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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RICHARD A. FLEMING, COMPLAINANT v. D & J COAL COMPANY, INC., RESPONDENT	Complaint of Discharge, Discrimination, or Interference Docket No. VA 81-16-D No. 1 Mine

DECISION

Appearances: Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, for Complainant;
James E. Arrington, Jr., Esq., and Gregory R. Herrell, Esq., Browning, Morefield, Schelin, and Arrington, P.C., Lebanon, Virginia, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to an order issued March 4, 1981, a hearing in the above-entitled proceeding was held on April 28, 1981, in Richlands, Virginia, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2).

Completion of Record

At the conclusion of the hearing, counsel for both complainant and respondent stated that they had intended to present one additional witness in support of their respective cases, but were unable to do so because the two witnesses had failed to appear at the hearing (Tr. 259). Counsel stated that they would like to have the record remain open until such time as they could determine whether they would like to present the testimony of the two remaining witnesses in the form of depositions. It was agreed that counsel would notify me by May 15, 1981, as to whether they would depose the two witnesses. Counsel for complainant filed a letter on May 8, 1981, in which she stated that depositions would not be taken by counsel for either party.

I indicated at the hearing that my decision would show whether the record had been expanded by receipt of the depositions. Inasmuch as the parties decided not to take the depositions, the record in this proceeding is closed and consists of the three exhibits received in evidence at the hearing and the 266 pages of transcript comprising the testimony of the witnesses presented at the hearing on April 28, 1981.

Counsel for complainant filed her brief on July 7, 1981, and counsel for respondent filed their reply brief on July 24, 1981.

Issues

Although complainant's brief and respondent's reply brief express their statements of the issues in somewhat different language, the two main issues in this proceeding may be expressed as set forth on page 2 of complainant's brief:

1. Was complainant, Richard Fleming, engaged in protected activities within the meaning of the Act?

2. Was complainant discharged by respondent because he engaged in protected activities?

Complainant's brief (p. 3) also raises a third issue, that is, the amount of civil penalty which should be assessed, assuming that a violation of section 105(c)(1) of the Act is found to have occurred. Since my decision finds that no violation of section 105(c)(1) was proven, it is not necessary for me to consider the issues with respect to assessment of a civil penalty.

Findings of Fact

My decision in this proceeding will be based on the findings of fact set forth below. My findings include all the facts proposed by the parties in their briefs to the extent that the proposed findings are correct. There are some rather egregious errors in complainant's proposed findings of fact. Those errors will hereinafter be discussed in this decision under the heading of "Consideration of the Parties' Arguments".

1. D & J Coal Company, Inc., the respondent in this proceeding, operate its No. 1 Mine for a period of about 3-1/2 years before the mine was closed on March 24, 1981. The mine was closed after respondent encountered large amounts of rock which made production of coal uneconomic. During the last 3 months of active mining from January 1981 through March 24, 1981 the mine suffered operating losses totaling $59,433 (Exh. A; Tr. 240).

2. D & J Coal Company on June 27, 1980, at the time the unlawful discharge alleged in this proceeding occurred, was owned by three individuals named Carmel Deel, O'Dell Deel, and Verlin Deel, each of whom owned a one-third interest. Some time after June 27, 1980, O'Dell Deel and Carmel Deel, who are brothers, purchased the one-third interest owned by Verlin Deel. Therefore, at the time the No. 1 Mine was closed, Carmel Deel and O'Dell Deel each owned a one-half interest in the corporation (Tr. 238-239). Verlin Deel is not related to either O'Dell or Carmel Deel (Tr. 152; 173).

3. At the time of the hearing held on April 28, 1981, Carmel and O'Dell Deel were trying to find a location where a new mine could be opened, but none had been found at that time. They are not planning to open the new mine under the name of D & J Coal Company and they do not plan to reopen the No. 1 Mine. They estimate that their liabilities are equal to their assets, but

they still owe for equipment and have been able to obtain an extension on their obligation to make payments while they are seeking to find a location

for a new mine. No one is drawing a salary or wages at the present time (Tr. 242). During the last 3 months of the company's operations, the two owners received a salary of $75 per day and the mine foreman, Charles Quinley, received a salary of $115 per day (Tr. 256).

4. Respondent's profit and loss statement shows that it also owes civil penalties in the amount of $2,319 which it is unable to pay at the present time (Tr. 257). Respondent has asked MSHA for an extension of time within which to pay the civil penalties and Carmel Deel testified at the hearing that if an adverse ruling should be made against respondent in this proceeding, that he would have to ask for permission to postpone payment of any back wages awarded to complainant until such time as a new mine can be opened so as to produce a business which would have an income from which back wages could be paid (Tr. 253).

5. The complainant in this proceeding, Richard A. Fleming, began working at respondent's No. 1 Mine in November 1979 as helper for the operator of the roof-bolting machine. After about a week, a new employee was hired and was given the position of helper for the operator of the roof-bolting machine. At that time, complainant was assigned to the position of general inside laborer whose job consisted primarily of hanging ventilation curtains and applying rock dust to the mine floor and ribs. Complainant stated that he was told that he would be allowed to rotate as helper for the operator of the roof-bolting machine until the new employee and complainant had each learned to operate the roof-bolting machine. Complainant alleges, however, that he was thereafter permitted to perform only the duties of a general inside laborer and was given no opportunity to learn to operate the roof-bolting machine (Tr. 9).

6. During the portion of complainant's employment beginning in November 1979 and extending to the end of December 1979, complainant took 2 days off after calling respondent's management to report that he would not be at work on those days. In January 1980 respondent took off a third day to attend to some personal business and failed to call respondent's management in advance. Respondent's management called complainant's aunt and advised her that complainant had been discharged for not reporting to work. When complainant learned from his aunt that he had been discharged, he called one of respondent's owners, O'Dell Deel, and explained why he had not reported for work. O'Dell told complainant to report to work the next day and explain the reason for his absence from work on the previous day to the mine foreman, Charles Quinley, and another of the owners, Verlin Deel, who worked at the mine as a scoop operator. O'Dell said that if those two men were willing to reinstate complainant, it was satisfactory with him. Complainant reported for work and Charles Quinley and Verlin agreed to allow complainant to continue working at the No. 1 Mine (Tr. 9-10; 57; 97; 114; 144; 245).

7. Complainant continued to work, after the first reinstatement, as a general inside laborer. The helper to the

operator of the roof-bolting machine left and another person was hired to take his place. Complainant asked management to let him become the helper the next time that position became available. Soon thereafter, the helper's position again became open and in February 1980 complainant was allowed to assume the position of helper

to the operator of the roof-bolting machine. Subsequently, the operator of the roof-bolting machine resigned and complainant was permitted to become the operator of the roof-bolting machine in early March 1980 (Tr. 10-12).

8. Complainant does not allege that he discussed any health or safety matters with respondent's management prior to January 1980 (Tr. 11). While complainant worked as a helper to the operator of the roof-bolting machine, he did not use temporary supports, as required by respondent's roof-control plan, because the operator of the roof-bolting machine did not want him to bother with erecting temporary supports prior to installation of roof bolts (Tr. 62; 76). After complainant became the operator of the roof-bolting machine in early March 1980, he stated that he installed roof bolts without using temporary supports because both the mine foreman, Charles Quinley, and part-owner, Verlin Deel, saw him installing roof bolts without using temporary supports and at no time did they ever instruct him to use temporary supports or ever explain to him any provisions of the roof-control plan (Tr. 16; 63; 76; 79).

9. A copy of the roof-control plan was at all times hanging in the mine office during complainant's entire employment by respondent, but at no time did complainant ever read the roof-control plan or examine it (Tr. 68-69). Complainant carried in his lunch box a copy of the Union contract and was able to explain its terms in considerable detail when any disputes arose as to his rights under the contract (Tr. 59-60; 97).

10. When complainant became the operator of the roof-bolting machine in early March 1980, he was an inexperienced operator. After about a week of operating the roof-bolting machine, complainant testified that his skill increased to the extent that he could install bolts in from 8 to 10 headings a day. The largest number of places which complainant ever bolted during a single shift was 10, whereas the operator who ran the roof-bolting machine prior to complainant's obtaining the job was able to install roof bolts in about 14 or 15 headings per shift and the operator who succeeded complainant as operator of the roof-bolting machine could install bolts in from 14 to 15 headings per shift (Tr. 66; 81; 76; 116). Complainant contended that he could operate the roof-bolting machine as fast and as skillfully as the other operators and that the only reason he failed to install as many roof bolts as the other operators did was that he was installing temporary supports, whereas they were not. Complainant argued that if the other operators had used temporary supports, they would not have been able to bolt any more places during a shift than he bolted (Tr. 77).

11. As stated in Finding No. 8 above, complainant did not at first use temporary supports after he became the operator of the roof-bolting machine. On May 20, 1980, however, an event occurred which caused complainant to begin using temporary supports. That event was the arrival at respondent's mine of an MSHA inspector named N. K. Rasnick. Inspector Rasnick, with respondent's permission, called the miners together and read the

roof-control plan to them. Inspector Rasnick explained to them that it was equivalent to committing suicide for them to install roof bolts without using temporary supports (Tr. 17-18). Complainant was so impressed with the inspector's lecture, that he claims that he told respondent's mine foreman, Charles Quinley, that he

wanted to use temporary supports and asked Quinley to provide him with the necessary timbers or with metal jacks which would work. Complainant contends that he daily asked for timbers because the jacks could not be adjusted to fit the varying heights which he was encountering in the mine. Complainant alleges that management never did supply him with either workable jacks or sufficient timbers to use in all entries (Tr. 19-20).

12. Complainant stated in his direct testimony that seven entries were being mined and that the entries were lower on the left side of the mine than on the right. Complainant said that the mining height varied from a low of 40 inches on the extreme left or entry No. 1, to a high of 5-1/2 feet on the extreme right, or entry No. 7 (Tr. 20). Complainant later testified that the mining height varied from a low of 48 inches in the No. 1 entry to a high of 6 feet in the No. 7 entry (Tr. 91). Complainant stated that there were timbers on the roof-bolting machine which measured 5 feet in length, but he claimed that he could not use them because of the varying heights in the mine (Tr. 20). Complainant testified that the lack of a sufficient supply of timbers prevented him from being able to use temporary supports at all in the No. 1 and No. 7 entries because his timbers were not long enough to reach the 6-foot mining height in the No. 7 entry, and that if he cut off his limited supply of timbers short enough to be used in the No. 1 entry, he would then not have timbers of the right length to use in the other entries (Tr. 20; 92-93).

13. Complainant testified that about June 1, 1980, respondent began to engage in retreat mining or the pulling of pillars (93-94). At that time, management brought in a plentiful supply of timbers to be used in the retreat-mining process. Although the timbers were not brought into the mine for use as temporary supports, complainant testified that he began to use the timbers for temporary supports (Tr. 95). He was able to use them in all entries because he had timbers to use in the 6-foot No. 7 entry as well as timbers that he could cut off for use in the 40 to 48-inch No. 1 entry (Tr. 94-95). Management at no time objected to complainant's use of temporary supports (Tr. 200).

14. Complainant testified that on June 4, 1980, Verlin Deel, one of the mine's owners, who also operated a scoop, watched complainant while he was installing roof bolts and remarked to complainant, as he had several times before, that complainant was not installing roof bolts fast enough to keep ahead of the miners who were drilling and shooting coal, and that unless he could increase his operating speed, management would have to replace him as the operator of the roof-bolting machine. After complainant came out of the mine on June 4, 1980, Verlin Deel informed complainant that he would not be allowed to operate the roof-bolting machine the next day. Complainant and Verlin engaged in a heated argument during which complainant stated that Verlin could not, under the Union contract, replace him as operator of the roof-bolting machine. Complainant then filed a grievance with the Union. Respondent refused to sign the grievance because respondent's management contended that

complainant had quit in a rage, whereas complainant argued that he had been discharged (Tr. 13; 25-26; 115; 147; 175). The grievance was never officially decided because respondent's management agreed to reinstate complainant after a Union representative advised management that miners had won similar grievances in the past (Tr. 59-60; 246).

15. After the second discharge on June 4, 1980, complainant returned to work on June 11, 1980, but he agreed to relinquish his job as operator of the roof-bolting machine and resume the position of general inside laborer in return for management's offer to pay him the wages of an operator of a roof-bolting machine for doing the work of a general inside laborer (Tr. 27; 65)

16. Complainant testified that his reinstatement on June 11 was marked by an atmosphere of strained relations between him and respondent's management (Tr. 28). His primary duties as a general inside laborer were to hang curtains, construct brattices, and apply rock dust. Complainant said that the mine foreman followed him around constantly to see that he performed his assignments promptly. If he were rock dusting, he would be told to go hang a curtain. If he were hanging a curtain, he would be told to go and hang a different curtain which had been torn down. He was told several times each day that he would have to improve the way he was doing his job or he would be discharged. Complainant stated that management would interrupt his lunch period by telling him to do some sort of job. Complainant explained that under the Union contract, if a person's lunch period is interrupted, he is entitled, after doing the assigned work, to resume his lunch period and take the full 30 minutes which he had a right to take in the first instance. Complainant said that his lunch period was interrupted two or three times and then he was reprimanded for having taken a 45-minute lunch period. Complainant testified that he did not let management's constant harassment bother him because he knew that management was looking for an excuse to discharge him and he was making every effort to prevent them from having a reason to discharge him (Tr. 28-32).

17. On June 26, 1980, when complainant was in the mine office at the end of his shift, Verlin Deel told complainant that the other miners were complaining to Verlin because they were having to do the work which complainant was supposed to be doing. Both Verlin's and complainant's descriptions of the incident show that the discussion was quite heated (Tr. 32; 177). After leaving the mine on June 26, complainant called the MSHA office and reported to Inspector N. K. Rasnick that temporary supports were not being installed in respondent's mine prior to installation of roof bolts. The inspector advised complainant that since the next day, June 27, 1980, would be the last day of work prior to the commencement of vacation, it was unlikely that anyone would be able to come to respondent's mine to investigate the complaint on June 27, but that some action would be taken (Tr. 34).

18. Complainant testified that he overslept on the morning of June 27 and arrived at the mine about a half hour late after the other miners had already gone into the mine to work. While complainant was preparing to go underground, the phone in the office rang and complainant answered it because no one else was in the office. The call was from an MSHA supervisor of inspectors named E. C. Rines. Complainant asked Rines if he was

calling in reference to a complaint about failure to use temporary supports and Rines said that he was. Complainant explained to Rines that he was the one who had called Inspector Rasnick the preceding day. Rines told complainant that complainant's name would not be used. Then Rines asked complainant to have the mine foreman to call him (Tr. 33-34; 104).

19. Complainant testified that he thereafter went underground and told Quinley, the mine foreman, that Quinley had been asked to return an important phone call, but complainant stated that he did not tell Quinley what the subject matter of the phone call had been (Tr. 35; 71). Quinley testified that complainant gave him the name of the man whose call was to be returned (Tr. 119; 148). Verlin Deel said that if complainant gave Quinley a name, Verlin did not recall hearing it, but Verlin did tell Quinley to find out what the call was about (Tr. 177). Verlin stated that complainant told Quinley the number to be called was on the desk (Tr. 178). Greg Deel is the son of Carmel Deel, one of the owners of respondent's mine (Tr. 209). Greg is unrelated to Verlin Deel (Tr. 173). Greg is the "surface man" and was in the mine office when Quinley came out to make the phone call. Greg testified that when Quinley told him he had received a message to call E. C. Rines, that Greg recognized the name to be that of an MSHA employee. Greg testified that there was no message on the desk of any kind and that the only way they were able to return the call was that Greg had written in the back of the phone book the number of the MSHA office in Norton (Tr. 214-215). The supervisory inspector, E. C. Rines, testified that he only gave complainant his name and place of employment (Tr. 104).

20. Greg testified that he and Quinley both tried to call Rines, but they could not get a dial tone on the phone (Tr. 210-211). They walked to an adjacent mine, located about 150 feet from their mine, and were unable to get a dial tone on that phone either. They returned to respondent's mine office. After about an hour, Quinley went back into the mine with the understanding that Greg would keep trying to get Rines on the phone and that Greg would let Quinley know what Rines wanted when Greg succeeded in talking to Rines (Tr. 159-160; 177-178).

21. Complainant's testimony as to the events which occurred after he entered the mine on June 27, 1980, the day of his discharge, is generally lacking in credibility for reasons which will hereinafter be noted. Complainant testified that after he had given Quinley the message about calling E. C. Rines, he was told to perform his regular duties which primarily consisted of hanging curtains and applying rock dust (Tr. 71). Complainant was at first very doubtful about what he had done on the morning of June 27 (Tr. 35-36), but he knew that some fly curtains had been pulled down by the scoop and that he had to go "hunt up some" (Tr. 37). Complainant also knew for certain that he had applied rock dust in the No. 7 entry because of some unspecified peculiarities that he recalled (Tr. 39). Complainant also said that he recalled speaking to Ronnie Lester in the No. 7 entry because someone borrowed some tools from him in the No. 7 entry (Tr. 39). Complainant said that he was not 100 percent certain that he spoke to Ronnie Lester in the No. 7 entry, but complainant said he then went into the No. 6 entry and learned that the miners who had borrowed his tools were using them to repair the coal drill (Tr. 39). Complainant then, without any reservations as to certainty, stated unequivocally that he saw Ronnie Lester and John Carpenter working on the coal drill in the No. 6 entry (Tr. 41).

22. Complainant explained that he had had some training as a repairman when he previously worked for Clinchfield Coal Company and that he knew more about repairing equipement than anyone at respondent's mine (Tr. 80; 84). Complainant, therefore, said that he checked on the status of the repairs being

performed on the coal drill and first said that the men working on the drill had "everything under control" and that there "wasn't anything there for me to do" (Tr. 40). Complainant later testified that when he went into the No. 6 entry, he gave the miners some suggestions on how to repair the drill (Tr. 80). Subsequently, complainant testified that one of the miners who was working on the coal drill came and borrowed his hammer and, that since he could not hang curtains without his hammer, he had to return to the No. 6 entry and ask when they would be finished with his hammer. Shortly after he arrived in the No. 6 entry to ask about the hammer, the miners finished repairing the coal drill and returned his hammer to him along with the other tools which they had borrowed from him on June 27 (Tr. 42).

23. As indicated in Finding No. 16 above, complainant first testified that Quinley followed him around to make sure he was working all the time and that Quinley would constantly send him to do a different job before he could finish the one he was then doing. Complainant later stated that he had an option, when told to hang a given curtain, of either going to hang it right then or of hanging the curtain in due course if his duties, within a reasonable period of time, would take him to the area where the curtain needed to be hung (Tr. 42). Complainant first stated that Quinley only gave him general instructions on June 27, but later he stated that Quinley specifically told him to hang a curtain in the No. 1 entry. Then complainant recalled having applied rock dust in each heading (Tr. 44-45), although he had previously been certain about having applied rock dust only in the No. 7 entry (Tr. 39).

24. Complainant also claimed that Quinley watched him closely all morning on June 27, but simultaneously testified that Quinley and Verlin Deel both went outside to return the phone call at 10:00 a.m. and that Quinley did not come back into the mine until 11 or 11:30 a.m. (Tr. 45). Also Quinley is said by complainant to have gone outside and obtained a load of rock dust at some time during the morning of June 27 (Tr. 46). Even though complainant stated that Quinley was outside until about 11 or 11:30 a.m., complainant then testified that he saw Quinley at the coal drill about 11 or 11:30 a.m. after Quinley had come back from trying to return the phone call (Tr. 43). If Quinley had followed complainant as constantly and as continuously as complainant alleged, he would only have needed to look up at any given moment and Quinley would have been 20 or 30 feet from complainant (Tr. 44).

25. After hanging the curtain in the No. 1 entry mentioned in Finding No. 23 above, complainant testified that he then went to the No. 3 heading where the roof-bolting machine was being used. While complainant was applying rock dust in the No. 3 heading, the miners completed that phase of their roof bolting and started backing the roof-bolting machine out of the No. 3 entry. In order to get out of the path of the moving roof-bolting machine, complainant said that he went into the break outby the No. 3 entry and sat down against the rib so that the roof-bolting machine could be taken to another entry.

Complainant alleges that Quinley was also sitting against the rib outby the No. 3 entry. Therefore, complainant said that he sat down beside Quinley and talked to him about the weather and such things for about 2 minutes while the roof-bolting machine was passing. Complainant then testified that he picked up his rock-dusting bag and started back to the place where he had been rock dusting. At that point, complainant alleges that Quinley told him

to get into the scoop as Quinley was taking him outside. After complainant had gotten into the scoop with Quinley, complainant asked why they were going outside and complainant alleges that Quinley replied that he was going to fire complainant for sitting down on the job (Tr. 45-48). Complainant then alleges that he asked Quinley if Quinley was firing him for sitting down for 30 seconds and that Quinley said "That's right" (Tr. 48).

26. Complainant said that he and Quinley then rode outside on the scoop and that both of them went into the mine office where they talked to Verlin Deel, owner of a one-third interest in the mine, and Greg Deel, the "outside man". Quinley told Greg to write out a discharge slip stating that complainant was being suspended for 5 days with intent to fire him for sitting down on the job. Quinley signed the discharge slip after Greg had written it. Complainant contends that the discharge slip had already been written before he and Quinley entered the mine office because Greg handed the discharge slip to Quinley without writing anything (Tr. 50-52). Verlin Deel is alleged to have said that he had found out from the Union how to discharge complainant this time and do it right. Complainant explained that the Union contract requires that a miner be suspended for 5 days before a discharge becomes effective so that the miner may file a grievance with the Union while still in an employed status (Tr. 51-52).

27. The testimony of complainant and the testimony of Verlin Deel, Charles Quinley, and Greg Deel concerning the details of the events which occurred on Friday, June 27, 1980, the day of complainant's discharge, vary in some details, but there is not dispute between complainant and the other three men about the fact that complainant was allegedly discharged for sitting down on the job (Tr. 126; 151; 179; 213). Quinley, Verlin Deel, and Carmel Deel all additionally testified that complainant was discharged for failing to perform the tasks which he was assigned to do. They stated that complainant would be assigned a job such as hanging curtains or rock dusting. They could check on the assignments at a later time and the work would not have been done. They would then find complainant talking with one or more of the other miners instead of doing the work he had been given to do (Tr. 115; 175; 247).

28. Among the details which cast doubt upon complainant's credibility are those pertaining to the time intervals between certain occurrences on June 27. As indicated in Finding No. 24 above, complainant stated that he knows for certain that Quinley went out of the mine to make the phone call at 10:00 a.m. Quinley, the mine foreman, on the other hand, did not purport to know exactly when he went outside to make the phone call, but agreed on cross-examination, that complainant came in about a half hour late at 7:30 a.m. Quinley and Verlin Deel both said that they went outside to make the call immediately after complainant had told them about it. Quinley stated that it takes about 10 minutes to go from the underground working section to the outside and that he would estimate that he was in the mine office to return the call by about 7:45 a.m. (Tr. 129). Quinley

said that Greg tried to make the call and could not get a dial tone in either respondent's mine office or in an adjacent mine office of another operator whose mine office was about 150 feet from respondent's mine office. Quinley further stated that he was not outside for more than an hour and that he would estimate that he was back on the working section by 9:00 a.m. (Tr. 130).

29. Quinley stated that when he returned underground after going out to make the phone call, he saw complainant sitting against the rib. He said complainant had not done any new rock dusting and had failed to hang the curtain which Quinley had told him to hang (Tr. 149-150). Quinley testified that he did not even get off the scoop and told complainant to get in the scoop so that they could go outside. Quinley estimates that they were back outside by 9:15 a.m. Quinley said that Verlin Deel and complainant argued for a while before complainant left the mine office after being discharged. Quinley stated that after he gave complainant the discharge slip, Verlin told him that the phone call had pertained to an allegation that management had not been using temporary supports in respondent's mine (Tr. 126; 134). Verlin Deel and Greg Deel also testified that Quinley had brought complainant out of the mine to discharge him before Quinley was ever told that a complaint had been made to MSHA about an alleged failure to use temporary supports (Tr. 180; 212). Greg testified that he was able to return Rines' call between 9:00 and 9:30 a.m. (Tr. 211). The supervisory inspector testified that he thought the call was returned between 9:30 and 10:00 a.m., but that he did not think the call could have been returned later than 10:00 a.m. (Tr. 104). The preponderance of the evidence, therefore, supports a finding that the phone call was returned no later than 10:00 a.m. Since it takes at least 10 minutes to get to the surface, Quinley could not have left the mine at 10:00 a.m., as stated by complainant, and still have succeeded in returning the call by 10:00 a.m. (Tr. 129).

30. One aspect of complainant's testimony about the events of June 27 was proven to be completely false. That was his statement, as indicated in Finding No. 21 above, that he had seen Ronnie Lester in the mine during the morning of June 27 when, as a matter of fact, Ronnie Lester was absent on June 27 (Tr. 229). Complainant's own testimony shows that he knew that Ronnie Lester was the operator of the coal drill (Tr. 83; 99). Complainant also testified that John Carpenter, who normally operated the roof-bolting machine (Tr. 100), was running the coal drill on June 27, and that Genco, who normally helped operate the roof-bolting machine, was actually operating the roof-bolting machine on June 27 (Tr. 55). Those facts should have alerted complainant to the fact that Ronnie Lester, the normal operator of the coal drill, was absent, but complainant was tripped up on that aspect of his allegations so that he falsely testified that he saw Ronnie Lester during the morning of June 27.

31. Complainant's felicity for devising answers was illustrated at pages 63 and 65 of the transcript. On page 63, he stated that he did not bring timbers into the mine for use as temporary supports when he was the operator of the roof-bolting machine because that was not one of his duties as operator of the roof-bolting machine. He said that bringing in timbers from the outside was a duty of the general inside laborer, the supply man, or the scoop operator. After complainant had agreed to resume the duties of a general inside laborer in return for complainant's offer to pay him the wages of the operator of a roof-bolting machine, complainant stated that although he hauled timbers when

instructed to do so by the foreman, hauling timbers was not a duty of a general inside laborer (Tr. 65).

32. Verlin Deel, Jr., was the helper to the operator of the roof-bolting machine on the morning of June 27 (Tr. 224; 231). He testified that he installed four metal jacks as temporary supports and that the metal jacks were carried on the roof-bolting machine (Tr. 232). He stated that it takes about 2 or 3 minutes to install four metal jacks as temporary supports. Deel, Jr., stated that the regular operator of the roof-bolting machine was John Carpenter who could install roof bolts in one working place within a period of 15 minutes, but Carpenter was running the coal drill on June 27 and Bryan Genco, the regular helper to the operator of the roof-bolting machine, was actually operating the roof-bolting machine. Carpenter was running the coal drill because the normal operator of the coal drill, Ronnie Lester, was absent (Tr. 229). Because Genco was not the regular operator, it took Genco from 20 to 30 minutes to install roof bolts in a single working place (Tr. 225). Deel, Jr., had only worked in the mine since June 1980 and had never seen complainant do any work other than that of a general inside laborer (Tr. 233). Deel, Jr.'s testimony about the use of temporary supports was not part of his direct testimony and he discussed his use of temporary supports only after I happened to ask him about his duties as helper to the operator of the roof-bolting machine.

Consideration of Parties' Arguments

Anyone who first reads the 31 findings of fact set forth above and then reads the proposed findings of fact given on pages three to eight of complainant's brief, will think that complainant's counsel was using a different transcript from the one used by me because very few of the facts given in complainant's brief agree with those given in my 31 findings of fact. Therefore, before I can begin to consider the arguments given on pages eight to 24 of complinant's brief, I must explain why the facts alleged on pages three to eight of complainant's brief must be rejected for being either erroneous or incomplete or misleading.

Complainant's brief states on page three that I shall have to make credibility resolutions in order to decide the issues in this proceeding. Respondent's reply brief (p. 4) agrees that "[p]art of this case hinges on the credibility of the witnesses". I agree wholeheartedly with that much of the briefs submitted by both parties. In determining credibility, a person's total testimony must be considered because, as the Commission noted in Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (1981), a lack of credibility by a witness with respect to one point does not mean that his testimony must be rejected as to all things if his testimony is corroborated by other evidence as to other matters. Additionally, it is important to consider all of a person's traits and characteristics in determining credibility. The way that a witness expresses his thoughts and describes events is also important. Even though one witness may answer a question with a rather complete exposition which sounds convincing, he may be expounding upon a complete fabrication. Another witness may answer questions in such a brief way, that he sounds unconvincing even though he is telling exactly what

happened to the best of his ability to describe a given event.

Complainant's First Discharge

Complainant's brief (p. 3) states that complainant was discharged in January 1980 for missing one day of work. That sort of incomplete description fails to reflect complainant's unsatisfactory performance which led to his discharge. Finding No. 6, supra, shows that complainant had taken 2 days off prior to the third absence in January which resulted in his first discharge. Complainant stated during the hearing that, under the Union contract, a miner can be discharged for missing 3 days at work during a 30-day period and defended his absences by stating that he had taken 3 days off within a 45-day period (Tr. 97). Complainant conceded that in a small mine like respondent's, which employs only eight miners, the operator is greatly inconvenienced when a single person unexpectedly takes a day off because of management's limited ability to shift workers so as to cover for the work which will not be done by the person who is absent (Tr. 98). The fact that the mine foreman, Charles Quinley, and a one-third owner, Verlin Deel, agreed to reinstate complainant on the following day after his first discharge shows that respondent's management was willing to give an employee a chance to redeem himself. Moreover, it should be noted that complainant was reinstated after his first discharge without any pressure by the Union to get complainant reinstated (Tr. 144).

Complainant's Position as Operator of the Roof-Bolting Machine (March to June 4)

Complainant's brief (p. 3) incorrectly states that complainant was promoted in March to the position of helper to the operator of the roof-bolting machine. Finding No. 7, supra, shows that complainant became a helper to the operator of the roof-bolting machine in February 1980, not March 1980, as stated in complainant's brief. As reflected in Finding No. 8, supra, complainant did not erect any temporary supports while he held the position as helper to the operator of the roof-bolting machine.

Complainant's brief (p. 3) incorrectly states that complainant began to use temporary supports on March 20, 1980, after an MSHA inspector explained the roof-control plan to the miners in respondent's mine. Finding No. 10, supra, correctly states that complainant became the operator of the roof-bolting machine in early March 1980 and Finding No. 11, supra, correctly states that complainant did not use temporary supports between early March and May 20, 1980, when the inspector explained the roof-control plan to the miners at respondent's mine (Tr. 17). Assuming that early March is about March 10, 1980, and recognizing that complainant actually began to use temporary supports after the inspector's visit on May 20, 1980, it is clear that complainant bolted without temporary supports for a period of about 52 days before he ever gave any thought to the fact that he ought to be using them.

As shown by Finding No. 14, supra, complainant was either discharged or quit on June 4, 1980, after having an argument with Verlin Deel, a one-third owner of respondent's mine. Finding No.

15, supra, reflects the fact that although complainant was reinstated as a miner at respondent's mine, he was reinstated as a general inside laborer who was to receive the pay of an operator of a roof-bolting machine. Therefore, complainant actually used temporary supports only for the period from May 20, 1980, to June 4, 1980, or a period of 11 days. Even during those 11 days, complainant did not use temporary supports when installing bolts in the Nos. 1 and 7 entries because

he claimed that he did not have timbers high enough to support the roof in the 6-foot No. 7 entry and that he wouldn't cut off the timbers he did have for use in the 40-to-48-inch No. 1 entry. Complainant said that he was not supplied with timbers of sufficient height for the No. 7 entry until respondent began pillaring operations about 2 to 4 days before complainant's second discharge on June 4, 1980. The evidence shows, therefore, that complainant actually used timbers or temporary supports in all entries for from 2 to 4 days out of the entire time that he held the position of operator of the roof-bolting machine (Finding Nos. 12 and 13, supra).

Complainant's brief (p. 4) incorrectly states that, after the inspector's visit to the mine, complainant "insisted on using temporary supports, in the form of either timbers or jacks, before adding permanent roof support". Complainant stated unequivocally at transcript page 20 that he was never supplied with metal jacks. Complainant's brief (p. 4) ignores complainant's testimony as to the height of respondent's mine and adopts a height given by Verlin Deel, one of the mine's owners. When complainant is justifying his difficulties in securing timbers, he should be held to the mining heights which he claimed existed in the mine rather than permit him to refer to a mining height given by Verlin Deel whose testimony complainant considers to be highly unreliable. As shown by Finding No. 12, supra, complainant at first stated that the height of the mine varied from 40 inches to 5-1/2 feet; he thereafter increased the height from 48 inches to 6 feet.

For a number of reasons, it was necessary for complainant to take the position that the metal jacks supplied by respondent were unworkable. First, he knew that if he admitted that they would work at all, he would have to agree that the jacks could be erected as temporary supports in a matter of 3 or 4 minutes and that complainant's inability to install roof bolts in more than 10 places per shift, as opposed to 15 by other roof bolters, would require him to acknowledge his lack of skill as an operator of a roof-bolting machine, rather than shore up his argument that the only reason he could not install roof bolts as fast as the other miners was that he had insisted on installing temporary supports, whereas they did not use temporary supports. This point is of vital importance in this case because, as I have explained above, complainant installed roof bolts for 52 days without using temporary supports and yet he unequivocally admitted that he never succeeded at any time in installing bolts in more than 10 working places per shift, even when he was not using temporary supports, although both his predecessor and succesor as operator of the roof-bolting machine could install bolts in from 14 to 15 places per shift (Finding No. 10. supra).

Another reason that complainant had to take the position that the jacks would not work is that he claimed that he only carried four timbers 5 feet long on the roof-bolting machine and that he could not use those timbers because the height varied from 40 inches to 6 feet (Finding No. 12, supra). Anyone knows that if the roof height varies from 40 inches to 6 feet, there

has to be some roof height which is 5 feet, or 60 inches high, when one is bolting an area which ranges between 40 inches and 72 inches in height. Therefore, complainant necessarily could have used the 60-inch timbers at least once in a while as temporary supports.

A further reason that complainant had to take the position that the jacks would not work is that they had an adjustment of 18 inches. Complainant had this fact ever in mind because when he first gave a variable height in the mine he gave a low of 40 inches and a high of 5-1/2 feet, or a variable height of 26 inches which was a variation of more than 18 inches. When complainant next gave different heights for the mine, he raised the low to 48 inches, but he found it necessary to increase the height of the mine to 6 feet, or 72 inches, because he knew that if he raised the minimum to 48 inches and left the maximum at 5-1/2 feet, or 66 inches, he would be supplying heights with an 18-inch variation which was exactly the range of adjustment of the jacks which had been supplied by respondent.

Complainant's brief concedes in footnote 4 on page 4 that a question exists as to whether metal jacks were ever made available, but complainant states that I do not need to resolve that question. Complainant cites some of Verlin Deel's testimony to the effect that he was not sure of the extent of the adjustments which could be made in the jacks. Complainant also cites Quinlty's testimony in which he took the position that the jacks were there if the miners wanted to use them.

Among complainant's other oversights in the argument in footnote 4 on page 4, is his failure to take into consideration Quinley's testimony on pages 157 and 158 where Quinley stated that he had actually tested the jacks and knew that they worked. He further stated that the height of the mine did not vary more than 18 inches at the time complainant was roof bolter, but that the height did vary more than that after complainant was discharged. Quinley stated that the increased height was allowed for by management's supplying long jacks which were laid on the high side of the mine and picked up by the roof bolters when they were bolting on the high side.

The other very significant testimony which complainant chooses to ignore in the footnote on page 4 is that Verlin Deel, Jr., testified that he was the helper to the operator of the roof-bolting machine on June 27, 1980, when complainant was discharged. He stated that he personally used metal jacks as temporary supports, that they were adjustable, and that they were kept on the roof-bolting machine. He further testified that it takes only 2 or 3 minutes to set the metal jacks as temporary supports (Finding No. 32, supra).

Now that complainant has been reminded of the fact that a miner on June 27, 1980, was installing temporary supports, I am sure that his argument will be that I should not give any credibility to the testimony of Verlin Deel, Jr., because his father was a one-third owner of the mine. I might have been inclined to agree with that sort of argument if I had not examined the testimony closely. It turns out that respondent's counsel did not ask Verlin Deel, Jr., a single question about temporary supports or the time it takes to set them at the time respondent's counsel presented Verlin Deel, Jr.'s direct testimony. If respondent's management had intended to coach

Verlin Deel, Jr., as to the kind of testimony he should provide for this proceeding, I cannot imagine that management would have failed to make certain that Verlin Deel, Jr., testified on direct as to his having been using metal jacks as temporary supports on June 27, 1980. Such testimony not only shows that the metal jacks

would work and were being used, but it also refutes complainant's contention that temporary supports were not being used in the mine on the day of his discharge (Tr. 74). Other reasons for giving Verlin Deel, Jr., a high credibility rating was his fairness in dealing with questions about complainant. For example, while Verlin Deel, Jr., stated that he had observed complainant sitting down in the mine, he also stated that everyone sits down once in a while (Tr. 234). Even though Verlin Deel, Jr., did not know whether the coal drill was being repaired on June 27, 1980, he supported complainant's testimony to that effect by stating that the coal drill broke down almost every day and that he would assume that sometime during the day on June 27, 1980, it would need to be repaired since that was a daily occurrence (Tr. 235).

For the reasons given above, Verlin Deel, Jr.'s testimony should be given a high credibility rating and is sufficient support for a finding that metal jacks were supplied by management, that they worked, and that they were being used on June 27, 1980, the day of complainant's discharge.

Complainant's brief (p. 5), for no apparent reason, relies on Verlin Deel's description of where timbers were stored to explain how hard it was for complainant to obtain timbers for use in making temporary supports. The brief states that complainant had to go beyond the last open crosscut to find timbers and a saw for the purpose of cutting timbers to use for temporary supports, but complainant cites Verlin Deel's testimony at page 200 in support of that statement, whereas complainant himself stated at page 94 that he and his helper had to go three breaks and carry 6-foot long timbers to the area and cut them and set them. It should be borne in mind, however, that complainant said he only had timbers of sufficient length for the No. 7 entry for 4 days at most (Tr. 94). Thus, while he claims that his roof-bolting speed was reduced greatly when he began to bolt during retreat mining, he was only engaged in very slow timber cutting for 4 out of the total of 63 days during which he was employed as operator of the roof-bolting machine.

Complainant's brief (p. 5) refers to the fact that Verlin Deal and Charles Quinley criticized complainant's inability to install roof bolts fast enough to keep ahead of the other miners who were drilling, shooting, and scooping up coal. The brief defends complainant's inability to install roof bolts rapidly by contending that the only reason complainant was slow was that he insisted on setting temporary supports. As I have explained above, and as my findings of fact show (Nos. 10 through 13, supra), complainant admitted that he was slow and that he never succeeded in bolting more than 10 places per shift for the 52 days during which he worked without using temporary supports. Moreover, complainant did not use temporary supports in all entries except for the last 2 to 4 days of the time he was employed as the operator of the roof-bolting machine. The evidence simply does not support complainant's contention that his lack of speed as a roof bolter was caused by his insistence that temporary supports be erected prior to installation of roof

bolts. A company which tolerates a slow roof bolter for 52 days certainly has a right to complain about his lack of speed after he has done the work that long without showing any improvement in the speed at which he was able to install roof bolts. Even complainant stated that he was inexperienced when he started operating the roof-bolting machine and that his speed increased during the first week to the point that he was able to install roof bolts in about

10 places during a single shift. The trouble was that complaint never did get above a speed of installing bolts in 10 places per shift even though he held that position for 52 days before he ever began to use temporary supports.

Complainant's brief (p. 5) gives an erroneous description of complainant's second discharge by saying that "[u]ltimately, Fleming was discharged for "slow production" on June 4 (Tr. 116)". No one used the term "slow production" on page 116. Moreover, the witness carefully explained on page 116 that complainant was not an experienced operator when he was given, at complainant's request, the opportunity to be the operator of the roof-bolting machine. Complainant was told at the time he became the operator that he could retain the position only if he showed that he could handle the job (Tr. 175). Complainant's own testimony shows without any equivocation that he could not install roof bolts in more than 10 working places per shift regardless of whether he used temporary supports or not. After respondent's management had given complainant a period of 52 days without using temporary supports, 7 days with partial temporary supports, and 4 days with temporary supports in all entries, a total trial period of 63 days (March 10 to June 4), Verlin Deel, a one-third owner, told complainant that he would have to relieve him of the job of operator of the roof-bolting machine. Complainant took the position that, under the Union contract, Verlin Deel could not make him give up the job of operating the roof-bolting machine.

Complainant's brief (p. 5) further makes a misleading statement of the facts by stating that "[t]his discharge [of June 4] was brought to the union's attention and resolved in the grievance procedure." As I have explained in Finding No. 14, supra, the grievance filed by complainant with respect to his alleged discharge on June 4 was never officially decided. Respondent's management simply agreed to allow complainant to continue working at respondent's mine after respondent's management was advised by a Union representative that miners had won similar cases. It is significant that when complainant returned to work on June 11, he agreed to accept the position of a general inside laborer after management agreed to pay him the salary of an operator of a roof-bolting machine.

Complainant's Position as General Inside Laborer (June 11 to June 27)

The discharge which is the subject of the complaint in this proceeding occurred on June 27, or the 13th day after complainant had returned to work on June 11 and had agreed to do the work of a general inside laborer while getting paid the wages of an operator of a roof-bolting machine. Complainant's brief (p. 5) states that management did not complain during this period about the way complainant was performing his job. Complainant's own testimony, as indicated in Finding No. 16, supra, shows that management told complainant several times a day that his work was unsatisfactory. To use complainant's own words (Tr. 28):

A. I could not sit down to eat my lunch without being ordered to go take care of something which meant that I had to interrupt my lunch. I was continuously told that I had to do better; I had to do more; I was not doing good enough. If I didn't improve I wouldn't be around much longer.

Q. When were things such as that said to you?

A. At various times throughout the day, whenever someone had something for me to do. If I were rock dusting and Charles Quinley had a curtain that needed to be hung, he would come and inform me of it and then add on top of the instructions, you will have to start doing better.

Q. Was this statement, you will have to start doing better, said to you at times you were performing other job duties?

A. Absolutely.

Complainant completely contradicted his statement above when he was describing his work on the 13th and last day of his employment as a general inside laborer. At that time, he testified (Tr. 42):

Q. Had you seen Mr. Quinley between the time you told him about the phone call and this time?

A. Yes.

Q. Had you had any discussions with him?

A. Only the normal discussions whereas he would inform me of anything that needed to be done. And it was his practice that in his tour of the face area, if he found a curtain down he would come to me and inform me of it, at which time I would have the option to either hang it immediately or if I, in my regular course of my duties were going to take me in that direction in the near future, I would just work down towards it.

The same supervisor, Charles Quinley, who was previously depicted as having been harassing complainant, is described above as having a "practice" of reporting curtains to complainant and giving him an option to hang them immediately or do them in due course. Despite complainant's many contradictory statements, as illustrated above and as set out in my Findings of Fact Nos. 23, 24, 29, 30, and 31, supra, complainant's brief (pp. 14-15) praises his own demeanor as a witness, claims that his recollections were largely uncontradicted, and urges that I rank him as a much more credible witness than Charles Quinley, the foreman who discharged complainant.

Complainant's brief (p. 6) refers to the fact that on June 26, after complainant had worked as a general inside laborer for 12 days, Verlin Deel, a one-third owner of the mine, engaged in a conversation with complainant. Complainant emphasizes that Verlin told him on June 26 that he would get 8 hours of work out of complainant one way or another and make it so hard on complainant that he would leave. Both men agreed that it was a heated conversation. It is a fact, however, that even though

complainant reported for work a half hour late the next morning, June 27, no one treated him harshly in any way. Complainant gave his supervisor, Charles Quinley, a message about returning a phone call. Verlin Deel was present and did not give complainant any orders. Instead, complainant states that, "after delivering the message to Mr. Quinley, I went on about my duties hanging curtains and rock dusting" (Tr. 35).

When complainant described the heated conversation of June 26, he stated as follows (Tr. 32):

> A. I do not recall what started the conversation, but it ended in a discussion of Union rights and contract obligations and it ended in a rather heated discussion between Mr. Deel and myself about my duties that were going to be assigned to me the next day. * * *

The part of the heated conversation which complainant could not remember was recalled by Verlin Deel who testified as follows about the heated conversation of June 26 (Tr. 176-177):

> Q. The day before the firing of Mr. Fleming did you have occasion to engage in any discussion with him?
> A. Yeah, I called him in the office the evening before and I told him that some of the men had made a complaint that he wasn't keeping up his job; they was having to do his job. And I told him, I said, you are going to have to do your job if you stay here. And so he kindly had a few words to say, you know, kindly talked smart, and I guess I talked smart to him, too. * * *

The reason that the above-described testimony is important is that it shows beyond any doubt that complainant was warned on the day before his discharge that his work as a general inside laborer was unsatisfactory and it also shows that complainant only argued his rights under the Union contract. Nothing whatsoever was said about complainant's alleged insistence on using temporary supports when he was the operator of the roof-bolting machine.

In footnote 5 on page 6 of complainant's brief, it is stated that Quinley alleged that he was constantly having to speak to complainant about his inadequate job performance. The footnote then states that Quinley could not give a single specific incident of poor job performance. There are many statements in the record about complainant's failure to do his job. It should be borne in mind that hanging curtains and rock dusting across seven entries is not the sort of work which creates specific incidents of poor job performance. As Quinley stated, it was obvious across the section when curtains were not hung and rock dust was not applied (Tr. 146). Quinley stated that he warned complainant daily about inadequate job performance (Tr. 123) and, as indicated above, complainant himself said he was "continuously told" he would have "to do better" (Tr. 28). Additionally, as also noted above, Verlin Deel certainly warned complainant about inadequate job performance on June 26, the day before he was discharged for sitting down on the job.

There is no record support whatsoever for the claim in complainant's brief (p. 6) to the effect that complainant "went to the number six or number seven heading where he met Charles Quinley (Tr. 35)". Complainant's brief (footnote 6, p. 6) then alleges that respondent's witnesses presented contradictory testimony as to where complainant first entered the working

section on June 27. The brief claims that Quinley testified it was the No. 3 entry (Tr. 149), whereas Verlin Deel testified it was the No. 5 entry (Tr. 182).

As to the claim in complainant's brief that complainant met Charles Quinley in the No. 6 or No. 7 entry, complainant did not specify any entry as the meeting place between him and Quinley (Tr. 35). Moreover, he stated that he did not recall exactly where he started hanging curtains that morning, but he said he might have started in the No. 6 or No. 7 entry (Tr. 35). The only witness who really professed to know where Quinley and complainant met on the morning of June 27 was Verlin Deel who stated at transcript page 203 that he first saw complainant in the last open crosscut near entry No. 5. Verlin said that Quinley "came walking up through there" and one must assume that Quinley and complainant met at entry No. 5 since complainant did not say where they met. As for complainant's claim in footnote 6 that Quinley testified that they met in entry No. 3, Quinley did not say where they first met on the morning of June 27. Complainant's brief cites transcript page 149 as the basis for claiming that Quinley said they met at entry No. 3. On page 149, however, Quinley is describing the place where complainant was sitting at the time Quinley decided to discharge him on June 27 and the only entries mentioned there are Nos. 1 and 2. Quinley finally decided that the site of complainant's discharge was outby the No. 3 entry, but Quinley decided that only after being shown a map of the mine prepared by complainant for the purpose of showing the site of his discharge (Tr. 46; 171; Exh. 2). Quinley also stated that he found complainant sitting where he had left him (Tr. 171). The testimony, therefore, shows that neither Quinley nor complainant ever specifically designated the place where they met on June 27 to discuss the phone call, so any finding as to their exact place of meeting rests on the statement of Verlin Deel that complainant and Quinley met in the vicinity of the No. 5 entry.

Complainant's brief (p. 7) alleges that complainant installed a total of four or five curtains on the morning of June 27. Complainant cites transcript page 35 in support of his claim that he hung four or five curtains, but when complainant was asked if he knew where he began hanging curtains, he answered "No, not exactly" and stated that he generally began in the No. 7 or No. 6 entry, but he didn't say that he did hang curtains in either the No. 7 or No. 6 entry. When complainant was asked by his own counsel if he could recall how many curtains he hung, he answered "[n]ot exactly" (Tr. 36). On page 37 complainant spoke of generalities about fly curtains and said that some curtains had been pulled down by the scoop and he said that if you follow the scoop you "usually" find them, but he did not testify that he found any by following the scoop on June 27. In fact, the only curtain which complainant specifically claimed to have hung on June 27 was the curtain in the No. 1 entry (Tr. 44).

Complainant's brief (p. 7) tries to establish a sequence of events for June 27 based on an amalgamation of the contradictory testimony of complainant and Quinley. Complainant acknowledges in footnote 7 on page 7 that the witnesses contradicted each other, but complainant states that it is unnecessary to resolve the credibility questions about the events of June 27 because of certain credibility arguments which are made in complainant's

brief on pages 8 to 15. Those arguments will next be considered.

The Credibility of Charles Quinley, the Mine Foreman

Complainant's brief (p. 8) acknowledges that he must prove that he was discharged for engaging in a protected activity. He alleges that his testimony supports a conclusion that he was discharged for engaging in a protected activity and argues that all I have to do before reaching that desired conclusion is to find that his testimony is credible, while I find that the testimony of Charles Quinley, the mine foreman who discharged him, is incredible. Complainant argues that Quinley's testimony shows that he was an evasive witness with a selective memory. Several examples of Quinley's evasive testimony are given. It is first noted that Quinley was responsible for all activities on the working section, yet when he was asked by his counsel on direct examination if the miners were using safety jacks in their roof-bolting procedures, he answered the question with the words "Safety jacks (Tr. 123)", instead of saying "Yes" or "No".

As I explained in the second paragraph of this decision under the heading of "Consideration of Parties' Arguments", supra, the mere fact that a witness answers a question briefly, or in a way which might be considered evasive, does not mean that his credibility is necessarily impaired. Quinley had a characteristic of giving monosyllabic answers. For example, he answered another of his counsel's questions as follows (Tr. 142-143):

> Q. Is it unusual for bolts to be out in the mine?
>
> A. No.
>
> Q. That's a common occurrence in all mines?
>
> A. Common.

Quinley later answered one of my questions as follows (Tr. 145):

> Q. He would come to work, but he wouldn't work after he got there?
>
> A. After he got there.

On another occasion, the following exchange between me and Quinley occurred (Tr. 158):

> Q. You should have brought one [metal jack] in here and demonstrated.
>
> A. Should have.

Notwithstanding the alleged evasiveness of Quinley in answering questions in as few words as possible, he conceded unequivocally that the miners were not using jacks or temporary supports when questioned about that subject by complainant's counsel during cross-examination (Tr. 140):

Q. And it is your testimony that those [metal jacks] were installed in every place before bolting?

A. They were supposed to have been.

Q. But is it your testimony that they were installed?

A. I can't say that they were.

Complainant's brief (p. 9) alleges that Quinley testified that there were not enough jacks on the section. Complainant cites Quinley's testimony on page 125 in support of that allegation. The actual testimony is as follows (Tr. 125):

Q. Did you have enough jacks for the job?

A. Yes sir.

Complainant may have been referring to the fact that on page 125 Quinley first stated that timbers were not needed for use as temporary supports because four metal jacks with an 18-inch variable adjustment were carried on the roof-bolting machine for use as temporary supports. Quinley conceded, after saying that they had enough jacks, that there might have been times when the jacks wouldn't fit and he also conceded that it would have been necessary for them to use timbers in such circumstances. Inasmuch as Quinley said that the height of the mine varied from 46 inches to 50 inches (Tr. 137), it would have been a rare situation when jacks with an 18-inch adjustment would fail to fit. As indicated in Finding No. 12, supra, complainant was very uncertain about the heights he encountered in the mine, so Quinley can hardly be discredited as a witness just because he gave different estimates as to the mine's variable heights from the ones given by complainant. Moreover, as I have already pointed out under the heading of "Complainant's Position as Operator of the Roof-Bolting Machine", supra, complainant relied in his brief (p. 4) on variable mine heights given by Verlin Deel and those variable heights are different from the ones given by complainant.

Complainant's brief (pp. 10-11) next challenges Quinley's credibility because it is claimed that he gave different and inconsistent answers when he was asked, on three different occasions, about the amount of time which it takes to install temporary supports. Complainant alleges that the first time Quinley discussed the use of temporary supports, he stated that it takes about the same amount of time to support a roof with temporary and permanent supports as it does to bolt a roof with only permanent supports (Tr. 138). Complainant says that the second time Quinley discussed temporary supports, he stated that it takes about 10 minutes more to cut and set four timbers than it would to install only permanent supports (Tr. 142). The third time he addressed the question of temporary supports, complainant alleges that he said it would take approximately 3 or 4 minutes extra to put up temporary supports before installation of permanent roof bolts (Tr. 158). Complainant's brief (p. 10) concludes that Quinley's inconsistent and self-serving replies speak for themselves and show that his testimony lacks credibility.

There are several errors in complainant's arguments about

Quinley's inconsistent answers to questions about the length of time required for setting temporary supports. In the first place, although Quinley was asked about the length of time it takes to set temporary supports on three different occasions, his answers were consistent each time. In the second place, complainant incorrectly refers to two occasions which really constituted a single time (Tr. 138 and 142). Finally, complainant chose to ignore the first time (Tr. 125).

To set the record straight as to the number of times Quinley was asked about the length of time it takes to set temporary supports, the first time was when his own counsel asked him (Tr. 125), the second time was when complainant's counsel asked him (Tr. 138-142), and the third time was when I asked him (Tr. 158).

Complainant's contention that Quinley inconsistently answered questions about the length of time it takes to set temporary supports is achieved by ignoring the fact that he insisted each time he was asked about temporary supports that the miners were furnished with metal jacks which could be installed in almost no additional time as compared with the miners' having to use timbers which he conceded might require as much as 10 minutes of additional time. To show that his answers were consistent, it is necessary to examine the testimony in each instance. Quinley first distinguished between use of metal jacks and timbers when questioned by his own counsel (Tr. 125):

> Q. But you didn't have timbers in there [on the roof-bolting machine] because you used safety jacks?
>
> A. That's right. Our height varied up and down and to use the timbers like that on the pinner, you would have had to cut all the time, haul them in these cuts, stand them up. Where you take the jack, they have got an eighteen inch variation to them. Use them, no worry.

When Quinley was asked about the period of time it takes to set temporary supports by complainant's counsel, he answered her questions as follows (Tr. 138-142):

> Q. How long does it take to put roof bolts in a section of this mine without setting temporary supports.
>
> A. How long? It's according to who does it.
>
> Q. Give me an average.
>
> A. A good operator, fifteen to twenty minutes.
>
> Q. And how much longer does it take if you do set temporary supports?
>
> A. Takes about the same time, because you have a helper to help you set the jacks.
>
> * * * * *
>
> Q. And how long does it take to set temporary supports?
>
> A. Just as long as you can spin a jack stand, [fraction] or five to ten seconds to a stand.
>
> * * * * *

Q. At the time when timbers had to be cut before they were set as temporary supports, did this cause the bolting operation to take longer.

A. Yes.

Q. How much longer?

A. Well, it's according to how hard they worked at it.

Q. Well, let's assume that somebody is working at the average speed, how long does it take to cut and set a timber?

A. I would say ten minutes more.

Q. Ten minutes more?

A. For four timbers.

The third time Quinley was asked about how long it takes to set temporary supports was when he answered my questions as follows (Tr. 158):

Q. How much extra time did you say it took to set the four temporary supports?

A. I wouldn't say any time.

Q. It has to take some time.

A. Maybe some, not that much to amount--maybe two or three minutes.

Q. If you had a man that wasn't using roof bolts or jacks at all and another man who did use them, you would say that the time they would bolt a place wouldn't vary more than how many minutes between the two men?

A. Couldn't be over three.

Q. Three or four minutes?

A. Something like that. All you have to do is stand them up and put a stand on them, that's all.

The testimony reviewed above shows that Quinley preferred to take the position that an experienced operator and helper should be able to install roof bolts while using metal jacks as temporary supports without allowing any additional time for the setting of the jacks, as compared to bolting without use of any temporary supports at all. Quinley, on one occasion, stated that he had done nothing but install roof bolts for 7 years before he became a section foreman and that "[i]f anybody knows [about roof bolting], I ought to" (Tr. 117). Despite his reluctance to agree

that it takes any additional time at all to install jacks, he consistently, when pressed on the subject, reluctantly conceded that it might take from 2 to 4 minutes to install jacks as temporary supports. He also conceded, when he was asked about installing temporary supports, that if metal jacks weren't available,

it would require extra time up to about 10 minutes to cut timbers and install them. The foregoing extensive review of Quinley's testimony about the period of time it takes to install temporary supports shows that Quinley cannot be discredited as a witness on the basis of an allegation that his testimony was inconsistent as to the amount of time it takes to install temporary supports.

Complainant's brief (pp. 10-11) next argues that Quinley's testimony should be discredited because of his inconsistency in answering questions about the duties to which complainant had been assigned on the morning of June 27. Complainant first notes that Quinley stated, as his basis for concluding that complainant had done no work on the morning of June 27, that "[t]he curtain at the mouth of the place he [complainant] was sitting in wasn't hung. And that's the one I left him definitely to set and rock dust the place" (Tr. 149). Complainant then points out that Quinley, on cross-examination, had stated in answer to a question about whether he had given complainant any specific instructions that he had "[j]ust [told complainant to] rock dust and ventilate" (Tr. 138). Complainant argues that Quinley can't have it both ways because Quinley either did give specific instructions or he did not. Complainant's brief (p. 11) further contends that respondent has completely failed to submit any evidence to substantiate its primary defense that complainant was discharged for sitting down on the job and failing to engage in productive work on June 27.

Complainant's arguments in the preceding paragraph overlook a considerable amount of evidence which supports the respondent's position in this proceeding much more than it does the complainant's contentions. Quinley's direct testimony shows that he spent some time and gave some specific thought to the work which he assigned complainant to do on the morning of June 27. Quinley stated that he had a miner by the name of Perry Ramey assisting complainant in the performance of complaiant's duties of hanging curtains and rock dusting (Tr. 118). On June 27, after complainant had told Quinley about the need for Quinley to return a phone call, Quinley instructed complainant to take care of all ventilation and rock dusting on that day because Perry Ramey was going to help "shoot" (Tr. 119). Quinley recalled that while he was giving complainant instructions as to his duties for the day, another miner came up and asked to borrow some of complainant's tools which complainant normally carried with him (Tr. 164). Quinley testified that he did not stay around to watch complainant work because he had to go outside, after assigning complainant's duties, for the purpose of returning the phone call (Tr. 160). Quinley came back into the mine about 9:00 a.m. and found complainant sitting against the rib outside the No. 3 entry. Quinley noted that the curtain in the No. 3 entry had not been hung and that no new rock dusting had been done. Quinley was riding in the scoop and he stated that he did not even get out of the scoop. He had had trouble in getting complainant to do his work of hanging curtains and rock dusting ever since complainant was reinstated on June 11. At that moment, Quinley decided that he had had enough of complainant's failure to work and just told complainant to get in the scoop as

he was taking him outside for the purpose of discharging him (Tr. 123; 145-146; 150-151).

Complainant's brief (p. 11) also contends that Quinley's testimony should be discredited because he admitted, after much evasion, that he did not know whether curtains had been hung by complainant in any entry other than the No. 3

outside of which complainant had been found sitting. It is true that Quinley reluctantly admitted that he did not know which entries had curtains, but that admission is more damaging to complainant's credibility as to his description of the events which occurred on June 27 than it is to Quinley's credibility. The reason for reaching the foregoing conclusion is that complainant contends that Quinley continuously followed complainant around on the morning of June 27 and watched everything that complainant did, except for the hour when Quinley went outside to return the phone call (Tr. 42; 44).

Quinley's testimony is much more credible as to the events which happened on the morning of June 27 than complainant's testimony because it was Quinley's failure to watch complainant and Quinley's having been outside up to the time he fired complainant that forced Quinley to have to admit that he did not know whether curtains had been hung in any of the headings other than No. 3--and possibly No. 4 (Tr. 170-172). If Quinley had been in the mine on the morning of June 27 long enough to have followed complainant around, as complainant contended, Quinley would have been able to state that, while he could not see into any of the headings except No. 3 and No. 4 at the time he discharged complainant, he knew that the curtains did or did not exist in the other headings by virtue of the fact that he had been following complainant that morning and knew the curtains were up or were not up.

Complainant at no time denied that he had failed to hang a curtain in the No. 3 heading. He claimed that he went into the No. 3 heading to apply rock dust and that when he went into the No. 3 entry, the roof-bolting machine was being operated (Tr. 44-47). Complainant's own testimony also shows that he understood that his duties on the morning of June 27 consisted of hanging curtains and applying rock dust (Tr. 35). Complainant's failure to install a curtain in the No. 3 heading was in violation of 30 C.F.R. 75.302(a) which provides in pertinent part:

> (a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes * * *

Therefore, Quinley was justified in being upset with complainant's failure to hang a curtain in the No. 3 heading because complainant's having allowed roof bolting to be done in the No. 3 heading without installing a line brattice was a violation of the safety regulations as well as a failure to perform the duties which he had been assigned to do on the morning of June 27.

Complainant's brief (p. 12) next attacks Quinley's credibility by citing testimony in which Quinley had stated that he could make decisions about discharging personnel, but

preferred not to make such decisions on his own initiative (Tr. 135). It is then argued that it is "unbelievable" that Quinley could thereafter have claimed, as he did, that he had made the decision to discharge complainant without consulting higher management (Tr. 126). The foregoing argument misapplies the testimony cited in the argument and overlooks other testimony. Quinley explained that he was able to make the decision

to discharge complainant because the mine owners knew what he had been putting up with and they had already told Quinley to "get rid" of complainant if Quinley couldn't get him to do his job (Tr. 152). A careful reading of the testimony cited by complainant and the testimony cited in the preceding sentence shows that Quinley made the decision to discharge complainant on June 27 after having had plenty of prior authorization by respondent's management to discharge him.

Complainant's brief (pp. 13-14) states that the final aspect of Quinley's testimony which shows that he is not a credible witness was his repeated assertion that he did not know he was going out of the mine on June 27 to return a call from MSHA. Complainant cites the testimony of Greg Deel, the outside man, for the purpose of showing that Quinley himself tried to dial the number as well as Greg. It is said that the testimony of both Quinley and Greg shows that they both knew they were trying to call someone who worked for MSHA (Tr. 119-120; 148; 215). In Finding of Fact Nos. 19 and 20, supra, I have compiled the testimony of all witnesses about the manner in which Quinley was told about the phone call from E. C. Rines, the MSHA supervisory inspector, and the steps that were taken by Quinley and Greg Deel to return the call. The preponderance of the evidence shows beyond any doubt that Quinley, Greg Deel, and Verlin Deel all knew that they had been asked to return a call from an MSHA employee before they ever succeeded in talking to him. That, however, does not mean that they knew before Quinley had brought complainant out of the mine to discharge him that complainant had reported to MSHA that temporary supports were not being used in respondent's mine. E. C. Rines testified in this proceeding that, in addition to the four complete inspections which are made of underground mines each year, there are about 30 types of policy inspections (Tr. 106; 109). Consequently, the mere fact that a person is asked to return a call made by an MSHA inspector does not provide an operator of a coal mine with any reason to believe that one of his employees has reported him to MSHA for a violation of a mandatory health or safety standard.

The Credibility of Richard A. Fleming, the Complainant

Complainant's brief (pp. 14-15) states that his testimony, as compared with that of Charles Quinley, was imminently credible and well reasoned. It is said that complainant's demeanor on the witness stand was commendable, that he recalled the events of June 27 clearly, and that he did not hesitate to answer any question on cross-examination. It is contended that complainant's attention to detail on the witness stand may be assumed to be characteristic of his attention to detail inside the mine. Complainant, however, does concede that his testimony was contradicted as to some allegations. For example, complainant acknowledges that he testified that he came out of the No. 3 heading on the morning of June 27 and sat down beside Quinley who was already sitting there, whereas Quinley testified that he did not sit down at all and that complainant certainly did not sit down beside him on June 27. Complainant urges me, however, to discredit Quinley's testimony and accept complainant's as to this

contradicted occurrence because Verlin Deel, Jr., confirmed in his testimony that complainant had to sit down next to the coal rib to allow the "drill" to pass.

Complainant inadvertently referred to a "drill" on page 15. All witnesses, without exception, have referred only to a roof-bolting machine in the No. 3 heading on June 27 in connection with complainant's allegation that he had to sit down against the rib to permit the roof-bolting machine to pass. Complainant's brief (p. 15) does not give a transcript reference in support of the claim that Verlin Deel, Jr.'s testimony corroborates complainant's allegation that he had to sit down against the rib to get out of the path of the roof-bolting machine and I have searched Verlin Deel, Jr.'s testimony in vain for any statement showing that he agreed that complainant had to sit down against the rib on June 27 to allow the roof-bolting machine to pass. Verlin Deel, Jr., stated that he heard Quinley tell complainant to hang a curtain or curtains before Deel went into an undesignated entry to assist the operator of the roof-bolting machine. Deel, Jr., testified that complainant was in the crosscut outside the entry when he went in to assist in roof bolting and that complainant was still in the crosscut outby the entry when the roof-bolting machine was brought out of the entry. There is no indication in Deel, Jr.'s testimony that complainant was ever in the entry applying rock dust while they were roof bolting. Deel, Jr., did say that he was pulling up the trailing cable on the roof-bolting machine at the time Quinley came back into the mine and took complainant outside (Tr. 224-225; 228; 234). Therefore, Deel, Jr.'s testimony corroborates Quinley's version of what happened on June 27 more than it corroborates complainant's account of the events.

As I have indicated in Finding of Fact Nos. 23, 29, 30, 31, supra, and in my discussion under the heading of "Complainant's Position as Operator of the Roof-Bolting Machine", supra, complainant's testimony is filled with contradictions which support a conclusion that he relied on his knowledge of the duties which should be done by a general inside laborer to fabricate a plausible account of what he actually did on the morning of June 27. Therefore, I must reject all of the arguments in complainant's brief to the effect that complainant's testimony is entitled to a high credibility rating.

Complainant's Protected Activity

Complainant's brief (p. 15) states that complainant was engaged in a protected activity under the Act and alleges that "[t]hroughout the time [complainant] was a roof bolter he insisted on setting temporary supports". As I have already explained in great detail under the heading of "Complainant's Position as Operator of the Roof-Bolting Machine", supra, complainant operated the roof-bolting machine for about 52 days before he used any temporary supports at all. He then used partial temporary supports from May 20 to about June 1 and finally used temporary supports in all entries for from 2 to 4 days before he either walked off the job or was discharged on June 4. The discharge which is before me in this proceeding occurred on June 27--not June 4--and the alleged protected activity involved complainant's calling MSHA to report that respondent was not using temporary supports, but complainant was

not employed as a roof bolter at the time he made the call to MSHA and had not been a roof bolter for 16 working days before he made the call.

Complainant's brief (p. 16) relies on the Commission's decision in Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981), in support of a claim that an employee is entitled to use "self-help" in order to protect himself

from a hazardous condition. Complainant's reliance on the Robinette case is misplaced. In that case, the Commission held that a person may use affirmative action to lessen a hazard after exercising his right to refuse to work where hazards exist.

The arguments in complainant's brief (p. 16) about complainant's having to use self-help to protect himself from hazardous conditions are contrary to the facts and are completely unrelated to the issues in this proceeding. Complainant's own testimony in this proceeding shows that at no time did management suggest that he should install roof bolts without using temporary supports. While it is true that complainant contended that it was difficult for him to obtain timbers for use as temporary supports, he did continue to operate the roof-bolting machine in the Nos. 1 and 7 entries without temporary supports from May 20 to about June 1. Therefore, at no time did complainant ever refuse to work under an allegedly hazardous condition and at no time did he ever use affirmative action by refusing to install roof bolts until management supplied timbers which were short enough for the No. 1 entry and long enough for the No. 7 entry. When complainant did begin to use temporary supports in all entries on or about June 1, he used timbers which had been provided by management. Although he claims that the timbers became available only because management brought the timbers in to use in pulling pillars, the fact remains that complainant never at any time engaged in any activities which justify reliance by complainant on the Commission's holding in the Robinette case, supra, especially since complainant's discharge on June 27 had nothing to do with his use of temporary supports while he held the position of roof bolter.

Complainant's brief (p. 17) refers to complainant's having called MSHA on the evening of June 26 to report the allegation that temporary supports were not being used at respondent's mine. Complainant's brief (p. 17) then quotes from section 105(c)(1) of the Act and correctly argues that an operator may not discharge or otherwise discriminate against a miner who makes a complaint about a safety hazard to MSHA. If the evidence in this proceeding showed that respondent had discharged complainant because he reported respondent's failure to use temporary supports to MSHA, I would have no difficulty in finding that respondent had violated section 105(c)(1). The evidence, however, does not show that complainant was discharged for reporting the failure to use temporary supports to MSHA. On the contrary, he was discharged for failing to do the work which had been assigned to him, that is, hanging curtains and applying rock dust.

Complainant's brief (p. 17) continues trying to claim that complainant's insistence on using temporary supports was a protected activity which is somehow related to complainant's discharge on June 27. Complainant was not a roof bolter at the time he was discharged on June 27 and had not been a roof bolter since June 4. Complainant's failure to do his work as a general inside laborer did not in any way slow down the installation of roof bolts. John Carpenter, who became operator of the

roof-bolting machine after June 4, was able to install roof bolts in 15 working places per shift as compared to complainant's ability to bolt only 10 places. Therefore, respondent had no reason whatsoever for discharging complainant on June 27 because he had, while performing his duties as a roof bolter between May 20 and June 4 followed the requirements of respondent's roof-control plan by using temporary supports before installing roof bolts.

Alleged Illegal Discharge

Complainant's brief (p. 18) alleges that "[o]wner Verlin Deel admitted that Fleming [complainant] was the only miner who ever set temporary supports". During cross-examination by complainant's counsel, Verlin Deel testified as follows (Tr. 206):

> Q. Now, other than Mr. Fleming did any other miner, as a practice, use temporary supports?
>
> A. Yes, John [Carpenter] and Genco, they went to using them later on, and when they started using them -- that was Bryan Genco.
>
> Q. In other words, they used them sometimes?
>
> A. Yeah, sometimes.
>
> Q. But not all the time?
>
> A. Not all the time.

As I have already pointed out under the heading "Complainant's Protected Activity", supra, the fact that complainant used temporary supports for 11 of the 63 days he was a roof bolter has nothing to do with his discharge. The alleged illegal discharge must stand or fall on the question of whether complainant was discharged because he reported to MSHA on June 26 [not June 27, as stated on page 18 of complainant's brief] that respondent's miners were not using temporary supports.

Complainant's brief (p. 18), after having argued extensively that Quinley's testimony should be totally discredited (Br., p. 8), chooses to adopt Quinley's statement that complainant told Quinley on June 27 to call E. C. Rines, the MSHA supervisory inspector in Norton, whereas complainant testified that he only told Quinley that there was a message on the desk for him about an important phone call Quinley was to return (Tr. 35; 71). As indicated in Finding of Fact No. 19, supra, every witness (Complainant, Quinley, Verlin Deel, and Greg Deel) who had anything to do with the phone call gave somewhat conflicting accounts of it. From a credibility standpoint, it would have made a slightly better case for complainant if he had told Quinley on the morning of June 27 that E. C. Rines, a supervisory MSHA inspector in Norton had called and had asked that Quinley return his call. Complainant, however, testified that he had been instructed by Rines not to use Rines' name and to tell Quinley to return a phone call (Tr. 35). Rines testified that he gave complainant only his name and the fact that he worked for MSHA. Therefore, unless complainant wrote Rines' name on the message he claims he left on the desk (Tr. 71), there would have been no possible way for Quinley or Greg Deel to have determined whose phone call Quinley had been asked to return.

Greg testified that there was no message on the desk and

that the only way he knew what number to call was that he knew when Quinley gave him Rines' name that Rines worked for MSHA. Greg stated that he had written MSHA's number down in the back of the phone book and that he knew what number to call by obtaining MSHA's number from the phone book. I can't see how it

could possibly have enhanced Greg's credibility or respondent's position in this proceeding for Greg to have claimed that he had to look up MSHA's number if the number had been written by complainant on a message and left on the desk in the office. Moreover, since Rines himself testified that he gave complainant only his name and the fact that he worked for MSHA, I conclude that Quinley must have known Rines' name when he came into the office and that Quinley must have obtained Rines' name from complainant despite complainant's testimony to the effect that he did not give Rines' name to Quinley.

Aside from the credibility determinations involved in the preceding discussion, it makes no difference how Greg and Quinley found out that they were supposed to call Rines in Norton. The significant aspect of the effort to call Rines on the morning of June 27 is that the evidence conclusively supports a finding that Quinley and Greg knew that they were supposed to return a call which had come from an MSHA employee. Of course, as indicated in Finding of Fact Nos. 20 and 29, supra, Quinley decided to discharge complainant before he ever learned that complainant had reported respondent's failure to install temporary supports to MSHA.

Complainant's brief (pp. 19-20) quotes some testimony by Quinley in which he stated that he thought when complainant told him to call Rines that Rines was a Union man who might be calling in connection with " * * * trouble we might have had with him [complainant] before and hired him back (Tr. 148)". Complainant then argues that regardless of whether I find that Quinley knew that complainant had made a complaint to MSHA before complainant was discharged, that Quinley's belief that complainant was again giving respondent "trouble" shows that Quinley wanted to discharge complainant for engaging in protected activities because the only prior trouble complainant had which involved the Union concerned complainant's setting of temporary supports, a protected activity.

There are several defects in the foregoing argument. First, although Quinley thought the call might involve the Union when he got on the scoop to go outside, he was advised by Greg Deel as soon as he gave Greg the name of the person to be called that they were supposed to call an MSHA employee--not a Union employee. Therefore, Quinley had no reason to associate complainant with any "trouble" pertaining to a call to MSHA because complainant had never made any complaints to MSHA about conditions at respondent's mine prior to June 26 and Quinley did not have knowledge of the subject matter of the call of June 26 until after he had discharged complainant.

A second defect in the argument is that complainant's use of temporary supports and "trouble" with the Union are not synonymous, interchangeable, or even interrelated matters. One of the important aspects of this case is that complainant, up to June 26, had never thought of going to MSHA to obtain redress for any of his alleged grievances. As indicated in Finding of Fact No. 9, supra, complainant at no time ever read or examined

respondent's roof-control plan, but he did carry around with him a copy of the Union contract. He was an expert in expounding upon his rights under the Union contract. When complainant filed his grievance with the Union on June 4 (Tr. 25-26), he filed it immediately after he was asked to relinquish his position as operator of the roof-bolting machine to another employee who could bolt faster than complainant (Tr. 25; 60; 175). The record does not contain

a detailed description of the grounds of the grievance filed with the Union, but the evidence in the record about the grievance shows that complainant's grievance dealt with complainant's rights under the Union contract rather than his insistence on installing temporary supports. Consequently, the record doesn't support complainant's contention that "trouble" with the Union is tantamount to complainant's insistence upon the use of temporary supports.

A third defect in the argument is that the events which occurred on June 26 prior to complainant's discharge on June 27 do not support complainant's argument that "trouble" with the Union automatically caused respondent's management to conclude that complainant should be discharged for having engaged in a protected activity. It must be borne in mind that when complainant was reinstated on June 11, he took the position of general inside laborer. On June 26, Verlin Deel talked to complainant in the mine office and told him that management had received complaints from the other miners about complainant's failure to do his work. Complainant described the conversation as follows (Tr. 32):

> A. I do not recall what started the conversation, but it ended in a discussion of Union rights and contract obligations and it ended in a rather heated discussion between Mr. Deel and myself about my duties that were going to be assigned to me the next day. * * * (FOOTNOTE 1)

The foregoing testimony shows that complainant, on the evening preceding his discharge on June 27, had argued Union contract rights with respondent's management. Since complainant had filed a grievance with the Union after the heated argument complainant had had with management on June 4, the evening of the preceding discharge, there is no reason for me to find that respondent's management would equate "trouble" with the Union as being synonymous with a complaint to MSHA about safety matters or any sort of protected activity.

Complainant's brief (p. 21) notes that Greg Deel testified that Quinley used the underground paging phone to announce that he was coming outside with complainant (Tr. 212). Then complainant argues that since complainant stated in his direct testimony that Quinley did not stop to use the phone when they went out together on the scoop (Tr. 49), that it must be concluded that Greg had called underground to advise Quinley of the subject matter of the phone call from MSHA. Therefore, it is argued that Quinley must have known about complainant's having reported the failure of respondent to use temporary supports prior to the time that Quinley discharged complainant.

The preceding argument would be convincing except for at least three defects in it. First, as I have hereinbefore explained in considerable detail, complainant's credibility in this proceeding is very poor. Therefore, the mere fact that he said Quinley did not call outside does not mean that Quinley failed to announce that he was coming out with complainant.

Second, Greg Deel

stated that a paging telephone was used by Quinley. A paging telephone can be heard for several breaks in a coal mine. It is highly improbable that Greg himself would have called underground to announce over a loudspeaker that someone had reported respondent to MSHA for failing to use temporary supports and that Greg thought that complainant was probably the one who had called MSHA. Third, Greg voluntarily brought out in his direct testimony that Quinley had "hollered" outside to notify Greg that he was coming outside with complainant on the scoop. Greg stated that he did not tell Quinley about the complaint made to MSHA until after Quinley had arrived in the mine office. Consequently, I disagree with the contention in complainant's brief (p. 20) that I "must find" on the basis of the record that Quinley knew complainant had called MSHA and that complainant's call was the actual reason complainant was discharged.

Complainant's brief (p. 22) seeks to establish an "animus" by respondent's management toward complainant by noting that Verlin Deel threatened to fire complainant in the heated discussion between complainant and Verlin which occurred on June 26 before complainant's discharge on June 27 (Tr. 32; 177). There is no doubt but that respondent's management was upset with respondent's failure to do his work. Both complainant and Verlin agree that their conversation was "heated". The mere fact, however, that complainant's relationship with his employer was discordant does not mean that their argument had anything to do with a protected activity for which respondent had decided to discharge complainant.

Complainant's brief (p. 22) also argues that there were many opportunities for the discharge of complainant, but they did not occur until after complainant reported the failure to use temporary supports to MSHA. It is contended that the occurrence of the discharge on the very next day following complainant's call to MSHA shows that the discharge was illegally motivated. Complainant also denies that respondent regularly criticized complainant's work. That argument is defective for at least two reasons. First, it ignores complainant's own testimony that he was daily told that his work was unsatisfactory (Tr. 28) and it overlooks the fact that Verlin Deel himself answered my questions about complainant's failure to perform his work as follows (Tr. 193):

> Q. If you were a part owner of the mine didn't it bother you to see him [complainant] doing nothing?
>
> A. Yeah, it did.
>
> Q. And you didn't say anything to him, though?
>
> A. Sure, I said a lot to him.
>
> Q. You did?
>
> A. Yeah.

Q. On June 27th?

> A. No, before that. What time he worked for me, I tried to get him to do his job. I talked to him several times and tried to get him to do his job. And actually, I didn't want to get rid of him. I wanted him to work.

Complainant's brief (p. 23) argues that Quinley did not know what complainant had done on June 27 and therefore Quinley had no basis for discharging him for failure to perform his duties. It is said that complainant's version of the events of June 27 should be credited as compared to Quinley's and it is contended that complainant's statement that he sat down beside Quinley, who was already sitting down, should be credited over Quinley's claim that he did not sit down at all. Finally, it is argued that complainant's account is supported by the equipment operator. I have already dealt with all of the foregoing arguments at least once in this decision. I have already shown why complainant's testimony is to be given less credit than Quinley's and it is incorrect that the Verlin Deel, Jr.'s testimony supports complainant's testimony. Verlin Deel, Jr., said that he saw complainant sitting down and that he heard Quinley tell him to hang a curtain. Deel, Jr., stated that he later saw complainant and that the curtain had not been hung (224-225). Deel, Jr., also said that he heard Quinley tell complainant that they were going outside and that Quinley and complainant were about 12 to 15 feet apart. Deel, Jr., did not state that he saw Quinley seated against the rib (Tr. 228-229). I don't see how it can be correctly contended that Deel, Jr.'s testimony supports complainant's version of the events which occurred on June 27.

Complainant's brief (p. 24) takes the narrow position that firing a person for sitting down on the job contains no other ramifications and argues that only one other person had ever been discharged for sitting down on the job and that that discharge occurred under circumstances highly distinguishable from the events which led to complainant's discharge. The other person who was discharged was fired because he refused to perform some work which Quinley asked him to do (Tr. 142). Complainant was also fired for refusing to do work which he was assigned to do (Tr. 146; 149). Also Quinley explained that he did not object to a miner's taking a break when he was caught up on his work and that he wouldn't have been upset by the fact that complainant was sitting down on June 27 if complainant had done the work which he had been assigned to do (Tr. 161).

Complainant's brief (p. 24) completes its extended argument with the unfounded conclusion that complainant has proven a violation of section 105(c)(1) if the principles of the Commission's decision in David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), are applied to the facts in this proceeding. It is contended that complainant was engaged in a protected activity both because he insisted on setting temporary supports and because he had called MSHA to report respondent's failure to use temporary supports. Complainant argues that even if one assumes, without admitting, that any part of respondent's motivation for discharging complainant was for an unprotected activity, it cannot be found that complainant would have been

discharged for his unprotected activities alone.

In the Pasula case, the Commission held that a miner has shown a prima facie case of discrimination or discharge if he has proven that he engaged in a protected act and that the adverse action or discharge was motivated in any part by the protected activity. If the miner succeeds in establishing his prima facie case, respondent has the burden of showing by a preponderance of the evidence that, although it was motivated by the protected activity, in part, the adverse action would have been taken in any event for the unprotected activity alone. The Pasula case is not applicable to this proceeding because complainant failed to present a prima facie case showing that his discharge by respondent was motivated by complainant's protected activity of calling MSHA to report respondent's failure to use temporary supports, or by his alleged protected activity of having used temporary supports for about 11 days while he was employed as a roof bolter.

Respondent's Reply Brief

My consideration of the parties' arguments above has dealt only with the arguments in complainant's brief. I have carefully read respondent's six-page reply brief. My decision shows that I am in substantial agreement with the arguments made in respondent's reply brief. Therefore, I shall not further lengthen this decision by discussing arguments with which I am in general agreement.

Civil Penalty Issues

My order of March 4, 1981, consolidated for hearing in this proceeding all civil penalty issues which might be raised if a violation of section 105(c)(1) of the Act had been proven. Inasmuch as no violation of section 105(c)(1) was proven, the civil penalty issues are moot and no action on that aspect of the proceeding is required.

WHEREFORE, it is ordered:

(A) The Complaint of Discharge, Discrimination, or Interference filed in Docket No. VA 81-16-D is denied for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

(B) All civil penalty issues are severed from this proceeding and dismissed as moot.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

ÄÄ
~FOOTNOTE_ONE

1 Although complainant alleged that Verlin had threatened to assign him all sorts of jobs for the purpose of forcing him to

resign, complainant's testimony shows that he was given no burdensome duties when he reported for work the next day despite the fact that he came in a half hour late (Finding of Fact No. 23, supra.)