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DANNY HENDERSON V. KING COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DANNY HENDERSON,
COMPLAINANT

Complaint of Discrimination

Docket No. SE 82-62-D

v.

KING COAL COMPANY,
RESPONDENT

DECISION

Appearances: Frederick T. Kuykendall, III, Esquire, Cooper, Mitch and Crawford, Birmingham, Alabama, for the complainant; Richard O. Brown, Esquire, Constangy, Brooks & Smith, Birmingham, Alabama, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This matter concerns a discrimination complaint filed by the complainant Danny Henderson pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Mr. Henderson is a miner employed by the respondent at the subject mine and he also serves as president of his local UMWA union. The complaint was initially filed pro se after Mr. Henderson was advised by the Secretary of Labor, Mine Safety and Health Administration, (hereinafter MSHA), that its investigation of his complaint disclosed no discrimination against him by the respondent. Mr. Henderson subsequently retained counsel to represent him, and pursuant to notice a hearing was convened in Birmingham, Alabama, on February 2, 1983, and the parties appeared and participated fully therein. Post-hearing briefs were filed by the parties and the arguments advanced in support of their respective positions have been fully reviewed and considered by me in the course of this decision.

The Complaint

The complaint filed by Mr. Henderson in this case concerns an assertion by him that the respondent violated the anti-discrimination provisions of the Act when mine management decided to idle the mine for several days. As a result of this action, Mr. Henderson claims that since he was scheduled to work during all or part of this period that the mine was idled, the action

taken by mine management has resulted in his loss of pay. In addition, Mr. Henderson claims that the idling of the mine was a decision made by management to prevent or somehow inhibit the miners working at the mine from exercising their safety rights on matters concerning the work place.

Issues

The issue presented in this case is whether the decision by mine management to idle the mine in question was made in retaliation for miners exercising any protected rights under the Act, and whether that decision was motivated by management's desire to inhibit or otherwise interfere with the right of miners in the exercise of any protected rights under the Act. Although Mr. Henderson's complaint was in the nature of a "class action" on behalf of a number of miners who signed a "petition" affixed to his complaint, my pretrial rulings limited my adjudication of this case to the question of whether Mr. Henderson's rights under the Act may have been violated. Additional issues raised by the parties are identified and discussed in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

Complainant's testimony and evidence

Danny Henderson confirmed that he is employed by the respondent as a bulldozer operator and serves as president of UMWA Local 1865. He confirmed that on Wednesday, April 21, 1982, he was at work removing overburden behind the dragline in an area known as "the pit", and he indicated that his work location at that time was "where the drill is and where the dragline is soon to be" (Tr. 27). He fixed the location of the dragline in relation to where the shots were being loaded as 900 feet away from the shot area (Tr. 38). He confirmed that he was not working on Friday, April 23, because he was at an arbitration hearing in Birmingham. He was scheduled to work on Saturday, April 24, but when he reported to the mine a security guard informed him that the mine had been idled. He observed the position of the dragline that day, and it was in the same location as it was on Thursday (Tr. 39). He was not scheduled to work Sunday, and did not work Monday because he was not called to come to work and the mine was still idle. He believed that partial crews were called back Monday, but that full production did not resume until 4:00 or 4:30 p.m. Monday or Tuesday (Tr. 40).

Mr. Henderson stated that on Tuesday, April 27, respondent's Vice-President and Manager Lynn Strickland requested a meeting with him and the safety committee concerning the event of the previous Thursday and Friday.

Mr. Strickland did not advise those in attendance as to why he had ordered the mine idled, and stated that if "the problem we had with that 103" came up again he would idle the mine again until an inspector arrived. When asked how he took that statement, Mr. Henderson replied "if we got into the habit of filing 103s and we couldn't get an inspector, we would be idled until one came" (Tr. 41).

Mr. Henderson confirmed that at no time while he was working at the pit area on Wednesday or Thursday, was he ever exposed to any hazardous or excessive dust (Tr. 42). He confirmed that the entire mining operation was idled on Friday, including reclamation work going on three quarters of a mile or a mile from the pit, welders working in the shop area approximately 4 mines from the pit, and the dragline itself (Tr. 43). Referring to a chart labeled "exhibit C-1", Mr. Henderson identified these areas, and he confirmed that prior to and after April 21, the dragline had operated closer to where shots were being fired than the 900 feet where it was located at the time in question. He confirmed that as of February 1, 1983, the dragline was located approximately "27 to 29 steps" from where a shot was put off, and he paced the distance off himself. However, he confirmed that the dragline did not operate all day since it was down for repairs (Tr. 48).

On cross-examination, and in response to a question as to why he believed the respondent's action in idling the mine has adversely impacted on the miners' safety rights, Mr. Henderson replied "if you're in the habit of getting idled if you exercise your safety rights, you would soon learn that you are going to lose money by doing it, not to do it, some peopled would" (Tr. 49). Mr. Henderson confirmed that he lost three work days, namely Saturday, Monday and Tuesday, and he believed that five employees came back to work on Monday, and full production resumed on Tuesday (Tr. 51). He also confirmed that he is an alternate member of the mine safety committee (Tr. 52).

Mr. Henderson stated that he estimated the 900 feet distance concerning the location of the dragline on Thursday, and that when he next observed it on Saturday it had not moved far, but believed it was closer to the shot area "by one day's tripping" (Tr. 56(a)). He confirmed that he was paid by the union for attending union business on Friday, and that he was called to come back to work at the mine either on the following Tuesday or Wednesday (Tr. 58).

With regard to the meeting with Mr. Strickland, Mr. Henderson stated that Mr. Strickland said nothing about the dragline being too close to the loaded shot, and Mr. Henderson confirmed that he was not working around the dragline or the drills on Wednesday and Thursday, April 21 and 22 (Tr. 60). He also confirmed that on the occasions when the dragline was closer to loaded shots than it was on Friday or Saturday, the mine was never idled, and he did not believe he was in any danger when he did work where the shots were fired on Thursday, and it is normal procedure to move away from the area where shots are fired (Tr.

62).

With regard to the shot which was loaded and fired on February 1, 1983, Mr. Henderson confirmed that he had no actual knowledge of how that shot was wired and shot, nor does he know whether the wiring and shot were accomplished "in an unsual manner" (Tr. 63). He also confirmed he actually met with Mr. Strickland on Tuesday, April 27, and that was a scheduled work day, and his actual lost days of work were only two days (Tr. 65).

Ronald Smith, testified that he has worked for the respondent for over seven years, that he is a certified Shooter, and that he was performing these duties on Wednesday, April 21, 1982. He described his duties that day, including the loading of shots after the holes are drilled by someone else. He stated that he was familiar with the Reed and Joy Drills, and he confirmed that on April 21, he requested other work due to the dust conditions, but that he did not request a section 103(g) inspection (Tr. 90). He did not work the next day, but returned to work Friday at 7:00 a.m., and the shot pattern had been drilled and he prepared to load the shots. However, he was instructed to load the holes which had been drilled with the Reed Drill, and since they were dusty he asked to see the safety committee for the purpose of requesting a section 103(g) inspection. He was later advised that no MSHA inspector was available to come to the mine, and he was given other work. At that time the dragline was some 800 feet from the loaded shot area (Tr. 92). Later that day, he was informed that the mine had been idled, and he was told to report back to work the following Monday, and he did so (Tr. 95). During the intervening weekend, the dust problems were negated by the rain, but the shot was fired on Monday when he returned to work (Tr. 95).

Mr. Smith confirmed that he was at the safety committee meeting held with Mr. Strickland on Tuesday, April 27, and he stated that Mr. Strickland stated that he had idled the mine because he could not put the shot off (Tr. 97). He also confirmed that the dragline has since operated closer to the shot, and in his opinion, no one would be in danger if it were operating within 500 feet of the shot (Tr. 98).

Mr. Smith explained the drilling operation, the loading operation, and he explained the reasons for the presence of dust during these operations. He confirmed that approximately a month after April 26, 1982, he did in fact file a request for a section 103(g) inspection, and that MSHA investigated the alleged dust problem and its ruling was not in his favor. Since that time he has filed no other requests for section 103(g) inspections (Tr. 106).

Mr. Smith confirmed that the mine conditions on April 21 and 23 were "unusual" in that there was an "abnormally high wind", and while the respondent furnished him with a respirator, he did not wear it because he doesn't like them (Tr. 108,109). He confirmed that he had a respirator when he refused to work in the dust, but opted not to wear it and chose to request a section 103(g) inspection instead (Tr. 111).

Mr. Smith confirmed that during the time the most recent shot was loaded, the dragline was located some 100 feet of the shot on February 1, 1983 (Tr. 115). He believed that was an unusual situation because the dragline was down and it could not be turned in a direction away from the shot (Tr. 115). Although he believed personnel were safe during this shot since everyone was removed from the pit, he did not believe that the equipment was safe because of the close proximity to the shot (Tr. 116). He confirmed that equipment has been damaged in the past by shots, but he could not recall how close to the shot the equipment was located (Tr. 118).

Mr. Smith confirmed that the respondent has never been cited by MSHA for being out of compliance with the applicable dust standard (Tr. 127). When asked whether Mr. Strickland had ever told him that he had decided to idle the mine because someone had filed a section 103(g) complaint, Mr. Smith testified as follows (Tr. 129-132):

> A. He said that when we -- first of all he said he was disappointed in the Safety Committee because they did not file a 103(g) and also he said that in the future that if we have this situation, a similar situation with the 103(g) that he would idle the mines until someone higher than him told him to put the mines back to work.
>
> A. Well, when you saw fit to file your 103(g) Complaint a month later, did he idle the mines?
>
> A. No, sir.
>
> Q. Why not?
>
> A. I don't know.
>
> Q. Well, at the time you filed that complaint did you expect him to idle the mines?
>
> A. I didn't know.
>
> Q. What was that subsequent complaint over, dust again?
>
> A. Yes, sir.
>
> Q. On this very same drilling device?

A. Yes, sir.

Q. And did someone actually come out from the --

A. (Interposing) Yes, sir, the Federal Inspector came and run a dust sample.

Q. On you?

A. Yes, sir.

Q. Hung a sampler on you?

A. Yes, sir, me and the driller.

Q. And the driller and found that they were in compliance?

A. Right.

Q. And they told you that that was the end of that.

A. Right.

Q. Did you, at that time, explain to him the problem you were having with the dust and everything?

A. Correct.

Q. Was that inspector aware of previous, of this particular complaint being filed?

A. Yes, sir, I believe he was.

Q. If you heard Mr. Strickland say that he was a little concerned about the 103(g)s, you weren't intimidated in any way, were you, a month later when you filed yours?

A. (No response)

Q. Did you feel intimidated or did you feel threatened by him that he would idle the mines if you did it again?

A. Yes, sir, at the time he said that, but I went ahead because I felt like I wanted to know whether they were in compliance or not and if I could still see the difference and I didn't know if he would idle the mine.

Q. But, that didn't prevent you from doing it?

A. No, sir.

Q. Did you say anything to Mr. Strickland before you filed that 103(g) a month later?

A. No, sir, I don't believe so.

Mr. Smith testified that he had no reason to disbelieve Mr. Strickland's assertion that he could not fire the shot on Friday, because he could see that it was not loaded and ready to shoot that day (Tr. 133). However, Mr. Smith saw no reason to idle everybody, and were it his decision to make, he would not have idled the miners working on reclamation or those working in the shop (Tr. 134). He confirmed that the reason the shot was not loaded and ready to fire on Friday was because he refused to do it (Tr. 138).

Respondent's testimony and evidence

Arthur W. Burks, respondent's resident engineer and safety director, testified that he is familiar with the complaint filed in this case. He confirmed that after being informed that Mr. Smith was having problems with dust on Wednesday, April 21, 1982, during the loading of a shot, he instructed the pit foreman to have him wear a respirator, and a call was placed to MSHA's office in Bessemer by mine management for the purpose of requesting an MSHA inspection of the asserted dust problem. MSHA informed the company that a section 130(g) inspection had to be requested by a miner or his representative and not the company (Tr. 146-150). No inspector came to the mine, and Mr. Smith requested, and was given, a union "benefit day" off and left the mine (Tr. 150). Mr. Dennis Myers was then called to the mine and assigned the shooter's duty the next day, Thursday. While on the phone with MSHA and mine management concerning a second request by management for a section 103(g) inspection, Mr. Myers stated that he was having no dust problems that day and he refused to request an inspection (Tr. 153).

Mr. Burks identified a mine map, exhibit R-1, and testified as to where he believed the dragline was operating during the week in question. He indicated that by Monday, April 26, the dragline would have been within 100 to 200 feet of the partially loaded shot (Tr. 156-159). He confirmed that the shot could not be put off because the holes could not be loaded, and he believed this posed a dangerous situation because the dragline was moving closer to the shot by Monday (Tr. 160-161). In light of this situation, and in view of the fact that he did not believe he could get an MSHA inspector to the mine over the weekend, he apprised Mr. Strickland that by Monday, the dragline would "be on top of that partially loaded shot", and Mr. Burks believed that this posed an unsafe condition (Tr. 161).

On cross-examination, Mr. Burks confirmed that the position of the dragline was surveyed and plotted on a daily basis on the mine map, and that this is done for the purpose of determining the coal inventory in the pit area in front of the dragline, and he located the position of the dragline on the map (Tr. 164-169). He estimated that on Friday, April 23, the dragline was some 500

feet from the shot location (Tr. 169). He confirmed that at an advance rate of 100 feet a day, he and Mr. Strickland and Mr. Ernest believed that by Monday, the dragline would have been dangerously or periously close to where the loaded shot was located.

Mr. Burks stated that he did not know why Mr. Strickland idled the welders in the shops or the reclamation workers, and when asked whether the operation of the dragline affected their work he responded "nothing I don't guess" (Tr. 175). He confirmed that the personnel directly involved in operating the dragline in firing off the shot would be the dragline crew, the shooter, the benching dozers, and drills. The welders and mechanics would be involved in the event of equipment break-downs. He confirmed that the dragline has been down in the past, but that mine policy does not necessarily dictate that everyone goes home. He did not know whether the same dragline had been idled in the past (Tr. 176-177).

Mr. Burks testified that the Reed Drill was a new piece of equipment, and that salesmen and factory mechanics were present at the mine to demonstrate the drill to the miners (Tr. 179). He also alluded to the dust problems and generally described the operation of the drill (Tr. 180-185).

William Lynn Strickland, confirmed that he is the mine general manager, and that he was advised by a telephone call on Wednesday, April 21, from mine superintendent Earnest, that there was a problem concerning the loading of certain holes which had been drilled by the Reed SK-60 Rotary Drill, and that the shooter Ronald Smith had requested other work becomes of certain dust problems (Tr. 187). Mr. Strickland confirmed that the dust control system on the drill in question met MSHA's standards and had been approved by MSHA (Tr. 188). He also confirmed that during the period April 21 through 23, 1982, the Reed Drill and a Joy Drill were both being operated in the pit, and that drill comparison tests were being conducted so that the company could decide whether to purchase the Reed Drill (Tr. 189).

Mr. Strickland confirmed that the mine conditions were dusty during the week in question, and in view of the reluctance of the shooters to operate the Reed Drill, mine management made attempts to contact MSHA for an inspection of the drill, and no interruption in the work flow was anticipated prior to Friday, and the company had no objection whatsoever to an MSHA inspection (Tr. 192). When he learned that MSHA could not send an inspector to the mine in response to a union request made on Friday, he met with Mr. Burks and Mr. Earnest at noon on Friday to discuss the fact that a shot had been partially loaded on Friday, but that it could not be fired (Tr. 194). He discussed the situation which he faced as follows (Tr. 194-195):

> A. Yes, sir. We discussed the situation that was in front of us; we had no reason to believe that we were going to be able to get an inspector available to us; we had every reason to believe that we had a problem with the shot there that was partially loaded that we were not going to be able to shoot; we had scheduled for the machine to run

> along with some of the other pieces of equipment, drillers, welders, I don't remember just exactly who had been posted to work; we knew that we would continue working that night and work on Saturday, we would have the shift come in on Sunday night, we would have another 8-hour shift there; we had no assurance that there would be an inspector on the property on Monday morning, we only knew that it had been requested, we had no guarantee that there would be an inspector there on Monday morning.
>
> * * * Well, Mr. Burks, who was in charge of preparing the map, Mr. Earnest, who knew from looking at the map where the dragline was sitting, where the shot was, we addressed the fact of that if we continued to proceed with the dragline that there was a possibility that we would be endangering the machine. We realized, we felt like there was no safety danger as far as personnel was involved because we would move them out of the area of the shot, as that's our practice and custom, but we felt like we would be endangering the machine itself.

And, at Tr. pgs. 196-201:

> Q. Did you hear Mr. Burks estimates of distances as far as where the shot area was located and where the dragline was located?
>
> A. Some 4-500 feet.
>
> Q. Do you agree with that?
>
> A. Yes, sir.
>
> Q. Is it an accurate reflection of the movement of the dragline as well as the other items which are noted on it?
>
> A. Yes, sir.
>
> Q. It's kept in the normal course of business?
>
> A. Everyday.
>
> Q. Do you depend on that map or maps like it?
>
> A. Yes, sir.
>
> Q. Did you depend on that map in making your decision in this instance?

A. Yes, sir, it was utilized in the decision.

Q. As I understand you listened to Mr. Earnest, you listened to Mr. Burks and you had personal knowledge of what had occurred, what was your conclusion?

A. My conclusion was that each segment of the operation in the mining of King Coal Company is dependent upon the other segment, before the dragline could come through the area has to be drilled and shot; for a coal loader to perform his function the overburden has to be removed; so each segment is dependent upon each other, so if one function was not going to be able to operate, then it would subsequently, at some later time, cause a delay or a failure of the other functions to be able to operate. On that basis I determined to idle the entire mine.

Q. Was that decision, in any way, based on any with respect to a safety complaint?

A. No, sir. It was an economic decision. It costs us approximately $40,000.00 a day to operate that mine.

Q. Where is most of that money spent?

A. A certain portion in labor and that balance of it in materials.

Q. If the dragline were unable to operate as you have testified you assumed it would be, could you still operate the mining?

A. Yes, sir, we could have, certain segments of it.

Q. Why did decide not to do so?

A. In my determination at that time, that would have only created a situation at a later date that those segments would have been affected by the lack of being able to shoot on that day and they would have been idled at a future date.

Q. So, in your mind at least in that point in time, it was inevitable that at some point in time all the functions of the operation would be affected?

A. Yes, sir.

Q. What did you do?

A. Sometime around 1:00 I instructed at the pits to idle the mines.

Q. Was that done?

A. Yes, sir.

Q. Did anyone work on Saturday?

A. No, sir.

Q. Did anyone work on Sunday?

A. No, sir.

Q. Did anyone report to work on the third shift on Sunday?

A. Yes, sir. We discussed that Friday, that knowing that there had been a request made for an inspector, not knowing whether they were going to come or not and knowing that the problem at the mine, if there in fact was one, centered around the drilling and shooting functions, that it was our intention at that time to bring those people in and have them working so that in the event an inspector was there, a determination could be made if a problem existed.

Q. Did you expect an inspector?

A. Well, we knew they been requested, we could only hope that one would show up.

Q. Who in fact worked?

A. I don't remember just exactly who was sitting in the particular functions at that time; the driller would have been in, the utility man on third shift, I'm not sure if a dozer operator would have been or not, but Mr. Smith, the shooter, was assigned to work along with the dayshift driller.

Q. How about Monday morning?

A. The day shift persons associated with the drilling and shooting process of which Mr. Smith was one.

With regard to the meeting of Tuesday, April 27, with the mine safety committee, Mr. Strickland confirmed that he requested the meeting, and he testified as follows as the discussion which took place (Tr. 203-204):

A. I requested Mr. Naramore, Mr. Henderson and Mr. Smith because those were the available people; Mr. Henderson as Local President; Mr. Smith because he was the most associated person with the problem; and Mr. Naramore as his Safety Committeeman, some of the other Safety Committeemen had gone and already left the parking lot. I told them at that time that I was disappointed with their actions as a Safety Committee, that I felt like that there had been reason for them to have made the request, we clearly understood that we could not make the request, and I told them that I was disappointed with their actions as the Safety Committee. Their response to that was that if they chose to call somebody out, an inspector, say on the day when Mr. Meyers was working, and that if he told them at that day or any other time that he didn't have a problem that they would look kind of foolish to have called somebody out, so they didn't. In their opinion it was not their responsibility to file on behalf of another employee.

I told them at that time the reason that we had idled the mine, that I had idled the mine because it was my decision, I think I told them something to the effect that whatever it was a good decision or a bad decision and that it was because we had the partially loaded shot and we chose not to continue allowing the dragline to move toward it.

Q. Did they respond to that?

A. Well, just other than the fact that someone questioned or either I offered, I don't exactly remember the extent of this part of the conversation, but it was discussed if it came up again in the future and I advised them at that time, under the same given conditions and circumstances that I felt like that the same decision would need to be made to idle the mine until such time that we could give a resolution.

Q. Did you ever, at any time, tell any of those individuals during this meeting or at any other point in time that any time they filed a 103(g) that you would idle the mine?

A. No, sir, a 103 had not even been filed at this time, it had been requested for, but it had never been filed.

Q. To your knowledge was it ever filed?

A. No, sir.

Q. Do you know why it was never filed?

A. No, sir.

Mr. Strickland identified exhibits R-2 and R-3 as copies of MSHA's findings concerning subsequent 103(g) inspections requested by the shooter and driller for the Reed SK-60 Drill, and those findings reflect that no violations occurred (Tr. 207). He denied that any retaliatory action was taken against the individuals who made those inspection requests (TR. 207-208). He expressed the following opinion as to why the miners objected to the use of the Reed SK-60 Drill (Tr. 210-211):

> A. Mr. Brown, I have my opinion as to why the classified employees took the position that they did in relation to the Reed SK-60 Metroplex dust control system. I assume that's where your question is leading, the result of King Coal Company utilizing that metroplex dust control system, one of the areas of responsibility for a utility person, classified employee, a member of the bargaining unit at King Coal Company was to furnish water to the drill, that drill, being prior to April of 1982 the Joy rotary drill. The end result of that was that when the Company purchased the drill and made a reduction in work force, the result was that its classified employees were reduced at the Ryan Creek Mine. This had to have had an impact on the bargaining unit at King Coal Company. They had a loss in reduction of numbers, but this had no affect on the Company's decision to purchase the Reed SK-60. It was done for a means of controlling the dust which was approved and therein we made the decision to buy the Reed SK-60 drill.
>
> Q. So at the time you purchased the SK-60 with the metroplex system, you were aware or had investigated this system and MSHA's attitude toward it, is that true?
>
> A. We only knew from the suppliers of the drill that the metroplex was an approved system.
>
> Q. Do you have any reason to doubt, at this point, particularly in light of the two subsequent 103 charges and investigations by MSHA that there is any problem with the Metroplex system?
>
> A. No, sir.

On cross-examination, Mr. Strickland confirmed that on April 23, 1982, he was at his office some 18 to 20 miles from the pit location, but based on the mine map and log book, he could estimate that the dragline was some 400 to 500 feet from the location of the shot on that day (Tr. 219).

He confirmed that the work schedules posted at the mine site on Thursday called for drillers, dozers, and the dragline to work on Saturday, but he was not sure about the welders (Tr. 220). He confirmed that he was responsibile for determining who will work and who will not work, and he confirmed that welders normally work in the shop area some 3 or 3 1/2 miles from the pit area, and that the mechanics would go around the entire operation (Tr. 222). He confirmed that the subject of the dragline working on Saturday was discussed with Mr. Earnest and Mr. Burks during their meeting on Friday, and while he personally did not see the posted work schedule, Mr. Earnest was instructed to schedule the dragline for work on Saturday (Tr. 223-228). However, he conceded that he did not know what was on the work schedule which was posted on Thursday because he did not see it (Tr. 224). No Sunday work was posted, and none is required to be posted (Tr. 228). He denied that Mr. Henderson was scheduled to work on Sunday (Tr. 229).

Mr. Strickland again reiterated his reasons for idling the entire mine, and he conceded that the dragline had operated closer to the loaded shot in the past (Tr. 230). He did not know how many holes were loaded on April 23, 1982, and confirmed that it was a "partially loaded shot" (Tr. 230). He also indicated that each "shot situation" is different, and the question as to whether one would be more dangerous than another is dependent on a number of circumstances (Tr. 231-240).

Stipulations

The parties stipulated to certain facts (Tr. 33-34), and these are as follows:

> On Wednesday, April 21, 1982 King Coal was using a Joy Brand drill with a water dust control system and a Reed brand drill with a dry "metroplex" brand dust control system. The two drills were operating in the same area, drilling holes in parallel patterns for purposes of comparison.
>
> At approximately 1:30 p.m. on Wednesday, April 21, Mr. Ronald Smith, the shooter, complained about the dust which he stated was created by the dry dust control system, refused to load the Reed drilled holes and requested work in a less dusty area. Mr. Smith's request was granted, and no further shooting was performed in the area.
>
> Late during the day shift of April 21 Mr. Ronald Smith came by the mine office and stated he was going to take a benefit day the next day. (Mr. Burks was present.) Mr. Dennis Myers was called in for the next day as shooter.

On April 22 at approximately 8:00 a.m., Mr. Earnest (in Mr. Burks' presence) asked Mr. Henderson to call the MSHA office and request a 103(g) inspection because the company's earlier request could not be honored. Mr. Henderson refused to make the call as requested and stated he had no problem with dust and the employee then working as shooter would not file. Mr. Henderson again refused to make the request.

Later that day (in Mr. Burks' presence) Mr. Earnest and Mr. Danny Henderson, local union president, telephoned the MSHA office. Mr. Burks was present while Mr. Earnest and Mr. Henderson spoke with the MSHA officials on a telephone with an extension. Mr. Henderson told the MSHA officials that he did not have a problem with dust, that the safety committee did not have a problem with dust, and that Mr. Myers who was on the shooter's job that day would not file a 103(g), and that no 103(g) inspection was being requested. Mr. Earnest was again told that MSHA could not come out without a union or miner request.

On the morning of Friday, April 23, Mr. Ronald Smith returned to the job of shooter. Mr. Smith refused to load the Reed holes and requested to see the safety committee and requested a 103(g) inspection. Smith's request for work in a less dusty area was granted. The safety committee, chaired by Mr. Naramore went to the mine office and Mr. Earnest called the MSHA office. No inspector was available, but a message was left for Jim Sanders to call as soon as possible.

On Monday morning, April 26, no inspector arrived, and Mr. Strickland personally talked with Mr. Ronald Smith who stated that he had no problem that day because it had rained and there was no dust. Mr. Strickland went on the explain to Mr. Smith the basis for the original decision to shut down the operation. Mr. Smith loaded and shot the entire shot pattern. Mr. Strickland then ordered that all miners be recalled and the mine be put back in operation.

Complainant's post-hearing arguments

In his post-hearing brief, complainant's counsel argues that the idling of the mine was totally unncessary and was done in retaliation to the filing of a section 103(g) complaint. Counsel asserts that Mr. Henderson was discriminated against because of a co-employee's attempt to exercise his rights under section 103(g)(1) of the Act, and as a result of the idling of the mine, Mr. Henderson lost several days'

wages. Counsel suggests that the clear message the respondent was sending to its employees was "Exercises your right under the law, and you will pay", and counsel submits that the respondent's idling of the entire mine not only violates both the letter and spirit of the Act, but has a chilling effect on the future exercise of the statutory rights of miners for a safe environment in which to work.

In response to the respondent's arguments that the decision to idle the mine was based on safety considerations, complainant asserts that the record here clearly establishes that on the day the mine was idled the dragline was operating approximately 500 feet from the shot area, and that prior to and since that time, it has operated closer to a shot. Complainant's counsel asserts that this defense "is incredulous" and an "artificial defense set up by the Company at trial", and that no justification or rationale was offered by the respondent to explain why shop and reclamation workers miles from the pit area were idled.

Counsel concludes that Mr. Henderson has made out a prima facie case of discrimination, and that the respondent has failed to rebut this fact. Counsel takes note of the fact that while the testimony in this case failed to establish the exact distance of the dragline on the day in question, records were available to the respondent which would have given the exact location of the dragline and the pit, and that the only inference that can be drawn from the respondent's failure to produce them is that it had something to hide.

Respondent's post-hearing arguments

In his post-hearing brief, respondent's counsel maintains (1) that Mr. Henderson is not a member of the class of persons Congress intended to protect when it enacted section 105(g) of the Act, (2) that he has offered no proof that he was ever singled out for retaliatory treatment, (3) that he has failed to establish any nexus between any of his actions and a retaliatory act by the respondent, and (4) there is absolutely no evidence of any intent to retaliate or any act of retaliation by the respondent in this case.

Counsel argues that section 105(c)(1) of the Act provides protection to miners who either: (1) file or make complaints under the Act; (2) are the subject of medical evaluations and potential transfer under section 101 of the Act; (3) institute a proceeding under the Act; (4) testify or are about to testify in a proceeding under the Act; or (5) exercise a statutory right under the Act. Counsel maintains that a prima facie case under the Act is only perfected when a Complainant takes action which places him within one of the categories of persons protected by the Act, and the mine operator then retaliates by discriminating against him based on his protected status. Counsel concludes that on the facts of this case, Mr. Henderson has failed not only to show the nexus between his protected status and the purported harm suffered, but has also failed to show that he took any action which brought him within the Act's umbrella of coverage.

In response to Mr. Henderson's assertion that the idling of the mine on Friday, April 23 was an act of retaliation against him in that the respondent's actions were based on Ronald Smith's attempt to file a request for a section 103(g) inspection, respondent's counsel argues that if the respondent here had retaliated against Mr. Smith, Mr. Smith would have grounds to file a complaint. However, since Mr. Henderson did not even work on April 23, he was not even present to take any action against which the respondent could have retaliated. Further, counsel asserts that Mr. Henderson has provided no evidence of any action on his part which could conceivably be construed to bring him within the parameters of the coverage of the Act, and that he never complained or filed a complaint on his behalf or as a miner representative. Counsel points out that Mr. Henderson refused to file a complaint.

In response to Mr. Henderson's assertion that Mr. Strickland's statements made during the April 27 meeting with the safety committee somehow "chilled" his rights under the Act, respondent's counsel argues that even assuming that Mr. Henderson's "tortured interpretation" of Mr. Strickland's remarks is credited, such a statement is not cognizable under the Act since actual interference with Mr. Henderson's statutory rights is required. Further, counsel argues that Mr. Henderson offered no evidence of any chilling effect on himself or any other employee. Counsel points to the fact that Ronald Smith testified that he filed a section 103(g) complaint approximately one month after the incident in question in this case and that the respondent took no retaliatory action against him. Counsel also argues that evidence of subsequent section 103(g) complaints concerning the drilling and shooting operations was presented at the hearing (exhibits R-2 and R-3), and this evidence establishes that similar dust complaints were subsequently filed with MSHA and MSHA found no violations existed, and there was no retaliatory action or threat by the respondent because of these complaints.

Respondent argues that the evidence in this case clearly establishes that it actually made numerous requests for a section 103(g) inspection between April 21 and April 23, and on various occasions asked the substitute shooter, the head of the Union Safety Committee, and Mr. Henderson to request such an inspection. Given these efforts on its part to initiate such an inspection, respondent maintains that Mr. Henderson's contention that it threatened to take adverse action against any miner who subsequently filed a complaing "must be viewed as absolutely incredible".

With regard to the purported "safety issue" concerning the use of the Reed and Joy Drills, respondent asserts that although Mr. Smith testified that he requested and was granted reassignment based on the dust condition which was created by the use of the Reed metroplex dust control system, the totality of the evidence shows that Mr. Smith's complaint was not based on concern for his safety. In support of this conclusion, counsel points to Mr. Smith's testimony that, to his knowledge, the Reed

Drill was the first one operated by the respondent without a water dust control system and that his complaint and the complaint of other employees was based on their disenchantment with the use of a waterless dust control system (Tr. 125-126).

Respondent points out that on April 23, the Reed Drill was operated with an MSHA approved dust control system, and that the Joy Drill was operated without a dust control system of any type. Thus, while the Joy Drill presented an infinitely greater potential hazard, Mr. Smith refused to load the Reed drilled holes and testified that he did not and would not have refused to load the dustier Joy drilled holes. Furthermore, respondent maintains that even after repeated requests from mine management, Mr. Henderson, the Chairman of the Safety Committee, and the April 22 substitute shooter refused to file a 103(g) inspection request, and denied both to mine management and to the local MSHA office that a dust problem existed for anyone but Ronald Smith. Under the circumstances, respondent concludes that the 103(g) inspection request was based on motivation other than the Safety Committee's concern over the dust problem. Since the purchase of the Reed drill with the metroplex dust control system resulted in the layoff of two classified employees, and the purchase decision was not subject to the grievance and arbitration provisions of the labor agreement, respondent concludes further that the safety complaint was used as a mechanism to prevent the purchase of the drill.

In response to Mr. Henderson's contention that Mr. Strickland's decision to idle the entire mine was motivated by his desire to retaliate against the miners, respondent points out that Mr. Henderson's contention in this regard is based in part on his unreliable estimates of a cable which was spread between the dragline and the shot area, and in part on comparisons between the mine operating conditions on April 23 and the mine operating conditions on subsequent occasions when circumstances were in no way comparable. As an example, respondent refers to the shot detonated the day before the hearing in this case. Respondent maintains that Mr. Henderson ignored the fact that the shot detonated at close distance to the dragline involved both powder which had lost strength because it had been subjected to rain and a relatively shallow layer of overburden. Furthermore, respondent points to the testimony of Mr. Smith, an experienced certified shooter, who confirmed that flyrock could be thrown up to 1,500 feet and that he was unable to predict the distance such rock would travel on a given occasion. Mr. Smith also confirmed that each time a shot is put off judgment must be exercised to determine which areas are endangered. (Tr. 111-112).

In response to Mr. Henderson's contention that Mr. Strickland's idling of the immediately affected area would have been a more appropriate response, and that he went too far when he idled the entire operation, respondent maintains that it is unrefuted that every operation in the mine would have been ultimately idled by the shooter's refusal to put off the shot, and that Mr. Strickland's decision simply idled all functions at one time and thus avoided both the danger which would have been created by continued operation of the dragline and the economic loss which would have resulted from partial operation of the remaining mining functions.

Respondent asserts that in reality, after less than 23 days on the job as Vice President and General Manager, Mr. Strickland was presented with a problem he had not previously encountered. Between 12:00 noon and 1:00 p.m. on April 23, all blasting was suspended because the only classified shooter refused to load and detonate holes drilled by a new piece of equipment. MSHA had not responded to an inspection request, and an MSHA inspector was not expected until the following Monday. The only dragline in the mine was 400 to 500 feet away and advancing toward the shot area. The dragline had previously been damaged by flyrock from a shot put off by the same classified shooter who refused to load and blast because of the dust. The Mine Superintendent and the Resident Engineer/Safety Director advised Mr. Strickland that continuing to operate the dragline over the weekend would place the dragline in danger when the shot was finally detonated. A partially loaded shot endangered personnel and equipment operating in the area. Because of the integrated nature of the mining operation, every function -- including those not in the immediate blasting area -- would ultimately be affected by a cessation of the blasting. Thus, Mr. Strickland exercised his judgment and directed that the entire mining operation be idled.

Finally, respondent concludes that Mr. Strickland's decision to idle the mine was based on sound business judgment, and not on any retaliatory motive. Respondent suggests that had retaliation been his motivation, Mr. Strickland would not have reassigned Mr. Smith (the only employee who complained about dust) and then scheduled him to work on the following Monday even though the mine was otherwise shut down. Respondent maintains that Mr. Strickland had no reason to retaliate against any other employee because no other employee had made a safety complaint. Mr. Strickland simply concluded that continued partial operation of the mine under the prevailing circumstances was neither safe nor economically feasible.

Findings and Conclusions

Section 103(g)(1) of the Act provides in pertinent part as follows:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of the inspection, except that the operator or his agent shall be notified forthwith

> if the complaint indicates that an imminent danger exists. * * * * Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists * * *.

There is no dispute as to the facts and circumstances which led to the filing of this complaint, and as correctly stated by the respondent in its post-hearing brief, the decision by mine management to idle the mine on Friday afternoon, April 23, 1982, is the focal point of the dispute. During the course of the hearing, complainant's counsel argued that the actions taken by mine management in this regard were overly broad and out of proportion to the risks involved in continuing the mining operation, and counsel characterized the idling of the mine as "a brash attempt to punish miners who were trying to exercise their rights under the Act" (Tr. 26). Counsel conceded, however, that the events of Wednesday and Thursday prior to the idling of the mine did not involve any discriminatory action on the part of the respondent, and he also conceded that the idling of the mine affected all miners, and that mine management did not selectively choose Mr. Henderson for any special treatment (Tr. 23-24).

This case presents a rather unusual situation in that the respondent mine operator is essentially being accused of taking retaliatory action against the entire rank-and-file miners, and specifically Mr. Henderson in this case, because of a refusal by one of the miners complaining about certain dust problems, and Mr. Henderson, as president of the local, to file a request with MSHA for a section 103(g) inspection. At the same time, Mr. Henderson complains that the respondent mine operator discriminated against him when company Vice President and General Manager Lynn Strickland discontinued mining operations at approximately 1:00 p.m. on Friday, April 23, 1982, "idled the mine", thus resulting in Mr. Henderson's losing two days' pay for the following Saturday and Monday, April 24 and 26, 1982, days on which he normally would have been scheduled to work. Mr. Henderson concludes that this action by Mr. Strickland was "a blatant act by the company to have us sacrifice our right to a safe place to work".

Mr. Henderson confirmed that in the eight years that he has worked at the mine, while there have been differences with mine management over certain problems, they were all worked out through MSHA or through the Union's Safety Inspector (Tr. 66). He also confirmed that under the Union contract, the respondent may idle the mine "when he gets very well pleased to do so", and that the present controversy does not fall under the normal Union-Management grievance procedures (Tr. 67). He confirmed that at no time during the time periods Thursday through Tuesday, April 22 through 27, 1982, did he ever personally attempt to register a section 103(g) complaint with MSHA (Tr. 71), and he confirmed that the respondent did nothing to intimidate or keep the miners affected by any dust conditions on Wednesday or Thursday from filing complaints (Tr. 83). Mr. Smith, who has worked at the mine for over seven years, and who serves as an alternate safety committeeman, testified that past safety

differences with mine management have been resolved through mutual discussions, and that "sometimes we'd have to get the District to come up" (Tr. 137).

Mr. Henderson's complaints make reference to a "safety issue". His first complaint, sighed by him on May 5, 1982, at page 4, contains a statement by Mr. Henderson that "the employees were upset over being idled because of a safety issue". At page 5 of that complaint of Mr. Henderson states "we do not want our fellow workers to compromise their safety rights in order to earn a living for themselves and their families." A second complaint, signed on May 25, 1982, on his own behalf, and on behalf of other miners listed in an attachment to his complaint, states that the idling of the mine "was done over a safety issue in which we strongly feel did not necessitate this type of discriminatory action against the employees of the Ryan Creek Mine."

It seems obvious to me from the record in this case that the "safety issue" is directly related to mine management's decision to purchase a new Reed SK-60 Rotary Drill which was equipped with a "metroplex" brand dust control system. Although the drill had the capability for a water induced dust control system, mine management opted not to use the water method and believed that the "metroplex" system was more desirable for dust control purposes. In any event, the Reed Drill, as used at the mine with the "metroplex" dust control system, apparently had MSHA's stamp of approval, and there is no evidence to the contrary.

The record in this case establishes that during the period April 21, 1982, through April 23, 1982, the Reed Drill, with the "metroplex" system, was used with a Joy Drill equipped with a water dust control system, to drill certain holes in preparation for loading and firing a shot. The drilling process being conducted at this time with the Joy and Reed drills was under normal mining operations, and the drilling was being conducted at a time when mine management had under consideration the possible purchase of the Reed Drill. The two drills were operating in the same area, drilling holes in parallel patterns for comparison purposes in order to test the operational effectiveness of the two drilling devices. In short, the Reed Drill was being used for "on the job testing purposes", and its effectiveness obviously met with mine management's approval since the drill was subsequently purchased and is still in operation at the mine. Conversely, it seems obvious from this case, that the decision to purchase that drill did not meet with the approval of some miners who had to work around it, and that is at the very heart of this discrimination case.

The record in this case establishes that on two occasions when Mr. Smith was asked to load holes which had been drilled with the Reed Drill he refused and asked to be reassigned to work in a less dusty area. The first incident involving Mr. Smith occurred on Wednesday, April 21, 1982, at approximately 1:30 p.m., when he complained about the dust created by the Reed dry dust control system. Mine management granted his request for other work and no further shooting was performed in the area. Later that day, Mr. Smith informed mine management that he was taking a contract "benefit day" off the next day, Thursday, April 22, 1982, and he did not work that day.

The second incident involving Mr. Smith took place on Friday, April 23, 1982, when he returned to his shooter's job. He was instructed to load certain holes which had been drilled by the Joy and Reed drills. He refused to load the holes drilled by the Reed Drill, and requested and was granted other work. At the same time, he requested to see the mine safety committee and requested a section 103(g) inspection. The safety committee, chaired by Archie Naramore, went to the mine office and superintendent Earnest called the MSHA office. He was informed that no inspector was available, but a message was left for Inspector Sanders to call as soon as possible.

Mr. Smith's reluctance to load and shoot the holes drilled by the Reed Drill stemmed from his belief that the drilling with that drill resulted in dry dust which had accumulated around the holes which had been prepared for loading and shooting. Mr. Smith testified that when he attempted to walk around and shovel the dust into the holes after they were loaded, the dust was dispersed into the air, and coupled with the unusual wind conditions which the parties agreed prevailed on April 21 and 23, 1982, created such a dusty environment around him, and resulted in his requests to be assigned other work.

Mr. Smith confirmed that his reluctance to load and shoot holes drilled by the Reed Drill did not affect his decision to load and shoot holes drilled by the Joy Drill. He stated that the water induced dust control system on the Joy Drill rendered the dust moist and prevented it from being dispersed when he worked around the holes drilled with that drill. In short, Mr. Smith obviously was satisfied with the Joy Drill, but was not too enchanted with the Reed Drill, even though it had an approved dust control device, namely the "metroplex" system. Although the "metroplex" system was designed to separate the respirable dust from other dust particles, Mr. Smith's reluctance to work around that drill was based on the fact that he could not visually distinguish the differences in the dust which was present. In short, he obviously believed that holes drilled with the Joy Drill presented no dust problems, but that holes drilled with the Reed Drill did. I can only assume that had the Reed Drill been provided with a water suppression dust control system, Mr. Smith would not be reluctant to work around holes drilled with that drill.

Although Mr. Smith refused to load the holes drilled with the Reed Drill, he confirmed that at the time of these refusals on April 21 and 22, he had available to him a dust respirator which had been furnished him by the respondent. However, Mr. Smith indicated that he did not use the company provided respirator because he "does not like to wear one." He also confirmed that when he was called back to work on Monday, April 26, he did not complain about any dust problems while loading holes drilled with the Reed Drill because it had rained and there were no dust problems.

The record in this case reflects that on at least three occasions, Mr. Henderson, when presented with certain facts indicating that miners were experiencing some problems with certain dusty mine conditions, opted not to file a section 103(g) inspection request with MSHA, and these are discussed below.

The first opportunity for Mr. Henderson to file a section 103(g) complaint came on Thursday, April 22, 1982, when substitute shooter Dennis Myers, filling in for the regular shooter Ronald Smith, questioned Mr. Henderson about Mr. Smith's request for other work on the previous day, and asked for Mr. Henderson's advice. Mr. Henderson advised Mr. Myers that the decision to request a section 103(g) inspection was his to make, and that he should be the one to decide whether to go ahead and load the holes or file a complaint and request an inspection. Mr. Myers decided to go ahead and load and shoot the holes which had been drilled.

Respondent's safety director Burks testified that after Mr. Henderson refused to request a section 103(g) inspection, Mr. Earnest called the MSHA office and spoke with Inspector James Sanders about the situation. While he was on the phone, Mr. Myers entered the office, and after being given the phone by Mr. Earnest, Mr. Myers advised Mr. Sanders that he had no problems with dust. Under these circumstances, MSHA refused to act on Mr. Earnest's request for a section 103(g) inspection.

The second opportunity for Mr. Henderson to file a section 103(g) complaint came on Thursday, April 22, 1982, when mine superintendent Sammie Earnest asked Mr. Henderson to call the MSHA district office and request an inspection. Mr. Earnest's request was made because a previous telephone request to MSHA by mine management the day before was denied by MSHA on the ground that a section 103(g) inspection could only be made upon request by a miner or his representative and not by the mine operator or mine management. Mr. Henderson refused to call MSHA as requested by Mr. Earnest, and he did so because he personally had no problem with dust, and the substitute shooter Dennis Myers would not file a section 103(g) request on his own.

The third opportunity for Mr. Henderson to request a section 103(g) inspection came later in the day on Thursday, April 22, 1982, when Mr. Earnest and Mr. Henderson placed a conference telephone call to MSHA officials, and Mr. Burks listened in on an extension phone. During that conversation Mr. Henderson advised the MSHA officials that he did not have a problem with dust, that the mine safety committee did not have a problem with dust, that Mr. Myers would not file a section 103(g) inspection request, and that no such inspection was being requested.

Contrary to Mr. Henderson's assertion that miners are reluctant to file complaints, Mr. Ronald Smith confirmed that a month or so after the incident which precipitated the instant complaint, he did in fact

file a request with MSHA for a section 103(g) inspection, that MSHA conducted an inspection concerning his complaint of dusty conditions, but ruled against him (Tr. 106), and that the mine was not idled as a result of his request for an MSHA inspection (Tr. 130).

Exhibit R-2 is an MSHA letter dated June 21, 1982, advising the respondent of the results of a section 103(g)(1) inspection requested by the UMWA. The purpose of the inspection was to investigate a May 24, 1982 complaint filed by a representative of the miners at the Ryan Creek Mine alleging that the driller and shooters work positions were exposed to too much dust. MSHA's findings were that the dust exposures for the two positions were tested and that the test results indicated that the respondent was in compliance and that no citations for noncompliance with the required dust levels were issued.

Exhibit R-3 is an MSHA letter dated September 7, 1982, advising the respondent of the results of a section 103(g)(1) spot inspection requested by the UMWA. The purpose of the inspection was to investigate an August 18, 1982, complaint by a representative of the miners alleging a dust problem on the Reed SK-60 Drill work position and the shooters work position, MSHA's findings were that the results of its testing and sampling indicated that the respondent was in compliance with the applicable dust exposure requirements and that no citations for noncompliance were issued.

In my view, on the facts of this case it appears to me that the respondent did everything humanly possible to meet the perceived safety concerns faced by the miners as a result of the use of the drill in question. Not only did mine management accomodate the miner who complained about the dusty conditions by assigning him other work, but management also provided him with a dust mask which he refused to wear.

With the regard to the question of requesting section 103(g) inspections, I find nothing in this record to support a conclusion that mine management ever attempted to intimidate, harass, or otherwise prevent miners, or the safety committee, from filing such requests. To the contrary, in the instant case, mine management asked the safety committee to request such an inspection, and even made the mine phone and office available to the committee, all to no avail. Further, as indicated above, on two subsequent occasions when miners saw fit to file section 103(g) requests with MSHA, mine management did nothing to prevent them from doing so, and there is absolutely no evidence that management ever retaliated against anyone, or did anything such as again idling the mine, because of those complaints. As a matter of fact, the record here establishes that the inspections conducted by MSHA in response to the 103(g) complaints disclosed that the respondent was in compliance with the applicable MSHA dust standards in question. One of those complaints concerned the very same Reed SK-60 Drill which is involved in the instant case.

Based on the testimony of Mr. Strickland, which I find

credible, it would appear that the mine was idled from approximately 1:00 p.m.

Friday, April 23, 1983, until the third shift on Sunday when several workers were called back. By Monday, April 26, the day shift crew associated with the drilling and shooting process was called back to work, and by 4:00 or 4:30 that afternoon, the majority of the miners came back to work after the blast was completed (Tr. 202). Mr. Henderson's assertion that Mr. Strickland did not tell him why the mine was idled during the meeting held with the safety committee is contradicted by the testimony of Ronald Smith. Mr. Smith, who was present at that same meeting, testified that Mr. Strickland explained that he idled the mine because "he couldn't put the shot off" (Tr. 97, 117). In addition, contrary to the complainant's argument at page 4 of his brief that the respondent has offered no justification or rationale to explain why it was necessary to idle the shop and the reclamation workers who were far removed from the pit area, Mr. Strickland's testimony in this case includes an explanation as to why he made the decision to idle the entire mine. Therefore, the question is whether or not that explanation is believable.

At the heart of the complainant's argument that there was unlawful discrimination in this case is the assertion that Mr. Strickland's explanation as to why he idled the mine, and in particular his statement that it was somehow dictated by safety concerns, is totally unbelievable, particularly in light of the fact that the dragline had been operated in close proximity to a shot before and after the incident in question and the mine was not idled on those occasions.

While it is true that the dragline in question had in the past operated closer to a shot area, and in fact did so on February 2, 1983, the fact is that the circumstances which prevailed when Mr. Strickland decided to idle the mine on Friday, April 23, were not the same as those which may have been present on other occasions. For example, the complainant's assertion at page 4 of its brief that the dragline "could have been operated" on February 2d, is tempered somewhat by Mr. Henderson's own testimony that the machine did not run all day because it was down for repairs, and that he had no knowledge as to whether it was in operation on February 1st because he was at a meeting in Birmingham, and was not at work (Tr. 48). In addition, as testified to by Mr. Strickland, the question as to whether one shot is more or less dangerous than another is dependent on a number of circumstances, including the size of the shot, the number of holes loaded, proximity of men and equipment, and the like. Absent any credible showing by the complainant that the circumstances which faced Mr. Strickland at the time he made the decision in this case to idle the entire operation were the same as those which prevailed in the past when the operations were not idled, I cannot conclude that his decision was unreasonable or went too far.

After careful consideration of all of the testimony and evidence adduced in this case, I cannot conclude that Mr. Strickland's decision to idle the mine was made for the purpose of intimidating or punishing the miners for their exercise of any

rights protected under the Act.

After viewing Mr. Strickland on the stand, I find him to be an honest and credible witness. I accept his explanation as to why he idled the entire mine, including the fact that this decision brought production to a grinding halt at a substantial economic loss to the respondent during the period the mine was idled. Since Mr. Strickland was responsible for the entire mining operation in question, he had the authority to take the action in question, and I conclude and find that his decision in this regard was a proper and legitimate management decision, and I reject the complainant's assertion that Mr. Strickland's explanation and justification for the decision was somehow concocted to cover up his intent to punish the entire work force at the mine.

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