

CCASE:

JAMES ELDRIDGE V. SUNFIRE COAL

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

JAMES ELDRIDGE,
COMPLAINANT

Complaint of Discrimination

Docket No. KENT 82-41-D

v.

SUNFIRE COAL COMPANY,
RESPONDENT

DECISION

Appearances: Tony Opegard and Stephen Sanders, Esquires, Appalachian Research and Defense Fund of Kentucky, Hazard, Kentucky, for the complainant J. L. Roark, Esquire, Hazard, Kentucky, for the respondent

Before: Judge Koutras

Statement of the Proceedings

This proceeding involves a complaint of discrimination filed pursuant to Section 105(c)(3) of the Federal Mine Safety & Health Act of 1977, after complainant received notice from the Mine Safety & Health Administration that MSHA would not take action on complainant's behalf under Section 105(c)(2) of the Act. Complainant asserts that he was discharged for engaging in activities protected under Section 105(c)(1) of the Act, namely, his refusal to continue working beyond the completion of his regular shift on August 6, 1981, due to mental and physical exhaustion. Complainant challenges the respondent's decision of August 11, 1981, to uphold and finalize his August 6 discharge for misconduct for disobeying direct orders from his immediate supervisors to stay and work beyond his normal work shift. A hearing was convened in Hazard, Kentucky, and the parties appeared and participated fully therein. The parties filed posthearing briefs and proposed findings and conclusions, and the arguments presented therein have been fully considered by me in the course of this decision.

Issues

The critical issued presented in this case is whether the complainant's refusal to work beyond his normal work shift on the day of his discharge was protected activity under the Act, and if so, whether his discharge was justified. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).
3. Commission Rules, 29 CFR 2700.1, et seq.

Stipulations

The parties stipulated that Mr. Eldridge had been employed with the respondent from May 2, 1980, until his discharge on August 6, 1981. His hourly wage rate was \$11.30, and since his discharge on August 6, employees in similar job classifications received a pay raise of fifty cents per hour, effective March 21, 1982, thereby increasing the hourly wage to \$11.80 (Tr. 4).

The parties also stipulated that for the purposes of the hearing and the record made in this case, the terms "pillar mining", "pillar retracting", "retreat mining", "pillar pulling", and "pillar recovery" are synonymous terms and may be used interchangeably (Tr. 4-5).

Testimony and evidence adduced by the complainant

James Eldridge testified that he is 26 years of age, married, has one child, and that he has been a coal miner for eight years. He confirmed that he was not presently employed, but had been employed with the respondent from May 2, 1980, until August 6, 1981, when he was fired from his job as a coal drill operator. He explained that his job as a driller entailed drilling at the coal face in preparation for coal being shot in a conventional section, and that he used a Gallis mobile coal drill. He also testified that he performed other duties besides that of a driller, and these duties included the work of a "shot firer", where he would load and shoot coal with dynamite and electric detonators. He confirmed that at the time of his discharge he was working the second shift at the No. 3 mine from 2:00 p.m. to 10:00 p.m., and that he was working the B-section at a location some 25 to 30 breaks from the mine drift mouth. He and his crew were scheduled for pillar pulling work extracting coal pillars. He explained this mining method by indicating that when they were advancing into the mine, blocks of coal were left for roof support, and when the pillars are pulled, they withdraw and take the coal blocks out (Tr. 5-12).

Mr. Eldridge stated that prior to the day of his discharge he had been engaged in pillar extraction work on the fourth row of pillars, and he believed that such retreat pillar work was more dangerous than the advance work, and this is because one must constantly be on the alert for falling roof. He indicated that on Thursday, August 6, 1981, he worked

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a full eight-hour shift performing such work as running the coal drill, shooting coal as a shot firer, helping to set timbers, helping the cutting machine operator with cable, and helping to hang ventilation curtains. He believed that retreat mining work was harder on him mentally and physically than advance mining because he must constantly be on the look out for adverse roof conditions such as timbers and roof bolts taking weight. He testified that he spent all of his eight hour shift pulling pillars, and that at the end of the shift he was too physically and mentally tired and exhausted to keep going. He did not believe he was alert enough to keep working on the night in question (Tr. 13-16).

Mr. Eldridge stated that approximately 35 minutes before the end of his normal shift he spoke with section foreman Eli Smith underground, and Mr. Smith asked him to stay and continue pulling the row of pillars that the crew was working on until they were pulled. Mr. Eldridge stated that he advised Mr. Smith that he was "too tired" to stay on the job and that Mr. Smith said nothing to him at that time. After this conversation, Mr. Eldridge began securing his equipment, and shortly before leaving the section he had a second conversation with Mr. Smith and at that time Mr. Smith advised him that the outside mine superintendent advised him (Smith) to inform the crew that they were to stay on the job finishing the row of pillars and that if anyone came out of the mine, they would no longer have a job (Tr. 21). Mr. Eldridge again informed Mr. Smith that he was too tired to stay on the job, and Mr. Smith did not at that time indicate to him (Eldridge) how long he was expected to stay and work, but simply told him that he was to stay until the pillar pulling job was completed. At that point in time, Mr. Eldridge left the mine (Tr. 22).

Mr. Eldridge stated that after he left the mine, he went to the lamphouse where he encountered Mr. Miller. At that time Mr. Miller had the paychecks and told the crew and Mr. Eldridge that he wanted them to go back into the mine and finish the pillar row, and if they didn't they would no longer have a job. Mr. Eldridge stated that he told Mr. Miller that he was too tired to stay on the job, and Mr. Miller responded that if he did not stay he was not to return to work on Monday. At that point, Mr. Eldridge went home (Tr. 23).

Mr. Eldridge stated that August 6th was a Thursday, that no work was scheduled for Friday, August 7th, since it was a "short week", and that the following Monday he spoke with mine officials Raymond Cochran and Bobby Morris for the purpose of setting up a meeting the next day to discuss the matter further. A meeting was held at the mine office, and present were Johnnie Jones, Eddie Hurley, and Joe Engle, three other miners who were fired at the same time for refusing to stay and work, and representatives of company management (Tr. 26). When Mr. Eldridge asked Mr. Morris whether he was fired, Mr. Morris answered "yes", and when asked "why", Mr. Morris replied "for not staying there and finishing that row of pillars out" (Tr. 27). When Mr. Eldridge told Mr. Morris that he was too mentally and physically exhausted

to keep on working that night, Mr. Morris still upheld the discharge (Tr. 27).

Mr. Eldridge testified that he was told by Mr. Cochran that those members of the crew who did stay to work to finish pulling the pillars stayed until approximately 3:00 a.m. (Tr. 29). Complainant's exhibit 2, which is a copy of a time card, shows that the remaining crew worked a total of 14 hours on Thursday, but counsel indicated that in fact they only worked 5 hours overtime, but were paid for six hours as a gesture of good will by the company (Tr. 32). Mr. Eldridge testified that at the time he discussed staying on the job with Mr. Smith, he (Eldridge) believed that it would take an extra shift or a shift and half to complete the job, or an extra 8 to 12 hours. He explained that 8 to ten cuts of coal had been removed during his normal work shift, and that there were 12 to 15 cuts left to be removed at the end of his normal work shift (Tr. 33). Mr. Eldridge went on to explain the mining cycle and procedures, and why he believed there were 12 to 15 cuts left, and why it would take a shift and half to finish the work (Tr. 34-36).

Mr. Eldridge explained the work that he had performed on his normal shift while he was shooting and drilling, and he indicated that he considered that he was actually doing "two jobs" (Tr. 41-45). He also indicated that he was setting timbers, and he explained that task as well as the work performed by him in pillar extraction (Tr. 45-52). He also explained the process of replacing line ventilation curtains in the event they were dislodged (Tr. 52). He also expressed an opinion that the roof top in the section "was bad", and that rock falls had occurred on the section in the past. Because of these "frequent" falls, resin bolts were being used to support the roof (Tr. 55). He also indicated that he has had "to run" from the section in the past because of bad top when he heard the roof making "noises like thunder" (Tr. 56).

Mr. Eldridge confirmed that the mine is a nonunion mine and that he has no contractual obligation to work overtime (Tr. 56). He indicated that he would have come to work the next day, on Friday, to finish pulling the pillars, if the company had asked him. Since his discharge, he has held one job for approximately six weeks with the Pygmy Coal Company located at Little Leatherwood in Perry County. Pygmy Coal is known as P.M. Coal Company, and he began working there in January 1982, as a mine foreman earning \$400 a week, until he was laid off because of the lack of coal sales. Since that time, he has actively sought employment, and he listed the names of the coal companies where he has sought employment. He attributed his failure to find work to "the way the coal business is right now. They can't sell coal" (Tr. 60-61). He also indicated that he has sought employment outside of the coal industry two or three times a week, but has been unable to find a job, and he also indicated that his family has incurred some medical and dental expenses during his period of unemployment (Tr. 62).

On cross-examination, Mr. Eldridge testified that the drilling machine which he operated on August 6, 1981, is electrically operated and that he sits on the machine in order to operate it by means of pushing and pulling levers and controls.

He confirmed that he had previously worked

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frequent overtime with the company, and that on several occasions prior to August 6, he has put in as much as close to 70 to 75 hours per week, including overtime (Tr. 65). He acknowledged that while on the job, every employee helps other employees, and that it is "pretty much a team effort" (Tr. 66). He confirmed that as of the time of the instant hearing, he was receiving unemployment benefits, but did not know from whom (Tr. 67).

Mr. Eldridge stated that prior to his discharge on August 6, he did not have a copy of the mine pillar plan (Tr. 67). When confronted with a transcript of his unemployment compensation hearing, he acknowledged that when asked the same question at that hearing he answered that he was aware of the pillar pulling plan, and that he had a sketch of it (Tr. 67). He also conceded that the intent in pulling pillars is to remove all of the coal so that the roof will fall and relieve the tension so as to preclude a danger in the roof falling further back when the pillars are removed in the future (Tr. 70). He also acknowledged that at the time he was asked to stay and finish pulling the pillars that the company "wanted to get the coal out" (Tr. 71). When asked to explain his answer, he replied as follows (Tr. 71):

JUDGE KOUTRAS: Why was that? Why do you think they wanted to get the coal out that specific night, on Thursday, August 6th.

THE WITNESS: To keep from losing the coal.

JUDGE KOUTRAS: How would they lose the coal?

THE WITNESS: If it fell.

JUDGE KOUTRAS: When would the roof fall -- the next day, and the next day, and the next day?

THE WITNESS: Yess -- whenever.

Mr. Eldridge explained the procedures for drilling holes with a drill, and he confirmed that after he was informed that he could not have a job if he did not stay to finish pulling pillars he took his equipment away from the work area and shut it down (Tr. 73). He also confirmed that he had "heard rumors" immediately before he was fired, or was under the impression, or had heard rumors, that on prior occasions when employees refused to work overtime or were told they would not have a job if they refused to work overtime, that when they came back to work the next succeeding day, they were permitted to return to work (Tr. 73). He confirmed that he did in fact attempt to return to work on the next succeeding work day by showing up at a regularly scheduled hour, but was again told that he was fired (Tr. 74).

Mr. Eldridge identified a copy of a company "Employee Handbook", and he stated that he had a copy before he was discharged. He read certain provisions from the "rules of conduct" part of the handbook

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for the record, including the "insubordination" provisions for "refusal to perform assigned work" and "intentionally restricting output". He also read the provisions concerning company policy calling for immediate discharge of the cited rules of conduct, as well as the policy concerning the payment of overtime (Tr. 76).

In response to further questions, Mr. Eldridge indicated that he went back to the mine the Monday after his discharge because he "was taking a shot at getting my job back" (Tr. 77). He conceded that he had in the past stayed and worked a full additional eight-hour shift on overtime when asked to do so by mine management, usually during advance mining, and that he has also volunteered to work overtime without being asked. He could not say why he was not scheduled to work on the Friday following his discharge, and he reiterated the work he performed pulling pillars during the shift prior to his discharge (Tr. 79-82). He also indicated that he and the section foreman had no discussion over how long it would take to complete all of the pillars, although he believed it would take a shift and a half. He confirmed that three other members of his crew were also fired for not staying over to finish the row of pillars, but he denied that the decision was not a "collective" one and that he made his own decision not to work, and he did so because he was too tired (Tr. 84). He denied having any discussions with the other three men on the crew who opted not to work, but he knows that one man, Johnnie Jones, said that he too was too tired (Tr. 84).

Mr. Eldridge testified further that he had never before refused to work overtime when requested because he was tired or mentally or physically exhausted, and that he had performed similar retreat pillar pulling work in the past on overtime when he was asked, but he then indicated that he had not previously worked more than an hour overtime after he had completed retreat mining (Tr. 85-86).

Mr. Eldridge stated that he believed he was fired for refusing to stay and finish pulling pillars, that he had never previously had any disciplinary problems at the mine, and he has no reason to believe that he was fired for reasons other than refusing to work overtime (Tr. 89-90). He confirmed that he did not complain about being tired during his normal work shift on Thursday, August 6th during 1:45 p.m. to 9:45 p.m., and that he performed his normal duties with no problems (Tr. 91). When asked whether it was true that during the 15 months of his employment, the work week which ended August 6th was the first time he had worked less than 40 hours, and whether he knew that he would not be paid time and a half if he stayed over, Mr. Eldridge replied "I don't know that" (Tr. 94).

Mr. Eldridge conceded that all mining was dangerous and strenuous, and he denied that he was contending that advance mining is perfectly safe, while retreat mining is unsafe. He also indicated that he did not refuse to work simply because pillar mining was harder work. With

regard to the shutting down of his equipment, Mr. Eldridge stated that he did nothing different on the day he was fired than what he did at other times at the end of his normal shift, and that the entire crew left the mine because Mr. Miller stated that he wanted to speak with them (Tr. 106). Mr. Eldridge stated that the fact that he would not be paid overtime had he opted to stay over and work never entered his mind at the time of his refusal to stay (Tr. 107).

Raymond Cochran, testified that he worked for the respondent from November 11, 1977 until January 1982, and that he was the general mine superintendent. He confirmed that he was aware of the fact that Mr. Eldridge was fired by the respondent for his refusal to work the evening of August 6, 1981. He stated that he had a conversation with Mr. Eddie Miller shortly before the shift ended sometime between 10:00 and 11:00 p.m., and that Mr. Miller advised him that there was a "problem" because some of the crew did not want to stay over and work (Tr. 114). Mr. Miller later informed that he had fired Mr. Eldridge and three others for refusing to work (Tr. 115). Mr. Cochran informed him that they were on a four day work week at the time of the discharge, and he also confirmed that a meeting was held the following week, at which time Mr. Eldridge advised company manager Bobby Morris that he had been too exhausted to work anymore. Mr. Cochran indicated that he took the term "tired out" to mean that Mr. Eldridge "physically wasn't able to work" and that "he didn't feel like continuing on and doing more work" (Tr. 116).

Mr. Cochran testified as to his 25 years' experience in underground mining, and he gave his views concerning pillar and advance mining. He indicated that pillar work was more dangerous than advance work because the coal is being taken out, and one must be alert for falling rock and roof. He conceded that any mining is dangerous and difficult, and that the top must also be watched during advance mining. He did not believe it was safe to require miners to work 11 and 12 hours on a pillar section. He also indicated that the mine program called for nine and ten hours of pillar work, but that he got more production in eight hours as he did in nine or ten (Tr. 121). He believed that a miner's efficiency and thinking drops if they work ten to twelve hours, and that one's physical condition is not like it ought to be and that a miner would be in danger (Tr. 122).

Mr. Cochran stated that when he worked for the company he never expected anyone to work a double shift, or to work 13 or 14 hours pulling pillars, because "its too much time. Your too wore out; you're too fatigued." (Tr. 123). Mr. Cochran confirmed that he spoke with Mr. Morris during the meeting and he asked Mr. Morris to put them back to work. He indicated that Mr. Morris told him he couldn't do it because "he would have a breakdown in his control over them or something" (Tr. 123). Mr. Morris then upheld their discharge, even though he had the authority to reinstate them.

On cross-examination, Mr. Cochran confirmed that when removing pillars, the object is to get a controlled roof fall, and that this actually improves safety conditions. He also confirmed that he taught the class on pillar pulling at the mine with the safety and engineering department. He conceded that during his instruction classes, he did teach miners to stay over and work two or three hours to pull pillars and to leave them in a safe condition for the next shift before finishing their work shift. However, he denied ever instructing miners that they should stay four or five hours beyond their normal work shift to finish pillars (Tr. 125). In response to further questions concerning his instructions with regard to staying over to pull pillars, he testified as follows (Tr. 125-127):

Q. See if this is a correct statement of what you just stated. Assuming that the second shift had cut through the pillars, and made the cuts through, and all that was remaining was to take the coal out of the sides of the three center pillars; you're saying that if they were at that point in their work, then they should stay overtime to complete the job?

A. Well, now, I'm not in there, and I don't -- that's what I got that foreman for, to make the decision on how long they stay. Okay -- and how dangerous it is. That's why I call them and talk to them. Now, if he splits those three pillars, he can go on to the house. If he turns around and splits those six other parts of the six pillars, he can go the house. But you've got a ten-foot stump, and each one of those pillars are 40 more feet holding that top in that particular area.

Q. Assuming that there's a four-day weekend coming up, after you get through the point of cutting through all the pillars, would it not be unsafe for the miners coming back four days thereafter, to go back into this same row of pillars and begin working again?

A. If he had left all of those ten-foot square stumps still in that row of pillars, to me, there is no danger. But if he had cut half of those, or more, out before the eight hours was up, then you should try to extract the rest of them in order to get a fall while we're all out and gone.

Q. Is it not true that the amount of overtime which these men actually worked would be until 3:00 o'clock in the morning, considering the fact that they were down, and had to go back outside to get replacements for the four men who were fired, and go back inside the mine, retrieve the equipment which Mr. Eldridge had shut down,

take it back to the work area -- considering those factors, is it not true that the amount of overtime actually worked for these men is pretty much normal? Wouldn't you agree that it's a reasonable amount of overtime?

A. A quarter until ten was quitting time for that section. Thirty minutes later, the next section came outside. And it was around 11:00 o'clock, I'd say, before he got his other four men off of A Section, and went back inside. And from 11:00 until 3:00 is four hours. That's half of a normal day's work.

Q. What I'm asking is, would you not agree that that amount of overtime would be pretty much normal, or routine? It's not excessive?

A. It wouldn't be too excessive if half of that was in down time. Do you understand what "im trying to say? Two or three hours -- I asked them to stay, in class, whatever it took to make it safe -- up to two or three hours. This is the way we discussed it -- all of us together. Anyway, with broken-down equipment, that really isn't too long. But all the equipment didn't break down, I don't imagine, at one time. I don't know what was down.

Q. But you are aware that there was equipment down that night?

A. Yes, sir. I understand there was something down, but I foreget what it was -- a shuttle car or a belt head drive, or something.

Q. Considering that down equipment, this was not an excessive time period, was it? And considering the other difficulties; going out of the mine; this is not an excessive period of overtime, was it?

A. No, sir.

Mr. Cochran reiterated that requiring miners to stay on beyond their normal work shift to work until 3:00 a.m., was not an excessive amount of overtime pulling pillars. In short, he did not believe working four hours beyond a normal work shift is "not too much overtime" (Tr. 129). However, doing straight pillar pulling for 13 or 14 hours without any down time would be a "problem" (Tr. 129). Mr. Cochran confirmed that he was responsible for hiring Mr. Eldridge, and that he knew him the entire 15 months he was employed there. He never had any problems with him, did not consider him to be chronic absentee, and as far as he knew, Mr. Eldridge was an experienced miner and a good worker (Tr. 132).

Mr. Cochran stated that he spoke with the section foreman, Eli Smith, who told him that he saw no need to keep the crew over to pull pillars, and that he (Smith) indicated to him that he tried to communicate this fact to second shift mine foreman Eddie Miller (Tr. 132). Mr. Cochran confirmed that he did not go to the mine when Mr. Eldridge and three crew members were fired, and he did not know whether it was necessary for the crew to stay over and finish the pillars. He left that decision to Mr. Miller (Tr. 134), and he found out a week later from Mr. Smith that he (Smith) did not think it was necessary to keep the crew over to pull pillars (Tr. 135). He explained his role in the discharge of Mr. Eldridge as follows (Tr. 134-136):

Q. So, at that point in time, you had no reason to believe that there was no necessity for the men to stay over?

A. I didn't know whether it was necessary for them to stay over or not to stay over. I had to trust his decision, because that's what --

Q. You didn't go to the mines?

A. No, sir, I didn't go to the mines.

Q. You didn't talk to Mr. Smith at that time?

A. No, sir. I talked to Mr. Smith the next Monday.

Q. In other words, Mr. Smith had told you the following week that he didn't think it was necessary for the men to stay over?

A. Yes, sir.

Q. Did he tell you that he had communicated that to the mine foreman at the time that --

A. He said he had tried to explain it to the mine foreman.

Q. And the mine foreman didn't want to hear it?

A. Well, evidently, yes. That's what he was telling me.

Q. You just accepted what the mine foreman told you when you talked to him?

A. After I talked to the mine foreman, and Bobby Morris talked to the mine foreman; then he goes inside; and when I talked to him again, the men are already dismissed. I didn't get to talk to him but once until they were already dismissed.

Q. After you learned about what had happened, did you change your position, or did you change your mind, or did you know enough about it to make any determination, as to whether the mine foreman was right or not in his judgment to keep the men over?

A. Well, he kept them over. And I have to trust his judgment too. And that's what we were paying him for. And I was in contact with him, because of the long weekend; and I wanted to make sure that if there was anything that needed to be done, do it before you come out of there. All right. Then, when I talked to him the first time, he goes back inside to talk to the guys, and convince them to stay and do whatever needed to be done. In the meantime I talked to mine management, and I talked to Bobby, and I talked with the mine foreman who was in charge of the mines, Elmer Jent; and I got hold of them again -- after he'd got back outside, he'd already dismissed the guys. And I told him then, "If you need to stay and do what you have to do, to get you four men off of A Section," in which they came out 30 minutes later.

Q. Did you have any reason to believe that his decision for the men to stay was wrong?

A. No, sir, I had no reason. So, it was do nothing but believe him.

Q. Do you have any idea why the other three men didn't want to work?

A. I don't.

Q. Did that come up at the meeting?

A. They came to the meeting. They never opened their mouth.

Q. They never said anything about why?

A. No, sir. They never said one word until after the meeting was over with. And Johnnie Jones talked to Bobby Morris, a few words, and then he left.

Q. And Mr. Eldridge was the only one at the meeting that said he was too tired to work?

A. The only one, other than Bobby Morris, that spoke, was James Eldridge.

Mr. Cochran confirmed that pillar pulling is done in accordance with an MSHA approved plan, and the plan says nothing about working hours, or the condition of the men. Further, during his tenure as mine superintendent for the respondent he never received any complaints from any miners concerning their working overtime, or that such requirements that they work overtime placed them in any jeopardy (Tr. 139). Mr. Cochran stated that while he never personally fired any employee, he would if he had to, and he explained the circumstances which would warrant a discharge. He also indicated that there are times when men are required to be kept over to finish work, but he usually tried to accommodate anyone that had an excuse for not staying by finding someone else to fill for him, but that if he couldn't find anyone else and absolutely needed someone to stay, he would fire anyone who refused to stay (Tr. 142).

Mr. Cochran confirmed that the three other miners were fired for refusing to stay and work, but he had no knowledge as to any excuses or reasons they may have had for this refusal. He also confirmed that at no time did any of the miners make any remarks that their refusal to stay was because of any safety reasons, and Mr. Eldridge simply stated that he was too physically tired and exhausted to work (Tr. 143). Mr. Cochran explained the different duties of a cutter, bolter, and shooter, and indicated that whether they all would be exhausted at the same rate would depend on their individual physical condition (Tr. 146).

Mr. Cochran stated that during his training sessions with the miners, he would tell them that should they need to stay over an hour or two to pull pillars, to do it because "it makes it better" for them when they go back in the next day. When asked whether they absolutely had to stay for five hours, he responded "that's fine. Let them stay. No problem there" (Tr. 147). However, he believed that it was dangerous to have anyone pull pillars for 16 hours because he did not "think that any man can stay 16 hours in the coal mines, and be himself" (Tr. 148). However, working 12 hours a day once a week "would be o.k." in his view, but 12 hours a day consistently would not (Tr. 149). He also indicated that each man would have to decide for himself whether this would be safe because of their different physical condition.

When asked about his knowledge of Mr. Eldridge's complaint, Mr. Cochran indicated as follows (Tr. 151-153):

Q. Do you know what Mr. Eldridge is complaining about in this case?

A. Not really. I know that he and Sunfire has a disagreement, but --

Q. They have a difference of opinion?

A. Yes, a difference of opinion. All I know is that he wasn't able to work that night. And I'm asked to come down and tell what I know about the whole

situation.

Q. If I were to tell you that Mr. Eldridge's claim in this case was that he felt that his refusal to work that night was based on his physical -- his claim that he was physically and mentally exhausted from working eight hours, pulling pillars, and that he felt that requiring him to stay might place him in jeopardy, and might place some of his fellow miners in jeopardy, because he felt that he wouldn't be alert enough to be in there, having worked a full day, and he feels that the company is unreasonable in asking him to stay -- what would be your comment on that?

A. Well, if he come to me and told me, and I was his foreman, that he wasn't able to stay, and he didn't feel like working, I'd say, "Well, we'll get you outside in a minute."

Q. What does that mean?

A. That means that I don't want him on my section if he isn't able to work, because he can't do nothing for me. I mean, if he's drilling coal for me, I want my coal drilled. I don't want him dragging around.

Q. When you said, "We'll get you outside," you didn't mean to fire him, did you?

A. No, sir. I'd send him home, and let him get himself recuperated for another day. I wouldn't fire him, no, sir. I sure wouldn't. I wouldn't have fired him, if it had been me. If he'd come to me and told me, and said, "Hey, I've had it. I don't feel like working any more. I'm bushed," I'd say, "Well, let me see if I can get somebody to replace you off of A Section."

Q. Let's say, you couldn't find anybody to replace him?

A. We could make it.

Q. You would make an exception, and as you say, "We can make it, and go on"?

A. We work short-handed pretty often.

Q. And the next day, in addition to Mr. Eldridge, two men come to you and say, "We're exhausted, and we can't work," what do you do there?

A. Well, I'd go looking into the situation; but more to find out why they get so exhausted. * * *

George Lowers, testified that he is employed as an MSHA underground mine inspector, and indicated that he had worked in the mines for 14 years, nine of which were as an underground miner. He testified as to his experience and training, which includes retreat or pillar mining, and the drafting of pillar pulling plans with mine operators and roof control specialists (Tr. 156-160). Mr. Lowers indicated that he has four mines under his inspection jurisdiction, but that the Sunfire Mine is not one of them (Tr. 162). He explained the differences between advance and retreat mining, and he indicated that during his inspection rounds in a pillar section he observes the physical and mental capabilities of the miners because they "have to be on their toes" and must be "looking after his buddy" (Tr. 165). In his opinion, since the object of retreat mining is to induce a roof fall, he believed that one needs to be more alert (Tr. 166-167).

Mr. Lowers identified a copy of the mine roof control plan which was in effect on August 6, 1981, and indicated that the plan reflects that the main roof is "a very good roof" (exhibit C-7; Tr. 169). The plan also reflects that the "immediate roof" is a combination of "shale and coal rider", and if this type of roof is left up very long, as time progresses it will deteriorate and fall out between the bolts" (Tr. 170). He also explained the differences in the use of resin roof bolts and conventional bolts (Tr. 171-173), and he also explained some of the dangers involved in retreat mining (Tr. 174).

Mr. Lowers examined sketches of the pillars which were split in the area where Mr. Eldridge and the crew were working at the time in question, and he further explained the effect of pulling pillars on the roof support (Exhibits C-8, C-9, Tr. 175-178). When asked whether he believed it is unsafe for miners to work 14 or 16 hours on a pillar section, he replied as follows (Tr. 178):

Q. In your opinion, given your experience as a coal miner, and supervisor, and an MSHA inspector, do you feel that it is safe for miners to work 14 hours or 16 hours on pillar sections?

A. Sir, the only way I can answer that is, it depends on the individual, the metabolism of each and every person. They know their own limitations. I would like to think that I know mine. I personally would not work 16 hours on a pillar section.

Q. Again, given your experience in the coal mine industry, if you're a supervisor, and a miner comes to you and says, "I'm exhausted. I'm tired. I can't continue any more," what does that mean to you?

A. He should be sent outside.

On cross-examination, Mr. Lowers stated that the longer a roof is allowed to remain standing once it is worked, the greater the danger that it will fall. When asked a hypothetical question concerning the safety of leaving a roof standing for four days after certain pillars had been cut and partially extracted, Mr. Lowers responded as follows (Tr. 181-182):

A. There's no way that I can answer that question. I've never been in that mine. I've never checked the roof. I don't know what you were anchoring in. There are too many variables there for me to answer that question correctly.

MR. ROARK: Then, Your Honor, based upon Mr. Lowers' statement, I move to strike his entire testimony as not being relevant, and not being founded upon fact, and so forth.

JUDGE KOUTRAS: First of all, he asked you a hypothetical question. Did you understand the question?

THE WITNESS: I believe his point was, is speed of the essence when you're pulling a pillar. Is it making it safe to pull it out as fast as possible, rather than go back in later.

JUDGE KOUTRAS: What's your answer to that one?

THE WITNESS: I'd say yes.

JUDGE KOUTRAS: Now, your hypothetical --

MR. ROARK: Extended further, and went to a period four days later. You're waiting, just letting it sit idle, and then four days later, someone goes back into that same row of pillars.

THE WITNESS: You would be taking more of a chance, yes, sir. The longer it sits there, the more weight that's going to be on it.

In response to further questions, Mr. Lowers stated that during his career as an inspector, he has never had a miner complain to him about fatigue. When asked whether he had ever checked a miner for fatigue, or whether one can tell that he may be fatigued by looking at him, he replied that sometimes miners "cut corners" so that they "can get out in front where he can sit down" (Tr. 185). However, he indicated that most of the mines he inspects work eight hour shifts (Tr. 186).

With regard to the roof control plan, exhibit C-7, he confirmed that it deals with advance work and does not include a pillar pulling

plan, but that such pillar plans are usually incorporated as supplemental plans (Tr. 187-188). He also confirmed that he has never seen a pillar pulling plan which contained provisions concerning miner fatigue, and he knows of no MSHA regulation covering employee fatigue or exhaustion. However, if he found a miner falling down or asleep because he was tired, he would issue an imminent danger order under section 107(a) ordering him out of the mine. He has never done this for any fatigued miner, but did do it once for a miner who was drunk (Tr. 189).

Mr. Lowers confirmed that he has no personal knowledge of the details of Mr. Eldridge's complaint, that he did not participate in the investigation of his case, was not aware that MSHA had investigated the complaint, and indicated that has never been asked by any miners to give an opinion as to whether their claims that they may be tired and do not wish to continue working are valid safety complaints (Tr. 190-191).

Billy Smith, repairman, Johnson Coal Company, testified that on August 6, 1981, he was employed at the same mine as Mr. Eldridge and they worked the same second shift that day. He indicated that he was doing repair work that day and that he worked a 12 hour shift. Before the normal shift ended, he learned from section foreman Eli Smith that the "outside boss or supervisor" had indicated that anyone who came outside after their shift would be fired. He would not have gone outside because he was expected to stay to repair a shuttle car which was down at the end of the shift. The car had a motor break-down, and it went down at approximately 9:00 p.m., but the section still operated with one other car. Once everyone got outside, Mr. Smith said that he heard Mr. Eldridge tell Eli Smith that he "was too tired to make the shift, you know ... stay late and work over" (Tr. 195). He believed that three split pillars were still left at the end of the shift, but that no side cuts had been taken out of any of them. In his opinion, with one shuttle car out of commission, it would have taken an additional time to take out the remaining coal. When he left the mine after staying over, it was his opinion that there was still 6 or 7 hours of work remaining (Tr. 196).

On cross-examination, Mr. Smith confirmed that he is Eli Smith's brother. He indicated that the shuttle car which had been down during the extra time beyond the regular shift was finally repaired at the end of the overtime shift. He confirmed that it was perfectly clear to him that Eddie Miller told Eli Smith that if the men did not stay to work they were fired, but he was never specifically asked to stay, and the reason for this was that he would have stayed anyway because he had to repair the shuttle car (Tr. 199). He also indicated that Mr. Eldridge had completed his regular work shift, and a repairman actually shut down his machine. The men that were asked to stay and work were simply told to stay "until the pillars were pulled". Those who stayed to work actually quit between 3:00 and 3:30 a.m., but he could not remember whether they were paid an additional hour overtime (Tr. 201).

Mr. Smith stated that at the end of the overtime shift on Thursday, or at 3:00 in the morning on Friday, the pillars had not been timbered

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up so that the next row could be pulled. He knows this because he observed the area the following Monday when he returned to the section. Although he saw no one in there working that Monday, he saw where the coal had been moved (Tr. 201).

Mr. Smith confirmed that at prior "pillar-pulling sessions", the men were told that if there was a danger to equipment or if it was necessary to work overtime, they would be expected to stay and finish pulling pillars. However, in his opinion it was not necessary to stay over on August 6th. He confirmed that he had worked overtime many times and was always paid overtime pay for any work over 40 hours, but at the time in question the men would have been paid straight time because they had not put in 40 hours (Tr. 203). As far as he knew, the men who opted not to stay did not get together and decide this as a group (Tr. 204). He explained his reasons for staying overtime as follows (Tr. 205-206):

Q. So, you put in twelve, twelve and a half hours, working that day?

A. That's right.

Q. How did you feel about that?

A. Well, I was tired, if that's what you're saying -- pretty tired.

Q. Why didn't you ask to leave at the end of your regular shift, and why did you stay?

A. Well, see, there's a difference. A repairman -- if something breaks down, you have to stay. I mean, this is something he does when he takes his job. If something is broke down, he's got to stay and repair it before the next shift comes in, because if he doesn't, those men are going to be knocked out of there too. So, he's got to be there, and see that it's fixed, so the next crew can work.

Q. Have you ever had occasion to refuse to stay to work on equipment?

A. Ever had an occasion?

Q. Have you ever done it?

A. No, I haven't.

Q. And whenever you're asked, you stay?

A. If it's relating to my job, yes.

Q. How do you explain the fact that Mr. Eldridge decided not to stay because he was tired?

A. Well, to begin with, mining is a strenuous job; and every job is not the same. Mr. Eldridge, here, was running the drill, shooting, and helping timber and things -- and I can see his point, myself. I mean, he was tired. And pillar work is dangerous to begin with. All mining is dangerous. When you work eight hours, you're tired. It doesn't matter what you do, you're still tired. But there are jobs that are more strenuous than others.

Q. When you perform your maintenance work underground, where do you do your maintenance work?

A. Usually wherever it breaks down.

Q. You just go wherever the machine is. Is that it?

A. That's right.

John Jones, testified that he is an unemployed coal miner, and that on August 6, 1981, he was employed with Mr. Eldridge at the mine in question, and worked the same shift with him as a cutting machine operator. The shift started at approximately 1:45 p.m. and was scheduled to end at 9:45 p.m., and the crew was working a conventional pillar section. He stated that pillar work entailed "more extra work" than advance work, and that this included the setting of breaker posts and timbers. He identified exhibit C-5 as a sketch of where the timbers would be set on the section on the evening in question, and he indicated that the setting of timbers was a continuous job during the eight hour shift (Tr. 210). He confirmed that pillar pulling makes the roof weaker and rib rolls are encountered, and that is the reason for installing timbers and posts.

Mr. Jones stated that he heard Eli Smith tell Mr. Eldridge that "Eddie wants to stay and get all this coal out" and that Mr. Eldridge told Mr. Smith "Well, I'm too tired". Mr. Smith did not specify the amount of time that he wanted Mr. Eldridge to work overtime, and Mr. Jones believed it would have taken eight to twelve hours to take out the coal (Tr. 212).

Mr. Jones stated that after the men came out of the mine on Thursday at the end of the regular shift, they met Eddie Miller in the lamphouse. He had the crew's paychecks with him, laid them down, and stated to the men "whoever gets checks, the company don't need anymore". Mr. Eldridge told Mr. Miller he was too tired to work anymore and picked his check up.

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When Mr. Jones asked whether "this was for everybody", Mr. Miller replied that it was, and Mr. Jones told Mr. Miller "I'll take my chances. Give me my check, too", and then he, Mr. Eldridge, and two other miners went home (Tr. 212). Mr. Jones indicated that he returned to the mine the following Monday for his regular work tour, and that Mr. Eldridge was there. They were told to report to the mine office, but since Mr. Morris had gone, they were asked to return the following Tuesday. When they returned, Mr. Morris told them they were fired and Mr. Eldridge told Mr. Morris that he was "too tired to work any more" (Tr. 214).

Mr. Jones testified that at the end of the regular shift on August 6, he had worked cutting the coal and that all five coal pillars had been punched through, that the coal from the number 1 and number 2 pillars had been cut, loaded out, and cleaned up, but that the three remaining pillars still had the last cut of loose coal which had been shot down still lying on the ground, and it had not been loaded out. No side cuts had been made. He confirmed that the mine top is a "pretty good top", but that the B section where they were working did have some rock falls which occurred "right often" (Tr. 216). Mr. Jones stated further that he did not know he would be fired for not working overtime until he got outside and picked up his check (Tr. 216).

On cross-examination, Mr. Jones identified the pillar pulling plan, exhibit R-2, explained the work that he had performed in cutting the pillars and the fenders, and he indicated that during his shift he took out nine or ten cuts of coal. Although the plan calls for five cuts to split a pillar, he split them with four cuts. He also indicated that at the end of his shift, including the cutting of side fenders, it is possible that he had taken 12 to 14 cuts, plus three cuts which were on the ground to be picked up (Tr. 219-226, exhibits C-9 through C-11). In his opinion, he thought it would have taken an additional shift or a shift and a half to take out all of the coal that remained at the end of his normal shift (Tr. 230).

Mr. Jones confirmed that he had put in 32 hours through Thursday, August 6, and he stated that he did not stay to work because "I got hold of one of the timbers, and it wasn't taking no weight. There wasn't no weight on it. I didn't see any reason for them asking us to stay there and work". In short, he saw no reason why the work couldn't stay until the following Monday, and he explained further at Tr. 232:

Q. But somebody from mine management; the mine superintendent or somebody, Mr. Miller, made a different evaluation?

A. Well, sir, somebody stayed there and worked until 3:00 o'clock the next morning, and they got five cuts of coal. And I don't know whether they ever got the rest of the coal or not.

Q. Why was it that you didn't stay? Was it because you felt that it wasn't necessary, or you didn't feel like it, or you weren't feeling good, or you felt you'd have to be there too long, or -- I'm trying to understand your reason for not wanting to stay.

A. Well, it was the end of my shift, and there wasn't no danger, I thought, of the top falling in. They wouldn't have lost the coal. And I didn't figure there was any reason to ask us to stay there and work, after we'd done had our shift in.

Respondent's testimony and evidence

Eddie Ray Miller, respondent's mine foreman at its No. 3 Mine, confirmed that he was in charge of the B Section at the time of Mr. Eldridge's discharge. Mr. Miller indicated that he has seven years of mining experience, and has worked as a roof bolter, driller, shuttle car, scoop, and miner operator, and has worked in pillar extraction as both a miner and supervisor. He is a certified mine foreman, and he confirmed that he was at the mine on August 6, 1981, and that at approximately between 7:00 and 7:30 p.m., he spoke with section foreman Eli Smith and Johnny Jones. Mr. Miller indicated that he and Mr. Smith were looking at the pillars, and Mr. Miller remarked "it looks like you're going to need to work overtime", and Mr. Smith replied "I guess we are" (Tr. 316). Mr. Jones was present at that time, and Mr. Miller indicated that they both knew they were to work overtime, and Mr. Smith did not disagree with him (Tr. 317). Mr. Miller then left the underground mine and was called later by Mr. Smith over the mine telephone and he informed him that some of the men were not going to work. Mr. Miller stated that he told Mr. Smith "if they didn't stay and help out, we might not need them anymore" (Tr. 318). Since it was the end of the shift and Mr. Smith informed him that some of the men were coming out of the mine, Mr. Miller instructed him to take the entire crew outside (Tr. 318).

Mr. Miller stated that when the B section crew came out of the mine, he met with them in the lamphouse. He had their paychecks with him, and he informed them that "the ones that take their checks, we won't need them anymore". Mr. Eldridge, Johnny Jones, Joe Engle, and Ed Hurley took their checks and left. There was no discussion at that time about why the men did not want to work overtime, and Mr. Miller stated that if Mr. Eldridge said anything to him about why he did not want to work overtime, he did not hear it (Tr. 319). However, Mr. Jones was cussing and using foul language, and he commented that "the company sucks". Mr. Engle made the comment "Eddie Miller, you'll be sorry for this". Mr. Miller also indicated that "they were hollering as they got in the car", and when asked whether he believed they were acting as a group, he responded "They rode together, and they just stayed together, and just hung together, I guess" (Tr. 320).

Mr. Miller testified that at the time he asked the men to work overtime he believed that it would be necessary to stay about three hours, and the crew who stayed finished working at 3:00 a.m. He confirmed that he paid them an hour and a half extra time as a bonus, and that this was company policy. He confirmed that he fired the four men, including Mr. Eldridge, because of their refusal to work (Tr. 322), and when asked why he believed it was necessary for the men to stay and work overtime, he responded as follows (Tr. 322-323):

A. Because, if we had left the pillars, it would have been unsafe to go back the following work day. Plus, you would have lost the coal, and maybe -- I couldn't say how much coal could have possibly been lost. And it would have been unsafe to go back in the same row of pillars, definitely.

Q. Why do you feel it would have been unsafe?

A. Because the pillars had already been cut through, and one cut out to the side, and it would just have been unsafe. The top couldn't have stood, I don't think, the following weekend and then went back in the pillar row; the same one.

Mr. Miller confirmed that a three day weekend was coming up, and he stated that at the end of the overtime shift, all of the coal except for one cut was taken out and "we had it all timbered off and ready to go" (Tr. 323). He indicated that breaker posts were installed in between the next row of back pillars, and he marked the areas where breaker posts were installed at the end of the overtime shift by marking four "X" marks on complainant's exhibit C-1 (Tr. 324-327). Mr. Miller stated that he estimated it would take three hours of overtime to finish the pillars because it takes 20 minutes to clean a cut of coal, and by looking at the pillars he estimated that there were seven cuts of coal left to clean up the row of pillars (Tr. 328).

On cross-examination, Mr. Miller stated that after his conversation underground with Mr. Smith, he left the mine approximately 45 minutes before the crew came out. Although Mr. Jones was there, Mr. Miller confirmed that he did not speak directly with him and did not personally tell him that the crew would have to stay overtime. He could not remember whether he spoke to anyone other than Mr. Smith when he was underground (Tr. 331). Mr. Miller conceded that during his previous testimony during a hearing regarding Mr. Jones' unemployment compensation claim, he (Miller) testified that he had spoken with Mr. Jones underground and told him of the need to work overtime (Tr. 334). Mr. Miller also conceded that it is easier and faster to take out pillar fenders and slabs, but he denied he wanted the men to stay so that he "would look good" for taking out as much coal as he could that night (Tr. 336). He confirmed that he paid the crew for six hours, but that they actually worked five, and the extra hour was a bonus. He also indicated that he did not tell the crew he was paying them an extra hour, and they were not aware of

it that night. He later said

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he paid them an hour and a half extra and Mr. Smith would keep the time (Tr. 340-341). Mr. Smith turned in a total of 14 hours for each man who stayed over, eight hours for their normal work shift, plus an additional five hours of actual overtime (Tr. 341).

Mr. Miller testified as to how the pillars were cut through and the need for staying over and taking out the coal. He confirmed that the cutting machine operator had gotten off center with the cuts, and he explained how pillars are pulled, and he indicated that each time a cut of coal is taken out the pillars take more weight and mining becomes more hazardous (Tr. 341-348).

Mr. Miller confirmed that at the end of the normal work shift for the crew he knew that Mr. Eldridge had been on the job for one full shift. He did not consider drilling and shooting to be the work of "two jobs", and considered them to be one job. He confirmed that a shot firer had to haul the explosives buggy back and forth and that it was normally loaded with 75 pounds of explosives. However, he confirmed that the buggy was on wheels. With regard to the setting of timbers, he confirmed that there are an "abundance" of timber posts used on a pillar section, and he conceded that many times extra timbers are set to insure that the roof is supported adequately (Tr. 352). He confirmed that "a lot of timbers" were installed on the section and that they are continuously knocked or jarred down by equipment while mining is in progress. It is the responsibility of the shot man or driller working at the face to make sure the posts are set back up once they are knocked down (Tr. 355).

Mr. Miller stated that he did not believe that Mr. Eldridge was tired at the end of his normal work shift, because he had no way of knowing. Even though he was not present during the actual work shift, he did not believe that Mr. Eldridge could have shot and drilled more than five or six cuts of coal in his eight hour shift, and eight cuts would have been the most that was cut and loaded (Tr. 357). He also indicated that there was a lot of down time during the shift (Tr. 357). When asked what he would do if a miner tells him he is too tired to go on after his normal shift, Mr. Miller responded as follows (Tr. 358-359):

Q. And he's doing pillar work which is more dangerous than advance work. He comes up to you and he says, -- or you come up to him and you say, "I want you to work another shift on this pillar section." And he says, "I'm too tired, I can't do it." What would you do with that man?

A. I'd work something out. If he had told me that I would have worked something out so he could leave and go home and rest.

Q. Why.

A. If he tells me that he's absolutely too tired to stay on and work, then he would just be accident prone,

I guess.

Q. It would be too dangerous for him to go back in, wouldn't it?

A. Yes, it would.

Q. I want to clarify one other point on your direct examination with Mr. Roark. It's your testimony that in the lighthouse that night you explained to Mr. Eldridge, Mr. Jones, the other men who were there why it was necessary for them to stay and get finish getting that row of pillars?

A. Yes.

Q. What exactly did you tell them?

A. I don't remember the exact words.

Q. I don't mean the exact words, but what, essentially, did you tell them?

A. That we needed to stay and finish these pillars, because if we don't they might get the roof to swimming and then we'd lose the coal that's there, and maybe more. And then if the day shift came in and tried to go on where we'd left, it would be dangerous for them. We know we need to stay and try to get it.

In response to further questions, Mr. Miller stated that when he met with the crew after they came out of the mine, he explained to them that they would not have to work more than two or three hours, but that there was some down time. He and Mr. Eldridge had no conversation at that time, and Mr. Eldridge said nothing about why he did not choose to stay and work overtime. Further, none of the other men said anything either (Tr. 362). Mr. Miller confirmed that he went back to the section the following Monday, but that at no time after the discharge did he ever meet with any of the men who were fired (Tr. 363). Once they picked up their checks "that was the end of it" as far as he was concerned (Tr. 363).

Roger D. Miller confirmed that he was working in the underground B-Section of August 6, 1981, at the tailpiece. He stated that he first learned that the crew would have to stay over about 20 minutes before the end of the shift, and he learned it when foreman Eddie Miller called in on the telephone. Roger Miller indicated that he passed the information to the car driver and asked him to inform Eli Smith that the crew had to stay in and finish the row of pillars. Shortly after this, the crew was called out of the mine and they assembled in the lighthouse. Mr. Miller informed the men that they had to stay over and work and that anyone who picked up their check and left were no longer needed (Tr. 374). Roger Miller recalled someone say "you're chicken", but he could not recall who said it. Since he wanted to keep his job, he decided to stay and work overtime (Tr. 376).

Mr. Miller stated that the mine conditions on the B-section during both the regular and overtime shift on August 6, 1981, were "normal" (Tr. 377). Mr. Miller confirmed that he was present at a company meeting when the pillar plan was discussed with the crew, and they were told that they would be expected to work additional hours if the pillars had not been completed at the end of the regular work shift (Tr. 378-379). He believed that Mr. Raymond Cochran made the statement that "if you got them started, and you take off and leave them without being finished, you've got a whole lot of coal right there that you've lost" (Tr. 379). Mr. Miller indicated that it was his opinion that at the end of the regular shift on August 6, that it would take 3 or 4 hours to finish the pillar (Tr. 379). Mr. Miller confirmed that the overtime shift finished at 3:00 o'clock, and he indicated that he stayed because there was work to do and he stated that "I felt I was lucky to get to go back and keep my job" (Tr. 384). He could not recall whether he was paid straight time, nor could he recall whether he had already put in 40 hours (Tr. 384).

Lester Caldwell, testified that on August 6, 1981, he was employed by the respondent on the B-section day shift and did not work with Mr. Eldridge on the night shift. He confirmed that he was working on the section on Monday, August 10, 1981, during the day shift, and that the row of pillars previously worked by Mr. Eldridge's shift had been timbered off. He explained "timbered off" by stating that "they'd already pulled out of it; pulled out of that row of pillars and set up on another set", and that breaker posts were set (Tr. 386). He confirmed that equipment could not be taken back into the area previously worked because it was blocked off by the breaker posts, and during his shift on Monday, he saw no one go beyond the row of breaker posts (Tr. 387).

On cross-examination, Mr. Caldwell stated that when he went back to the section on Monday, August 10, he was working on a different row of timbers than that worked on by Mr. Eldridge's crew the previous Thursday evening, and that the row of pillars worked on by Mr. Eldridge's crew was still standing on Monday and had not caved in (Tr. 387).

Charles Cody testified that on August 6, 1981, he worked the second shift A-section of the mine but was called to the B-section and asked to stay and work overtime. He believes that he operated a loader, and before the work began he estimated that he would have to stay and work four or five hours (Tr. 389). At the end of the overtime, except for a cut that could not be taken, all of the pillar row was gone and the breaker posts were set before they left the section (Tr. 390). The section looked "about normal for a pillar section" when he was there working on overtime (Tr. 391).

On cross-examination, Mr. Cody confirmed that a week or so before August 6th he was working on a different pillar row and he indicated that mine conditions do change quickly once cuts are taken (Tr. 392). He also confirmed that the roof top on the B-Section had a "four foot rash all the

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way back" and that the top was "pretty unsteady" because supports are being taken out (Tr. 393). He also confirmed that the roof "thunders and roars" during pillar work, that he has run and backed up to observed the top when this occurs (Tr. 394). When asked whether he would stay and work if he were tired, Mr. Cody responded as follows (Tr. 394-395):

Q. Now, if you're working on a pillar section and you were dead tired, and you didn't feel you were alert, you wouldn't want to be on that pillar section, would you?

A. If I was too tired I don't think I would want to be on it.

Q. I suppose it wouldn't be safe. Right?

A. Well, I've worked on them tired, but that was my shift.

Q. What I mean is, if you were too tired to work it wouldn't be safe for you to be working on a pillar section, would it?

A. I don't know, because it would depend on how alert your mind is.

Q. It depends on what?

A. If your mind is alert and your body is tired you'd be safe as long as you listened to your mind.

Q. What I'm trying to say to you is, if you're on the pillar section and your mind's not alert, you're not mentally alert, it wouldn't be safe to be there would it?

A. No.

And, at (Tr. 398-399):

JUDGE KOUTRAS: How did you feel after your first eight hour shift, in terms of your physical condition?

THE WITNESS: I was in pretty good shape. About normal for a regular shift. I wasn't too awful fited.

JUDGE KOUTRAS: Let's assume that you were tired, kind of exhausted. Would you have stayed?

THE WITNESS: Probably.

JUDGE KOUTRAS: Why would you have stayed?

THE WITNESS: Well, if I was plumb give out, till I didn't think I could handle the shift, I wouldn't have stayed. But if I was just tired, kind of exhausted, and I thought I could still make the shift, I would have stayed.

JUDGE KOUTRAS: Have you ever been in such a state that you -- have you ever decided not to stay, or to leave work?

THE WITNESS: Yes, a few times.

JUDGE KOUTRAS: Because you've been tired?

THE WITNESS: Sometimes I was too tired, yes.

JUDGE KOUTRAS: Do you recall whether on any of those occasions anyone said anything to you about not staying, or what?

THE WITNESS: No. I never have -- I've always stayed if they said they needed us to do something.

JUDGE KOUTRAS: You've never refused to stay?

THE WITNESS: No, usually you've got a choice if you want to stay or not. But if they said, you have to stay, yes, I'd stay.

Rebuttal testimony

Mr. Eldridge was recalled the second day of the hearing and he testified that when he told Mr. Eddie Miller that he was too tired to stay and work overtime he (Eldridge) did not feel that it would be safe for him to continue working until the pillar row was pulled because he did not believe he was alert enough and was too exhausted from his work on the first shift (Tr. 304). Mr. Eldridge also indicated that he rode to work alone and did not car pool with the other men who were fired (Tr. 403). He also confirmed that Eddie Miller did not tell the crew that it would take three or four hours to finish the pillars, nor did he explain why it was necessary to stay and finish them (Tr. 403).

Mr. Eldridge testified that he worked constantly during his shift on August 6, and that the only thing down was a shuttle car at the end of he shift (Tr. 404). He also testified how pillars are normally pulled in the section (Tr. 411-416). At one point in his testimony he stated that the respondent was not following its approved pillar plan (Tr. 416), and at another point stated that during the normal work shift they were following the plan and were in compliance (Tr. 417, 420-421).

P. J. Roberts, respondent's personnel manager and safety director identified exhibit R-1 as an employee's handbook issued to all employees, and he confirmed that the grievance procedures contained therein have never been used because no grievances have ever been filed (Tr. 435). There have been no discharges, although there have been some voluntary "quits", and three days suspensions. Mr. Roberts does not consider Mr. Eldridge's discharge to be harsh, and he confirmed that he was discharged strictly for refusing to work on August 6, 1981 (Tr. 438), and Mr. Eldridge had never been disciplined by the company in the past (Tr. 439).

Johnny Jones, confirmed that Mr. Eldridge drove his own car to work. He reiterated that Eddie Miller said nothing about how long the crew would have to work overtime, nor did he explain why the work was required. Mr. Jones could recall no significant down time during the shift that was worked on August 6th (Tr. 422-444). Mr. Jones confirmed that he made the statement "company sucks", but indicated that he said it while in his car and before driving off, and he was not sure whether anyone heard him (Tr. 455).

Complainant's Arguments

In his post-hearing brief, complainant asserts that mine management was informed on four occasions prior to his discharge that he was too tired or exhausted to continue working until the row of pillars in question were pulled, and that the respondent has presented no testimony or evidence to contradict this fact. Citing MSHA ex rel. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982), the complainant argues that his statements to mine management that he was "too tired" or "too exhausted" to continue working were sufficiently clear under the circumstances to constitute a safety complaint. Although conceding that he did not claim that he told management that it would be "unsafe" for him to continue working, complainant nonetheless maintains that mine management recognizes that when a miner states that he is too exhausted to continue working, it is not safe for him to do so, and in support of this argument complainant cites the testimony of respondent's former general superintendent and safety director Raymond Cochran who testified that if a miner came to him and told him he was too exhausted to work an extra shift or extra work he would seek a replacement for him and send him home. Complainant also cites some testimony from MSHA Inspector George Lowers who indicated that a miner who tells his supervisor that "I'm exhausted. I'm tired. I can't continue anymore" should be sent outside. Finally, complainant maintains that the most convincing testimony that a miner who says he is too tired to continue working has articulated a safety concern is the testimony of Mr. Eddie Miller, the man who fired him. Citing Mr. Miller's testimony that he (Miller) "would've worked something out so he could leave and go home and rest", complainant concludes that the respondent has no grounds for arguing that his complaints did not alert management to his safety concerns.

Complainant argues that his refusal to continue working until the pillar row was pulled was made in a good faith concern for his safety. Citing MSHA ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803

(1981), complainant concludes that the evidentiary burden to prove the absence of good faith is on the mine operator. In this regard, complainant notes that while respondent's Answer in this case did not allege bad faith on his part, at the hearing the respondent contended that the real reason that he refused to continue working was because he had not accumulated 40 hours of work that particular week and, thus, he would not have been paid time-and-one-half (the overtime rate) for the additional work he was ordered to perform that night. Complainant also points to the statement made by respondent's counsel at the hearing that the theory of its case is that the complainant's claim of exhaustion was a sham (Tr. 94-96).

In support of his arguments that the respondent's proof of bad faith or that his refusal to work was a "sham" went no further than the mere raising of this theory, complainant points to the fact that after he answered on cross-examination that he did not know whether the week of his discharge was the only week during his 15 months employment that he had worked less than 40 hours, and thus would not have been paid time-and-one-half for the additional hours, respondent made absolutely no efforts to prove that was, indeed, the case. Complainant asserts that respondent called no other witnesses regarding this issue, nor did it introduce into evidence the Company time records to attempt to prove its allegation. Under the circumstances, complainant concludes that respondent's attempt to establish bad faith on his part by mere assertion alone must be rejected.

Moreover, complainant asserts that an examination of the applicable employee handbook (Respondent's Exhibit #1) and the testimony of Sunfire's personnel manager, P. J. Roberts, establish that respondent's theory is facially without merit. Respondent's employee handbook on page 5, under the section entitled "Work Days and Work Week", states that "the work week commences at 12:01 A.M. on Thursday". Further, Mr. Roberts admitted on re-direct examination that that section of the handbook is accurate and likewise was applicable at the time of the discharge (Tr. 440-441). Thus, complainant argues that since he was discharged at the end of his regular Thursday shift (Tr. 24, 115), and respondent's work week began on Thursday, he was discharged on the first day of his pay period, not the last day as respondent contends. Had he worked 8-12 additional hours on the night of his discharge, as he believed he would have to do, complainant would have accumulated 16-20 hours on the first day of his pay period. Thus, complainant concludes that this does not indicate that he knew he would not have worked less than 40 hours during that pay period.

Complainant argues further that respondent's proof was similarly deficient with regard to its theory that he was not exhausted at the end of his August 6th shift in that the most that the respondent was established was that complainant's mobile drill was operated by manual levers. Complainant points out that the respondent did not cross-examine him regarding his additional job as a shot firer on the section, nor did respondent attempt to dispute the testimony of the several witnesses who stated that

retreat mining is more physically strenuous than advance

mining, more hazardous than advance mining, and more mentally exhausting. Respondent likewise asked him no questions regarding his other duties on August 6th - setting timbers, hanging brattice curtains, and assisting with the cutting machine cable, and called not a single witness to testify that he had not worked continuously that night as he claimed, and it did not question Bill Smith's testimony that Eldridge was, indeed, tired. Complainant cites the testimony of Eddie Miller conceding that he "might have been tired" (Tr. 358), and admitting that he did not personally observe the amount of work that he did on the section on the night in question (Tr. 356). Finally, complainant argues that the respondent did not challenge the testimony of the complainant and Mr. Jones that had the crew continued to work beyond the completion of its regular shift, it would have been cross-cutting pillar fenders (Tr. 215, 414), which complainant and MSHA Inspector Lowers testified is the most hazardous aspect of pillar-pulling (Tr. 175, 304).

In summary, the complainant contends that the respondent has provided no evidence that he acted in bad faith in refusing to work. Citing other Commission decisions where the Judge found bad faith on the part of a miner in connection with other discrimination complaints, complainant points out that in those cases concrete evidence was introduced to substantiate the bad faith allegations. As an example, complainant cites MSHA ex rel. Griffin v. Peabody Coal Co., 4 FMSHRC 204 (1982), where the complainant alleged that he had been discharged for his refusal to turn on the section power unit as ordered by the section foreman because of his belief that excessive dust made the chore unsafe. Contrary evidence was introduced that the complainant, upon receiving the assignment, had passed a remark indicating that he intended to disrupt activities on the section. Evidence was also introduced that after the complainant had received a notice of a 5-day suspension with intent to discharge, he had admitted his wrongdoing and convinced mine management to reduce his penalty to a 3-day suspension. Complainant states that in ruling for the company, the Judge credited the evidence introduced by the company and found that the complainant deliberately attempted to disrupt the section in the hope of obtaining some time off and that his contention regarding a dusty atmosphere was used as a pretext.

A second example cited by the complainant is the case of MSHA ex rel. Bryant v. Clinchfield Coal Co., 4 FMSHRC 1379 (1982), a case in which the complainant alleged that he had been discharged for refusing to set safety jacks due to a weakened physical condition brought on by a stomach and respiratory ailment. The company countered that the complainant's work refusal was an attempt to shirk a distasteful work assignment and that the miner's allegation of physical sickness was pretextual. Substantial testimonial evidence was introduced regarding co-workers observations of the complainant immediately prior to his work refusal, and statements made by the complainant regarding his alleged illness. Evidence was also introduced showing that a stormy relationship had existed between the complainant and the company prior to the discharge, and while the

case also involved other issues, the Judge found for the company, in part, because he believed the complainant was faking or, at least, exaggerating his claim of illness and that the actual reason for his work refusal was his resentment of the operator's assignment of an onerous task.

Complainant notes that in Bryant, supra, while the miner admitted that he didn't like setting jacks, and in fact, had a general fear of the job, in the instant case the respondent did not allege that the complainant's refusal to stay over and work was based on his dislike of pillar work, but simply maintained that he did not want to continue working because of the straight time pay rate. Further, complainant points out that while he did state that pillar work is more strenuous, he never stated, nor was it established by any testimony, that he specifically disliked pillar pulling, and when asked if his work refusal was because pillar work was hard, he responded "no" (Tr. 87, 105).

Complainant contends that the record in this case strongly supports the proposition that his work refusal was made in good faith. He points to his testimony, as well as the agreement by the respondent, that he had never before been disciplined or warned or encountered any problems whatsoever with management during his 15 months employment (Tr. 88, 90, 438-439). He also cites the testimony of Raymond Cochran, who hired him and was respondent's superintendent during his entire employment, stating that he was both an experienced and a good worker (Tr. 131-132). In addition, complainant asserts that it is not disputed that he had frequently worked overtime before his discharge (Tr. 65), had volunteered to work overtime before his discharge (Tr. 65), had volunteered to work overtime (Tr. 79), and had never before refused to work overtime (Tr. 88). Complainant concludes that these are not the characteristics of a miner who shirks his duties and attempts to deceive management. He also states that it is undisputed (and the payroll record Exhibit #2 confirms) that he worked an additional hour after the completion of his regular shift earlier during the week of his discharge, and that he explained at hearing that the crew had stayed beyond their normal work hours in order to take the final cross-cuts out of the last (or number 5) pillar in a row (Tr. 85). Absent proof to the contrary, complainant argues that this tends to indicate that he was a conscientious worker. He also notes that if I accept the respondent's assertion that Thursday was the last day of the pay period, this would establish that he had been paid straight time for the extra hour he worked two days before and would contradict the assertion that he refused to work the additional work on Thursday because it would have been the first time he would not have been compensated for extra work at the overtime rate.

In light of the respondent's allegations of bad faith, the complainant poses the question as to why superintendent Cochran did not question his good faith when he stated at the August 11th meeting that he had been too exhausted to continue working on August 6th. Complainant cites my inquiry of Mr. Cochran from the bench during the hearing if he knew what the complainant was complaining about in this case, and Mr. Cochran's response "All I know is he wasn't able to work that night" (Tr. 151). Complainant also cites Mr. Cochran's further statement that he would not have fired the complainant if it had been his decision to make (Tr. 152), and complainant concludes that it is highly unlikely that a mine superintendent who was second in command at

the mine would oppose the discharge of a miner for refusing to work if he suspected the miner's reasons for the work refusal were fraudulent.

Complainant goes on to argue in his brief that his refusal to continue working until the pillar row in question was pulled due to his fear for his safety was a reasonable one under the circumstances he was confronted with on August 6, 1981, when he refused to continue working. In support of this conclusion he cites the fact that he has established that retreat mining is more hazardous than advance mining, and that had he continued to work beyond the completion of his regular shift, he would have been cross-cutting the pillar fenders, which is the most hazardous aspect of pillar mining. He also cited the record testimony to support his conclusion that he was already exhausted at the completion of his regular work shift, and the lack of any evidence by the respondent to support its claim that his claim of exhaustion was made in bad faith.

Complainant argues that another important consideration in determining whether his refusal to continue working was reasonable is the exact nature of the order given him by respondent's management. Complainant maintains that the record convincingly shows that he was not told to continue working for a specific amount of time, but rather, was ordered to continue working until the row of pillars was pulled or face the loss of his job. Complainant asserts that implicit in this order was that he was being required to continue working no matter how long it took the crew to complete the job, and that this resulted in his having to determine for himself how much additional work remained to be done and how long that work would take. Discounting Mr. Miller's claim that he told the crew in the lamphouse that the extra work "shouldn't take us over two or three hours", complainant points to other testimony, including certain alleged contradictory statements by Mr. Miller, to support the conclusion that the crew was never specifically told how long they were expected to remain to work. Even assuming *arguendo* that Mr. Miller did make the statement that he believed the extra work would only take two or three hours, complainant asserts that this was an expression of Mr. Miller's opinion and it did not change the work order, nor did it change the fact that the miners on the section did not agree that the work could be completed in that amount of time.

Complainant maintains that the reasonableness of his belief regarding how long it would take to finish pulling the pillar row is supported by the fact that two of his co-workers on the section likewise felt, at the time the order to continue working was given, that the additional work would require another shift to complete. The complainant and Mr. Jones were the miners in the best position to determine how much coal remained to be mined and how long the work would take, as they were directly responsible for cutting, drilling and shooting the coal face. Recognizing the respondent's attempts to establish through the testimony of Mr. Miller that it was unreasonable for the complainant to believe the extra work would have taken more than a couple of hours, the complainant cites the testimony reflecting disagreement as to how many of the remaining fenders would have been cross-cut in completing the pillar-pulling process, but emphasis the fact that the complainant's belief that the

additional work to be done would have taken another shift was based on the amount of coal

remaining at the end of the regular shift, and was also based on the practices respondent regularly used in extracting the coal. Because the two additional fenders were regularly cross-cut, complainant maintains that it was reasonable for him to assume that they would be cross-cut again that night.

The complainant notes that the parties are in agreement that the miners who continued to work on August 6th after his discharge labored for an additional 5 hours, or until approximately 3:00 a.m. However, complainant also notes that whether the pillar row was finished during that 5 hour period is debated. Complainant asserts that while Eddie Miller and Charles Cody testified that it was (Tr. 323, 389-390), Bill Smith testified that there was still several hours' worth of work to do when the crew finally left the mine early the next morning (Tr. 196), and Superintendent Cochran testified that he understood all of the coal was not removed that night, and that the Monday morning shift finished the job (Tr. 128-129). This testimony was confirmed by Bill Smith (Tr. 201-202). Johnny Jones likewise testified that he had been told by Elmer Gent, Eddie Miller's immediate supervisor (Tr. 134), that it took the company a shift and a half to finish taking the coal (Tr. 446). However, the complainant maintains that whether or not the pillar row was totally pulled that night is not crucial to the determination of this matter since the fact is that he knew he was being required to work a lengthy overtime period, and the proof shows that a lengthy overtime period was indeed worked.

In summary, the complainant maintains that the circumstances surrounding his work refusal were as follows: he had already worked a full 8 hour shift, during which time he worked continuously performing two jobs; at the end of the shift he was both mentally and physically exhausted; the work he was performing, pillar-pulling, is more hazardous than advance mining and requires a miner to be especially alert; he was not ordered to continue working for a specific amount of time, but rather until the entire pillar row was pulled; he knew the work he was ordered to do would require several additional hours (and, in fact, a lengthy overtime period was worked); and he was too mentally and physically exhausted to perform that work. Clearly, under these circumstances, it was reasonable for him to believe that his safety would be jeopardized by continuing to work until the pillar row was finished.

In further support of his belief that his work refusal was reasonable, complainant cites his own testimony that he did not believe it would be safe for him to continue working (Tr. 304-305), the testimony of Charles Cody, a loading machine helper on another section who was called as a witness by the respondent and confirmed that on occasion he had been so exhausted from working his regular shift that he decided not to work overtime when requested to do so by the company (Tr. 398), Mr. Cody's testimony that if he were "dead tired" and "didn't feel alert" he would not want to be on a pillar section, and the testimony by Mr. Cochran that he would not expect anyone at the mine to work double shifts 13 or 14 hours pulling

pillars because they become fatigued, loose efficiency, and may "become an accident going to happen somewhere" (Tr. 121-123). Recognizing that Mr. Cochran's later testimony in response to bench questions was somewhat inconsistent on these points, complainant nonetheless argues that it supports his conclusion that his safety concern was a reasonable one. Complainant also cited the testimony of Inspector Lowers that each person knows his own limitations, and that he (Lowers) would personally not work 16 hours on a pillar section (Tr. 178, 184).

Complainant concludes his arguments in support of his case by asserting that the respondent's arguments that his work refusal due to exhaustion does not merit the Act's protection because (1) the work refusal did not involve the violation of a mandatory safety standard; and (2) the claim of exhaustion is "too subjective" in nature (Tr. 97-100), are not supported by case law or the legislative history of the Act. Moreover, complainant states that both arguments contradict the intent of the Act, which is to protect the safety and health of miners, and therefore must be rejected.

In further support of his arguments, complainant cites the legislative intent of Congress that the Act be broadly interpreted to afford protection for miner's for safety related work refusals. In response to the respondent's arguments that a claim of exhaustion is "too subjective", complainant points out that while this is true of almost all coal mine safety complaints, in his case common sense dictates that if he is too exhausted to work, to require him to do so presents a hazard both to him and to his co-workers. Complainant notes that he does not claim, nor does he expect me to hold, that a miner's claim of exhaustion must always be deemed protected activity. Nor does he expect me to strictly define when a work refusal due to exhaustion is deserving of the Act's protection. However, on the facts of his case, where he has shown that he was exhausted after having worked continuously for a full shift in a uniquely demanding work environment, was faced with the prospect of several hours additional work, and honestly believed he could not perform that work safely, complainant maintains that it would be inequitable to find that the respondent had the right to force him to make a choice between his safety or his job. Complainant asserts that this is particularly true in light of the fact that the foreman who discharged him admitted that it would be "too dangerous" to require an exhausted miner to continue to work on a pillar section after the miner had already completed a shift's work (Tr. 359). Moreover, complainant argues that it would be anomalous for the Act to protect miners who are discharged for complaining about filthy or inaccessible restroom facilities at a mine - MSHA ex rel. Johnson v. Borden, Inc., 3 FMSHRC 926 (1981); Edwards v. Aaron Mining, Inc., 3 FMSHRC 2630 (1981) - yet not protect miners who cannot safely perform a work assignment due to fatigue.

Regarding respondent's argument that his claim of exhaustion is "too subjective" to be afforded protection, complainant contends that the belief underlying his work refusal was no more

subjective than numerous other

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beliefs that have been protected by the Commission, and, in fact, was not as dependent on subjective belief as the respondent alleges. In support of this argument, complainant cites MSHA ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), where the complainant refused to continue operating a continuous mining machine which he claimed gave him a headache, made his ears hurt, and made him nervous. While a noise standard, pursuant to the Act does govern permissible "dba" limits, the Commission found that the machine in question had not been in violation of the standard. Nonetheless, Pasula's work refusal due to his subjective head pain was granted protection.

Complainant also cites the case of MSHA ex rel. Pratt v. River Hurricane Coal Co., 3 FMSHRC 2366 (1981), where a miner's refusal to extinguish a lead-acid battery fire in a scoop, based on his subjective belief that the batteries could explode, was deemed protected activity despite the fact that the Judge found that the complainant's good faith fear of a battery explosion was unfounded.

In response to the respondent's arguments at hearing that his claim of exhaustion must be based on "something concrete", and that he must show that he was "confronted with certain facts or circumstances which give rise to an indication that there is a hazard" (Tr. 98, 100), complainant maintains that he was faced with a combination of circumstances which placed his safety in jeopardy, namely -- the number of hours he had already worked, how strenuously he had labored, the type of work he had performed, the type of overtime work he would have been required to perform, and the amount of work that he would have been required to do. Complainant submits that all of these critical factors are capable of objective, ascertainable proof, and that they were subject to examination by the respondent at hearing. However, complainant asserts that the respondent chose to argue its case on the basis of allegations rather than proof, and therefore its claim that his good faith work refusal is too subjective in nature should be rejected.

Complainant cites the testimony of Mr. Cochran at pgs. 121-122 of the trial transcript in further support of his argument that company policy did not intend for miners to work excessively long hours on a pillar section. Complainant points to Mr. Cochran's testimony that when he explained the pillar-pulling plan to miners at company safety meetings prior to beginning work on a pillar section he never said anything about staying 4 or 5 hours overtime.

Complainant submits that his case is not a "mixed motivation" case where respondent's actions against him were motivated both by his protected activity and also by any asserted separate unprotected activity. Complainant asserts that respondent's arguments at hearing that "an inference can be drawn" that he shut his drill down and removed it from the working section at the time of his work refusal (thus causing a

"deliterious affect on production"), and that he also "attempted to disrupt the entire work force" should be rejected because the respondent introduced no probative evidence whatsoever to support either of these claims.

Although the complainant admits that he had removed his equipment from the work area and shut it down (Tr. 73), he points out that this took place at the completion of his regular shift when he had finished operating the equipment, and that he did nothing unusual or out of the ordinary with his equipment that night (Tr. 81-82, 105-106). He also points out that his testimony in this regard was confirmed by Bill Smith (Tr. 200), and that Eddie Miller admitted that he had ordered the entire crew out of the mine at the end of the regular shift (Tr. 318). Thus, complainant argues that he had no choice but to shut off his machine.

With respect to any "inference" that the complainant may have conspired with the three other miners to disrupt the work force, complainant asserts that the respondent failed to present any evidence to support this allegation. And, while there was testimony that two of the discharged miners made some disparaging comments to company management or to the others who chose to work, complainant points out that there is absolutely no testimony or evidence that he was a party to this conduct.

In conclusion, the complainant points to the testimony by Raymond Cochran and Eddie Miller that he was discharged for refusal to work (Tr. 140, 142, 322), and no other reasons were mentioned. In view of all of the circumstances presented in this case, complainant maintains that his case is not a mixed motivation case, and that the only conduct in issue is whether his work refusal is protected activity under the Act. He concludes that he was discharged by the respondent on August 6, 1981, and denied reinstatement on August 11, 1981, because of his good faith refusal to work under conditions he reasonably believed threatened his safety.

Respondent's Arguments

In its post-hearing brief, respondent summarizes the testimony of all of the witnesses who testified in this case, and advances the proposition that in resolving this case, one must first determine the credibility of complainant's assertion that he refused overtime work because he was fatigued. Respondent notes that the complainant is a 26 year old man who appears to be in good health and physical condition, and that under these circumstances respondent notes that it is not surprising that he did on various occasions work between seventy (70) and seventy-five (75) hours per week and that he did, on occasion, work two (2) consecutive shifts for a total of sixteen (16) hours continuous mining. Respondent asserts that during the week preceding the week in which he was fired, complainant had only worked forty (40) hours, and that during his final week of employment he worked four (4) days, including the date on which he was discharged. At the time of his termination, he had only worked twenty-eight and one half (28-1/2) hours during that particular week. Thus, respondent concludes that on August 6, 1981, the complainant had both the physical and mental ability to, as did his co-workers, work until 3:00 A.M., or, for that matter, complete the second shift.

Respondent states that had the complainant remained and worked a full shift overtime, he still would not have surpassed forty (40) hours during that given week and, accordingly, he would not have been entitled to overtime pay at the rate of one and one half (1-1/2) times regular pay. Respondent suggests that Johnny Jones, by his own testimony, second guessed the company and felt that it would not be unsafe to cease mining in that particular row of pillars and return to them on the next regularly scheduled work day, and that this must have been his primary motive in refusing overtime work.

Respondent argues that an ultimatum such as was given to the four miners who were fired can invoke a strong response and a spirit of rebellion, and that this is especially true when an individual, as did the complainant, believed "rumors" that other miners who had previously refused to work overtime under threat of discharge, were able to retain their jobs. Respondent argues further than in "all likelihood", the four miners fired on the night of August 6, 1981, were acting in concert since their actions are typified by the remarks made by Johnny Jones as he left the mine and that the profanity which he used was an attempt to arouse strong emotions within the other employees and to discourage them from remaining on the job.

Respondent asserts that the complainant knew that requests for overtime work must be honored, and that from his first day of employment he had an employee's handbook which stated that a refusal to perform the assigned work would result in an immediate discharge. Respondent suggests that while in attendance at meetings with Raymond Cochran, complainant must have heard him state that employees would, on occasion, be required to remain and complete a row of pillars.

Although respondent conceded that the complainant had no other problems with mine management, and that the parties are in agreement as to the reason that he was fired, respondent argues that his "work history also plays a part in the analysis of his claim". In support of this assertion, respondent states that although only 26 years of age, complainant has been employed by 6 different employers, the longest period of employment being for 2-1/2 years.

Respondent asserts that its legitimate business interests in requiring its employees to work overtime is made clear by the testimony in this case, and that even the complainant's own witnesses acknowledge the necessity of completing a row of pillars once they are begun. Respondent concludes that when all of the facts are analyzed one readily concludes that the complainant was not so fatigued at the end of his regular shift to work overtime; rather, he did not want to work overtime for straight pay, did not want to be "bossed" by mine management, and had heard of other employees disregarding a similar direct order and being permitted to remain in the respondent's employ. However, having refused to work and being terminated, respondent concludes that the complainant "fell upon this scheme for reacquiring the job abandoned by him".

Respondent argues further that, even assuming that the complainant was in fact too tired to continue with overtime work, the complaint must still fail because such an assertion involves a highly subjective state of facts known only to the complainant. Respondent asserts that the purpose of the Act "did not run to such highly subjective personal situations, but is intended to enlist the miners aid in enforcing the Act and to insure a safe work place within which the miner might function." Respondent concludes that the complainant has failed to show by a preponderance of the evidence that he refused to work the requested overtime hours because he was too tired, and that "it is obvious that this man was motivated by other reasons and only fell upon the guise of fatigue after he had lost his job".

Findings and Conclusions

The critical issue in this case is whether Complainant Eldridge's refusal to work beyond his normal work shift because he was "too tired" is protected by section 105(c) of the Act. Refusal to perform work is protected under section 105(c)(1) if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

In Pasula the Commission established in general terms the right of a miner to refuse work under the Act, but it did not attempt to define the specific contours of that right. The Fourth Circuit Court of Appeals which reviewed Pasula discussed in detail the right of a miner to refuse work, and agreed that such a right generally exists. The Court stated as follows at 663 F.2d 1216-1217, n. 6:

Thus, although we need not address the extent of such a right, the statutory scheme, in conjunction with the legislative history of the 1977 Mine Act, supports a right to refuse work in the event that the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health.

In several decisions following Pasula, the Commission further refined "work refusals" by miners based on certain claimed safety hazards. In MSHA ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803, April 3, 1981, the Commission ruled that any work refusal by an employee on safety grounds must be bona fide and made in good faith. "Good faith" is interpreted as an "honest belief that a hazard exists", and acts of deception, fraud, lying, and deliberately causing a hazard are outside the

"good faith" definition enunciated by the Commission. In addition, the Commission held that "good faith also implies an accompanying rule requiring validation of reasonable belief", but that "unreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection".

In Robinette, the Commission, in fashioning a test for the application of a "good faith" work refusal, adopted a "reasonable belief" rule, which is explained as follows at 3 FMSHRC 812:

More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing corroborative physical, testimonial, or expert evidence. The operator may respond in kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.

* * * * *

In sum, we adopt a good faith and reasonableness rule that can be simply stated and applied: the miner must have a good faith, reasonable belief in a hazardous condition, and if the work refusal extends to affirmative self-help, the miner's reaction must be reasonable as well.

In MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126, February 5, 1982, the Commission defined further the scope of the right of a miner to refuse work under the Act. The case concerned two miners who refused to continue working because of certain perceived safety concerns. The company fired the miners for having "walked off their jobs", an action which the company "took as a quit on their part". The Commission held that if the walk off was a protected refusal to work, the termination over it was unlawful; if it was not protected, the termination was legal. In discussing and further refining the refusal to work, the Commission asserted that a statement of a health or safety complaint must be made by the complaining miner, and it adopted the following requirement in this regard, at 4 FMSHRC 133:

Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances -- such as futility -- may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal. (Emphasis added)

The res judicata question

In its Answer to the discrimination complaint, filed April 5, 1982, respondent stated, inter alia, that "the complainant was discharged from his job for improper actions and misconduct on the job, including, but not limited to, disobeying direct orders from his immediate supervisors". Respondent goes on to state that Mr. Eldridge alleged discrimination only after he was discharged and should be estopped from filing his discrimination complaint with this Commission. Respondent also asserted that a prior state unemployment insurance commission decision of February 4, 1982, which denied Mr. Eldridge's compensation claim is res judicata and constitutes a bar to the present discrimination complaint. Respondent does not elaborate further on this question in its brief, and at the hearing, the parties advised that Mr. Eldridge's appeal of his denial of unemployment benefits is pending in a state court.

Mr. Eldridge's state unemployment compensation claim was denied in a decision rendered on November 5, 1981, by a State of Kentucky referee who heard his case. His appeal of that decision was denied by the State Unemployment Insurance Commission in an Order entered February 4, 1982 (copy attached to the respondent's Answer filed in the instant case). The referee found that Mr. Eldridge had voluntarily quit his employment without good cause attributable to that employment. The appeals commission however rejected the referee's conclusion of law in this regard, and its rationale for doing so is stated as follows in its Order:

* * * * Whether a separation from employment is a discharge or quitting is determined by which party's actions initiated the separation from the employment. If the employer initiates it, the separation is a discharge. If the worker does so, it is a quitting. In this case it is an indisputable fact that the employer initiated the separation.

Misconduct has been defined as any act or omission by a worker which demonstrates a willful, wanton or reckless disregard for the legitimate business interests

of the employer. Insubordination is an act of misconduct. Insubordination consists of the unjustified refusal to comply with a reasonable request or order of a superior. The request that claimant work overtime in an effort to remove all coal possible from the pillars was both feasible and practical. Claimant, an experienced miner, admitted he was aware of the necessity of extracting the coal prior to a long week-end so that if the roof collapsed the coal would not be lost to the employer. He had no physical limitations, thus his refusal to work the overtime necessary to complete the task constituted a deliberate or willful disregard of the employer's legitimate business interests. Accordingly, such action is sufficient to warrant a finding of misconduct.

* * * It is now held the claimant was discharged from his most recent employment for reasons of work connected misconduct.

In the prior state proceeding, it appears that the initial decision denying his claim was based on a finding by the hearing officer that Mr. Eldridge had quit his job. On appeal, the state commission found that this was not the case. It found that Mr. Eldridge had been fired for misconduct (insubordination) for refusing to follow a legitimate management directive to work overtime, denied his claim because of work connected misconduct, and rejected the hearing officer's finding that he had quit his job.

It does not appear from the record here that Mr. Eldridge raised any "safety concerns" before the state unemployment commission referee who heard his initial claim and rendered his decision on November 5, 1981. Nor is there anything to suggest that he raised this issue during his appeal of that decision which was finalized by the state board's order of February 4, 1982. MSHA's denial of his discrimination complaint was communicated to him on December 14, 1981, when he received a letter notifying him of this decision, and his complaint with the Commission was received on January 18, 1982. Although Mr. Eldridge's failure to raise the issue in the state proceeding lends some credence to respondent's assertion that his "safety concerns" were an afterthought, this question must be decided within the parameters of the Pasula and Robinette decisions. The facts on which a state agency denies one unemployment compensation claims are different from those which must be considered under the Act.

If the issues and facts presented in the state proceeding are identical to those presented in cases considered under the Federal statute, the Commission has suggested that the doctrines of res adjudata and collateral estoppel may be available, Frederick G. Bradley v. Belva Coal Company, 4 FMSHRC 982, June 4, 1982, at pgs. 986-991). The Bradley case concerned a state proceeding before the West Virginia Coal Mine Safety Board of Appeals which considered the miner's claims of discrimination under a state coal mine safety law. Even so, the Commission affirmed Judge Broderick'

ruling that no weight should be accorded the state decision of no discrimination, 3 FMSHRC 921, at pg. 921, and 4 FMSHRC 991.

In the instant proceeding, the full transcript of Mr. Eldridge's hearing before the state referee and the referee's full decision are not in evidence. The parties used certain transcript portions and references for impeachment and credibility purposes, and it seems clear to me that the issues regarding Mr. Eldridge's "good faith", his "motivations", and the "reasonableness" of his work refusal must be decided on the basis of the Pasula and Robinette guidelines. Under the circumstances, respondent's assertions of res adjudicata and collateral estoppel are rejected and denied.

The alleged "concerted action" and "interruption of production"

Respondent's proposed finding VII that the four employees fired by the respondent on August 6, 1981, were acting in concert in the refusal to work the additional hours, and that they attempted to discourage, dissuade, and intimidate the remaining employees from returning into the mine is rejected as unsupported by any credible evidence or testimony. Although it may be true that Mr. John Jones may have cursed or made some disparaging remarks about mine management, and that someone may have referred to those miners who opted to go back to work as "chicken", and one man felt intimidated, there is absolutely no evidence that Mr. Eldridge was a party to any of this.

There is no evidence to support the respondent's assertion that the four discharged miners acted in "concert" or engaged in any conspiracy to disrupt or intimidate the work force. It seems to me that if this were in fact the case, the respondent would have presented some credible evidence to support this at the hearing. In addition, since it is logical to assume that "conspiracy" type work stoppages and intimidation of the work force on the part of miners are matters more serious than work refusals, it seems strange to me that the respondent did not discharge the four miners in question for those reasons, rather than for their refusal to work the requested overtime, as it did in this case.

Mr. Miller's speculation that the four discharged miners were acting in concert was based on his observations that "they rode together, and just stayed together, and just hung together". Mr. Eldridge's testimony that he did not car pool with any of the three discharged miners and drove to work alone was not rebutted by the respondent, and although Mr. Eldridge did state in his deposition that one of the discharged miners rode to work with him on the evening of the discharge, he also indicated that he left work alone.

In its proposed finding VIII, the respondent asserts that Mr. Eldridge's refusal to continue working additional overtime hours made it necessary for management to cease all operations in the section, remove the miners to the outside, secure replacements for those who refused to stay, and return the force

into the mine, all to the delay and additional expense of respondent and hindrance of the production of coal.

The record in this case reflects that Mr. Eldridge's refusal to work the extra hours came at the end of his regular work shift, and that he advised the section foreman shortly before the shift ended that he was too tired to continue working. When the section foreman said nothing further, Mr. Eldridge began to secure his equipment and again advised the foreman that he was too tired to continue working. Thus, Mr. Eldridge's work refusal came at the end of the work shift. The decision to take the entire crew out of the mine was made by mine management, and Mr. Miller conceded that since it was the end of the shift, and after section foreman Eli Smith advised him that some of the men were coming out of the mine, he instructed the foreman to bring them all out.

The "overtime pay" issue

During the course of the hearing, respondent's counsel suggested that Mr. Eldridge's motivation for refusing to stay over and work the additional hours was based on the fact that he would only be compensated straight time, rather than overtime. Since Mr. Eldridge had only put in approximately 32 hours at the close of his normal shift on Thursday, had he opted to stay and work as requested by mine management, he would only have been compensated with regular pay for the ensuing eight hours (Tr. 94-96).

Respondent's argument that Mr. Eldridge's refusal to stay and work was based on the fact that he knew he would only be compensated for straight time, and not at overtime rates, thus raising an inference that Mr. Eldridge's work refusal was based on monetary considerations. Mr. Eldridge denies that this was the case, and in fact asserted that he had no idea as to how many hours he had worked, and that the matter of compensation never entered his mind.

The evidence establishes that during the period of the discharge, the mine was only operating on a four day week. Although it is true that the respondent's employee handbook states that the "work week" commences at 12:01 a.m. on Thursday, the handbook (exhibit R-1, pg. 5), also states the following:

Most employees will work regularly scheduled shifts on Monday through Friday. A few employees may work on a regular work week of Tuesday through Saturday rather than Monday through Friday. At times it may be necessary to work other than regularly scheduled hours in which case your supervisor will notify you as much in advance as possible so that you may plan accordingly.

With regard to the payment of overtime pay, pg. 7 of the handbook states:

Sun Fire will pay time-and-one-half for all hours worked over 40 in one week. * * * If the needs of the company

dictate, management may be forced to reschedule working hours or require overtime work. We will give you as much advance notice as possible. (Emphasis added)

In response to an interrogatory served on the respondent by complainant's counsel for information as what period of time constituted a "work week" for the company, respondent's counsel simply referred to page 5 of the employee handbook, a copy of which had been given to the complainant. Complainant's further interrogatory as whether the company's "work week" was altered anytime during Mr. Eldridge's employment, including a request for the date(s) of any such change and any "daily sequence" which may have constituted the new "work week", was not answered.

Respondent's handbook references to the work week and pay for overtime are somewhat confusing and lend themselves to different interpretations. While the term "work week" is defined as commencing on a Thursday, the handbook also indicates that work shifts may run from Monday through Friday, and that some employees may be required to work a regular work week of Tuesday through Saturday, rather than Monday through Friday. The provision dealing with overtime pay states that overtime will be paid for all hours worked over 40 in one week. Thus, one may conclude that employees are compensated for overtime work when they work over 40 hours during any of these combinations, and that if an employee's scheduled work runs from Monday through Friday, as was the case here, any hours over 40 during that time frame are compensable as overtime.

Mr. Cochran testified that mine employees were only paid time and one-half pay for hours exceeding forty in number during any given work week (Tr. 138). Billy Smith, one of the miners who stayed, could not recall whether the men who stayed were paid any additional hour overtime pay. He did confirm that many times when he worked overtime, he was paid overtime rates for any work over 40 hours, but that on the evening in question, the men who stayed would have been paid straight time because they had not at that point in time put in 40 hours. Roger Miller, another miner who stayed, could not recall whether he was paid straight time, nor could he recall how many hours he had already put in during the week in question.

At hearing, the parties were in agreement that in general there has been no disputes or controversies between the miners and management over the question of working overtime, and that as far as counsel are concerned this case does not involve any issues concerning "enchantment or disenchantment, singularly or collectively" with regard to overtime work (Tr. 104).

Eddie Miller testified that company policy dictated that if an employee stayed and worked an extra hour on overtime, he was given an additional hour (Tr. 322). He also stated that he gave the crew who did stay and work overtime "an hour and a half" (Tr. 321). He later testified that the normal shift ended 9:45 p.m., and that the men who stayed and worked the overtime until 3:00 a.m., an additional five hours, were actually paid for six hours.

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When asked whether the men are paid an extra hour for each additional hour of overtime, or whether they would be paid an extra hour for 15 hours of overtime, he responded that they would be paid "maybe two" extra.

Mr. Miller testified that the normal work shift ended at 9:45 p.m. He also indicated that he did not tell the men that they were being paid for an additional extra hour, and they were not aware of it (Tr. 339). He confirmed that the men who stayed beyond the normal eight hour shift were credited for working a total of 14 hours on the day in question (Tr. 341), but he did not say that they were compensated at the overtime pay rate.

After careful review of the testimony and evidence adduced in this case I cannot specifically conclude that the crew who stayed and worked were in fact compensated at the actual overtime rate of pay for the extra time in question. A copy of the weekly time record (exhibit C-2), merely shows the total hours worked for two weeks. Respondent did not call the time keeper, Eli Smith to testify, nor did it produce any evidence as to precisely how much the men were in fact paid for the extra work. However, it would appear from all of the testimony that the men were paid at the straight time rate, with an extra "bonus" of an hour's pay as authorized by Eddie Miller.

I find no credible testimony or evidence to support the inference that Mr. Eldridge's refusal to stay and work the overtime hours was based on his belief that he would only be compensated for straight time. Since the mine was on a "short week", and he had only worked less than 40 hours when asked to stay over, one could also speculate that he would normally want to stay and work the additional hours, thus giving him a total of 40 hours, for his normal work week shift. In addition, the time record reflects that Mr. Eldridge worked a full 40 hour week the week before the discharge. The record also reflects that he was credited with 28 1/2 hours of work through Wednesday, the day before his discharge, and that on Tuesday he worked 9 hours, one of which was on "overtime" when he stayed over at mine management's request. It seems illogical to me that a miner who otherwise earned pay for a full 40 hour week, when faced with a credit of only 28 1/2 hours at the end of his scheduled weekly shift would turn down an opportunity to earn additional hours of pay. Of course, it is altogether possible that in a non-union mine, management could manipulate the work week so as to avoid paying overtime rates, but neither party has advanced any arguments to support this speculation on my part, and they agreed that the question of overtime as such is not an issue.

On the basis of the foregoing findings and conclusions, respondent's assertion that Mr. Eldridge refused to work overtime because he knew he would not be paid at the overtime pay rate is rejected.

Statement of safety complaint

One of the crucial questions in this case is whether

requiring a miner who claims he is "too tired" or "physically and mentally exhausted"

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to continue working beyond his normal work shift is an unsafe or hazardous practice. Assuming that the answer to this question is in the affirmative, the next question is whether the individual's claims in this regard constituted a safety complaint which has been communicated to mine management. Leaving aside for the moment the question as to whether the facts of this case support Mr. Eldridge's claim that his asserted physical condition constituted a hazardous safety condition, I will first address the question as to whether the record supports a finding that Mr. Eldridge did in fact communicate his asserted safety concern to mine management before the final decision was made to discharge him.

The facts in this case reflect that the mine in question is a non-union mine, and the case does not involve a complaint made by a miner to MSHA. In any event, in a case decided under the 1969 Coal Act, *Taylor Adkins and Fred Hunt v. Deskins Branch Coal Company*, 2 FMSHRC 2803, October 23, 1980, the Commission ruled that "in a non-union mine without established procedures for reporting complaints, as was the situation here, a miner's notification to any mine official brings the miner within the protection of section 110(b)." Respondent's Employee Handbook, exhibit R-1, does contain information concerning employee grievance procedures. Page 18 of the handbook advises employees to "ask" and not "guess" if they have any doubts regarding safety matters. Page 21 cautions employees that they must understand and abide by company, state, and federal safety rules, and that any questions in this regard are to be discussed with a supervisor. Respondent's position on this issue is that at the time Eddie Miller informed the crew that any miner who opted to pick up his check and leave the mine would no longer be needed by the company, Mr. Eldridge did not advise Mr. Miller that he was "too tired", and that only after coming to the realization that he was out of a job, Mr. Eldridge fell on a "scheme" to get his job back. My evaluation of the testimony and evidence on this question follows below.

Mr. Eldridge testified that approximately 35 minutes before the end of his normal shift he advised his section foreman Eli Smith on at least two occasions that he was too tired to stay and continue pulling the row of pillars that the crew was working on. He told him this when he first learned that outside mine foreman Eddie Miller expected the men to stay and finish the pillar work, and he told him a second time after he had secured his equipment and was told that Mr. Miller wanted the crew out of the mine. Billy Smith, Eli's brother, and Mr. Eldridge's fellow crew-member, confirmed that he heard Mr. Eldridge tell Eli Smith that he was too tired to stay late and work the extra time. John Jones, one of the miners who was also discharged for refusing to stay over and work, testified that he too heard Mr. Eldridge tell Eli Smith that he was too tired to work, and that Mr. Eldridge also told Eddie Miller that he was too tired to work when they were in the lamphouse.

Mr. Eldridge testified further that when he returned to the mine on the Tuesday following his discharge for a meeting with

company manager Bobby Morris and mine superintendent Raymond Cochran, he explained to

Mr. Morris that he had been too mentally and physically exhausted to keep on working after the conclusion of his work shift the previous Thursday evening, but that Mr. Morris nonetheless upheld his discharge. John Jones, who was also present at the meeting, confirmed that Mr. Eldridge told Mr. Morris that he was too tired to work anymore, and Mr. Cochran confirmed that during the meeting Mr. Eldridge had in fact explained to Mr. Morris that he had been too exhausted to continue working anymore at the end of his shift the previous Thursday evening. Mr. Cochran stated that he interpreted Mr. Eldridge's assertion that he was "too tired" to mean that he was physically unable to continue working. Mr. Cochran also indicated that during the Tuesday meeting he asked Mr. Morris to put the four discharged miners back to work, but that Mr. Morris refused and made some statement that if he did he "would lose control over them". Mr. Cochran also testified that section foreman Eli Smith told him that he saw no need to keep the crew over to pull pillars and that he tried to communicate this fact to Foreman Miller on Thursday. Mr. Cochran also testified that during the Tuesday meeting, Mr. Eldridge was the only one who offered any excuse for refusing to work the requested extra time, but that the other three discharged miners said nothing.

Mr. Eldridge's testimony that he specifically told section foreman Eli Smith that he was too tired to continue working beyond his normal shift, is corroborated by the testimony of John Jones and Billy Smith. Eddie Miller's denials that Mr. Eldridge ever told him that he was too tired to work beyond his normal shift is in direct conflict with the corroborative testimony of John Jones, who confirmed that Mr. Eldridge told Eddie Miller that he was too tired, and that he did so in the lamphouse.

Neither Bobby Morris or Eli Smith testified in this case. Further, while there were other miners present in the lamphouse on Thursday evening when Eddie Miller delivered his ultimatum that those who picked up their checks no longer had a job, respondent presented no testimony from any of them to corroborate Eddie Miller's assertion that Mr. Eldridge said nothing. Although Billy Smith left the mine with the crew when they were ordered out by Eddie Miller, he testified that he was not with the group when Mr. Miller spoke to them (Tr. 198). Roger D. Miller, who was also present in the lamphouse when Mr. Miller spoke to the crew, said nothing about any statements by Mr. Eldridge and no testimony was elicited from him with regard to this question.

In his deposition of May 7, 1982, and in response to questions from respondent's counsel, Mr. Eldridge stated that on August 6, 1981, he told Eli Smith and Eddie Miller that he was too tired to stay and work the requested overtime. He also indicated that August 6th was a regular payday. He also stated that after he picked up his check he left the mine in his own car, and that miner Joe Engle who rode with him to work that day, left with someone else. He confirmed that the next regularly scheduled work day for the mine would have been the following Monday. With regard

to the meeting held after his discharge, Mr. Eldridge stated in his deposition that he and the other discharged miners went to the mine on the following Monday and met with Raymond Cochran, but that Bobby Morris was not there. Mr. Cochran arranged for another meeting for either Tuesday and Wednesday, and at that meeting Mr. Morris was present, along with Mr. Cochran and the other discharged miners. Mr. Eldridge stated further that he told Mr. Morris and Mr. Cochran at that time "I was too mentally and physically exhausted to continue to work another eight-hour shift that night. I had put in a hard shift and it wouldn't be safe for me or anybody else", and that "they still said they didn't need us".

Eddie Miller denied that Mr. Eldridge ever told him that he had been too tired to continue working beyond his normal shift on Thursday evening. He denied that Mr. Eldridge advised him that he was too tired during the meeting with the men in the lamphouse, and he also denied ever meeting with any of the four discharged miners after they were fired on Thursday. He stated that once they picked up their checks in the lamphouse "that was the end of it" as far as he was concerned. Mr. Miller indicated that if Mr. Eldridge did state that he was "too tired" to continue working, he (Miller) did not hear it. Mr. Miller also indicated that if any miner ever came to him and advised him that he was too tired to stay on and continued pillar work he would "work something out" (Tr. 358). He also indicated that had Mr. Eldridge told him that "I would have worked something out so he could leave and go home and rest" (Tr. 358). He explained this answer by stating further that under these circumstances "if he tells me that he's absolutely too tired to stay and work, then he would just be accident prone, I guess", and that "it would be too dangerous for him to go back in" (Tr. 359).

In response to an Order issued by Chief Judge Merlin on April 2, 1982, complainant submitted a copy of his original discrimination complaint filed with MSHA on October 2, 1981. Mr. Eldridge's signed statement of October 2, 1981, contains the following statements:

I had already worked an eight-hour shift pulling pillars, and I told management that I was too exhausted to continue working. I was told that if I did not stay until all of the pillars were pulled that I need not return to work on Monday (my next scheduled work shift). I was fired by Eddie Miller, the Mine Foreman, when I refused to continue working. I subsequently met with Bobbie Morris, the Sunfire Manager on Tuesday, August 11th, regarding my discharge. I told Mr. Morris that I had been too mentally and physically exhausted and wouldn't have been alert enough to continue working, but Morris upheld the discharge.

The credibility of the witnesses who testified in this proceeding is most critical in any determination by me as to who is telling the truth and who is not. Mr. Miller testified that when he spoke to the men in the lamphouse after he ordered them out of

the mine, he told them that it was necessary for them to stay and finish the row of pillars. While

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he could not recall his exact words, he stated that he told them that if they did not stay the roof "might get to swimming" and "we'd lose the coal." He also indicated that he told the men that if the coal were left it would be too dangerous when the day shift came in (Tr. 359). Later, when asked by me whether he recalled specifically advising the men in the lamphouse how long he wanted them to stay, he stated that he told them it shouldn't take over two or three hours to finish the pillar row in question (Tr. 361).

Mr. Miller testified on direct examination that when he was underground on Thursday evening approximately 45 minutes before he ordered the crew out of the mine, he spoke with Eli Smith and informed him about the need to keep the crew over to finish the pillars. Although he conceded that Mr. Jones was present in the section, he denied that he spoke with him or with anyone else. Mr. Miller testified that none of the four men who picked up their checks in the lamphouse and refused to stay made any statements to him as to why they refused to remain and go back to work, and he indicated that three of the men car pooled together in the same automobile, and that Mr. Eldridge was one of them (Tr. 363).

However, on cross-examination, Mr. Miller confirmed that when he previously testified at the state unemployment compensation hearing, he testified under oath that at approximately 7:00 p.m., while in the section on Thursday evening, he personally informed John Jones about the need to stay over to finish the pillar work, and that he also spoke with all of the men. When asked to reconcile his inconsistent testimony, Mr. Miller indicated as follows at Tr. 333-335:

Q. Now, I asked you question fourteen on page 30 -- now you also answered Mr. Hall's question -- Mr. Hall was the hearing officer. You said that 7:00 p.m. you personally informed Mr. Jones that they might need to stay late to finish pulling pillars. You answered uh-huh. I asked if you were on the section at that time. You said, yes, uh-huh. And the next couple of questions don't pertain to anything. I'll just go ahead and read them for continuity. "Are you ordinarily on the section?" and you said "No". And I asked, "Aren't you ordinarily outside?" You said, "On the section where he worked, and the other section; all over the mines; inside and out." And I asked you, "you're saying that on August 6th, that night you worked?" You said, "Yes." "You came in, who did you speak to?" You said, "All of the men." Now you're saying tonight you didn't speak to all of the men?

A. Yes.

Q. You just spoke to Eli Smith, and Johnny Jones happened to be there?

A. Yes. I don't remember whether any of the other men were there at that time or not.

Q. And I asked you, "What specifically did you tell Mr. Jones?" You said, "I told him that we were going to need to work late to finish the pillar row, which I shouldn't have had to tell them anyway; they knew it." And I asked you "What did Mr. Jones say at seven o'clock when you told him?" Answer, "He didn't say anything." "He didn't say a word?" Answer, "No, he didn't say he wasn't going to stay or --" Now at that time you very clearly were trying to tell the Hearing Officer that you had a personal conversation with Mr. Jones, weren't you?

A. No.

Q. I asked you "What specifically did you tell Mr. Jones?" You said, "I told him that we were going to need to work late -- I told him --"

A. I don't get your question.

JUDGE KOUTRAS: Do you remember talking to Mr. Jones on August 6th while you were underground, between seven and nine? Personally talking to Mr. Jones, and telling him that, you're going to have to stay and work?

THE WITNESS: Not personally. Mr. Jones and Eli Smith were there at the time, and I was talking to both of them.

JUDGE KOUTRAS: You were looking right at them?

THE WITNESS: Yes.

JUDGE KOUTRAS: What Mr. Oppegard is asking you is that some time ago when you testified at another hearing you specifically said that you looked Mr. Jones right in the eye and told him personally, you have to work, and Mr. Jones said nothing to you. What Mr. Oppegard is asking you now is, try to reconcile your statement. At that time you said you talked to Mr. Jones, and today you're saying you didn't talk to him. That's what he's trying to --

THE WITNESS: I talked to both of them.

JUDGE KOUTRAS: Did you talk at them or to them or what?

THE WITNESS: To them.

After careful consideration of all of the testimony adduced in this case, I conclude and find that Mr. Eldridge did in fact advise mine management both before and after his discharge that he was too physically and mentally exhausted to continue working on the pillar section beyond his normal work shift. His testimony that he advised section foreman Eli Smith and mine foreman Eddie Miller of this fact before his discharge is corroborated by other witnesses who I find to be credible. Mr. Eldridge's testimony that he also advised company manager Bobby Morris that he was too tired and exhausted is also corroborated by Mr. Cochran who was present at the subsequent Tuesday meeting. Further, Mr. Eldridge has consistently asserted that he advised all of these mine management personnel of the fact that he was too tired to continue on, both in his original complaint and in his pretrial deposition of May 7, 1982.

There is nothing in the record to show whether Mr. Eldridge's discharge was in any written form. There is nothing to indicate that the respondent served any written notice of discharge on any of the miners who were discharged for refusing to work. It would appear that foreman Eddie Miller advised the crew that if they did not work and picked up their checks, they were not needed any more. Company manager Bobby Morris, who I assume either made the initial decision to fire the men, or at least confirmed what Mr. Miller had told them, refused to reinstate them, and he did so after Mr. Eldridge offered his excuse for not staying to work the extra time, and after rejecting Mr. Cochran's suggestion that the men be put back to work. Under all of these circumstances, I conclude and find that Mr. Eldridge's reasons for refusing to work the requested extra time was not only communicated to mine management, but that mine management had ample opportunity to ponder the matter further.

Respondent's proposed finding XII that the complainant "failed to fully discuss his predicament with mine management prior to being discharged" is rejected. On the facts of this case, it seems clear to me that the discharge of Mr. Dickey was rather summary and abrupt, and Eddie Miller testified that when Mr. Eldridge decided to pick up his check in the lamphouse on Thursday evening and leave the mine, the matter was over as far as he was concerned. I have concluded that Mr. Eldridge communicated the fact that he was too tired to continue working to section foreman Eli Smith and mine foreman Eddie Miller before his discharge, and that he also communicated this fact to the then superintendent Cochran and mine manager Bobby Morris after he was informed that his services were no longer needed, all to no avail.

I conclude from the testimony in this case that once mine management decided that the crew was to stay and work until the pillar was mined, and once foreman Eddie Miller advised them that they either worked or were no longer needed, anything further

that Mr. Eldridge may have said

would not have changed management's decision, and I do not believe Mr. Miller's assertion that had Mr. Eldridge told him he was too tired, he would have worked something out with him.

Respondent's proposed finding IX that Mr. Eldridge did not, at any time, inform Mr. Miller that he was too tired to work the requested overtime hours is rejected. As discussed in my findings and conclusions on this issue, the preponderance of the evidence in this case is to the contrary, and I take note of the fact that respondent did not call Eli Smith or Bobby Morris to testify in this case. It seems to me that these two individuals would have been most critical witnesses to corroborate the respondent's claims that at no time prior to the discharge was mine management ever advised of Mr. Eldridge's excuse for not staying and working the requested overtime.

The reasonableness of Mr. Eldridge's work refusal

I am most cognizant of mine management's concern over the maintenance of discipline of its work force, and its concern for the setting of any precedent that would permit miners to "willy nilly" dictate to management over matters which are a legitimate business concern. As a matter of fact in a recent decision handed down by the Seventh Circuit in *Miller v. FMSHRC*, 687 F. 2d 194, 196 (1982), the court stated: "We are unwilling to impress on a statute that does not explicitly entitle miners to stop work -- a construction that would make it impossible to maintain discipline in the mines". Considering that statement, I honestly believe that in this case respondent's mine manager Bobby Morris had the same thought in mind when he opted not to change his decision regarding Mr. Eldridge's refusal to work overtime. However, the distinction to be made is that under the *Pasula* and *Robinette* line of cases, a miner may, under certain circumstances, stop work and refuse to continue on if his refusal is reasonable and made in good faith.

As indicated earlier, it seems clear from the *Pasula*, *Robinette*, and *Dunmire* and *Estle* cases, *supra*, that a miner may refuse to work if he has a good faith, reasonable belief regarding the hazardous nature of the safety condition in question. Good faith means an honest belief that a hazard exists. *Robinette*, 3 FMSHRC at 810. The miner's honest perception must be a reasonable one under the circumstances, and his belief as to the existence of any perceived hazard need not be supported by objective ascertainable evidence. The reasonableness of the miner's belief as to the existence of any hazard can be established at a minimum through the miner's own testimony as to the condition responded to with the testimony evaluated for its detail, inherent logic and overall credibility. Corroborative physical testimonial or expert evidence may be introduced and the mine operator may respond in kind. *Robinette*, 3 FMSHRC at 812. Unreasonable, irrational, or completely unfounded work refusals are not within the purview of the statute. *Robinette*, 3 FMSHRC at 811. Further, the Act's protection may be extended to those who possess the requisite belief even if the evidence ultimately shows the conditions were not as serious or hazardous as

believed, Consolidation Coal Company, supra, 663 F. 2d at 1219;
Dunmire, supra, 4 FMSHRC at 131. The reasonableness of the
belief must be judged as of the time it was held.

During the hearing, complainant's counsel suggested that there are at least three factors which should be considered in any determination as to whether Mr. Eldridge's work refusal was reasonable; namely, (1) the amount of work he had done on his shift, (2) the type of work involved, and (3) the length of time he was expected to continue working beyond his normal shift (Tr. 312). Counsel also suggested that each miner's claims in this regard should be made on the basis of each individual's own circumstances, and it seems clear that in the case at hand there is no medical evidence to suggest that Mr. Eldridge's refusal to work was based on any illness or known physical impairment. Respondent, on the other hand, takes the position that a miner's assertion that he is "too tired" is too subjective and should never be permitted.

The facts in this case do not suggest that Mr. Eldridge's safety concerns were directly related to any specific hazardous conditions which existed in the section at the time he was directed to stay and work the overtime in question. In other words, there is no evidence to establish that the roof conditions in the section were such as to constitute specific violations or infractions of any safety standards. Further, as observed by me at the hearing, at Tr. 102-103, Mr. Eldridge's reluctance to work the overtime was not because he found anything unsafe about the prevailing mine conditions or the area where he was expected to continue working, but was based on his own evaluation as to his mental and physical state at the time of the work refusal.

I reject the respondent's arguments that before Mr. Eldridge may prevail, he must first establish a violation of some mandatory health or safety standard, or establish that the mine conditions were so hazardous that to require him to work would place him in jeopardy of life and limb. The question presented is whether Mr. Eldridge's claims that he was so mentally and physically exhausted at the conclusion of his regular tour of duty reduced him to such a state physically and mentally, that to require him to continue on with the pillar work would place him in jeopardy. If the answer to this question is in the affirmative, then I believe it follows that his refusal to work was not unreasonable, and that his work refusal in these circumstances was a reasonable judgment on his part which is protected from any reprisals by mine management.

The record in this case establishes the fact that Mr. Eldridge had never previously been involved in any management "disputes", had never been disciplined for missing work or failing to do his job, that he was considered to be a good worker, and that he had previously worked long and short hours of overtime when asked, and had never before the incident in question refused management's requests to work overtime. In these circumstances, I agree with his counsel's arguments that these factors are not the characteristics of a miner who shirks his duties. I also agree with respondent's counsel's observations that Mr. Eldridge is a man of 26 years of age who appears to be in good health and physical condition.

The testimony and evidence establishes that at the time of the work refusal, Mr. Eldridge was aware of mine management's concern that the

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additional work required to finish the pillar work was needed so that the coal was not lost, and to insure that the area was timbered and rendered safe for the next crew which was scheduled to work the following Monday. Further, I conclude that management's concerns and interests in this regard were legitimate concerns. However, insofar as Mr. Eldridge is concerned, the critical question is whether or not the request to stay was "open ended", and whether the record supports a finding that mine management's request that he stay "until the work was finished", with no indication as to how long it would take, was a reasonable request to accomplish management's objectives.

A pivotal question surrounding the reasonableness of Mr. Eldridge's work refusal, is the amount of time that he believed he was required to stay and finish the pillar work. The fact is that the miners who stayed worked until 3:00 a.m., or approximately five hours of overtime. It is easy for one to speculate after the fact that any given amount of time worked may or may not be reasonable. While it is true that Mr. Eldridge indicated he did not know whether his decision would have been any different had Mr. Miller specifically told him that the overtime work would not last more than three or four hours, the critical question is to decipher the actual circumstances which faced Mr. Eldridge at the time he made his decision that he was "too tired" to continue working.

I am impressed by the testimony of former mine superintendent Cochran who indicated that if it were his decision to make, he would not have fired Mr. Eldridge. Although Mr. Cochran's testimony is somewhat contradictory in that he indicated that the decision to keep the crew over was not unreasonable and that the miners who did stay until 3:00 a.m., did not work an "unreasonable" amount of overtime, his testimony that mine policy did not require or call for a long period of overtime pulling pillars, that section foreman Eli Smith told him that he saw no need to keep the men beyond their normal shift and tried to communicate this to Eddie Miller, and that he (Cochran) tried to talk Bobby Morris out of his decision to fire Mr. Eldridge all remains unrebutted and unimpeached, and I find Mr. Cochran's testimony credible. Although Mr. Cochran is apparently no longer employed with the respondent, there is nothing in the record to suggest any animus on his part toward his former employer or that he colored his testimony in any way.

Respondent's proposed finding II states that "Complainant was informed by his immediate supervisor, approximately thirty-five (35) minutes before the end of his shift of work, that he should remain on the job finishing pulling the row of pillars on which he was working at the end of the regularly scheduled shift. In proposed finding XIV, respondent asserts that at the time Mr. Eldridge was requested to work overtime, "a reasonably prudent miner knew or should have known that an additional period of about three (3) hours would have been necessary to complete the indicated work".

to stay and work overtime until the pillar work was completed. Given this situation, I cannot conclude that Mr. Eldridge's explanation and evaluation of what work remained to be done, particularly when he was underground working on the pillar section in question, was unreasonable. Mr. Miller indicated that when the men who stayed left at 3:00 a.m., a cut of coal was left and was not taken. Further, Lester Caldwell testified that when he went back to the section the following Monday, August 10, the row of pillars worked on by Mr. Eldridge's crew the previous Thursday, August 6, was still standing and had not caved in. Given these circumstances, Mr. Eldridge's assertion as to what work remained to be done at the time of the work refusal is credible.

Of the four men who decided not to stay and work the overtime, Mr. Eldridge was the only one who offered any excuse. Mr. Jones opted "to take his chances" and left after voicing his "displeasure" with mine management. The other two men picked up their pay checks and left without offering any explanation. The facts in this case do not suggest that Mr. Eldridge's asserted fatigue and exhaustion resulted from something that he had prior control over, or that he reported for work in such a state that his exhaustion can be attributable to nonwork related activities. Here, Mr. Eldridge worked and completed a full normal shift, at the conclusion of which he felt too tired and exhausted to continue working overtime until the rest of the pillar work was completed. Mine foreman Eddie Miller, the man who fired Mr. Eldridge, conceded that had Mr. Eldridge informed him that he was too tired to stay and work, he would have worked something out so he could leave the mine and go home and rest. Mr. Miller conceded further that under these circumstances, Mr. Eldridge would be "accident prone", and that "it would be too dangerous for him to go back in" (Tr. 359).

On August 6, 1981, Mr. Eldridge was working on the second shift, and the scheduled work time for that shift began at approximately 2:00 p.m. and ended at 10:00 p.m. Retreat pillar mining was taking place at this time, and Mr. Eldridge testified that during the shift in question, he performed work operating the coal drill, shooting coal as a shot firer, helping the cutting machine operator with his cable, assisted in the hanging of ventilation curtain, and installed roof support timbers. Mr. Eldridge testified that he worked a full shift, and the only "down time" came at the end of the shift when a shuttle car broke down. Equipment repairman Billy Smith corroborated the fact that the car broke down at approximately 9:00 p.m., and that he was expected to stay over and repair it. He also testified that the section continued to operate with another machine.

John Jones confirmed that retreat pillar work entailed the continuous setting of roof support and breaker posts to protect against roof falls and rib rolls. He estimated that by the end of the normal work shift, he had made approximately 12 to 14 cuts of coal with his machine. Charles Cody, a miner who was called in from another section and who did stay to work the requested overtime, testified that if he were "dead tired" after working on

a pillar section, he would not want to continue working because
he would

John Jones' refusal to stay was based on his assertion that there was no indication that the top would fall over the intervening weekend and he saw no reason for staying. He worked the entire regular shift with Mr. Eldridge, and in Mr. Jones' opinion it would have taken an additional shift or shift and a half to take out all of the remaining coal on the pillar (Tr. 230).

Mine foreman Eddie Miller first testified that when he met with the crew in the lamphouse he informed them that it was necessary for them to stay and finish the row of pillars, and he explained that the company did not want to lose the coal in the event of a roof fall. Later, in response to my questions, Mr. Miller stated that he did inform the men that the additional pillar work would not take over two to three hours. Former mine superintendent Cochran testified that section foreman Eli Smith informed him that he saw no need to keep the crew over for the extra work, and that he tried to communicate this to Eddie Miller.

It seems clear from the record in this case that mine foreman Eddie Miller was aware of the fact that some of the men did not want to stay beyond their normal work shift and that his awareness of this fact was communicated to the then general superintendent Raymond Cochran in terms of "a problem". Mr. Miller then ordered the entire crew out of the mine so that he could speak with them. Up to that point I can find no credible testimony to support a finding that the crew was ever told precisely how long they were expected to stay over and work. Mr. Miller testified that when he went into the mine after the men left there was no loose coal which had been cut that needed to be loaded out. He confirmed that the men who did stay to work left at 3:00 a.m., because the row of pillars had been mined and the breaker posts were set. However, he acknowledged that a cut of coal was left because the roof which had been cut and shot was "popping" and that "we felt that we had it in good shape, and we could go ahead and leave" (Tr. 360). He also indicated that when he was underground sometime between 7:00 and 7:30 p.m. on August 6, he remarked to section foreman Eli Smith that "it looks like we need to work overtime."

Although there is a conflict in the testimony of the witnesses as to precisely what was said in terms of how long management expected the crew to stay and work, careful scrutiny of the entire record and all of the testimony in this case leads me to conclude that management made no real estimate as to how long the additional work would take and simply expected the crew to stay until the work was finished. While it is easy for anyone to speculate and offer an opinion "after the fact", it seems clear to me that at the time of the incident and prior to the work refusal in question no one actually physically inspected the area which remained to be worked to determine precisely how long it would take to finish the pillar work.

I find that the preponderance of the credible testimony establishes that Mr. Miller did not tell Mr. Eldridge that he was required to stay and work any specified amount of time. I find

that he was simply directed

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not be alert and that this would not be safe. Although he did concede that he was tired at the time he was asked to stay over for the additional work but opted to stay anyway, I am convinced that he did so because he personally felt some obligation to stay.

Former mine superintendent Cochran testified that company policy did not call for miners to work long hours pulling pillars because they would be "wore out" and "too fatigued". He also indicated that had he been advised that Mr. Eldridge was too tired to stay on and work he would have sent him home to rest and would have attempted to get someone else to replace him. MSHA Inspector Lowers testified that based on his experience, if he were a supervisor and a miner told him he was too exhausted to continue working, he would "send him outside".

Apart from its conclusion that a claim of "too tired and exhausted" is too personally subjective to ever be believed, the only testimony presented by the respondent to refute Mr. Eldridge's claims in this regard is that of Eddie Miller. However, close scrutiny of his testimony reflects that he was not underground during the entire work shift in question, and he conceded that the reason he does not believe Mr. Eldridge's claims is that he "had no waying of knowing" whether he was too tired and exhausted to continue working. He then candidly conceded that had Mr. Eldridge informed him that he was too tired and exhausted to continue working he would have sent him home to rest because he would have been accident prone. Thus, I can only conclude from this testimony that Mr. Miller would have accepted Mr. Eldridge's claims of being too tired and exhausted, and his only reason for not doing so in this case is his assertion that Mr. Eldridge said nothing to him.

Eddie Miller testified that Mr. Eldridge had been on the job for one full shift at the time the crew was directed to work overtime. Although he refuted the fact that "drilling and shooting" entailed two distinct jobs, he did not rebut Mr. Eldridge's claims that he did in fact do that work in addition to his other duties. Further, Mr. Miller confirmed that timbers were continuously being knocked down and reinstalled during the mining operation in question, that an "abundance" of timber roof support posts were installed on the pillar section, that many times extra posts are installed to insure the stability of the roof, and he did not rebut the fact that Mr. Eldridge was also engaged in this work in addition to his other duties.

In addition to pointing out that Mr. Eldridge is a young man who had held six jobs, none of which lasted more than 2-1/2 years, the thrust of respondent's defense to Mr. Eldridge's claim that he was too tired and exhausted to continue working beyond his normal work shift is the suggestion that such claims should never be allowed because they are too personally subjective and lend themselves to abuse by miners who simply wish to make their own determination when they will work. Although I agree with the general proposition advanced by the respondent on this

question, on the facts and evidence presented in this case, I cannot conclude that the respondent has rebutted Mr. Eldridge's prima facie showing that at the conclusion of his normal work shift he was too tired and exhausted to continue working on the pillar section until all of the pillar was extracted and the area secured for the next subsequent work shift. Further, I cannot conclude that the respondent has rebutted Mr. Eldridge's prima facie showing that given the circumstances and options facing him at the time of the work refusal, he acted unreasonably and in bad faith. As a matter of fact, as detailed earlier in this decision, the preponderance of the testimony adduced in this case supports Mr. Eldridge's assertion that requiring him to continue working when he was physically and mentally exhausted would have jeopardized his safety, and possibly the safety of other members of the crew who did stay and complete the work.

Considering all of the circumstances surrounding Mr. Eldridge's discharge, there is a strong inference in this case that once the management decision was made to discharge anyone who did not stay to work the required overtime, management simply did not want to "back off" for fear of jeopardizing its disciplinary control over the work force. Since Mr. Eldridge was the only one of the group who advanced an excuse for not wishing to stay, and since management had a further opportunity to consider that excuse when it met with the men the following week after the discharges, one would think that management would consider that the circumstances surrounding Mr. Eldridge's work refusal were different from those concerning the other three miners who were fired. The testimony in this case suggests that at the time management met with the men after they were fired, it should have been evident that Mr. Eldridge's reasons for refusing to work the requested overtime was reasonable "protected activity", while the work refusals of the other miners were not. However, it would appear that management simply did not wish to make any exceptions, regardless of the reasons advanced by Mr. Eldridge for his work refusal. The result of that decision is that what may appear to be a legitimate business management decision to discharge three of the men who refused to work the requested overtime, Mr. Eldridge's discharge was contrary to the anti-discrimination provisions of the Mine Act, as interpreted by the applicable case law.

Conclusion

Given all of the aforementioned circumstances, including my findings and conclusions on the issues discussed above, and based on a preponderance of all of the credible evidence and testimony of record in this case, I conclude and find that Mr. Eldridge has established that at the time he was directed to work the requested overtime to complete the pillar work in question he was physically and mentally exhausted. I further find and conclude that given those circumstances, his refusal to stay and complete the requested work was reasonable, and that his decision in this regard was made in good faith. I further find and conclude that requiring Mr. Eldridge to stay and work under the circumstances here presented constituted a safety hazard to himself as well

other members of his crew,

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and that his refusal to stay in these circumstances was protected activity under section 105(c) of the Act. Accordingly, I conclude and find that Mr. Eldridge was unlawfully discriminated against and discharged by the respondent for engaging in activity protected under section 105(c) of the Act, and his complaint of discrimination IS SUSTAINED.

Relief and Remedies

As part of his discrimination complaint filed in this case, and incorporated by reference in his post-hearing brief, Mr. Eldridge requests me to give him the following relief and remedies:

- (1) Order that he be reinstated to his former position with full backpay plus interest;
- (2) Order that he be reinstated by Respondent at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been discriminatorily discharged;
- (3) Order that his seniority rights be adjusted to reflect his work time lost due to Respondent's discriminatory discharge;
- (4) Order that all references to his illegal discharge by Respondent be expunged from his personnel file;
- (5) Order that Respondent reimburse him for all expenses incurred by him in the institution and prosecution of this proceeding;
- (6) Order that he be compensated by Respondent for all medical expenses incurred by him and his family since the date of his discharge, which would have been covered by his medical insurance;
- (7) Order that he be awarded reasonable attorney's fees; and
- (8) Order such other relief as the Court may deem just and proper.

Discussion of Remedies

Section 105(c)(3) of the Act empowers the Commission to remedy discrimination by ---

* * * granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.

Whenever an order is issued sustaining the

complainant's charges under this subsection, a sum
equal to the aggregate

amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed the person committing such violation.

The general subject of the Mine Act's remedies for discrimination are discussed in detail by the Commission in its Northern Coal Company and Belva Coal Company decisions, 4 FMSHRC 126 and 982 (1982), and the parties' attention is invited to those decisions.

During the hearing in this matter, the parties stipulated as to certain matters concerning Mr. Eldridge's employment status (see pg. 2 of this decision). In addition, Mr. Eldridge testified as to other employments held by him, as well as his efforts to seek employment since his discharge by the respondent on August 6, 1981 (Tr. 60-61). He also alluded generally to certain medical and dental expenses incurred by his family during his period of unemployment (Tr. 62). However, the parties have not had an opportunity to file, nor have they filed, any detailed documentation with respect to the question of the compensation due Mr. Eldridge in the event he prevailed in this case. In this regard, it seems clear to me that pursuant to the terms of section 105(c) of the Act, as well as the case law on this subject, that Mr. Eldridge is entitled to the aforementioned itemized relief which he has requested.

ORDER

1. Respondent IS ORDERED to reinstate Mr. Eldridge to his former position with full backpay plus interest, from August 6, 1981, to the date of his reinstatement, with all of his seniority rights intact as noted in requested relief No. 3 above, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been discharged.

2. Respondent IS ORDERED to compensate Mr. Eldridge for all legitimate medical expenses incurred by him since the date of his discharge, which would have been covered by any employee medical insurance carried by the respondent for his or his family's benefit, reimbursement or coverage of which would have been afforded him had he not been discharged.

3. Respondent IS ORDERED to expunge from Mr. Eldridge's personnel records and files any reference to the discharge of August 6, 1981.

4. Respondent IS ORDERED to compensate Mr. Eldridge for any reasonable personal expenses incurred by him in the institution and prosecution of his discrimination complaint.

5. Respondent IS ORDERED to reimburse Mr. Eldridge for all reasonable attorney's fees incurred by him as a result of his

institution and prosecution of his discrimination complaint.

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IT IS FURTHER ORDERED that counsel confer with each other with respect to the amount of back pay and other compensation due under the above order, including the amount of any claimed costs and attorney's fees, and any agreements, stipulations, and/or settlements in this regard are to be filed with me in writing within fifteen (15) days of the receipt of this decision. If counsel cannot agree, they are to notify me of this in writing within the 15 day period. In the event of any disagreements, the parties are further directed to state their respective positions on those compensation issues where they cannot agree, and they shall submit their separate proposals, with documentation and supporting arguments in writing within twenty five (25) of the receipt of this decision. For purposes of fixing the compensation due Mr. Eldridge, including the awarding of any attorney fees and other costs, I retain jurisdiction of this matter.

George A. Koutras
Administrative Law Judge