what the men normally did--not on his recollection of what they actually did on September 27 (Tr. 666-667).

Maggard was the only one of the five men on West's shift who corroborated West's claim that he went underground at all before 5 a.m. on the night of September 27 and morning of September 28. Although Maggard agreed that he saw West underground about twice

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before 5 a.m., Maggard's testimony otherwise contradicts West's own account of what happened on the night of September 27. Whereas West and the four men on his shift stated that West and the entire crew worked outside the mine until about midnight (Tr. 82; 219; 597; 616; 620; 639; 656), Maggard testified that all the men went directly underground without doing any work on the surface (Dep., pp. 6-7). Whereas West said that Maggard and Houseright helped service the continuous-mining machine until about 2:30 a.m., and therefore would not have seen West make methane checks before 2:30 a.m. (Tr. 84; 224), Maggard and Houseright testified that they started roof bolting as soon as they went into the mine and Maggard said that he saw West about twice before lunch (or 3 a.m.) while he and Houseright were operating a roof-bolting machine (Tr. 639; Dep., p. 8). Moreover, while Maggard stated that he saw West about twice before lunch time, Maggard specifically stated that West did not make any methane checks in the heading where he and Houseright were roof bolting (Dep., p. 10).

Another example in MSHA's brief of the "meaningless" testimony of the men on West's shift is the claim that whereas Kelly testified that he came outside with West and did not recall any conversation on the surface, Dockery recalled that when West and Kelly came out of the mine, West told Dockery to return to the mine office and that Dockery said that West and Kelly were still standing at the portal when Dockery left to go to the mine office (MSHA's Br., p. 10).

In my opinion, Dockery's testimony rates extremely high in credibility. He specifically looked at his watch and knew when West went underground (Tr. 616). Dockery refused to discuss aspects of the events of West's discharge about which he had no direct knowledge (Tr. 604). Dockery specifically stated that he could not be certain that West told Kelly to go back into the mine, but he was certain that West told him to go to the mine office (Tr. 609). Moreover, Dockery's statement that West told him that he (West) was going to get up in Phipps' Jeep where it was warm (Tr. 617) was as detrimental to West's position as any testimony given about the events of September 27 and 28. Yet, Dockery did not make that detrimental statement until MSHA's counsel, during recross-examination, specifically asked Dockery what West said he personally was going to do after West had instructed Dockery to return to the mine office. If Dockery had set out in the beginning to testify adversely to West, it is fairly certain that he would have managed to use West's statement about getting into the Jeep where it was warm as a part of his direct testimony.

I have seriously and painstakingly considered West's claim in his discrimination complaint that he was the victim of a frame-up by management as to the events of September 27 and 28. My detailed examination of the testimony of all witnesses leads me to conclude that my finding No. 36, supra, correctly states what actually happened on the night of September 27, 1978. Among the factors which have caused me to reject the frame-up claim are the following:

(1) If Phipps, who was a son-in-law of one of the owners of the No. 6 Mine, had been told to look for a reason to discharge West, it is logical to assume that Phipps would have directly reported the matter of West's being asleep to his father-in-law rather than tell his father-in-law about finding West asleep only after his father-in-law, who was visiting in Phipps' home, had kidded Phipps about sleeping all the time (Tr. 625-626).

(2) If the men on West's shift had been persuaded to agree on a story to support West's discharge, there would not have been as many minor variations in their testimony as there were. The important aspects of the occurrences on the night of September 27 are generally supported by the testimony of all five men on West's crew. All but Maggard agreed that they worked on the surface until about midnight (Tr. 598; 620; 639; 656; Dep., p. 7). All but Maggard stated that West did not go into the mine until 5 a.m. (Tr. 597; 616; 621; 656). Three of the men who worked underground, including Maggard, unequivocally states that West made no methane checks at any time in the two headings where they were roof bolting (Tr. 622; 640; Dep., p. 18). None of the four men working underground ever saw West underground after 5:30 a.m. and therefore West could not have made a preshift examination before the day shift entered the mine (Tr. 623; 641; 657-658; Dep., p. 13). West's own testimony, of course, shows that he did not make a preshift examination, but he filled out the preshift book as if he had (Tr. 90-92; 95).

(3) West filed his second discrimination complaint on September 29, 1978, or 1 day after the events of September 27 and 28, 1978, which resulted in his discharge. That discrimination complaint was received in evidence as Exhibit No. 3 in this proceeding. Since West's account of the events of September 27 and 28 was written in Exhibit 3 while the facts were fresh in West's memory, they are likely to be more accurate in the complaint than the facts given in his testimony at the hearing which was held about 4 months after his discharge. West's testimony at the hearing conflicts in several respects with the facts set forth in Exhibit 3. The conflicts between the facts set forth in Exhibit 3 and the facts given in West's testimony are discussed below.

First, in his discrimination complaint, West explained that there were 11 places which needed roof bolting and that roof bolts from 6 to 10 feet long would be required. For that reason, West stated that he assigned all four men to installing bolts with use of both roof-bolting machines (Exh. 3, p. 3). At the hearing, however, West testified that he assigned Maggard and Houseright to assisting with servicing of the continuous-mining machine. Since servicing the continuous-mining machine was what Maggard and Houseright normally did, West testified at the hearing on the basis of what normally occurred and apparently forgot about the special aspects of roof bolting which needed attention on the night of September 27 as described in his discrimination

complaint. For that reason, Maggard probably recalled the facts correctly when he stated that he and Houseright went underground on September 27 and began roof bolting as soon as they got underground. Maggard's testimony shows no mention of assisting with any servicing of the continuous-mining machine as was normally done (Dep., pp. 7-8).

Second, in his discrimination complaint West stated that Dockery was still outside the mine when West and Kelly came out at 5:55 a.m. (Exh. 3, p. 3), but in his testimony at the hearing, West stated that Dockery was gone when he and Kelly came out because he had given Dockery permission to return to the mine office before he (West) went underground at 5 a.m. (Tr. 88). Both Kelly and Dockery testified at the hearing that Dockery was still outside the mine portal when West and Kelly came out (Tr. 599; 617; 658). Furthermore, in the discrimination complaint West explained to Ridley at the discharge meeting on September 28 that West could not take Dockery's light because Dockery needed the light to see to walk down to the mine office in the dark (Exh. 3, pp. 4-5). If Dockery had already left, as West testified at the hearing, it would have been unnecessary for West to explain to Ridley why he did not use Dockery's light for use in going back inside the mine to make his preshift examination.

Third, in the discrimination complaint, West stated that he was sitting in Phipps' Jeep when Phipps and Kelly came out of the mine at 6:50 a.m. (Exh. 3, p. 4), but in his testimony at the hearing West stated that he just opened the door on Phipps' Jeep and stood there leaning against the Jeep with the door open so that the door would knock some of the cool air off of him (Tr. 91; 93). West's statement in the discrimination complaint that he was sitting in the Jeep is consistent with the testimony of Dockery who stated that West told him that he was going to get up in the Jeep where it was warm (Tr. 617). It is also reasonable to believe that a person who has been at the mine from 11 p.m. to about 6 a.m. may go to sleep once he has yielded to the temptation of getting into a Jeep "where it's warm."

Fourth, in the discrimination complaint, West stated that Phipps and Kelly came out of the mine at 6:50 a.m. (Exh. 3, p. 4), but at the hearing West testified that Phipps and Kelly came out at 6:40 a.m. (Tr. 89). West's statement in the discrimination complaint is consistent with Phipps' testimony because Phipps testified that he and Kelly came out of the mine at 6:50 a.m. Phipps explained that he had intended to leave earlier than 6:50 but that he could not leave before 6:50 because it took Kelly and him that long to finish bolting in the heading where they were working (Tr. 624-625). Phipps' reference to the difficulty he had in finishing bolting is consistent with West's statement in the discrimination complaint to the effect that there was an abnormally large amount of roof bolting to be done on the night of September 27 (Exh. 3, p. 3).

Fifth, in his discrimination complaint, West stated that Dane Meade, who was servicing the continuous-mining machine, came outside about 2:30 a.m. to get two cans of Coke or beer and in his testimony West stated that the two men who had been servicing the continuous-mining machine went home about 2:30 or 3:00 a.m. (Exh. 3, p. 5; Tr. 225). West's detailed knowledge about occurrences on the surface support Dockery's testimony that West remained on the surface with him until 5 a.m. without ever going underground (Tr. 597; 616).

The foregoing discussion shows why I have concluded that the testimony of the men on West's shift is more credible than West's testimony with respect to the events which occurred on West's shift on the night of September 27 and morning of September 28. Therefore, I must reject the claim in MSHA's brief that Elkins Energy did not have sufficient grounds for discharging West on September 28, 1978.

Relief Requested by MSHA's Brief

MSHA's brief (p. 10) asks that I find that West was unlawfully discriminated against and laid off and subsequently discharged by respondent for engaging in actions protected by section 105(c) of the Act. If that finding is made, MSHA's brief asks that certain payments for back pay, etc., be made. Then MSHA's brief states on page 11 that "[b]ecause there are two separate incidents in this case, it is recognized that a finding of discrimination in only one of them is possible." Then MSHA's brief (pp. 11-12) makes certain recommendations about respondent's being ordered to pay West for salary lost during the period he has not worked.

I do not understand why two findings as to discriminatory discharge could not be made if the evidence supported them. It is certain that West filed two discrimination complaints and MSHA, on West's behalf, amended the complaint in this proceeding so as to raise the issue of two unlawful discharges. I assume that MSHA is under the impression that when West was "laid off" on April 4, 1978, that we cannot refer to that as a discharge unless it is also found that respondent discriminated against West when it declined to rehire West when the third shift was begun about May 1, 1978, or less than a month after West was laid off.

I have hereinbefore found that respondent discriminated against West in laying him off on April 4, 1978. That is one finding of discrimination. If the evidence supported West's claim that he was unlawfully discharged on September 28, 1978, that would have been a basis for finding that respondent had for a second time discriminated against West. As Finding No. 34, supra, shows, West had continued to make complaints about safety after he was reinstated. Therefore, I do not understand why MSHA would claim that since there are two separate incidents, only one finding of discrimination is possible.

Additionally, I do not understand why MSHA's brief (p. 12) claims that the whole purpose of the Act will be frustrated if a respondent can discharge an employee who has been reinstated. All that would have been necessary to have put West back on respondent's payroll after West's second discharge would have been for the Secretary to make a finding under section 105(c) that West's second discrimination complaint was not frivolous. If such a finding had been made, I know of nothing that would have prevented a second order of temporary reinstatement from having been issued. Presumably, the Secretary did find that there had been a second act of discrimination or the Secretary would not have amended the complaint in this proceeding to allege a second unlawful discharge (Finding Nos. 31 and 39, supra).

Vacation Pay

West claimed that when he was hired, he was promised that he would be given 2 weeks of vacation pay. When he tried to collect the vacation pay at a later time, he was told that no section foreman was receiving any vacation pay (Tr. 77; 106). No one asked respondent's management to explain its policy with respect to vacation pay. There is nothing in the record to support a finding that West is entitled to vacation pay, but since he continued to claim that he was entitled to vacation pay (Tr. 106), I shall hereinafter order that West be paid 2 weeks of vacation pay with interest from the date that he should have received it if he had not been discharged on April 4, 1978. My order that West be given vacation pay is, however, subject to the following condition: If within 30 days after this decision is issued, Ridley Elkins files an affidavit under oath stating that no section foreman at the No. 6 Mine received vacation pay in 1977 and 1978, then respondent shall be excused from the requirement of giving West any vacation pay.

Ultimate Findings and Conclusions

(1) Respondent Elkins Energy Corporation discriminated against complainant Robert L. West and violated section 105(c)(1) of the Act by laying him off on April 4, 1978, without ever reemploying him when vacancies for section foreman subsequently became available at respondent's No. 6 Mine.

(2) Respondent did not discriminate against complainant when it discharged him on September 28, 1978, because sufficient reasons having no protection under section 105(c)(1) of Act were shown for such discharge.

(3) Respondent should be required to provide the affirmative relief provided for in section 105(c)(2) of the Act as hereinafter directed in paragraph (B) of the order accompanying this decision.

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WHEREFORE, it is ordered:

(A) MSHA's amended discriminatory complaint filed in this proceeding is granted with respect to the claim of discriminatory discharge dated April 4, 1978, and denied with respect to the alleged discriminatory discharge dated September 28, 1978.

(B) Respondent shall provide the affirmative relief set forth below:

(1) Respondent shall reimburse complainant at the rate of \$2,100 per month from April 4, 1978, to September 28, 1978, less any salary paid to complainant from the time he was temporarily reinstated on July 10, 1978, to the date of his discharge on September 28, 1978, together with interest at the rate of 8 percent per annum.

(2) Respondent shall pay complainant \$100 for each Saturday complainant worked from July 10, 1978, to September 28, 1978, together with interest at the rate of 8 percent per annum.

(3) Respondent shall pay respondent the same amount of vacation pay which was given to any other section foreman at the No. 6 Mine in 1977 or 1978, together with interest at 8 percent; provided, however, that respondent is not required to provide complainant with vacation pay if Ridley Elkins submits within 30 days after issuance of this decision an affidavit stating that no section foreman at the No. 6 Mine was given any vacation pay in 1977 or 1978.

(4) Respondent shall include complainant under any fringe benefits to which he would have been entitled for the period from April 4, 1978, to September 28, 1978, to the same degree he would have been protected had he not been unlawfully discharged on April 4, 1978.

(5) Respondent shall expunge from complainant's employment records any references to his discharge of April 4, 1978.

Richard C. Steffey
Administrative Law Judge