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LEHMAN BILLIAM V. BLUE MINING  
DDATE:  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

LEHMAN GILLIAM, COMPLAINANT	Complaint of Discharge, Discrimination, or Interference
v.	
BLUE DIAMOND MINING, INC., RESPONDENT	Docket No. KENT 80-288-D Leatherwood Mine

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky, for Complainant  
Stephen A. Sanders, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Prestonsburg, Kentucky, for Complainant  
Randall May, Esq., Craft, Barret & Haynes, Hazard, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued October 3, 1980, as amended October 15, 1980, March 19, 1981, and May 13, 1981, a hearing in the above-entitled proceeding was held on June 24, 25, 26, 27, and 29, 1981, in Hazard, Kentucky, under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below:( FOOTNOTE- 1)

This proceeding involves a complaint of discharge, discrimination or interference filed in Docket No. KENT 80-288-D on July 21, 1980, as amended February 17, 1981, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. The complaint was filed under section 105(c)(3) after complainant received a letter from the Mine Safety and Health Administration which indicated that MSHA would not file a complaint on complainant's behalf under section 105(c)(2) of the Act.

The amended complaint alleges that complainant was discharged for engaging in activities protected under section 105(c)(1) of the Act, namely, (1) complainant's refusal to

alter canopy legs on a loading machine in the manner requested by respondent's chief electrician because complainant believed compliance with the chief electrician's instructions would render the canopy unsafe, (2) respondent's belief that complainant had notified MSHA of a suspected safety violation, and (3) complainant's report to respondent's management on April 23, 1980, of numerous safety violations. At the hearing I granted respondent's request to strike the third reason given in support of the complaint after counsel for complainant stated that he was not going to pursue the third ground because complainant's report of safety violations had been made so close to the time of discharge as to make it difficult, if not impossible, to prove that those alleged safety violations had any bearing upon complainant's discharge.

I shall first make some findings of fact on which my decision will be based. They are lengthy, but are as concise as I can summarize five days of testimony.

(1) Lehman Gilliam, the complainant in this proceeding, began working for respondent, Blue Diamond Mining, Inc., on June 14, 1972, at respondent's No. 11 Main Mine. He worked as a union employee until August 1, 1977, when he became a salaried employee as a maintenance foreman on the second shift which began at 3:00 p.m. and ended at 11:00 p.m.. In April 1979 Gilliam was transferred to the third shift which began at 11:00 p.m. and ended at 7:00 a.m.. His supervisor on the third shift was Marion Shepherd for the first 2 months, followed by Emmet Farmer for the next 6 months, and by Marion Shepherd again for the last 6 months of his employment. His duties as maintenance foreman on the third shift consisted of obtaining parts for repair of equipment and supervising the work to make sure it was done. Gilliam supervised three mechanics who were assigned to work on the third shift. Their names were Dorsey Hall, Denton Gross, and Jerry Lewis.

(2) When Gilliam was supervised by Emmet Farmer, it was Farmer's preference to report for work at the respondent's main supply house. Farmer would obtain the supplies and parts needed on the third shift and bring them to the No. 11 Mine. When Gilliam was supervised by Marion Shepherd who worked on the day shift, Gilliam reported for work at the supply house for the purpose of obtaining parts. Sometimes Gilliam would first go to the Jim Polly Mine before reporting at the supply house. A conveyor belt transports coal from the No. 11 Mine to the Jim Polly Mine and Gilliam could call underground to ask men working at the face in the No. 11 Mine what parts were needed for his shift. Then Gilliam would proceed to the supply house from the Jim Polly Mine. Gilliam normally arrived at the supply house between 10:45 and 11:00 p.m.. If

Gilliam did go to work by way

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of the Jim Polly Mine, he would leave home 10 or 15 minutes earlier than he did when he proceeded directly to the supply house or to the No. 11 Mine from his home. Even though Gilliam could call the second shift from Jim Polly Mine, he could not determine what repair work might have been reported by the day shift. Therefore, Gilliam would call the No. 11 Mine Office from the supply house and ask his crewmen, who were still on the surface, what kinds of repair work, if any, remained to be done as a result of problems encountered by the miners working on the day shift.

(3) Gilliam used his own pickup truck to haul supplies to the No. 11 Mine, which was about 13 miles from the supply house. At the end of each month, Gilliam submitted a claim for mileage driven for respondent's benefit for which he was reimbursed at the rate of 22 cents per mile.

(4) Gilliam was discharged by his supervisor, Marion Shepherd, at the end of Gilliam's shift on the morning of April 21, 1980. Gilliam had reported for work on the preceding Sunday, April 20, 1980, at the supply house between 10:45 and 11:00 p.m.. Gilliam called the No. 11 Mine from the supply house and one of his crewmen, Jerry Lewis, read the maintenance report to him. He found that three different pieces of equipment needed repairs. Specifically, a traction motor had to be installed on the loading machine, the lights had to be repaired on the roof-bolting machine, and a clutch had to be installed on the B-23 shuttle car.

(5) Lewis told Gilliam that, in addition to the three aforementioned repairs, Marion Shepherd had given Lewis oral instructions to the effect that the back legs of the canopy on the loading machine should be raised 3 inches by welding chain links to the canopy legs. Gilliam alleges that he told Lewis not to start work on the canopy legs until Gilliam arrived at the mine. While Gilliam was at the supply house, he discussed the raising of the canopy with Wallace Cornett, who was maintenance foreman at respondent's Owens Branch Mine. It was Cornett's view that cutting the canopy legs and welding chain links to them would weaken them.

(6) Gilliam traveled to the No. 11 Mine, arriving there between 12:00 midnight and 12:15 a.m.. Gilliam alleges that he tried to get a member of his crew to come out of the mine with a vehicle to take Gilliam into the mine, but Gilliam couldn't get anyone to answer the paging phone. Gilliam waited on the surface until about 1:45 a.m. before Lewis came out of the mine to provide Gilliam with a means of transportation into the mine. While waiting for transportation into the mine, Gilliam talked to Franklin Mayhew, who is foreman over a clean-up crew on the third shift.

(7) When Gilliam first went underground at 2:00 or 2:15 a.m. on April 21, 1980, he stated that Dorsey Hall and Denton Gross were completing work on installation of a traction motor on the loading machine. The loading machine was stuck in mud and water and the repairmen tried to get it out of the mud but could not. Gilliam claims that the three men finished installing the traction motor after Gilliam came underground. Gilliam and the three men on his crew discussed the raising of the canopy on the loading machine. Since the front legs of the canopy were about 4 inches longer than the back legs, they decided to cut all four legs from the canopy so that the front legs could be welded to the back of the canopy and the back legs could be welded to the front of the canopy. While Lewis cut off the legs of the canopy with a cutting torch, Hall repaired the lights on the roof-bolting machine. Hall subsequently installed a new clutch in the shuttle car. Hall found that the trouble with the shuttle car was not caused by a defective clutch, but by a stripped pinion or shaft on the pump motor. Hall went to Gilliam about 5:30 a.m. and reported that a new pump motor was needed to restore the shuttle car to an operative condition. By 6:00 a.m., Lewis and Gross had finished rewelding all four legs on the canopy, but their failure to cut off the back legs at an angle and failure to reweld the back legs to the front of the canopy at an angle prevented the legs from fitting into the holders on the loading machine. At the finish of their shift, the repairmen had been able to bolt the back legs into their holders, but they never did get the front legs to fit into their holders even though they tried to force them into their holders by using jacks. Gilliam asked his crewmen to work overtime to finish the bolting of the canopy, but all of them refused to do so.

(8) The operator of the loading machine on the day shift ran the loading machine with the front legs of the canopy unbolted and out of the holders, but the operator on the second shift refused to do so. The canopy was ultimately raised by the cutting of new legs which were used to replace the legs whose position had been reversed by the third shift.

(9) When Gilliam left the section on April 21, he reported to Shepherd, his supervisor, that they had installed a clutch in the shuttle car but that the shuttle car couldn't be operated because it needed a new pump motor which he had not yet ordered from the supply house. Gilliam also alleges that he told Shepherd that the traction motor had been installed on the loading machine but that the canopy's front legs were unsecured. Gilliam also claims that he told Shepherd it would have been in violation of the mining laws for him to weld pieces to the canopy's legs. Shepherd indicated his dissatisfaction with the condition of the equipment and Gilliam said he might have to quit if his work wasn't considered to be

satisfactory, to which Shepherd

replied that as far as he was concerned Gilliam had already quit and that Gilliam did not work for Blue Diamond any longer.

(10) After his discharge on the morning of April 21, Gilliam drove to the mine office at Leatherwood and spoke to Everett Kelly, respondent's general superintendent. Gilliam allegedly told Kelly that Shepherd had fired him because he had refused to repair a canopy in a manner which Gilliam felt was unsafe. Kelly told Gilliam that he should do the work assigned to him by Shepherd. Gilliam returned to the office again the same day about 3:00 or 4:00 p.m. and talked to both Kelly and Richard Combs, another superintendent, and asked that Shepherd's discharge be reversed by top management. Kelly told Gilliam that he would check into the situation and let Gilliam know what his ultimate decision was. During his second trip to the mine office, Gilliam alleges that Kelly asked Gilliam if he was the person who had called MSHA after the motor in a roof-bolting machine burned up during the third shift while miners were working in the main intake airway. Richard Combs was not present when Kelly allegedly asked that question. Combs called Gilliam on April 23, 1980, about 7:30 a.m., to say that he was upholding Shepherd's discharge of Gilliam. When Gilliam went to the mine later in the day about 8:30 a.m. to turn in his self-rescuer, he tried to talk to Combs again, but Combs declined to talk to Gilliam any more.

(11) Marion Shepherd asked Gilliam if he had called the MSHA inspectors after the motor in the roof-bolting machine burned up and Gilliam denied having done so. Shepherd told Gilliam that he would fire Gilliam if he found out that Gilliam had called MSHA. Gilliam told Shepherd if Shepherd fired him in connection with the phone call to MSHA, he, Gilliam, would take Shepherd with him. During Shepherd's and Gilliam's conversation about calling the inspector, Shepherd told Gilliam to stop portalling, or reporting for work, at the supply house. Gilliam alleges that for one shift he reported for work at the No. 11 Mine, instead of at the supply house, and went into the mine with his three crewmen, but he says about one shift later, Shepherd told him to resume reporting to work at the supply house because Shepherd was going to be away for several days to take his wife to the hospital in Lexington, Kentucky, and that he wanted Gilliam to install canopies on three pieces of equipment by April 18, 1980, that being the date which MSHA had set for the abatement period for some citations written by MSHA inspectors on April 11, 1980, when they came to the No. 11 Mine following the phone call regarding the burning of lead wires to the motor on a roof-bolting machine.



(12) Gilliam stated in his direct testimony that he had been caught asleep at the mine during his regular working shift on four different occasions. The first time was in

April 1979 when Gilliam was caught by a night watchman named Caudill when Gilliam fell asleep in his truck in which he was installing a CB radio. The second time was when Dana Eldridge caught him asleep on top of the power center at a time when the mine fan had been turned off. The third and fourth times were when Gilliam had gone outside the mine to provide a means of transportation for Dana Eldridge to come into the mine to make a preshift examination. While waiting for Eldridge to appear, Gilliam fell asleep and was found to be asleep by Eldridge.

(13) Marion Shepherd, the chief electrician and person who discharged Gilliam, was told about Gilliam's having been seen asleep at the mine during Gilliam's normal working hours. Shepherd says he had been told by Stidhams, the chief night watchman, and Dana Eldridge that they had seen Gilliam asleep. Additionally, Shepherd was told by Pearl Campbell, Bill Pennington, Kenneth Colwell, and Johnny Joseph of having seen Gilliam asleep at the mine. Campbell and Pennington based their report on a single instance when they arrived on the section at the end of the track and saw Gilliam sitting in a railrunner. Pennington's testimony expressed great doubt that Gilliam was asleep at that time because Gilliam was about 60 feet from him and Campbell. Pennington testified that he could not say for certain that Gilliam was asleep.

(14) Paul Watson and Ray Williams are duly authorized representatives of the Secretary of Labor. They went to the No. 11 Mine on April 11, 1980, in response to an anonymous telephone complaint to MSHA to the effect that the mine was not being properly ventilated at the time a motor on a roof-bolting machine burned up. They arrived at the mine about 5:30 a.m. and interviewed Frank Mayhew, a third-shift foreman in charge of a clean-up crew, and other personnel. The inspectors found that the main fan was operating at that time and they wrote no citations in connection with an electric motor which had burned out in a roof-bolting machine or use of an auxiliary fan instead of the large main fan. While they were at the mine, however, they wrote seven citations, three of which alleged violations of permissibility standard 75.503, three of which alleged violations of canopy standard 75.1710, and one of which alleged a violation of ventilation standard 75.316 requiring installation of permanent stoppings outby the last open crosscut. The citations required that the three alleged violations of section 75.1710 be abated or corrected by April 18, 1980, and that the remaining four be abated by April 14, 1980. The termination sheets show that all violations had been abated by April 23, 1980, when the termination sheets were written, except for installation of a canopy on the E-90 roof-bolting machine which was removed from the

mine in order to achieve abatement. The termination  
sheet on the E-90 roof-bolting machine was written on  
May 12,

1980. All of the termination sheets were written by an inspector other than the one who wrote the original citation.

(15) Willie Bill Pennington was an employee who checked water pumps each day. His working hours were from 7:00 a.m. to 3:00 p.m.. On April 21, 1980, the day of Gilliam's discharge, Pennington was at the mine office about 7:00 a.m. and heard Shepherd ask Gilliam about a canopy on a loading machine but does not know what was said, except that Gilliam told Shepherd he would quit if his work wasn't satisfactory to which Shepherd replied that "as of this time, you no longer work for Blue Diamond Coal Company".

(16) Roger Jones is a repairman who worked on the third shift under the supervision of Frank Mayhew who was assigned to preparing for opening of a new section in the No. 11 Mine. He testified that all the men were brought out of the mine one morning when the motor on a roof-bolting machine burned. Smoke was said to be headed toward the working face. Someone called the inspectors about the incident and Shepherd asked him if he had called the inspectors. Jones stated that Shepherd was upset over it because it cost Shepherd seven violations. The seven violations have been described in paragraph 14 above.

(17) Ricky Baker on April 21, 1980, the day of Gilliam's discharge, was a supply clerk at the supply house. On the evening of April 20, 1980, Gilliam reported to the supply house about 10:45 p.m.. Baker was about 10 feet from Gilliam and Wallace Cornett when they were discussing something about putting a canopy on or taking one off of a piece of equipment. Baker didn't recall for certain when Gilliam left the supply house on April 20, 1980. Baker thinks during Gilliam's employment as a maintenance foreman, Gilliam came for parts about three or four times in the middle of a shift. Baker also testified that Gilliam once said he had been sleeping in his truck and would continue to do so, that Gilliam at least once got to the supply house at 1:00 a.m. because he had been watching a game played by the University of Kentucky. Baker recalled that the game started at 11:30 p.m. and said that he remembered the incident well because he wanted to watch the game but could not because he had to go to work. Baker also testified that Gilliam said it helped his expenses to claim mileage for making trips to the supply house for parts.

(18) One of the three repairmen on Gilliam's crew was Dorsey Hall. He testified that another repairman, Jerry Lewis, talked to both Shepherd and Gilliam on the phone before they went underground on April 20, 1980. They either took parts in or parts were already in the

mine. He claims the new traction motor for the loader had not yet been put in place. All three of them worked on the traction motor and had finished installing it when Gilliam got inside the mine. Hall said Lewis and Gross, the third repairman, worked on the canopy while Hall repaired

lights on the roof-bolting machine and replaced the clutch on a shuttle car the clutch was not the cause of the shuttle car's problem and that a stripped pinion on the pump motor was the cause of the problem. Hall went to the power box at 5:30 a.m., where Gilliam was sitting, and told Gilliam he needed a pump motor. About 6 a.m. Hall started helping the other two repairmen and Gilliam on the canopy, but they couldn't get the front legs to fit into the holders. Hall testified that Gilliam stayed at the power box most of the time and often lay down on top of the box, but Hall said he could find Gilliam if he needed him. Hall said that Gilliam reported at the No. 11 Mine and went in the mine with his three crewmen for about 1 week. On the morning of April 21, 1980, Hall and Gross went down to the track when they heard Gilliam and Lewis come in. They discussed the canopy at that time and Gilliam left it up to Lewis to determine how the canopy should be raised. Hall said they left equipment down or unable to be used at the beginning of the day shift about once each month or less often. Hall rated Gilliam as an average foreman. Hall said Shepherd asked him if he had called the inspectors after the motor on the roof bolter burned and that Shepherd said whoever called was a dirty low down blankety blank. Hall told Shepherd in a joking way that it might have been Gilliam or Hall, himself, who had called the inspectors.

(19) Jerry Lewis, who was another of the three repairmen who worked under Gilliam's supervision on the third shift, stated that Shepherd called the No. 11 Mine Office about 11:00 p.m. on Sunday, April 20, 1980, before he and the other two repairmen went underground. Shepherd instructed him to raise the canopy on the loading machine about 3 inches and to repair a shuttle car on which a clutch was to be installed. Lewis stated that Shepherd told him to use a coupling link which measured about 8 inches in width and 16 to 18 inches in length and which was leaning against a pole near the 7,200-volt power box outside the mine. Lewis also said the width of the coupling bar was 6 inches at a later time. Lewis claims that he saw the piece of metal but can't recall whether he took it inside the mine or left it outside. Lewis stated that the three crewmen went underground about 11:30 p.m. and that all three repairmen went to the loading machine and completed the installation of the traction motor. Lewis said that the new motor was sitting in the loader but had not been bolted into position or connected to the power wires. He said he had to crawl under the loader to pull enough slack from the power wire to complete installation of the motor. Lewis claims that Gilliam left it up to the repairmen as to how they wanted to repair the canopy and that Gilliam did not say raising the canopy, as Shepherd had instructed,

would be unsafe, nor did Gilliam tell him to install it differently from the way Shepherd had instructed him to do it. Lewis said he cut all four legs off the canopy and welded the front legs on the back of the canopy and the back legs on the front of the canopy because the front legs were longer than

the rear legs and putting the front legs at the rear raised the canopy on the end where the operator of the loading machine sits. Lewis said that the front holders for the canopy legs were slanted but that he welded the legs back on in a straight position. Therefore, they were never able to force the front legs into the holders and at the end of their shift they left the loader with the front canopy legs unbolted and out of the holders. Lewis recalled that Gilliam was told by Shepherd to stop portalling, or reporting for work, at the supply house and Lewis said that Gilliam portalled at the No. 11 Mine and went into the mine with them for about a week. Lewis said that Gilliam had told him about watching University of Kentucky ball games on TV, that there were times when Gilliam did not come into the mine at all, that Gilliam did not tell Lewis about checking any traps, that Gilliam did tell Lewis about checking for pokeberries on company time, that Gilliam spent most of his time on the power box, at times with his hard hat and light belt off, and that he would rate Gilliam as a poor foreman. Lewis stated that he went to see Everett Kelly, the General Mine Superintendent, after work on April 21, 1980, the day of Gilliam's discharge, about a diesel job and saw Gilliam already talking to Kelly. Lewis said that he voluntarily told Kelly that he had not called the MSHA inspectors after the lead wires to the motor burned out on a roof-bolting machine. Lewis said he normally went outside the mine about 1:00 a.m. to provide Gilliam with a means of transportation into the mine, but his time of going out varied somewhat so that, for example, on the morning of April 21, 1980, he did not go out for Gilliam until 2:00 a.m.. Lewis said he did not like to be a rat and had declined to tell Shepherd whether Gilliam was sleeping in the mine on top of the power box.

(20) Denton Gross was also one of the three repairmen on Gilliam's third-shift maintenance crew. He testified that Shepherd called the No. 11 Mine Office on April 20, 1980, and talked to Lewis. Shepherd instructed Lewis to cut the canopy legs and splice in a piece of metal so as to raise the canopy a few inches. The metal was supposed to be lying by the trolley track but he and Hall were unable to find it. A day or two after April 20, Dean Whitaker, a car driver on the second shift, showed Gross a piece of metal about 1-1/4 inch thick, 4 inches wide, and 14 to 18 inches long and stated that it was the metal which was supposed to have been used on the canopy. They went into the mine about 11:30 p.m. on April 20 and all three repairmen worked on replacing the traction motor on the loading machine.

Gross stated that they had to remove the old motor and install the new one and that the band which holds the motor in place was bent and warped. Lewis went out and brought Gilliam in about 2:00 a.m.. Gross said that



they all discussed the raising of the canopy top, but that it was Gilliam's decision that the legs in front be moved to the back. Gross stated that none of them could weld in a horizontal or vertical position well enough to do the job without taking the

canopy off. Gross said that they took the canopy off, cut all four legs off, and rewelded them so that the front legs were on the back and the back legs were on the front of the canopy, but they were unable to get the front legs into the holders on the loading machine and left the underground section about 6:45 a.m. without attaching the front legs to the holders. Gilliam asked them to stay late but they refused because they were too tired to continue working. Gross claimed they only left equipment down twice at the end of their shift, once when the feeder was not operable and again when the head drive in the conveyor belt was inoperable. Gross said that he saw Gilliam stretched out on the power box about twice each week, that he complained to Shepherd once about Gilliam's failure to obtain repair parts which were needed, that Shepherd had asked him if Gilliam was sleeping in the mine, that Gilliam spent most of his time at the power box and that he would rate Gilliam as a fair to good supervisor. Gross claims that all three of them lifted the canopy off the loading machine and that Lewis then worked on the canopy alone while Gross and Hall replaced the clutch in the shuttle car and discovered eventually that the problem was a stripped pinion on the pump motor. Gross said that he and Hall then helped Lewis with the canopy until the end of the shift at about 6:45 a.m..

(21) Marion Shepherd was Chief Electrician at the No. 11 Mine on April 21, 1980, when Gilliam was discharged. Shepherd is 55 years old and has been repairing equipment for 30 years, but has only a fifth-grade education. Gilliam worked directly under Shepherd's supervision, but Shepherd worked on the first or day shift, from 7:00 a.m. until 3:00 p.m., whereas Gilliam worked on the third shift which began at 11:00 p.m. and ended at 7:00 a.m.. Shepherd, therefore, had to communicate with Gilliam by telephone about repairs which had to be done on the third shift. Gilliam resented receiving telephone calls at his home from Shepherd at nine or ten o'clock at night before Gilliam left for work and asked Shepherd to stop calling him at his home. On the night before he discharged Gilliam, Shepherd called the No. 11 Mine Office about 10:55 p.m. and Gilliam had not arrived. Shepherd called again about 11:10 p.m. and Gilliam had still not arrived. Therefore, it was necessary for Shepherd to give his instructions about raising the canopy height, installing a traction motor on a loading machine, and replacing the clutch in a shuttle car to Jerry Lewis, one of the three men on Gilliam's maintenance crew. Shepherd was advised by Lewis that Gilliam might be at the supply house and Shepherd claims he called the supply house but got a busy signal and did not call again. Although Shepherd had been told not to call Gilliam at his home, Shepherd stated that he also called Gilliam's home and got a busy signal there also.

Consequently, all instructions which Gilliam received on the night of April 20, 1980, were relayed to Gilliam by Jerry Lewis.

(22) Although Jerry Lewis knew that Shepherd had instructed the repairmen to use a coupling link about 1-1/4 inch thick, from

4 inches to 8 inches wide and about 18 inches long as the stock to be welded onto the canopy legs to raise the canopy 3 inches, Lewis used the term "chain link" in passing Shepherd's instructions on to Gilliam. Gilliam discussed the raising of the canopy legs with Wallace Cornett, now deceased, but whose deposition is Exhibit 11 in this proceeding, and Cornett expressed an opinion to Gilliam that use of chain links to extend the canopy height would weaken it and Cornett said he wouldn't carry out Shepherd's instructions because welding a chain link to the legs would weaken them. Cornett stated that Gilliam expressed no opinion that carrying out Shepherd's instructions would be unsafe.

(23) Marion Shepherd stated during his direct examination that he had instructed Lewis to weld a piece of coupling bar measuring 1-1/4 inch in thickness to the bottom of the canopy's legs so as to raise it 3 inches. Shepherd claims that welding a piece to the bottom of the legs would not have weakened them because the joining welds would be down in the sleeves that hold the legs on the loading machine. He conceded during cross-examination that the holes in the bottom of the canopy's legs and in the top of the canopy's holders were situated so close to the top of the holders that the welds would necessarily be outside the holders. Shepherd also expressed the opinion that the repairmen had simply turned the canopy around so as to place the front legs, which were about 4 inches longer than the rear legs, in the rear where the increased height was needed. Shepherd was unaware that the canopy was wider in the rear than it was in front and that the front legs would not fit into the rear holders nor the rear legs into the front holders if the canopy were simply turned around. Although he conceded that the repairmen would have had to cut all four legs off in order to reverse the position of the front and rear legs, he nevertheless insisted that the repairmen had plenty of time within which to raise the canopy's height. He found it inexcusable for the repairmen to have rewelded the front legs on straight when they knew while they were welding them that they would have to fit into holders which projected at an angle. Shepherd said the repairmen could easily have set the canopy on the loader and could have spot welded the canopy with the legs in proper position and could thereafter have taken the canopy off again so that they could have welded the legs or extensions to the legs in a flat position in view of the repairmen's claim that they were inept at performing welding while the parts to be joined were situated in a horizontal or vertical position.

(24) Shepherd was also critical of the repairmen for having waited until about 3:00 a.m. to begin installing the clutch in the shuttle car. Shepherd said he had

gone into the mine on Saturday and had removed the traction motor from the loading machine and had put a new motor in the loader and that the only work remaining to be done was to connect the wires and bolt a metal band around the motor to hold it in position. He said that no more than 1

hour, at most, would have been required to finish that work. He also said that Hall should not have repaired the lights on a bolting machine until the shuttle car had been restored to operating condition because he had given Lewis strict instructions to give repair of the loading machine and shuttle car first priority. Shepherd said that even if Gilliam and his men could justify not having found until 5:30 a.m. that a pump motor, instead of a new clutch, was needed for the shuttle car, that Gilliam, at the very least, should have called the supply house and ordered the pump motor. Shepherd claimed that Gilliam could have ordered the pump motor without leaving the section by having called the watchman on the surface and asked him to order the motor. As things turned out, Shepherd had to order the motor himself on the day shift and help install it in order to get the shuttle car working again. Shepherd did not personally examine the canopy on the loading machine, but said that since Gilliam had told him that the canopy had been left off the loading machine, he assumed the loader was used by the day shift without any canopy on it, or that another stand-by loader, not equipped with a canopy, had been used. Shepherd was upset about the repairmen's failure to get the shuttle car fixed because the other two shuttle cars on the section were old and unreliable.

(25) Shepherd stated that he discharged Gilliam for six reasons: (1) Gilliam for a period of about 1 year would fail to have equipment in an operable condition at 7:00 a.m., that is, at the end of Gilliam's shift; (2) Gilliam did not go into the mine early enough or follow on the work closely enough to know whether equipment was operable at the end of his shift; (3) Gilliam admitted to Shepherd that he had checked his traps during company time to see if he had caught foxes or other wild game, and other people, such as Ken Colwell and Lonzo Shepherd, told Shepherd about seeing Gilliam hunting at night on company time; (4) Gilliam admitted to Shepherd that he had slept on company time and Shepherd had been told at least once by Pearl Campbell, Bill Pennington, Dana Eldridge, Ken Colwell, and Johnny Joseph that they had seen Gilliam asleep; (5) Gilliam went into the mine so late that he was not present to supervise his men when they encountered difficult wiring problems which required electrical knowledge which they admittedly did not have; and (6) Gilliam disobeyed Shepherd's orders to stop portalling, or reporting for work, at the supply house, instead of reporting for work at the No. 11 Mine Office so as to be at the mine where he could go in each night with his three-man crew. Instead, Gilliam continued to portal at the supply house so that on April 21, 1980, the day of his discharge, Gilliam did not get to the underground working section where his men were repairing equipment until 2:00 or 2:15 a.m., whereas

his men had been there since 11:30 p.m., April 20. Shepherd stated that Gilliam's favorite sleeping place was on top of the power center which handles 7200 volts of electrical current. Shepherd stated that it is

against company policy for miners to eat their lunch at the power center or otherwise gather in close proximity to it, much less to lie down on top of it and go to sleep.

(26) Although Shepherd conceded that he had permitted Gilliam to report for work at the supply house so as to bring needed parts to the mine after the start of the third shift, Shepherd said he ordered Gilliam to stop portalling at the supply house when Shepherd became aware that Gilliam was using the practice of portalling at the supply house as an excuse for not going into the mine until 3:00 or 4:00 a.m.. Shepherd says he ordered Gilliam to stop portalling at the supply house about 2 weeks before Gilliam's discharge and that he had not changed that order so as to allow Gilliam to resume portalling at the supply house. Shepherd specifically denied Gilliam's claim that he had ever asked Gilliam to have canopies installed on all equipment by April 18, 1980, and in connection with that work, had told Gilliam to report to the supply house as often as necessary to get the parts needed to install the canopies. Gilliam claimed that one reason for the alleged reversal of Shepherd's order about portalling at the supply house was that Shepherd was going to be away from work about a week so that he could take his wife, who was suffering from a serious illness, to the hospital. Shepherd said he doesn't think he took his wife to the hospital at all during the week of April 18, 1980, that he never had been off for more than 1 day to take his wife to the hospital in Lexington, Kentucky, and that his wife was not suffering from a serious illness.

(27) Shepherd agreed that he had asked Gilliam if he had called MSHA inspectors after the power leads to the motor on the roof-bolting machine burned out in early April 1980 during Gilliam's third shift. Shepherd also stated that he had asked some of the men on Shepherd's crew if they had called the MSHA inspectors. The time that Shepherd asked the repairmen about calling the inspectors occurred one morning when Gilliam and his crew were about to get in their trucks to leave and were kidding each other about calling the inspectors. Shepherd's description of the kidding episode was supported by Dorsey Hall, one of the crewmen who testified that he had in a kidding manner told Shepherd one day that Gilliam might have called the inspectors. Shepherd denied that he had threatened to fire anyone who called an inspector if he should find out who did it. Shepherd also denied that the visit by the inspectors after receipt of the complaint about the roof-bolting machine had anything to do with Shepherd's discharging Gilliam.

(28) Dana Eldridge was a belt foreman on the day shift



at the time of Gilliam's discharge on April 21, 1980. Eldridge also was the preshift examiner and reported at the mine from 4:30 to 5:00 a.m. in order to perform preshift examinations.

Eldridge would see Gilliam stretched out on the power box about twice a week and often Gilliam would be asleep. Shepherd asked Eldridge several times whether he had seen Gilliam asleep in the mine or not and Eldridge would give an evasive reply to the effect that Shepherd would have to find that out by going into the mine himself. Eldridge said he liked Gilliam and did not want to tell anyone about the fact that Gilliam was sleeping in the mine. Eldridge said, however, that Shepherd had asked him about Gilliam's sleeping approximately 6 months before Gilliam was discharged. On one occasion, the mine fan was turned off and Eldridge was unable to get anyone to answer on the paging phone. Eldridge went into the mine to get the miners out and found Gilliam snoring on top of the power box. Eldridge went on to the face area and got Gilliam's men out of the mine until it was safe for them to return to work. Eldridge also stated that Gilliam had once asked Eldridge if he had reported him to anyone for sleeping in the mine and Eldridge said he had not at that time. On the morning that Gilliam was discharged, Eldridge heard Gilliam and Shepherd discussing the equipment and heard Shepherd tell Gilliam that they could not go on like this. Although Denton Gross, one of the repairmen on Gilliam's crew, stated that he had heard Shepherd say to Eldridge that Shepherd would fire anyone who called the MSHA inspectors, Eldridge denied that he had ever heard Shepherd make such a statement.

(29) Richard Combs was Superintendent of the No. 11 Mine on April 21, 1980, when Gilliam was discharged. His office is about 9 miles from the No. 11 Mine. Combs made a routine call to the No. 11 Mine Office on the morning of April 21, and Shepherd told him that he had discharged Gilliam. Later in the day Shepherd told Combs that he had discharged Gilliam for leaving equipment down or in an inoperable condition. Combs talked to Gilliam on April 22, at which time he told Gilliam he would investigate the discharge and let Gilliam know the outcome of his investigation. Combs then talked to Shepherd and Eldridge and decided, along with Combs' supervisor, that Gilliam's discharge should be upheld. Combs called Gilliam on April 23 and advised him that the discharge was being upheld. Combs stated that Gilliam did not discuss the canopy with him. The first time Combs became aware of Gilliam's allegations about the canopy was when an MSHA investigator named Edward Morgan mentioned it to him.

(30) Everett Kelly, who is Combs' supervisor and General Mine Superintendent, became aware that Shepherd had discharged Gilliam on April 21, 1980, when he received a brief phone call from Shepherd advising Kelly of that fact. A short time later, Gilliam came by in person and told him that he and Shepherd had had words and that Shepherd had discharged him. Kelly

denies that Gilliam at that time, April 21, mentioned the canopy, or a hazard to the miners, or anything about calling an MSHA inspector.

Kelly assigned Combs to investigate the discharge and he and Combs decided to uphold the discharge after Combs had talked to Shepherd and Eldridge and had been told that Gilliam left the loader and shuttle car inoperable on April 21 and had not gone into the mine until 2:00 a.m.. Kelly was told by Gilliam about the allegedly unsafe raising of the canopy and other claimed violations on April 29, 1980, when Gilliam came to Kelly's office and provided additional allegations, including Gilliam's claiming that he had told Shepherd that if Shepherd discharged Gilliam, Gilliam would take Shepherd with him. Kelly denies that he ever asked Gilliam whether he had called the MSHA inspectors. Kelly remembered that a watchman named Caudill had called him at home one night to report that Gilliam was sleeping in his truck. Kelly told Caudill to call the Chief Watchman named Stidhams, which Caudill did. By the time Stidhams arrived at the mine, Gilliam was awake.

(31) Frank Durbin is respondent's Safety Director and was employed by MSHA, MESA and the Bureau of Mines for 10 years before becoming Safety Director. It was his opinion that adding a piece of steel to the legs as recommended by Shepherd would not have prevented the canopy from passing the stress test of 18,000 pounds or 15 pounds per square inch required by 30 C.F.R. 75.1710-1(d).

(32) Dale Junior Colwell is a cutting machine operator at the No. 11 Mine and was such an operator on April 21, 1980, when Gilliam was discharged. He testified that his cutting machine was inoperable only on one occasion that he can recall and that on that occasion, Gilliam remained at the mine and worked on the day shift long enough to repair his cutting machine. He believes that Gilliam and his crew did very good work in keeping equipment in operable condition. Colwell was a rebuttal witness, but he did not controvert Shepherd's testimony to the effect that on one occasion the repairmen on Gilliam's crew had improperly hooked some wires on the cutting machine so that the cutting machine would not run. On that occasion, Shepherd had to rewire the equipment himself. It was Shepherd's contention that Gilliam could have wired the cutting machine properly if he had just gone into the mine that morning and checked out the cause for the cutting machine's failure to operate.

(33) Robert Begley has been a shuttle car alternate driver and general laborer at the No. 11 Mine. He testified that the equipment now being used is not maintained as well at the present time as it was when Gilliam was maintenance foreman. He finds the shuttle car frequently inoperable now and seldom, if ever, saw them inoperable when Gilliam was maintenance foreman. He said the mine made 10 cuts a day when Gilliam was

maintenance foreman, whereas now the mine only

runs from three to five cuts. Begley conceded that the coal height is only 47 inches now as compared to 60 or 80 inches at the time Gilliam was maintenance foreman. He also stated that the shuttle cars now being used are different from the ones that were being used when Gilliam was maintenance foreman. Begley was presented as a rebuttal witness but his testimony only tends to confirm Shepherd's contention that the reason he was so upset when Gilliam failed to repair the B-23 shuttle car on the day of Gilliam's discharge was that the B-23 was the only really good shuttle car they had and that the other two were very unreliable and frequently were out of order. The B-23 car is not in the section where Begley works.

In C.C.C.-Pompey Coal Co., Inc., 2 FMSHRC 1195 (1980), and in Council of Southern Mountains v. Martin County Coal Corp., 2 FMSHRC 3216 (1980), the Commission held that a judge's bench decision is not a final decision until it has been issued by the Commission's Executive Director pursuant to 29 C.F.R. 2700.65(b). In the Pompey case, the Commission held that it is error for a judge to issue a bench decision in final form without considering any applicable decisions which have been issued by the Commission between the time the bench decision was rendered and the time the decision is issued in final form under section 2700.65(b).

The above findings of fact have been reproduced, with minor changes, as they were given at the hearing which ended on June 29, 1981, but the complete transcript in this proceeding did not become available until September 1, 1982, which was 1 year and 2 months after the bench decision was rendered. In the long interim between the rendering of the bench decision and the issuance of this decision in final form, the Commission has decided several cases which should now be considered in the substantive portion of my decision which gives the reasons for my conclusions that complainant failed to prove that his discharge was a violation of section 105(c)(1) of the Act. In order to give proper consideration to all interim decisions which have been issued since the bench decision was rendered, I am hereby vacating everything in the bench decision following the 33 findings of fact set forth above and am inserting the rationale which is hereinafter given.

The outcome of this revised decision is the same as the result reached in the bench decision, but the revised decision considers the Commission's holdings in Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), and Elias Moses v. Whitley Development Corp., 4 FMSHRC ÅÅÅ, Docket No. KENT 79-366-D, decided August 31, 1982, and follows the specific guidelines which were given by the Commission in decisions issued after I rendered the bench decision. In Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982), the Commission explained why it believes that the court's decision in Consolidation Coal Co. v. Ray Marshall, 663 F.2d 1211 (3rd Cir. 1981), reversing the results reached by the Commission in Pasula v. Consolidation Coal

Co., 2 FMSHRC 2786 (1980), did not change the Commission's analysis of the parties' burdens of proof which were formulated by the Commission in its Pasula decision.

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Therefore, even though the results reached by the Commission in the Pasula case were reversed by the Third Circuit in Consolidation Coal, the Commission still expects its judges to apply the Commission's Pasula holding set forth below (2 FMSHRC at 2799-2800):

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis in original.]

The complaint in this proceeding alleges two violations of section 105(c)(1) of the Act which provides, in pertinent part, as follows:

No person shall discharge or in any manner discriminate against or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, \* \* \* or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The First Alleged Violation of Section 105(c)(1)

The first question to be considered is whether complainant was discharged because he made a complaint about safety to the operator's agent. The safety complaint which complainant claims



to have made is based on the allegation that complainant had stated to Shepherd, complainant's supervisor, prior to his discharge, that increasing the height of the canopy on

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respondent's loading machine by welding pieces of metal to the canopy's two rear legs, as Shepherd had suggested, would be unsafe and in violation of the State and Federal regulations pertaining to installation of canopies on self-propelled electric face equipment (Finding Nos. 5, 8, 15, and 20, supra).

Respondent claims that complainant was primarily discharged for failing to have equipment in an operable condition by 7 a.m. which was the time complainant's shift ended and the time the day shift began. The two pieces of equipment which were inoperable on the morning of April 21, 1980, the date of complainant's discharge, were the loading machine and the B-23 shuttle car. Respondent contends that complainant never mentioned, prior to his discharge, that raising the canopy on the loading machine, in the manner Shepherd had suggested, would adversely have affected the safety of the operator of the loading machine (Finding Nos. 18, 19, 22, 29, and 30, supra).

The last shift complainant worked prior to his discharge began at 11 p.m. on Sunday, April 20, 1980. Shepherd had called the No. 11 Mine before and after 11 p.m. and had been unable to talk to complainant. Therefore, he gave his instructions about the repair of equipment to Lewis who was one of the three repairmen who worked under complainant's supervision. Shepherd asked Lewis to tell complainant that the traction motor in the loader needed to be replaced and that the canopy on the loader needed to be raised about 3 inches. Shepherd suggested that the back legs of the canopy be raised by welding to them pieces of metal which could be obtained from a coupling link which Shepherd had left outside the mine office near the 7,200-volt power box. Shepherd also told Lewis that a new clutch would have to be installed in the B-23 shuttle car (6/26, Tr. 6-7; 167-168). ( FOOTNOTE 2)

It is undisputed that Lewis passed on to complainant the instructions which he had received from Shepherd, except that Lewis seems to have referred to the kind of metal which Shepherd had mentioned for use in raising the canopy as a "chain" link, instead of a "coupling" link (6/24, Tr. 23; 189; 6/25, Tr. 9; 41; 64; 86; 105; 141-144; 159-160). Lewis claims to have found the coupling link prior to going into the mine and said that it was a flat piece of metal about 1-1/2 inch thick, 6 to 8 inches wide,

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and 14 to 18 inches long (6/25, Tr. 86; 143). Lewis testified that even if complainant had initially misunderstood what kind of metal Shepherd had intended for the repairmen to use in raising the canopy, no confusion about a chain link verses a coupling link should have existed after complainant and his three repairmen had discussed the raising of the canopy when complainant finally reached the working section about 2:15 a.m. on Monday, April 21, 1980 (6/25, Tr. 144; 6/24, Tr. 28).

Complainant testified that he told Lewis not to do any work on the canopy until he had arrived underground to discuss the canopy with Lewis (6/24, Tr. 22). Although Lewis fails to recall that complainant gave him any such instructions (6/25, Tr. 112), one of the repairmen, Gross, testified that Lewis told them that complainant did not want any work done on the canopy until complainant had arrived on the section (6/25; Tr. 162). Complainant did not arrive on the section until Lewis brought him in on a rail car about 2:15 a.m. (6/24; Tr. 28). Shortly thereafter all four men discussed the method which should be used to raise the canopy and, although complainant and Gross claim that it was complainant's decision (6/24, Tr. 34; 6/25, Tr. 168), while the other two repairmen, Lewis and Hall, say that complainant left the decision up to the repairmen (6/25, Tr. 48; 91; 112; 135), the men unanimously concluded that the best way to raise the canopy was to swap the position of the canopy's legs by moving the front legs to the rear and the rear legs to the front because the front legs were longer than the rear legs (6/24, Tr. 34; 6/25, Tr. 90). One reason that the repairmen decided to switch the legs' position was that they had put the canopy on in the first place and had incorrectly installed the canopy with the shortest legs in front (6/24, Tr. 53; 6/25, Tr. 145). Therefore, they concluded that the canopy would probably meet Shepherd's approval if they simply reinstalled the canopy in the manner it should have been installed in the first instance.

Since the canopy was wider in the rear than it was in front (6/24, Tr. 54), and since the holders for the canopy's front legs protruded upward from the loading machine at an angle (6/24, Tr. 56; 6/25, Tr. 90), the canopy could not be raised in the rear simply by taking it off and turning it around. Therefore, Lewis cut off all four of the canopy's legs with a cutting torch. When Lewis rewelded the legs to the canopy, he forgot to allow for the angle of the holders for the front legs and rewelded all four legs to the canopy in a straight position (6/25, Tr. 90). The result was that the rear legs went into the rear holders, but the front legs would not go into the front holders. Consequently, all three repairmen and complainant worked from about 6 a.m. to quitting time at 6:45 a.m. ( FOOTNOTE 3) in an effort to get the front legs into their holders, but they never did succeed in doing so (6/24, Tr. 46-47; 6/25, Tr. 19; 170).

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Complainant's repairmen also failed to have the B-23 shuttle car ready to operate at the time their shift ended on April 21, 1980 (6/24, Tr. 40; 62). Shepherd had instructed the repairmen to replace the clutch on the shuttle car. None of the repairmen began to work on the shuttle car until about 3 a.m. when Hall started working on it (6/24, Tr. 24; 35; 6/25, Tr. 17; 44). Hall found, after replacing the clutch, that the shuttle car still would not operate. He then removed the pump motor and found that it had a stripped pinion (6/24, Tr. 39; 6/25, Tr. 17).

He reported the need for a new pump motor to complainant about 5:30 a.m., but complainant concluded that it would not be possible to obtain a new motor from the supply house for the shuttle car in time for the pump motor to be installed during complainant's shift, so complainant did not order a pump motor so that one could be delivered from the supply house to the No. 11 Mine for subsequent installation by other repairmen on the day shift. Complainant excused his failure to order the pump motor by claiming that he would have had to go outside the mine to order the motor which would have taken 20 minutes and then he would have had to return underground which would have taken another 20 minutes. Since he did not know the motor was needed until 5:30 a.m., he would not have been back into the mine until about 6 a.m.. He claims that he needed to help his men reinstall the canopy and that he believed the canopy work was more important than ordering the pump motor for the shuttle car (6/24, Tr. 43).

Shepherd's testimony at the hearing contained very convincing reasons to support his dissatisfaction with the way complainant had performed his duties on the morning of April 21, 1980 (6/27, Tr. 103-104). Shepherd was a supervisor who actually did repair work and who knew exactly how long it should take for work to be done. No one controverted Shepherd's testimony to the effect that he had gone into the mine and worked on the loading machine on Saturday, April 19, 1980 (6/26, Tr. 5; 21; 157). Shepherd and another repairman not on complainant's crew had removed the old motor on the loading machine and had placed the new motor on the loader, but Shepherd ran out of time and did not install the packing gland on the new motor, or reattach the power wires, or reinstall a band which holds the motor in a secure position (6/26, Tr. 21; 147; 201; 6/27, Tr. 104).

In Shepherd's opinion, no more than one of the repairmen was needed to finish installation of the motor and he believed that 1 hour would have been ample time for completing that work (6/27, Tr. 101-102). In the meantime, Shepherd said that another repairman could have been working on replacing the clutch in the shuttle car (6/27, Tr. 103). Since the repairmen arrived on the section at 11:30 p.m. on April 20, 1980, there is reason to believe that they could easily have completed installing the motor on the loading machine by 2 a.m., could also have replaced the clutch in the shuttle car by 2 a.m., and could easily have found by 3:00 a.m. that a pump motor was needed for the shuttle car (6/27, Tr. 97-99).

Shepherd's belief that complainant and his men had failed to

do their jobs properly on the morning of April 21, 1980, is thoroughly supported by the repairmen's own testimony. All of the repairmen gave different testi

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mony about some details of what happened on their shift on April 21, but they all agreed that all three of them worked on installation of the motor in the loading machine until about 2 a.m. at which time Lewis went out in a rail car to provide complainant with a means of transportation into the mine. All of them agree that installation of the motor on the loading machine was not completed until after complainant had arrived underground on the section at about 2:15 a.m. (6/24, Tr. 29; 6/25, Tr. 12; 88-89; 110-111; 149; 163-164). None of them did any work on anything but the loading machine until about 2:30 a.m. when Hall went to the roof-bolting machine and replaced a light (6/25, Tr. 13). Then about 3 a.m. Hall began working on the installation of the clutch in the B-23 shuttle car (6/24, Tr. 35; 6/25, Tr. 17). By 5:30 a.m. he had reported to complainant that he needed a pump motor (6/24, Tr. 42).

It is obvious, therefore, that Hall had installed the clutch and discovered that he needed a pump motor within 2-1/2 hours after he began working on the shuttle car. If Hall had started working on the shuttle car as soon as he went underground, as Shepherd believed he should have done, Hall would have known by 3:00 a.m., at the latest, that he needed a pump motor for the shuttle car. Ricky Baker, the supply clerk, testified that he could have had a pump motor delivered to the No. 11 Mine within 30 to 45 minutes after receiving a request for one (6/24, Tr. 281). If complainant had made a request for the pump motor by 3 a.m., it could have been delivered to the No. 11 Mine and could easily have been installed before the end of the shift at 6:45 a.m..

Shepherd also rejected complainant's excuse for not having at least ordered the pump motor at 5:30 a.m. when he was told by Hall that it was needed. Shepherd testified that complainant would not have had to use a half hour to go in and out of the mine to order the pump motor because, according to Shepherd, all complainant would have had to do to order the motor would have been to call outside and have the night watchman, Caudill, order the pump motor from the supply house (6/27, Tr. 121). Moreover, even complainant's excuse for not ordering the motor is defective because he could have gone out and ordered the motor at 5:30 a.m., when he knew the motor was needed, and could have been back into the mine by 6:10 a.m., after personally ordering the motor. Inasmuch as complainant's own testimony shows that he did not do a single thing to help raise the canopy until 6 a.m., he could have gone out and ordered the motor and still have been back in the mine in time to begin working on the canopy at approximately the same time he actually did begin to work on it.

As indicated above, the primary reason given by Shepherd for discharging complainant was that complainant had been leaving equipment "down", or inoperable, at the end of his shift. Complainant's counsel sought to discount Shepherd's testimony as to inoperable equipment by arguing that Shepherd's testimony is less credible than complainant's testimony. While it is true that Shepherd was unable during cross-examination to give the exact dates on which complainant had left equipment inoperable,

it is an undisputed fact that two pieces of equipment,

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the loading machine ( FOOTNOTE 4) and the B-23 shuttle car, were left in an inoperable condition at the end of complainant's shift on April 21, 1980, the day complainant was discharged for failure to perform his job. It was also uncontroverted that complainant's repairmen failed to wire a cutting machine properly a few weeks before his discharge (6/26, Tr. 18-19). It was necessary for Shepherd to rewire the cutting machine on the day shift while 14 to 16 miners were paid to wait while the machine was rewired. Shepherd testified that complainant was competent in electrical matters and that he knew that if complainant had been with his men that morning, he could have made certain that the cutting machine was properly wired (6/26, Tr. 19; 61; 109; 156). Although the miners were exceedingly unwilling to say anything at the hearing which was in any way critical of any other miner, at least two miners indicated that there was a hostile relationship between Shepherd and complainant (6/24, Tr. 236; 6/25, Tr. 152) and one of the repairmen testified that he did not like to talk to Shepherd and avoided doing so when possible (6/25, Tr. 81).

Moreover, it is significant that two of the repairmen, Hall and Lewis, testified that Pearl Campbell, the section foreman on the day shift, reported them for leaving equipment in an inoperable condition when, in their opinion, it was not their fault (6/25, Tr. 39-41; 60; 127). Hall claimed that Campbell would report equipment as being inoperable to excuse his failure to produce as much coal as he thought was required of him (6/25, Tr. 62). Shepherd testified that complainant would report that all equipment was operable, but he would receive calls from underground that equipment was not operable (6/26, Tr. 54; 161-162; 6/27, Tr. 59). Since Shepherd personally went underground every day and frequently repaired equipment himself, there is hardly any way that Campbell could have falsely claimed that equipment was inoperable just to conceal his own deficiencies as a foreman (6/26, Tr. 164). The testimony discussed above supports my conclusion that Shepherd's testimony about complainant's leaving equipment in an inoperable condition is more credible than complainant's denial that he frequently left equipment inoperable.

Another aspect of the repairmen's testimony which requires some discussion is that they were definitely on the defensive throughout their testimony. They realized that they had not performed well on the morning of April 21, 1980. In all probability, they had done almost nothing between the time they went underground and the time complainant came into the mine about 2:15 a.m.. That would explain why all of them had to claim that they were working on installation of the motor on the loading machine until 2:30 a.m. (6/24, Tr. 24-33; 6/25, Tr. 9-13; 88-89; 162-166). Gross was so ill at ease about the amount of work he had done that night that he testified that he had helped Hall install the clutch on the



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shuttle car and had helped remove the pump motor from the shuttle car (6/25, Tr. 171; 182-183). Gross is almost certainly wrong in so claiming because complainant and Hall both testified that only Hall worked on the shuttle car at any time during the morning of April 21 and that Gross worked at no place other than at the loading machine where he helped Lewis cut off the legs on the loading machine's canopy and helped in rewelding the legs (6/24, Tr. 32; 35; 42; 6/25, Tr. 13-14; 17). Gross' credibility was further eroded when he testified that "we" held the legs while Lewis welded them (6/25, Tr. 201). If Gross had been working with Hall at the shuttle car, no one would have been available at the loading machine to hold the legs while Lewis welded them.

It should be noted that Lewis did nothing from 2:30 a.m. until 6 a.m. other than cut off the canopy's legs and reweld them (6/24, Tr. 32; 44; 6/25, Tr. 14; 90-91). Each canopy leg was 1-1/4 inch thick and 4 inches wide. Shepherd correctly stated that no more than 10 minutes, at most, would have been required to cut each of the legs off with a cutting torch (6/27, Tr. 91). That means that Lewis should have had the legs cut off by 3:40 a.m., assuming he began cutting on them at 3 a.m.. It is incredible to think that it took Lewis and Gross about 2-1/2 hours to reweld the four 4-inch legs to the canopy's top. Yet that is all that Lewis claims to have done between 3 and 6 a.m.. As indicated above, Gross was so ill at ease about his role between 3 and 6 a.m. that he testified that he had assisted Hall in installing the clutch and removing the pump motor on the shuttle car. Gross was so confused about what he did that morning that he even testified at one point that he had installed a pump motor on the shuttle car (6/25, Tr. 182-183). Yet he later testified correctly that the shuttle car wouldn't run at the end of the shift because it needed a pump motor (6/25, Tr. 188). Finally, Gross contradicted himself so much about the time that events were alleged to have occurred on the morning of April 21, that complainant's counsel, who had called Gross as a witness, had to have Gross explain on redirect that he was confused about the times when events occurred during the morning of April 21 (6/25, Tr. 195).

It is true that complainant, Gross, and Hall testified that they spent about an hour trying to get the loading machine unstuck but never were able to do so (6/24, Tr. 32; 6/25, Tr. 13; 165). Even if they did spend an hour trying to get the loading machine unstuck, they still did not explain satisfactorily how they spent their time during their shift on April 21. Also, their statements as to the depth of the mud are so inconsistent that it is not possible to form any sound conclusions as to how much actual trouble they had with mud and water. Complainant, for example, gave three different depths for the mud and water. He first said that the mud and water were 2 or 3 feet deep (6/24, Tr. 31). He then reduced the depth of the mud and water to 8 to 10 inches (6/24, Tr. 34). He finally increased the depth of the mud and water to 12 to 14 inches (6/24, Tr. 183). Complainant contended that the repairmen had to put down header boards to work on in order to stay out of the mud and water (6/24, Tr. 33).

Lewis is the repairman who had to crawl under the loader to

obtain slack wire for rewiring the new motor, yet he said that  
the mud was over

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come by laying down brattice cloth (6/25, Tr. 150). It is uncontroverted that Lewis is the one who crawled under the loader to get the wire, so he undoubtedly knew better than anyone else how much mud and water were on the mine floor. It is certain that brattice cloth could not keep a person out of mud and water if it had been as deep as complainant testified that it was.

A discussion is also required as to the merits ( FOOTNOTE 5) of complainant's contention that it was unsafe to raise the height of the canopy by welding pieces of metal to the bottoms of the canopy's two rear legs (6/26, Tr. 7). The only safety question which complainant allegedly raised with respect to Shepherd's suggested method of raising the canopy was whether the repairmen could achieve a high quality of weld when they added pieces to the canopy's rear legs (6/24, Tr. 60; 129). Although the repairmen believed that it would have been unsafe to raise the canopy by welding pieces to the legs, they also said that the safety aspects of adding metal pieces to the legs related to the quality of the welds made to attach the metal pieces to the legs (6/25, Tr. 15; 112; 145; 202).

Only one of the repairmen, Gross, claimed to have heard complainant say that it would have been unsafe to weld pieces to the canopy's legs (6/25, Tr. 185) and his testimony is filled with inconsistent statements and is less credible than the testimony of the other two repairmen. Hall testified that complainant left it up to Lewis to raise the canopy the way Lewis thought was safest (6/25, Tr. 51). Lewis specifically testified that complainant did not express a belief that welding pieces to the canopy's legs would be unsafe (6/25, Tr. 92). The repairmen said that the reason they doubted their ability to achieve a high quality of weld was that none of them had the expertise to weld in the horizontal or vertical position ( FOOTNOTE 6) which would have been required to weld pieces to the

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legs while the canopy remained in an upright position on the loading machine (6/25, Tr. 145; 168; 201).

I was inclined to agree with the repairmen that there was no way for them to weld the legs so as to obtain a thorough fusion of the metal (6/27, Tr. 90), until Shepherd explained in his testimony that all the repairmen would have had to do in order to weld pieces to the legs, while using a flat welding position, would have been to have placed the canopy on the loading machine just long enough to spot weld the legs sufficiently to know where they would have to be attached (6/27, Tr. 93). Then the canopy and legs could have been taken off and welded with the legs situated in a flat position. Shepherd's suggestion becomes quite feasible and logical for nonexpert welders to use when one considers that the longest legs were only 24 inches long and the shortest legs were only 20-3/4 inches long (6/24, Tr. 49). Such short legs could easily have been held in place for spot welding.

Complainant conceded during his testimony that there was no essential difference between the method suggested by Shepherd for raising the legs and the method which he had recommended because, regardless of which method they used, it was necessary to cut off the legs and reweld them (6/24, Tr. 189). The competency of the welders came into play just as much in switching the legs from the front to the back as it would if they had merely welded pieces to the bottoms of the legs as Shepherd had suggested. Actually, Shepherd's method was superior to the one allegedly recommended by complainant because, if they had followed Shepherd's suggestion, only two welds on the two rear legs would have been required, whereas, under complainant's method, it was necessary to make one weld on each of the four legs, or a total of four welds.

It should also be pointed out that Lewis must have been able to make very thorough welds because the repairmen used two sets of jacks in trying to force the two front legs into their holders after Lewis had welded the front legs in a straight position (6/24, Tr. 46; 6/25, Tr. 170). The testimony shows that Lewis' welds did not crack or break under the stress of jacks applied to the sides of the legs. Therefore, the welds which were made undoubtedly achieved an excellent fusion and there is no reason to believe that there would have been anything unsafe about welding a couple of pieces of metal to the bottoms of the two rear legs, as Shepherd had suggested.

Complainant's attorneys argue that Kelly's and Combs' testimony is not credible insofar as they deny that complainant mentioned any safety

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aspects of raising the canopy when he went to them in person to ask that they reverse Shepherd's action of discharging him. When that allegation is examined in light of the facts revealed by the preponderance of the evidence, I find that Kelly's and Combs' testimony is more credible than complainant's.

The testimony of complainant and all three of his crewmen shows that complainant sat down at the power box from about 3 a.m. until 6 a.m. without attempting in any way to supervise the work which Lewis and Gross were doing on the canopy (6/24, Tr. 28; 32; 44-46; 6/25, Tr. 12, 19, 48; 52; 170; 184). The only basis complainant had for claiming that Shepherd's suggestion for raising the canopy was unsafe was that satisfactory welds might not have been achievable. Yet complainant made no effort whatsoever to supervise the canopy work until he went to the loading machine about 6 a.m. and found that the welding had been completed but that the front legs would not go into their holders. I believe complainant's actions during his shift support the statements of respondent's supervisory witnesses who say that complainant did not raise any safety claims about Shepherd's suggestions for raising the canopy until after Shepherd had discharged complainant for leaving equipment in an inoperable condition on the morning of April 21 and until after Kelly had advised complainant that Shepherd's discharge was being upheld.

Shepherd and complainant disagree as to what each of them said on the morning of April 21 when complainant was discharged. Shepherd claims that complainant approached Shepherd at the end of complainant's shift just as if he were Shepherd's boss, by telling Shepherd that Shepherd had better get his light and go into the mine to repair a loading machine and a shuttle car which were "down", or inoperable. Shepherd claims that when he asked complainant what was wrong with them, complainant said that the canopy was off the loader and the shuttle car needed a pump motor. Shepherd claims that he asked complainant if he had ordered a new pump motor to which complainant answered "No". Shepherd states that when he pointed out to complainant that the B-23 shuttle car was the only reliable car they had, complainant became angry and stated that if his work was not satisfactory, he would just have to quit. Shepherd then says that he told complainant that as of that time, complainant no longer worked for respondent (6/26, Tr. 8-9; 30; 32; 192).

Complainant's version of the events leading up to the discharge is that he told Shepherd that the canopy work had not been finished and that the shuttle car required a pump motor. Complainant also states that he told Shepherd it would have been unsafe and in violation of the mining laws for him to have raised the canopy by welding pieces to its legs as Shepherd had suggested. Complainant agrees that he stated that if his work was not satisfactory, he would quit and that Shepherd told him that as of that time complainant no longer worked for respondent (6/24, Tr. 61-62).

A part of complainant's version of the discharge

conversation was corroborated at the hearing by the testimony of Willie Pennington, a pump

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man, who claims that he heard Shepherd ask complainant about the canopy but doesn't know what else was said other than that he did hear complainant suggest that he might have to quit and Shepherd's statement to the effect that complainant was no longer working there as of that time (6/24, Tr. 230). It is difficult to understand how Pennington can be so certain as to some things and not know what was said as to other aspects of the conversation. Inasmuch as Pennington has known complainant for 10 years and was obviously trying to testify in complainant's favor, it is more probable than not that complainant did not mention the safety aspects of raising the canopy and that Pennington preferred to forget certain parts of the conversation rather than to testify unfavorably on complainant's behalf (6/24, Tr. 231).

In view of the fact that Shepherd had obtained a piece of metal on Saturday for welding to the canopy's legs and had left it outside the mine for use in raising the canopy (6/26, Tr. 5; 167), and in view of the fact that Shepherd had made a call to the mine on Sunday night to suggest how the canopy should be raised (6/26, Tr. 6), it is unlikely that Shepherd failed to ask complainant some questions about the canopy. On the other hand, there is nothing in the record to corroborate complainant's contention that he discussed with Shepherd the fact that the canopy could not be safely raised in the manner suggested by Shepherd. The evidence also shows that complainant and Shepherd could not have had a detailed discussion about the canopy because Shepherd did not realize that the canopy was wider in the back than it was in front and Shepherd thought the repairmen had tried to raise the canopy's height by merely turning it around so that the front legs were in the rear where the increased height was desired (6/26, Tr. 22; 180; 205; 6/27, Tr. 89). Any detailed discussion by complainant of the way they had tried to raise the canopy would certainly have made Shepherd aware of the kind of work which had been done on the canopy.

After he had discharged complainant, Shepherd ordered a new pump motor for the shuttle car and went underground and helped install it (6/26, Tr. 157). Afterwards Shepherd had to do some work on the conveyor belt and did not personally examine the canopy on the loading machine (6/26, Tr. 178-179). Although the loading machine was used by the first shift with the front legs out of the holders just as complainant had left it (6/26, Tr. 183), Shepherd assumed that the loader had been operated on the first shift either with the canopy removed or that the first shift had used a stand-by loading machine which did not have a canopy on it (6/26, Tr. 194; 197; 203). The operator of the loading machine on the second shift refused to run the loader with the front legs unattached and new legs were obtained and completely installed by the repairmen on the second shift, except for a slight amount of welding which was completed by the third-shift repairmen on April 22, 1980 (6/25, Tr. 72; 76; 146; 6/26, Tr. 180).

Since Shepherd stated that he had discharged complainant for leaving two pieces of equipment in an inoperable condition, it

must be concluded that part of the reason for complainant's discharge was complainant's failure to have the canopy in an operable condition. The foregoing con



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clusion is necessarily true because the repairmen on complainant's crew had finished replacing the traction motor on the loading machine. Therefore, the only reason that complainant had for telling Shepherd that the loading machine was "down", or inoperable, was the fact that the front legs of the canopy had not been secured properly. Nevertheless, there is a vast difference between discharging a foreman for failure to have equipment operable and discharging him for stating that the equipment was left in an inoperable condition because it would have been unsafe to have raised the canopy in the manner suggested by his supervisor, especially when, as has been shown above, the method adopted by complainant to raise the canopy was just as defective from a safety standpoint as the method suggested by Shepherd, that is, both methods were equally safe or unsafe, as the case may have been, because both methods depended on the thoroughness or quality of the welding done on the legs by the repairmen.

I believe that the foregoing discussion shows beyond any doubt that complainant completely failed to satisfy the first test set forth by the Commission in Pasula, supra. Specifically, complainant failed to establish by the preponderance of the evidence that he engaged in a protected activity with respect to refusing to raise the canopy in what he believed to be an unsafe manner. The preponderance of the evidence shows that complainant was actually discharged for failing to have equipment in an operable condition, rather than for stating that the canopy had not been raised because it would have been unsafe to raise it by welding pieces to the rear legs of the canopy as suggested by Shepherd. Complainant conceded during his testimony that Shepherd may have mentioned that he was upset about complainant's leaving equipment in an inoperable condition (6/24; Tr. 162). There must also have been some discussion about the quality of complainant's work or complainant himself would not have stated that if his work was not satisfactory, he would have to quit. Therefore, I find that complainant's first claim that he was engaged in a protected activity when he failed to have the loader ready to operate on April 21 must be rejected as not having been proven under the test laid down by the Commission in Pasula.

#### The Second Alleged Violation of Section 105(c)(1)

The second and final reason given by complainant for his contention that he was discharged in violation of section 105(c)(1) is that respondent believed complainant was the person who requested MSHA to send inspectors to respondent's No. 11 Mine to investigate the circumstances associated with the burning of wires on a roof-bolting machine (Finding Nos. 10, 11, 16, 18, 27, 28, and 30, supra). Shepherd testified that he had asked complainant if complainant had called the inspectors. Shepherd also testified that one morning when the repairmen on complainant's crew were getting into their cars to go home, they were kidding each other about having called the inspectors and that he joined in the kidding and asked if they had called the inspectors, but Shepherd denied that his interest in finding out who called the inspectors had anything to do with his discharging

complainant (Finding No. 27, supra).

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Roger Jones was a repairman on Franklin Mayhew's clean-up crew which worked on the third shift. Jones was working on the morning that the lead wires to the motor on the roof-bolting machine burned and he testified that Shepherd had asked him if he had called the inspectors. He claimed that Shepherd was upset about the fact that while the inspectors were at the mine in response to the phone call, they wrote seven citations concerning matters other than the subject of the phone call (Finding Nos. 14 and 16, supra).

Dorsey Hall, one of the repairmen on complainant's crew, testified that Shepherd had asked him if he had called the inspectors. While he supported Shepherd's claim to the effect that Shepherd had made the inquiry when they were kidding about the identity of the person who had called the inspectors, Hall also testified that Shepherd stated that whoever did call the inspectors was a dirty low down blankety blank (Finding No. 18, supra).

Complainant also testified that when he returned a second time on the day of his discharge, April 21, 1980, to ask Kelly, respondent's general superintendent, to reverse Shepherd's action of discharging him, he talked to both Kelly and Richard Combs, another superintendent, outside the mine office. Complainant stated that, after Combs had left, Kelly asked him whether he was the one who had called the inspectors (Finding No. 10, supra). On the other hand, when Kelly testified, he denied that he had asked complainant about whether he had called the inspectors (Finding No. 30, supra).

I believe that Kelly's denial of having asked complainant about calling MSHA is more credible than complainant's contention that Kelly asked him whether he had called the inspectors. Shepherd had called Kelly very shortly after discharging complainant to advise Kelly that he had discharged complainant. Therefore, if discharge of the person who had called MSHA to request a special inspection had been an important consideration in Kelly's mind for upholding complainant's discharge, it is highly likely that he would have raised that issue when complainant first went to see him very soon after Shepherd had discharged complainant. Complainant does not contend that he and Shepherd discussed the question of whether complainant had called the inspectors during the argument which culminated in complainant's discharge. For that reason, it is not likely that Shepherd would have discussed complainant's suspected role in calling MSHA about the roof-bolting machine at the time Shepherd reported his discharge of complainant to Kelly.

The credibility of complainant's testimony about Kelly's having asked him if he had called MSHA is further eroded by the fact that complainant made it a part of his direct testimony to note that he had started his conversation with both Kelly and Combs in front of the office and that Kelly had waited until Combs had left before asking complainant if he had called the inspectors. Complainant's laying of a foundation for Kelly's question about calling the inspectors as a matter which occurred

when no one but him and Kelly were present shows a predisposition  
on the part of

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complainant to establish an allegation whose credibility would have to be determined without existence of anyone else's presence to corroborate either his or Kelly's testimony as to whether Kelly asked complainant about calling the inspectors.

The only remaining testimony pertaining to Shepherd's concern about ascertaining the identity of the person who had called MSHA is the statement of Gross, one of the repairmen on complainant's crew, to the effect that Gross had heard Shepherd say to Dana Eldridge that he would fire anyone who called the inspectors (6/25, Tr. 193). When Eldridge testified, however, he denied that he had ever heard Shepherd make such a remark (Finding No. 28, supra). In this instance, I believe that Eldridge's testimony of denial is more credible than Gross' allegation as to what Shepherd may have said to Eldridge. Gross' testimony about the events which occurred on his own shift on the morning of April 21, the day of complainant's discharge, are very inconsistent and show a lack of certainty as to the time that events occurred and disagreed with all the other repairmen on complainant's crew as to the type of work which Gross performed during his shift (Cf. Finding No. 20 with Finding Nos. 10 and 18, supra).

Although I have found that some of the complainant's testimony introduced in support of complainant's contention that he was discharged because of respondent's belief that he had called MSHA to request an investigation of the burning of the leads to the motor on the roof-bolting machine is incredible, the preponderance of the evidence shows that Shepherd did make an effort to establish the identity of the person who called MSHA. Even though Shepherd admits that he tried to find out who called MSHA, he denies that his effort to determine who had called MSHA had anything whatsoever to do with his discharge of complainant (Finding No. 27, supra).

Nevertheless, there is no reason to doubt complainant's testimony to the effect that he and Shepherd had a rather intense discussion about whether complainant had called MSHA and there is no reason to doubt Jones' testimony to the effect that Shepherd appeared to be very upset about the calling of the inspectors because their coming had resulted in the writing of seven citations about matters other than the smoke which came from the roof-bolting machine (Finding Nos. 11 and 16, supra). Additionally, Hall testified that Shepherd asked him whether he had called the inspectors and stated that whoever did call them was a dirty low down blankety blank. Moreover, Hall testified that he had, in a joking manner, said to Shepherd that complainant might have been the one who called the inspectors (Finding No. 18, supra).

The testimony discussed above is sufficient to show that Shepherd would probably have taken some sort of disciplinary action against the person who called the inspectors if he could have determined for certain the identity of the person who did so. I believe that the testimony supports a finding that part of Shepherd's motivation in discharging complainant was his

suspicion that complainant may have been the miner who

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had called MSHA about ventilation problems and the burning of the leads to the motor on the roof-bolting machine. It should be noted that complainant does not assert that he called MSHA about the roof-bolting machine (Finding No. 11, supra) and the inspector testified that the call to MSHA about the roof-bolting machine had been placed anonymously (Finding No. 14, supra). Therefore, any finding that respondent violated section 105(c)(1) when it discharged complainant must rest on a conclusion that a discriminatory act occurs if an employer tries to ascertain whether an employee has exercised his right under section 103(g)(1) to request that a special inspection be made concerning an alleged violation of the Act or of a mandatory health or safety standard.

In *Elias Moses v. Whitley Development Corp.*, 4 FMSHRC ÄÄÄ, Docket No. KENT 79-366-D, decided August 31, 1982, the Commission held that the respondent in that case had violated section 105(c)(1) by discharging a miner because it suspected him of having reported an accident to MSHA. The facts in the Moses case showed beyond any doubt that Moses had not called MSHA to report an accident, but the Commission concluded that respondent had violated section 105(c)(1) because it had discharged Moses for the reason that respondent thought Moses had reported an accident to MSHA. The facts in the Moses case are very similar to the facts in this proceeding because in the Moses case, as in this case, the employer tried to find out who had called MSHA to request a special inspection pursuant to the provisions of section 103(g)(1) of the Act. Section 103(g)(1) requires MSHA to reduce to writing a request for a special inspection. The written request should be shown by MSHA to the operator, but MSHA is forbidden to provide the operator with the name of the person who made the request for a special inspection.

The discussion above shows that complainant successfully established a prima facie case under the Pasula test by showing that his discharge was motivated in part by a protected activity, that is, the right to request MSHA to make an inspection under section 103(g)(1) of the Act without respondent's supervisory personnel making an effort to determine whether he did, in fact, request such an inspection. Respondent's evidence, however, has successfully shown that even if a part of its motivation may have been attributable to complainant's having been suspected of requesting MSHA to make a special inspection, respondent would, in any event, have discharged complainant for his unprotected activities alone.

Between the time I wrote my bench decision and the time that the record in this case became available, the Commission issued its decision in *Johnny N. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), pet. for review filed, No. 81-2300, D.C. Cir., December 11, 1981, in which it stated (3 FMSHRC at 2516-2517):

\* \* \* Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's

business judgment our views on "good" business



practice or on whether a particular adverse action was "just" or "wise". Cf. *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis and meets the first part of the *Pasula* affirmative defense test, then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined that miner. \* \* \*

In the bench decision I had referred to the fact that it was my opinion that complainant's sleeping in the mine on the power box carrying 7,200 volts was a sufficient reason for discharging complainant even if all the other reasons given by respondent for discharging complainant were ignored. That expression of my personal opinion was improper under the Commission's *Chacon* decision because I should have restricted my evaluation of respondent's evidence to a determination of whether respondent's reason for discharging complainant was "not plainly incredible or implausible" and whether respondent's asserted reason for the discharge was enough "to have legitimately moved that operator to have disciplined that miner".

It is clear from both complainant's and respondent's evidence that the basis for complainant's discharge arose from a heated discussion which occurred after Shepherd had criticized complainant for leaving the loading machine and B-23 shuttle car in an inoperable condition. It is undisputed that Shepherd had called the No. 11 Mine Office about 11 p.m. on April 20, 1980, (Sunday) to give specific instructions that the traction motor be installed on the loading machine, that the canopy on the loading machine be raised 3 or 4 inches, and that a clutch be installed in the B-23 shuttle car.

Shepherd had gone into the mine on the previous day (Saturday) in an effort to replace the traction motor on the loading machine. He knew how much work remained to be done on the loading machine and knew that three repairmen and one foreman (complainant) would be present on the shift beginning at 11 p.m. on Sunday to perform the repairs. Shepherd fully explained, under questioning by me, how the repairs should have been made and how the repairmen should have allocated their time for the purpose of accomplishing those repairs (6/27, Tr. 86-93; 99; 101-104). He explained, for example, in response to the repairmen's claim that they did not have the expertise to weld in a horizontal or vertical position, that they could have replaced the canopy on the loading machine, after they had cut off its legs, and could have spot welded the legs while they were on the machine. Then the canopy could have been removed for the purpose

of firmly rewelding the legs in a flat position (6/27, Tr. 93).

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Shepherd also convincingly pointed out that all three of the repairmen were not needed to install the traction motor on the loading machine and that at least one of the repairmen should have gone to the B-23 shuttle car so that work on installing the clutch could have been started immediately after the miners arrived underground at about 11:30 p.m.. If one repairman had started working on the B-23 shuttle car immediately after going underground, he would have had plenty of time during his shift to have determined that replacement of the clutch was not the cause of the shuttle car's trouble and he could have removed the pump motor, could have ordered a new one from the supply house, could have had it delivered to the No. 11 Mine during the third shift, and could have installed it before the shift ended at 6:45 a.m. (6/27, Tr. 100-103).

The repairmen agreed that the first-shift section foreman often complained about their leaving equipment in an inoperable condition (6/25, Tr. 60; 127). Although they claimed that they rarely left equipment in an inoperable condition (6/25, Tr. 27; 173), they agreed that they were often blamed for the failure of equipment to be ready to operate on the day shift (6/25, Tr. 39-41). Therefore, regardless of the fact that Shepherd could not give many specific instances, other than the failure of complainant and his men to wire a cutting machine properly (6/26, Tr. 18-19; 109; 156), when a certain type of equipment was left inoperable by complainant's crew, the evidence clearly supports Shepherd's contention that the primary reason for his discharge of complainant was the fact that complainant had left both the loading machine and the B-23 shuttle car inoperable on the morning of April 21, 1980, when Shepherd discharged complainant.

Shepherd's claim that he discharged complainant for leaving equipment in an inoperable condition is "not plainly incredible or implausible" under the rationale given by the Commission in the Chacon case, *supra*, and the discussion above shows that complainant's failure to have the equipment ready to operate would have been "enough to have legitimately moved" Shepherd to take the discharge action which he took at the time complainant reported that the loading machine and B-23 shuttle car were inoperable.

Although Shepherd testified that he discharged complainant for the six reasons which are listed in Finding No. 25, *supra*, complainant's counsel objected to my giving consideration to any of those reasons other than Shepherd's expressed dissatisfaction with the condition of the equipment. Complainant's counsel supports his contention by referring to the following statement by the Commission in Pasula (2 FMSHRC at 2800):

\* \* \* It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for

engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis in original.]

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Complainant's counsel argues that Shepherd did not discuss anything but the inoperable equipment at the time complainant was discharged and that the other five reasons given by respondent for complainant's discharge merely constitute conduct which may have irritated Shepherd but would not have caused complainant to be discharged if complainant had not allegedly engaged in the protected activity of telling Shepherd that raising the canopy as Shepherd had suggested would be unsafe. Complainant agreed that Shepherd discussed the condition of the equipment (6/24, Tr. 162), and complainant's statement that he would just quit if his work was not satisfactory (6/24, Tr. 62), support Shepherd's claim that the primary reason for complainant's discharge was the fact that complainant had left two major pieces of equipment in an inoperable condition (6/26, Tr. 30).

There is an inconsistency about complainant's argument to the effect that the Commission's Pasula decision prohibits me from considering five of the six reasons given by respondent for discharging complainant because only one of those reasons, that is, leaving equipment in an inoperable condition, was discussed by Shepherd at the time the discharge took place. The inconsistency of the argument lies in the fact that, on the one hand, complainant is contending that it is improper for me to consider any discharge reasons not raised by Shepherd on April 21, the day of the discharge, while, on the other hand, complainant is asking me to consider an alleged protected activity, that is, Shepherd's belief that complainant had called MSHA to request a special inspection, even though that particular activity was not discussed by either Shepherd or complainant on April 21, the day of the discharge.

Despite the inconsistency of arguing that complainant should be allowed to raise any claim of protected activity at any time subsequent to discharge, while respondent should be limited to only such reasons for discharge as were mentioned on the day of discharge, I have hereinbefore considered complainant's contention, that Shepherd's suspicion that complainant may have called MSHA to request a special investigation, was a contributing factor in respondent's having discharged complainant, and I have hereinbefore found that Shepherd's suspicion of complainant's having called MSHA was a contributing factor in complainant's discharge.

Even though the Commission stated in Pasula, supra, that it would not consider an unprotected activity which did not concern the employer enough to discharge an employee when the unprotected activity was originally encountered, it seems to me that I am still required to examine the unprotected activities given by respondent as reasons for the discharge in order to show that respondent's discharge reasons have not been summarily ignored as being unworthy of any consideration. Therefore, I shall hereinafter examine the reasons given by respondent for discharging complainant to determine whether those reasons would have caused complainant's discharge if complainant had not been suspected of engaging in the protected activity of calling MSHA to request a special inspection.

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As to respondent's claim that Shepherd discharged complainant for having slept on company time, and especially for having slept on the power box several times each week, the evidence shows that Shepherd made many inquiries in an effort to determine whether complainant was consistently sleeping in the mine (6/26, Tr. 15-17; 68-73; 109; 6/27, Tr. 11). Complainant conceded during his testimony that he was warned twice that he would be discharged if he were caught sleeping again (6/24, Tr. 160). All three repairmen on complainant's crew testified that complainant remained at the power box during most of the shift on April 21 (6/25, Tr. 53; 96; 188; 200), but none of the repairmen testified that complainant was asleep on the shift ending at 7 a.m. on April 21. Since Shepherd did not see complainant asleep on April 21 and did not know whether he had been sleeping on that shift, there would have been no reason for Shepherd to have discharged complainant on April 21 for sleeping during working hours. Therefore, respondent failed to prove, under the test set forth by the Commission in Pasula, that it would have discharged complainant for the unprotected activity of sleeping in the mine if complainant had not also engaged in the unprotected activity of leaving equipment in an inoperable condition.

As to Shepherd's claim that he discharged complainant for hunting for game on company time, neither Shepherd nor complainant contended that hunting had any bearing on complainant's failure to get the equipment in an operable condition. Therefore, I find that respondent failed to show that complainant's acts of checking his traps or engaging in other hunting activities actually caused complainant to be discharged on April 21.

Another reason which Shepherd gave for discharging complainant was that complainant would often tell Shepherd that equipment was operable when, in fact, it was not. On April 21, both complainant and Shepherd agree that complainant reported that the loading machine and B-23 shuttle car were inoperable. Consequently, even though complainant may have given erroneous reports about the equipment's operability on some days, on April 21 complainant did correctly report that two major pieces of equipment were inoperable, so I find that complainant's alleged incorrect reporting of equipment as operable was not shown to have contributed to complainant's discharge on April 21.

Two other reasons given by Shepherd for complainant's discharge have merit under the Pasula rationale. Shepherd testified that the maintenance foremen, including complainant, had a practice of reporting for work, or "portalling", at the supply house, rather than reporting for work at the mine where they worked (6/26, Tr. 9; 20; 130). The reason that the maintenance foremen were permitted to report for work at the supply house was that they would pick up any parts needed to repair equipment and take the parts directly to the mine where the parts could be used in the repair of equipment (6/24, Tr. 15). The record shows that complainant generally went into the mine at 1 a.m., after having first gone to the supply house, because that was the agreed time when Lewis would come out in a

rail car to provide complainant with transportation into the mine  
(6/24, Tr. 24; 6/25, Tr. 93; 103).

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Shepherd testified, without contradiction, that one morning the cutting machine was improperly wired so that Shepherd had to rewire it on the day shift with the result that commencement of production was delayed. On that occasion, Shepherd testified that he criticized complainant for failing to wire the machine properly. Shepherd said that he knew that complainant understood how to wire the machine and that its being incorrectly wired showed that complainant had not stayed with his repairmen to give them proper supervision or assist them in wiring problems in which they were inexperienced. Complainant, according to Shepherd, stated that he did not get into the mine that night until about 4 a.m., whereupon Shepherd stated that he forbade complainant to continue reporting at the supply house because complainant was using the practice of reporting to the supply house as an excuse to report underground at an unreasonably late hour (6/26, Tr. 19-20).

Complainant does not dispute that Shepherd ordered him to stop reporting for work at the supply house, but he claims that after he had reported at the No. 11 Mine Office, so as to go underground at the beginning of the shift with his crew, for about one shift, Shepherd countermanded his prior order and told complainant to resume reporting to work at the supply house because canopies had to be installed on three pieces of equipment by April 18, 1980, and that Shepherd wanted complainant to be sure he obtained the parts for installing the canopies by that date (6/24, Tr. 80; 142). Complainant also alleged that Shepherd told him that his wife was seriously ill and that Shepherd would have to be away for several days to take his wife to a hospital in Lexington, Kentucky (6/24, Tr. 97-99).

Shepherd denied that he had reversed his order about complainant's being allowed to resume reporting to work at the supply house. Shepherd denied that he had asked complainant to install the canopies by April 18. Shepherd further denied that his wife was seriously ill or that it had ever taken him more than 1 day to take her to a doctor in Lexington (6/26, Tr. 200-201; 6/27, Tr. 114).

I do not believe that it is necessary for me to make a credibility finding as to whether Shepherd did revoke his order requiring complainant to report to the No. 11 Mine, instead of to the supply house, since both complainant and Shepherd agree that Shepherd had ordered complainant to stop reporting for work at the supply house. The fact that Shepherd ordered complainant to stop reporting for work at the supply house for any period of time shows beyond any doubt that Shepherd had become upset about complainant's tardiness in getting into the mine.

The test given in the Commission's Chacon decision, *supra*, is not whether a judge or the Commission thinks a given unprotected activity is grounds for disciplinary action, but " \* \* \* whether the reason was enough to have legitimately moved that operator to have disciplined that miner" (3 FMSHRC at 2517). Shepherd did not think that complainant had given adequate reasons to justify his getting into the mine at 2:00 or 2:15 a.m.



and Shepherd believed that the equipment was left inoperable because complainant had not performed his supervisory job in a satisfactory manner (6/26, Tr. 23; 66; 136; 6/27, Tr. 93; 103).

~1687

Even if one accepts complainant's version of the facts in their entirety, Shepherd was justified in his belief that complainant's performance of his duties on April 21 was unsatisfactory. Complainant testified that on April 20, 1980, he reported to the supply house at about 10:45 p.m. and Ricky Baker, the supply clerk, agrees that complainant arrived at the supply house well before 11 p.m. when complainant's shift was scheduled to begin (6/24, Tr. 18; 261). Complainant stated that Lewis told him over the phone that Shepherd wanted the canopy on the loading machine raised 3 or 4 inches by welding pieces to the canopy's rear legs (6/24, Tr. 20).

After talking to Lewis on the phone, complainant stated that he left the supply house about 11:45 p.m. and arrived at the No. 11 Mine about 12 midnight or 12:15 a.m. (6/24, Tr. 24). Complainant testified that he then tried to call Lewis on the mine's paging system, but that he could not get anyone to answer. He stated that he did not know whether the repairmen on his crew were too far away to hear the phone or whether the phone was operable, but he said he did not check to determine whether the phone was out of order (6/24, Tr. 27). Complainant stated that he talked to another foreman, Franklin Mayhew, in the mine office until Lewis came out to get him in a rail car about 1:45 a.m. and that he finally arrived on the section where his repairmen were working about 2:00 or 2:15 a.m. (6/24, Tr. 28). Complainant also testified that the only parts needed for the repairs which Shepherd had instructed them to perform on April 21, that is, a motor for the loading machine and a clutch for the B-23 shuttle car, had already been taken to the mine on a prior shift (6/24, Tr. 30; 36). Complainant can't recall what parts, if any, he took to the mine on April 21 (6/24, Tr. 194).

Shepherd's displeasure with complainant's performance has considerable merit. Complainant did not justify his reason for remaining at the supply house from 11 p.m., when his shift began, to 11:45 p.m. before starting to the No. 11 Mine when it is realized that he did not have to obtain any parts which were needed for the work they had been instructed by Shepherd to do on April 21. Lewis testified that he and complainant had an agreement under which Lewis was supposed to come out in the rail car each morning to get complainant about 1:00 a.m. and Lewis denied that complainant tried to call underground on April 21 (6/25, Tr. 93; 116; 140). Gross testified that they were not close enough to the phone to hear it when complainant called (6/25, Tr. 197-199). Hall testified that they didn't hear any phone on April 21 and that Lewis normally knew before going underground when complainant wanted Lewis to come outside for complainant (6/25, Tr. 44). Regardless of whether complainant tried to call and couldn't get any answer, or whether the phone failed to function, Shepherd was justified in being displeased with complainant's complacency in talking to another foreman for 1-1/2 hours while complainant waited for Lewis to come out in the rail car to take complainant inside.

One of the mandatory safety standards, namely, 30 C.F.R. 75.1600-2(e), provides as follows:

Telephones or equivalent two-way communication facilities shall be maintained in good operating condition at all times. In the event of any failure in the system that results in loss of communication, repairs shall be started immediately, and the system restored to operating condition as soon as possible.

Other provisions of section 75.1600-2 provide that the communication system is not to be more than 500 feet outby the last open crosscut. Complainant testified that the phone was located underground about four or five breaks outby the face and that the breaks were on 60-foot centers (6/24, Tr. 27; 38). Therefore, the phone should have been audible to his repairmen underground at the place where they were working and, in any event, it was a violation of section 75.1600-2(e) for complainant to have gone underground, as he subsequently did, and to have worked the remainder of the night without making sure that the communication system was operable.

Complainant's repairmen and complainant himself all agree that he did not get into the mine until 2:00 or 2:15 a.m. on the morning of his discharge (6/24, Tr. 28; 6/25, Tr. 44-45; 165; 199). The repairmen and complainant also agree that when they left the mine on April 21, neither the loading machine nor the B-23 shuttle car was in operable condition (6/24, Tr. 42; 62; 6/25, Tr. 17-19; 188). Shepherd was justified in believing that complainant's failure to get the equipment repaired was, at least in part, the result of complainant's failure to get into the mine in time to start supervising his repairmen. Complainant contended that he had instructed Lewis, when they talked on the phone about 11 p.m. on April 20, not to do any work on the raising of the canopy until complainant arrived at the mine (6/24, Tr. 22). Lewis testified that complainant normally advised him, at the beginning of the shift while they were discussing the types of repairs that were to be done, what time Lewis should come out to get complainant (6/25, Tr. 93; 116; 140). If complainant did not want any work done on the canopy until he arrived at the mine to supervise that particular assignment, it is hard to understand why he would have failed to advise Lewis while they were discussing the canopy that Lewis should be certain to come out for him sooner than 1 a.m. so that they could promptly decide how to raise the canopy.

I believe that the discussion above supports a finding, and I so find, that respondent properly based its action of discharging complainant on his failure to get into the mine in time to perform his work satisfactorily. It cannot be reasonably argued that a supervisor who is confronted by the failure of a foreman to repair two major pieces of equipment would fail to be motivated in discharging him by the fact that the foreman had not managed to get into the mine to work until 2:00 or 2:15 a.m. on Monday, as compared with the repairmen on his crew who had arrived on the working section at 11:30 p.m. on Sunday.

I am still of the opinion, as I stated at the hearing, that when a supervisor discharges a person, all of the reasons for

being dissatisfied with that person's performance have a cumulative effect in the supervisor's

mind when he decides that the time has arrived for discharging the employee whose work has been growing progressively unsatisfactory. Nevertheless, to give complainant every benefit of any argument which his counsel can make under the Commission's Pasula decision, I have interpreted the Commission's decision as complainant's counsel has asked that it be interpreted, that is, I have rejected all of the reasons given by respondent for complainant's discharge, even if those reasons did show that complainant "deserved" to be discharged, and I have accepted as meritorious only those discharge reasons which involve unprotected activities which alone would have caused respondent to discharge complainant even if complainant had not been suspected of having engaged in the protected activity of requesting that MSHA make a special inspection. I still find, however, that under the Commission's holding in the Chacon case, supra, respondent has very convincingly shown that its reasons for discharging complainant are " \* \* \* not plainly incredible or implausible". The reasons found to be acceptable under the Commission's Pasula decision would have legitimately moved respondent to discharge complainant on the morning of April 21 notwithstanding the fact that respondent might also have been motivated in part by a suspicion that complainant may have been the person who requested that MSHA conduct a special inspection of respondent's mine.

Inasmuch as respondent has been shown to have satisfied the tests given by the Commission in Pasula and in Chacon, I find that complainant has failed to prove that he would have been discharged for allegedly claiming that it was unsafe to raise the height of the canopy on a loading machine by 3 or 4 inches by welding pieces to the rear legs of the canopy, or for having been suspected of calling MSHA to request a special inspection, if complainant had not left the loading machine and B-23 shuttle car inoperable and had not gone into the mine at 2:00 or 2:15 a.m. on the morning when the equipment was left inoperable.

WHEREFORE, it is ordered:

The complaint filed in Docket No. KENT 80-288-D is denied for failure of complainant to prove that he would have been discharged for an activity protected under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 if he had not engaged in other unprotected activities which, alone, would have caused his discharge.

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

AA

~FOOTNOTE\_ONE

1 Although the hearing was held in June of 1981, none of the transcript was received from the reporter until June 1, 1982, and all of the transcript was not received until September 1, 1982. My decision appears in the record as a separate volume of

transcript and bears the title "Finding of Facts and Ruling."

~FOOTNOTE\_TWO

2 There were 5 different days of hearing in this proceeding. A reporter would normally have made a separate volume of transcript for each day's hearing, but the page numbers would have run consecutively through all five volumes. The reporter in this proceeding made a separate volume of transcript for each day, but began renumbering the pages of each day of transcript with the figure "1". Therefore, it is necessary to prefix each reference to a transcript page with the date shown on the front of the volume in which that transcript page may be found. To find a reference such as "6/26, Tr. 6-7", one would find the volume having the date of June 26, 1981, on it and turn to pages 6 and 7 of that volume of transcript.

~FOOTNOTE\_THREE

3 Although the actual quitting time was 7 a.m., the miners left the underground working section at 6:45 a.m. so as to be outside the mine and ready to go home by 7 a.m.

~FOOTNOTE\_FOUR

4 Since the repairmen had finished installing a motor in the loading machine, the only defect in the loading machine was that the front canopy legs were not secured in their holders. The day-shift operator ran the loader in that condition, but the second-shift operator refused to do so (6/26, Tr. 180; 183; 6/25, Tr. 72; 76; 146).

~FOOTNOTE\_FIVE

5 I recognize that if a miner, in good faith, erroneously raises a question about safety and is discharged because he mistakenly raised a safety issue, it would be a violation of section 105(c)(1) for his employer to discharge him for raising a false question of safety if he sincerely believed the safety question was valid when he raised it. In this proceeding, however, complainant's act of sitting down at the power center for 3 hours out of sight of the work being done on the canopy shows that complainant was not really concerned about the quality of the welding being done on the canopy. Complainant's obvious indifference to the actual welding process casts a great deal of doubt on complainant's contention that he raised a safety issue about the canopy at the time he was discharged on April 21, 1980.

~FOOTNOTE\_SIX

6 The repairmen would have been using an electric welding machine which welds by fusing metal from an electrode into two pieces of metal as the electrode is passed along the crack between the two pieces of metal which are being joined. A puddle or pool of liquid metal is formed at the tip of the melting welding rod. When welding is done in a flat position, the liquid pool remains steady, but when the two pieces of metal are raised to a horizontal or vertical position, the liquid pool will run off the metal, instead of fusing into the metal, until the welder has learned to keep his welding rod sufficiently in advance of the liquid pool to allow just enough cooling to prevent the pool from running off the pieces being welded. An experienced welder

can make a thorough fusion in a horizontal or a vertical position. See, e.g., J. Giachino, and W. Weeks, *Welding Skills and Practices*, American Technical Society, Chicago, IL 60637, 1976, Chapter 4, pages 42-53.