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JAMES DICKEY V. U.S. STEEL MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JAMES W. DICKEY, COMPLAINANT	Complainant of Discrimination
v.	Docket No. PENN 82-179-D
UNITED STATES STEEL MINING CO., INC., RESPONDENT	Cumberland C Mine

DECISION

Appearances: Kenneth J. Yablonski, Esquire, Washington, Pennsylvania,
for the complainant Louise Q. Symons, Esquire, Pittsburgh,
Pennsylvania, for the respondent

Before: Judge Koutras

Statement of the Proceeding

This matter concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Complainant claims that he was unlawfully discriminated against and discharged from his job by the respondent for engaging in activity protected under section 105(c)(1) of the Act. Respondent filed a timely answer denying any discrimination and asserting that the complainant was discharged for just cause. A hearing was convened in Washington, Pennsylvania, and the parties appeared and participated therein. The parties filed posthearing briefs, and the arguments presented therein have been considered by me in the course of this decision.

Issue Presented

The principal issue presented in this case is whether the Complainant's discharge was prompted by protected activity under the Act. Additional issues raised are 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, 20 CFR 2700.1, et seq.

Introduction

Mr. Dickey's discrimination complaint was filed with the Commission on April 5, 1982, and it was filed after he had been notified by MSHA on March 15, 1982, that its investigation of his complaint disclosed no violation of section 105(c) of the Act. Briefly stated, the background concerning his discrimination complaint against the respondent follow below.

The complainant James Dickey is a 35 year old miner who was hired by the respondent in August 1977, after working some seven years with the Bethlehem Mines Corporation, where he worked as a continuous miner operator, and also served as an elected UMWA safety committeeman. During his employment with the respondent, he worked as roof bolter, continuous miner operator, and shortly before his discharge he was working in the preparation plant. In addition, during his tenure with the respondent, he either directly or indirectly filed several safety complaints and grievances questioning certain safety practices or otherwise challenging certain safety practices or decisions on the part of mine management. Some of his complaints and personal grievances were directed against mine management personnel, and as a result of these encounters with management, Mr. Dickey claims he was singled out and fired over an incident involving himself and his common law wife, Donna Yoder, which occurred at the mine on September 18, 1981. In support of this conclusion, Mr. Dickey claims that the incident with Donna Yoder was used as a pretext by the respondent to make good on certain management threats and promises to fire him made by one Sam Pulice, the mine foreman. Mr. Dickey claims further that because of his intense interest in safety matters, his "safety activism" (even though he was not a member of the safety committee while employed by the respondent), and his numerous complaints and grievances, management considered him to be a "troublemaker" and fired him at the first opportunity.

The incident which precipitated Mr. Dickey's discharge took place at the preparation plant shortly after the start of the scheduled 12:01 a.m. shift on September 18, 1981. Donna Yoder also worked at the mine, and on that evening, she and Mr. Dickey were both scheduled to work. However, Donna Yoder had asked to see plant foreman Doug Held to discuss her personal problems with Mr. Dickey, and while Donna Yoder was in Mr. Held's office speaking with him, Mr. Dickey arrived on the scene and he and Donna Yoder became embroiled in a heated discussion over their relationship. The "discussion" escalated into an exchange of cursing and threats between Donna Yoder and Mr. Dickey, and Mr. Held attempting to keep the two separated while trying to get Mr. Dickey to leave the scene and return to work. This proved futile, and after Donna Yoder left his office, with Mr. Dickey in "hot pursuit", Mr. Held followed them out and encountered them on

a stairway landing where he discovered Mr. Dickey "pinning" Donna Yoder against the stair railing trying to restrain her from leaving. Later, after separating the two, and after Mr. Dickey had left the mine, Donna Yoder stated that Mr. Dickey had struck her at some point in time during their encounter that evening.

On the day following the incident with Donna Yoder Mr. Dickey was notified that the respondent had suspended him with intent to discharge him for his "threatening and abusive conduct" toward Donna Yoder, which respondent claims resulted in injuries to Donna Yoder during the claimed assault on her by Mr. Dickey. The discharge was arbitrated and upheld under the union contract. Mr. Dickey then filed a complaint with MSHA, and after MSHA declined to pursue the matter further, the instant discrimination complaint was filed with this Commission.

Respondent's defense is that Mr. Dickey's discharge was prompted because of his violation of a company "shop rule" which prohibits the use of threatening and abusive conduct by one employee on another employee. Respondent denies that Mr. Dickey was "singled out" for "special treatment" because of his prior safety complaints, grievances, and encounters with mine management, and maintains that he would have been discharged because of his conduct involving Donna Yoder whether or not he filed safety complaints. Respondent denies that Mr. Dickey suffered disparate treatment that his discharge was in any way motivated by protected activities, and points to the fact that an independent arbitrator judged Mr. Dickey's actions of September 18, 1981 alone to justify his discharge.

Complainant's Testimony and Evidence

Mr. Dickey testified that he began work at United States Steel's Cumberland Mine in August 1977, and when first hired he worked as a roof bolter. He then worked as a continuous miner operator from October to June 1981, at which time he bid on an "outside" job as a coal sampler in the preparation plant, and started that job on July 1st. While employed at the mine he was never a safety committeeman, but stated that he "was very active on safety matters", and confirmed that he was a committeeman during his past employment at the Bethlehem Mine's Marianna Mine in 1977 (Tr. 14-17). He explained his interests in safety as follows (Tr. 17-18):

A. Well, I have always been a strong person as far as safety issues were concerned, and I was a past committeeman at Marianna. I learned a lot about safety and I came to realize that production and safety had to go hand in hand in any mining industry because without one, you couldn't have the other.

I became very interested in safety, and I was approached on daily occasions by other men of my local at the Cumberland Mine who knew that I had safety experience and that I was familiar with the various laws and situations concerning safety; and they asked my opinions on different issues, and I gave it to them.

Mr. Dickey identified exhibit C-1 as a May 23, 1979 safety grievance concerning an unsafe slope belt. The belt had several missing rollers which caused the slope car cable to cut into the ties and cement. He and several other miners reported the condition to the safety committeeman, and when mine management took the position that there was nothing wrong with the cable, Mr. Dickey exercised his safety rights and refused to ride the slope car into the mine. MSHA was called in and the respondent was cited for the condition, and the crew was paid for the shift (Tr. 23-25).

Mr. Dickey identified exhibit C-2 as an October 4, 1979, safety report he and another miner filed concerning the slope belt emergency evacuation system. Mr. Dickey's complaint concerned his refusal to ride the belt out of the mine in other than emergency situations. He refused to ride the belt when the slope car was out of service, and when mine management refused to pay him for staying in the mine he filed one grievance for his pay and another one seeking to clarify the emergency use of the belt in question (Tr. 26-31).

Mr. Dickey testified as to safety dispute on February 1, 1979, concerning the lack of adequate communications on the slope car. He indicated that communications had to be maintained between the car and the hoist operator, and on the day in question the system was not working. He and other crew members exercised their safety rights and refused to ride the car until the problem could be taken care of. Mr. Dickey stated that he suggested the use of walkie talkies, but that this was rejected by mine management. He also stated that mine superintendent Sam Pulice accused him of being the "ring leader" in complaining, and also told him he "was creating a lot of waves that shouldn't be created" (Tr. 37). Mr. Dickey stated that the communications on the slope car were restored during the day shift and he went into the mine and went to work (Tr. 36; exhibit C-3).

Mr. Dickey identified exhibit C-4, as a report of an incident which occurred on November 30, 1979, and which resulted in a charge of insubordination being filed against him. Mr. Dickey stated that he was operating a continuous miner loading coal onto shuttle cars when he saw someone walking up to and along side his miner. He flashed his cap lamp at him and Mr. Dickey shut off the machine. The person was section foreman Kenny Foreman, and he spoke with Mr. Dickey about some work which needed to be done. Mr. Foreman was between the machine and the rib, and Mr. Dickey refused to start his machine until Mr. Foreman removed himself from a position of danger between the machine and the rib. Mr. Foreman would not move, and Mr. Foreman informed him that if he didn't start his machine and begin loading he would charge him (Dickey) with insubordination.

Mr. Dickey stated that when Mr. Foreman refused to remove himself to a safe position, Mr. Dickey informed him that he was involving his safety rights and would refuse to operate the machine as long as Mr. Foreman

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insisted on staying between the rib and the machine. Mr. Dickey requested other work, and Mr. Foreman then spoke with shift foreman Crocker, and Mr. Dickey was instructed to see mine superintendent Sam Pulice. Mr. Pulice summoned him to his office and accused him of refusing to operate the miner. Mr. Pulice then sent him home, and Mr. Dickey filed a grievance and indicated that he was paid for the time he was off work, and that the incident was supposed to be removed from his record (Tr. 48).

Mr. Dickey identified exhibit C-5 as a report concerning an incident which occurred on approximately March 17 or 18, 1980, concerning a cable on his continuous mining machine. Upon an inspection of the machine he discovered a spliced cable which he considered to be damaged. When a mechanic opened up the splice, he found it had been mashed and simply taped over. The mechanic gave Mr. Dickey the defective piece of cable which he cut out, and the next morning he took it to maintenance foreman Lee Gurley, and after discussing it with him realized that he had missed the slope car into the mine. He then took the next car in, but upon arrival underground, was instructed to go back outside. He was sent home for missing the first car, but filed a grievance and stated that he was paid for the day he was sent home (Tr. 51-54).

Mr. Dickey stated that shortly after the slope car incident there was another incident in September 1980 involving a great deal of dust on the section while he and his crew were loading coal. The dust was coming up the track entry and the crew stopped work and went to the dinner hole while the section boss was attempting to find out the source of the dust and clear up the situation. Since most of the crew had stopped work, Mr. Dickey, his helper, and two shuttle car operators shut down their equipment and joined the rest of the crew in the dinner hole.

Mr. Dickey stated that when he was told the crew would have to continue working in the dust, he requested his individual safety rights and refused to work, and he was informed that the rest of the crew had done the same thing. Since the shift was over, the men left the section and went home. The next morning, foreman Dan Fraley informed Mr. Dickey that Mr. Pulice wanted to know "if Dickey was the guy that started this and had the guys leave the crew." Mr. Fraley stated to Mr. Dickey that he informed Mr. Pulice that Mr. Dickey did not instigate the stoppage and each miner decided on his own not to work in the dust.

Mr. Dickey stated that as a result of the aforementioned dust incident, he was called to Mr. Pulice's office, and Mr. Pulice accused him of taking the crew off the section (Tr. 60). However, Mr. Dickey was not reprimanded or given time off because of this incident (Tr. 61). However, Mr. Dickey stated that Mr. Pulice told him that he was fed up with him, accused him of being an instigator, and told him that if he kept up with "these so-called safety issues", he would not have a job (Tr. 62).

Mr. Dickey identified exhibit C-6 as a grievance incident which occurred on approximately October 1, 1980, a week or so after the dust incident. Mr. Dickey discovered a taped spliced cable that connected the mining machine cutting motor to the miner distribution box. The machine was taken out of service and shut down, and Mr. Dickey was sent to another section after invoking his safety rights and refusing to operate the machine. Shortly after being assigned work cleaning the return, Mr. Dickey stated that he and three others were sent home. They were told that Mr. Pulice or Gene Barno had ordered them sent home. As a result of this, they filed a grievance and were subsequently paid. (Tr. 67-70).

Mr. Dickey testified as to a grievance filed in October 1980, over an incident concerning the procedure for cutting through an underground gas well. In the past the crew was kept outside of the mine and put to work while the cutting was taking place. On this occasion, the crew was sent home and they filed a grievance. Mr. Pulice called a meeting with the crew over the grievance, and at the meeting he cursed Mr. Dickey and Mr. Dickey stated that "he told me that he was going to fire me the first chance he got" (Tr. 71-73).

Mr. Dickey identified exhibit C-7 as the grievance he filed against Mr. Pulice for cursing him, and although he indicated that he also filed a separate safety grievance for being sent home he could not locate a copy of it (Tr. 73-74).

Mr. Dickey stated that the grievance filed against Mr. Pulice was filed on October 27, 1980, and in February 1981 it had proceeded to step three of the grievance process. Mr. Pulice at first denied cursing him, but when reminded that Mr. Dickey had many witnesses who heard him, Mr. Pulice admitted it, cursed him again and again threatened to fire him (Tr. 79). Mr. Dickey stated that this took place at the third step grievance meeting, but that Mr. Pulice apologized to him and Mr. Dickey accepted it, and that ended the grievance (Tr. 79-81).

Mr. Dickey testified that on approximately June 12, 1981, he was called to the mine office after finishing his work. Safety committeeman Goody advised him at that time that Mr. Pulice was going to fire him for purportedly creating some kind of an unsafe condition. Mr. Dickey spoke with Union district safety inspector Tom Rabbitt, who also was at the mine at this time, and Mr. Rabbitt advised him that mine management would try to fire him over the alleged incident. After Mr. Dickey advised Mr. Rabbitt that he did not work on the evening of the alleged incident, and when Mr. Rabbitt advised Mr. Pulice of this fact, the entire matter was dropped and nothing happened (Tr. 82-85). Following this incident, Mr. Dickey successfully bid on an outside job in the preparation plant (Tr. 86).

Mr. Dickey testified that he bid on a surface job because he was concerned that mine management would find a way to fire him because underground superintendent Cook and Sam Pulice continually accused him

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of "creating a lot of problems". In addition, Mr. Dickey stated that his section foreman, William Homastat, advised him that Sam Pulice told him that he would fire Mr. Dickey the first chance he got (Tr. 88).

Mr. Dickey stated that on June or July 1, 1981, he began work in the preparation plant and his foreman was Dale Norris. Mr. Dickey stated that he met with Mr. Norris and Mr. Norris stated that he had "heard a lot of stories" about his "safety activities" and stated "I understand that you are going to be a real problem for me" (Tr. 89). Mr. Dickey stated that he advised Mr. Norris that he never tried to create any problems, but that he would insist that safe working conditions be maintained (Tr. 90). During his work in the preparation plant, Mr. Dickey stated that he filed no formal safety grievances, but did discuss a dirty belt and a belt malfunction with his supervisors, but the conditions were taken care of (Tr. 90-91).

Mr. Dickey confirmed that he and Donna Yoder lived together in a "common law" relationship as man and wife since 1975, or for seven and a half years, and that her two children by a previous marriage lived with them. The relationship ended on September 22, 1981. Donna Yoder was also employed at the mine as a utility person, and prior to the incident of September 18, 1981, they were having some problems (Tr. 92-95).

Mr. Dickey testified that on September 22, 1981, he reported for work but was upset over his problems with Donna Yoder. He decided to "report off" on sick leave. He went to plant foreman Doug Held's office to advise him that he was taking sick leave and when he arrived at his office he found Miss Yoder there speaking with Mr. Held. Mr. Held advised Mr. Dickey that he was busy and closed his door. Mr. Dickey opened the door and he and Miss Yoder began swearing at each other (Tr. 99). Miss Yoder asked for his car keys, and when he refused to give them to her, she left the room and started down the stairs. He ran after her and they were cursing at each other. She was screaming at him, and they became entangled on the stairwell and he grabbed the hand rail and pressed against her in an effort to calm her down. At this point, Mr. Held appeared at the top of the stairs, and Miss Yoder told him that he (Dickey) struck her. Dickey and Yoder continued cursing each other, and Mr. Held asked Mr. Dickey to leave since he had reported off, and Mr. Held ordered him off the property. Mr. Dickey accused Mr. Held of interfering in his family life, took off his hat and threw it on the floor, and then left (Tr. 100-106).

Mr. Dickey confirmed that following the incident at the mine, he and Miss Yoder ended their relationship and Mr. Dickey "moved out". Miss Yoder filed no criminal charges against him as a result of the incident (Tr. 106).

Exhibit C-9 is a copy of U.S. Steel's employee "shop rules", and Mr. Dickey conceded that these are the employee rules of conduct applicable to all employees, and that everyone is given a copy and told to read them (Tr. 109). He confirmed that he was

supposed to have violated rule #4, but believes that he was discharged for his safety activities (Tr. 110).

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Mr. Dickey testified that other employees were guilty of violating company shop rules but were not suspended or discharged. He identified exhibit C-10 as a grievance filed by employee Randall Dugan against Sam Pulice after he was cursed and threatened by Mr. Pulice. Mr. Pulice was not disciplined, and the company's position was that he was a "company official" and the rules did not apply to him (Tr. 111-112).

Mr. Dickey testified as to a fight which occurred in 1979 between employee Les Reiser and acting section foreman Rich Borzani. They were not suspended or discharged, but foreman Cook spoke to them and they apologized to each other (Tr. 113).

Mr. Dickey testified to an incident in 1979 where foreman Denzell Desmond struck shuttle car operator David Rowe, and Mr. Desmond was not suspended or discharged. Mr. Cook purportedly stated that had Mr. Rowe punched back he would have been discharged (Tr. 114).

Mr. Dickey stated that section Foreman Kenny Foreman violated the shop rule by failing to observe safety regulations when he insisted on standing between the miner machine and the rib, but he was not disciplined (Tr. 115). Mr. Dickey also testified in 1979, employee Tom Pollock was caught falsifying a doctor's slip and was suspended for one to three days (Tr. 116).

Mr. Dickey testified that he filed a complaint against assistant mine foreman Bernie Steve when Mr. Steve directed him and his helper to pull some ventilation back to a point which would be in violation of Federal or state law, but the company did not discipline Mr. Steve for this (Tr. 117).

Mr. Dickey testified that employee Donny Boyle was caught sleeping in the mine in 1980 and was suspended for a few days (Tr. 117). Employee Mike Mechanic falsified a doctor slip to cover an absence, and was suspended for one or three days (Tr. 117). Employee Timmy Ross was caught with matches in the mine and was suspended for one day (Tr. 118). Employee Dale Williams was on company property drunk when he was supposed to be working, and on another occasion was caught pouring whiskey out of a bottle into a cup and drinking it in the bathhouse. When the company found out that the whiskey bottle belonged to preparation plant superintendent Dale Norris, the matter was dropped (Tr. 118-119).

Mr. Dickey testified that employee Lisa Zern violated shop rules on four or five separate occasions, and was suspended one time for five days (Ex. C-11, Tr. 119). He also testified that employee Jane Christopher and another girl who worked on the belt line filed grievances against a foreman whose nickname is "Snuffy" because he was constantly cursing at them and harrassing them. The grievances were filed after Mr. Cook took no action against the foreman, and the girls were reassigned to another crew (Tr. 120).

Mr. Dickey was cross-examined as to each of his asserted safety and personal complaints and grievances, and was also

questioned concerning his contentions that other mine employees
has violated certain shop

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rules but were either not suspended or discharged or received less severe discipline than he did (Tr. 131-152; 158-167; 168-179; 241-257).

Mr. Dickey confirmed that under the mine labor agreement he was subject to discipline for claiming his individual safety rights in bad faith, but denied that he was acting in bad faith or was disciplined for filing the grievance of December 7, 1979 (Tr. 159).

In response to questions from U.S. Steel's counsel as to whether Mr. Dockey considered Mr. Pulice to be "volatile", Mr. Dickey responded as follows (Tr. 179-183):

Q. You had a run-in with Sam Pulice?

A. Yes, ma'am.

Q. Would you characterize Mr. Pulice as volatile?

A. I don't understand what you mean.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Does he have a tendency to lose his temper, blow his cool, so to speak?

BY MS. SYMONS:

Q. Would you call him hot tempered?

A. He was with me.

Q. Do you know if he was hot tempered with anyone else?

A. I'd say he was once in a while on different issues, if he thought that he was right on it, I imagine, yes, ma'am. I can't really tell you, you know, the man's personality. All I know is that he came after me a good bit.

Q. Do you know if he yelled at anyone else?

A. If he yelled at anyone else, ma'am?

Q. Yes.

A. Yes, ma'am. Yes, ma'am.

Q. Do you recognize something called mine talk or shop talk at Cumberland Mine?

A. Yes, ma'am.

Q. Isn't it true that almost everyone at Cumberland Mine uses that kind of language on occasions?

A. It depends on what you are saying by that kind of language, ma'am.

Q. What I will categorize as four-letter words.

A. To use a four-letter word, ma'am, in mine talk, is sometimes nothing, unless they are directed towards a person for a certain thing.

Q. Well, is it true that sometimes at Cumberland Mine, you used four-letter words?

A. You mean just in a manner of speaking?

Q. Yes.

A. Never addressing towards anyone that I can recall, no.

Q. You accused Mr. Pulice of occasionally using four-letter words, isn't that true?

A. I have accused him of using more than four-letter words, ma'am.

Q. How do you categorize them then?

A. Well, I don't, ma'am. I don't classify son-of-a-bitch as a four-letter word.

ADMINISTRATIVE LAW JUDGE KOUTRAS: By the same token, that particular expression, if you get your finger caught in a pinch point, is a little different than cussing some employee down, isn't that what we are talking about here?

MS. SYMONS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Because if you disciplined everybody in the mines who used four-letter words, there wouldn't be any mining going on.

MS. SYMONS: I think that is my point.

ADMINISTRATIVE LAW JUDGE KOUTRAS: But the context in which the question is asked and his answer is yes, he probably uses four-letter words like anybody else, but never directly to any one person as a personal insult is what I think he is trying to say.

THE WITNESS: Yes, sir.

Mr. Dickey reiterated that he bid on the preparation plant job to get away from Sam Pulice (Tr. 191). However, he conceded that as mine foreman, Mr. Pulice would also be in charge of the preparation plant, but that he would not have to see him everyday or walk by his office as he did when he was assigned underground (Tr. 196).

Mr. Dickey stated that Mr. Pulice reported to mine superintendents Dale Norris and Walter Cook. Mr. Norris was the preparation plant superintendent and that Mr. Cook was the underground mine superintendent (Tr. 198). Mr. Dickey believed that Mr. Pulice's authority as mine foreman also extended to the preparation plant (Tr. 199).

Thomas J. Rabbitt, Safety Inspector, UMWA, District 4, confirmed that he was acquainted with Mr. Dickey and described him as being concerned with his and other's safety rights, and that he would not hesitate to complain about safety. Mr. Rabbitt also confirmed that he gave him copies of exhibits C-2 and C-3 when he came to his office to request them (Tr. 278-282).

Mr. Rabbitt confirmed the incident concerning an allegation against Mr. Dickey that he may have caused a safety violation and that the matter was dropped after he (Rabbitt) told Mr. Pulice that Mr. Dickey was not working in the mine at the time of the incident in question (Tr. 285).

On cross-examination, Mr. Rabbitt confirmed that Mr. Dickey and others did file a grievance concerning the slope car incident of October 4, 1979 (Tr. 286). He also confirmed that Mr. Dickey was involved in talks with management over the suggested walkie-talkie (Tr. 291). Mr. Dickey stated that Mr. Pulice would "blow off steam just like everybody does" when he got mad, but he doesn't know Mr. Pulice, nor has he ever been present when he may have yelled at Mr. Dickey (Tr. 294). He also has never been told by any union members at the mine that Mr. Pulice ever yelled, screamed, or used foul language to them (Tr. 295).

Mr. Rabbitt stated that he did not feel that Mr. Dickey's discharge was justified, but that if he actually physically assaulted Donna Yoder, then the company would have just cause to discharge him under the union-management conduct rules (Tr. 298).

Jane Christopher, testified that she has been employed at the mine since December 1978. She testified that on several occasions she and another female miner, Helen Kozloski, were harrassed practically daily by Foreman Ed Yanik who stood beside them and swore at them. They complained to Mr. Pulice and Mr. Cook but no action was ever taken against Mr. Yanik (Tr. 316-318).

On cross-examination, Ms. Christopher stated that she filed a regular grievance to be removed from Mr. Yanik's crew sometime in April 1980, but that after the grievance was filed she was taken off of his crew (Tr. 320).

Ms. Christopher testified that she knew Mr. Pulice, characterized him as "hot tempered", and confirmed that she has heard him use profanity or obscenities at the time that she complained to him about the language Mr. Yanik was using (Tr. 325).

Gerald E. Swift, Executive Board member, UMWA District No. 4, confirmed that he has been involved in grievances brought against mine bosses for cursing at employees at the mine. However, the grievances were withdrawn because of questions raised as to whether there was actual cursing and because the contract does not provide for the union to tell mine management how to discipline its salaried personnel (Tr. 329).

On cross-examination, Mr. Swift confirmed that two miners filed a grievance against a supervisor for cursing them but that it was withdrawn because he could not process it under the contract (Tr. 332). He identified exhibit C-7 as the grievance filed by Mr. Dickey against Mr. Pulice, and he indicated that grievances of this kind where the employee is seeking an apology are usually resolved or settled at the third stage (Tr. 334).

Mr. Swift confirmed that two employees, Dave Smith and Ralph Korzum, were discharged for insubordination and using obscene language towards a supervisor, but when they filed cross complaints against the supervisor for using the same type of language against them, management took the position that there was nothing to be gained by going to arbitration because under the contract the union couldn't force management to discipline salaried managers (Tr. 339). Mr. Swift also confirmed that employee Chris Watson was discharged for falsifying a doctor's slip (Tr. 337).

Danny Litton testified that he is employed at the mine in question and that on some occasions he worked on the same crew with Mr. Dickey as a "fill in". He confirmed that Mr. Dickey was concerned about safety and that he and other miners on occasion consulted with Mr. Dickey about safety problems. He stated that Mr. Dickey was not afraid to stand up for safety issues (Tr. 350), and he confirmed that he had overheard a conversation between Mr. Dickey and Mr. Sam Pulice in the mine office during an incident concerning the cutting through of a gas well, and his testimony in regard to this incident is as follows (Tr. 352-353):

Q. What was it you heard Pulice say to Dickey?

A. Well, Sam Pulice looked at him between me and said some swear words and pointed his finger and said he'd fire him if it was the last thing he ever done.

Q. Would you tell us how that happened to occur, that you heard this?

A. Well, they called the whole crew, told us that they were going into the office or something; and that's all we knew. So me and a couple of my

friends went into the office to see what was going on, you know, because it might concern the rest of us, too; so we just, you know, we went in and then I just kind of stayed in the back and listened to him talk.

Q. Do you recall what the incident was that they were called in about?

A. I believe it was about the gas well at the time.

Q. Was there a grievance filed over the gas well?

A. Yes.

Q. You say you heard Pulice using some pretty choice language directed at Dickey?

A. Yes.

Q. Did he accuse Dickey of being the instigator of this thing?

A. He said something to that effect.

Q. Then somewhere along the line, you also heard him say to Dickey that I will fire you if it's the last thing I do?

A. Yes; he did say that.

Mr. Litton stated that he participated in the grievance filed over the miner cable (exhibit C-6), and he indicated that he has never had any "encounters" with Mr. Pulice and had chosen "to stay away from him whenever I could" (Tr. 358).

Bruce G. Diges, testified that he is employed at the mine and that he worked with Mr. Dickey when he was there for about a year as Mr. Dickey's miner helper. He described Mr. Dickey as being "very safety conscious", and would always check out his machine (Tr. 362).

Mr. Diges confirmed that grievances were filed over the miner cable and gas well, and that as a result of these incidents Mr. Dickey was threatened by mine management (Tr. 364). He stated that at the grievance meetings in the mine office Mr. Pulice advised his crew that he "was going to break us up", that "he will fire us if he can", and that he proceeded to argue with Mr. Dickey and they were cursing back and forth (Tr. 365). Mr. Diges also indicated that Mr. Pulice indicated to him that he should sever his relationship with Mr. Dickey, and that if he didn't "I would be fired" (Tr. 369).

Mr. Diges testified further that "Sam Pulice was a rat. He was very hot tempered; very easy to fly off the handle" (Tr. 376). He had never known Mr. Dickey to "fly off the handle" on safety issues (Tr. 377).

Mr. Diges confirmed that he had received a couple of absentee notices from management, and he confirmed that when Mr. Pulice and Mr. Dickey were arguing over the grievances which were filed, Mr. Dickey did not curse back (Tr. 380).

Walter E. Cook, Jr., testified that he has been the underground mine superintendent at the Cumberland Mine since approximately 1977, and that he knew Mr. Dickey as a safety oriented person who was always involved if there were any "safety confrontations" on his shift. He considered Mr. Dickey to be "right up there" with some of his good continuous miner operators. Although he and Mr. Dickey occasionally exchange words, he did not consider Mr. Dickey to be a "hot head" in his daily operations (Tr. 384).

Mr. Cook stated that most of the time Mr. Dickey was astute and knowledgeable on safety matters, and he conceded that most of the safety issues brought to his attention were important issues (Tr. 384). Although he disagreed with Mr. Dickey's complaints over the slope car communications, he did not believe that Mr. Dickey was trying to "blow it out of proportion" or that he was "agitating for the sake of agitating" (Tr. 385-386).

Mr. Cook stated that he was not involved in the decision to discharge Mr. Dickey, and that the decision in this regard was made by outside superintendent Dale Norris, general superintendent J. W. Boyle, and he indicated that "our Pittsburgh Corporate Office would have been consulted in this matter" (Tr. 387). He confirmed that he learned of Mr. Dickey's discharge "after the fact" (Tr. 389).

Mr. Cook indicated that he was aware of the grievance filed by employee Randall Dugan against Mr. Pulice because of Mr. Pulice's alleged abusive language to Mr. Dugan, and he confirmed that he gave Mr. Pulice a verbal reprimand, but he could not recall telling Mr. Dugan about this reprimand (Tr. 394). Mr. Cook could not recall any fighting incident between employees Les Reiser and Rich Borzani, or any incident between employees Denzell Desmond and David Rowe (Tr. 395). He did recall the incident concerning Mr. Dickey and foreman Kenny Foreman, and he confirmed that he verbally reprimanded Mr. Foreman over the matter, but gave no official notice of this to anyone (Tr. 396). He also confirmed that the record of Mr. Dickey's one-day suspension in the matter should have been removed from his personnel file (Tr. 397), and he did not know why it was still in his file (Tr. 400; exhibit C-12). He also identified exhibit C-13 as a written reprimand to Mr. Dickey for being absent from work, and he could not explain why the copy does not show that it was ever delivered to Mr. Dickey, even though this is required (exhibit C-13; Tr. 401).

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Mr. Cook confirmed that he lifted the one-day suspension given to Mr. Dickey over the incident with Kenny Foreman, and he did so because "I don't think the foreman did act in the proper fashion in suspending Mr. Dickey, and I didn't think I had a cause to argue under the contract and I settled that case from that standpoint" (Tr. 409). Mr. Cook confirmed that he knew about the disciplinary action against employee Dennis Boyle which resulted in a 3-day suspension for sleeping on the job, and he indicated that Mr. Boyle was suspended with intent to discharge, but was given the opportunity to resign rather than being discharged (Tr. 411). He also indicated that he was not familiar with the outcome of any disciplinary action against Dale Williams for drinking on company property, nor could he confirm that Dale Norris was disciplined for having whiskey on company property (Tr. 412-413). He also confirmed that he was aware of the three-day suspension given employee Tim Ross for having matches in his dinner bucket, and while management contemplated discharging Mr. Ross, the union intervened, and based on all of the facts of his case, it was decided to suspend him for three-days instead of discharging him (Tr. 417).

Mr. Cook also confirmed that he was aware of the disciplinary case against Lisa Zern for an "absentee problem", but he indicated that he was not familiar with all of the details of her case, and while he recalled that she may have resigned, he could not state that she was not discharged (Tr. 424). Mr. Cook indicated that since his supervisory personnel are not under the UMWA/BCOA contract he can discipline them "in a little different fashion than I can a bargaining unit employee" (Tr. 431). He confirmed that he spoke with Ed Yanik about cursing and harrassing Jane Christopher, but did not suspend or fire him and simply "talked to to him" (Tr. 431). He also confirmed that he did not discipline Mr. Pulice over the incident where he cursed Mr. Dickey, and he stated that "I don't have too many people who are as rambunctious as Mr. Pulice" (Tr. 434). He also stated that Mr. Pulice did not receive a bonus and that one of the reasons for this was the cursing incident with Mr. Dickey (Tr. 435), but he conceded that Mr. Pulice's personnel file did not reflect this fact and that no one knew about it (Tr. 436). He confirmed that he has suspended foremen for safety infractions, and stated that foremen would "receive some discipline" for harrassing employees. When asked about any action against Mr. Pulice, Mr. Cook testified as follows (Tr. 439-441):

Q. What happened to Sam Pulice insofar as Jim Dickey was concerned?

A. I look at that really as being in Sam's nature. I don't look at that as being threatening and abusive per se.

Q. C7 involved a situation with the cussing and threatening of James Dickey by Sam Pulice, right?

A. Yes.

Q. Without my reading all of that into the record, are you telling me that you didn't, because it happened to be Sam Pulice, that you didn't consider this to be a very serious situation?

A. That's basically right, yes, sir.

Q. In other words, if you are Sam Pulice, you are allowed to do this sort of things?

A. Yes, sir; and there was some question as to exactly, in the step three, if that was exactly the way the words were stated.

Q. Didn't he in fact, and doesn't the grievance indicate, that the grievance was withdrawn because he apologized to Dickey and he admitted that he had said these things?

A. To the best of my knowledge, there was a step three meeting, and in the step three meeting, Jim was asking for an apology. I don't know that Sam actually said, I apologize. I know they went round and round. I can't recollect the exact words.

Q. Well, I show you C7 again. It's signed by Mr. Passera and Mr. Antonelli, and doesn't it say he apologized to Jim Dickey on the back of step three?

A. Apologized to Jim Dickey on the back, yes.

Q. Wasn't that the settlement?

A. Must be, sir. Like I said, I can't recall the exact wording that Sam used with Mr. Dickey.

Q. Notwithstanding all that, that is not nearly as important or as serious as Mr. Dickey getting into the altercation with his common-law wife, Donna Yoder, was it?

A. No. sir, it wasn't.

Q. This injury that Mr. Yoder received never resulted in any Workmen's Compensation claim being filed against U.S. Steel?

A. I can't answer that; not to my knowledge.

Q. As far as you know, it never cost U.S. Steel a dime, did it?

A. I don't know. I don't handle the Preparation Plant, so I am not sure if there was any time lost on it.

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On cross-examination, Mr. Cook identified a copy of exhibit C-7 as respondent's file copy concerning Mr. Dickey's grievance against Mr. Pulice and he confirmed that it contains no notations concerning any apology made by Mr. Pulice over the incident (Tr. 442). Mr. Cook confirmed that he is the mine superintendent for the underground operation, and that he reports to J. W. Boyle, the general mine superintendent. He confirmed that the "outside" superintendent who is also in charge of the preparation plant, is equal in rank to him. He also confirmed that Sam Pulice worked for him as the general mine foreman in charge of the underground mine, but that he had no authority to fire anyone. Mr. Pulice and the general foreman of the preparation held comparable supervisory positions (Tr. 448-450). Mr. Cook stated that during the time Mr. Pulice worked for him he often received complaints that he was "very verbal". However, he indicated that he did not believe that Mr. Pulice discriminated against Mr. Dickey by the language he used because "sam used that language toward everyone, including myself on occasions", and that he (Cook) did not take him seriously (Tr. 455).

Mr. Cook confirmed that Sam Pulice had no input into the decision to fire Mr. Dickey, and he based his conclusion on the fact that "since Mr. Pulice worked for me and I wasn't involved, I am sure that he wasn't involved" (Tr. 457). He conceded, however, that the possibility exists that Mr. Pulice could have contacted those responsible for Mr. Dickey's discharge, but found this "rather unlikely" (Tr. 458).

In response to further questions, Mr. Cook stated that Mr. Pulice resigned his job in January 1982, for "personal reasons", and that he had worked at the mine since 1977. When asked to explain why at least two miners, including Mr. Dickey, went out of their way to avoid Mr. Pulice, Mr. Cook responded "That was basically the way he did business. I don't condone it; don't get me wrong. I have talked to him quite numberously about, you know, his handling of people." (Tr. 462). When asked to explain the circumstances surrounding Mr. Pulice's resignation, Mr. Cook testified as follows (Tr. 462-463):

ADMINISTRATIVE LAW JUDGE KOUTRAS: How long has he been in a management position at U.S. Steel?

THE WITNESS: He was in a position probably two years; eighteen months to two years.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Prior to his resignation?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did any of that have anything to do with the personal reasons for his resigning?

THE WITNESS: It had part of it, part of it to do with the problem.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did management kind of give him a nudge or was it all of the sudden, his decision to voluntarily resign for personal reasons?

THE WITNESS: He wasn't given an ultimatum, if you want to put it that way. If you want to put it in that fashion no, sir. He made the election to resign himself.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did someone talk to him?

THE WITNESS: Talk to him to try to get him to stay, yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did somebody talk to him, trying to nudge him out?

THE WITNESS: No, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did his resignation have anything to do with the filing of this Complaint?

THE WITNESS: No, sir; it did not.

Mario L. Antonelli, Executive Board Member, UMWA District #4, testified that he knew Mr. Dickey to be "always concerned for safety", and he confirmed that he was involved in several grievances filed by Mr. Dickey against mine management (Tr. 475). He confirmed that Mr. Pulice apologized for the language used against Mr. Dickey, and that this in effect settled the grievance (Tr. 478). He also confirmed that Mr. Pulice admitted stating during the grievance that if he had a chance he would fire Mr. Dickey (Tr. 480). He also confirmed that at the grievance meeting concerning Mr. Dickey's complaint, Mr. Pulice was "hot headed" (Tr. 480).

David B. Rowe, testified that he is employed at the mine in question, and he confirmed that he was involved in an incident where he was "grabbed" by the neck and "smacked" by a supervisor who believed he was part of a practical joke to "grease" the supervisor. He explained that miners sometimes put grease over a man who is new on the job or who is there for his last day, and the supervisor thought that he was going to do this to him. Mr. Rowe did not report the incident, and other miners told him that he (Rowe) would have been fired had he retaliated and struck the supervisor (Tr. 493).

On cross-examination, Mr. Rowe conceded that "greasing" a supervisor is "horseplay", and he admitted that other miners had selected him (Rowe) to do the "greasing" (Tr. 494). He also confirmed that during the two years or so that he worked for the supervisor in question, they had no problems (Tr. 500).

Testimony and Evidence Adduced by the Respondent

Douglas Held, Preparation Plant Operating Foreman, testified that Mr. Dickey worked for him four days before his discharge. He testified that while he could recognize Mr. Pulice, he did not know him personally and had no contacts with him. He confirmed that Mr. Dickey was a good worker during the four days that he worked for him, and that he had no problems with him prior to his discharge on September 18, 1981 (Tr. 516-519).

Mr. Held testified that on Friday, September 18, 1981, he arrived at the mine shortly after twelve midnight and went to the central control room of the preparation Plant. Donna Yoder called him over the mine phone and asked to speak with him. She came to his office, and since she indicated she wanted to speak with him in private, he closed his office door. Miss Yoder began telling him about her problems with Mr. Dickey, and at that point Mr. Dickey opened the door and "wanted to know what the hell was going on". Mr. Held responded "Jim, it's none of your business; leave the room" (Tr. 520). He left, but then returned, and he and Miss Yoder exchanged words, began cursing each other, and argued over keys to a car and the trailer where they both lived. Mr. Held stated that he requested Mr. Dickey to return to work, but Mr. Dickey replied "I don't have to do a "F'ing thing you tell me because I quit", and when Mr. Held again advised him to return to work and that he shouldn't quit over such an incident, Mr. Dickey repeated his statement (Tr. 522).

Mr. Held stated further that after his exchange with Mr. Dickey, Miss Yoder left the room and Mr. Dickey followed her out. Mr. Held left the room to call superintendent Dale Norris and as he went down the stairway he found that Mr. Dickey had pinned Miss Yoder against the stair railing with her back against the rail. He split them up and directed her to go to the utility room. She went to the room and Mr. Dickey followed her in and Mr. Held asked the four men who were there to try and keep the two separated while he went to phone Mr. Norris. After speaking with Mr. Norris he again asked Mr. Dickey to go back to work, and Mr. Dickey informed him again that he had quit. Mr. Norris then asked him to leave the property, and as he left the room he threw his hat back towards him and he left (Tr. 526-527). Later, he learned that Miss Yoder wanted to leave work early and she told him that Mr. Dickey had struck her, that her back and jaw were sore and that she had lost a contact lens. Miss Yoder filled out an "early-out" slip at approximately 3:00 a.m., and left the property (Tr. 530).

Mr. Held testified that after Miss Yoder left the property, he called Mr. Dickey on the phone and advised him that "it was a real ridiculous thing to lose your job over", and he asked him to report to the office at 7:30 a.m., that morning so that he could discuss the matter with him and Miss Yoder. Mr. Held stated that Mr. Dickey told him he "didn't have to do a damn thing I told him and hung up" (Tr. 531). Mr. Dickey did not come to the office, but he called him (Held) at 7:00 a.m., and Mr. Held again asked him to come to the office so that he could help him

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get his job back and Mr. Dickey informed him that "I reported off" (Tr. 531). Miss Yoder came in at 7:30 a.m., but Mr. Held did not speak with her, but she did speak with Mr. Norris (Tr. 532).

Mr. Held stated that the incident in question did not affect mine production, but that the employees who were in the utility room used an hour of nonproductive time (Tr. 534). Mr. Held confirmed that he had only known Mr. Dickey for the four days he worked for him and he knew nothing about his being a "safety activist" (Tr. 535).

On cross-examination, Mr. Held confirmed that he did not make the decision to discharge Mr. Dickey. He stated that since Mr. Dickey informed him that he had quit, there was no decision to make (Tr. 536). He also indicated that Mr. Norris was involved in the decision to suspend Mr. Dickey with intent to discharge him (Tr. 536). Mr. Held also indicated that he prior to the incident in question, he had no knowledge that Miss Yoder and Mr. Dickey were living together, and that she informed him the evening of the incident that she "wanted to throw his clothes out", and he surmized from this conversation that they were living together (Tr. 538). He also confirmed that Miss Yoder told him that she and Mr. Dickey had lived together for some time and were having marital problems, that they had some trouble that evening, and that "she was fed up with it and she wanted to get out" (Tr. 538). He also confirmed that Mr. Dicket was agitated and upset that evening, and that when he entered his office the second time he asked Mr. Held whether he and Miss Yoder were discussing their problems and Mr. Held conceded that it appeared to him that the two were having "a lovers or marital quarrel" (Tr. 541). He also confirmed that Miss Yoder and Mr. Dickey were both cursing each other, and were making accusations to each other (Tr. 542).

Mr. Held stated that he did not know whether Miss Yoder filed any workmen's compensation claims for her injuries, but he confirmed that she lost no work time as a result of any injuries (Tr. 543). He also confirmed that Miss Yoder required no medical attention, and that he did not suggest she see a doctor (Tr. 544). Mr. Held also indicated that while Miss Yoder was emotional, he observed nothing about her condition that would lead him to believe that she was in serious pain or needed medical attention (Tr. 545). Mr. Held also indicated that because of Mr. Dickey's "attitude", he was concerned that "anyone who got in his way was going to get knocked down the stairs", but that this did not happen (Tr. 547). He also confirmed that all of Mr. Dickey's activities that evening were directed at Miss Yoder, and to his knowledge Mr. Dickey did not threaten anyone else and that the preparation plant did not shut down over this incident (Tr. 548).

Mr. Held stated that while he did not participate in the decision to discharge Mr. Dickey, he did participate in the company investigation of the incident and told Mr. Norris and general plant foreman Parfitt about the incident. Mr. Held was not at the arbitration hearing, nor was he present when

management made the decision to suspend Mr. Dickey with intent to discharge him (Tr. 549). He made no recommendations in the matter, but he acknowledged that he told Mr. Parfitt and Mr. Norris that Miss Yoder

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reported that Mr. Dickey had struck her, and he also informed them that Miss Yoder's comments concerning her desire to end the relationship with Mr. Dickey. Mr. Held confirmed that he considered the incident to be between "two employees", and said nothing about any "marital quarrel" (Tr. 551).

Mr. Held confirmed that Mr. Dickey appeared upset when he first appeared at his office, but that the incident on the stairway happened after he and Miss Yoder were quarreling and cursing each other. He also confirmed that he made no recommendations to discipline Mr. Dickey or Miss Yoder over the incident that evening (Tr. 558).

In response to further questions, Mr. Held stated that he made no recommendations concerning Mr. Dickey because Mr. Dickey told him he had quit. When asked why the respondent fired him if he had quit, Mr. Held responded "because the following morning, he did not quit. He called me at 7:00 a.m., and said, I told him to report back to the mine, and he said why, I reported off" (Tr. 563). Mr. Held confirmed that Mr. Dickey had not "reported off", worked only one hour the evening of September 18th, and his pay was docked for the seven hours he did not work when he left the property (Tr. 565). When asked why he docked Mr. Dickey if he had quit his job, Mr. Held then stated "Well, I'd have to say I don't really remember about docking him. I don't even know what became of his time that night". He also indicated that Mr. Dickey did not report for his next scheduled work shift because he was suspended (Tr. 569-570). Mr. Held confirmed that he had not met Miss Yoder prior to the incident of September 18th, and that he did not personally observe Mr. Dickey strike her other than "just restraining her" (Tr. 573).

James F. McNeeley, preparation plant maintenance foreman, stated that prior to the incident of September 18th, he did not know Mr. Dickey, had no contact with him, had never met him, and Mr. Dickey never worked for him. He confirmed that Mr. Dickey told Mr. Held that he had quit and did not have to do what Mr. Held told him. He also confirmed that when he observed Miss Yoder in the utility room he saw blood on her teeth, she appeared to have been crying, and he could see a slight puffiness on her lower left lip. When Mr. Held told Mr. Dickey to leave the property, Mr. Dickey "pushed his way past Mr. Held", and two other employees held Mr. Dickey on each arm while Mr. Held was trying to get him to leave. He observed Mr. Dickey throw his hat on his way out of the room, and after he left Mr. McNeeley instructed the two employees who were holding Mr. Dickey to patrol the parking lot to insure that Mr. Dickey had left the property, and they confirmed that he had in fact left (Tr. 579).

On cross-examination, Mr. McNeeley confirmed that he made no recommendation concerning the discharge of Mr. Dickey, but did give a statement during the investigation. He was not present during the 24/48 discharge meeting, did not hear Miss Yoder curse Mr. Dickey, and simply informed fellow employee Ms. Groves to "try to clean her up and calm her down" because Miss Yoder was upset (Tr. 580).

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Dale W. Norris, testified that he is presently employed as manager of preparation for the Kerr-McGee Coal Corporation, Harrisburg, Illinois, that he has held this position since February 2, 1982, and that he previously worked at the Cumberland Mine as the outside superintendent. Part of his responsibility was the preparation plant, but he had no responsibility for the underground mine since that was under Walter Cook's jurisdiction (Tr. 591). Mr. Norris stated that Mr. Pulice never worked for him and did not tell him how to direct his work force. He confirmed that Mr. Dugan worked for him (Norris), and he confirmed that Mr. Dugan filed a grievance against Mr. Pulice (exhibit C-10), and that Mr. Pulice had lost his temper over the slope car incident and that "Mr. Cook, was, needless to say, a little bent out of shape" over the incident (Tr. 593). The grievance was withdrawn and he confirmed that Mr. Pulice apologized to Mr. Dugan (Tr. 595).

Mr. Norris identified his general foreman as Paul Parfitt, and he indicated that Mr. Parfitt had no authority to fire anyone. He explained the procedure for discharging an employee as follows (Tr. 596):

Q. If you want to fire someone at U.S. Steel, what are the steps that have to be taken?

A. Before we make any discharge, the first thing that we have to do is, of course, if Paul were handling the initial part of the case like he was in this incident, he has to notify me. I then talk to Mr. Boyle, who was and at this time still is general superintendent at Cumberland. We then bring in our local labor relations man, who at that time was Robert Hoover. Then we jointly contact Pittsburgh Labor relations, as well as Pittsburgh operations. In other words, we go to the corporate office of the coal group, and then a decision is jointly reached after that discussion and issued.

When asked what he knew about Mr. Dickey before he came to work for him, Mr. Norris stated as follows (Tr. 597):

A. I was aware of his past activities and reputation as a somewhat rowdy individual; and I had in fact talked to both Mr. Pulice and Mr. Cook about that, and I felt that I would be remiss not to find out what sort of person he was from these people that managed him before I was receiving --

Q. What did they tell you of his safety activities?

A. They told me that he was in fact very safety conscious and that he wouldn't be a problem.

With regard to any knowledge on his part concerning the relationship between Mr. Dickey and Donna Yoder, Mr. Norris acknowledged that "we had heard about their sort of relationship", and that they were split up and assigned to different crews. However, they were later assigned to the same crew at their request for reasons of travel, et cetera, and we condescended and let that happen" (Tr. 598).

Mr. Norris conceded that Mr. Dickey was doing a good job as a sampler when he was reassigned to the preparation plant. He explained the procedures for "reporting off" work by an employee once he reports for work, and he indicated that it was not uncommon for employees to report for work in their work clothes, and then "report off". After it became a problem, supervisors were instructed to require an employee to sign an "early quit slip" when they reported off (Tr. 600).

Mr. Norris stated that he was not at the mine during the incident of September 18, 1981, but found out about it the next morning from his general foreman, Paul Parfitt. Mr. Norris then contacted Mr. Boyle and Mr. Hoover, and then spoke with Mr. Held to find out what had happened. Mr. Held informed him that Mr. Dickey had been asked to report to the mine at 7:30 a.m., and when he did not appear, he (Norris) called Mr. Dickey at home, and Mr. Dickey informed him that he had no way to get to the mine. Donna Yoder was there and she explained the events of the evening before to him while they were in his office. Donna Yoder told him that Mr. Dickey had struck her and that he had lost her contact lens. Mr. Parfitt was present during this conversation, and Mr. Norris confirmed that he had taken notes of the conversation with Donna Yoder (exhibit R-6). He also confirmed that he again met with Donna Yoder the next day, Saturday, September 19, and that Mr. Hoover and Mr. Vernon Baker, a UMWA committeeman assigned to the preparation plant were also present. Donna Yoder went over the notes of the previous days' conversation, and she confirmed that they were essentially accurate (Tr. 605).

Mr. Norris testified that after the second meeting with Donna Yoder, he met with Douglas Held, Mr. McNeely, Paul Parfitt, employee relations superintendent Bob Hoover, and J.W. Boyle to discuss the entire episode. In addition, he contacted the respondent's labor management relations manager Ernie Helms, and Mr. Helms recommended or "advised" that Mr. Dickey be discharged (Tr. 606, 609). Since a thorough investigation had to be made in a discharge case, it was decided to suspend Mr. Dickey with intent to discharge him, rather than to immediately discharge him (Tr. 606). Since the incident with Ms. Yoder was a "pretty grave offense", Mr. Norris concurred in the decision to suspend Mr. Dickey with intent to discharge, and this was a "joint-type decision" (Tr. 608). The people who were part of the "joint" or "group" decision regarding Mr. Dickey were identified by Mr. Norris as "himself, Mr. Boyle, our local labor relations, as well as labor relations in Pittsburgh". He stated that Ernie Helms only "advised" that Mr. Dickey should be "discharged after a thorough investigation", and that "we concurred" (Tr. 609).

Mr. Norris acknowledged that he knew that Mr. Dickey and Ms. Yoder were living together and that they lived in the same town that he lived in.

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He "did not believe" that any consideration was given to the fact that they lived together when the decision to discharge Mr. Dickey was made, and he stated that had they been strangers, the same decision would have been reached (Tr. 610). When asked what effect Mr. Dickey's safety activities had on the decision by the group to discharge Mr. Dickey, Mr. Norris responded as follows (Tr. 610-611):

Q. Have you had any safety complaints from Jim Dickey?

A. No, I hadn't.

Q. Had his supervisor reported to you that he had made any safety complaints in the Preparation Plant?

A. Not that I was aware of. Our policy was if possible, when a safety complaint was made by an employee, we checked it out, took care of it.

Q. Did Mr. Dickey's prior record have anything to do with the decision to suspend with intent to discharge?

A. Well, it's my opinion and in the past it has been true, Mr. Dickey had not been the first person we had ever received that had any sort of prior reputation that I was aware of. We felt in a lot of cases that people were not particularly happy in the mine. They actually wanted to work outside, and as a result, we had seen really no problem with people prior to that that had come outside; so I tried to the best of my capability to keep that as a fresh start.

Q. So what effect did his prior record have in this decision to suspend him?

A. It was not taken into account as far as I know.

Q. Was there any mention made during that discussion of September 18th, about his problems underground?

A. No, ma'am.

Q. Was there any mention made of safety activities?

A. No, ma'am.

Mr. Norris confirmed that an investigation of the incident was conducted on Saturday morning, September 19, 1981, and he identified the individuals who were interviewed. Present during the interviews

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were Mr. Hoover and Mr. Baker, and he identified the statements taken from the employees (Exhibits R-7 through R-13). He confirmed that the statements were reviewed with Mr. Dickey's union representative during the 24/48 hour labor-management conference concerning the proposed discharge, and the statements were also used during the arbitration hearing (Tr. 617). Mr. Norris also confirmed that the reason for taking the statements was to support management's decision as to the ultimate discipline to be given to Mr. Dickey, and he stated that the union took an active part in the investigation, including witnessing the taking of the statements from each of the employees who gave one, and he identified one of the union representatives who was present as Vernon Baker (Tr. 623).

Mr. Norris explained that after an employee is suspended with intent to discharge, management has five days to decide whether to go ahead with the discharge, or to impose a lesser penalty such as a suspension. He confirmed that the fact that Ms. Yoder suffered injuries "was all important" to any decision, and he "believed" that the suspension with intent to discharge Mr. Dickey would have been made even if Ms. Yoder had not been physically injured (Tr. 629). He further elaborated as follows (Tr. 629-630):

Q. Did it make any difference to your decision on September 18th, to issue the suspension with intent to discharge as to whether or not her injuries resulted from Mr. Dickey striking her or a slip and fall or anything of that nature?

A. I would say they had some bearing in the case, but it wasn't the overall important thing in the investigation.

Q. Once you got Mr. Berdar's statement that he was an eye witness to the blow, what effect did that have on the ultimate decision to change the suspension to a discharge?

A. It was taken into consideration with the balance of the other statements that we had received during the investigative period on the 19th.

Mr. Norris testified that the decision to discharge Mr. Dickey was made after the investigation and 24/48 hour meeting which took place on Monday, September 21, 1981, and that this was the first time that he heard Mr. Dickey's side of the incident which had occurred the previous Thursday. Mr. Norris confirmed that at the 24/48 meeting, Mr. Dickey did not allege that management was using the incident as a pretense to "get him" for having filed past safety complaints, that Mr. Dickey never mentioned those complaints, nor did he ever mention anything about discriminatory discipline (Tr. 641).

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Mr. Norris testified that the decision to escalate the suspension to a discharge was made in "caucus" after the 24/48 meeting and after a review of all of the information gathered by management during its investigation. Mr. Norris confirmed that during the interim between the incident of September 18 and the 24/48 meeting, he discussed the circumstances surrounding Mr. Dickey's discharge with Wally Cook, but that he did not seek Mr. Cook's advice, and Mr. Cook offered none. Further, Mr. Dickey's safety activities were not discussed with Mr. Cook. Although he also discussed the matter with Sam Pulice, Mr. Norris denied that they discussed Mr. Dickey's discharge, and while he was also "pretty sure" that Mr. Pulice was aware that Mr. Dickey was being discharged, Mr. Pulice did not mention Mr. Dickey's safety activities to him (Tr. 643). Mr. Norris also conceded that it was "common knowledge" among labor and management that a decision whether to discharge Mr. Dickey was in process (Tr. 643).

Mr. Norris denied that Mr. Dickey's discharge by management was "a set up", stated that "I would hardly subject one of my foreman to what Mr. Held had to go through", and indicated that he was aware of no reason why Mr. Dickey would not still be employed at the mine had the incident of September 18, with Ms. Yoder not happened (Tr. 644).

On cross-examination, Mr. Norris confirmed that Dale Williams was accused of drinking whiskey which belonged to him (Norris) on the job, and that he was suspended with intent to discharge. Mr. Norris stated that he recommended that Mr. Williams be discharged, and that he (Norris) "would take my own lumps". While Mr. Williams was not discharged, he agreed to abide by a "last chance" mine policy, and he was in fact discharged several weeks later (Tr. 645). Although Mr. Norris did not actually sign a "last chance" agreement, Mr. Norris indicated that he was basically under such an agreement because the whiskey found on mine property was his (Tr. 646).

Mr. Norris stated that he knew Sam Pulice and Walter Cook very well, and believed that he would have heard about the incident concerning Mr. Pulice's threatening to fire Mr. Dickey. He also confirmed that he was aware of the fact that Mr. Pulice and Mr. Dickey had "multiple run-ins". He also confirmed that he was aware of the fact that "Mr. Dickey was safety conscious and I was told by Mr. Cook that it was not a problem" (Tr. 649). He also confirmed that it was "common knowledge that Dickey was a hard nose on safety and that kind of thing and filed a number of grievances relative to safety and so forth" (Tr. 648). He also confirmed that it was "common knowledge" among the work force when a supervisor has to apologize to an employee for cursing him (Tr. 649). When asked whether a supervisor would be happy over such an occurrence, Mr. Norris responded "if they handle themselves so poorly that they put themselves in that position, that's what they should -- that's absolutely what they should do" (Tr. 650).

Mr. Norris testified that he was ignorant of the incident concerning David Rowe's assertion that he had been struck by a

supervisor, and knew

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nothing about it. He also indicated that he was not aware of a purported fight between Les Reiser and Rich Borzani, and stated that he did not know Mr. Borzani (Tr. 650). Although foreman Kenny Foreman did not work for him, Mr. Norris confirmed that he was aware of Mr. Dickey's safety grievance against Mr. Foreman, and in fact stated that he sat in on the grievance hearing (Tr. 651). Mr. Norris denied any knowledge of the incident concerning Timmy Ross having matches in the mine, and stated that he did not know Mr. Ross (Tr. 652).

Mr. Norris stated that the fact that Mr. Dickey had been a good worker was taken into consideration when the decision to discharge him was made, but he considered the incident with Ms. Yoder to be a very serious matter, and while acknowledging that it took place on a stairway landing, it could just as well have happened around moving machinery, thereby raising a possibility of more serious injuries to Ms. Yoder had she fallen into said equipment. He confirmed that he had nothing to do with the decision resolving his "whiskey incident", and acknowledged that no consideration was given to the possibility of giving Mr. Dickey a "last chance agreement". He also confirmed that Mr. Dickey's prior work record, includes a past incident of insubordination, were not considered during the decisional process to fire him, and that no one looked at his personnel file (Tr. 656-658; 675). Mr. Norris confirmed that the sole basis for Mr. Dickey's discharge was for his "threatening and abusive conduct towards Donna Yoder" (Tr. 667-668), and he believed that this was just cause for discharge under the union-labor contract (Tr. 668). He confirmed that Mr. Helms is the respondent's labor-management representative for respondent's coal operations, located in Pittsburgh, and if any grievances related to safety are filed on a standard UMWA form used for that purpose, Mr. Helms would be aware of them. He conceded that Mr. Helms might be informed of any such grievance decisions after the third step, but pointed out that he handles five districts as part of his job (Tr. 670).

Mr. Norris identified J.W. Boyle as the general superintendent for Cumberland Coal's operations, and while he had never communicated any of Mr. Dickey's safety encounters with Sam Pulice to Mr. Boyle, Mr. Norris "assumed" that Mr. Boyle "is aware of what goes on in his mine" (Tr. 671).

Mr. Norris identified Bob Hoover as Mr. Helm's "counterpart on the local level", confirmed that Mr. Hoover works for Mr. Boyle, and when asked whether Mr. Hoover would have been aware of Mr. Dickey's safety complaints, grievances, and encounters with Sam Pulice, he responded "I would think so" (Tr. 672). Mr. Norris denied that while he could not speak for Mr. Boyle, Mr. Hoover, or Mr. Helms, Mr. Dickey's safety activities and encounters with Sam Pulice were personally never considered by him in the decision to discharge Mr. Dickey, and he indicated that the subject was never mentioned during the discussion with this group of individuals (Tr. 672).

Mr. Norris indicated that he had been involved in four or

five suspensions with intent to discharge actions while he was at
the mine,

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and when asked whether it was a practice to first check an employee's background in those instances, before discharging them, he replied (Tr. 673-674):

Q. Isn't it a part of your practice when determining whether or not you should discharge a man to look at his record, find out whether he is a good guy, bad guy?

A. It's all dependent on what sort of offense is involved.

Q. Well, let me ask you this. Wouldn't you think that it would have been helpful to know whether Mr. Dickey was a chronic absentee, whether he was caught drinking on the job, whether he was an unsafe worker, whether he was insubordinate to foremen and so forth, wouldn't that have helped you in making your decision to make a discharge determination?

A. It would have neither helped nor hindered in a decision.

Q. Why not?

A. Because that is a matter of safety and abusive behavior towards an employee. How can you let somebody's past record impact an action that they took like this. I don't understand that.

Q. Don't you think the person's past record is important in determining whether you want him around anymore or not?

A. I think he should have considered his past record before he was involved in this instance.

Mr. Norris indicated that while it was entirely possible that he did discuss Mr. Dickey with Sam Pulice, he had no specific recollection as to any specific incident which may have been discussed, except the grievance case concerning Mr. Foreman. As for any conversations with Wally Cook, Mr. Norris stated that it was "routine" for he and Mr. Cook to discuss "different situations and what not that we were handling; and that was going on about the mine" (Tr. 678). Regarding Mr. Dickey's prior reputation, Mr. Norris stated as follows (Tr. 678-681):

Q. I believe you testified that when Dickey came to work for you, you knew he was a rowdy or something of that nature.

A. I had heard that, yes.

Q. How was he described as a rowdy? What is a rowdy as you knew it to be?

A. I just heard that he was a little radical; and that can imply anything, and I knew -- The reason I know about all the safety grievances now is I sat and listened to them yesterday; but up to that point in time, the only incident I was aware of yesterday was the incident with Kenny Foreman.

Q. Let's get back to your original description of rowdy. Now you said radical. What is your understanding of him being a radical?

A. That he could be trouble.

Q. What kind of trouble could he be?

A. Just general pain in the back trouble.

Q. Over what?

A. Just anything; just trouble.

Q. You mean that is the label Dickey had, that he was just a trouble maker over everything?

A. I didn't say that. I said that I was informed that he could be trouble.

Q. Who informed you that he could be trouble?

A. I believe that when I found out who was getting the job, I probably talked to Mr. Cook; but you have to remember what I also said is that Mr. Cook said that Jim was a good man.

Q. I understand; he said that three times, sir, and I understand the purpose in saying that, but what I want to get at is this business of Wally Cook telling you that this guy was a radical or rowdy and he was trouble.

A. I said he could be.

Q. I'd like to know as best you recall because you recall some things pretty specifically here; I'd like you to recall as best you can what Wally Cook told you with reference to this man being a rowdy or a radical or general trouble.

A. I think I just did tell you to the best that I can recall.

Q. What was it?

A. I was informed that he could be trouble. It was not pinned down as to why; that he could just be a pain in the back.

Q. That was Wally Cook's opinion of him?

A. Like I said before, he also said that he was a good man on the job.

Q. Did he describe to you that he could be trouble where safety was concerned?

A. All he said was that he could be trouble.

Q. I may be wrong on this, so you correct me if I am wrong, but it's my recollection that in your original testimony, that you said that Wally Cook told you that he had a reputation for being tough on safety or what have you.

A. That is not what I said. I said that Wally Cook told me that he was safety conscious. That was not all he told me. If you remember, I also said that was no trouble. It was after the fact that he said that he could be trouble, just a general pain in the back; and the comment, I don't know to me, he stated to me the safety part of it was not the problem; that the guy could just generally be a pain.

And, at pgs. 688-689:

Q. Did Mr. Pulice ever tell you that he wanted to get Mr. Dickey?

A. He never told me he wanted to get Dickey; not me personally.

Q. Did Mr. Pulice ever ask you to help him get Mr. Dickey?

A. No.

Q. Could you explain what you mean when you said it's your job to find out about people before they come to work for you and what do you do with that information once you have it.

A. Well, it's like this, you know. Before you would even hire anybody, you would interview them to find out, you know, what sort of personality traits they have; how they handle themselves; what past occurrences might have been in their previous employment, things like that; and to me, it's no different.

The only difference is that when a person is coming out of the mine on a bid situation, you can't accept or reject him because of that. It's a power bid, so you do try to find out, you know, what is this guy like, what is she like, any problems here that you know of.

Q. What do you do with this information once you have it?

A. Keep it in my own memory. It's not entered into any personnel file; it's just for my own edification.

Mr. Norris stated that he could recall no thought being given to suspending Mr. Dickey rather than discharging him, and he indicated that each offense which could lead to disciplinary action against an employee must be looked at on its own facts (Tr. 681-685). Mr. Norris confirmed that Sam Pulice did not work for him, and he indicated that during the time Mr. Dickey filed many of his grievances Mr. Boyle was not the mine superintendent (Tr. 687). He also stated that Mr. Pulice "had a reputation of just walking in and saying, gee, I'd like to fire you", but that he personally had no authority to fire anyone (Tr. 697). He described Mr. Pulice as "a character", and indicated that he (Norris) "wouldn't put up with that sort of behavior from my foremen" (Tr. 698).

Mr. Norris confirmed that he had no knowledge of the extent of Mr. Dickey's involvement in safety grievances until the instant hearing (Tr. 703). He confirmed that Mr. Helms would have been aware of the grievances, if in fact grievances were held (Tr. 704). He also confirmed that he (Norris) was involved in the "Dugan grievance", and that since Mr. Dugan was his employee, Mr. Norris had to hear the case. He also confirmed that Mr. Pulice agreed that he had said what Mr. Dugan accused him of, but that since Mr. Dugan was insubordinate, he withdrew his grievance at step two (Tr. 705).

Mr. Norris stated that he did not consider that Mr. Dickey had quit his job because when he spoke with him the morning after the incident, Mr. Dickey informed him that he had "reported off work" (Tr. 732). Further, he had no written resignation from Mr. Dickey, and stated that he did not know that he was actually not paid for the day or that he was absent without his supervisor's approval (Tr. 732).

Discussion

In *Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786 (October 14, 1980) (hereinafter *Pasula*), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held as follows:

We hold that the complainant has established a prima facie case of a violation of Section 105 (c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. *Id.* at 2799-2800.

In several decisions following *Pasula*, the Commission discussed, refined, and gave further consideration to questions concerning the burdens of proof in discrimination cases, "mixed-motivation discharges", and "work refusal" by a miner based on an asserted safety hazard. See: MSHA, ex rel. *Thomas Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (April 1981). MSHA ex rel. *Johnny N. Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508 (November 1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981).

In *Robinette*, the Commission held that a miner may refuse and cease work if he acted in good faith and reasonably believed that the performance of the work would expose him to a hazard. *Robinette* complained about being taken off a job as a miner's helper and being reassigned as a conveyor belt feeder operator. *Robinette* ceased to operate and shut down the belt after his cap lamp cord was rendered inoperative and he could not see. *Robinette* and his section foreman exchanged heated words over the incident and *Robinette* uttered several cuss words. *Robinette's* prior work record included prior warnings for unsatisfactory job performance and insubordination, and his section foreman was not too enchanted with his work. The section foreman testified that "anytime *Robinette* had to do something he did not like, he usually messed it up".

Judge Broderick treated the *Robinette* case as a "mixed motivation" discharge case. Although finding that *Robinette's* work was "less than satisfactory" and that he was "obviously belligerent and uncooperative" with his section foreman as a result of his change in job classification, Judge Broderick concluded that the "effective" cause of *Robinette's* discharge was his protected work refusal, and he rejected the operator's contentions that the primary motives for the discharge were insubordination and inferior work.

In Chacon, the Commission affirmed the Pasula-Robinette test, and, at 3 FMSHRC 2516-17 explained the following criteria for analyzing an operator's business justification for taking an adverse action against an employee:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise". Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979) (Articulating an analogous standard).

Thus, in Chacon, the Commission approved a restrained analysis of a mine operator's proffered business justification for discharging a miner to determine whether it amounts to a pretext. The Commission then held that once it is determined that a business justification is not pretextual, then the judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action. In a further

refinement of the "limited" or "restrained" analysis of an operator's "business justification" for taking an adverse action against a miner, the Commission stated "our function is not to pass on the wisdom or fairness of such asserted business justifications but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982).

Absent any direct evidence that a mine operator's adverse action against a miner was motivated in any part by his protected activity, the Commission, in the Chacon case, suggested four criteria to be utilized in analyzing the operator's motivation, and these are as follows:

1. Knowledge of the protected activity.
2. Hostility toward protected activity.
3. Coincidence in time between the protected activity and the adverse action.
4. Disparate treatment of the complainant.

Complainant's post-hearing arguments

After arguing that he has established that he filed safety related complaints and grievances, Mr. Dickey concludes that he earned the ire of the respondent for being a safety activist, that the respondent through its agents was highly irritated with him for his safety activity, and that his discharge was motivated in part by management's displeasure with these safety activities. Mr. Dickey argues further that all of his safety activities were reasonable and good faith acts designed to protect himself and his coworkers from being exposed to unsafe hazards.

Mr. Dickey asserts that the record in this case supports a conclusion that the respondent's improper reaction to his protected activities is "glaringly obvious and pervasive", and when one considers the respondent's reactions to his activities, he concludes that they indicate more than "some feeling of resentment". He claims that the respondent's reactions to his activities were clearly intended to chill him and others from engaging in protected activity. Mr. Dickey asserts that in each instance when he exercised his protected rights, respondent attempted to punish him.

In support of his argument that respondent attempted to punish him when he exercised his right to complain, Mr. Dickey first mentions the slope car incident when management attempted to dock his pay (Exhibit C-1). He then mentions the October 1979 incident when he refused to ride an unsafe belt for routine exit from the mine (Exhibit C-2), and asserts that "they tried to dock his pay". He goes on to cite his complaint about unsafe communications on the slope car and management's alleged characterization of him as a "ring leader" and accusations that

he was causing a "wild-cat strike" (Exhibit C-3). He then cites an incident when he assertedly attempted to protect the safety of a foreman and was called insubordinate and had his pay docked and was verbally abused (Exhibit C-4; Tr. 46-48).

Mr. Dickey cites additional incidents of alleged "retribution" against him, including a day when he claims management tried to send him home without pay when he was late entering the mine because of a discussion over a damaged electric cable (Exhibit C-5), verbal abuses and threats to fire him made by superiors over certain alleged hazardous dust conditions, attempts by management to dock the pay of Mr. Dickey's crew after his immediate supervisor shut down a dangerous machine and gave the men alternative work (Tr. 60, 62; Exhibit C-6), and attempts by management to discriminate against Mr. Dickey's entire crew over the gas well incident which resulted in a grievance by the crew, and in particular, management's focus on Mr. Dickey for verbal abuse and threats (Tr. 71, 73).

Mr. Dickey asserts further that the incident of June 12, 1981, when he was called to the mine foreman's office for assertedly creating an alleged unsafe mine condition, only to be exonerated when it was discovered that he was not at work that day, is indicative of the kind of treatment afforded him by the respondent because of his safety activities. Mr. Dickey goes on to argue that it was impossible for the respondent to have forgotten and forgiven him for his "past transgressions against them from February 1979 until the summer of 1981", and that the clear and unequivocal language of mine foreman Sam Pulice, in October 1980, when he announced in front of the entire crew that he would fire him at the first opportunity (Tr. 73), left no doubt about the respondent's attitude towards him.

Mr. Dickey notes that it is interesting to note that there is no record evidence to indicate that the respondent ever told Mr. Pulice to discontinue his threats nor did they warn him not to carry them out. Additionally, he argues that knowledge of the respondent's attitude toward him was not limited to Sam Pulice, Mr. Cook and Mr. Pasera, and he cites his testimony that section foreman, William Homastat, in June 1981 told him that Sam Pulice had told the foreman that he was going to have him fired the first chance he got (Tr. 88). Mr. Dickey concludes that it is impossible to believe that all of this animosity did not play "any part" in his discharge. Of equal importance, states Mr. Dickey, is the "incredible explanation" of the respondent that they never even looked at his personnel file before taking discharge action, and he concludes that the evidence clearly establishes that he has met his burden and proven that his discharge was motivated in part by his protected activity.

In response to the respondent's affirmative defense, Mr. Dickey first points out that the charges against him are limited to his alleged abusive and threatening conduct towards Ms. Yoder, and that respondent's counsel's suggestions at the hearing that respondent also discharged him for assertedly abusing a supervisor (Douglas Held) should be rejected. As for his conduct involving Ms. Yoder, Mr. Dickey admits that he lost his temper, admits to arguing and cursing, and admits to becoming entangled with her. However, he denies striking her and suggests that

since he and Ms. Yoder had a common-law relationship, the very nature of this relationship makes it somewhat different than the usual confrontation between two employees.

Mr. Dickey argues that there is no direct evidence offered by the respondent to prove that he physically abused Ms. Yoder, and he points out that the respondent did not subpoena Ms. Yoder or any other witnesses to prove it. He also argues that the "statements" offered by the respondent to establish that he struck Ms. Yoder should not be accepted as proof of that fact, and should be rejected as hearsay. Even if they are accepted, he asserts further that they are contradictory and nonclusive as to any physically abusive conduct on his part towards Ms. Yoder, and that Mr. Yoder denied that he struck her.

Mr. Dickey asserts that since he has proven by a preponderance of the evidence that he engaged in protected activity, and that part of the respondent's motive for his discharge was this protected activity, respondent's affirmative defense in support of its discharge action must be judged by its past treatment of other violators of the shop rules. At pages 19 through 21 of his brief, Mr. Dickey cites the testimony of respondent's chief witness, Dale Norris, and concludes that it "is fraught with inconsistencies and evasions and is, therefore, not credible". Further, Mr. Dickey asserts that the failure by the individuals who made the decision to discharge him to look at his personnel file indicates a predetermined decision to fire him at the first opportunity, and in support of this contention he cites the advice given by respondent's labor relations representative in Pittsburgh to Mr. Norris "to discharge Mr. Dickey after a thorough investigation" (Tr. 609).

At pages 23 through 25 of his brief, Mr. Dickey cites a number of incidents concerning violations of company shop rules by other wage employees, as well as supervisors, all of which he claims resulted in no punishment being meted out, or punishments less than discharge. Mr. Dickey points out that his safety activity began in February 1979, that his last safety incident was June 1981, that the mine was on strike from March 1981 until June 1981, and that his discharge came just three months later. Under these circumstances, he argues that there was no great lapse of time between his safety activity and his discharge, and he concludes that it is inconceivable that anyone can believe that his discharge was totally divorced from his safety activities.

Respondent's posthearing arguments

Citing the Pasula case, respondent points out that the burden of proof is on Mr. Dickey to establish a prima facie case that he was discharged for engaging in protected activity. Respondent maintains that Mr. Dickey's own testimony contradicts his assertion that he was discharged for engaging in protected activity in that (1) he filed safety grievances and prevailed in them; (2) he obviously was not afraid of retaliatory conduct

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by mine management since he pursued safety grievances as long as he worked underground; (3) others who joined him in filing grievances are still employed by the respondent; and (4) he knew when he bid on his last job in the preparation plant that he was moving out of the area and jurisdiction of foreman Sam Pulice, his asserted nemesis.

Respondent argues that after the incident of September 18, 1981, Mr. Dickey did not take up the offer of his foreman to come to the mine to discuss the matter and see whether it could be resolved short of discharge, and that his refusal to do so was based on his conviction that he would not be discharged (Tr. 232). Respondent points out that Mr. Dickey had only worked for Mr. Held for four days prior to the incident in question, and that Mr. Held had no knowledge of his prior employment history, and considered him to be a good worker. Respondent suggests that Mr. Dickey's assertion that he did not believe he would be fired "is a strange assertion by a man who supposedly was worried by Sam Pulice's threats to discharge him". Respondent concludes that Mr. Dickey was not seriously worried about Mr. Pulice because he knew that Mr. Pulice did not have the authority to fire anyone.

Respondent argues further that even assuming Mr. Dickey can establish a prima facie case, it can rebut this by showing that he would have been discharged for threatening and abusive conduct toward a fellow employee regardless of whether he filed safety complaints. In support of this argument, respondent points to the fact that the four management officials who participated in the decision to discharge Mr. Dickey did not consider his prior record because they believed the incident of September 18, 1981, sufficient grounds for discharge, and that the notice to suspend him, and the subsequent grievance, all focus on that one incident. Respondent suggests that if Mr. Dickey really believed his discharge was because of his problems with foreman Pulice, he did not timely raise this allegation, took no steps to mention it during the arbitration, and waited until the arbitrator ruled against him to file a complaint with this Commission on January 20, 1982.

Respondent concedes that Dale Norris, the preparation plant superintendent, was aware of Mr. Dickey's prior activities through conversations with Walter Cook, the underground superintendent, but emphasizes that Mr. Norris found him to be a good worker and had no problems with him. Respondent also concedes that Bob Hoover, employee relations superintendent, was aware of Mr. Dickey's prior history because he handled company grievances, that Ernie Helms, respondent's labor relations manager in the Pittsburgh office, handles grievances from all miners employed by the respondent, but that it is hardly likely that Mr. Dickey made any particular impression on him. As for J. W. Boyle, the general superintendent, respondent points out that he had only been at the mine since March of 1981 and "probably had more important things to do than rehash old gossip." Respondent concludes that it has established that protected activities were not part of the decision to discharge Mr. Dickey

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and that its testimony clearly shows that the factors considered by management were that an employee suffered physical injury, and it was pure chance that the altercation happened where a supervisor was in a position to prevent further injury, and that it was just as likely had Ms. Yoder gone to work without requesting to speak to Mr. Douglas Held, the altercation would have happened near moving machinery with a likelihood of greater injury.

Respondent maintains that the use of threatening and abusive conduct by one employee on another employee resulting in physical injuries is a serious matter in the workplace, and that in and of itself, such conduct is considered grounds for discharge pursuant to Rule 4 of the mine rules of conduct, and Mr. Dickey is not the only employee of the mine who has been terminated for threatening and abusive conduct (Tr. 337). In further support of its argument, respondent cites the testimony of superintendent Walter Cook that the factors used to judge whether conduct is considered threatening and abusive are "the voice tone and flexion, mannerisms with hands, arm gesture, the underlying dispute and the actual words used" (Tr. 455-456). Respondent also cites the testimony of UMWA District 4 Safety Inspector Rabbitt, who indicated that if Mr. Dickey assaulted Ms. Yoder, the respondent had just cause to fire him (Tr. 298).

In response to Mr. Dickey's arguments that he was treated disproportionately to the offense, respondent points out that although the union contract allows an employee to argue that he was treated differently than others similarly situated, the complainant did not raise this defense during the arbitration. Regarding the two incidents where Mr. Dickey claims that foremen struck wage employees and were not disciplined, respondent answers that he failed to establish that anyone in mine management was aware of the incidents. Although Mr. Dickey claimed that Walter Cook told Mr. Reiser and Mr. Borgani to apologize after an altercation (Tr. 113), respondent points out that Mr. Cook had no recollection of the incident (Tr. 394), and assumed that because of the physical disparity between the two men he would have heard of any altercation (Tr. 451). Further, respondent points to the fact that Mr. Borgani is still employed at the mine, "obviously is a friend" of Mr. Dickey's, but that Mr. Dickey never subpoenaed him to testify at the hearing (Tr. 243, 246).

Regarding an alleged incident between David Rowe and Denzell Desmond as testified to by Mr. Dickey (Tr. 114), respondent points out that Mr. Cook was not aware of the incident and that Mr. Rowe testified that he told no one in management of the incident and had heard "locker room gossip" that Mr. Cook would have fired both him and Mr. Desmond if the incident had escalated (Tr. 491, 493). With regard to Mr. Dickey's attempts to equate an assault on a fellow employee with absenteeism, forging doctor's slips, and sleeping on the job, respondent argues that common sense dictates that an incident involving a physical injury to an employee would be treated differently than one involving only economic injury.

In response to Mr. Dickey's arguments that allowances should be made for his behavior because the woman involved was his common law wife, respondent states that following this to its logical conclusion, had management "shrugged the matter off", and had Mr. Dickey proceeded to continue his assault on Ms. Yoder, respondent would have exposed itself to liability, compensation, and grievances by Ms. Yoder.

Respondent maintains that the circumstances of this case shows no animus toward Mr. Dickey. In support of this claim, the respondent points to the fact that when Mr. Dickey and Ms. Yoder wanted to work the same shift, the company accommodated them to the extent possible (Tr. 194). When he brought safety items to the attention of management in the preparation plant, the conditions were quickly remedied (Tr. 90-91). He was not given a particularly onerous job (Tr. 598), and admits that his problem with Ms. Yoder began outside the work environment (Tr. 95). In response to Mr. Dickey's assertion that Mr. Douglas Held agitated the situation because he tried to physically separate him and Ms. Yoder, respondent maintains that this was done to prevent Ms. Yoder from suffering injuries, and that Mr. Held was obviously not out to get Mr. Dickey for he made every effort to solve the problem short of discharge.

Finally, respondent maintains that the one person who Mr. Dickey accuses of being out to get him, Sam Pulice, was obviously not capable of carrying out his threats to discharge him during the two years he worked underground. Aside from the question of establishing a motive for Mr. Pulice to arrange the firing of an employee who no longer worked for him and therefore was not causing him any trouble, respondent points to the fact that the incident of September 18, 1981, occurred when Mr. Pulice was not at work and that the original decision to suspend Mr. Dickey with intent to discharge was made so quickly that Mr. Pulice could not have had any input. Respondent maintains that Mr. Dickey's attempts to forge a chain of circumstantial evidence to bridge the gap between his problems with Mr. Pulice underground and his termination at the preparation plant must fail, and he has failed to carry his burden of proof in establishing that he suffered disparate treatment or that his firing was motivated by protected activities.

Findings and Conclusions

Mr. Dickey's safety complaints

It is clear that Mr. Dickey has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act these complaints are protected activities which may not be the motivation by mine management in any adverse personnel action against him. Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC

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803 (April 1981). In order to establish a prima facie case Mr. Dickey must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Further, his safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

In this case, there is no evidence that Mr. Dickey ever personally filed any safety complaints with MSHA or any State mining enforcement agency. Further, while Mr. Dickey may have served as a member of the mine safety committee at his previous place of employment, during his employment with the respondent he apparently lost his bid for election to the mine safety committee and had no official connection with that committee at the Cumberland Mine. However, he has established that during his employment with the respondent he did file safety grievances and complaints, and while he may not have been the direct moving party who initiated each of those complaints or grievances, his participation in those complaints and grievances was such as to lead one to conclude that he participated in them.

Mr. Dickey was first employed by the respondent in August 1977, and his safety complaints and grievances took place during the period of approximately May 1979 through June 1981, and were confined to his period of employment underground. In his deposition of June 16, 1982, Mr. Dickey confirmed that during the time he was assigned to the surface preparation plant, June 1981 to the date of his discharge, while there were some problems with dirty belts and screens, management always took care of these matters and he filed no safety complaints (deposition, pg. 27). The record in this case reflects that his complaints and grievances began in May 1979, when several miners, including Mr. Dickey, had some differences over the safe operation of a slope car, and the miners refused to ride the car out of the mine. The grievance included a claim for pay by the aggrieved miners, and while the respondent was apparently cited by MSHA for the condition of the cable on the slope car, the grievance was settled after the miners were compensated for their lost work time (exhibit C-1). Subsequent safety grievances concerned the use of an emergency evacuation belt system, and an asserted lack of an adequate communications system on the slope car, and these were filed by the mine safety committee on October 4, 1979, and February 1, 1979 (exhibits C-2 and C-3). The grievance concerning the emergency belt included a claim by the miners, including Mr. Dickey, for compensation for lost wages.

Other safety grievances in which Mr. Dickey was involved include a September 1980, incident concerning an asserted unusual amount of coal dust exposure on the section where Mr. Dickey and his crew were working, and an incident in October 1980, concerning the procedure for cutting through an underground gas well (exhibit C-6). These grievances apparently included miner claims for compensation for time lost because of these incidents, and disputes over whether or not miners were given other work,

and the grievances appear to have been settled by the payment of compensation to the miners.

Safety grievances in which Mr. Dickey was directly involved as the moving party concerned an incident where he refused to operate a continuous mining machine while his section foreman was standing within his line of travel, and an incident where he missed a man trip into the mine during the start of his work shift because he had stopped by a maintenance foreman's office to show him a defective cable splice which had been removed from his machine the day before. Mr. Dickey was sent home over both incidents, and his grievances included claims for compensation. He prevailed on each of these claims and was subsequently compensated for the time lost. A third grievance stemming from the asserted defective cable splice concerned Mr. Dickey's reassignment to other work and then being sent home. He apparently prevailed in his claim for lost wages over that incident.

Mr. Dickey's grievance against Sam Pulice for cursing him was filed on October 27, 1980, (exhibit C-7), and the record reflects that after going through the grievance step 2, it was withdrawn on February 3, 1981, at setp 3 after Mr. Pulice apologized to Mr. Dickey.

In view of the foregoing, it seems abundantly clear from the record that Mr. Dickey did file safety grievances and complaints with the respondent, and that mine management was aware of them. At least two of the grievances and complaints personally involved general mine foreman Sam Pulice and section foreman Kenny Foreman. Walter Cook, the underground mine superintendent, acting as management's reviewing official for some of the grievances, initially denied several of Mr. Dickey's grievances. Further, in its post-hearing brief respondent concedes that preparation plant superintendent Dale Norris and employee relations superintendent Bob Hoover were aware of Mr. Dickey's grievances and complaints.

Mr. Dickey's discharge

The September 18, 1981, notification to Mr. Dickey that he was suspended with intent to discharge, effective that same day, exhibit C-8, specifically charged him with the following violation of Mine & Shop Conduct Rule #4:

On September 18, 1981, Midnight Shift, your abusive & threatening conduct towards a fellow employee of the Company resulted in her multiple injuries.

The general language of the Mine and Shop Conduct Rules, exhibit C-9, cautions all mine employees to "avoid conduct which violates reasonable standards of an employer-employee relationship", and included among the 10 classes of such "conduct" is Rule #4 which states:

Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive or threatening language or conduct towards subordinates, fellow employees, or officials of the Company.

Shop Rule #8 prohibits "fighting", but Mr. Dickey was not charged with an infraction of this rule. Although the September 18, 1981, incident in question raised the question of Mr. Dickey's refusing to comply with Mr. Norris' directive to leave his office and return to work, and also gave rise to a possible charge of "abusive conduct" towards Mr. Norris, respondent opted not to include these matters as part of the charge initially levied at Mr. Dickey to support his suspension and subsequent discharge, and counsel's attempts to expand the charges during the course of the hearing is rejected.

Mr. Dickey's assertion that assistant plant foreman Douglas Held's actions at the time of the incident with Ms. Yoder somehow contributed to Mr. Dickey's "blow up" and subsequent discharge is rejected. Mr. Held was conducting a private conversation in his own office with Ms. Yoder at her request. The testimony in this case establishes that Mr. Dickey intruded into that conversation and conference by barging into Mr. Held's office uninvited, and demanding to know "what the hell is going on here". Mr. Dickey refused to heed Mr. Held's request to return to work, and his insistence on pursuing the confrontation with Ms. Yoder precipitated the incident in question and was the direct result of his actions, not Mr. Held's. As a matter of fact, based on the testimony presented here, including the fact that Mr. Dickey had to be physically restrained and ultimately escorted off the premises, I am of the view that Mr. Held exercised remarkable restraint in the circumstances. Further, when Mr. Held subsequently contacted Mr. Dickey by telephone in an effort to have him come to the mine the next morning to discuss the matter further, Mr. Dickey insisted that he had "reported off", did not have to do "a damn thing" Mr. Held told him, and hung up on him.

Management's alleged hostility to Mr. Dickey's safety complaints

Mr. Dickey's post-hearing arguments suggest that "mine management's attitude" towards him because of his safety activities manifested itself in the "treatment" accorded him by Mine Foreman Sam Pulice, Mine Superintendent Walter Cook, and a supervisor identified as R. T. Passera. As indicated earlier, Mr. Pulice and Mr. Passera did not testify in this case. Absent an opportunity to hear their testimony and observe their demeanor on the witness stand, I am constrained to make my findings on the basis of the available testimony and evidence of record on this question. Based on the unrebutted testimony and evidence adduced by Mr. Dickey, while I may find and conclude that Mr. Pulice was hostile towards Mr. Dickey, I find nothing in the record to support such a finding and conclusion concerning Mr. Cook or Mr. Passera, and my reasons in this regard follow.

I take note of the fact that the respondent has presented no evidence to establish that Mr. Dickey's safety complaints and grievances were made in bad faith or that they were made to harass mine management. As a matter of fact, respondent has never advanced this as an argument, and Mr. Cook took Mr. Dickey's safety complaints as serious and not frivolous. Further

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during the grievance filed by Mr. Dickey against Mr. Pulice, it was Mr. Cook and Mr. Passera who insisted that Mr. Pulice apologize to Mr. Dickey and the grievance was terminated on that basis. Mr. Dickey seems to read something "sinister" into Mr. Cook and Mr. Passera's motivations or "attitudes" which I simply cannot find supported by any credible testimony or evidence of record. While it may be true that Mr. Cook may not have publicly chastised Mr. Pulice over his outbursts during the grievance hearing, and particularly with regard to his alleged statements at the third stage grievance that he would "fire him (Dickey) tomorrow if I get the chance", Mr. Dickey testified that Mr. Cook interrupted Mr. Pulice, took him out of the room, and returned shortly thereafter with an apology (Tr. 79).

I reject Mr. Dickey's broad and general assertion that in each instance where he filed a grievance, mine management attempted to punish him. There are two sides to a safety complaint or grievance, and the fact that a miner chooses to file such an action does not in of itself indicate that he is right. Further, simply because mine management chooses to exercise its right to answer the complaint and to run its mine and supervise the work force in a manner in which it believes it has a right to do does not necessarily mean that management is trying "to chill the rights of the miner". For example, one of the grievances filed by Mr. Dickey involved his missing the man trip into the mine at the beginning of a work shift. His explanation is that he missed the trip because he decided to stop off at the maintenance office fo discuss a cable splice with the maintenance foreman. Mine management obviously expected him to ride the trip in and to go to work, and I do not consider his being sent home or disciplined for missing the trip as "punishment", notwithstanding the fact that Mr. Dickey may have prevailed on his grievance on this issue.

In support of his post-hearing argument that mine management became "infuriated" and refused to pay Mr. Dickey and his crew for the extra time they were forced to remain in the mine when they refused to ride the emergency slope belt out, Mr. Dickey refers to exhibit C-2. That exhibit is a copy of UMWA Safety Inspector Rabbitt's report of the incident. That report shows that a grievance was filed claiming two hours and 15 minutes double time compensation, and a requested clarification as to when the belt could be used. It also shows that 80 other employees either walked out of the mine or rode the belt, and Mr. Rabbitt's opinion was that the men who opted to stay in the mine were only entitled to compensation for an hour and fifteen minutes. This is hardly evidence of management's being "infuriated" or acting out of retribution. As a matter of fact, miner representative Rabbitt's assessment of the claimed compensation is contrary to the miners who filed the grievance.

The fact that mine superintendent Cook chose not to implement Mr. Dickey's suggestion that hand-held walkie talkies be used as a means of communications on the slope car and rejected this suggestion does not establish any animus towards Mr. Dickey by Mr. Cook, and Mr. Dickey's

conclusion that Mr. Cook rejected his suggestion simply because he (Dickey) made it is simply Mr. Dickey's conclusion, and his transcript reference to pg. 37 simply does not support his assertion. Mr. Cook's testimony concerning this incident simply shows that he disagreed with Mr. Dickey's assessment for the necessity of walkie talkies, and since it was his (Cook's) decision to make, he rejected it. Further, the record shows that the communications problem was ultimately corrected, and I cannot read into the grievance which was filed over the incident a conclusion that mine management had "a heavy-handed reaction" to that incident. As a matter of fact, Mr. Cook testified that he did not believe that Mr. Dickey "agitated" this incident or attempted to "blow it out of proportion".

Mr. Dickey's post-hearing arguments concerning management's reaction over the slope car incident simply makes references to "exhibit C-3", which is a copy of the "findings and recommendations" of UMWA District #4 Safety Inspector Thomas J. Rabbitt. Mr. Rabbitt was called as a witness by Mr. Dickey, and he simply confirmed the fact that a grievance had been filed. He gave no testimony concerning this incident and I have given no weight to the hearsay conclusions and statements made in his report. The fact that mine management believed that the refusal of the crew to ride the slope car was an illegal work stoppage for which the men should not be paid stands as management's "opinion" and "position" on that issue, and I cannot conclude that it was a "heavy handed" attempt to retaliate against Mr. Dickey or the other members of the crew.

Mr. Dickey argues that as a result of his safety activities, Mine Foreman Sam Pulice became hostile, verbally abused him, threatened to fire him at the first opportunity, and otherwise made life miserable for him. So much so, that Mr. Dickey claims he was scared to walk by Mr. Pulice's office, and eventually prompted him to bid on a surface job in the preparation plant to get away from Mr. Pulice. Mr. Dickey has produced credible testimony and evidence to support his contentions that Mr. Pulice did in fact harass and threaten him with discharge over his safety complaints and grievances. In addition to the verbal abuse which led to a grievance against Mr. Pulice, the incident concerning Mr. Dickey's refusal to run his machine for fear of running over his section foreman, the incident concerning Mr. Pulice's unfounded accusation that Mr. Dickey may have been involved in a safety infraction, and the incidents concerning work stoppages over a gas well and dusty mine conditions, all of which resulted in Mr. Pulice berating and intimidating Mr. Dickey, make it clear to me that Mr. Pulice was not too enchanted with Mr. Dickey and was hostile towards him because of his safety activities. Given all of these circumstances, I conclude and find that Sam Pulice was openly hostile towards Mr. Dickey, and that this hostility resulted from Mr. Dickey's protected safety activities.

Insofar as Mr. Pulice's role in Mr. Dickey's discharge is concerned, respondent has established through credible testimony that notwithstanding Mr. Pulice's threats to fire Mr. Dickey, Mr.

Pulice had no such authority and did not in fact personally discharge Mr. Dickey. Further, there is no direct evidence to establish that Mr. Pulice made any input into the

management decision to discharge Mr. Dickey, nor is there any direct evidence to establish any nexus between Mr. Pulice's open hostility and displeasure with Mr. Dickey over his safety activities and his discharge.

On the facts of this case, had Mr. Pulice actually discharged Mr. Dickey, recommended that he be discharged, or participated in the management decision to discharge Mr. Dickey, Mr. Dickey would have a strong prima facie argument that his discharge was motivated in part by Mr. Pulice's hostility and displeasure over his protected safety activities. In such a situation, since Mr. Pulice is part of mine management, any illegal discharge made in retaliation for Mr. Dickey's exercise of his protected safety rights would be imputed to the respondent, and it would be held accountable for Mr. Pulice's actions if it could not establish by a preponderance of the evidence that the discharge was motivated by unprotected activities and that management would have discharged Mr. Dickey in any event for those unprotected activities alone. On the other hand, if I conclude that Mr. Pulice had no connection with the decision to discharge Mr. Dickey, the question still remains as to whether the management members who did make that decision were motivated in part by Mr. Dickey's safety activities, or whether he would have been discharged anyway over the Yoder incident. Mr. Dickey maintains that the management decision to discharge him was made because management wished to rid themselves of a "safety thorn" in their side, and that respondent's assertion that his safety activities played no role in the discharge decision is simply incredible. Findings on these issues are discussed later in this decision.

The asserted disparate treatment of Mr. Dickey

One of the critical elements of Mr. Dickey's case is the argument that mine management treated other employees different from him when disciplining them for infractions of the shop rules. Mr. Dickey concludes that the evidence and testimony presented in this case establishes beyond any doubt that he was dealt with more harshly than others. As indicated earlier, the "shop rules" are set forth in a one page exhibit C-9. Aside from the exhibit itself, the rules contain no explanations as to the mechanics of their application, the relative severity of each enumerated infraction, and there is no further explanation of the terms "discipline or discharge".

As previously noted, at pages 23 through 25 of his brief, Mr. Dickey itemizes and summarizes a number of examples of what he believes to be disparate treatment of other employees for infractions of the shop rules. In each of the cited instances, Mr. Dickey claims that mine management either meted out less severe punishment, or no punishment at all, for more serious offenses than what he was charged with.

As one example of disparate treatment, Mr. Dickey states that Sam Pulice cursed him and employee Randall Dugan, but that Mr. Pulice was never disciplined for these violations of the shop

rule. The fact

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is that Mr. Pulice was the subject of grievances filed by Mr. Dickey and Mr. Dugan. Mr. Dickey's grievance was dropped at stage #3 after Mr. Pulice apologized, and Mr. Norris confirmed that Mr. Dugan's grievance was also withdrawn after Mr. Pulice apologized to him. Management's position in both instances was that Mr. Pulice had not violated the labor-management agreement, and both grievances were settled after the apologies were made. The fact that mine management did not see fit to discipline Mr. Pulice further was its decision, and as explained by Mr. Cook, he did not take Mr. Pulice seriously, and Mr. Norris obviously believed that the apology to Mr. Dugan was punishment enough, and he also considered the fact that Mr. Dugan had been charged with insubordination. Mr. Cook did confirm that Mr. Pulice did not receive a scheduled bonus, and cited his cursing of Mr. Dickey as the reason for this. He also confirmed that he had suspended foremen for safety infractions.

Other instances of supervisors cursing wage employees were brought out by the testimony of UMWA representative Swift and miner Jan Christopher. Grievances were filed by the employees allegedly cursed, but they were withdrawn after the union apparently accepted mine management's position that the contract did not provide for mine management disciplining its own salaried management personnel. The record here strongly suggests that the "typical" case concerning supervisors cursing wage employees was either settled at the third stage of the grievance by the supervisor apologizing, the employees being assigned to other supervisors, or the matter was dropped by the union because it could not dictate to management how it should discipline its managers and supervisors.

Another example of alleged disparate treatment cited by Mr. Dickey concern employees charged with absenteeism and abuse of sick leave, including falsifying doctor's excuses. Mr. Dickey takes the position that since none of these employees were discharged for these offenses, which he characterized as more serious than his confrontation with Ms. Yoder, management obviously had it in for him. However, the fact is that in each instance of absenteeism cited by Mr. Dickey, the employee was in fact disciplined and suspended without pay for the infraction. In the case of Liza Zern, she was suspended on several occasions for absenteeism, and Mr. Cook testified that the last incident resulted in a five-day suspension with intent to discharge her, but that under the union contract he could not make out a case for discharge, but that she subsequently resigned while under charges for other offenses. Union representative Swife confirmed that employee Chris Watson was discharged for falsifying a doctor's excuse.

Copies of previous personnel actions taken against Mr. Dickey for infractions of the shop rules dealing with absenteeism and insubordination while he was employed at the Cumberland Mine, reflect that Mr. Dickey had also received verbal reprimands, warnings and suspensions, and in each case he was advised that "future violations similar in nature may result in more severe discipline", (exhibit C-12 and exhibit C-13), and the

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notifications to him for these infractions are signed by section foreman Kenneth Foreman and mine superintendent Walter Cook. The notices were issued on December 5 and 31, 1979, and they include references to previous infractions concerning absenteeism, "excessive early quite", and insubordination during various periods in 1978 and 1979.

Other examples of alleged disparate treatment cited by Mr. Dickey concern incidents of fights involving miner Les Risor and face boss Rich Borzani, and an incident where section boss Denzell Desmond allegedly struck contract employee David Rowe. Mr. Dickey claims that no discipline was meted out for these alleged encounters. Superintendent Cook testified that he had no knowledge of those incidents, and absent any credible evidence that the incidents were ever reported to mine management, and that mine management was aware of them, I fail to understand how Mr. Dickey expects management to address the problem. Hearsay statements that these incidents were matters of "common knowledge" is insufficient to impute any knowledge of these events to management.

Mr. Rowe testified that the supervisor who allegedly "smacked" him and "grabbed him by the neck" did so after learning that Mr. Rowe had been designated by his fellow miners to "grease" the supervisor as some sort of "horseplay ritual" or "practical joke". Mr. Rowe admitted that this was the case, and he conceded that he did not report the incident and that he and the supervisor in question had never had any problems. In my view, the Rowe-Desmond incident cited by Mr. Dickey as an example of a supervisor "fighting" with a rank and file miner is taken totally out of context. Since Mr. Rowe was a willing participant in the prank to "grease" the supervisor, any attempts to carry out his mission was undertaken at the risk of the supervisor resisting. In short, given these circumstances, if the supervisor "smacked" Mr. Rowe, I believe Mr. Rowe had it coming.

Mr. Dickey characterizes Mr. Cook's apparent lack of zeal in publicly disciplining his supervisory personnel to be "incredible". He also takes issue with Mr. Cook's testimony that the personnel records of supervisory personnel are not noted when they are disciplined, and that any discipline given to supervisors is done privately. Mr. Cook's position is that supervisory personnel do not come under the UMWA/BCOA contract provisions, and that it is management's prerogative to determine when and how supervisors are to be disciplined. UMWA District #4 Executive Board Member Swift's testimony strongly suggests to me that he is in agreement with Mr. Cook on this issue, and in the grievances in which he was involved he conceded that the union did not take them to arbitration because they could not force management to discipline its management salaried employees under the contract.

Part of Mr. Dickey's argument concerning disparate treatment is based on the premise that management's failure to treat its management employees the same as wage and contract employees in disciplinary matters

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is patently arbitrary and illegal. The fact is that management has seen fit to run its affairs in this manner, and whether its decisions made in a given case involving supervisory or other personnel may be just or fair is beside the point. Absent a showing that management has violated any rule of law, the manner in which it chooses to run its business affairs is not a subject for judicial scrutiny by this Commission, Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2 MSHC (BNA) 1505 (1981), appeal filed, No. 81-2300 (D.C. Cir. December 11, 1981).

As for Mr. Dickey's arguments that other employees were dealt with less severely than him for more serious offenses, I simply cannot reach that conclusion from the record in this case. As indicated above in my discussion and findings concerning the disciplining of employees for infractions of the shop rules, management's decision in each of those instances was obviously made on a case-by-case basis and on the basis of the then prevailing facts. Lisa Zern resigned after repeated infractions of the absentee rule; Chris Watson was discharged for falsifying doctor's leave slips; and Mr. Dickey admits and concedes that other employees were suspended and disciplined for various infractions of the shop rules. Mr. Dickey would have me substitute my judgment for mine management in each of those instances. This I decline to do.

Management's motivation for the discharge

Respondent maintains that the decision to discharge Mr. Dickey was premised on the fact that management had reasonable cause to believe through its investigation of the altercation with Ms. Yoder that Mr. Dickey had physically assaulted her by striking her with his fist, and that this assault resulted in physical injuries to Ms. Yoder. UMWA District #4 Safety Inspector Rabbitt testified that assuming Mr. Dickey had actually physically assaulted Ms. Yoder, respondent would be justified in discharging him (Tr. 298).

At the hearing in this case, the parties went to great lengths to establish whether or not Mr. Dickey actually struck Ms. Yoder, and the testimony is in conflict. Mr. Dickey denied that he struck Ms. Yoder with his fist, and claimed that she suffered her injuries during their "entanglement" on the stairway as he chased after her, and suggested that it was possible that her injuries occurred when a hard hat may have fallen off during their struggle and hit her, or that his head may have bumped into her check (Tr. 741). He also testified that when Douglas Held interceded at the stairway, Ms. Yoder told Mr. Held that he (Dickey) had hit her (Tr. 103). Ms. Yoder did not testify in the instant case, and Mr. Dickey called no witnesses who may have been present during his altercation with Ms. Yoder.

The only witnesses called by the respondent with regard to the altercation in question were Mr. Held and Mr. McNeeley. Mr. Held testified that he personally did not observe Mr. Dickey strike Ms. Yoder, but he confirmed that when he encountered them on the stairway Mr. Dickey had her pinned against the stairway

railing with her back bent over the

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railing. He also confirmed that Ms. Yoder told him that Mr. Dickey had struck her, that her back and jaw were sore, that she lost a contact lens during the altercation, and that she wanted to go home. She filled out an "early quit" slip and left the mine at approximately 3:00 a.m. Mr. Held confirmed that Ms. Yoder required no medical attention, did not appear to be in serious pain, and while she was emotionally upset over the incident, he did not suggest that she see a doctor. He also confirmed that she lost no subsequent time from work over the incident.

Mr. McNeeley testified that he observed Ms. Yoder after she was taken to the preparation plant utility room and saw blood on her teeth, observed a slight puffiness on her left lower lip, and she appeared to have been crying. He instructed one of her fellow miners to take her to the ladies room to "clean her up and try to calm her down" because she appeared to be upset.

At the hearing, respondent's counsel produced copies of statements taken during respondent's investigation of the incident in question (exhibits R-6 through R-13). The statements were taken the day after the incident by Mr. Norris and Mr. Hoover, and they include statements by Ms. Yoder and other mine employees who witnessed the events the previous morning. None of the statements are sworn or signed, no verbatim transcripts were made, and they are simply summaries of the statements made by the witnesses to management's representatives who were making the inquiry. Further, none of the individuals who made the statements in question were called to testify in the instant case. Under all of these circumstances, while management saw fit to use these statements as the basis for its discharge action taken against Mr. Dickey, I have given them no weight insofar as establishing that Mr. Dickey had in fact struck Ms. Yoder. However, the fact I have rejected them as credible proof of the actual assault on Ms. Yoder by Mr. Dickey does not necessarily give rise to any conclusions that management's use of those statements in its decision to discharge Mr. Dickey was unreasonable or illegal.

The question of whether there is sufficient evidence to establish that Mr. Dickey actually struck Ms. Yoder is really not that critical. In this regard, the testimony by Mr. Held and Mr. McNeeley as to Ms. Yoder's physical appearance shortly after the encounter with Mr. Dickey on the stairway, and her statements to Mr. Held at the time of the event, give rise to a strong inference that Mr. Dickey struck her. However, Mr. Dickey is not charged with assaulting or striking Ms. Yoder. The respondent charged him with "abusive and threatening conduct" resulting in "her multiple injuries".

On the basis of the evidence and testimony of record before me, I conclude and find that the respondent has established its charge against Mr. Dickey by a preponderance of the credible evidence. The fact that the respondent presented no eye-witness testimony, or conclusively proved that Mr. Dickey actually struck Ms. Yoder with his fist, does not detract from the fact that his

abusive and threatening conduct towards

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Ms. Yoder was the proximate cause of her injuries. In short, the fact that I cannot conclude that there is sufficient evidence of record before me to make a finding that Mr. Dickey actually struck Ms. Yoder with his clenched fist with intent to do her bodily harm, does not mean that mine management was wrong or unreasonable in drawing that conclusion when it decided to discharge Mr. Dickey.

Mr. Norris, who at the time of the hearing in this case was no longer employed by the respondent, testified as to the results of his investigation into the incident. His investigation includes a statement by plant attendant Mike Berdar that he witnessed Mr. Dickey strike Ms. Yoder in the face with his fist and hard hat and that she screamed. Other statements to Mr. Norris indicated that Ms. Yoder told him that Mr. Dickey had struck her, and others confirmed that they personally observed her puffy and bloody lip, and observed blood on the ground. Mr. Norris also testified that Ms. Yoder was called as a Union witness at the arbitration hearing, that the Union represented Mr. Dickey, and that Ms. Yoder testified at that grievance hearing that "she was highly anxious during that period and she wasn't exactly sure at that point in time what occurred, whether she had slipped and fallen or had been struck by Mr. Dickey or what exactly had occurred" (Tr. 639).

When Mr. Norris was asked whether Ms. Yoder characterized Mr. Berdar's assertion made during the investigation or 24/48 hour meeting that he witnessed Mr. Dickey strike her as "a bunch of baloney" or "hogwash", he responded that he did not remember such remarks on her part. He then said that it was possible that she said it, but that if she did, "that was not the way she said it" (Tr. 658). He also stated that he did not recall all of the details of the 24/48 hour meeting, but confirmed that Ms. Yoder said she had "no recollection or she couldn't honestly say she had been struck by Mr. Dickey", and when asked whether Ms. Yoder had actually seen Mr. Berdar's prior statement, Mr. Norris responded that "she heard the statement at the 24/48 hour meeting" (Tr. 659).

Upon refreshing his recollection from some notes from the 24/48 hour meeting, Mr. Norris testified as follows during a bench colloquy (Tr. 664-666):

BY MR. YABLONSKI:

Q. Mr. Swift asked you, he was the company representative, he asked Yoder, do you think Dickey did anything intentionally to cause you bodily harm, and then she said not intentionally.

A. That's correct.

Q. He then asked Yoder, when you talked with D. Norris in the meeting, were you upset. She said she was upset, humiliated, and had not slept after she got a chance to think it over, over the weekend. She didn't

really know if he had hit her, fell into her, or what.

A. That is what she said according to those notes.

ADMINISTRATIVE LAW JUDGE KOUTRAS:

So at the 24/48 hour meeting, Ms. Yoder's testimony was that she wasn't too clear on what happened two days before, and after sleeping it off, she felt that, no, I don't think he hit me. Isn't that the way you would analyze it?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS:

And Mr. Yablonski's next question faced with that information would be, why did you decide to go ahead and fire Mr. Dickey. Didn't you believe Ms. Yoder? I don't want to take over your cross, Mr. Yablonski.

MR. YABLONSKI: You asked the question, Judge. Let him answer it.

THE WITNESS: There was a preponderance of evidence other than Ms. Yoder's statement.

ADMINISTRATIVE LAW JUDGE KOUTRAS:

In other words, you just chose not to believe Ms. Yoder, and that what she was really doing when she recants it was because she just didn't want to see Mr. Dickey lose his job?

THE WITNESS: I didn't chose to believe or disbelieve.

And, at Tr. 667-668:

BY MR. YABLONSKI:

Q. You say that Mr. Helms is the one that recommended that Mr. Dickey be discharged to the group?

A. That was his counsel to us, that based on the evidence and what we had learned in the 24/48, that we would let the suspension convert to a discharge.

Q. Just to clear up one thing, when you made the decision to proceed with the discharge, you chose to discharge Mr. Dickey for threatening and abusive conduct towards Donna Yoder, right?

A. Right.

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Q. That was the sole basis of your discharge?

A. That's correct.

Q. At that time, you had heard everything that was to hear, I guess?

A. Correct.

Mr. Dickey attacks the credibility of Mr. Norris, and at page 21 of his brief asserts that his testimony "is fraught with inconsistencies and evasions" and so "clearly incredible relative to the discharge action", Mr. Dickey notes that Mr. Norris admitted that: he was aware that Dickey was a rowdy (597), he did not consider the common-law relationship between the parties (610), he did not consider Mr. Dickey's prior record (611), he was aware of Dickey's run-ins with management (647), he didn't care about Dickey's prior good record (656), he knew Donna Yoder repudiated her previous charges (657), Cook had told him Dickey was a radical (679), and the injury to Yoder was so slight that she didn't need medical attention (676).

Mr. Norris no longer works for the respondent, and he confirmed that since February 1982, he has been employed with Kerr-McGee in Illinois. He confirmed that when Mr. Dickey first came to work for him at the preparation plant on June 21, 1981, he was aware of his reputation as "a rowdy", and that Mr. Pulice and Mr. Cook informed him of this after he (Norris) had inquired. Mr. Norris also confirmed that Mr. Pulice and Mr. Cook also told him that Mr. Dickey was "safety conscious and would not be a problem" (Tr. 597). Mr. Norris also confirmed that while Mr. Dickey worked for him Mr. Dickey made no safety complaints, and he was not aware of any safety complaints made by Mr. Dickey to any supervisors while he worked at the preparation plant (Tr. 710).

It is true that Mr. Norris knew that Ms. Yoder and Mr. Dickey lived together, since he lived in the same home town. It is also true that he did not consider their relationship in the decision to discharge Mr. Dickey. While it is true that Mr. Norris responded "that's correct", and confirmed that he had knowledge that Ms. Yoder had repudiated her statement that Mr. Dickey had struck her, he went on to explain his answer and to point out that Ms. Yoder said she was not sure of what happened. Further, contrary to Mr. Dickey's characterizations of Mr. Norris' testimony at transcript pg. 676, Mr. Norris did not testify that Ms. Yoder's injury "was so slight" that she did not need medical attention. Mr. Norris testified that Ms. Yoder did not repudiate the fact that she did in fact receive injuries (Tr. 675). He then confirmed that he was informed that no doctor was called.

With regard to Mr. Dickey's past record, while it is true that Mr. Norris confirmed that he did not look at his personnel file at the time the decision was made to discharge Mr. Dickey, the record does not support

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the conclusion that he "did not care about his prior good record". Mr. Norris' testimony is that he was aware that Mr. Dickey was considered a good worker, but since Mr. Dickey had not worked for him underground he was not aware of any reputation that he may have had as "one of the better continuous miner operators". While Mr. Norris did respond "that's correct" when asked to confirm that he "didn't care" how good Mr. Dickey's record was, taken in context, the same response could have made if he were asked about Mr. Dickey's "bad record". As previously noted, exhibits C-12 and C-13 are copies of previous notifications to Mr. Dickey concerning his violation of the shop rules concerning absenteeism, contain notations of previous similar infractions, as well as notations concerning "early quits" and "insubordination", for which Mr. Dickey apparently received warnings and suspensions.

Respondent concedes that Mr. Dickey's prior record did not influence the decision by management to discharge him because the "committee" that made that decision did not look at his personnel file. Respondent's position is that the group decision to fire Mr. Dickey was based solely on the incident of September 18, 1981, and respondent argues that this incident, standing alone was, sufficiently grave and serious to warrant Mr. Dickey's discharge, and that he would have been discharged regardless of his prior record, good or bad. On the other hand, Mr. Dickey takes the position that the failure of the group who decided to fire him to consider his past record clearly indicates that they had some predisposition to fire him and were simply waiting for an excuse to do so.

Mr. Dickey suggests that the decision to discharge him was cast in concrete, and he implies that management's investigation was simply a sham to support its preordained decision to fire him for his safety activities. In support of this conclusion, Mr. Dickey cites the testimony of Mr. Norris to the effect that Mr. Helms advised him to "discharge Mr. Dickey after a thorough investigation" (Tr. 609).

Mr. Norris testified that the initial decision to suspend Mr. Dickey with intent to discharge, rather than to discharge him outright, was in keeping with normal procedure in discharge cases so that a thorough investigation could be made. Since he considered the incident in question to be a "grave offense" and a "severe infraction", the decision was made to suspend Mr. Dickey with the intent to discharge, and the investigation of the incident began immediately. Mr. Norris then identified his notes concerning Ms. Yoder's August 19, 1981, statement taken during the investigation, exhibit R-6, and he also confirmed that after taking her statement, he met with Mr. Held, Mr. McNeeley, Paul Parfitt, Bob Hoover, and J. W. Boyle to "discuss the whole situation". He also confirmed that he was in contact with labor relations manager Ernie Helms, from the respondent's corporate Pittsburgh headquarters, and that his recommendation to the group was that Mr. Dickey be discharged (Tr. 606). However, Mr. Norris also confirmed that his statement interview with Ms. Yoder was prepared before he conducted the other interviews with the crew

who witnessed the incident the previous morning (Tr. 606).

After careful scrutiny of all of Mr. Norris's testimony concerning management's investigation, I find nothing to support the contention that it was somehow "rigged" against Mr. Dickey. As a matter of fact, one of the individuals who was present during the employee interviews, and who also gave a statement adverse to Mr. Dickey, was Vernon Baker, a UMWA local union officer. Further, the record establishes that Mr. Dickey was given at least two opportunities to come to the mine and give his side of the story. The first opportunity was when Mr. Held called him and Mr. Dickey hung up on him. The second opportunity presented itself when Mr. Norris called him and Mr. Dickey advised him that he had no way of getting to the mine.

While I have found that Mr. Pulice was hostile towards Mr. Dickey because of his safety grievances and complaints, respondent has established through credible testimony that, notwithstanding Mr. Pulice's threats to fire Mr. Dickey, Mr. Pulice had no such authority, and there is no direct evidence that Mr. Pulice ever initiated or recommended that Mr. Dickey be discharged. Further, Mr. Held's testimony is that he was not a part of the group management decision to discharge Mr. Dickey, and Mr. Dickey has presented no evidence to disputethat fact.

In his post-hearing brief, Mr. Dickey points out that his last "safety incident" occurred in June 1981, and that his discharge came just three months later. His conclusion is that this is hardly enough evidence to support a finding of lack of coincidental timing between the protected activity and his discharge, or that his safety activities were so far in the past that it was forgotten by the mine management personnel who made the decision to discharge him. However, Mr. Norris testified that Mr. Dickey came to work for him on June 21, 1981, and as the outside mine superintendent, Mr. Norris also supervised the preparation plant where Mr. Dickey was assigned. Therefore, from June 21, 1981 to the date of his discharge, Mr. Dickey's supervisors would have been Mr. Norris and Mr. Held. Neither Mr. Pulice nor Mr. Cook reported to, or worked for, Mr. Norris and their supervisory authority over Mr. Dickey ceased when he successfully bid on the surface job in the preparation plant and reported there on or about June 21, 1981. Mr. Norris' supervisor was J. W. Boyle.

With regard to any hostility on the part of Mr. Held, he testified that Mr. Dickey had only worked for him for four days prior to his discharge, and that he considered him a good worker and had no problems with him. Mr. Held also testified that he did not know Mr. Pulice personally and had no contacts with him. I find Mr. Held to be a credible and straightforward witness and cannot conclude that he was hostile towards Mr. Dickey because of any safety activities. However, since Mr. Held was "in the middle" of the Yoder-Dickey altercation of September 18, 1981, any "hostility" on his part would stem from that incident. Given the circumstances of that incident, I believe that any "adverse impression" of Mr. Dickey by Mr. Held would be justified. In any event, I cannot conclude that Mr. Held had any impact or input on management's decision to discharge Mr. Dickey because of any

protected activity on his part.

With regard to Mr. Cook, Mr. Dickey testified that he continually accused him of "creating a lot of problems". However, neither Mr. Dickey nor anyone else testified that Mr. Cook ever overtly or directly threatened to discharge Mr. Dickey over his safety activities. Although Mr. Dickey testified that he bid on the surface job in the preparation plant because of his fear that Mr. Pulice and Mr. Cook would find a way to fire him, on cross-examination, he stated his belief that Mr. Pulice was also in charge of the preparation plant, and that he (Dickey) would not have to walk by his office every day if he were in the preparation plant. Further, Mr. Dickey conceded that he and Ms. Yoder often worked on and asked to be assigned to the same shift, both underground and in the preparation plant, (Tr. 193-194), and Mr. Norris confirmed that Mr. Dickey and Ms. Yoder asked to work on the same shift in the preparation plant because of travel and other reasons, and management "condescended and let that occur" (Tr. 598).

In light of the foregoing circumstances, I believe it is just as likely as not that Mr. Dickey's bid for a surface job in the preparation plant was made for personal reasons to accommodate him and Ms. Yoder. Mr. Norris testified that the job of sampler, which Mr. Dickey bid on and held at the time of his discharge, was the lowest paying UMWA job. Since Ms. Yoder's transfer to a surface job in the preparation plant occurred at the same time as Mr. Dickey's (Tr. 597), there is just as strong an inference that Mr. Dickey bid on that job to be with Ms. Yoder, rather than to escape from of Mr. Pulice or Mr. Cook. Since Mr. Dickey did not impress me as the type of individual who could be intimidated over his safety activities, and since there is no evidence to establish that Mr. Pulice or Mr. Cook ever attempted to initiate discharge action against Mr. Dickey, I doubt very much that Mr. Dickey would bid on a low paying union job solely because of Mr. Pulice's conduct.

While one may question Mr. Cook's level of tolerance with regard to Mr. Pulice's conduct towards his subordinates, and Mr. Pulice's lack of sensitivity and apparent lack of managerial judgment in berating and cursing his subordinates, Mr. Cook stated that he constantly counseled Mr. Pulice about his shortcomings and his obvious lack of discretion in dealing with his subordinates. The fact that management did not see fit to fire Mr. Pulice does not in my view necessarily mean that management condoned his actions. The record here shows that it was Mr. Cook who apparently denied Mr. Pulice a bonus because of his behavior, and it was Mr. Cook who interceded at a grievance and obviously directed him to apologize to Mr. Dickey for cursing him. Although Mr. Cook denied that Mr. Dickey's complaint in this case had any direct connection with Mr. Pulice's resignation, and while he indicated that he tried to talk Mr. Pulice out of resigning, he conceded that Mr. Pulice's manner of handling his personnel played a role in his resignation.

Mr. Cook conceded that he and Mr. Dickey occasionally exchanged words over safety matters and that whenever any safety confrontations occurred on Mr. Dickey's shift, Mr. Dickey was

always involved in them. Mr. Cook also conceded that it was possible that Mr. Pulice could have contacted those persons responsible for the decision to discharge Mr. Dickey, but he found this highly unlikely. As for his own role in the discharge, aside

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from stating that he had no input in that decision, he testified that he found out about it after Mr. Dickey had been discharged. However, Mr. Cook asserted that he considered Mr. Dickey to be a competent and good worker, that he was safety conscious and took safety matters serious, and Mr. Cook did not believe that Mr. Dickey's safety complaints or grievances were frivolous or made to "hassle management".

Mr. Norris testified that during the interim between management's investigation and the 24/48 hour meeting, namely, September 19 and 21, 1981, he did discuss the facts or circumstances surrounding Mr. Dickey's discharge with Mr. Cook, but he denied that he sought Mr. Cook's advice or that Mr. Cook gave him any. He also denied that he and Mr. Cook discussed Mr. Dickey's safety activities (Tr. 642). When asked whether he had similar conversations with Mr. Pulice during this period of time, he denied that he and Mr. Pulice discussed Mr. Dickey's discharge, but admitted that he had conversations with Mr. Pulice "but we didn't talk about discharging Dickey at that point in time" (Tr. 643).

Later in his testimony, when asked whether he had earlier testified that he never discussed Mr. Dickey with Mr. Pulice at any time, Mr. Norris responded as follows (Tr. 676):

A. No. It was my testimony that I had been brought up to date on things that occurred around the mine by Mr. Pulice and Mr. Cook is what I testified to earlier; and its entirely possible that he had discussed Dickey.

Q. Do you recall what Sam Pulice may have told you about Jim Dickey?

A. I don't recall any particular incident except the case that I actually sat it on, step three.

Q. Did he have nice things to say about Dickey or not so nice things to say about Dickey?

A. I don't know.

Q. Well, did he tell you about having to apologize to Dickey and how he felt about that?

A. I think I said once before that I didn't know about that, whether he did or didn't.

Q. So your recollection is that you vaguely may have remembered conversations about Dickey with Sam Pulice, but you don't remember what they consisted of?

A. That's right.

Q. What about with Wally Cook?

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A. With Wally Cook, again, as I said earlier, it was our routine to discuss different situations and what not that we were handling; and that was going on about the mine.

Mr. Norris' testimony is in direct conflict with Mr. Cook's assertion that it was "highly unlikely" that Mr. Pulice contacted anyone involved in the decision to discharge Mr. Dickey prior to the making of that decision. As for Mr. Cook's assertion that he had no "input" into the decision to discharge Mr. Dickey, the fact is that Mr. Norris confirmed that he did in fact discuss the facts and circumstances surrounding the discharge with Mr. Cook. In response to a question as to whether he told Mr. Pulice that management was in the process of discharging Mr. Dickey at the time of their conversation, Mr. Norris responded as follows (Tr. 643):

A. There is common knowledge on the management side, as well as the union side; and I am pretty sure that he had been aware that Mr. Dickey was being discharged.

Mr. Norris' testimony that he was sure that Mr. Pulice was aware of the fact that management was disposed to discharge Mr. Dickey gives rise to a strong inference that Mr. Cook was also aware of that fact at the time of his discussions with Mr. Norris, and contradicts Mr. Cook's assertion that he found out about it after the fact.

Mr. Norris confirmed that the decision to "upgrade" Mr. Dickey's suspension to a discharge was made after management's investigation was completed, and after the conclusion of the 24/48 hour grievance hearing held on Monday, September 21, 1981. Mr. Norris confirmed that Mr. Dickey was represented by a UMWA representative at that hearing, and he confirmed that at the conclusion of that hearing, the management group who made the decision to discharge Mr. Dickey "caucused" to review the information received at that hearing, that a "recommendation" was made to convert the suspension to a discharge, and that the "local staff" at the mine concurred in this "recommendation". The group then went back into the meeting and "indicated that we would not bring back Mr. Dickey and that the intent to discharge stood" (Tr. 642). Mr. Norris identified the person who made the "recommendation" to the group that Mr. Dickey be discharged as Mr. Helms, and Mr. Norris stated that Mr. Helms advised the group "that based on the evidence and what we had learned in the 24/48, that we should let the suspension convert to a discharge" (Tr. 667).

Later, in response to bench questions, Mr. Norris explained the decisional process to discharge Mr. Dickey as follows (Tr.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Who made the decision to discharge and at what stage; the three of you?

THE WITNESS: Yes. There was, well, four, I guess. It's a joint decision, you know. It's like checks and

balances.

ADMINISTRATIVE LAW JUDGE KOUTRAS: I got the impression that three people, like three men on an ad hoc committee looked at all the reports, had all the information that the union put on the table at the 24/48 hour meeting, and three of you decide to make a recommendation as to discharge and Mr. Helms is the guy who said, fine, I concur. Is that the way it happened?

THE WITNESS: He concurred, yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Helms, he got the file placed on the desk after three people made the recommendation?

THE WITNESS: After the fact. We went over the facts of the case over the phone at that point in time.

ADMINISTRATIVE LAW JUDGE KOUTRAS: With Mr. Helms?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: He is down in Pittsburgh?

THE WITNESS: Yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Mr. Helms probably said, what, something to the effect that it sounds like you got a good case; go ahead and can the guy?

THE WITNESS: I believe that he said to discharge.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Did Mr. Helms have the prior privilege of looking at any of the papers, any statements?

THE WITNESS: I really don't know, sir.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Is this kind of a rush, rush; you go to the 24/48 hour; you come up with a position and you jockey back and forth and management people are talking and union people are talking; you say we got to do something; you run out and call down to corporate headquarters, Pittsburgh, give them the facts over the phone. He says sounds good to me, go for discharge. Is that essentially how it happened?

THE WITNESS: That's part of it, yes.

ADMINISTRATIVE LAW JUDGE KOUTRAS: So Mr. Helms has more or less bought the recommendation of the three people that were right immersed in this whole controversy?

THE WITNESS: Right.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You and Mr. Hoover conducted the investigation; you and Mr. Hoover and Mr. Boyle had an input into the recommendation; and Mr. Helms simply said, sounds good to me. Is that essentially what happened?

THE WITNESS: Right; but again, he could not override; but at least put that decision on hold and involve somebody from Pittsburgh operations as well.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Why would he want to do that? Is there a delegation here, wouldn't you think? What is Mr. Helm's position now; does he have authority over the mines or he will pretty much take whatever punishment comes to him from managers, wouldn't he?

THE WITNESS: I would assume he is a check and balance man.

ADMINISTRATIVE LAW JUDGE KOUTRAS: What reason would he have to say listen, I think you three fellows, I don't think your recommendation holds water and I caution you not to do it.

THE WITNESS: He could think the case was unprepared or that the evidence that you have was not substantial enough.

ADMINISTRATIVE LAW JUDGE KOUTRAS: But he obviously didn't think that in this case?

THE WITNESS: That's correct.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Why didn't he; that is what I am driving at. You must have made a pretty good presentation to him over the telephone.

THE WITNESS: No. I think we had good evidence and it was a serious offense.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You convinced him of that, is that correct?

THE WITNESS: I don't know that I convinced him; I informed him that was my position.

ADMINISTRATIVE LAW JUDGE KOUTRAS: So in effect, what you are telling me then, the decision to discharge Mr. Dickey ultimately was not the decision of one man; it was a group decision between you, Mr. Hoover, Mr. Boyle, and Mr. Helms collectively?

THE WITNESS: I would say that's correct.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Who would you say of all these people had a greater impact and input on the decision of the four of you?

THE WITNESS: I don't know. I believe it's a check and balance.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Is it a closed ballot? You do not vote on it by ballot?

THE WITNESS: No.

ADMINISTRATIVE LAW JUDGE KOUTRAS: Was anybody for suspension of Mr. Dickey rather than discharge?

THE WITNESS: No; not that I recall. I don't remember, but I don't think so.

The thrust of Mr. Dickey's case is the assertion that the management decision to discharge him was made not because of his encounter with Ms. Yoder, but was made because he had become a "safety thorn" in management's side because of his complaints and grievances. In this regard, while I have concluded that Mr. Pulice was hostile to Mr. Dickey because of his safety grievances and complaints, I cannot conclude that Mr. Dickey has established any open hostility because of his safety activities on the part of those management individuals who actually made the decision that he should be discharged. Of the four individuals who made that decision, Mr. Norris was the only one called as a witness in this case. Since Mr. Boyle, Mr. Hoover, and Mr. Helms did not testify, I have no way of assessing their demeanor or credibility. Mr. Pulice did not testify, and he is no longer employed by the respondent, having resigned for "personal reasons".

Mr. Norris left his employment with the respondent in February 1982, and is currently employed with another company in Illinois, and he was not an employee of the respondent when he testified in this case. Apart from Mr. Dickey's grievance concerning section foreman Kenny Foreman, Mr. Norris testified that he had no personal knowledge of the extent of Mr. Dickey's underground mine safety activities prior to his transfer to the surface preparation plant. Mr. Norris conceded that he did make an inquiry about Mr. Dickey after he bid on the surface job, and that Mr. Cook characterized Mr. Dickey as a "rowdy" or "radical", and that he could be a "general pain in the back problem" (Tr. 676). Mr. Norris explained that he made the inquiry simply to learn the type of person who would be coming to work for him, and that he had no choice but to accept Mr. Dickey because of his union bid for the job. However, Mr. Norris also indicated that Mr. Cook also told him that Mr. Dickey was safety conscious and a "good man", and there is no evidence that during his employment tenure under Mr. Norris' jurisdiction Mr. Dickey filed safety complaints or grievances or otherwise caused Mr. Norris any problems.

Mr. Norris testified that at the time Mr. Dickey was first assigned to him on June 21, 1981, he had no initial conversations with him (Tr. 597). He confirmed that Mr. Dickey's immediate supervisor, plant engineer Rudy Dulik, reported that Mr. Dickey was doing a good job as a dust sampler, and he confirmed that in a subsequent conversation with Mr. Dickey he (Norris) told him that he was doing a good job (Tr. 599). However, on cross-examination, Mr. Norris admitted that he was aware of Mr. Dickey's "multiple run-ins" with Mr. Pulice, but was not clear as to what may have caused them. He also admitted it was "common mine knowledge" that Mr. Dickey was a "a hard nose on safety" and had "filed a number of grievances relative to safety", and that he was aware of these facts (Tr. 648-649). In response to a question from me, Mr. Norris stated that he "didn't know all the background" of Mr. Dickey's grievances until the hearing in this case (Tr. 703).

Although I find Mr. Norris' testimony concerning his knowledge of Mr. Dickey's prior safety grievances at the time he contributed to the decision to discharge him to be somewhat contradictory, I cannot discount all of his testimony in this case. After viewing him on the stand during his testimony, while some of his testimony was inconsistent, I cannot conclude that he was hostile to Mr. Dickey because of his prior safety activities, nor can I conclude that during the period June 21 to the date of his discharge, Mr. Norris did anything to discourage Mr. Dickey's involvement in safety matters, or otherwise harassed or intimidated him.

The record in this case establishes that a number of miners who filed safety complaints and grievances similar to Mr. Dickey are still employed by the respondent. Danny Litton was part of the grievance filed over the miner cable (exhibit C-6), and he is still employed at the mine. Jane Christopher filed grievances against a foreman for alleged acts of harassment and cursing, and while no action was apparently taken against the foreman, Ms. Christopher was taken off his crew (Tr. 320), and is still employed at the mine. Bruce Diges testified that Mr. Pulice threatened to fire him if he didn't "sever his relationship" with Mr. Dickey. Mr. Diges confirmed that he had received several "absentee notices" from management, but he is still employed at the mine. Mr. Dugan, who worked under Mr. Norris' jurisdiction, filed a grievance against Mr. Pulice because he cursed him, and Mr. Dugan is apparently still employed at the mine. Given these circumstances, I reject Mr. Dickey's assertion that his discharge has had a "chilling effect" on the work force and that miners are afraid to exercise their rights. The record in this case simply does not support that conclusion, and based on the testimony of record in this case, I cannot conclude that the miners who are employed at the Cumberland Mine are passive and inactive when it comes to the exercise of their rights to file grievances and complaints.

It seems clear to me under Pasula and its progeny, once a showing has been made that a mine operator's disciplinary decision was tainted or motivated "at least in part" by a miner's

protected activity, the burden then shifts to the miner operator to show that while this may be true, mine management was also motivated by the miner's unprotected activity,

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and that management would have taken the adverse action against the miner in any event for the unprotected activity alone. The Commission, in Chacon, supra, held that a mine operator has carried its burden in establishing its motive for an adverse action if it can establish that such action was "not plainly incredible or implausible".

Mr. Dickey has established by a preponderance of all of the credible testimony and evidence in this case that he did in fact file a number of safety complaints and grievances against mine management personnel during his underground employment at the mine. He has also established that these complaints and grievances resulted in hostility and animosity against him by mine foreman Sam Pulice, and that Mr. Pulice's conduct towards Mr. Dickey was a direct result of Mr. Dickey's safety complaints and grievances. Although Mr. Pulice had no authority to carry out his threats to fire Mr. Dickey, I believe it is reasonable to infer from the record in this case that Mr. Cook was not completely oblivious to the fact that Mr. Dickey was a source of irritation to Mr. Pulice because of his safety activities. It is also reasonable to infer that, notwithstanding Mr. Cook's assertions that Mr. Dickey was a good worker and safety conscious, Mr. Cook did not totally erase Mr. Dickey's safety activities from his mind during the investigation conducted by management immediately prior to his discharge.

While I find Mr. Cook and Mr. Norris to be generally credible witnesses, their contradictory and somewhat equivocal testimony concerning certain conversations and contacts between them, as well as Mr. Pulice, during the interim between the incident of September 18, 1981 and the 24/48 meeting held on September 21, 1981, give rise to a strong inference that Mr. Cook and Mr. Pulice made known to Mr. Norris all of Mr. Dickey's prior safety activities and grievances, and that Mr. Norris, as one of the group who decided to discharge Mr. Dickey, was not totally divorced from these past events at the critical time that decision was being considered. Further, while Mr. Boyle, Mr. Helms, and Mr. Hoover did not testify in this proceeding, I believe the testimony by those who did establishes that these individuals were also aware of Mr. Dickey's past safety grievance and complaint history at the time of management's discharge deliberations.

Given the foregoing findings and conclusions, although the timing of his discharge did not come directly after or fairly close to his last safety complaint, and even though I have found a lack of disparate treatment on management's part in discharging him, the record in this case, taken as a whole, does establish a strong inference that the management decision to discharge Mr. Dickey was motivated in part by his past safety grievances and complaints. However, the critical question here is whether the respondent has nonetheless established a credible justification for the discharge, and if so, whether its decision to discharge Mr. Dickey would have been made in any event regardless of his protected activity.

With regard to Mr. Dickey's arguments and inferences that management's failure to look at his personnel file before making the decision to fire him supports a conclusion that management was predisposed to fire him,

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respondent's responsive and persuasive argument that management believed it had sufficient reasons and cause to support the discharge is just as believable and not patently implausible. As a matter of fact, Mr. Dickey's counsel conceded as much during the following bench colloquy during the hearing at Tr. 631-634:

ADMINISTRATIVE LAW JUDGE KOUTRAS: That is a little bit along what I commented on earlier, Mr. Yablonski. It seems to me that your theory is, if your theory prevails, I mean, if United States really wanted to get rid of a trouble maker like you say they believed Mr. Dickey was, it seems to me they'd have a locked case. They wouldn't do such a slipshod job, quite frankly, on the letter of charging him, and they would have been specific in there; assaulted a supervisor, insubordination in that he refused to leave the premises, you were forced to call a guard, and they would have this down here, A through Z, and by God, they'd have a locked case against Mr. Dickey, but in no way in the world do we have that, but here we have got quite frankly a letter, a statement of charges that leaves very much to the imagination; and that is it.

One of the critical questions in this case is whether I am bound by that, or whether I am going to let her come on after the fact and try to show how the real reason for discharge was insubordination, throwing the hat at Mr. Held, physically putting his hands on him and all that business. That is all hindsight as far as I am concerned. It cuts both ways here.

MR. YABLONSKI: I understand it cuts both ways, Judge, but I suspect and I have seen enough of these arbitrations to know, that they took what they thought was their best to get this guy. They didn't think they needed anymore than that and they went with what they had.

ADMINISTRATIVE LAW JUDGE KOUTRAS: You mean in arbitration?

MR. YABLONSKI: That's right; in their initial charge against him.

ADMINISTRATIVE LAW JUDGE KOUTRAS: What that is, I am saying, so that if that is what happened, how can you now argue that they had some devious motive as a safety activist?

MR. YABLONSKI: I think this was the basic motivation, everything they did. Sure, they were waiting for this guy to do this and then they grabbed him. They went with whatever they felt they needed and that is what they chose.

ADMINISTRATIVE LAW JUDGE KOUTRAS: That is an unusual argument, Mr. Yablonski. The problem is, all these arguments are made well after the fact.

MR. YABLONSKI: But the fact of the matter is, Judge, they'd have a serious problem even proving what they charged. We haven't seen an eye witness yet as to this thing. Donna Yoder has never been here to testify as to what heppened.

ADMINISTRATIVE LAW KOUTRAS: Where is she? Can't you subpoena her? You have got the burden here; the initial burden.

MR. YABLONSKI: Let me proceed with my cross-examination on this, and then we will see if we need Donna Yoder.

After careful and considered scrutiny of the entire record in this case, I conclude and find that the respondent's decision to discharge Mr. Dickey, as made by the management personnel designated and charged with making that decision, was made because of his altercation with Ms. Yoder on September 18, 1981, and were it not for that incident, Mr. Dickey would not have been discharged and would still be in the respondent's employ. I reject Mr. Dickey's argument that because of his asserted Common Law relationship with Ms. Yoder at the time the incident took place on mine property, management should have treated the incident as something different from the usual confrontation between two employees. The fact is that at the time of the altercation, Mr. Dickey and Ms. Yoder were mine employees, and the fact that mine management treated them as such and disregarded or refused to consider their relationship for purposes of making an adverse disciplinary decision under the applicable mine shop rules does not establish that management acted arbitrarily or exceeded its legitimate interests in disciplining its own work force.

As indicated earlier in my findings and conclusions concerning the altercation of September 18, 1981, the information available to the mine management decision makers at the time of its investigation, including the information developed during the 24/48 meeting at which Mr. Dickey was represented, supports the charges lodged against him. In addition, Mr. Norris' testimony that management considered the incident to be a most serious and aggravated offense because it did in fact result in injuries to Ms. Yoder at the work site and could have happened around moving machinery, thus exposing Mr. Yoder to the potential for more serious injuries, cannot be totally discounted. I conclude and find that respondent had ample justification for taking the adverse personnel action that it did take in this case.

I conclude and find that the respondent has established that it would have discharged Mr. Dickey for his unprotected activity alone, that is, his altercation with Ms. Yoder, and this conclusion and finding is made by me

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after careful consideration and review of the record taken as a whole, including all of the testimony and evidence adduced by the parties at the hearing in this case. In short, I believe that the respondent has carried its burden as enunciated by the Pasula line of cases, as well as the more recent Commission decisions on this subject; *Bradley v. Belva Coal Company, supra*; *MSHA ex rel. Johnny N. Chacon v. Phelps Dodge Corp., supra*; *Lloyd Brazell v. Island Creek Coal Company, 4 FMSHRC 1455 (1982)*.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude and find that the record in this proceeding does not establish by a preponderance of any reliable, credible, or probative evidence that the respondent discriminated against the complainant because of any protected safety activities on his part. Under the circumstances, the complaint IS DISMISSED, and the relief requested IS DENIED.

George A. Koutras
Administrative Law Judge