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SOL (MSHA) V. EMERALD MINES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
EX. REL. MICHAEL HOGAN
AND ROBERT VENTURA,
COMPLAINANTS

DISCRIMINATION PROCEEDING

Docket No. PENN 83-141-D

Emerald No. 1 Mine

v.

EMERALD MINES CORPORATION,
RESPONDENT

DECISION

Appearances: Catherine O. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, Pennsylvania,
for the Complainants R. Henry Moore, Esq., Rose,
Schmidt, Dixon & Hasley, Pittsburgh, Pennsylvania,
for the Respondent

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern a complaint of discrimination filed by the Secretary of Labor on behalf of the named complainants pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint alleges that Mr. Hogan and Mr. Ventura were suspended without pay for five days by the respondent on or about December 28, 1982, for exercising certain protected safety rights under Section 105(c)(1) of the Act. Specifically, the complainants assert that they were suspended by mine management for refusing to ride an elevator which they believed to be unsafe. The elevator is used to transport the working shifts to the underground working section.

A hearing was convened in this matter on August 23-24, 1983, in Washington, Pennsylvania, and the parties appeared and participated fully therein. Posthearing proposed findings and conclusions, with supporting arguments, were filed by the parties and they have been fully considered by me in the course of this decision.

Issues

The critical issue presented in this case is whether the suspensions meted out by mine management were prompted by protected activity under the law. Specifically, the crux of the case is whether the refusal by Mr. Hogan and Mr. Ventura to ride the elevator in question to their assigned work stations on the asserted grounds that it was not safe was reasonable and made in good faith. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

Complainants' Testimony and Evidence

Michael Hogan testified that he first heard about a problem with the elevator during his work shift of December 27, 1982. Sometime after 5:00 p.m., he heard the shift foreman call underground superintendent Morris to advise him that the elevator was inoperative. However, shortly thereafter, the problem was taken care of and the elevator was operating, and he left the underground section by means of the elevator without any problem, and heard nothing further about any problems. He next returned to the mine at approximately 3:30 p.m., on December 28, and he went to the bathhouse to change into his work clothes. At this time he learned from general bathhouse conversation that the crew on the evening shift of December 27 had encountered some problems with the elevator, and that the day shift on December 28th had delayed entering the mine until approximately 10:00 a.m., because the elevator had some problems and some maintenance people were working on it. He also spoke with someone on the day shift who advised him that the elevator doors would not open (Tr. 29-34).

Mr. Hogan testified that after he dressed and left the lamp room on December 28th, he encountered several miners from the day shift who had just alighted from the elevator at the end of their shift, and he identified them as Pat Buttermore,

~2176

Charlie Cooper, Jerry Kessler, and Don Dowling. They informed him that the elevator had malfunctioned, that it slowed down as it came up the shaft, and that they then felt it drop and their knees buckled. He described the miners as being "shaken up" and "highly agitated", and described two of them as being "actually white" (Tr. 34-35). Mr. Hogan stated that he then returned to the lamproom for a cigarette, and he spoke with Terry Limely, another miner who had just alighted from the elevator. Mr. Limely told him "you are crazy if you get on that thing, it is really messed up, it's really bad". When he questioned Mr. Limely further, Mr. Limely informed him that the elevator had dropped, started to fall, stopped suddenly, and that his knees buckled (Tr. 36).

After assessing the situation further, and since it appeared that there would be no "collective refusal" to ride the elevator, Mr. Hogan decided to speak with shift foreman Denny Smith. He advised Mr. Smith that he did not believe the elevator was safe to ride and that he was invoking his individual safety rights in refusing to ride the elevator, but that he was available for other work (Tr. 39). Mr. Smith asked him to stand aside while the other employees were loaded on the elevator, and by this time Mr. Ventura had also invoked his safety rights and refused to ride the elevator. At that point in time, mine foreman Allen Hager arrived on the scene and Mr. Hogan advised him that he would not ride the elevator, and Mr. Hager responded "there's nothing wrong with it" (Tr. 41).

When asked to explain why he believed the elevator was not safe at the time of his refusal to ride it, Mr. Hogan replied as follows (Tr. 42-43):

Q. Why did you believe that the elevator was not safe at that time, Mr. Hogan?

A. Well, I felt very sure, for myself, that all the incidents that had happened in the previous twenty-four hours or so, and then the most recent incident, at approximately ten to four, so I felt that if this had been a problem for all this time, that there should have been something done about it, it shouldn't still be malfunctioning like that.

Q. In your opinion, was it still defective at that time?

A. Absolutely.

Q. What did you figure could happen, if you got on the elevator, based on what information you had?

A. Well, I thought it could, if it would fall, I thought perhaps it could get stuck, somewhere along the way you could be stuck in it, and the one thing that Terry Limely had said about it, buckling his knees, I thought perhaps about being injured in it.

Q. What kind of injuries did you feel that you could sustain?

A. Well, I felt that I could get killed, you know, anything from being highly shook up to being killed, or anything in between, you know what I mean.

Q. Mr. Hogan, what reason did you give to Mr. Hager, as to why you were afraid to ride the elevator on that day?

A. Well, I told him that I didn't think it was safe, you know.

Mr. Hogan stated that at the time he informed Mr. Hager that he would not ride the elevator, he had no knowledge as to what steps had been taken to ascertain the reason for the elevator "dropping". He did know, however, that the elevator had been "test run" up and down several times after the complaints by the day shift crew, but he had no knowledge as to whether or not any repairs or maintenance had been performed. He was also aware of the fact that several groups of miners from his shift went underground on the elevator after the complaints were made (Tr. 44). Mr. Hogan also stated that he asked maintenance foreman Jackie Smith "what was wrong with the elevator", and that Mr. Smith replied that he did not know and could not state whether it was safe (Tr. 45).

Mr. Hogan testified that after the initial conversation with Mr. Hager, Mr. Hager instructed Mr. Denny Smith to "find something for us to do" (Tr. 45). He later spoke with Mr. Hager by phone while he (Hogan) was still in the elevator area, and he again informed Mr. Hager that he would not ride the elevator because he didn't feel it was safe, and that "I was using my safety rights" (Tr. 46). Mr. Hogan confirmed that Mr. Hager offered to operate the elevator manually, but he still refused to ride it, and he explained the refusal as follows (Tr. 47):

Q. Did you understand what he meant by the manual motor?

A. Yes, I understood what he meant, yes, he asked us if we would ride on the elevator, if it was being run manually, and I told him that I didn't feel that in my opinion, it didn't make a difference whether it was run on manual or automatic, they seemed to have an obvious problem, and unless they knew the source of the problem, I don't think that they could say it would be safer one way or the other.

Mr. Hogan confirmed that he and Mr. Ventura were then summoned to Mr. Hager's office, and Mr. Hager asked if they were willing to ride into the mine on the slope car. Mr. Hogan stated that he asked Mr. Hager how this would "leave us in regard to having two fresh air escapeways from the mine", and Mr. Hager did not reply and instructed Denny Smith to find something for Mr. Hogan and Mr. Ventura to do. Mr. Hogan and Mr. Ventura left the office, but were immediately called in again and Mr. Hager informed them that he was withdrawing his offer to have them transported into the mine by means of the slope car. Mr. Hager also informed them that depending on the outcome of an investigation by federal and state agencies, they could be subject to disciplinary action, up to and including discharge, and Mr. Hogan informed Mr. Hager that "I understood the situation" (Tr. 50).

Mr. Hogan stated that after leaving Mr. Hager's office, he and Mr. Ventura spent the rest of the shift working around the bathhouse (Tr. 50). At approximately 6:00 p.m., the elevator manufacturer's representative arrived, and shortly thereafter, state inspector Monohan and federal inspector Conrad arrived. At approximately 8:15 p.m., Mr. Hogan, Mr. Ventura, and management and union representatives were summoned to a meeting in Mr. Hager's office. Mr. Hager asked the elevator representative whether it was safe and he indicated that "in his opinion, the elevator was safe, and none of the safety features had been jumpered out". Mr. Hogan stated that he "nodded in the affirmative" to this statement, and that Mr. Conrad indicated that he was no expert on elevators, but was simply present "to see that there were no violations of law", and that after speaking with the elevator representative, he simply wanted to assure Mr. Hogan and Mr. Ventura that it "was safe to run" (Tr. 52). Although Mr. Hogan stated that Mr. Monohan concurred with Mr. Conrad, Mr. Hogan said that Conrad made the statement that "he wouldn't rode [sic] the God damn thing either" (Tr. 54).

~2179

Mr. Hogan testified that at the conclusion of the meeting in Mr. Hager's office, Mr. Hager informed him that he and Mr. Ventura were suspended, and that he stated as follows (Tr. 55):

* * * * he said that it was the company's opinion that Bob and I had interfered with their right to direct the work force at four o'clock, by not boarding the elevator, and we had acted arbitrarily and capriciously, and not in good faith, in not boarding the elevator, and that we were thereby suspended for five days, beginning at about eight forty-five, which the time was, and not to return to work, until Wednesday, January the 5th.

Mr. Hogan confirmed that he became angry after being informed that he was suspended, and that at this time he was available to work underground and would have ridden the elevator (Tr. 56). Mr. Hogan also confirmed that he stated to Mr. Hager that "they had a pretty good guy here up until this point, now I wasn't sure, but watch out now, or something to that effect". Mr. Hogan explained that he was upset because he did not believe he would be suspended, and he confirmed that since the episode he has had no suspensions or other actions taken against him (Tr. 57).

Mr. Hogan stated that after the oral suspension, he met further with Mr. Hager during the initial grievance stage of his case, and he identified exhibit G-1, as a copy of the written notice of suspension which he received on January 4, and he confirmed a notation on the notice which states "revised as agreed in the meeting of December 31, 1982" (Tr. 58). Mr. Hogan explained the notation, and he also confirmed that he had been involved in a prior exercise of his safety rights in the summer of 1981, and was assigned other work but was not suspended (Tr. 60-62). Mr. Hogan also confirmed that he has made safety complaints in the past, and that they are generally taken care of (Tr. 62).

On cross-examination, Mr. Hogan confirmed that he did not know what the elevator problem was on December 27, but by the end of the shift the elevator was repaired, and that any repairs were made within ten or fifteen minutes after he heard that the elevator was inoperative. Mr. Hogan also confirmed that when he spoke with Jackie Smith, Allen Hager, and Denny Smith on December 28, he did not ask them about the condition of the elevator on December 27 (Tr. 65). Mr. Hogan stated that he spoke with no one on the midnight shift, and that other than the fact that the elevator was not working, he had no knowledge of the specific problem.

~2180

With regard to any "elevator drop", Mr. Hogan conceded that he did not mention this to Dennis Smith or Jackie Smith, but he believed he mentioned it to Mr. Hager, but was not certain (Tr. 67-68).

Mr. Hogan confirmed that on the afternoon of December 28, after the "elevator dropping incident", there were some tests made on the elevator and it was his understanding that local union president Tom Rebottini rode the elevator during the tests (Tr. 68). Mr. Hogan also confirmed that one or two elevator loads of men on the evening shift went underground before he approached Dennis Smith to tell him he would refuse to ride it, and at these times Mr. Hogan saw no evidence of any elevator malfunctioning (Tr. 69).

Mr. Hogan confirmed that during the taking of his deposition he did indicate that to a small degree, he has a fear of being enclosed in small spaces, and in response to a question as to whether he had a certain fear or riding elevators, he replied "I would call it more of a healthy respect for them" (Tr. 73).

Mr. Hogan stated that prior to the time he refused to ride the elevator, he was aware that the elevator "had been run up and down", and that after the "elevator stopping incident", he did not ask Dennis or Jackie Smith or Mr. Hager whether they had checked the elevator to determine what was wrong with it (Tr. 77).

In response to bench questions, Mr. Hogan confirmed that he was not on the elevator during the alleged "dropping incident", and his knowledge of this event is from what others told him (Tr. 79-80). He recounted what he had heard as follows (Tr. 81-83):

JUDGE KOUTRAS: While you were back there, waiting to come to your shift, you had conversations with people, that were coming off of the day shift?

THE WITNESS: Yes.

JUDGE KOUTRAS: During these conversations, you learned about the problems with the elevator?

THE WITNESS: Yes.

JUDGE KOUTRAS: Now, you indicated that you talked about all these things that had happened, on the elevator, did you actually sit down and talk with Mr. Buttermore, and Mr. Dowling, and have

any detailed discussions with them about the events that transpired on the elevator, while they were coming out, the knees buckling, the fears and all that, before you went to work, or did you find this all out, after all this happened?

THE WITNESS: I spoke with them, within a minute of the time they come out from the elevator that dropped.

JUDGE KOUTRAS: And they said what?

THE WITNESS: They said that it had come up, started to drop, and then fell, and the one in particular, said his knees buckled, and they were saying they were scared.

JUDGE KOUTRAS: Okay.

THE WITNESS: And the one individual screamed.

JUDGE KOUTRAS: Who was that?

THE WITNESS: I don't know, they said somebody on the elevator screamed.

JUDGE KOUTRAS: Did they tell you how far the elevator dropped?

THE WITNESS: Each had their own opinion of that, it's very difficult to tell, but you can't say.

JUDGE KOUTRAS: Any length of time, how did they describe the dropping to you?

THE WITNESS: Well, one individual said, he thought it fell about ten feet, and another one, some of their estimates ran much higher than that, to the possibility that it could have been a hundred feet, or something like that.

JUDGE KOUTRAS: Once the drop had stopped, how did they come out, how did the elevator proceed, how did they take care of the problem, when I say they, whoever was there in charge, did they have somebody there on the elevator that was in charge of the crew?

THE WITNESS: Well, at the time of the incident Jackie Smith was in the penthouse, which is above

ground, above the elevator, and he took over manual control of the elevator at that point, and brought it up.

JUDGE KOUTRAS: How did he know to bring it up?

THE WITNESS: I suppose he knew some way that something had malfunctioned.

JUDGE KOUTRAS: How did he know that, was this elevator coming up and down automatically, do you know?

THE WITNESS: As far as I know, it was running on automatic at that point, yes, but see, because they were having the problems, there were someone where the elevator comes up here, there's an area above the elevator, right above the shaft, to other controls and circuits and stuff, where I guess Jackie Smith was in that penthouse, what they call the penthouse, at the time it malfunctioned, and he just in some manner, knew that it was malfunctioning, and he brought it up manually.

Mr. Hogan indicated that Jackie Smith told him that he did not know what was wrong with the elevator, and Mr. Hogan believed that the only time the elevator would be operated on a manual mode would be in the event of a motor malfunction (Tr. 87, 89). Regardless of which mode it operated on, he did not believe that management had sufficient time to check the malfunction and conduct proper tests (Tr. 89). He conceded that the prior elevator problems had been taken care of the day before his work refusal, but he insisted that "some problem apparently kept repeating itself" (Tr. 90). He also believed that it "was possible" that the prior malfunction still prevailed, and when asked whether he would have still refused to ride the elevator if no one had mentioned that it had dropped, he answered "I don't know, that's hypothetical" (Tr. 91).

Mr. Hogan confirmed that safety committeeman Willis and Union President Rebottini were both present when he refused to ride the elevator, and he indicated that they worked the same shift. He stated further that Mr. Rebottini worked underground and rode the elevator, but that Mr. Willis was assigned to surface work (Tr. 93). Mr. Hogan also confirmed that approximately a year or so earlier he had refused to ride the same elevator, but that this prior incident did not influence his decision in this case (Tr. 98).

~2183

Mr. Hogan stated that prior to the instant case he had no knowledge that the elevator had ever "dropped" in the past. He confirmed that the elevator shaft is approximately 600 feet high, and that on prior occasions when miners refused to ride the elevator they were taken into the mine by means of the slope shaft (Tr. 101). He also indicated that he was unaware of any other miners being suspended or fired for refusing to ride the elevator (Tr. 102). He stated that the elevator was installed sometime in 1976 or 1977, and that it has been the topic of past discussions and meetings between the union and mine management (Tr. 104).

Robert Ventura testified that he is employed by the respondent as a mechanic, and that at the time of his suspension he worked as a utility man. He stated that on December 27, 1982, he reached his working place by means of the elevator which took his crew underground on the second shift, 4:00 p.m. to 12:00 p.m. Mr. Ventura stated further that at approximately 5:30 p.m. that day he was informed by his foreman that the elevator was inoperative and that if it were not repaired within a half hour the crew had the option of leaving the mine. Since the elevator was the main escapeway, Mr. Ventura indicated that he would leave and requested that he be allowed to do so. However, since the elevator was repaired, he did not do so. He subsequently took the elevator out at the end of his shift at approximately 11:45 p.m. One of his fellow shift workers told him that as he was boarding the elevator to leave, it raised up 8 to 12 inches and he tripped while getting on (Tr. 109-111). However, Mr. Ventura did not report this and went home.

Mr. Ventura testified that he reported for work on December 28, 1982, and while in the bathhouse he had some discussions with other miners concerning the elevator, but he did not know any of the specific details. While in the lamphouse he said one of the miners from the day shift, Jerry Kessler, advised him that the elevator had stopped and then dropped about fifty feet while he was riding it up the shaft at the end of his work shift. Mr. Ventura then proceeded to the elevator and asked his safety committeeman Willis if the elevator was safe, but he could not state whether Mr. Willis responded. Mr. Ventura then spoke with section foreman Russ Clark, and Mr. Clark referred him to foreman Denny Smith. Mr. Smith advised him that the elevator was safe and referred him to Mr. Hager, but Mr. Ventura did not discuss his safety rights with Mr. Smith (Tr. 111-117).

Mr. Ventura confirmed that Mr. Hager offered to operate the elevator on the manual mode, but he (Ventura) stated that

~2184

he was afraid to ride it for fear that it might drop again. He said Mr. Smith advised him that the elevator representative had been summoned to the mine, but that Mr. Smith could not tell him what was wrong with the elevator. During this time, all of the other crew members had gone underground on the elevator, and Mr. Ventura confirmed that this made no difference to him as he was exercising his own personal safety rights in refusing to ride the elevator (Tr. 117-120).

Mr. Ventura confirmed the meeting in Mr. Hager's office and he also confirmed that Mr. Hager offered to take him into the mine by means of the slope car. However, after Mr. Hogan raised the escape route question, Mr. Hager said nothing further and he and Mr. Hogan were assigned other work (Tr. 121). Mr. Hager subsequently retracted his offer to take them in by means of the slope car (Tr. 122). Mr. Ventura corroborated the fact that another meeting was held with Mr. Hager and that he was subsequently suspended (Tr. 123-128).

On cross-examination Mr. Ventura confirmed that at the time of his refusal to ride the elevator he believed that "there was something wrong with the elevator", and he confirmed that he knew nothing about its features (Tr. 133). He also confirmed that Mr. Kessler told him it dropped fifty feet and that this scared him, but that no one was injured. He conceded that since no one was hurt after the asserted fifty foot drop, Mr. Kessler may have exaggerated the extent of the drop (Tr. 134). Mr. Ventura also confirmed that he asked no one else on the elevator about the drop, and he stated that he did tell Mr. Smith and Mr. Hager what he heard about the elevator dropping fifty feet (Tr. 135).

Mr. Ventura confirmed that he knew that the reported elevator malfunction of December 27th had been repaired, but that he did not know all of the specifics of the problem (Tr. 135). He also stated that it was possible that he would not have refused to ride the elevator had Mr. Kessler not mentioned the drop (Tr. 136). Mr. Ventura indicated that he was not aware that test runs had been made on the elevator on December 28th prior to his work shift, and he was unaware that Mr. Rebottini had ridden it (Tr. 139). Mr. Ventura stated that he mentioned the elevator dropping to Dennis Smith, Jackie Smith and Alan Hager, but that none of them could assure him that the elevator was safe (Tr. 141).

In response to further questions concerning what he told mine management about the elevator dropping, Mr. Ventura stated as follows (Tr. 149-151):

JUDGE KOUTRAS: Well, then after you spoke to Willis, when was the first time that you had any contact with any management representative?

THE WITNESS: Right after I talked to Mr. Willis.

JUDGE KOUTRAS: Who did you talk to then?

THE WITNESS: My shift foreman.

JUDGE KOUTRAS: Which is?

THE WITNESS: My section foreman, Mr. Clark.

JUDGE KOUTRAS: You told Mr. Clark, that you were reluctant to get on the elevator, and Clark did what?

THE WITNESS: He referred me to the shift foreman, Mr. Smith.

JUDGE KOUTRAS: Who was Mr. Smith, and you told him the same thing?

THE WITNESS: Yeah.

JUDGE KOUTRAS: Now, in both those conversations did you specifically tell either Mr. Clark, or Mr. Smith, that someone had told you that the elevator had dropped fifty feet?

THE WITNESS: Yes.

JUDGE KOUTRAS: You did?

THE WITNESS: Yeah, well, I didn't say fifty feet, but that it had dropped.

JUDGE KOUTRAS: Did you tell them who had told you that?

THE WITNESS: No.

JUDGE KOUTRAS: Then what happened, when did Mr. Hager get in on the act?

THE WITNESS: Mr. Smith referred me to Mr. Hager.

JUDGE KOUTRAS: Was Mr. Hager there physically?

THE WITNESS: Yes.

JUDGE KOUTRAS: And you told him the same thing?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you specifically tell Mr. Hager, that you had heard from someone from the previous shift, that the elevator had dropped some distance?

THE WITNESS: Yes.

JUDGE KOUTRAS: What was his reaction to that?

THE WITNESS: He couldn't answer why, I asked him if he was aware of the elevator dropping, and he says, no.

JUDGE KOUTRAS: Do you have any idea how many people were on the elevator, when riding it up with Mr. Kessler?

THE WITNESS: I would say maybe eight people, I don't know, for sure.

JUDGE KOUTRAS: About eight, and you heard no one else say anything about the elevator dropping, how far it dropped or anything?

THE WITNESS: Not at the time, you know it was a situation, where I was coming out to get my lamp, and Jerry was there, and other people were starting to leave, I was running late.

Martin Willis, stated that he is employed by the respondent as a motorman, and that he is vice-president of local union 2258 and also serves a safety committeeman. He confirmed that he went to the mine on December 28, 1982, at 9:00 a.m., to attend a safety meeting with mine management and that he was scheduled to work that day on the 4:00 p.m. to 12:00 midnight shift. While at the bathhouse someone advised him that there was a problem with the elevator, and he spoke with the general mine foreman Allen Hager about the matter and Mr. Hager advised him that "they were working on it". Mr. Willis then proceeded to the elevator area and someone from the work crew which had just finished a shift told him that "the elevator came up, stopped, felt like it dropped, and then it came up on inspection speed" (Tr. 165-169, 171). When asked who told him this, he identified the crew members as Jerry Kessler and Wayne Bara, and he indicated that Mr. Kessler appeared scared and frightened (Tr. 172).

~2187

Mr. Willis confirmed that while speaking with several miners waiting to go underground on the four to midnight shift, Jackie Smith informed him that he did not know that was wrong with the elevator and that he could not state whether it was safe. Mr. Willis did not speak with Mr. Hogan or Mr. Ventura at this time, but he did learn that they informed foreman Denny Smith that they were invoking their individual safety rights and would not ride the elevator underground. Mr. Willis then accompanied Mr. Hogan and Mr. Ventura to Mr. Hager's office for a meeting, and Mr. Ventura and Mr. Hogan were subsequently assigned other work. Later, a federal and state inspector arrived on the scene but did not examine the elevator. The elevator company mechanic changed some electrical contactor points and determined that the elevator safety features had not been "jumpered out" (Tr. 178). Later, Mr. Hager informed him that Mr. Hogan and Mr. Ventura would be suspended for five days (Tr. 179). Mr. Willis confirmed that federal inspector Conrad stated that he found no violations of federal law and that as far as he was concerned the elevator was safe. However, state inspector Monahan indicated that he would not ride the elevator (Tr. 180).

On cross-examination, Mr. Willis stated that when he spoke with Mr. Kessler he did not tell him how far the elevator had dropped, and that Mr. Bara characterized the elevator as being "f..... up" (Tr. 183). He also confirmed that while Mr. Bara did not specifically state that the elevator had dropped, he did indicate that it "felt like it" (Tr. 184). Mr. Willis also confirmed that Jackie Smith told him he could not find the elevator problem (Tr. 184).

In response to further questions, Mr. Willis confirmed that after the inspectors and the elevator representative were called, they all "gave the elevator a clean bill of health", and while no one knew what the specific problem was, the changing of the contactor points took care of it and he learned that if dirt gets into the contactor tips they have a tendency to stick (Tr. 190).

Mr. Willis stated that he did not believe that mine management acted unreasonably by calling in the elevator mechanic and the state and federal inspectors, but he believed that Mr. Hogan and Mr. Ventura should not have been suspended, and he expected management to just let them go back to work after they determined that the elevator was safe (Tr. 193). Mr. Willis confirmed that he had ridden the elevator many times and he explained how it operates on the "manual" mode, and he also indicated that "anytime that elevator malfunctions it is a headache for both management and union, it causes a lot of concern" (Tr. 192, 194-195).

Jerry Kessler, mechanic, testified that on December 28, 1982, he reported to work on the day shift, 8:00 a.m. to 4:00 p.m., and the usual procedure is to ride the elevator underground. However, on this particular morning the elevator was not working and his crew had to wait until 10:00 a.m. to go to work. He was told that there was a problem with the elevator and that it had been repaired, but he was not aware of the specific problem. His crew used the elevator and he was not aware of any other problems with it during his shift. However, after his work shift ended and while coming up on the elevator a problem developed, and he described it as follows (Tr. 205-207):

A. Well, when we got on the elevator, we started up, the elevator got approximately one hundred feet from the top, the cage stopped, it fell, how far, I don't know, it stopped, it started back up, and it stopped a third time, then that's when Wally Petros called out to see what was the matter, and he said, that they said it would be going in just a second.

Q. Who is Wally Petros, can you tell the Judge?

A. He's one of my mechanic bosses.

Q. Did you hear him make the phone call?

A. He made the phone call, I didn't hear the conversation.

Q. What did he say to you after he made that call?

A. He said that it would be fixed in just a minute, that it would be coming up, and then it started up on inspection speed, slow speed.

Q. Can you describe for the Judge, in as much detail as you can, as much as you can recall, how long the drop, and how long the drop lasted, when you were in the elevator, can you give us an idea of the distance?

A. It was difficult to tell, because you were enclosed in the cage, but when it stopped, it fell, the second stop buckled my knees, because we were on a downfall, I had time enough to make up my mind, I was prepared to hit the bottom, and I thought that if I could possibly time it and jump, that I wouldn't get my legs broke, whatever time that was, I don't know.

Q. How did the other people on the elevator react, what did you see?

A. Everybody was shook up, everybody was scared, Hap Buttermore screamed, Bob Richie pinched a gentleman's arm, or grabbed his arm, to get something to hold on to, everybody was shook up.

Q. How about when you got off the elevator, what happened when you finally got to the top?

A. Well, as soon as it got to the top, the door opened, and everybody rushed for the landing.

Mr. Kessler testified that after getting off the elevator he mentioned the elevator episode to Denny Smith, but he assumed that Mr. Smith did not hear him (Tr. 208). Mr. Kessler spoke to no other management people, but did speak with Mr. Willis and Mr. Ventura. Mr. Kessler stated that "I told Bob Ventura that something was wrong with the cage, and told him to go out and find out what was wrong" (Tr. 209). Mr. Kessler confirmed that he returned to work the next day and the elevator had been fixed and the midnight and second shift had taken it underground (Tr. 210). After observing several elevator trips, he too rode it underground (Tr. 211).

On cross-examination, in response to a question as to whether he told Mr. Hogan or Mr. Ventura a specific distance that the elevator fell, Mr. Kessler replied as follows (Tr. 212):

Q. Did you tell him how far it fell?

A. I would imagine six to eight feet if I made a guess, I don't know.

Q. So you didn't tell him that it had fallen -- either Mr. Ventura, or Mr. Hogan, that it had fallen fifty feet?

A. No, sir, I didn't tell it had fallen fifty feet.

Mr. Kessler explained further that he did not tell Denny Smith how far the elevator had dropped, and that no one else from mine management was present when he got off the elevator (Tr. 214). When shown a copy of his prior statement to the MSHA investigator indicating that the elevator dropped 10 to 15 feet, Mr. Ventura was asked to reconcile that statement with his testimony that it only dropped six to eight feet. He replied "you are enclosed in the cage, I can't tell you how far the cage dropped" (Tr. 223)

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Don Dowling, mechanic trainee, testified that he was scheduled to work the 8:00 a.m. to 4:00 p.m. shift on December 28, 1982, and that upon reporting to work that day he did proceed immediately underground by means of the elevator as was his usual practice because "there was trouble with the elevator" (Tr. 226). He went underground on the elevator at 10:10 a.m. that day after being advised by his foreman that the elevator had been fixed (Tr. 227). When asked whether anything unusual happened when he came out of the mine on the elevator at the end of his shift, he replied as follows (Tr. 227-229):

A. Well, when we got on the elevator, the doors weren't exactly operating correctly.

Q. What were they doing?

A. The doors were slow to close, and then finally someone pushed it shut. And we started up, and I don't know how far up, it seemed like it was fairly close towards the top, than it was the bottom, and it hung up, stayed there for a couple of seconds, and then fell, and then locked, felt like it was pretty solid down, and then while we were falling, one guy screamed and Bob Richie grabbed a hold of my arm, pretty tight, it was hurting me, and then it locked up pretty solid, it felt just like it hit something.

It wasn't the ground or anything, it was like something caught a hold, it felt solid after that, a couple of jerks, and then, while we were waiting there, Wally Petros called outside, and I don't know who he called, but a few minutes after he hung up the phone, it jerked a couple of times, and then started up.

Q. Did you hear what Wally Petros said that day?

A. He was asking about the elevator itself, and I didn't hear no response, and he just kept saying, yeah, yeah, after that.

Q. What did he say, to the rest of you in the elevator?

A. He said, it would be fixed in a little bit, we would be going up, and the next thing you know, we were going up on inspection speed, real slow.

Q. Can you describe for us, how you felt when that happened, Mr. Dowling?

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A. I was scared, very scared.

Q. What were you scared of, afraid of?

A. Hitting the bottom, actually, when it fell, then after we locked up solid, and while we were standing there, one guy popped the top off of it, and looked up, and we could see the top of the shaft, it was still a fairly good distance, and I was scared, being locked there, myself.

Mr. Dowling testified that after he got off the elevator he made no comments to any of the other miners, and since he did not know Mr. Hogan or Mr. Ventura he did not speak with them (Tr. 230). He returned to work the next day and rode the elevator and "it worked fine" (Tr. 231).

On cross-examination, Mr. Dowling confirmed that after he got off the elevator he did not approach mine management, but he was sure that someone else had informed them as to what happened (Tr. 233).

Charles W. Cooper, continuous miner operator, testified that he worked the 8:00 a.m. to 4:00 p.m. shift at the mine on December 28, 1982, and he did not enter the mine until approximately 9:45 a.m. because the elevator was not working properly (Tr. 238). When asked whether anything unusual happened at the end of his shift, he replied as follows (Tr. 239-241):

A. Well, we started up in the elevator, it came up, oh, a little over half way, and then the elevator stopped, and when it stopped, and then it seemed to drop right back down, it dropped oh, around eight to ten feet, roughly, and we couldn't judge the distance it fell, and then the elevator stopped again, and like locked up, and when it locked up, everybody jumped down you know, like, you were on a gum band, just being bounced, and you could feel the elevator, like shaking up and down.

Q. Could you see the other people move up and down, like you just described?

A. Yes, all of them, the majority of them did.

Q. Okay. What else happened, what did the other employees do now?

A. Everybody was standing dazed like, you know, looking at each other, and saying what happened, and stuff like this.

Q. What did you think had happened?

A. I thought we were going down.

Q. By going down, you mean you thought you were going to hit the bottom?

A. I thought we were going to the bottom.

Q. Were you afraid?

A. Yeah.

Q. What happened next?

A. Well, then, Wally Petros, the foreman, got on the phone, and called out to somebody outside or something.

Q. Could you hear what he said?

A. No, offhand, I couldn't hear what he said.

Q. What happened, after he called outside?

A. The elevator, it was a few minutes, and then the elevator started, and it started coming up, when it got to the top, it went up past where it usually stops at the door, about eight, ten inches above, and then somebody or something, it recycled or something, and it came back down a couple of inches above the normal position, the door opened.

Mr. Cooper stated that after he got off the elevator he spoke with Mr. Willis and advised him that "there's something wrong with that elevator". However, he did not see or speak with Mr. Hogan or Mr. Ventura (Tr. 243). Mr. Cooper confirmed that he returned to work the next day, December 29, and was told that the elevator had been repaired, that some relays were replaced, and he rode it underground without incident and there has been no reoccurrence of any elevator "dropping" (Tr. 244).

On cross-examination, Mr. Cooper stated that he could not recall seeing the wall of the elevator shaft from the inside of the elevator when it dropped, and he confirmed that he estimated that it fell eight to ten feet "by the way I felt" (Tr. 245). He estimated that 18 to 19 miners were on the elevator during the incident in question (Tr. 246).

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Mark A. Sunyak, shuttle car operator, testified that he worked the 4:00 p.m. to 12:00 midnight shift on December 28, 1982. After dressing, he proceeded to the hallway by the elevator to take the first trip underground. When the elevator doors opened, no one from the crew seemed to be boarding and someone commented that there was a problem with the elevator. He could recall no specifics, he did not ask the shift foreman if there was a problem, and he could recall no conversations as to whether the elevator had problems (Tr. 252). As the crew began getting on, he hesitated but then got on after the shift foreman began telling everyone to get on. He rode the elevator down without incident, and no one said anything further about it (Tr. 254).

On cross-examination, Mr. Sunyak stated that his initial reluctance to board the elevator was prompted by his doubts as to whether anything was wrong with it. However, since he knew none of the facts he rode it. He confirmed that prior to December 28, 1982, he had exercised his safety rights in the past with regard to certain imminent danger situations but was never disciplined since management recognized the dangers and took corrective action (Tr. 258).

Mr. Sunyak stated that before he got on the elevator on December 28, he was not aware that employees from the preceding shift had reported a "drop" while they were coming out. He confirmed that he worked on the same shift with Mr. Hogan and Mr. Ventura, but did not know at that time that they had refused to ride the elevator (Tr. 259-260). He also indicated as follows (Tr. 267):

JUDGE KOUTRAS: Did you hear anything from the previous shift coming up?

THE WITNESS: No, I had no knowledge of anything.

JUDGE KOUTRAS: The only knowledge that you had, was the night before, there was a problem?

THE WITNESS: Yeah, but that was more or less unusual, if that would be the right word, but just little things like that happen every now and then, but I was probably more concerned about getting home, than anything else.

JUDGE KOUTRAS: But while you were waiting to ride the elevator down, you knew that something was up, because things weren't moving along, you surmised that there were some problems?

THE WITNESS: Yeah, right.

JUDGE KOUTRAS: Yet, you didn't exercise your safety rights, and refuse to go?

THE WITNESS: Not knowing full well, what all was involved, I didn't really feel that I could, not knowing any specifics on it.

Thomas Barrett, respondent's employee relations representative, confirmed that he was at the mine on December 28, 1982, and was aware of the elevator problem. He identified exhibit G-3 as a memorandum he prepared from his own personal notes relating to the events of December 28, and he confirmed that he was present when Mr. Hager informed Mr. Willis that he had changed his mind about offering to transport Mr. Hogan and Mr. Ventura into the mine through the slope (Tr. 273-276).

Respondent's Testimony and Evidence

John F. Lusky, testified that he is employed by the Schindler Haughton Elevator Company as an elevator mechanic, and he described his duties and experience. He confirmed that he received a service call on the afternoon of December 28, 1982, and he went to the mine in response to information that there was a "problem with the elevator not automatically returning to the top, and that it had made a stop. It was traveling up, and it made a stop" (Tr. 288). Mr. Lusky identified exhibit R-1 as a copy of a service record indicating the work which he performed on the elevator in question, and he estimated that he arrived at the mine at 6:00 p.m. He confirmed that he found no malfunction with the elevator while he was there, but did indicate that he visually inspected the elevator, adjusted some switch contacts, and he changed a relay contact since he believed it had something to do with returning the car to the top. While he indicated that it was possible that the contactor was related to the elevator stopping, he did not believe this was likely because there is very little current passing through the contactor (Tr. 292). He also explained the adjustments he made to certain switches, and confirmed that the work he performed on the elevator did not relate to or affect the safety features of the elevator. He also confirmed that the safety features were not by-passed or "jumpered out", and he could not determine what caused the elevator to stop (Tr. 293).

Mr. Lusky stated that during the time he was at the mine the elevator was safe. Based on the work he performed on the elevator, he was of the opinion that it was safe earlier in the day. He confirmed that the elevator will not run if the doors do not close properly, and in his opinion the fact that there is a problem with doors would

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not affect the other safety features because they are on separate circuits (Tr. 295). He described the safety features of the elevator, and he stated that no one told him that the elevator had dropped. He also indicated that had the elevator dropped "the safeties would have set," and he saw no evidence that this happened (Tr. 298).

On cross-examination and in response to further questions, Mr. Lusky explained the functions of the elevator relays and contactors, and he confirmed that he had not previously done any work on the elevator in question. He confirmed that he spoke with no one who had ridden the elevator and that he considered his service call to be "routine." He also indicated that any prior service calls would be a matter of record, but he could not recall exactly when the elevator was first installed. He confirmed that an elevator could stop for a number of reasons, and conceded that such a stop would be an "unusual event" (Tr. 311).

Willard D. Smith, shift foreman, testified that on December 27, 1982, when he rode the elevator down at 5:30 the doors would not shut and the elevator would not go up. He reported this to the maintenance foreman, and the elevator was operated manually until the problem could be taken care of. The elevator was repaired, but he did not know what work was done on it. He reported to work for the second shift on December 28, and prepared to load the elevator to send the crews underground. He was not present when the elevator stopped while coming up and he spoke to no one who was on that elevator. He stated that "I had heard through the maintenance that they had trouble with the elevator," and he was present when Mr. Rebottini came up on the elevator and he heard him state "it worked fine." Mr. Smith did not speak with Mr. Rebottini, and after he got off the elevator the evening shift began loading on the elevator (Tr. 324).

Mr. Smith stated that no one told him that the elevator had stopped and he heard no one waiting to load on his shift state that they thought the elevator was unsafe. Three elevator loads went underground while he was there and the elevator did not malfunction. Mr. Smith described his conversations with Mr. Hogan and Mr. Ventura as follows (Tr. 325-327):

Q. Now, there came a point when Ventura and Hogan approached you?

A. Yes, they did.

Q. What did they say to you.

A. The only thing I remember Bob saying, Ventura saying, was, "Do you guarantee me -- , can you guarantee me that elevator is safe?"

Q. And what was your response to that?

A. I said, "The elevator is running fine, but I can't guarantee anything."

Q. Did you, at that point, feel that it was safe to ride?

A. Yes, sir.

Q. Did Mr. Ventura and Mr. Hogan raise the fact that they had heard that the elevator had dropped?

A. I don't recall it. No.

Q. Had you heard from anybody else, at that point, that the elevator had dropped?

A. No. I didn't.

Q. Did either Ventura or Hogan raise to you the issue of the previous malfunctions on the elevator as making it unsafe?

A. No, they didn't.

* * *

Q. Yes, assuming that Ventura and Hogan came up to you and said, "We heard that it dropped fifty to a hundred feet" would you have behaved differently?

A. No.

Q. And that's because you had heard that it was running properly at that point?

A. Fine, Right.

Q. Did you have any further conversation with Ventura and Hogan?

A. Not after that, no sir.

Q. What did you tell them to do?

A. If I recall right, I said, "Well -- ". Allen Hager, our mine foreman was there. We all went into the office, and meanwhile, as soon as they arrived in the office, I stepped inside, and I had a phone call, and I had to leave. And that's all that I --. What happened in the office, I don't recall. I wasn't in there.

Q. Were you involved in assigning them other work?

A. Yes, sir.

Q. Did you ride that elevator that day?

A. Yes, sir.

On cross-examination, Mr. Smith stated that he surmised something had been wrong with the elevator when he saw Mr. Rebottini "test ride" it, but he was sure it was fine when Mr. Rebottini got off. Mr. Smith confirmed that approximately 80 miners rode the elevator into the mine after 4:00 p.m. on December 28, and he also confirmed that he was present by the elevator doors when the 8:00 a.m. to 4:00 p.m. shift came out (Tr. 332). He denied speaking with Charles Cooper, Donald Dowling, or Patrick Buttermore, and denied hearing any comments that there was anything wrong with the elevator (Tr. 334). He also denied hearing any comments that the elevator had dropped or that men were screaming when it did (Tr. 335-336).

In response to further questions, Mr. Smith indicated that Mr. Hogan and Mr. Ventura had served on his crew for two years and that during this period they had never asked him to "guarantee" their safety, and he conceded that this was an "unusual occurrence". He conceded that Mr. Ventura and Mr. Hogan were concerned when they refused to ride the elevator, and when asked about this concern on their part, he replied "I guess they were reluctant because of the situation that happened on the day shift. That's the only reason I can say" (Tr. 339). When asked what he would have done had he been told that the elevator stopped or dropped, Mr. Smith replied "if the maintenance people that was checking the elevator told me it was safe and okay to operate, then I would have expected them to go to work" (Tr. 340). He explained further at Tr. 341:

JUDGE KOUTRAS: But, as far as guaranteeing anyone's safety, you took the position that you couldn't do that?

THE WITNESS: I could not.

JUDGE KOUTRAS: So, for all you know, even though they said it was fine, it could very well have been, once they got on, something could happen, some unforeseen thing, or something.

THE WITNESS: It could have malfunctioned.

JUDGE KOUTRAS: Is that the context in which you made the statement that you can't guarantee their safety?

THE WITNESS: Right. I could have put them on it, and the doors may have malfunctioned, anytime.

JUDGE KOUTRAS: But, in any event, once you got on and went down, you went down without any problem?

THE WITNESS: Fine.

JUDGE KOUTRAS: And, how about coming back at the end of the shift?

THE WITNESS: Yes. It worked fine. To my knowledge, no one had reported anything.

Mr. Smith confirmed that he had no similar problems with Mr. Hogan or Mr. Ventura in the past and that he considered them to be good conscientious employees. When asked whether he would have ridden the elevator given the same circumstances, Mr. Smith replied as follows (Tr. 342):

JUDGE KOUTRAS: Let me ask you this hypothetical. It might be tough to answer, but put yourself in their position, what would you have done?

THE WITNESS: I would have rode the elevator.

JUDGE KOUTRAS: For what reason?

THE WITNESS: Because everyone else rode it, and I would have felt that --. I would have rode it too. I would've felt that it was safe once it was checked out, to ride.

Wayne S. Bair, maintenance foreman, testified that he worked the day shift on December 28, 1982, and was on the elevator when it stopped while coming up the shaft. He indicated that the elevator stopped near the top and it did not drop. He described the sensation when it stopped as "you got light on

~2199

your feet". He heard no one scream and saw no one grab anyone's arm, and he stated that "everyone kind of got quiet" (Tr. 347). He confirmed that foreman Walter Petros called out on the elevator phone and that after the call the elevator came up. After he got off the elevator he encountered Mr. Willis and they went to Mr. Hager's office and Mr. Bair told Mr. Hager that "the elevator did mess up". Since he did not believe that it dropped, he said nothing to Mr. Hager about any reported drop.

Mr. Bair stated that at no time did he hear anyone state that the elevator had dropped. He confirmed that a week prior to the hearing Mr. Kessler remarked that he thought the elevator had dropped and while Mr. Bair disagreed with him he told Mr. Kessler "to tell them the way he really feels" (Tr. 349). Mr. Bair also confirmed that he did not speak with Mr. Hogan or Mr. Ventura on the day in question.

In response to further questions, Mr. Bair stated that when the elevator stopped he felt "a little light", but that his knees did not buckle and his feet never left the floor (Tr. 350). He indicated that "I think some people had some pretty big eyes, %y(3)4B but outside of that everything was pretty quiet right after that, until they made the telephone call" (Tr. 353). He said that he would have ridden the elevator again "once it was checked".

Adren A. Whitehair, maintenance clerk, testified that while he was not directly involved in the repair of the elevator on December 28, 1983, he was aware of the problems that day. He confirmed that a Haughton elevator representative and surface electrician Scott Kramer had performed some work on the elevator on the morning of December 28, and that no other problems developed until late in the afternoon. He received a call from the bottom of the elevator which indicated that the doors would open and close but that the elevator would not work properly. He contacted Jackie Smith in the shop, and Mr. Smith and shop mechanic Jim Howard checked the elevator, and they "recycled" it by turning the power on and off. They then tested it by "two dry runs" and it worked properly. However, ten to fifteen minutes later the doors malfunctioned and Mr. Smith recycled it a second time, and after testing it he indicated that it was working (Tr. 358).

Mr. Whitehair testified that after the first elevator malfunctions were taken care of he received a call that the elevator had stopped. Mr. Petros advised him that it stopped approximately 100 feet from the top of the shaft and he said nothing about any drop. Mr. Whitehair then went to the penthouse, and Jackie Smith was checking the contactors. The elevator

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was tested, and after several test runs, Jackie Smith advised him that the elevator was operating properly. Mr. Whitehair later heard some conversations regarding the elevator drop, but he was not present when Mr. Hogan and Mr. Ventura initially spoke with Mr. Hager. However, he was present at a subsequent meeting when Mr. Willis informed Mr. Hager that they should not be expected to be on an elevator which was not safe and which purportedly dropped (Tr. 362).

In response to further questions, Mr. Whitehair stated that if he had been told that the elevator had dropped he would not permit anyone to ride it. He characterized a "drop" as the "free-falling of an elevator", and the distance would not make any difference. When asked how he would account for such differences of opinions as to the purported drop of the elevator, he replied "That's hard to say, but I will say that when an elevator stops when its traveling at speed, that you will get light-footed, of course" (Tr. 366).

Jackie T. Smith, maintenance foreman, testified that his work experience includes some five years of inspections of the elevator in question. He identified exhibit R-2 as a copy of an inspection form dated December 28, 1982, for the elevator in question, and he confirmed that it was executed by mechanic Scott Kramer. Mr. Smith explained all of the required inspection steps listed on the form, and he explained the safety features of the elevator, and he confirmed that operating it on a manual speed does not result in any loss of safety (Tr. 371-379).

Mr. Smith confirmed that he was present on the morning of December 28, 1982, when work was done on the elevator during the day shift. He stated that he received a call at 3:05 p.m. advising him that the elevator was stuck on the bottom. He checked the switches, ascertained that the safety features were operative, and after recycling the power and making some test runs the elevator operated properly. Shortly thereafter he was again informed that the elevator doors would not function properly, and since they couldn't close the elevator would not run. He recycled the power again and the elevator worked properly. Shortly after this, the elevator stopped and he could see it from his vantage point in the penthouse. As soon as the elevator stopped, the brakes set and he observed no slippage. He then turned it on the manual mode and Mr. Petros called him. Mr. Smith said that he informed Mr. Petros that "We're going to bring you up manual mode" (Tr. 383).

Mr. Smith stated that he immediately brought the elevator up on manual mode to avoid "waiting time" while he recycled the power. Had there been any malfunction of the safety

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features he would not have been able to move the elevator at all. After bringing the elevator to the top, he checked out the contactors and "test ran" the elevator at least four times, but he could not find out why it had malfunctioned. However, it was his opinion that the elevator was safe to operate. He later encountered Mr. Hogan and Mr. Ventura and they asked if he had found the problem. Mr. Smith responded that he had found nothing wrong with the elevator, and in response to a question as to whether it was safe to ride, Mr. Smith stated that he responded "it was the safest piece of equipment in the mine" (Tr. 386). Mr. Smith could not state whether Mr. Hogan or Mr. Ventura said anything to him about the elevator dropping.

Mr. Smith stated that he was present when the Haughton elevator representative arrived to check out the elevator, and he confirmed that some contactors were changed but that the mechanic could not specifically identify the malfunction that caused the elevator to stop (Tr. 388).

On cross-examination, Mr. Smith stated that he did not speak to any of the miners who were on the elevator when it stopped. He identified a copy of his previous statement given to an MSHA special investigator, exhibit G-4, and confirmed that his statement indicated that he told Mr. Hogan and Mr. Ventura that he "didn't know what the problem was". When asked whether there was a difference in telling them that "there's no problem", as opposed to telling them that he "didn't know what the problem was", he replied "I'd say that's pretty close to the same thing" (Tr. 395).

In response to further questions, Mr. Smith stated that from his position in the penthouse at the time the elevator stopped he would have been able to observe any drop. While he could not see the actual cage, he could observe the cables and would have seen any slippage of the elevator motor or head frame. He confirmed that he was standing at the penthouse by the elevator braking device when the motor stopped and he heard the brakes set, and had the elevator dropped he would clearly have seen the cable drop (Tr. 404). When asked to explain why some of the miners described the stop as a drop, he replied "I've been on it when it stopped before, and it gives you a sensation of rising and then falling down, gravity" (Tr. 404). He also confirmed that from his position he could hear no shouts or screams from inside the elevator cage.

James S. Conrad, Jr., MSHA Federal Mine Inspector, testified that he was familiar with the safety features required

~2202

for elevators in underground mines. He confirmed that he was called to the mine at approximately 5:00 p.m. on December 28, 1982, by Mr. Hager, the general mine foreman, and that he was asked to come to the mine "to help settle a dispute in relation to the elevator, whether or not it was safe to operate" (Tr. 408). After arriving at the mine, Mr. Conrad indicated that he met with elevator mechanic John Lusky who advised him that none of the safety devices were "jumpered out". Mr. Lusky also advised him that the elevator was safe to operate, and Inspector Conrad confirmed that he issued no citations or violations (Tr. 411).

Allen E. Hager, General Mine Foreman, testified that he was aware of the fact that on December 27 and 28, 1982, the elevator in question was experiencing problems. There was a problem with the doors on December 27, and it was taken care of. The problems early in the day on December 28, were also with the doors, and the midnight shift came out of the mine by means of the slope, and this was because the elevator representative was trying to find out what was wrong with the elevator (Tr. 425). The decision to call in the mechanic had nothing to do with the safety of the elevator because the elevator could have been used and any malfunctions had nothing to do with its safe operation (Tr. 426).

Mr. Hager confirmed that on the morning of December 28, the malfunctioning elevator doors had been repaired, but another malfunction occurred at approximately 3:00 p.m. that day, and this was again connected with the doors. He later learned that the elevator stopped as it was coming up with a load of miners. When he was informed of this incident, he proceeded to the elevator landing, and learned that Mr. Smith had run some tests and he asked Mr. Smith if anything was malfunctioning and he responded "no" (Tr. 427). Mr. Hager then remained while the evening shift rode the elevator down, and prior to 4:00 p.m. no one complained to him concerning the safety of the elevator (Tr. 428).

Mr. Hager stated that he first learned that Mr. Hogan and Mr. Ventura refused to ride the elevator after the day shift had "caged out" and the majority of the afternoon shift had "caged in". Mr. Hogan, Mr. Ventura, and Mr. Denny Smith "confronted him" on the elevator landing and informed him of the fact that Mr. Hogan and Mr. Ventura were exercising their individual safety rights because they believed the elevator was unsafe to ride (Tr. 429). Mr. Hager stated that he offered to "cage them down on in the manual mode" and explained to them that he believed the elevator was safe to ride. His precise words were "there's nothing wrong with the elevator. It's safe to ride" (Tr. 430). He stated that they still persisted in invoking their individual safety rights and that they said nothing about the elevator dropping (Tr. 430).

~2203

Mr. Hager confirmed that he met with Mr. Hogan and Mr. Ventura in his office after their refusal to ride the elevator and that he repeated his offer to cage them in manually, and also repeated his view that the elevator was safe to ride (Tr. 431). Prior to this meeting he (Hager) had spoken with Jackie Smith and was informed that the elevator was operating properly and that he had found nothing wrong with it. Mr. Hager also confirmed that he had initially offered to transport Mr. Hogan and Mr. Ventura into the mine by means of the slope, but subsequently retracted that offer. He retracted the offer after he gave thought to the fact that by making the offer in the first place he would be placed in a position of saying there was something wrong with the elevator, and as far as he was concerned this was not the case (Tr. 432).

Mr. Hager stated that he summoned the federal and state inspectors to the mine to determine the safety of the elevator because this is the procedure dictated by the labor-management contract, exhibit R-3 (Tr. 433-435). He also called in the elevator representative, and Mr. Hager stated that there was no doubt in his mind as to the safety of the elevator (Tr. 436-437). He confirmed that during his meetings with Mr. Hogan and Mr. Ventura concerning their refusal to ride the elevator no information was forthcoming concerning the purported elevator dropping or the fact that people on the elevator had screamed, grabbed other people's arms, or that legs had buckled (Tr. 437).

Mr. Hager confirmed that he met with Mr. Willis, Mr. Hogan, and Mr. Ventura and informed them collectively that he was suspending Mr. Hogan and Mr. Ventura for their refusal to ride the elevator. He further confirmed that the suspensions were made in accordance with the contract which authorizes such suspensions if it is determined that the proper state and federal inspection officials confirm that the work conditions on which the refusals are based did not constitute violations. Further, it was his view that Mr. Hogan and Mr. Ventura did not act in good faith because the elevator was operating properly at the time of their refusal to ride it and that approximately 160 miners caged in and out of the mine on the very same elevator at the same time as the work refusal (Tr. 441-442). When asked what he would do if he had been told that the elevator dropped 50 to 100 feet, Mr. Hager responded as follows (Tr. 445):

A. Well, I'd investigate the incident with the people that allegedly made the statements, and if they were sincere in saying they fell that distance, I'd have no alternative but to shut the elevator down until it was inspected thoroughly.

~2204

On cross-examination, Mr. Hager reiterated that he may have heard about the elevator dropping, but the first time he heard this would have been after 4:00 p.m. on December 28, 1982. He also confirmed that he had no knowledge as to the specific causes of elevator malfunctions at the time he made the offer to take Mr. Hogan and Mr. Ventura down on the elevator by manual mode (Tr. 447). He was aware of the test runs and had no knowledge of any additional malfunctions at the time this offer was made, and he was present when Mr. Rebottini got off the elevator. Mr. Hager confirmed that while he did not draft the suspension notices given to Mr. Hogan and Mr. Ventura, exhibits G-1 and G-2, he signed them (Tr. 450). He confirmed that Mr. Hogan had on one previous occasion exercised his individual safety rights in connection with the elevator, but he was not disciplined and was given alternative work (Tr. 454).

In response to further questions, Mr. Hager denied that Mr. Hogan or Mr. Ventura ever apprised him of any statements made by miners on the elevator that the elevator had dropped any distance, that their knees buckled, that someone grabbed another, or that anyone screamed (Tr. 460-461). If these assertions had been communicated to him he would have shut the elevator down and conducted a thorough investigation (Tr. 461).

Walter A. Petros was called as the Court's witness, and he confirmed that he is employed by the respondent as a maintenance foreman. He confirmed that he was on the elevator in question when it stopped on December 28, 1982, and that he spoke with Jackie Smith over the telephone from the elevator. Mr. Petros stated that after the elevator stopped he heard no one screaming, and he described the demeanor of the miners on the elevator as follows (Tr. 474-475):

Well, I would say, just like everybody else, it was a shock at first, you know, because just like going in any other elevator that comes up to the floor, it sort of, you know, your stomach sort of feels uneasy to start with, and then it just settles back down when you come to a pretty fast stop. But, I know myself, it's happened two or three times that when you're going down somebody'll accidentally hit the stop button. And it does the same thing. It gives you a jolt. And as soon as it did that, you know, like I said, everybody was probably scared at first, but as soon as it did that, and it did it, you realized what happened, or I did. And then I went over to find out what, you know, had caused it.

~2205

Mr. Petros stated that in his opinion the elevator did not drop, and he indicated that when it came up the shaft and stopped there was spring tension on the cables and that "this will give you a little up and down movement" (Tr. 475). When asked whether he detected any panic on the elevator, he replied as follows (Tr. 476):

Not right --. You know. I don't know. Like I said, I was trying to get to the phone and, I mean, I didn't actually pay any attention to what everybody was saying. But, some people are more susceptible to panic than others. So, you know, I mean --. I think, what happened is when it did stop and then I got on the phone and talked to Jackie and it started back up, I don't really think there was time for --, you know, if it would have set there for maybe 10 or 15 minutes, then you might have got the people into a little panic situation.

Mr. Petros confirmed that after he got off the elevator he went to the bathhouse but did not speak with Mr. Hogan or Mr. Ventura, and he remembered speaking to no one else, nor did he remember observing anyone talk to any management people (Tr. 477).

Findings and Conclusions

The critical issue in this case is whether the refusal by Mr. Hogan and Mr. Ventura to ride the elevator underground to their work stations because they believed it was not safe is protected by Section 105(c) of the Act. Although Mr. Hogan and Mr. Ventura were assigned other work after the refusal, since the elevator was the normal means for transporting them underground to their assigned duty stations, their refusal to ride the elevator constituted a work refusal.

Refusal to perform work is protected under Section 105(c)(1) if it results from a good faith belief that to go ahead with the assigned work would expose the miner to a safety hazard, and if the belief is a reasonable one. Secretary of Labor, ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (October 1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 802, 2 BNA MSHC 1213 (April 1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). Further, the reason for the work refusal must be communicated to the mine operator. Secretary of Labor ex rel. Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982).

In *Secretary of Labor ex rel. Bruce Edward Pratt v. River Hurricane Coal Company, Inc.*, 5 FMSHRC 1529 (September 1983), the Commission relied on its prior decisions in *Robinette, supra*, and *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1944 (November 1982), and rejected River Hurricane's argument that any standard used to assess the legitimacy of a miner's work refusal must be an objective one supported by ascertainable evidence. The Commission followed its previously adopted standard that the miner's honest perception of a hazard be "a reasonable one under the circumstances." The Commission also rejected a suggestion that it articulate a standard as to how severe a hazard must be in order to trigger a miner's right to refuse to work, and opted to rely on the "gradual development of the law in the cases contested before us."

In the Pratt case, the Commission considered the miner's perception of the hazards involved when he refused to fight a battery fire and refused to agree to attempt to extinguish future fires under similar circumstances. The Commission found that Pratt feared an explosion of the batteries in question would throw shrapnel and acid over him and might kill him, and they affirmed the Judge's finding that Pratt reasonably believed in a serious risk of injury from an exploding battery. Citing *Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 998 (June 1983), the Commission held that once a reasonable good faith fear in a hazard is expressed by a miner, the operator has an obligation to address the perceived danger, 5 FMSHRC at 1534.

After review of the circumstances surrounding Pratt's work refusal, the Commission found that the mine operator's explanation or attempt to address his fears did not include specific information or support as to why fighting the battery fires may not have been as dangerous as Pratt believed. The Commission affirmed the Judge's finding that the operator violated Section 105(c) of the Act by discharging Pratt for his refusal to perform a task still reasonably believed by him to be dangerous.

The facts and circumstances surrounding the work refusal in the Pratt case are different from those presented in the instant case. In addition, it seems clear to me that contrary to the position taken by the mine operator in Pratt, the operator in the case at hand took positive and affirmative steps to address the concerns articulated by Mr. Hogan and Mr. Ventura, and my reasons for this conclusion follow below.

Mr. Ventura and Mr. Hogan were not on the elevator at the time of the "dropping" incident. They learned of the incident through passing conversations with others. The

~2207

testimony concerning the purported dropping of the elevator is conflicting. Mr. Hogan testified that the miners he spoke with had different opinions, and that the purported dropping distance ranged from ten to 100 feet. Mr. Ventura claimed that Mr. Kessler informed him that the elevator stopped and then dropped about 50 feet. However, Mr. Ventura conceded that since no one was injured, Mr. Kessler may have exaggerated the extent of the purported drop. Mr. Ventura also testified that he believed eight miners may have been on the elevator with Mr. Kessler, but heard no comments from anyone else indicating that the elevator dropped.

Mr. Kessler denied that he told Mr. Ventura that the elevator dropped 50 feet. He then testified that he may have said it fell six to eight feet, and when asked to reconcile his prior signed statement to the MSHA investigator that it dropped 10 to 15 feet, Mr. Kessler stated that since he was enclosed in the cage "I can't tell you how far the cage dropped."

Mechanic trainee Don Dowling and continuous miner operator Charles Cooper, who were also on the elevator, believed that the elevator rose, stopped, fell, and then stopped again. Mr. Dowling did not state how far it fell, and while Mr. Cooper said it may have fallen eight to 10 feet, he also said "we couldn't judge the distance it fell."

Mr. Dowling stated that after he got off the elevator, he did not speak with Mr. Hogan or Mr. Ventura because he did not know them. He also stated that he said nothing about the incident to mine management. He returned to work the next day, rode the elevator, and he indicated that "it worked fine."

Mr. Cooper stated that after he got off the elevator, he spoke with safety committeeman Willis, but simply told him "there's something wrong with the elevator." However, Mr. Cooper said that he did not see or speak with Mr. Hogan or Mr. Ventura at that time. Mr. Cooper returned to work the next day and rode the elevator without incident.

Shuttle car operator Mark Sunyak, who worked the same shift as Mr. Hogan and Mr. Ventura on December 28, testified that he rode the elevator down on the first trip and that he heard no one from the preceding shift mention anything about the elevator dropping.

Shift foreman Dennis Smith loaded three trips on the elevator during Mr. Hogan's and Mr. Ventura's shift, and the

~2208

elevator did not malfunction. He heard no statements from the prior shift indicating that the elevator had dropped.

Maintenance Foreman Wayne Bair was on the elevator when it stopped, and he stated that it did not drop. Maintenance Foreman Walter Petros was on the elevator when it stopped, and he stated that it did not drop. Maintenance Foreman Jackie T. Smith was at the elevator controls when it stopped. He observed nothing in the cable mechanism which would lead him to conclude that the elevator dropped.

Mr. Hogan admitted that before telling Dennis Smith that he refused to ride the elevator, he was aware that several elevator trips were made underground with other crew members and that he observed no evidence of any elevator malfunction. Mr. Hogan also conceded that after the asserted elevator dropping incident, he did not ask Dennis Smith, Jackie Smith, or Alan Hager whether they had checked the elevator to determine what was wrong with it.

At no time during his direct testimony did Mr. Hogan ever indicate that he specifically informed anyone in mine management about the purported elevator dropping prior to, or at the time of, his work refusal. On cross-examination, Mr. Hogan conceded that he did not mention the purported elevator dropping to Dennis Smith or Jackie Smith. As for Mr. Hager, Mr. Hogan testified that he "believed" he mentioned it to Mr. Hager, but was not certain.

Mr. Ventura testified that he mentioned the elevator dropping to Dennis Smith, Jackie Smith, Alan Hager, and his section foreman Clark. When asked whether he specifically mentioned to Mr. Smith and Mr. Clark that someone had told him that the elevator dropped fifty feet, Mr. Ventura replied "yes." He then testified "* * well, I didn't say fifty feet, but that it had dropped." He also indicated that he did not identify the person who had told him about the drop to Mr. Hager, and that Mr. Hager advised him that he was not aware that the elevator had dropped.

Respondent's testimony and evidence establishes that after the complainants informed Dennis Smith and Alan Hager that they were exercising their individual safety rights in refusing to ride the elevator, both Mr. Hager and Mr. Smith assured them that the elevator was safe. Mr. Hager testified that had he been informed that the elevator had dropped 50 or 100 feet, he would have shut it down as an imminent danger and prohibited anyone from riding it. While it is true that miners are not necessarily required to accept mine management's evaluation of a perceived hazard, on the facts of the instant

~2209

case, I conclude and find that mine management here made a positive and reasonable response to the complainants safety concerns and my reasons in this regard follow.

While it may be true that Mr. Hogan and Mr. Ventura communicated "their fears" about the elevator to several management members, MSHA's inference at page 8-9 of its brief that they articulated any specific concerns about the purported elevator dropping to either Mr. Hager, Mr. Dennis Smith, or any other management representative is rejected as unsupported by any credible testimony.

While it may be true that Mr. Hager and Mr. Dennis Smith had reason to know that the elevator had malfunctioned prior to the work refusal, I cannot conclude that Mr. Hager's reactions to the complaints by Mr. Hogan and Mr. Ventura were unreasonable in the circumstances. He summoned an elevator serviceman from the manufacturer, dispatched a maintenance foreman to the elevator penthouse to try to find the problem, and also summoned a Federal and state mine inspector to the scene. He also offered to operate the elevator in a manual mode so as to transport Mr. Hogan and Mr. Ventura underground without resort to the automatic elevator controls. In the meantime, several elevator trips were made underground with the rest of the shift, and the union president himself made two "test runs" on the elevator and found nothing wrong with it. All of these events were known to Mr. Hogan and Mr. Ventura prior to the work refusal. Mr. J.T. Smith, an experienced maintenance foreman who had gone to the elevator penthouse to check it, assured the complainants that he found nothing with it and that it was safe. This was communicated to Mr. Hogan and Mr. Ventura prior to the work refusal.

No cause for the stopping of the elevator was ever found. While there was speculation that a faulty contactor relay may have caused the elevator to stop, at no time were any of its safety features inoperative, and the relay was replaced. Further, the inspection by the Federal and state mine inspector revealed no safety infractions, and did not result in the issuance of any citations.

Safety committeeman Willis believed that mine management acted reasonably in summoning an elevator mechanic and the Federal and state inspectors. He commented that he had ridden the elevator many times and that "anytime that elevator malfunctions it is a headache for both management and union, it causes a lot of concern."

Committeeman Willis, who also held the elected position of vice-president of the local UMWA union, worked the same shift with the complainants, and was at the mine on December 28. He

~2210

testified that Mr. Hogan and Mr. Ventura did not speak with him prior to their work refusal. Although he spoke with Mr. Kessler, Mr. Willis testified that he simply told him that the elevator stopped and "felt like it dropped," but that Mr. Kessler said nothing about how far the elevator may have dropped.

The complainants failure to bring the purported hazardous elevator condition to the attention of a mine safety committeeman who was present for work on the same shift remains unexplained. A possible answer may lie in the fact that the complainants may have expected a "collective" work refusal by the entire shift not to ride the elevator. When this failed to materialize, the complainants invoked their own individual safety rights.

I find it rather surprising that the complainants would not bring the purported elevator "dropping" condition to the immediate attention of the safety committeeman who was present at the scene. Rather than doing this, the complainants waited until they were summoned to the mine foreman's office before involving safety committeeman Willis. The failure by Mr. Hogan and Mr. Ventura to immediately bring the purported 50 to 100 foot elevator drop to the attention of their safety representative is not only irresponsible, but casts serious doubts on their credibility and motivation in refusing to ride the elevator.

While it is true that there were elevator problems on December 27, and earlier during the day shift on December 28, the fact is that those problems involved malfunctions of the doors which had been corrected prior to the work refusal in question. Further, both Mr. Hogan and Mr. Ventura rode the elevator out of the mine at the end of their shift on December 27, and they encountered no problems.

Mr. Hogan confirmed that by the end of his shift on December 27, the elevator problem had been repaired, and that such repairs were made within ten or fifteen minutes after he heard about it. He also testified that when he later spoke to mine management (Jackie Smith, Allen Hager, and Denny Smith) on December 28, he did not ask them about the December 27 problem.

Mr. Ventura confirmed that he knew that the reported elevator malfunction of December 27 had been repaired. As a matter of fact, he testified that since the elevator was the main escapeway, his foreman granted his request to leave the mine early if the elevator were not repaired within a

~2211

half hour. Since it was repaired, Mr. Ventura did not leave early, and he rode the elevator out of the mine at the end of the shift. At that time, even though Mr. Ventura claimed that one of his fellow workers told him that he tripped while boarding the elevator when it raised up 8 to 12 inches, Mr. Ventura did not report this incident to anyone and went home.

In view of the foregoing, I conclude and find that the earlier problems with the elevator on December 27, cannot serve as a basis for any reasonable good faith belief that the elevator was hazardous at the time of the work refusal immediately prior to the work shift on December 28.

With regard to the elevator door problems of December 28, which delayed the day shift from entering the mine until approximately 10:00 a.m., testimony from several men on that shift (Kessler and Dowling), maintenance personnel (Whitehair and Jackie T. Smith), and mine foreman Hager, reflects that repairs were made. The day shift then used the elevator to enter the mine, and that they did so without experiencing any problems. Under these circumstances, although Mr. Hogan and Mr. Ventura may have learned about these problems through general bathhouse conversations after the day shift came out of the mine on December 28, at the end of the shift, I cannot conclude or find that these earlier problems contributed to, or formed a basis for, any reasonable good faith belief that the elevator was hazardous at the time of their refusal to use it.

Based on a careful review and scrutiny of all of the testimony and evidence in this case, I conclude that the only possible basis for the complainants' belief that an elevator hazard existed is the information given them by certain day shift miners who were on the elevator when it reportedly "dropped." The essence of the work refusal lies in the contention by Mr. Ventura and Mr. Hogan that, not knowing what caused the reported "drop," they were not willing to chance a possible repeat incident.

Mr. Ventura testified that it was possible that he would not have refused to ride the elevator had Mr. Kessler not mentioned the purported "drop." When asked whether he would have still refused to ride the elevator if no one had mentioned the "drop," Mr. Hogan responded "I don't know, that's hypothetical."

There is no evidence in this case that the respondent has ever retaliated against any miners because they exercised their individual safety rights. As a matter of fact, Mr. Hogan

~2212

and Mr. Ventura were assigned other work when they refused to ride the elevator. On prior occasions, Mr. Hogan had made safety complaints and invoked his right to refuse to work for safety considerations, and nothing happened to him. He was given other work, and the matters complained of were taken care of by mine management.

Shuttle car operator Mark Sunyak testified that he had previously exercised his safety rights in regard to certain imminent danger situations, but that mine management took corrective action and did not discipline him.

In *Dunmire and Estle*, supra, the Commission held that a combination of trustworthy first-hand reports from other miners, coupled with the complainant's immediate preceding first-hand experience as to certain hazardous roof conditions, supplied a supportable and acceptable basis for concluding that there was a reasonable belief in the existence of the hazardous conditions. In affirming the Judge's finding that the complainant's work refusal was protected activity, the Commission relied on the record of credible, first-hand, corroborative evidence presented, including the complainant's prior personal exposure to the hazardous roof conditions, and their previous complaints spanning several months.

In the case at hand, I cannot conclude that the circumstances faced by Mr. Hogan and Mr. Ventura, were similar to those faced by *Dunmire and Estle*. Based on a preponderance of all of the credible testimony, I am convinced that Mr. Ventura and Mr. Hogan were not presented with credible first-hand information indicating that the elevator in question would more than likely fall to the bottom of the shaft if they were to ride it. Taken as a whole, the record in this case establishes to my satisfaction that notwithstanding the fact that mine management took reasonable steps to insure their safety, Mr. Hogan and Mr. Ventura took it upon themselves to decide that they were not going to ride the elevator. The fact that their own union representatives rode it, that other members of the crew rode it, and that mine management assured them that it was safe, simply had no impression on them. Given these circumstances, I cannot conclude that the respondent violated their protected rights under the Act. In the final analysis, I believe that Mr. Hogan and Mr. Ventura, faced with a decision that they would have to make as individuals, opted to make a decision that they believed would ultimately vindicate their own individual opinions. However, after close examination of all of the objective testimony and evidence of record, I believe that they were wrong. Accordingly, I cannot make findings and conclusions that would support their position.

~2213

After both sides had completed their questioning of the complainants, I recalled them for additional questions. When asked why their prior signed statements given to MSHA's special investigator during his investigation of their complaints fail to mention that they informed anyone in mine management at the time of the work refusal about the purported elevator dropping, Mr. Hogan indicated that the special investigator somehow failed to record his entire statement and somehow edited his statement. Mr. Ventura stated that he "was not sure" why he did not tell MSHA's investigator the full story of the purported elevator "dropping."

After viewing Mr. Ventura and Hogan on the stand during their testimony at the hearing, I conclude that they were less than candid in what they told the MSHA special investigator during his investigation of their complaint, as well as what they testified to at the hearing. In short, I simply do not believe that they in fact told the special investigator that they were informed that the elevator had in fact dropped or fallen, and that this asserted event really influenced their decision not to ride it. To the contrary, I conclude and find that Mr. Hogan and Mr. Ventura did not communicate the asserted elevator "dropping" to anyone at anytime prior to their work refusal. Absent this communication, I cannot conclude that their work refusal was reasonable.

Contrary to the situation which existed in the Pratt case, supra, I conclude and find that the respondent in the instant case specifically and directly addressed the purported hazardous condition articulated by Mr. Hogan and Mr. Ventura, and it did so in a manner which should have pacified and assured a reasonable person that he was not faced with a choice of riding an elevator that could have been expected to result in injury or exposure to possible harm. In short, I conclude and find that the complainants in this case acted unreasonably in refusing to ride the elevator in question, and that the suspensions meted out for the work refusal were reasonable in the circumstances, and did not violate any protected rights under the Act.

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of a preponderance of all of the testimony and evidence adduced in this case, I conclude and find that the respondent did not discriminate against Mr. Hogan or Mr. Ventura, and their rights under the Act have not been violated. Accordingly, their complaints ARE DISMISSED.

George A. Koutras
Administrative Law Judge