

CCASE:

BILLY DEEL V. D.O. & W. COAL

DDATE:

19831216

TTEXT:

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

BILLY K. DEEL,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

D. O. & W. COAL COMPANY,  
RESPONDENT

Docket No. VA 82-62-D

MSHA Case No. NORT CD-82-17

No. 5 Mine

DECISION

Appearances: Michael A. Genz, Esq., and Barbara A. Samuels, Esq.,  
Client Centered Legal Services of Southwest Virginia,  
Inc., Castlewood, Virginia, for Complainant  
Louis Dene, Esq., Abingdon, Virginia, for Respondent

Before: Judge Steffey

A hearing was held in the above-entitled proceeding on February 15, 16, 17, and 18, and April 26, 1983, in Abingdon, Virginia, pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), of the Federal Mine Safety and Health Act of 1977. The complaint was filed on September 23, 1982, and supplemented on October 12, 1982, and October 27, 1982. The complaint was filed under section 105(c)(3) of the Act after complainant had received a letter from the Mine Safety and Health Administration advising him that MSHA's investigation of his complaint had resulted in a finding that no violation of section 105(c)(1) of the Act had occurred.

Counsel for complainant and respondent filed simultaneous initial posthearing briefs on July 15, 1983, and July 18, 1983, respectively. Counsel for respondent and complainant filed on August 31, 1983, and September 2, 1983, respectively, letters stating that they were waiving the filing of reply briefs.

Issues

Complainant's brief contends that complainant was engaged in activities protected from acts of discrimination by section 105(c)(1) of the Act, that his discharge by respondent was motivated by that protected activity, and that respondent would not have terminated complainant had it not been for his protected activity.

Respondent's brief renews its motion for dismissal of the complaint made at the hearing on the ground that complainant has failed to establish a prima facie case.

#### Findings of Fact

Based on my observations of the witnesses' demeanor and the preponderance of the credible evidence, the following findings of fact are made:

1. D. O. & W. Coal Company (hereinafter referred to as "DOW") operates a one-unit mine in Southwest Virginia. Coal is produced from a single working section having seven entries. The mining process, prior to July 1982, consisted of shooting coal from the solid, that is, without using a cutting machine to undercut the coal seam prior to setting off explosives. The coal was transported from the working face to the belt conveyor by means of battery-powered scoops. DOW employs about 34 miners on two production shifts. In July 1982 the mining system was changed to use of a continuous-mining machine and shuttle cars equipped with trailing cables were substituted for the scoops which had previously been utilized to transport coal to the belt conveyor.

2. A fire occurred in the mine in February 1982 and, as a result of the fire, the Mine Safety and Health Administration placed the mine on a 10-day spot inspection which was still in effect at the time the hearing was held in this proceeding in February and April of 1983. The inspector regularly assigned to examine the mine was William H. Strength who testified in this proceeding that he made spot inspections of both the belt lines and working faces on April 5, 6, 15 through 22, and May 5, and 6, 1982. He also conducted a complete regular inspection on May 24 through June 3, 1982.

3. Complainant Billy K. Deel was first employed by DOW on or about January 17, 1980. The mine encountered some uneconomic producing conditions which resulted in DOW's laying off of all miners on the 3-to-11 p.m. shift about July 17, 1981, including Deel. At the time of Deel's lay-off, he held the position of a mine committeeman. Prior to the second shift's lay-off, Deel brought to DOW's attention the fact that the miners were upset because DOW had changed the date of issuance of their pay checks from Thursday to Friday. DOW claimed that the change in date for issuance of checks had resulted from a time lag in a computer used by a bank in Pikeville, Kentucky, and DOW refused to reverse its decision to issue the checks on Friday. When the miners heard that DOW had refused to revert to a Thursday pay day, they declined to go into the mine to work, claiming illness, although they had been well enough to report to work and well enough to await the outcome of their complaint about the change in date of delivery of their pay checks.

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4. DOW was mining about 1 mile from the surface when it encountered the uneconomic conditions which caused it to lay off all miners on the second shift. DOW subsequently withdrew its equipment from the mile-deep location and moved the working section close to the surface by commencement of production in a new area off to the left of the mine's main entries. When Deel heard that DOW was recalling miners, he made some telephone calls and visited the mine. He was so anxious to obtain work to support his wife and child, that he volunteered to sign a statement to the effect that he would not cause DOW's management further trouble if they would rehire him (Exh. A). DOW's mine foreman did not believe that Deel had waived any of his rights under the Act or the UMWA wage agreement by having signed the statement.

5. Deel was recalled to work on the day shift on or about March 5, 1982, and was told that he would be paid top contractual wage rates, but that there was no specific job available and he would be required to operate the scoop, the roof-bolting machine, or to shovel coal along the belt line, although at the time of his lay-off on July 17, 1981, he claims to have successfully filed a bid for the job of an operator of a roof-bolting machine.

6. On April 3, 1982, about a month after being recalled to work, Deel was elected by the union to the position of safety committeeman to replace Chann Fields, a shotfirer, who had previously held that position for about 4 years. DOW was notified of Deel's election as safety committeeman on April 5, 1982, and Deel continued to hold that position for 32 days, or until he was discharged on May 7, 1982.

7. The drilling of coal in DOW's mine was performed by use of a hand-held drill which received its hydraulic power from the roof-bolting machine or a scoop. When the section foreman had a full crew of miners, he would assign two men to operate the roof-bolting machine. One of them would install roof bolts and the other one would drill holes in the face so that the shot firer could prepare the heading for another explosive charge. DOW used two roof-bolting machines. Deel and Randy O'Quinn normally operated one roof-bolting machine and associated drill and Kyle Turner and Lee Grizzle normally operated the other roof-bolting machine and drill. Randy O'Quinn hurt his shoulder in February 1982 and was not able to work at the time Deel was recalled to work on March 5, 1982. At times, the section foreman was unable to assign another miner to work with Deel on the roof-bolting machine. Deel's section foreman, Tivis Stiltner, on at least one occasion was unable to obtain a miner to assist Deel in running the roof-bolting machine and asked Deel to operate the machine by himself with the result that Deel was required to install both roof bolts and drill holes for explosives.

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8. The miners normally left the surface to go underground at 7 a.m. and it took about 25 minutes to get to the working section. When Stiltner examined the face area about 8:30 a.m. on the day when he had ordered Deel to roof bolt and drill, he found that Deel had drilled holes in only one place and had not installed any roof bolts. Stiltner believed that Deel should have been able to accomplish more than the drilling of one place by 8:30 a.m. and asked Deel why he was not working. Deel replied that Stiltner could make Deel perform two jobs, but couldn't make him "run at it". Stiltner claims that Deel refused to perform both jobs and that he told Deel he was suspending him with intent to discharge for refusing to operate the roof bolter and drill. Deel, however, asked to talk to the mine committeeman, Kyle Turner, and Turner was able to persuade Stiltner to put Deel back to work after Deel had agreed to perform both jobs. After Deel had returned to work, Stiltner again went to the place where Deel was supposed to be working and he still had not installed any roof bolts. Therefore, Stiltner told Deel that he would help him on the roof-bolting machine for the rest of the day. Stiltner then proceeded to install roof bolts for the remainder of the shift and Deel operated the coal drill.

9. On May 5, 1982, one of the spot inspections referred to in Finding No. 2, supra, was conducted by Inspector Strength who issued three withdrawal orders at that time citing DOW for failure to install temporary supports as required by its roof-control plan, for firing 24 charges from a detonating device which was rated for firing no more than 20 charges, and for failing to have the line curtains installed to within 10 feet of the working faces (Exh. 1). The miners spent the remainder of the day performing the work necessary to abate the violations, but they had not completed the abatement work by the end of the shift and Stiltner asked Deel and Randy O'Quinn to come in 1 hour early on May 6 to finish abating the violations. Strength returned to the mine on May 6 and terminated the orders so that DOW could resume mining operations.

10. On May 7, 1982, the day after the withdrawal orders had been terminated, Floyd O'Quinn, the regular scoop operator, was absent. Stiltner asked Deel to get the large scoop that Deel had been operating from time to time and hook it to the mantrip so that Deel could transport the men into the mine. Stiltner also told Deel that he himself was going to drive the little scoop into the mine because he had an internal bleeding illness and that operating the little scoop aggravated his condition less than operating the large scoop. Deel objected because he also preferred to operate the little scoop, but Stiltner insisted that Deel get the large scoop and take the mantrip in. Deel hooked the mantrip to the large scoop, but went over to Stiltner who was cleaning water out of the little scoop and

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reminded Stiltner to make sure he had the safety chain hooked on the scoop's dipper since Stiltner had indicated that Chann Fields was going to ride into the mine with Stiltner in the little scoop.

11. It is customary for all of the miners to gather near the door of the parts trailer and mine office before going into the mine. While they were gathered in the vicinity of the parts trailer on May 7 (Exh. M), Randy O'Quinn and Kyle Turner heard Stiltner assign Deel the job of pulling the mantrip with the scoop, but they did not hear any of the argument between Stiltner and Deel as to which one would be operating the little scoop as opposed to the large scoop. The mine foreman, Joe Taylor, also heard Stiltner assign Deel the job of pulling the mantrip.

12. When Stiltner reached the working section, he parked the little scoop near the tailpiece where he had some work to do on the controls to the conveyor belt. Deel dropped miners from the mantrip at their various working places and drove the large scoop to the vicinity of the roof-bolting machine which he, Randy O'Quinn, and Clayton Justice had been taking turns in operating. Justice had been hired as a prospective foreman on the assumption that DOW's plan to open a new section would materialize. In the meantime, because of absenteeism by union workers, Justice had been performing jobs which are normally done by union employees. Specifically, Justice had been drilling holes from the hydraulic power provided by the roof-bolting machine to which Deel and Randy O'Quinn were normally assigned. Justice had sharpened about 16 bits near the parts trailer just before they came into the mine on the morning of May 7 and the noise of the grinder prevented Justice from hearing Stiltner assign any work to anyone. Nevertheless, both Randy O'Quinn and Justice were already preparing the roof-bolting machine and drill for operation before Deel parked the large scoop near the roof-bolting machine.

13. When Deel came to the roof-bolting machine, Justice immediately realized that three men were more than could be justified to operate one roof-bolting machine. Therefore, Justice asked Deel what job he was planning to do that day and Deel said he was planning to run the roof-bolting machine. Justice replied that he guessed that meant he would have to operate the large scoop which Deel had driven into the mine and Deel agreed that Justice had made a correct conclusion. Justice, who had not operated a scoop in DOW's mine for transporting coal to the belt conveyor, was not comfortable with the unorthodox manner in which he had become assigned to be the scoop operator. Consequently, Justice got on the large scoop and drove it about 120 feet to the place where Stiltner was working on the tailpiece. When Justice advised Stiltner that Deel had decided to

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run the roof-bolting machine, Stiltner told Justice to go back to the roof bolter and tell Deel that he wanted Deel to operate the scoop and for Justice to work on the roof bolter with Randy O'Quinn. When Justice conveyed Stiltner's message to Deel, Deel refused to follow Stiltner's instructions and told Justice to go back and tell Stiltner to come and tell Deel in person if operating the scoop was what Stiltner wanted him to do that day. Justice again returned on the scoop to Stiltner's location at the tailpiece and stated that Deel had refused to run the scoop and wanted Stiltner to come up there and tell Deel in person if Stiltner wanted Deel to operate the scoop. Stiltner then told Justice to park the large scoop and return to the roof-bolting machine and wait until he could finish the repairs on the belt conveyor and come up to talk to Deel. Justice dutifully parked the large scoop and returned to the site of the roof-bolting machine. This time Justice just sat down and waited for Stiltner to show up after he had advised Deel that Stiltner would be there in a little while.

14. After Stiltner had repaired the tailpiece, he got on the little scoop and drove it to the roof-bolting machine where Deel, Justice, and Randy O'Quinn were gathered. Stiltner asked Deel what was wrong and Deel replied that nothing was wrong. Stiltner then asked Deel why he was not operating the scoop and Deel wanted to know why he should run the scoop and let someone else run "his" roof-bolting machine. Stiltner explained that they had not been producing very much coal lately and that Stiltner believed that Deel could do a better job on the scoop than Justice and that he, therefore, preferred that Deel run the scoop for the day. When Deel made no immediate reply, Stiltner then said that if Deel was not going to run the scoop, he should get in the dipper of the scoop Stiltner was operating and Stiltner would take him outside the mine. Deel got his lunch bucket and got into the scoop's dipper.

15. After Stiltner had finished talking to Deel, he looked at Randy O'Quinn who was doing nothing and asked him why he was not working. Randy replied that the auger barrel was bent and he needed a new one before he could begin drilling coal. Stiltner told Randy to go get a new auger barrel. Randy, who is 6 feet 2 inches tall and was working in a mine which ranges from 4-1/2 to 5 feet in height, did not want to walk a few breaks to get an auger barrel which Chann Fields had already gone on a tractor to get. Therefore, Randy said that he was sick and believed he would just go home, so Randy got into the dipper with Deel and Stiltner started to the surface with both men in the scoop's dipper.

16. After Stiltner had started to the surface, Deel asked Stiltner to stop the scoop so that Deel could talk to the mine committeeman, Kyle Turner, who was operating the other roof-bolting machine. Stiltner reluctantly stopped the scoop and

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Deel got out of the dipper and went to talk to Turner. After Turner had obtained Deel's version of the incident, he asked Stiltner to allow Deel to go back to work. Stiltner remained adamant and Turner was unable to persuade Stiltner to put Deel back to work. In the meantime, Chann Fields had returned with the new auger barrel and Randy O'Quinn decided to go back to work and got out of the scoop's dipper and returned to the roof-bolting machine. Chann Fields, who had heard Turner's intercession on Deel's behalf and who believed the conversation was at an impasse, spoke up and asked Stiltner to bring him a new shot-firing battery from outside the mine. Fields also suggested that Stiltner go ahead and take Deel out of the mine as there was no use in engaging in further arguments. Stiltner told Turner that he could go outside with Deel and they could discuss the matter with the mine foreman, Joe Taylor.

17. When Deel, Turner, and Stiltner reached the surface, Stiltner went to the mine office while Deel and Turner went to the house where they kept their miner's cap lights. Stiltner told Taylor that he was suspending Deel for refusing to run the scoop. Taylor asked Stiltner to have Deel and Turner come to the office to discuss the matter, but they entered the mine office about the time Stiltner was going after them. Taylor expressed surprise that Deel had refused to operate the scoop that day, especially since Taylor had already heard about Deel's near discharge by Stiltner for refusing to operate the roof bolter and the drill by himself, as described in Finding No. 8, supra. Deel told Taylor that he had not refused to run the scoop, but Taylor felt that he had to support his section foreman and advised Deel that he was suspended with intent to discharge pending the holding of a 24/48-hour meeting at which they could further discuss the matter.

18. The above-described suspension occurred on Friday, May 7, 1982, and Deel and Turner came to a 24/48-hour meeting on Monday, May 10, 1982, at which time the suspension was converted to a discharge. Deel filed a grievance under the National Bituminous Coal Wage Agreement of 1981 and the matter went to arbitration which resulted in a decision by an arbitrator sustaining the discharge. The decision was issued on June 8, 1982, in Arbitration Case No. 81-28-82-96 in a proceeding entitled The United Mine Workers of America, Local Union #7170 v. D. O. & W. Coal Company by Arbitrator Peter Judah.

19. On July 14, 1982, Deel was denied unemployment compensation on the ground that he had been discharged for misconduct. Deel appealed that unfavorable ruling to the Virginia Employment Commission and the Appeals Examiner held a hearing and issued a decision on October 22, 1982, upholding the refusal to award Deel unemployment compensation. The examiner's decision was, in turn, appealed to the Commission which issued a



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decision on January 14, 1983, reversing the examiner's decision and holding that Deel was entitled to receive unemployment compensation. The Commission's decision recognized that its examiner and an arbitrator had already issued decisions adverse to Deel, but held that DOW had failed to sustain its burden of proof in showing that Deel had refused to carry out reasonable instructions given by his employer. The Commission emphasized that the hearing before its examiner had not been as extensive as the hearing before the arbitrator and the Commission stressed the fact that Clayton Justice, the person who had relayed Stiltner's instructions to Deel about operating the scoop, had not testified at the hearing before the Commission's examiner (Virginia Employment Commission's Decision in Billy K. Deel v. D. O. & W. Coal Co., Decision No. 19888-C, January 14, 1983, pages 3 and 4).

#### Consideration of the Parties' Arguments Contentions in Deel's Brief

The first six pages of Deel's brief are devoted to a statement of facts which shows that everything alleged by Deel in this proceeding has been convincingly contradicted by DOW's witnesses, or is the subject of several different versions by Deel during cross-examination. My findings of fact above are based on credibility determinations which will hereinafter be explained. The first six pages of Deel's brief are rejected as being nothing more than a summary of disputed facts.

#### Deel's Protected Activity

Pages 6 through 42 of Deel's brief are properly placed under the heading, "Contentions of Law" because Deel can only argue the law in this proceeding since none of the credible evidence supports his factual allegations.

Deel's brief (p. 6) properly begins with a reference to the Commission's decision in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (1980), rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3d Cir. 1981), (FOOTNOTE 1) in which the Commission stated that a complainant in a discrimination case, in order to make a prima facie case, must show that he engaged in protected activity and that the protected activity

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was a motivating factor in his termination. Inasmuch as Deel was elected by the union as a safety committeeman on April 3, 1982, he necessarily, in that capacity, had to bring safety complaints to management's attention. Therefore, Deel successfully proved the first part of the requirement for establishing a prima facie case when he correctly alleged that he acted as safety committeeman for about a month before his discharge. Deel, however, completely failed to show that his discharge was in any way motivated by the fact that Deel was a safety committeeman who had brought safety complaints to DOW's attention.

#### Contentions in DOW's Brief

DOW's brief correctly argues throughout 87 pages that the facts do not support Deel's allegation that his discharge was motivated by the fact that he had engaged in the protected activity of acting as safety committeeman. DOW's brief (p. 6) quotes a portion of section 105(c)(1) of the Act, but fails to quote the last part of section 105(c)(1) on which Deel relies, viz., the portion which provides that a miner may not be discriminated against for having exercised "\* \* \*" on behalf of himself or others of any statutory right afforded by this Act." Since Deel accompanied MSHA's inspector when he was making inspections of DOW's mine, Deel is alleging that he was exercising his rights under section 103(f) of the Act when he accompanied an MSHA inspector. It is true that Deel accompanied an inspector, but the evidence does not show that Deel's discharge was motivated in any way by the fact that he was for a very short time the miners' representative to accompany inspectors at DOW's mine.

DOW's brief (p. 6) renews its motion to dismiss which was denied at the hearing (Tr. 364). DOW correctly argues that the preponderance of the evidence in this proceeding fails to show that Deel was discharged for having engaged in any activities which are protected under the Act. Therefore, DOW's motion to dismiss will hereinafter be granted.

DOW's brief (pp. 6-85) considers Deel's alleged grounds for arguing that his discharge involved a violation of section 105(c)(1) of the Act and shows that all of them are unfounded. It is quite obvious that if I were to paraphrase all of DOW's factual arguments from pages 6 through 85 of its brief and then were to explain why I agree with most of them, and that if I were to paraphrase in detail all of Deel's legal arguments from pages 6 through 42 of his brief and then explain why I disagree with all of them, my decision would be about 200 pages long.

In order to reduce the length of this decision to a reasonable length, I shall hereinafter consider all of the parties' arguments without giving specific page references and detailed summaries of the parties' arguments before a given subject is

discussed. My discussion of the evidence and the parties' arguments, however, will be made under numerous headings which will clearly show that I have considered all of the contentions of both parties. Additionally, my decision gives immediately below a Table of Contents to show exactly where my discussion of the factual and legal arguments may be found so that the parties, or the Commission, if it should grant a petition for discretionary review, may easily find the page or pages on which the various subjects are considered.

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No Dates and Length of Deel's Tenure as Safety Committeeman

Deel took pride in not being able to give the date on which any event occurred (Tr. 86; 115; 122; 168; 189). He did not know for certain when he was laid off during a reduction in force in 1981 (Tr. 7). He did not know the date on which he was recalled to work in 1982 (Tr. 7). He did not know when he was elected as safety committeeman (Tr. 52). He objected during cross-examination when DOW's counsel repeatedly tried to establish when certain alleged discriminatory acts were supposed to have occurred (Tr. 168). It was necessary for DOW's counsel to make a concerted effort to establish that Deel was elected safety committeeman on April 3, 1982 (Tr. 391) and that is one of the few dates which was ever established for certain in this proceeding.

Deel's brief (p. 1) purports to state with certainty that Deel was laid off on July 16, 1981, and was recalled to work on March 4, 1982, but the transcript references (Tr. 123 and 50, respectively) given in support of those alleged dates show that the dates were included in lawyers' questions and in the first instance Deel's own counsel used the dates of both July 15 and July 16 in asking the question, so there is no reason whatsoever to select July 16 over July 15. In the other transcript reference (Tr. 50), DOW's counsel used the date of March 4, 1982, in asking the question, but Deel's direct testimony (Tr. 7) shows that he was uncertain as to the date of March 4, 1982. Joe Taylor, the mine foreman, did not know for certain when Deel was laid off and guessed that he was recalled about March 3, 1982 (Tr. 389). DOW's brief (pp. 2-3) states that Deel was laid off on July 17, 1981, and was recalled on March 5, 1982, but DOW's brief does not provide any transcript references for either date. Therefore, I have used the word "about" in Finding Nos. 3 and 5, supra, in connection with Deel's dates of employment because the record does not support a finding as to any precise dates for Deel's dates of lay off and reemployment.

During his direct testimony (Tr. 8), Deel stated that he was made safety committeeman a "few days" after he was recalled, but he was called back to work no later than March 5, 1982, and did not begin acting as safety committeemen until April 5, 1982, which was only 32 calendar days before his discharge on May 7, 1982. After he became safety committeeman, he did not work for from 7 to 13 calendar days because of some bruised ribs (Tr. 189; 873). Consequently, Deel actually acted as safety committeeman for only 25 or 19 calendar days.

#### Hauling Explosives on Tractor

Fields, the shot fireman, was hauling explosives on top of a battery-powered tractor at the time Deel was called back to work about March 5, 1982. Deel contends that an accident in a coal mine in Kentucky occurred because explosives were being handled in a similar fashion. The accident in the Kentucky coal mine caused DOW's employees to ask that Fields be required to stop hauling explosives on the tractor. Deel claims that he brought the hazardous powder-hauling practice to DOW's attention and that the mine foreman, Taylor, told him that DOW had always done it that way (Tr. 10). Deel contends that he gave Taylor 2 weeks within which to get the powder off the tractor and that, when that was not done, he complained again. After Deel's second complaint, he alleges that Taylor ordered Randy O'Quinn and Kyle Turner to carry or drag the powder into the face area by use of permissible powder bags. The powder was carried in bags for only 1 day and then Fields resumed the practice of hauling explosives on the tractor (Tr. 11). Fields claims that he did not revert to hauling explosives on the tractor until the

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miners had discussed the matter and had agreed that he could haul the powder on the tractor, provided he would cut a piece of conveyor belt and place the belt on top of the tractor so as to provide insulation between the metal frame of the tractor and the powder, and provided Fields would not haul more than four cases of powder at any one time (Tr. 713-714; 737).

Fields also claims that the Kentucky mine explosion occurred in December 1981 or January 1982 and that the miners complained to him about hauling explosives on the tractor while he was safety committeeman and that the mine foreman had a permissible explosives car constructed so that the powder could be hauled with explosives and detonators placed in separate compartments as required by the mandatory safety standards (Tr. 731; 739; 741). Clayton Justice was hired as a trainee section foreman on April 19, 1982, and he stated that the explosives were still being hauled on the tractor for about a week after he was hired (Tr. 705; 770; 1027-1028). Fields also testified that he had asked an MSHA inspector whether there was any way a permissible box for carrying explosives could be installed on the tractor and that, while the inspector doubted that such a box could be constructed in compliance with the safety standards, he would make a special inquiry about the matter. After Fields subsequently learned from the inspector that it would not be possible to obtain permission to continue hauling the explosives on the tractor (Tr. 715-716), Taylor had an old pump cart removed from the mine and the wheels and frame from the pump were used to accommodate the construction of a permissible powder car (Tr. 675-676; 762).

Taylor testified that neither Deel nor Randy O'Quinn brought the matter of hauling explosives on the tractor to his attention and that the powder car was constructed and placed in the mine solely on the basis of Fields' having reported the matter to him before Deel ever became safety committeeman (Tr. 407-411; 670-671). Since Deel did not challenge Fields' statement that the Kentucky mine explosion occurred in December 1981 or January 1982, there is no obvious reason why the miners would wait until Deel became safety committeeman in April 1982 to bring up a hazardous practice which had been brought to the miners' attention in December 1981 or January 1982 before Deel was recalled about March 5, 1982.

Randy O'Quinn claimed that Deel brought the matter of hauling powder on the tractor to Stiltner's attention and claimed that Stiltner agreed to bring the matter to Taylor's attention and that management had a box made for hauling the powder. O'Quinn said the box was apparently satisfactory because Inspector Strength did not say anything adverse about their use of the box (Tr. 215-216). O'Quinn also admitted that the matter of hauling explosives on the tractor was brought up while Fields was safety committeeman (Tr. 921).

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Deel and Randy O'Quinn claim that when O'Quinn and Kyle Turner were asked to drag the explosives into the mine in permissible bags, they were ordered to do so because Taylor wanted to retaliate against them for having been among the persons who wanted Fields to stop hauling the powder on the tractor (Tr. 11; 40; 955). Deel claims that Taylor should have ordered Fields himself to drag the explosives in bags because it was a part of his job as shot fireman to bring in the powder (Tr. 11; 40; 54-55). On the other hand, DOW claims that Randy O'Quinn and Kyle Turner were asked to drag the powder because there are two roof-bolting crews in the mine and that there are two people on each crew, whereas Fields, the shot firer, works by himself and is responsible for shooting from 16 to 20 places per shift (Tr. 760; 830). Deel himself stated that the roof-bolting crews remained caught up all the time and were ready to start bolting in each place as soon as the scoops had finished cleaning up a cut of coal (Tr. 33-34).

Deel's claim that Taylor objected to changing the method of hauling the explosives on the tractor on the ground that they had always done it that way was refuted by Fields and Randy O'Quinn. Fields said he began hauling powder on the tractor after their permissible powder car was demolished when it was run over by a scoop (Tr. 731). Randy O'Quinn testified that he and Deel had worked on the second shift in 1981 before the reduction in force occurred and that, during that time, Deel and he worked on the same roof-bolting machine and did their own shot firing and that they hauled the explosives at that time on top of the roof-bolting machine (Tr. 963-964). Hauling explosives on a roof-bolting machine would cause the explosives to be very close to the face prior to the installation of permanent roof supports, whereas Fields' tractor did not need to be close to the working face until after permanent supports had been installed.

In view of the circumstances described above, I find that DOW's claim that the hauling of powder was brought to the mine foreman's attention by Fields is more credible than Deel's claim that he was the person who first brought up the matter of hauling powder on the tractor. Moreover, I find that the roof-bolting crews were chosen for sound reasons as the persons who should drag the powder in permissible bags because they remained caught up with their work and would have had more time to drag powder than Fields would have had because he had to prepare all the explosives in each heading, whereas the roof-bolting crews were able to divide the work of installing bolts among four persons.

#### Belt-Bridging Incident

Deel alleges that one day the roof-bolting machine became inoperative and that Stiltner, the section foreman, ordered him

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and Randy O'Quinn to go down to the belt and shovel up any loose coal which might have accumulated along the belt (Tr. 13). It was necessary for them to get on the opposite side of the belt from the side on which they were traveling, but when they asked the person assigned to work at the belt head to cut off the power, he told them the switch had been bypassed or bridged out and that he could not turn the belt off at the belt head (Tr. 14). Deel contends that he returned to the section foreman and told him they couldn't work along the belt because it had been bridged out (Tr. 15). The matter was then reported to the mine foreman who came underground and tried to replace the fuse, but was unable to do so. Deel claims that he was advised that the belt had been repaired, but when he and Randy returned to the belt head, they found that the switch was still bridged out. Deel claims that he reported back to Stiltner that the switch was still bridged out and that Stiltner told him to call Taylor again (Tr. 16). During Deel's second conversation with Taylor, the safety of the miners was raised and Taylor told Deel to have the miners come out of the mine if they were afraid to work in the mine while the switch was bridged out. Stiltner talked to Taylor and ordered all the miners to leave (Tr. 16). Deel contends that they were told when they left that they would not be paid for the remainder of the shift, but Taylor contends that the belt-bridging incident occurred on April 16, 1982, and DOW presented as Exhibit I an attendance sheet showing that the miners were all paid for 8 hours of work on that day (Tr. 57; 412-415).

Deel also claims that when he and Randy O'Quinn came out of the mine on the day of the bridge-out that Taylor told him DOW had a right to run the belt with the switch bridged out provided someone was stationed at the power center to turn off the power in case of an emergency (Tr. 16). Deel claimed that no one was stationed at the power center, as alleged by Taylor, but Deel gave conflicting statements about how far the power center was from the belt head (Tr. 14; 60) and it is doubtful that either Deel or O'Quinn really looked to see if anyone had been stationed at the power center (Tr. 931).

Another claim by Deel in connection with the belt-bridging incident is that he personally called Inspector Strength and reported the bridge-out to him and that the inspector came to the mine on the next working day in response to the complaint (Tr. 17). When Inspector Strength testified, however, he stated that he had come to the mine in response to a complaint forwarded to him by his supervisor, but he said that Deel had not called him personally to complain about the bridge-out (Tr. 1056). The control switch for the belt head had been repaired by the time Inspector Strength came in response to Deel's alleged complaint and since both Deel and Taylor advised the inspector of that fact, the inspector was not even asked to go underground to check the switch (Tr. 382-383; 415).

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Deel, as usual, did not know when the belt-bridging incident occurred, but Deel's attorneys tried to prove that it occurred on April 5, 1982, because Kyle Turner had a calendar on which Turner had written that he had been paid for only 7 hours on April 5, 1982, and he claimed that the reason he was not paid was that April 5 was the day they were withdrawn when the belt head was bridged out (Tr. 308; 1005-1006). Turner's calendar, however, contained no actual notation that the belt-bridging had anything to do with his being paid only 7 hours on April 5, 1982. Moreover, Inspector Strength testified that he performed spot inspections at the mine on April 5 and April 6, 1982, and on each day he checked both the belt lines and the faces (Tr. 1260). Therefore, it would not have been necessary for Deel to have called the inspector on April 5 to report a bridged-out belt because Strength would have been present at the time the bridging out occurred. The inspector also testified that he was at the mine on April 15 through April 22 (Tr. 1060). Therefore, Deel should not have had to call the inspector about a bridged-out belt on April 16 either, except that the inspector was not certain that he was present at the mine on each day from April 15 through April 22 (Tr. 1079).

Regardless of whether the mine foreman was correct in contending that he had a right to bridge out the belt so long as he stationed someone at the control center, the fact remains that no one ordered either Deel or Randy O'Quinn to work along the belt after the bridged-out switch was called to DOW's attention. The miners were withdrawn and there is no convincing evidence to show that DOW failed to pay them for 8 hours of work. The belt-head switch was repaired before the miners reported for work on the next shift and DOW was cited for no violations by MSHA in connection with the belt-bridging incident. Therefore, the preponderance of the evidence fails to support a finding that DOW's management would have been motivated to discharge Deel because he reported to management that the belt-control switch had been bridged out.

#### Cleaning of Mainline Conveyor Belt

Deel claims that he had been telling Inspector Strength about trying to get DOW to clean up along the mainline belt conveyor, but DOW would not do so. Deel alleged that when Inspector Strength came to the mine the day after the belt-bridging incident, Strength asked him if the belt had been cleaned up yet and Deel replied that it had not. Deel claims that the inspector and he then went into the mine and found the belt in such bad condition that Strength issued a withdrawal order as soon as they came out of the mine after inspecting the belt (Tr. 17).

Strength testified that the walk-around miners at DOW's mine did not point out violations to him (Tr. 1091). Additionally,



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Deel introduced as Exhibit 1 copies of the citations and orders which were issued while Deel was employed at the mine. Exhibit 1 shows that the only violation of section 75.400 for failure of DOW to prevent accumulations of loose coal and coal dust along the main beltline was alleged in Citation No. 930855 issued on April 15, 1982. That citation gave DOW until April 19, 1982, to clean up the loose coal and coal dust. The inspector then extended the compliance time to April 21, 1982, and issued Order No. 922763 on April 21, 1982, when DOW failed to clean up along the belt by April 21, 1982.

Deel, therefore, was shown to be mistaken about all the details alleged in connection with DOW's being cited for loose-coal accumulations. First, Deel had nothing to do with Strength's checking of the mainline belt conveyor as Strength had received no complaint from Deel requesting that a special examination of the beltline be conducted (Tr. 1093). Second, the inspector did not issue any order immediately after finding loose-coal accumulations along the beltline, as alleged by Deel. The order of withdrawal was written 6 days after the citation was issued and the order was issued for DOW's failure to clean up the loose coal within the time given by the inspector and not because Strength considered the violation to be unwarrantable or an imminent danger which would have required immediate action under either section 104(d) or 107(a) of the Act, respectively.

When Deel, for a second time, discussed his role in the citing of DOW for loose-coal accumulations along the mainline belt conveyor, he claimed that he had specifically called Strength and asked him to make a special inspection of the mainline belt conveyor (Tr. 37). The inspector testified that no one had made a complaint to MSHA with respect to loose-coal accumulations along the main conveyor belt (Tr. 1056; 1081). If a complaint as to the main conveyor belt had been made, the inspector would have had to have advised DOW of that fact when he reported to the mine because section 103(g)(1) of the Act requires MSHA to report to the operator that an inspection is being conducted in response to a complaint. Since Strength only went to the mine in connection with a complaint about the bridging out of the belt-head switch, there is no reason to believe that Deel ever made a complaint to MSHA about loose-coal accumulations along the main conveyor belt.

#### Pay for Accompanying Inspector

Deel claimed that DOW discriminated against him because he was advised by Taylor, the mine foreman, that DOW would pay him when he accompanied the inspector in the face areas underground, but would not pay him for coming outside the mine to meet the inspector and take him underground and would not pay him for going back outside after the underground inspection was over

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and for staying outside until the inspector had completed the writing of any citations which the inspector might believe were appropriate (Tr. 24; 78). As a matter of fact, the section foreman, Stiltner, had continued to give Deel full credit for any time he accompanied the inspector, regardless of whether it was for underground inspections or for being with the inspector on the surface of the mine (Tr. 419; 842).

Deel, however, contends that he was given disparate treatment because DOW had always paid Fields, the other safety committeeman, when he accompanied the inspector. Therefore, Deel contends that just the threat by Taylor that DOW would not pay him for accompanying the inspector on the surface showed disparate treatment of him as compared with Fields. The preponderance of the evidence fails to support Deel's allegations. Fields testified that he was safety committeeman for about 4 years as compared with Deel's 24 days as an active safety committeeman (Tr. 716). Fields said that he did not go out to greet the inspector and bring him underground and that he did not accompany the inspector on his trip out of the mine after he had completed his inspection. Fields additionally testified that if he were behind in his work as shot fireman, he would just tell the inspector to let him know what he had found when he was leaving and that he did not even accompany the inspector underground on such occasions (Tr. 724-725).

Inasmuch as Taylor advised Deel that DOW would pay him when he accompanied the inspector in the face areas, but not on the surface (Tr. 78), Taylor was treating Deel exactly as DOW had treated Fields in that Fields had been paid for accompanying the inspector only when the inspector was making an underground inspection at the faces and DOW was planning to pay Deel for the same portion of the time he spent accompanying the inspector. While Deel was entitled to be paid for the entire time he spent with the inspector, Taylor was unaware of that fact until Inspector Strength advised him that DOW was required to pay Deel for the entire time he spent accompanying the inspector. Since Taylor immediately paid Deel upon being advised that Deel had to be paid for all time spent with the inspector (Tr. 419), and since Stiltner had never deducted a single minute of time from Deel's attendance sheet for time spent accompanying the inspector (Tr. 842), there is nothing in the record to support a finding that DOW engaged in disparate treatment in advising Deel that he would be paid only for the time he spent accompanying the inspector in the face areas of the mine because that is exactly what DOW had done with respect to the previous miners' representative who had accompanied inspectors at DOW's mine.

Neither DOW's brief nor Deel's brief makes any reference to the fact that Deel accompanied inspectors only when they were engaged in making spot inspections because that is the only type of inspection which was made by Inspector Strength while Deel

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held the position of the miners' representative who was entitled to accompany inspectors under section 103(f) of the Act (Tr. 1060). The Commission majority held in *The Helen Mining Co., 1 FMSHRC 1796 (1979)*, that operators have to pay miners for accompanying inspectors only when the inspectors are engaged in making one of the regular quarterly inspections required under section 103(a) of the Act. The Commission's decision was reversed by the District of Columbia Circuit in *UMWA v. FMSHRC*, 671 F.2d 615, in a decision issued February 23, 1982. Since Deel testified in this proceeding during the week ending February 19, 1983, he was technically incorrect in stating that he was required to be paid by DOW for accompanying an inspector who was engaged only in making spot inspections.

A final day of hearing was held in this proceeding on April 26, 1983, but the Supreme Court did not deny petitions for certiorari with respect to the D. C. Circuit's reversal of the Commission's Helen Mining decision until October 10, 1983. The matter of paying miners for spot inspections is still being contested in current cases before the Commission. See, e.g., a notice issued by the Commission on September 2, 1983, indicating that the Commission had declined to vote for the grant of a petition for discretionary review of my decision issued July 28, 1983, in *Consolidation Coal Co. v. Secretary of Labor*, Docket No. PENN 82-221-R, in which I had held that Consolidation, under the D. C. Circuit's decision in the UMWA case, supra, had to pay a miner who accompanied an inspector who was engaged in making a spot inspection.

#### Inspection of Face Areas on May 5, 1982

It is a fact that Inspector Strength made a spot inspection of the face areas and the beltline in DOW's mine on May 5, 1982, and that inspection occurred just 2 days before Deel was discharged on May 7, 1982 (Tr. 1040; 1060). The inspector recalls no unusual delay before beginning his inspection (Tr. 1047). The inspector arrived at the mine about 8:30 a.m., called for the miners' representative (Deel) to meet him on the surface, spent about 30 minutes examining DOW's record books before going underground, took about 25 minutes in traveling to the working section, and began his inspection in the No. 1 entry about 10 a.m. (Tr. 1069). On May 5 the inspector wrote three withdrawal orders (Nos. 922773, 922774, and 922775) under section 104(d)(2) of the Act citing DOW for violations of section 75.316, 75.200, and 75.1303, respectively (Exh. 1). Deel did not point out any violations to the inspector in his capacity as the miners' representative (Tr. 1091).

Deel, however, claims that Strength was coming on May 5 to make an inspection only of the beltline and that DOW knew that he was coming that day to inspect only the beltline. Deel claims

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that he told Strength that the face area was in a terrible condition and that he was specifically requesting Strength to inspect the face area in addition to the beltline because Deel wanted to prove to Strength that conditions in the mine were as bad as he had been telling Strength they were (Tr. 24).

Deel thereafter claims to have advised both the mine foreman, Taylor, and the section foreman, Stiltner, that Strength was going to make an inspection of the face areas and that they asked him to stall the inspector until they could improve conditions in the face area prior to the inspection (Tr. 25; 195). Deel claims that when he advised Strength that they wanted him to stall the inspection for a while, Strength stated, "If there's that much wrong in there, there ain't no way they're going to get it done; \* \* \* let's give them their time" (Tr. 195-196). For the foregoing reason, Deel said that "\* \* \* we were about a half hour to an hour late going in" (Tr. 196).

As indicated above, the inspector stated that he inspected both the beltline and the face every time that he made a spot inspection and he specifically stated that it was not possible that he failed to check the face areas when he made any of the spot inspections (Tr. 1040; 1060). Additionally, section 110(e) of the Act provides for a fine of up to \$1,000 and up to 6 months imprisonment as punishment for anyone "\* \* \* who gives advance notice of any inspection". There is no likelihood, therefore, that the inspector would have stated, as Deel alleges, that "\* \* \* we'll give them advance warning" (Tr. 195) of the fact that he was going to inspect the face areas.

When Deel was being cross-examined about his claim that he persuaded the inspector to make an inspection of the face areas which he would not otherwise have made, Deel stated that he was so positive of the allegation, that he would lay his hand on the Bible and swear on his mother's grave that the inspector had come on May 5, 1982, only to check the beltline (Tr. 170). Deel at first stated that he knew the inspector was coming on May 5 to make a follow-up examination to see if DOW had corrected some beltline violations previously cited and that he and everyone else knew the inspector was coming only to check the beltline (Tr. 128). The citations and orders in Exhibit 1, however, show that the inspector had written no citations requiring that violations be abated by May 5, 1982. Deel later realized that he could not specify an exact abatement date given by the inspector and changed his testimony to say that the inspector had given DOW an oral warning to get the belt cleaned up by a certain date and had advised DOW's management that he would issue a citation or order if DOW had failed to clean up the belts by that time (Tr. 166).

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Another reason for doubting Deel's claim that Strength would not have inspected the face areas on May 5 if Deel had not made a special request that such inspection be made, is that the violations which Strength found on May 5 included DOW's failure to set any temporary supports in the Nos. 1 and 2 headings and failure to set one temporary support in the No. 3 heading. The inspector also cited violations for DOW's failure to hang reflectors or warning devices outside the Nos. 1, 2, and 3 headings (Order No. 922774, Exh. 1). No section foreman with as much experience as Stiltner had would ask for an inspection to be delayed until he could improve conditions at the face and then overlook the setting of temporary supports which can be installed in a very short period of time.

On the basis of the above discussion, I find that the preponderance of the evidence fails to support Deel's claim that he requested Inspector Strength to make a special inspection of the face areas on May 5. Since Deel failed to prove that he had requested such an inspection, the evidence also does not support Deel's claim that his discharge was motivated because of his having allegedly requested the inspection on May 5 which resulted in the inspector's issuance of three unwarrantable failure orders.

#### The Firing of Two Shots at Once

As has been shown in the preceding discussion, Deel accompanied the inspector during the spot inspection conducted on May 5, 1982. Deel has arrogated to himself great credit for the inspector's having cited DOW for a violation of section 75.1303 in Order No. 922775 which alleges that permissible explosives were not being used in a permissible manner in the No. 7 heading and the crosscut right off the No. 7 heading because 24 charges (12 in each place) were shot or detonated at the same time (Exh. 1). The inspector explained that DOW's shot-firing battery is designed to detonate only up to 20 shots at one time and that the violation consisted of DOW's shot fireman (Chann Fields) having detonated 24 charges simultaneously when, in fact, he should not have detonated more than the 12 charges by means of a single discharge of electrical energy from the shot-firing battery (Tr. 1084).

Deel claims that when Strength found the wires running from the two headings tied in such a manner that they could have been fired simultaneously, Strength accused DOW of having shot both places at the same time. Deel contends that Stiltner stated that they wouldn't do such a thing and asked Deel to agree with him that the shots were fired separately, but Deel claims that he replied "Tivis ÕStiltnerÊ, I ain't going to lie for you or nobody else" (Tr. 26). Deel also alleges that Strength told him that he might have to have Deel to testify in court in support of that alleged violation. Finally, Deel claims that Stiltner

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repeated that the two places were shot separately and again asked Deel to agree with him, but Deel states that he reiterated that he would not lie for anyone (Tr. 27).

Strength recalled that Deel had said "The conditions are there and the evidence shows it; there's no need to lie about this" (Tr. 1051), but Strength did not recall whether Deel's statement was made in reply to any statement or question by anyone else. Additionally, Strength recalled that Stiltner said that he was unaware that the condition existed (Tr. 1051).

Deel additionally alleged that he was "right over from Fields" when he fired the two shots at once and that he knows of his own knowledge that Fields shot both places at once (Tr. 27). Deel, however, did not tell the inspector that he had seen Fields shoot both places at once (Tr. 1091). The inspector did not recall hearing Stiltner try to persuade Deel to agree with him that the places had been shot separately. Stiltner testified that Strength rolled up the wires and took them with him as evidence in the event DOW contested the citing of a violation of section 75.1303 (Tr. 885). The inspector kept the wires until after DOW had paid the proposed penalty for the violation and then discarded the wires (Tr. 1053-1054). When the inspector asked Fields if he had fired both places at once, Fields stated that they had been fired with separate cables, but the inspector told Fields that he could not agree with Fields because of the way the wires were tied together (Tr. 1052).

Deel called Kyle Turner as a witness to corroborate Deel's contention that he had upset Stiltner by refusing to agree with Stiltner that the two places had been shot separately. Kyle claims to have walked by an intersection on May 5 and to have seen the inspector, Stiltner, and Deel standing in a heading and heard Stiltner asking Deel to try to go along with Stiltner in claiming that the two shots were fired separately, but Turner said that Deel refused, saying that the inspector could see from the physical evidence that both places had been fired at once (Tr. 286). Turner, however, could not recall where he was when he heard the alleged conversation and could not recall what he was doing (Tr. 287). Deel's counsel tried to establish on cross-examination that Stiltner was wrong in saying that Turner was engaged in setting temporary supports or safety jacks in the No. 4 heading during the time they were inspecting the No. 7 heading where the double shots were fired. Stiltner agreed that supplies are stored in the vicinity of the No. 7 heading but continued to insist that Turner had no reason to be near the place where the double shots were alleged to have been fired (Tr. 1011).

There are at least two reasons for doubting Turner's claim that he heard Stiltner trying to persuade Deel to agree with Stiltner that the shots had been fired separately. First, it is

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a fact that Turner was working near the headings in which the inspector had cited DOW for failure to install sufficient temporary supports in three different headings. It could have taken him a considerable period of time to set temporary supports in all three headings and if he had to go to the No. 7 heading to obtain temporary supports or timbers, he should have recalled his need to do so. Second, Strength testified that Stiltner merely stated that he was unaware that the conditions found by the inspector existed. If Stiltner had engaged in an all-out effort to persuade Deel to agree with him that the shots had been fired separately, the inspector would surely have recalled Stiltner's efforts to persuade Deel to agree with him, yet the inspector does not recall that Deel's remark about the existence of the wires was made in response to any question by anyone (Tr. 1051). It is also highly unlikely that the inspector ever stated to Deel that the inspector might have to call Deel as a witness because the inspector was relying on the wires themselves as being all the evidence he needed to support his citing of the violation. Moreover, since Deel did not tell the inspector that he had seen Fields fire the two shots at once, the inspector had no reason to believe that Deel had any independent knowledge of the manner in which the shots were fired other than the physical evidence on which both Deel and the inspector were relying in concluding that both shots had been fired simultaneously.

Deel's credibility with respect to the firing of two shots at once is greatly eroded by other inconsistent statements which he made when he testified before the Virginia Employment Commission and at the arbitration hearing. At the Virginia Employment Commission hearing, Deel gave the following account of the shot-firing incident (Tr. 44):

A \* \* \* and we went to Number 7 heading, and we found it had been double-shot, which is a federal violation, and the jumper wires was wired on through there, and Bill said, look here, we have found one that has been double-shot. Tivis Stiltner said, no; he said, that was shot the same turbine (sic). And he looked at him and said, now Tivis, you know it's been double-shot. He said, here's your lead wires and everything, and Bill Strength looks at me, and he said, now I want the truth; he said, what do you think about it? I said, well it's plain to see that places have been double-shot. He said, well I may have to call you for a witness when we have a trial, and he rolled the wires up and put them in his pocket as--you know, to show that the jumper cables were there. He took the cables and put them in his pocket for evidence.

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It is obvious that Deel had forgotten, by the time he testified in this proceeding in February 1983, that he had previously stated in the Virginia Commission hearing, held on September 22, 1982, that his remark about the double-shot firing had been made in response to a question asked by the inspector, whereas in this proceeding, he claimed that his remark was made in response to at least two questions asked by Stiltner in an effort to get Deel to agree with Stiltner that the shots had been fired separately.

As to Deel's claim that he saw Fields shoot both places at once and knew of his own knowledge that Fields had shot the two places at once, Deel was read in this proceeding (Tr. 190) the following testimony from the arbitration hearing held on May 28, 1982 (Tr. 72-73):

- A. I said, I just said anybody can see the evidence is there; they are wired together. I said I wasn't there when they was shot. I said it's plain to see the evidence is there they was both shot together; but I wasn't going to lie and say they was shot one at a time because I wasn't there. \* \* \* ÔEmphasis supplied.Ê

Deel's explanation in this proceeding concerning the above inconsistent statements is as follows (Tr. 192):

A Well, let me explain to you what I was meaning by that. I wasn't actually up there when he tied -- the inspector asked me if I was actually up there when he tied the cable from that cable to this cable. I wasn't actually up there, but I was over from Chann Fields when he mashed the trigger on it. I could -- half a break. I could see him and I could hear it. I wasn't right beside him. But what I was saying was I couldn't be an actual witness to him wiring them together because I wasn't there to see him wire them together; and what I mean by I was there, I was over from him, you know, I could hear him hollering fire, fire, fire, and I heard the shot go off when he pulled the trigger. I never did see him go back up in there and wire another one. I never did hear him yell fire, fire, fire and shoot nothing else over in there.

Q Well, if you were that close by, wouldn't it have been obvious that he was shooting two places at once?

A Well, I had it figured for that; but like I said, I couldn't swear, I never seen him trying the cables up there.



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I stated at the hearing that I was glad I had asked him about the two inconsistent statements because it appeared that Deel was telling two different stories (Tr. 192). Further examination of the statements shows that he did tell two different stories because he first stated that he knew of his own personal knowledge that Fields had fired two places at once, but then he changed his testimony when confronted with his prior statements in the arbitration hearing to state that he "couldn't swear" that Fields had fired two places at once. Yet, that is exactly what he had done during his direct testimony in this proceeding--sworn under oath that he knew of his own personal knowledge that Fields had fired two places at once.

In the application which Deel filed on May 21, 1982, with MSHA, he alleged that "I told Tivis not to shoot two places at the same time in No. 7, but he did anyhow." When Deel was asked about that claim during cross-examination, he stated that he might have made that request on May 5 and that may be the reason that he recalls that two places were shot at once (Tr. 122). It is highly unlikely that Deel even knew it was a violation prior to May 5 that the mandatory safety standards prohibit the shooting of two places at once because he had previously worked with Randy O'Quinn on the evening shift and O'Quinn testified that they sometimes fired three places at once (Tr. 261).

Other reasons for doubting that Deel ever brought the firing of two shots to Stiltner's attention are: (1) Deel was called out of the mine at 8:30 a.m. to accompany Strength during his inspection of the mine on May 5. If Deel had asked Stiltner not to shoot two places at once before he came out of the mine, that would have been foremost in his mind when he returned underground with the inspector and Deel would have called the shooting of two places at once to the inspector's attention, but the evidence shows that it was the inspector who found the wires and concluded that two places had been shot at once. (2) No shots were fired after Strength began his inspection of the face area. Therefore, if Deel had asked Stiltner on May 5 not to fire two places at once, his tendency to brag about his safety-related activities would have compelled him to tell the inspector that he had asked Stiltner not to fire two places at once before he left the face area to come outside for the purpose of accompanying Strength during his inspection.

On the basis of the discussion above, I find that the preponderance of the evidence shows that Inspector Strength was the sole person who discovered evidence leading to a conclusion that Fields had fired two places at once. Since Deel played no part in calling the alleged violation to the inspector's attention, DOW's management would have had no reason to retaliate against Deel merely because he had repeated the inspector's own words and had stated at the time the inspector found the wires

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that the physical evidence supported the inspector's belief that two shots had been fired simultaneously. In such circumstances, the inspector's citing DOW for firing two shots at once, based on physical evidence leading to a conclusion concurred with by Deel, would not have been a protected activity which would have motivated DOW to discharge Deel on May 7, 1982, or 2 days after the inspector had cited DOW for the violation of section 75.1303.

#### Stiltner's Alleged Threat

Deel claims that on May 6, 1982, the day after the order had been written citing DOW for shooting two places at once, that when the miners were getting into the mantrip to go outside, the miners were kidding Stiltner about the fact that Deel had refused to lie for him so that the inspector would not cite a violation, Stiltner is alleged to have looked at Deel and said, "I'll make you pay for this one" (Tr. 27; 120). Deel said that he figured Stiltner just meant that he would work Deel hard, like having him drill and roof bolt by himself, but instead Stiltner fired him the next day, May 7.

Stiltner denies having made such a statement (Tr. 836) and Fields testified that he did not hear Stiltner make such a statement (Tr. 723). On the other hand, both Randy O'Quinn and Kyle Turner claim to have heard Stiltner's alleged threat (Tr. 220; 288).

I believe that Stiltner's denial of having made the threat is more credible than Deel's claim because the inspector stated that all Stiltner said in response to the inspector's allegation that two places had been shot at once was a statement that he was unaware that the condition found by the inspector existed. It was just as obvious to Stiltner that the wires spoke for themselves as it was to the inspector and about the only denial Stiltner could have made was that he was unaware of the fact that the wires had been connected so as to support a conclusion that two places had been shot simultaneously. Deel gave inconsistent accounts, as indicated on pages 23-24, supra, about his personal knowledge of what had happened. Stiltner would have had no reason to threaten Deel about his part in bringing about the issuance of Order No. 922775 (Exh. 1) because Stiltner knew that the inspector had found the alleged violation by himself and had taken the wires as evidence that the violation had occurred. Nothing Deel could have said would have changed the inspector's belief that a violation occurred and there was no reason for Stiltner to have been carrying any special ill will toward Deel for the fact that the inspector had cited DOW for a violation of section 75.1303.

Failure To Install Curtains and Failure To Apply Rock Dust

Deel claims to have irritated management by constantly complaining about the fact that DOW failed to maintain curtains as close to the face areas as he thought was required and for failure to apply rock dust as close to the face as Deel thought was required (Tr. 9; 12). The evidence shows that Deel operated a scoop at times and Deel conceded that he personally knocked down curtains at times and sometimes he would just tell the "curtain man" he had knocked the curtain down so that the curtain man could rehang the curtain (Tr. 63; 67). Deel also conceded that the "curtain man", Darrel O'Quinn, had threatened to hit him in the head with a hammer if he drove through a curtain which was not intended as a travelway for the scoop (Tr. 64-65). While Deel contended that the confrontation with Darrel over Deel's running through the curtain occurred shortly after Deel had been recalled and that Deel was not familiar with the layout of the mine at that time since they were developing a different area of the mine from the one in which he had been working when he was laid off in 1981 (Tr. 65), the fact remains that DOW was using the same seven-entry mining system when Deel was recalled in 1982 that was being used in 1981 when Deel was laid off. Deel claims to have been an experienced miner and should have familiarized himself with the travelways being used for scoops before he got on a scoop to operate it. Deel also agreed during cross-examination that DOW's position as to the hanging of curtains was reasonable and that DOW had had so much trouble with the miners knocking down curtains that DOW had had to assign one miner, Darrel O'Quinn, to the job of hanging and maintaining the curtains (Tr. 200). Neither Deel nor O'Quinn was able to explain why DOW would have gone to the expense of assigning a miner to the sole job of hanging curtains and would then have refused to supply curtains, as alleged by Deel (Tr. 12, 68; 937).

While Randy O'Quinn supported Deel's claim that DOW did not maintain the curtains as required by the mandatory safety and health standards, O'Quinn admitted that he personally failed to maintain the curtain at the required distance from the face when cold weather prevailed because the cold air made him uncomfortable (Tr. 938). O'Quinn also conceded that when he was failing to maintain the curtain at the required distance from the face, he was necessarily relying entirely on the methane monitor to safeguard him from encountering a hazardous concentration of methane (Tr. 939).

Deel also contended that he complained to DOW's management about their failure to keep the mine properly rock dusted (Tr. 9; 36). Exhibit 1 contains one citation alleging a violation of section 75.403 for failure of DOW to apply an adequate amount of rock dust and three citations alleging that DOW had failed to clean up accumulations of loose coal and coal dust. There is no

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doubt, therefore, that DOW failed to apply adequate amounts of rock dust, but the issue in this case is whether Deel's complaints about DOW's failure to apply rock dust contributed in any way to his discharge. There are several aspects about Deel's understanding of the mandatory safety standards which cause me to conclude that Deel did not really complain to DOW about the failure to rock dust in a way which would have motivated DOW to discharge him for that reason.

I believe that if Deel had complained to the mine foreman and the section foreman about their failure to hang curtains and their failure to rock dust, they would have explained to Deel that he was in error about his contentions as to how close to the face rock dust has to be applied. Yet, the evidence clearly shows that Deel did not understand the regulations and argued with me on the record as to the meaning of section 75.402, contending that DOW was required to apply rock dust to within 35 feet of the working face and that section 75.402, which requires rock dusting only to within 40 feet of the working face, is inapplicable to DOW's mine (Tr. 201).

Deel, unfortunately, cannot read well enough to understand the citations, orders, and regulations to which he was exposed as a safety committeeman and the miners' representative to accompany inspectors pursuant to section 103(f) of the Act (Tr. 75). Deel testified that the inspector mailed copies of the citations and orders he issued to Deel at his home address and that he had his wife read the contents of the citations and orders to him (Tr. 76). If Deel did have his wife read the language on the citations and orders to him, he did not understand what was being read to him because Citation No. 922767 makes it clear that section 75.400 is enforced only to within 40 feet of the face. Deel also was uncertain as to how close to the face the line curtain must be maintained (Tr. 69). The inspector stated on the termination sheet accompanying Order No. 922764 that DOW's ventilation, methane, and dust control plan requires DOW to maintain the line curtain to within 10 feet of the working face (Exh. 1).

On the basis of the discussion above, I find that Deel failed to become acquainted with the mandatory health and safety standards sufficiently to be effective in his role as safety committeeman and that his complaining about curtains and rock dust applications were not likely to have been of sufficient concern to DOW's management to cause them to want to discharge him because he may have mentioned the lack of curtains and failure to rock dust on a few occasions.

There are other aspects about Deel's alleged complaints about failure to erect curtains, apply rock dust, and clean up loose coal which are less than convincing. For example, Deel contends that temporary supports or safety jacks were not being set, but he conceded on cross-examination that it is the duty of

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the operator of the roof-bolting machine to install the safety jacks. Since Deel generally operated a roof-bolting machine, he necessarily recognized that he had to be a primary offender if the safety jacks were not being set, so he claimed that the section foreman, Stiltner, had ordered him not to set safety jacks, or temporary supports, because it took too much time to set them (Tr. 126).

Taylor, the mine foreman, claims that he ordered Stiltner to have Deel set temporary supports on at least one occasion when he saw Deel installing roof bolts without using them (Tr. 423; 844). Taylor also stated that the miners were not using safety jacks when he became mine foreman and that that was one of the areas in which he tried to improve safe mining practices at the mine (Tr. 421-423). Stiltner testified that the miners objected to erecting safety jacks when he ordered them to do so. He said that when they asked him if they would be fired for not setting them, he told them he would not fire them for failing to set them, but he would have to give them time to do so and would have to see that they worked safely (Tr. 844). It is not likely that miners would ask if they could be fired for failing to install safety jacks unless they had a propensity for preferring to ignore the requirement for setting safety jacks. Consequently, it is just as likely that safety jacks were not being set because that was the miners' preference as much as it was that Stiltner had told them he would prefer that safety jacks not be set, as claimed by Deel (Tr. 126).

If Deel had been the aggressive safety committeeman that he contends he was, he would have had an ideal situation for calling an MSHA inspector to get it established that the setting of safety jacks is required by DOW's roof-control plan. Deel contends, without record support as indicated above on page 14, supra, that he called Inspector Strength to ask for a special inspection when the belt-control switch was bridged out, and he contended that he called Inspector Strength to ask for a special inspection as to loose coal accumulations along the belt line (Tr. 36). There is hardly any explanation for Deel's failure to insist on setting safety posts, if he had really been instructed not to do so, other than the simple fact that he was too lazy to bother with setting them himself and brought up the matter of DOW's failure to require the setting of safety posts as just one more contention about his alleged safety-related complaints.

In his complaint filed with MSHA on May 21, 1982, Deel stated "\* \* \* I asked Tivis Stiltner to have Chann to pull the curtain 30 feet out the face before he shot the coal. Tivis said that Chann didn't have to. That you could do it yourself" (Exh. 2; Tr. 70-71). If DOW had complied with the aforesaid request, it would have been in violation of the mandatory health and safety standards and its own ventilation,

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methane, and dust control plan. One of DOW's owners, Walker W. Hay, testified that they were shooting from the solid and that the explosives would knock holes in the curtains and throw them back down the track about 20 feet outby the face. Therefore, he said that in 1981 DOW asked MSHA for a variance in its ventilation plan which would permit them to set the curtains back out of the way prior to detonating the shots so that the curtains would not get torn or knocked down by the explosives. MSHA denied the request (Tr. 366-367).

Deel's allegation that he asked Stiltner to have the curtain moved back 30 feet before blasting shows that he did not understand the reason for having the curtain close to the face. Noxious fumes, methane, and dust are very likely to accumulate at the working face immediately after explosives are detonated. It is safer for the miners to have a damaged curtain hanging as close as possible to the face after a shot is detonated, than to have the curtain removed 30 feet from the face before the shot is detonated. A damaged curtain will remove some dust, noxious fumes, and methane, but a curtain which is 30 feet outby the face will have no ability whatsoever to sweep dangerous accumulations from the working face.

The above discussion shows that Deel was simply uninformed as to what the safety and health regulations were. Management necessarily had to deny some of his complaints about safety, if they were made, because he was asking management, at least part of the time, to violate the safety and health standards and to perform acts which were not required by its ventilation plan. In such circumstances, it cannot be successfully argued that DOW would have discharged Deel because he was making safety complaints.

Additionally, Deel's condemnation of DOW's management is inconsistent like all his other allegations in this proceeding. For example, Deel testified that when he was first elected as safety committeeman, DOW's management cooperated with him and provided him with all the supplies he wanted to make the mine safe. Deel states that, as a result of DOW's cooperation, the mine received no citations of violations during the first inspection which occurred after he became safety committeeman (Tr. 199, 431).

It is correct that Inspector Strength did not write any citations during the first inspection he made after Deel became safety committeeman, but Deel was elected safety committeeman on Saturday, April 3, 1982, and Deel's first day at the mine as safety committeeman occurred on Monday, April 5, 1982. The "clean" inspection made by the inspector on April 5 and April 6, 1982, during which no citations of violations occurred, would necessarily have been made on the basis of the way the mine had been left by Chann Fields, who was superseded by Deel as safety committeeman. DOW's management did not even know that Deel had

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been elected to replace Chann Fields as safety committeeman until April 5, 1982 (Tr. 711). In such circumstances, Deel cannot take credit for the fact that no violations were cited by the inspector when he examined the mine on April 5 and April 6, 1982.

The effect of Deel's having claimed that DOW's management, when he was first elected committeeman, cooperated with him and provided him with all the supplies he needed to make the mine safe, leaves Deel in the position of having indicated that DOW's management was interested in operating a safe mine on or about April 5, 1982. Deel was the safety committeeman for 32 calendar days prior to his discharge and only actively performed the duties of a safety committeeman for a period of about 20 days, as indicated on page 11, supra. Deel has not established that he actually did anything after April 5 which would have changed DOW's position regarding safety within a period of 32 days so drastically that DOW would have wanted to discharge its safety committeeman just because he had tried to make the mine safe. As will hereinafter be shown, it was Deel's failure to do his job properly which caused him to be discharged--not his alleged protected activity under section 105(c)(1) of the Act.

#### Deel's Allegations of Disparate Treatment

Deel testified during his direct testimony and cross-examination (Tr. 42; 48) that he had not refused to perform a work order and that he did not know of anyone else who had ever refused to perform a work order. Randy O'Quinn testified, however, that he had refused to perform work orders and that Deel "thought it up" and had his attorneys ask O'Quinn about it (Tr. 273). The nearest O'Quinn ever came to refusing a direct order was one time when he was working for Jim Deel (who is not related to complainant (Tr. 353) and who was a section foreman). On that occasion, O'Quinn refused to watch the belt drive and said he was going home if that was all they had for him to do. He alleges that when he went outside at that time to hang up his light, Taylor, the mine foreman, asked him where he was going and persuaded him to go back into the mine to work on an extension of the water line (Tr. 912). O'Quinn also claims to have refused to perform work orders given by Stiltner, such as refusing to run the drill, and that Stiltner would undertake to drill a few holes and would feign that the drilling was hurting his back and O'Quinn would then take over and go ahead with the drilling (Tr. 910-911). The only time O'Quinn ever claimed to have refused to perform a work order, without changing his mind and doing the work after having said he would not do it, was in connection with the aforesaid incident of watching the belt drive, and even in that case, he relented and returned underground to perform alternate work other than watching the belt drive. Moreover, that alleged refusal to work involved a different section foreman from the one who discharged Deel.

In this proceeding, it is a fact that O'Quinn first told Stiltner that he was sick and could not go after an auger barrel which Stiltner had requested him to obtain. Yet, a few minutes later, he either went back to work voluntarily, as contended by Stiltner (Tr. 823), or he obeyed Stiltner's request that he go back to work, as he claimed (Tr. 226). Therefore, the record does not support Deel's claim that Stiltner allowed other miners to refuse to perform work orders without disciplining them, whereas Stiltner discharged Deel for refusing to perform a work order.

Kyle Turner stated at the arbitration hearing that he believed Stiltner treated all the miners on his crew alike (Arb. Tr. 122). Although Turner had some difficulty in answering a question about Stiltner's equal treatment of the miners when he testified in this proceeding, he ultimately conceded on cross-examination that his statement made at the arbitration hearing was correct (Tr. 297-300). When Turner testified on redirect examination of his rebuttal testimony, however, he was finally persuaded to state that he thought Deel was treated "a little different from the rest of the men" (Tr. 1000), but that change of opinion was elicited from him after several admissions to the contrary.

The different treatment Turner appears to have been referring to would apparently have been Turner's allegation that Stiltner had at times assigned Deel to run the coal drill which involves considerable manual labor (Tr. 342). Turner stated that Stiltner always told them on such occasions to bolt the places as fast as they could just to make Deel work hard (Tr. 326; 973), but Turner subsequently said that he still switched jobs sufficiently to avoid making it "that hard" on Deel (Tr. 343). Turner also conceded that he rarely had to work on the same roof-bolting machine that Deel was assigned to operate (Tr. 987-988).

O'Quinn also testified that when Deel was working on the night shift prior to the time Deel was laid off in 1981 for economic reasons, that Stiltner once granted Deel's request that he be permitted to work at the face, instead of at the tailpiece where he was normally assigned to work. On that occasion, Stiltner told O'Quinn to make Deel do all the drilling, but O'Quinn also admitted that he had a miner named Mack Lester helping him and that Lester liked to drill and did all the drilling, so that the way they made it "hard" on Deel was that they just worked faster than usual so that they were able to bolt and drill 10 places that night instead of eight (Tr. 964-966).

O'Quinn additionally stated that Stiltner, in those days, would assign Deel to performing work at the tailpiece just to get Deel out of the face area because Deel "got under his skin"



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and he did not want Deel where he had to see him very often (Tr. 960). There was certainly nothing about Deel's activities in the mine that indicated he was a safety-conscious leader in those days because he requested permission to help a crew of men operate in the face area at a time when they were carrying explosives on the top of the roof-bolting machine--a procedure which was certainly as hazardous as it was for Chann Fields to haul explosives on his tractor. Yet Deel does not claim that he or anyone else ever pointed out to DOW's management that hauling powder on the roof-bolting machine was an unsafe practice.

In order for Deel to prove that DOW discriminated against him, he must show that he was treated differently from the other miners because of some activity protected under the Act, but Deel has been unable to show that his different treatment, if any, had anything whatsoever to do with safety-related activities. Stiltner testified that he discharged Deel on May 7 because he "had had it" with him (Tr. 810).

The record shows that Deel engaged in activities which were in no way protected under the Act and in conduct which would necessarily cause a supervisor to want to assign him to tasks that would make it unnecessary for the supervisor to come in contact with him. For example, Stiltner testified that one night when Deel was working on the night shift, also before he was ever laid off in 1981 for economic reasons, that the electrical power kept going off at the main power source and Stiltner could not determine what was causing the power interruptions. Finally, one of the miners told Stiltner that Deel was sitting behind the rectifier kicking the power off. Stiltner said that he went to the power source and found Deel sitting behind the rectifier. Stiltner stayed at the rectifier for an hour or longer and the power never did go off any more after that. Stiltner stated that after Deel was called back to work in 1982, Deel admitted under questioning by Stiltner that he had been knocking the power off, but he said that Stiltner could not prove it and could not do anything about it (Tr. 845-846). Deel made no attempt to rebut Stiltner's allegations about his power-interrupting activities.

In my opinion, if any other miner had been as obstinate about doing the work assigned to him by his foreman as Deel was on May 7, Stiltner would have taken the same action against that miner that he did in connection with Deel's failure to operate the scoop. I find that the preponderance of the evidence fails to support Deel's contentions that he was treated differently from other miners because of his safety-related work as safety committeeman or because of any other activity protected under the Act.

The Aborted Discharge

About 1 (Tr. 115) or 3 (Tr. 819) weeks before Deel was actually discharged, Stiltner did not have a full crew of miners and requested Deel to install roof bolts as well as drill holes in the face for the placement of explosives. About 8:30 a.m. Stiltner checked the face area and found that Deel was not doing anything and had only drilled holes in one heading. Stiltner asked Deel what was wrong and Deel told Stiltner that installing roof bolts and running the drill were too hard for one man to do and that he was not going to do both jobs. Stiltner advised Deel that his response left Stiltner with no alternative but to take him outside for purposes of discharging him. As Stiltner and Deel were passing the loading point in a scoop, Deel asked to talk to his committeeman, Kyle Turner, who was at the loading point. After a discussion between Turner and Deel, Turner asked Stiltner to put Deel back to work as Turner did not think Deel had refused to perform both jobs. Stiltner asked Deel if he would do his job if he put him back to work and Deel said he would. Therefore, Stiltner allowed Deel to return to the roof-bolting machine. Stiltner said that he went to check on Deel about 10 minutes later and Deel had still not started installing roof bolts. Therefore, Stiltner ran the roof-bolting machine for the remainder of the day so that Deel would only have to operate the drill (Tr. 820-821).

Deel's story in this proceeding about his having to drill holes and install roof bolts on the same day differs from Stiltner's only in that Deel contends that he had already drilled three or four places before Stiltner found him resting long enough to get his breath before going into a new place (Tr. 117). Deel also claims that Stiltner "hollered" at him to get moving and he meant right then. Deel says that when he told Stiltner that Stiltner could make him do the work, but could not make him "run" at it, Stiltner told him he was fired and started taking him out of the mine in the scoop, but Stiltner stopped so that Deel could talk to Turner who persuaded Stiltner to put Deel back to work (Tr. 117-118). Deel also agrees that Stiltner ran the roof-bolting machine for the remainder of the day so that Deel only had to operate the drill for the rest of the shift (Tr. 120).

Once again Stiltner's version of the incident is more credible than Deel's because Deel endeavored to justify his position by claiming that he had already drilled three or four places before Stiltner asked him to get to work (Tr. 117). It is necessary to bolt the top before drilling is done at the face (Tr. 182). Several witnesses, including Deel, have testified that it takes 15 minutes to install roof bolts without using temporary supports and that it takes at least 10 minutes to drill 10 holes in one place (Tr. 127; 162; 776; 942). Therefore, it would have taken Deel three times 25 minutes to install roof

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bolts and drill in three places and 100 minutes to bolt and drill four places. Deel did not deny that his near discharge occurred about 8:30 a.m. as claimed by Stiltner. The miners go underground at 7:00 a.m. and it takes about 25 minutes to arrive at the working place (Tr. 720; 1069). They generally spend some time emptying the dust-collecting box and checking over the roof-bolting machine and drill (Tr. 133; 187; 793). Therefore, it is quite unlikely that Deel had been working for as much as an hour before Stiltner asked him why he was not working. In an hour's time, he would not have been able to install roof bolts and drill in three or four places before Stiltner asked him why he was not working. Stiltner was upset because Deel had drilled only one place before Stiltner found him doing nothing. There is no reason to believe that Stiltner would have been upset if he had actually drilled three or four places before Stiltner found him "resting".

At the Virginia Employment Commission hearing, Deel testified that he had been running both the roof-bolting machine and doing the drilling by himself for almost 3 days before Stiltner started to discharge him (Emp. Com. Tr. 41), but in this proceeding, he claimed that he had been assigned to do both types of work only "that morning" (Tr. 115). Stiltner testified that other miners, such as Turner, had been assigned the dual jobs of installing roof bolts and operating the drill (Arbitration Hearing, Tr. 8).

Regardless of whether Stiltner was unduly critical of Deel's work efforts on the day he almost discharged Deel, the fact remains that Deel was involved in a confrontation with his foreman which caused the mine committeeman to think it was necessary to explain to Deel that he could not refuse to perform a work order (Arb. Hearing Tr. 70). Moreover, Deel testified at the arbitration hearing that he was aware of the fact that he was required under union rules to carry out a foreman's instructions and subsequently file a grievance if he felt that the work order was unreasonable (Arb. Hearing Tr. 96). Deel's statement that he replied to Stiltner's order for him to get to work by saying that Stiltner could make him work but couldn't make him "run" at it was argumentative and was equivalent to saying that he would work as slowly and do as little as he found it convenient to do.

Stiltner's willingness to abort his trip out of the mine after the mine committeeman's appeal that Deel be given another chance to do his job shows that Stiltner was not unreasonable in his demands of his employees and, in fact, Deel admitted during cross-examination that he thought Stiltner was "fair" in performing his supervisory duties (Tr. 120). There is nothing about Deel's near discharge for failing to perform the jobs of roof bolting and drilling which indicates that DOW would have discharged him that day or on May 7 because of his having made alleged safety complaints to DOW's management or to MSHA.

The Actual Discharge

At the time Deel worked for DOW, coal was produced by a conventional mining process involving the use of two roof-bolting machines, two coal drills, three or four battery-operated scoops, and conveyor belts (Tr. 267; 806-807). The coal drills operated from hydraulic power supplied by the roof-bolting machines (Tr. 181). Two miners were assigned to each roof-bolting crew. Normally, one of the miners would operate the roof-bolting machine and the other would operate the coal drill, but often the miners would swap jobs so that each one would engage in an equal amount of coal drilling which involved more actual manual labor than operating the roof-bolting machine (Tr. 117; 184; 342; 708-710). When the normal crew of men was available, Billy Deel and Kyle Turner were considered the operators of the roof-bolting machines (Tr. 275). Lee Grizzle was assigned to operate the coal drill attached to Turner's roof-bolting machine and Randy O'Quinn was assigned to operate the coal drill attached to Deel's roof-bolting machine (Tr. 162; 987). Chann Fields was the shot fireman, Floyd O'Quinn was one of the operators of a scoop, and Darrel O'Quinn was assigned as curtain man to install ventilation curtains at the face and out-by the face (Tr. 806-807). Darrel O'Quinn was off in May of 1982 and Stiltner, the section foreman, was short a scoop operator because of absenteeism (Tr. 680). A miner by the name of Clayton Justice had been hired as a prospective section foreman on April 19, 1982, on the assumption that DOW would be able to open another section in the mine (Tr. 679; 705). Justice had not operated scoops as they were used in DOW's mine and had not operated a roof-bolting machine like the ones used in DOW's mine, but he was competent as an operator of a coal drill (Tr. 771; 775; 782). Justice was assigned to operate the coal drill attached to the roof-bolting machine which was normally operated by Deel and Randy O'Quinn (Tr. 788). Deel and Randy O'Quinn were also experienced operators of a scoop and, for that reason, they had been asked to alternate between the jobs of operating the scoop and operating the roof-bolting machine (Tr. 124; 186; 773; 792; 801). The above-described arrangement required that on the days when O'Quinn was assigned to the roof-bolting machine, Justice did the drilling. Likewise, when Deel was assigned to the roof-bolting machine, Justice did the drilling (Tr. 785; 788).

Deel's discharge on Friday, May 7, 1982, occurred because he insisted on operating the roof-bolting machine despite the fact that his supervisor, Stiltner, wanted him to operate a scoop and haul coal from the working faces to the conveyor belt (Tr. 773; 809-810). About half of the testimony in this proceeding was devoted to listening to Deel's, O'Quinn's, Justice's, Stiltner's, Taylor's, Fields', and Turner's versions of the incidents which led up to Stiltner's decision to discharge Deel.

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for insubordination. It is significant that Deel did not voluntarily give an account of the events which led up to his discharge in the complaint he filed with MSHA, or in the complaint filed with the Commission, or in his direct testimony in this proceeding. Deel's failure to give in his direct testimony a complete running account of his version of the incidents of May 7, 1982, requires one to collect his version of those events from various places throughout his cross-examination.

If all the statements made by Deel during cross-examination, redirect examination, recross-examination, and my examination are pieced together, Deel's version of the events is as follows: On May 7, 1982, Deel was asked by Stiltner to get a scoop and use it to pull the mantrip into the mine (Tr. 100). After Deel arrived at the working section, he delivered the miners to their working places, unhooked the mantrip, and proceeded on the scoop to "his" roof-bolting machine (Tr. 102-103; 125; 173). Although Randy O'Quinn and Clayton Justice were already at "his" roof-bolting machine when Deel arrived, the fact that two miners were there did not have any significance to Deel because Justice was getting something to eat out of his lunch bucket which was carried on Deel's roof-bolting machine (Tr. 183). Additionally, Justice had been assigned to drill from Deel's roof-bolting machine before May 7 and Justice, Deel, and O'Quinn would just swap jobs and work together (Tr. 184). There was no significance to Deel that Justice asked Deel what job he was planning to do that day because, when Deel told Justice that he was planning to operate the roof-bolting machine, Justice said only that he guessed he would operate the scoop (Tr. 185).

Justice, after saying he guessed he would have to operate the scoop, got on the scoop which Deel had parked near the roof bolter and left. In a little while, Justice returned and stated that Stiltner, the mine foreman, wanted Deel to run the scoop that day and wanted Justice to run the coal drill hooked to the roof-bolting machine. Deel's reply to Justice's message from Stiltner was that if Stiltner wanted Deel to run the scoop that Justice should go back to Stiltner and tell him to come to the roof-bolting machine in person and tell Deel what he wanted Deel to do. Justice left again on the scoop and returned on foot a little while later (Tr. 172-173). Deel, upon Justice's second appearance, asked Justice what the story was now and Justice told him that Stiltner said he would be up there to talk to Deel "in a minute" (Tr. 187).

Stiltner soon thereafter rode to Deel's roof bolter on a scoop and Deel claims that the first thing he said to Deel when he arrived was "to get my goddamned ass in the buggy." Deel said "What?" and Stiltner then asked, "Are you refusing to run a scoop?" to which Deel replied, "No, sir, I ain't refusing to do nothing." Stiltner then said, "Well, you're fired. Get your damn ass in the buggy, you're going to the outside." (Tr. 103).

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About that time, Deel claims that Stiltner turned to O'Quinn and started talking to him about an auger barrel needed for the coal drill and Stiltner tried to send O'Quinn to get one, but O'Quinn did not want to go after one on foot, so O'Quinn told Stiltner he was sick and was going home. Stiltner told O'Quinn to get his ass in the scoop's bucket and then Stiltner looked at Deel and told him to get in the scoop bucket also (Tr. 103-104).

Deel said that after Stiltner started out of the mine with both him and O'Quinn in the scoop's bucket, Deel asked Stiltner three or four times to stop so that Deel could talk to his safety committeeman, Kyle Turner. Deel says that Stiltner finally stopped and a discussion ensued during which Turner asked Stiltner to give Deel another chance since, as Turner understood the matter, Deel had not refused to operate the scoop. Deel claims that Stiltner calmed down a lot and asked Deel if he were to put him back over there, would Deel run coal and Deel said he would. Deel thinks that Stiltner would have allowed him to go back to work if, about that time, Chann Fields had not spoken up and said, "There ain't no damn use arguing with him any more. Take him the hell on out (Tr. 114)." Whereupon, Deel says that Stiltner told Deel and Turner both to get in the scoop's bucket and he would take both of them outside. Deel additionally claims that Stiltner did not want O'Quinn to be a witness to the conversation he was having with Turner and Deel and ordered O'Quinn to go back to work and O'Quinn got out of the scoop's bucket and went back to the roof-bolting machine (Tr. 114-115).

Stiltner's version of what happened on May 7, 1982, is as follows: Stiltner says that he explained to Deel before they went into the mine that he was short a scoop operator that day and that he would take the little scoop in and try to operate it himself along with doing his supervisory duties and that he wanted Deel to get the big scoop and pull the mantrip in with it. The reason Stiltner had the discussion with Deel about the "little" and "big" scoops was that Stiltner had had some stomach problems associated with internal bleeding and he had found that he could be more comfortable in the little scoop than he could in the big one. Stiltner stated that Deel also wanted to take the little scoop and it was necessary for Stiltner to insist that Deel use the big scoop (Tr. 807; 857).

Chann Fields rode into the mine with Stiltner in the little scoop and all the other miners went underground in the mantrip pulled by Deel. Stiltner let Fields off at his tractor used to pull the explosives wagon and Stiltner then drove the little scoop to the belt tailpiece where Stiltner needed to make some repairs. While Stiltner was working on the belt, Clayton Justice came to see him riding on the big scoop which Deel had used to pull the mantrip into the mine. Justice told Stiltner that Deel had decided he wanted to operate the roof-bolting machine and

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that Justice assumed that Stiltner wanted him to run the scoop, but Stiltner told Justice to go back to the roof-bolting machine and tell Deel that he wanted Deel to run the scoop and for Justice to drill coal. Subsequently, Justice returned and stated that Deel had told him he was not going to run the scoop and for Stiltner to come up there and talk to him. Stiltner says he told Justice to park the big scoop and go back and tell Deel that he would be up there in a few minutes (Tr. 808).

Stiltner says that he got in the little scoop a short time later and drove over to the roof-bolting machine where he asked Deel what his problem was and Deel stated that he did not have any problem. Stiltner then asked him why he wouldn't run the scoop and Deel said that he wouldn't run the scoop and let somebody else do his job. Stiltner then told Deel "to either get on his scoop or get in the bucket" (Tr. 809). Deel then came toward the scoop's bucket. At that time, Stiltner looked at O'Quinn and asked him why he was not working and O'Quinn said he needed an auger barrel for the drill. Stiltner told O'Quinn to go get one, but O'Quinn said that he was sick--had an earache or something like that--and was going to the house. O'Quinn then got into the scoop's bucket with Deel and Stiltner started outside with both of them (Tr. 809).

After they had gone about two breaks, Deel wanted to stop and talk to the committeeman, Kyle Turner. Stiltner stopped the scoop and Deel got out and went to talk to Turner. O'Quinn, according to Stiltner, decided he felt like working and went back to the roof-bolting machine. After Turner and Deel had talked for a few minutes, both of them came over to Stiltner who was still sitting on the scoop. Turner asked Stiltner what the problem was and Stiltner says he explained to Turner that Deel had told him that he was not going to run a scoop and let someone else operate his roof bolter. Stiltner claims that Turner asked him twice to put Deel back to work and Stiltner refused both requests, saying that "he had had it with" Deel and was taking him out (Tr. 810). Stiltner alleges that he then told Turner that he would do even better than taking Deel out and would take Turner and Deel both out so they could all talk to the mine foreman, Taylor.

Chann Fields, who had already returned with the auger barrel which O'Quinn had asked him to obtain, was listening to the discussion in which Stiltner, Turner, and Deel were engaged. Fields needed to obtain an explosives-shooting battery from outside the mine and, feeling that the discussion was at an impasse at this point, spoke up and said that if Stiltner was going out, he would like for Stiltner to bring him a shot-firing battery when he returned. Turner, Deel, and Stiltner all say, however, that Fields began his statement by saying, "There ain't no use

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arguing about it no more. Take him on out." Turner and Deel claim that Stiltner would have relented and would have put Deel back to work if Fields had not made that statement (Tr. 114; 285), but Stiltner claims that it was none of Fields' business in the first place and that Fields' statement did not influence his determination to discharge Deel for insubordination (Tr. 824-825). Fields denies that he stated anything about there not being any use to argue and that Stiltner should go ahead and take Deel outside, but he agrees that he did ask for Stiltner to bring him a shooting battery (Tr. 749; 758).

Regardless of whether Fields influenced Stiltner's decision, all witnesses agree that Turner and Deel got into the scoop's bucket and were taken outside by Stiltner. There is no need in giving a detailed discussion here of what occurred on the surface of the mine as those facts are not contested by the parties, except in very minor details, and are summarized in Finding Nos. 17 and 18, supra.

As indicated above, Clayton Justice was the miner who carried Deel's statements to Stiltner and Stiltner's replies back to Deel. Justice was also present when Stiltner returned from working on repairing the conveyor-belt tailpiece to find out why Deel would not run the scoop. Justice's version of the actions and statements leading up to Deel's discharge is as follows: Justice began working for DOW on April 19, 1982, and O'Quinn was on sick leave at that time. Justice had run a coal drill prior to being hired by DOW (Tr. 771). Therefore, Justice was asked to run the coal drill which received its hydraulic power from the roof-bolting machine normally operated by Deel. Consequently, on his first day at the mine, Justice worked with Deel. DOW did not have enough scoop operators when Justice first began working there. As a result, when O'Quinn and Deel were both present at the mine, O'Quinn and Deel alternated jobs so that every other day Deel ran a scoop while O'Quinn operated the roof bolter and when O'Quinn ran the scoop, Deel operated the roof bolter. Justice was the drill man regardless of whether Deel or O'Quinn was the operator of the roof-bolting machine (Tr. 785). Justice knew how to run a scoop, but had never used one to haul coal in DOW's mine (Tr. 785).

Deel was hurt about April 22 when he was thrown to the front of a scoop while he was riding in a scoop operated by Webb Bailey (Tr. 189; 873). Deel returned to the mine to work on May 3, 1982 (Exh. L). The mine was closed by Inspector Strength on May 5, 1982, and was not released from the withdrawal orders until May 6, 1982 (Tr. 825; 831). Since Justice had been operating the drill on a rather continual basis, he assumed he would be running the drill on May 7, the day of Deel's discharge. Consequently, Justice spent the time just prior to going underground sharpening bits for use in the coal drill. Therefore, Justice



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did not hear Stiltner give any instructions to Deel as to whether he was expected to operate a scoop that day, but Justice assumed Deel would operate the scoop that day because O'Quinn and he rode the mantrip while Deel operated the scoop which pulled the mantrip into the mine (Tr. 792).

Justice took his bits and went to the roof-bolting machine from which he normally drilled. Shortly thereafter Deel pulled up to the roof bolter in the scoop and came over to the roof bolter. Justice asked Deel what he intended to do and Deel said that he was going to run "his" roof bolter. Clayton replied that he assumed that meant that he would have to run the scoop to which Deel said "I guess so" (Tr. 722). Clayton felt that since Deel had been working for DOW longer than he had, that he had no reason to argue with him, but Justice was also uneasy about starting to run the scoop without making certain that Stiltner wanted him to change jobs (Tr. 794), so Justice got on the scoop which had been parked by Deel near the roof bolter and drove it about 120 feet, or two breaks, to the tailpiece where Stiltner was working (Tr. 795-796).

When Justice explained to Stiltner that Deel said he was going to operate the roof bolter and asked Stiltner if he wanted Justice to run the scoop, Stiltner replied by requesting Justice to go back to the roof bolter and tell Deel that Stiltner wanted Deel to run the scoop and wanted Justice to drill coal. After Justice had returned to the roof bolter and had relayed Stiltner's message to Deel and had received Deel's retort that Deel was going to run "his" roof bolter and for Stiltner to come in person and tell Deel what he wanted him to do, Justice went back to the tailpiece and told Stiltner that Deel was insisting on running the roof bolter. Stiltner then told Justice to park the scoop and go back to the roof bolter and that he would come and talk to Deel after he had finished his repairs at the tailpiece (Tr. 773).

Justice went on foot back to the roof bolter and told Deel that Stiltner would be up there and talk to him in a few minutes. Justice then sat down and waited for Stiltner to appear. According to Justice, Stiltner came to the roof bolter in a few minutes and asked Deel why he wouldn't run the scoop. Deel wanted to know what Stiltner meant by that question and Stiltner explained that he was asking Deel to run the scoop because he believed that Deel was more familiar with the scoop than Justice and that more coal could be produced with Deel as the scoop's operator than would be produced with Justice as the scoop's operator. Stiltner then told Deel that if he was not going to run the scoop, to get in the scoop's bucket and Deel got into the bucket (Tr. 773; 799).

As Justice recalls the events, Stiltner's conversation with Deel had been completed before Stiltner turned to O'Quinn to find out why O'Quinn was doing nothing. Stiltner then ordered O'Quinn to go after an auger barrel on foot. O'Quinn did not want to walk a few breaks to get one, so O'Quinn said he was sick and got

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in the scoop's bucket with Deel and Stiltner started to the outside with both of them. Justice does not know anything more about what happened after that (Tr. 773). While Justice said on direct examination that he did not hear O'Quinn tell Stiltner that Fields had gone for an auger barrel, Justice was recalled as a rebuttal witness and stated at that time that O'Quinn did ask Stiltner why Fields could not go after an auger barrel on the tractor (Tr. 1017). Assuming that Justice's rebuttal testimony is correct, he was still unable to explain how Stiltner would have known O'Quinn needed an auger barrel if O'Quinn had not told him that he was not drilling because of a lack of an auger barrel (Tr. 1019).

Randy O'Quinn was the other miner present during Justice's and Stiltner's conversations with Deel on May 7, 1982. O'Quinn testified at the arbitration hearing held on May 28, 1982. O'Quinn's testimony at the arbitration hearing supports in nearly every detail Stiltner's and Justice's versions of the events leading up to Deel's discharge, but in this proceeding O'Quinn's testimony shows that he was trying very hard to support only Deel's version of the events of May 7 (Tr. 222-229). During cross-examination by DOW's counsel, O'Quinn stated that what he said at the arbitration hearing was closer to the time the events occurred than his testimony in this proceeding was and would be likely to be more correct than his testimony in this proceeding which was given on February 15 and 16, 1983 (Tr. 253). Subsequently, the following colloquy occurred (Tr. 271):

Q Do you think that anything you said at the arbitration hearing was wrong?

A No, because that was closer to the time. I'd say it would be more right than what I could tell you today, because that long ago I can't remember every word. I just remember patches.

In view of the above statement by O'Quinn, I am relying upon his testimony in the arbitration hearing for the purpose of determining his version of the events leading up to Deel's discharge.

According to O'Quinn, Stiltner ordered Deel to get the scoop and pull the mantrip into the mine. Deel pulled the mantrip into the mine as ordered and parked the mantrip at its accustomed place. Then Deel drove the scoop to the site where Justice and O'Quinn were beginning to prepare the roof-bolting machine and drill for work. When Deel came close to the roof bolter, Justice asked Deel what job he was planning to do and Deel replied that he was going to bolt the roof, so Justice got on the scoop which Deel had driven to the roof bolter and left. After a while, Justice returned and told Deel that Stiltner wanted Deel to run the scoop. Deel told Justice that if Stiltner

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wanted him to run the scoop, for Stiltner to come up and tell Deel that in person. Subsequently, Stiltner came to the roof bolter on a scoop and wanted to know what was going on and Deel said nothing unusual was going on. Stiltner then asked Deel what job he was going to do and Deel said he was going to bolt the roof, but Stiltner said "No" to that and stated that he wanted Deel to run the scoop. Deel then asked Stiltner if he was going to park the roof bolter and Stiltner replied "No" (Arb. Tr. 100-101).

O'Quinn recalls that Stiltner then turned to O'Quinn and ordered him to get an auger barrel, but O'Quinn said he was sick and would just go to the house. O'Quinn claims that he then got his dinner bucket and got into the scoop's bucket after which Stiltner asked Deel if he was refusing to run the scoop and Deel replied, "No", but Stiltner looked at Deel, according to O'Quinn, and told him that he might as well get into the scoop's bucket with O'Quinn. Deel got into the scoop's bucket and Stiltner started out with both of them, but finally stopped, at Deel's request, so that Deel could talk to the mine committeeman, Kyle Turner. Stiltner then told O'Quinn to go back to the roof bolter. O'Quinn got out of the scoop and went back to the roof bolter, as requested, and did not hear any of the discussion which took place after Stiltner stopped the scoop so that Deel could talk to Turner (Arb. Tr. 101).

I have already provided in Finding Nos. 11 through 17, supra, the version of the events of May 7, 1982, which is supported by the preponderance of the evidence in this proceeding. Even if one were to adopt, however, the version of the events of May 7, 1982, which was elicited from Deel during cross-examination and my questioning, DOW was justified in discharging Deel for insubordination. Deel conceded that he had gone to "his" roof bolter on May 7, 1982. He found a two-man crew already preparing the roof bolter for operation. Prior to his being off for a week, he had been running the scoop on alternate days and he claimed that he did not mind running the scoop because he knew "how to do everything they had there" (Tr. 186).

Although Deel said he did not mind running the scoop, he also stated that Justice did not like to operate the scoop because it "bounced" him around (Tr. 183). If the scoop "bounced" Justice around, it would also have bounced Deel around. When it came to the desirability of running a scoop as compared with operating a roof-bolting machine, Randy O'Quinn stated that operating the roof bolter was the easiest job in the mine and that if running a scoop was as easy as roof bolting, he would have a scoop operator's job (Arb. Tr. 109).

Deel's claim that he had no reason to believe that Stiltner wanted him to operate a scoop when he went into the mine on May 7, 1982, is unconvincing because Deel had previously been alternating

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between running the roof bolter and the scoop and he knew that Justice had sharpened drill bits just before coming underground and knew that Justice was planning to operate the drill. Deel also knew that O'Quinn and Justice were both at the roof bolter before he arrived there. He knew when Justice asked him what he was planning to do that day that Justice was planning to run the drill and he knew from O'Quinn's presence at the roof bolter that O'Quinn was planning to operate the roof bolter because O'Quinn had been running the roof bolter when Deel operated the scoop and that O'Quinn drove the scoop when Deel operated the roof bolter (Tr. 792; 872). Deel tried to explain Justice's being at the roof bolter by claiming that Justice's dinner bucket was carried on the roof bolter and that he thought Justice had come there to get something to eat, but they had just arrived on the section and no one had done any work yet.

Deel also claimed that Stiltner was sitting on the only scoop in the mine on the morning of May 7 and that there was not room on the operator's seat for both him and Stiltner. Deel said that when Stiltner told him to run the scoop or get in the scoop's bucket, he had no choice but to get into the scoop's bucket because Stiltner did not offer to get off the operator's seat so that Deel could get on the operator's seat (Tr. 132). Deel's actual knowledge of the location of scoops was much greater than he claimed it was because Deel subsequently testified that there was another scoop operating in the mine on the morning of May 7 and that they sometimes used three or four scoops simultaneously (Tr. 185-186). Additionally, Deel knew that Stiltner and Fields had ridden into the mine on the little scoop and he certainly knew the difference between the big scoop which he had used for pulling the mantrip and the little scoop which Stiltner had driven into the mine. Therefore, all he would have had to do in response to Stiltner's ultimatum for him to run the scoop or get into the bucket of the scoop on which Stiltner was sitting would have been to have said that he had decided to run the scoop and ask Justice, who was listening to the conversation between him and Stiltner, where Justice had left the big scoop. Moreover, there was nothing whatsoever to keep Deel from stating that he would rather run a scoop than to get into the scoop's bucket. He knew that getting into the bucket would be the equivalent of consenting to being discharged. Therefore, he could not possibly have increased his risk of being discharged by refusing to get into the scoop's bucket and simultaneously stating that he would rather run a scoop than be discharged. Instead of assuring Stiltner that he did not mind running a scoop, as he claimed at the hearing, he said nothing and got into the scoop's bucket to be taken out for discharge.

References to "his" Roof-Bolting Machine

There was a discussion at the hearing as to whether Stiltner had inconsistently testified about telling Deel to obtain "his"

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scoop and pull the mantrip or had simply asked Deel to get "the" scoop and pull the mantrip (Tr. 863-864), but Deel himself referred to the roof bolter as "his" and "my" roof bolter on at least three occasions (Tr. 125; 173; 175). Consequently, there is no reason to doubt Stiltner's testimony to the effect that Deel had refused to operate the scoop because he did not want someone else running "my" roof bolter (Tr. 875).

On the contrary, there are ample grounds for believing that Deel had made up his mind on the morning of May 7 that he was not going to do any more alternating between the jobs of scoop operator and roof-bolter operator. He had been successful in getting Stiltner to provide him relief on the previous occasion when he had refused to perform both the job of running the drill and operating the roof bolter and he was confident that he would be able to appeal to Turner, the mine committeeman, again on the way out of the mine to be discharged, and Turner would be able, as he had on the prior occasion, to persuade Stiltner to put him back to work as the operator of the roof bolter which, according to O'Quinn, is the easiest job in the mine.

#### Supervisor Doing Classified Work

Another of Deel's motives for insisting on operating "his" roof bolter was that Justice had been hired as a section foreman. Justice, as a salaried or managerial employee, was apparently violating union rules by operating the coal drill which is normally work performed by union employees or hourly workers. That issue was a part of Deel's union grievance filed after his discharge on May 7, 1982, but that issue was dropped from the case before the arbitrator who upheld Deel's discharge under the Wage Agreement (Arb. Tr. 132-133). Since Deel agreed to waive that issue at the arbitration hearing, it is certainly inappropriate for him to raise that as an issue in this proceeding.

In any event, it is a fact that there were not enough hourly or union employees at the mine on May 7 to operate all the equipment and Stiltner had no choice but to utilize Justice for the purpose of operating equipment which is normally operated by union employees. Although Deel claimed that he would have been allowed to operate the roof bolter if Justice had not been present on May 7, the evidence does not support that contention because, after Deel was discharged on May 7, Randy O'Quinn was assigned to run a scoop and Justice operated a coal drill by using the hydraulic power from another scoop. There were two roof-bolting machines in the mine and the other crew operated a roof-bolting machine that day, but Deel's roof bolter was not used at all (Tr. 801). Obviously, running the scoop was more important for producing coal than having O'Quinn operate a second roof bolter.

Therefore, Deel was incorrect in contending that the only reason he was asked to run a scoop was that Justice took a job

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which would otherwise have been assigned to an hourly employee. There is additionally no merit to Deel's claim that DOW was improperly using a managerial employee to do an hourly miner's work at a time when an hourly miner was available to do the work. DOW's contention that it only used managerial employees to do union employees' work when absenteeism forced it to do so was shown to be true on May 7, 1982 (Tr. 680).

#### Requirement To Perform Work Order and Then File Grievance

Deel admitted at the arbitration hearing that he is required to perform a work order and then to file a grievance if he believes that the order is unreasonable, assuming, of course, that the order does not involve a requirement that he work in unsafe conditions (Arb. Tr. 96). It would appear that Deel violated union rules when he refused to run a scoop on May 7, 1982, because no safety issue was raised in connection with Stiltner's request that Deel operate the scoop.

#### Deel's Refusal To Ask Stiltner About His Assignment

Deel conceded that Justice brought him a message to the effect that Stiltner wanted Deel to run the scoop on May 7 rather than operate the roof bolter (Tr. 172-173; Arb. Tr. 75). Deel claimed that he could not rely upon a section foreman's order brought to him by another miner because they kid around in the mines and that if he were to obey such an order, the other miners would have him running all over the place doing things which the boss had not actually requested him to do (Tr. 188). Also Deel said that if he had gone to the scoop and had started running it on the basis of a message from Stiltner brought to him by Justice, that he could have been fired for leaving "his" roof bolter at the face and going off to do another job (Tr. 174).

On the other hand, the mine committeeman, Kyle Turner, stated that if another miner had brought him a message to the effect that his supervisor wanted him to run a scoop instead of a roof bolter, that he would have finished installing the bolt he was then working on and "\* \* \* would go hunt the foreman" (Arb. Tr. 126). Turner is an experienced miner and his answer shows that Deel was being unduly obstinate in failing at least to check with Stiltner so as to find out for sure what his assignment was for that day. After all, Deel had not started doing any work and Stiltner was only 120 feet from the place where Deel's roof bolter was situated (Tr. 796).

As indicated above, there has been no mention by anyone in this proceeding that operating the scoop, as requested by Stiltner, would have exposed Deel to any hazardous conditions. Therefore, I cannot find any justification whatsoever for Deel's refusal to operate the scoop when Justice brought Stiltner's work order to him. At the very least, Deel should have been willing

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to go 120 feet and ask Stiltner what he wanted him to do that day. As Stiltner appropriately remarked, "I ain't got all day to sit there and beg a man to do his job" (Tr. 877).

#### Final Consideration of Arguments in Deel's Brief

The attorneys who represented Deel in this proceeding were very conscientious and prepared a brief which presents Deel's contentions in as favorable a manner as they can possibly be argued. Deel's counsel followed the Commission's burden-of-proof guidelines as set forth in the Pasula case, supra, in an admirable fashion. Nevertheless, Deel's contentions lose all of their validity when one begins to examine in detail the true facts which underlie Deel's legal arguments.

Deel's brief contains a Table of Contents which facilitates review of his arguments. It is claimed under Part I that Deel's discharge was motivated by his protected activities. Part A under the aforesaid heading lists the protected activities in which Deel is alleged to have engaged. As I have previously indicated, it is a fact that Deel was a safety committeeman for about 32 calendar days and he also accompanied an MSHA inspector on some inspections while he was safety committeeman. Therefore, Deel did engage in some protected activities prior to his discharge.

While Deel's brief does establish that he was engaged in some activities which are protected under the Act, Deel's brief utterly fails to show that his protected activities had anything whatsoever to do with his discharge. It is correct, as Deel argues under Part I(B) of his brief, that DOW was aware of Deel's activity as safety committeeman and it is a fact that he only held that position for 32 days prior to his discharge. Therefore, Deel is necessarily correct in arguing that his protected activity preceded his discharge by only a short period of time. The preponderance of the evidence, however, fails to support the remaining allegations made under Part I(B) of Deel's brief. As I have shown under the headings discussed above, Deel incorrectly argues that DOW displayed animus in the face of Deel's protected activity. Deel himself, for example, stated that when he was first appointed as a safety committeeman, the mine foreman was very cooperative and provided Deel with all the supplies and equipment he needed to make the mine safe (Tr. 199). As to the remaining contentions in Part I(B) of Deel's brief pertaining to DOW's alleged animus toward Deel for his protected activities, my discussion, supra, of the hauling of powder on the tractor, the belt-bridging incident, Deel's alleged refusal to support DOW in the simultaneous firing of two shots, and Deel's allegations of disparate treatment have been thoroughly considered above under those respective headings and the preponderance of the evidence clearly shows that DOW discharged Deel solely for his recalcitrance and insubordination and not because he had brought a few safety-related problems to DOW's attention.

Under Part II of his brief, Deel argues that DOW would not have discharged Deel if he had not engaged in protected activity. Under Part II(A) of Deel's brief, he argues that he was not assigned to operate the scoop before he went into the mine on May 7, 1982, the day of his discharge. Even if one agrees with Deel's argument that he was not given a direct order to operate the scoop for the entire shift before he went into the mine on May 7, 1982, the preponderance of the evidence supports the section foreman's contention that Deel knew before going into the mine that his section foreman wanted him to operate the scoop on that day. I have addressed that contention in great detail in my discussion of the "The Actual Discharge" above, and the preponderance of the evidence clearly supports the section foreman's contention that Deel knew that his section foreman wanted him to operate the scoop before he went into the mine on May 7. Assuming, arguendo, that Deel did not know his section foreman wanted him to operate the scoop on May 7 before Deel went into the mine, Deel's argument in Part II(A)(1) of his brief cannot be sustained because Deel was given a message from his section foreman by another miner as to exactly what the section foreman wanted Deel to do, but Deel was so determined to ignore his section foreman's orders that he refused to go a distance of only 120 feet to ask what his section foreman actually wanted him to do that day. Moreover, it cannot be successfully argued that Deel did other than argue with his section foreman about the assignment even after the section foreman personally came to Deel and gave him specific orders that he wanted Deel to operate the scoop, instead of the roof-bolting machine, on May 7, 1982. These matters are all discussed in great detail above under the headings of "The Actual Discharge" and the other headings following my discussion of the actual discharge.

The most astounding and utterly unfounded argument in Deel's brief is contained under Part II(B) in which he claims that even if he had refused to operate the scoop on the day of his discharge, DOW still would not have been justified in terminating him. Since my prior discussions above of the factual allegations in this proceeding have not specifically dealt with the arguments in Part II(B) of Deel's brief, beginning on page 39 of the brief, I shall give those contentions some detailed consideration at this time. Deel attempts to find support for the aforesaid contention by stating that DOW's management has no established policy for determining when a miner will be discharged for refusing to obey a work order. Deel also claims that the mine foreman inconsistently stated first that an employee was given a warning for the initial refusal to obey a work order and was discharged for the second offense and later stated that the employee was discharged for the first offense.

An employee's refusal to obey a work order may be done in an outright defiant and quarrelsome way or it may be done in such



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a way that the section foreman looks upon the refusal as an aberration in a person's normal willingness to work. For example, under the heading of "Deel's Allegations of Disparate Treatment", supra, I discussed the fact that O'Quinn would say he was not going to do a particular job and would then almost immediately thereafter change his mind and do the very work he had just said he was not going to do. Deel's refusal to run the scoop on May 7 was not accompanied by any ameliorating circumstances. He ignored the previous conditions under which the work force had been used which required him to alternate with O'Quinn on running a scoop one day and a roof-bolting machine the next. He ignored the clear indications that the section foreman expected him to run the scoop because Justice and O'Quinn had gone to the roof-bolting machine before Deel ever reached that machine after delivering the other men to their assigned working places. Deel then ignored a specific message brought by Justice from the section foreman telling Deel that the section foreman wanted him to run the scoop. Deel then argued with the section foreman in person about the assignment to operate the scoop. Finally, when given the ultimatum that he would have to run the scoop or get into the scoop's bucket to be taken out for discharge, Deel said nothing and got into the scoop's bucket to be taken outside.

The aforesaid defiant refusal to perform a work order cannot be tolerated by a section foreman if he wants to control the work force on which he has to rely for production of coal. Therefore, regardless of whether DOW's management has written guidelines or a consistent policy of determining when it will discharge employees, Deel's refusal to carry out his section foreman's orders on May 7 were accompanied by such blatant defiance of his section foreman's instructions that the section foreman was clearly within the bounds of reason in deciding that Deel should be given the ultimate punishment of discharge.

Assuming, arguendo, that there is some merit in Deel's claim that he should only have received a warning for his first refusal to obey a work order and should not have been discharged until he had refused a second time to perform a job assigned to him by his foreman, it is a fact that Deel did refuse to perform work on a prior occasion as I have noted in the discussion above under the heading of "The Aborted Discharge". Deel, of course, argues in his brief (pp. 40-41) that DOW cannot take refuge in a claim that Deel's refusal to perform the two jobs of bolting and drilling on a prior occasion should be counted as a true refusal to perform work because, it is argued, that assignment was unfair and the fact that the section foreman ultimately did the roof bolting for Deel for the remainder of that day shows that Deel was unfairly asked to do two different jobs. As I have already pointed out in my discussion of the aborted discharge above, Deel was nearly discharged that day for failing to do anything more than drill 10 holes, requiring 10 minutes of time, within a period of an hour

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after the miners had been delivered to the working section. Moreover, Deel's refusal to do both jobs in anything like a reasonable speed exposed the other miners to excessive danger because the section foreman, in order to get any work at all out of Deel on that day, had to operate a roof-bolting machine for the remainder of the shift and therefore had to slight his supervisory work. If he had failed to make methane checks or otherwise had failed to assure that the miners were using proper safety procedures, an accident could have occurred solely because of Deel's obstinate refusal to do two types of work on a day when a full crew of miners was not available.

The aforesaid discussion shows that if Deel was supposed to have been given a warning for the first refusal to perform work, he had already had that warning when the section foreman almost discharged him on the previous occasion. Consequently, his discharge on May 7 occurred after a first warning if that is a prerequisite which should be given any consideration.

The final argument Deel makes in Part II(B) of his brief (p. 41) is that Deel would not have been discharged on May 7 except for his protected activity because other miners had engaged in unprotected activity of refusing a work order and had not been disciplined by discharge for such unprotected activity. As I have clearly shown above under the heading of "Deel's Allegations of Disparate Treatment", other miners have not engaged in refusals to obey work orders in the defiant and belligerent manner which was associated with Deel's refusals to work. If the other miners had acted as Deel did, I am confident they would have been discharged just as Deel was.

The Commission pointed out in the Pasula case, supra, at page 2795, that a judge should give some weight to an arbitrator's decision if there was congruence between his decision and the issues raised in a discrimination case. I have noted in Finding No. 18, supra, that the question of Deel's discharge on May 7 was the subject of an arbitrator's decision issued on June 8, 1982. That decision is pertinent in ruling upon Deel's arguments in Part II(B) of his brief because the arbitrator, upon an adequate record, discussed Deel's refusal to operate the scoop on May 7 and found that his discharge was justified. The arbitrator pointed out on page 6 of his decision that refusal of an employee to comply with an order of his foreman is one of the most serious offenses which can be leveled at a subordinate. The arbitrator found that Deel had willfully refused an order given by his foreman and that DOW's management was clearly justified in discharging him for that refusal. I agree with the arbitrator's ruling and believe that his decision is a further reason for holding that Deel would have been discharged solely for his unprotected activities even if he had not also engaged in the protected activities of calling some safety problems to DOW's attention.

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For all of the reasons hereinbefore given, I find that the preponderance of the evidence fails to support Deel's contentions that he was discharged because of any activities protected under section 105(c)(1) of the Act. For that reason, DOW's motion to dismiss is hereinafter granted.

WHEREFORE, it is ordered:

The motion to dismiss made by respondent's counsel is granted and the complaint filed on September 23, 1982, in Docket No. VA 82-62-D is dismissed for failure of complainant to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

Richard C. Steffey  
Administrative Law Judge

FOOTNOTE START HERE-

1 Some of the Commission's language about the parties' burden of proof in discrimination cases was rejected in *Wayne Boich d/b/a W. B. Coal Co. v. F.M.S.H.R.C.*, 704 F.2d 275 (6th Cir. 1983), but on October 14, 1983, in Case No. 81-3186, the Sixth Circuit vacated its decision reported at 704 F.2d 275, except as to backpay issues, and held that the Commission's Pasula decision properly specifies the parties' burden-of-proof requirements in discrimination cases.