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KENNETH PITTMAN V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

KENNETH D. PITTMAN,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 82-334-D

v.

MSHA Case No. HOPE CD-82-25

CONSOLIDATION COAL COMPANY,
RESPONDENT

Rowland No. 3 Mine

DECISION

Appearances: F. Alfred Sines, Jr., Esq., Anderson, Sines
& Haslam, L.C., Beckley, West Virginia, for
Complainant;
Robert M. Vukas, Esq., Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Steffey

Pursuant to an order consolidating issues and providing for hearing issued December 22, 1982, an 8-day hearing in the above-entitled proceeding was held on February 1 through February 4, 1983, and April 5 through April 8, 1983, in Beckley, West Virginia, under 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 July 29, 1982, as amended on September 27, 1982, by Kenneth D. Pittman alleging that he was unlawfully discharged by Consolidation Coal Company on January 18, 1982, in violation of section 105(c)(1) of the Act. 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.

Complainant filed his initial brief on June 20, 1983, and respondent filed its brief on August 18, 1983. Complainant filed a reply brief on September 20, 1983. In addition to the usual credibility determinations which have to be made in most discrimination proceedings, respondent's brief poses the following issues: (1) Did complainant engage in any protected activities prior to his discharge? (2) If complainant did engage in any protected activities, did those activities contribute in any way to complainant's discharge? (3) Assuming, arguendo, that complainant did engage in protected activities, did Consolidation Coal Company (Consol) have a legitimate business reason for discharging him for matters which are not protected under the Act? (4) As a matter of policy, would a disobedience of the mining laws be encouraged, if it were to be

found that complainant engaged in a protected activity when he knowingly carried out an unlawful order given to him by the mine foreman?

On the basis of credibility determinations hereinafter made, I find that complainant's discharge was not motivated by any protected activities and that complainant was discharged for legitimate business reasons. It is unnecessary for me to consider the fourth issue raised in Consol's brief because the facts do not support a finding that Consol's management ordered complainant to produce coal in violation of the mandatory health and safety standards.

Findings of Fact

Based upon the demeanor of the witnesses and the reliable, credible evidence, the following findings of fact are made:

1. Complainant, Kenneth D. Pittman, began working for coal companies in February 1970 (Tr. 13). He received a certificate as a certified mine foreman on April 13, 1976, and began working for respondent, Consolidation Coal Company, on May 15, 1976, as an assistant section foreman (Exh. 3; Tr. 19; 24). He received a promotion to section foreman in August 1976 and continued working in that capacity until he was discharged on Monday, January 18, 1982, for producing coal without establishing and maintaining adequate ventilation in the working section or, in the words used in his personnel file, for "unsafe work performance" (Tr. 54).

2. The events leading up to Pittman's discharge began to occur on Friday, January 15, 1982. On that day, Pittman started producing coal in five entries which were to be developed to the right of a pillared-out area in the 3B Section of Consol's Rowland No. 3 Mine (Exh. 21; Tr. 76). Pittman recognized at the beginning of his day shift that an inadequate volume of air was available on his section because the blades in his anemometer would not turn when he tried to obtain an air reading for the No. 1 entry which he was planning to cut into the new producing area (Tr. 87). He believed that some air was leaking around the temporary curtains which had been placed across the entries leading into the pillared-out area and he also believed that some air was going back down the track entry outby the prospective new producing area (Tr. 89; Exh. 21).

3. Pittman called the mine foreman, Fred Thomas, on the phone and advised him that he was unable to obtain any air in the new area and that he believed the air was primarily bleeding into the pillared-out area and was passing through the gob to the outside of the mine through some holes or "punchouts" which had been made to the surface for the express purpose of preventing a build up of noxious gases in the pillared-out area (Tr. 90). Thomas asked Pittman about the condition of his curtains and Pittman told Thomas that he had already hung

double curtains along the pillar line. Thomas replied that Pittman had put his curtains in the wrong place because they should have been placed about one break out by the pillar line, but Pittman advised Thomas that he had already installed them on the gob line or pillared-out area and that he believed he needed seven permanent stoppings made of cinder blocks to prevent air from leaking into the gob area (Tr. 1800). Thomas replied that he believed Pittman only needed four permanent stoppings (Tr. 91).

4. Pittman claims that Thomas told him to go ahead and produce coal as well as he could and that he would immediately send in some blocks for construction of permanent stoppings (Tr. 101). Pittman said that the dust on the section was so bad that if you stood on the right side of the continuous-mining machine, you "couldn't see anything" (Tr. 101). Although the men on Pittman's crew complained about excessive dust, they produced 109 shuttle cars of coal before quitting time at 3:30 p.m. (Tr. 102-103). The miners produced coal in the extremely dusty atmosphere because they understood that Pittman might get fired if he had refused to produce coal in accordance with Thomas' alleged instructions for Pittman to produce coal as well as he could until the cinder blocks requested by Pittman could be sent to the 3B Section (Tr. 125; 467; 929; 980; 1121; 1138).

5. The day following the production of coal without adequate ventilation was Saturday, January 16, 1982. Saturday is used for maintenance work rather than production of coal. Pittman was the only section foreman who was scheduled to work on January 16, 1982 (Tr. 110). Six miners were assigned by Thomas to assist Pittman in advancing the conveyor belt on 3C Section where Pittman did not normally work (Tr. 110-113; 115). Although some supplies were taken to Pittman's 3B Section on Saturday (Tr. 848), those supplies did not include the cinder blocks which Thomas had allegedly promised to send to Pittman's section on the previous day (Tr. 116). Thomas did not have the cinder blocks delivered to the 3B Section because he believed that the available men should be used for the purpose of replacing some trailing cables on equipment in the 3A Section (Tr. 848; 1810).

6. The next day on which Pittman worked was Monday, January 18, 1982. Pittman claims that he reported for work about 7:30 a.m. and inquired of miners who had worked on the midnight to-8 a.m. shift whether any cinder blocks had been taken to the 3B Section during that shift and received a negative reply. Pittman claims that he talked to Thomas about the urgent need of construction of permanent stoppings along the pillared-out area in 3B Section and that Thomas promised to send into the mine the cinder blocks needed for construction of permanent stoppings. Pittman alleges that when he arrived on his section on Monday, he had the usual Monday safety meeting, found that

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he had "no" air, and again called Thomas, as he had on Friday, and told him that he had no air and that the men were refusing to work without air (Tr. 121-122). Thomas again allegedly told Pittman to get the men to work and that Jerry Toney, the belt foreman, was in the process of bringing in blocks to build the stoppings (Tr. 123). Pittman passed on to his crew Thomas's alleged request that they work and they again agreed to work without adequate ventilation because they knew that Thomas had threatened several times to discharge Pittman (Tr. 125; 199).

7. Jerry Toney subsequently arrived on the 3B Section with two flatcars loaded with cinder blocks as well as two supply men to unload the blocks and three miners to stack the blocks in the places where Thomas had ordered the construction of permanent stoppings (Tr. 1697). Pittman asked Jerry Toney if he needed any of Pittman's crew to help in constructing the stoppings and Toney replied that he only needed Pittman's unitrak or scoop operator for the purpose of hauling the blocks to the respective locations where the stoppings were to be constructed (Tr. 126; 1699). Although Pittman claims that Toney instructed him to produce coal while the stoppings were being constructed, Toney claims that no such question regarding the production of coal arose because Pittman's crew was already producing coal at the time he arrived on Pittman's 3B Section (Tr. 126; 1011; 1700). Toney's version of that conflicting testimony is accepted as correct because the dispatcher's report shows that Pittman reported that production had begun at 8:42 a.m. and that Toney did not arrive on the 3B Section until 9:51 a.m. (Exh. C). Toney's crew was able to stack the blocks as fast as the unitrak operator delivered them at the respective stopping sites so that the stacking of all of the permanent stoppings had been completed by 1 p.m. (Tr. 1042; 1701).

8. When Pittman called out his midday production report on Monday, the mine foreman, Thomas, answered the phone and advised Pittman that the mine superintendent, Norman Blankenship, and a newly hired mine engineer, Kent Wright, would be visiting his 3B Section that afternoon and Pittman replied that "Everything looks good to me" (Tr. 1890). Jerry Toney left the 3B Section about 1 p.m. to check on a newly installed belt conveyor in the 3C Section and encountered Blankenship, Thomas, and Wright in that section (Tr. 1702-1703). Toney soon thereafter returned to the 3B Section and advised Pittman that his superiors were on their way to visit his 3B Section (Exh. C). Pittman told Toney that "Everything's okay" (Tr. 1704).

9. About 2 p.m., Blankenship, Thomas, and Wright arrived on the 3B Section and Blankenship very soon thereafter found the operator of the continuous-mining machine producing coal under such dusty conditions that Blankenship could hardly see the lights on the machine (Exh. C; Tr. 2006). Blankenship

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immediately ordered the operator to back the continuous miner out of the entry until ventilation could be restored (Tr. 154; 1893). When Pittman asked Blankenship what was happening, Blankenship asked Pittman to obtain an air reading and Pittman replied that he could not do so because he had lost his watch (Tr. 2006). Blankenship went to the main intake entry for the 3B Section and obtained an air velocity of 26,000 cubic feet per minute (cfm) which he knew was sufficient to provide the required 9,000 cfm at the last open crosscut as well as the required 3,000 cfm at each working face (Tr. 1706; 2007). Blankenship also found that some pieces of belting being used as a stopping at the No. 2 entry in by the tailpiece had space between the pieces of belt so that a considerable amount of air was leaking down the conveyor belt entry and Thomas and Jerry Toney found that a check curtain in the No. 3 entry was torn and only partially hung so that air was escaping into that entry (Tr. 1705; 1897; 2008). After curtains were placed over the belting in the No. 2 entry and additional curtains were hung in the No. 3 entry, Blankenship and Thomas obtained an air velocity of 16,500 cfm in the intake of the area where Pittman had been producing coal and a velocity of 13,400 cfm in the last open break of the area where Pittman had been producing coal (Tr. 1707; 1898; 2009).

10. Blankenship then asked Pittman to take a reading behind the curtain in the entry where the continuous miner had been operating and told him to resume production of coal if everything was all right (Tr. 2009-2010). A period of only 15 minutes elapsed between the time Blankenship found inadequate air and the time when production was resumed (Tr. 1710; 1897; 2009). Blankenship watched the continuous-mining machine run long enough to satisfy him that the ventilation problem no longer existed (Tr. 2010). The operator of the continuous-mining machine, Basile Green, testified that the dusty conditions under which he had been working all day were eliminated after Blankenship stopped production and worked on the ventilation system (Tr. 1120; 1136).

11. After Blankenship, Thomas, and Wright had returned to the surface of the mine on Monday, Blankenship checked the fireboss books and found that Dennis McConnell, the section foreman who worked on the evening, or 4 p.m.-to-midnight shift, on Friday, January 15, 1982, had reported air velocities of 9,100 cfm for both the intake and last open break (Exh. 18, p. 55; Tr. 1648) and that Pittman had reported 9,000 cfm for the intake and no entry was made for the last open break (Exh. 18, p. 53; Tr. 108). McConnell had, by then, already reported for work on Monday so that Blankenship was able to ask him in person whether he had just written that figure in the book or had actually obtained it. McConnell assured Blankenship that he had actually obtained the velocities shown in the book and

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also advised Blankenship that the shift foreman, George Taylor, had been on the 3B Section on Friday and had also taken an air reading. Blankenship asked Taylor what velocity he had obtained and he stated that he had obtained a velocity of 10,000 cfm at the last open break. Blankenship noted that no entries in the book, including those reported by Pittman, had been less than the required velocity of 9,000 cfm (Tr. 2011-2012). Blankenship then ordered Thomas and Pittman to report to his office as soon as Pittman had come out of the mine at the end of his shift (Tr. 2013).

12. After Pittman and Thomas had reported to him, Blankenship advised Pittman that the operator of the continuous-mining machine and his helper had told him when he stopped them from mining that they had complained to Pittman about the dust at the beginning of the shift and that Pittman had asked them to run the miner because Jerry Toney was coming to the section to construct permanent stoppings so as to provide the air velocity they needed (Tr. 2014). Blankenship said that Pittman stated that Thomas knew he was producing coal without adequate ventilation. Thomas's reply to that allegation was that Pittman was telling a "damn lie" (Tr. 2015). Blankenship stated that he believed Thomas was telling the truth because he had already had Pittman lie to him on previous occasions and that he knew that Thomas was aware of his feelings pertaining to safety and that he did not believe Thomas would have taken him to the 3B Section if he had known in advance that Pittman was operating without adequate ventilation (Tr. 2020). Blankenship reminded Pittman of the times when he had warned Pittman about producing coal in violation of the roof-control plan and about having suspended Pittman for 5 days without pay for a second violation of his instructions as to the construction of cribs before making a pushout in a pillaring operation (Tr. 2013).

13. Blankenship was called out of his office during his discussion with Pittman. He talked with Thomas in the hall at that time and asked Thomas to give Pittman an opportunity to resign so that no record of a discharge would show in his personnel file. When Blankenship returned to the office, Thomas advised him that Pittman would not quit. Therefore, Blankenship discharged Pittman as of that day, January 18, 1982 (Tr. 2019).

The findings of fact set forth above support a conclusion that Consol's management discharged Pittman for knowingly operating his section without adequate ventilation in violation of Federal regulations and Consol's ventilation system, methane, and dust control plan (Exh. 19). The preponderance of the evidence, as hereinafter explained, supports a finding that Pittman's discharge did not involve a violation of section 105(c)(1) of the Act.

Consideration of Parties' Arguments

Overview of Parties' Briefs

Pittman's initial brief argues in Part I (pp. 8-18) that Pittman made safety complaints to the mine foreman about a lack of adequate ventilation on his section and that those complaints were protected activity under section 105(c)(1) of the Act which provides as follows:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to the Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Pittman's initial brief contends in Part II (pp. 19-30) that the motivation for Pittman's discharge was his having annoyed the mine foreman by making complaints about inadequate ventilation on his section on Friday and Monday and by having urged the mine foreman on Saturday to send cinder blocks to his section so that permanent stoppings could be constructed. Pittman's brief has a Part III (pp. 31-37) which does not begin with a subject-matter heading, but that portion seems to be devoted to an argument that Pittman's discharge involved disparate treatment. Part IV (pp. 38-40) concludes that

Pittman would not have been discharged if it had not been for his reporting of inadequate ventilation to the mine foreman. (FOOTNOTE 1)

Consol's brief (Part I, p. 1) states correctly that Pittman was discharged for knowingly having operated his section on Monday without adequate ventilation. Pittman's excuse for having violated an important health and safety regulation was that the mine foreman had asked him to produce coal until such time as cinder blocks could be brought into the mine for construction of permanent stoppings.

Part II (pp. 1-2) of Consol's brief lists the issues which I have already noted in the second paragraph of this decision. Part III (pp. 2-8) of Consol's brief is entitled "Testimonial Facts" and provides an accurate summary of the record. Part IV (pp. 9-34) of Consol's brief discusses all of the issues raised in this proceeding and contends that Pittman was not discharged for having engaged in any activity protected under the Act. Consol argues that Pittman was treated no differently from other employees who have been discharged or otherwise disciplined. Consol's brief shows that the documentary evidence introduced in this proceeding was produced before Pittman was discharged and that the preshift books show that Pittman deliberately falsified the records in an attempt to support his claim that he could not obtain an adequate amount of air on his section on January 15 and 18, 1982, without having permanent stoppings constructed, that the credibility of all of the UMWA employees who testified in Pittman's behalf was largely destroyed by their inconsistent testimony and by the fact that one of Pittman's witnesses, Randy Workman, testified with great vividness and detail about facts which occurred at the mine on January 15, 1982, although Workman did not actually report for work on that day. Part V (p. 35) of Consol's brief is a conclusion asserting correctly that Pittman's complaint should be dismissed for failure to show that his discharge involved a violation of section 105(c)(1) of the Act.

Part I (pp. 1-2) of Pittman's reply brief claims that Consol's safety record at the Rowland No. 3 Mine may be based on misleading statements in accident reports. Part II (pp. 2-5) addresses the issue of credibility by arguing that company or managerial employees have more reason to testify falsely than UMWA or wage employees because UMWA employees are protected from discrimination by their Wage Agreement, whereas managerial employees are vulnerable to discharge and denial of promotional advancement if they should testify in support of an employee who has been discharged. Part III (pp. 5-6) of Pittman's reply brief argues that Pittman is not the only employee Consol or an affiliate has discharged for "just following orders", citing Judge Fauver's decision in *Roger D. Anderson v. Itmann Coal Co.*, 4 FMSHRC 963 (1982). Part IV (pp. 6-16) of Pittman's reply brief argues that Consol's motivation for discharging Pittman was its obsession with achieving production as cheaply as possible at the expense of slighting safety considerations. Pittman's reply brief does not even attempt to answer the precise credibility issues discussed in Consol's brief.

The Parties' Burden of Proof in Discrimination Cases

The test for determining whether a complainant has shown a violation of section 105(c)(1) of the Act was given by the Commission in *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom., *Consolidation Coal Co. v. Ray Marshall*, 663 F.2d 1211 (3d Cir.1981). Some of the Commission's language pertaining to the burden of proof was temporarily reversed 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 thereafter the court vacated its decision reported at 704 F.2d 275, except for its rulings as to back-pay issues, in *Wayne Boich d/b/a W.B. Coal Co. v. F.M.S.H.R.C.*, 719 F.2d 194, Sixth Circuit No. 81-3186, October 14, 1983, leaving intact the Commission's rationale regarding the requirements for proving a violation of section 105(c)(1) of the Act. The test set forth by the Commission in *Pasula* reads as follows (2 FMSHRC at 2799-2800):

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's

unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. [Emphasis in original.]

Pittman's Discharge Was Not Motivated By Pittman's Protected Activity

As indicated in Finding No. 3, supra, Pittman called Thomas, the mine foreman, on Friday, January 15, 1982, to report that he did not have any air on the section. The discussion which ensued shows that Thomas inquired about the condition of Pittman's temporary stoppings and suggested to Pittman that he had erected them in the wrong places, but Pittman defended his placement of the curtains and contended that his lack of adequate ventilation would be eliminated only if permanent stoppings were installed along the gob line or the pillared-out area from which they had withdrawn on the previous day, January 14. Thomas agreed to send in cinder blocks for construction of permanent stoppings along the gob line, but Pittman claims that Thomas told him to produce coal until such time as the permanent stoppings could be constructed (Exh. 21).

As indicated in Finding No. 4, supra, Pittman's crew produced 109 shuttle cars of coal on Friday despite the dusty conditions which prevailed. The miners produced coal without adequate ventilation because they understood that Pittman had been threatened with discharge by Thomas and they did not want to endanger Pittman's job by refusing to work until adequate ventilation had been established. Although Pittman worked on Saturday, January 16, 1982, which was a nonproducing day, he worked on an extension of the conveyor belt in 3C Section and no cinder blocks were sent to his 3B Section on Saturday (Finding No. 5, supra).

On Monday, January 18, 1982, Pittman again failed to find an adequate velocity of air on his section and again called Thomas and advised him that he did not have any air on the section and again Pittman claims that Thomas asked him to produce

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coal until such time as Jerry Toney could bring in cinder blocks and construct permanent stoppings on the section. Pittman thereafter, as he had on the previous Friday, told his men that Thomas wanted him to produce coal until the stoppings could be built and the men again produced coal with the realization that Pittman's job would be jeopardized if they declined to run coal until adequate ventilation could be provided (Finding No. 6, supra).

Pittman's initial brief (pp. 19-30) argues that Pittman's calls to Thomas concerning ventilation were safety complaints which irritated Thomas so much that Thomas said nothing in Pittman's defense when the mine superintendent, Blankenship, inspected the 3B Section on Monday and discharged Pittman after finding him to be producing coal without adequate ventilation (Finding Nos. 9-13), supra).

There can hardly be any argument but that a section foreman's report to the mine foreman of inadequate ventilation is an act which is protected under section 105(c)(1) of the Act, but under the Pasula test, supra, Pittman is obligated to prove that his discharge * * * was motivated in any part by the protected activity." Even if everything Pittman alleged in this proceeding were true, neither Thomas nor Blankenship would have had any reason for discharging Pittman for calling Thomas on Friday and Monday to report that he had inadequate ventilation on his section. Thomas, of course, did not discharge Pittman, but if he had, Pittman's reporting of inadequate ventilation would not have been an irritant to Thomas because Exhibits A and C show that Pittman produced at least an average amount of coal on both Friday (109 shuttle cars) and Monday (100 shuttle cars). Pittman's production was greater than that achieved by 3C Section on both days and greater than 3A Section on Friday. On Monday, the 3A Section did outproduce Pittman's 3B Section by 11 shuttle cars.

Both of Pittman's briefs argue extensively (Initial, pp. 19-30, and Reply, pp. 6-8) that Thomas was so production oriented, that he would have been greatly upset with Pittman for calling him on two successive production days to advise him that there was "no" air on the section. Since Thomas obtained a very satisfactory run of coal from Pittman's section on both days, Pittman's claim that his calls about a lack of air on his section annoyed Thomas so much that Thomas wanted to see him discharged is not supported by the preponderance of the evidence. Thomas did not send the cinder blocks which Pittman requested until Monday. Since Pittman's calls did not cause Thomas to take action toward constructing permanent stoppings any sooner than he had planned to do so, there is nothing in the record to show that Pittman's having reported inadequate ventilation to Thomas on Friday and Monday would have been such an annoyance to Thomas that he would have been motivated by

those calls to discharge Pittman for that reason. Therefore, for the reasons given above and for the reasons hereinafter given, I reject Pittman's claim that his discharge was motivated by Pittman's protected activity of having reported inadequate ventilation to Thomas on Friday and Monday.

I have noted that the parties' briefs refer repeatedly to certain incidents which occurred during Pittman's 5 years and 8 months of employment by Consol. In order to facilitate the parties' review of my decision, and the Commission's review if a petition for discretionary review is subsequently granted, I am setting forth below a Table of Contents to assist the parties in finding the place in my decision where I have indicated my findings with respect to various factual and legal arguments made by the parties.

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Pittman's Testimony Must Be Given a Very Low Credibility Rating

Consol's brief (pp. 23-34) pointed out so many credibility defects in Pittman's testimony, that Pittman's reply brief did not even attempt to rebut Consol's specific arguments. All that Pittman's reply brief (pp. 2-5) could use as a rebuttal argument was that the company or managerial employees who testified on behalf of Consol are more likely to perjure themselves than the UMWA employees who testified on behalf of Pittman because UMWA employees are protected from discriminatory action by their Wage Agreement, whereas managerial or salaried employees are completely at the mercy of Consol if they fail to support Consol's position in a discrimination proceeding. There is no doubt some validity in Pittman's argument that managerial employees are likely to be motivated toward supporting their employers and I always take that tendency into consideration in evaluating their testimony. On the other hand, UMWA employees are prone to support each other, especially when the discipline handed out to a section foreman, as in this case, spills over onto the UMWA employees who were working for the section foreman who is disciplined. Inasmuch as Blankenship criticized the operator of the continuous-mining machine for running without adequate ventilation, he also had a reason for supporting Pittman's claim that the only reason they were running without adequate ventilation was that Thomas had asked Pittman to get them to run coal despite a lack of adequate ventilation (Tr. 1154).

Credibility of witnesses, however, is a matter which a judge learns to perceive on the basis of their demeanor while testifying and on the basis of the pattern of inconsistent testimony which accrues in a lengthy hearing such as the one in this proceeding. I shall hereinafter demonstrate by specific references to the record why I believe that nearly all the allegations made by Pittman in this proceeding must be rejected in their entirety as being outright fabrications made in a desperate effort to regain the job which he lost by reason of incompetence or indifference or both.

Pittman's Unsupported Claim of Having Erected and Rechecked Temporary Stoppings

Pittman testified that he had his crew erect double curtains as temporary stoppings along the pillared-out area on

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Friday, January 15, 1982, and also had them install temporary stoppings in the original area of development of the 3B Section to prevent air from going down the track or belt entry (Exh. 21; Tr. 82-87). After the work on stoppings had been completed, Pittman claims that he tried to take an intake air reading in the No. 1 entry of the new places which they were going to start driving to the right of the pillared-out area, but Pittman claims that his anemometer would not even turn (Tr. 88). He then called Thomas, the mine foreman, and told him that he could get no air on his section. Thomas advised Pittman to go hang some curtains, but Pittman replied that he had already hung the curtains and still could not obtain air for his section. Pittman then told Thomas that he would not be able to ventilate the new producing area until seven permanent stoppings had been constructed (Tr. 93-100). Pittman claims that Thomas subsequently asked him to produce coal until the stoppings could be constructed and he did so (Tr. 100-101).

On Monday, January 18, 1982, Pittman again could obtain no air reading and called Thomas to advise him that he had no air and that the men were refusing to work until an adequate amount of ventilation could be provided. Pittman claims that Thomas again asked him to get the men to produce coal until cinder blocks could be delivered to the 3B Section and permanent stoppings could be built. The men again produced coal without having adequate ventilation (Tr. 123-125).

Despite Pittman's claim during his direct testimony that he had his men erect double curtains along the gob area and inby the belt, he was unable on cross-examination to state how many curtains were already up or how many he hung even though he also claimed that he * * * went over them myself and proceeded to tighten them all up and do everything to them" (Tr. 323). Pittman tried to excuse his failure to obtain an adequate amount of air by saying that he did not have authority to ask that supplies be brought in (Tr. 369), but he had testified previously that he had requested 15 curtains to be brought in on January 14 and that he had received them on January 15 and had used them to install double curtains along the gob line (Tr. 82). Moreover, Pittman testified that * * * I required a stopping to be erected across the belt entry because of the loss of such a high amount of air being lost going back down across the overcast and the belt" (Tr. 279). Subsequently, Pittman stated that the cinder blocks had been delivered for construction of his "required" stopping, but that the stopping was never actually built and, if it had been, it would have stopped the bleeding of air down the belt entry to the track (Tr. 412).

Pittman eventually testified that he did not know how many curtains he erected along the gob line, that he had two men working on them and that they did not work together and that he

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did not know what his men had done. When he was reminded that he had said the curtains were nailed to wood, he said that a wooden piece is attached to a roof bolt in each entry during initial development in case a stopping is needed at a later time in any entry and that all stoppings are nailed to that piece of wood (Tr. 440-442). Although Pittman had originally claimed that he had his men hang double curtains along the gob line, Pittman eventually testified that he could not say for certain that he or his men had erected any stoppings or whether they had merely tried to tighten curtains which already existed along the gob line (Tr. 443).

I agreed with Pittman that it might be reasonable for him not to know for certain what his men had done (Tr. 443), but it later turned out that when the men on his crew testified, they did not know what they had done either. Danny Blevins, the roof-bolting machine helper, testified only that he and the operator of the roof bolter * * * tightened up the air coming up there to the working place there" (Tr. 448).

Darrell MacDaniel, the helper to the operator of the continuous-mining machine, testified that he thought the evening shift had hung some curtains and that he and the operator of the continuous miner hung some curtains. He first stated that none of the curtains were nailed at the bottom and admitted that failure to secure the curtains at the bottom would allow air to leak under the bottoms of the curtains (Tr. 883). Thereafter, he supplemented his testimony by stating that they had done all they could with the curtains * * * unless you might have put something heavy on [the bottoms of the curtains]. I don't know. There was timbers and stuff, but I don't know if that would have helped or not" (Tr. 890).

Theodore Robert Milam, the mechanic on Pittman's 3B Section, testified that on Friday, January 15, 1982, "everybody" helped hang curtains along the pillared-out area and that they "put crib blocks and timbers on the bottom of them to keep them from blowing out, and this was done" (Tr. 904). Milam first testified on cross-examination that every member of Pittman's crew helped hang the six double-check curtains along the pillar line, but then stated that the evening shift had already hung the curtains before Pittman's crew arrived on the 3B Section on Friday morning. Milam also confirmed on cross-examination that they had used crib blocks and timbers at the bottoms of the curtains (Tr. 921). Milam further stated that if MacDaniel stated that the curtains were not nailed to timbers or fly boards at the bottom, MacDaniel was "incorrect" (Tr. 925). Despite Milam's assertion that MacDaniel was incorrect about how the curtains were secured at the bottom, he said that he "probably didn't" see all six of the curtains and that he could not say for certain how many curtains he had personally examined (Tr. 922).

Lawrence Simms, the unitrak or scoop operator, was a good friend of Pittman's and Pittman rode back and forth to work with Simms (Tr. 983; 1002). He testified that he knew there were double-check line curtains along the pillared-out area "because I hung them" (Tr. 986). On cross-examination Simms first stated that he did not * * * know how many I actually hung, but I do know I went over there and tightened up the curtains" (Tr. 1003). Shortly thereafter, however, he said that he personally had hung * * * three, four, maybe five or six" (Tr. 1004). Simms first testified that the curtains were secured at the bottoms with * * * half-headers or crib blocks or something" (Tr. 1005), but then testified that he actually could not say how many were secured at the bottom (Tr. 1006).

Pittman's attorney called Andrew E. Fox as a witness to support Pittman's contentions. Fox is a consulting mining engineer with a master's degree from Virginia Polytechnic Institute (Tr. 1049-1050). Fox is also a certified mine foreman and has had experience as a section foreman, mine foreman, and mine superintendent (Tr. 1053-1054). He was shown a map or diagram of Rowland No. 3 Mine and he testified that properly hung line curtains along the pillared-out area should have been sufficient to have directed an adequate amount of air to the new area which Pittman began to drive on Friday, January 15, 1982 (Tr. 1085). He also stated that if air was leaking under the bottoms of the curtains, they had not been properly constructed (Tr. 1086). He further said that it was the responsibility of the section foreman to make certain that the curtains were properly constructed (Tr. 1087).

Basile Eugene Green was normally the helper for the operator of the continuous-mining machine, but the regular operator had been sent to work in 3C Section and Green was the operator of the continuous miner on Friday and Monday, January 15 and 18, 1982 (Tr. 1125). Green testified that he believed that Simms had hung the curtains along the pillared-out area and that he went over and tightened the curtains. He believed they were nailed to half-headers, cribs, and timbers, but he said "I'm not for sure * * * because "I went through there after that was done" (Tr. 1128). Although he said that "We went all the way across and tightened them up," he said that he personally tightened "Maybe one or two" (Tr. 1129). Green's testimony about what he did to the curtains was so often accompanied by words like "I believe" (Tr. 1128; 1143), "to the best of my knowledge" (Tr. 1129), and "I'm not for sure" (Tr. 1128), that one cannot make findings of fact based on such equivocal and doubtful-sounding statements.

Carlos Williams, Jr., was the operator of the roof-bolting machine (Tr. 1193). He testified that he helped tighten the curtains along the pillared-out area on Friday, January 15,

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1982, but he said that tightening the curtains did not improve ventilation any (Tr. 1195). Williams testified that he and Blevins, his helper, just tightened up six curtains which had already been constructed across the pillared-out area. He could not say for sure how many they worked on but he "guessed" that they worked on all six of them (Tr. 1207). While other witnesses had said that the curtains were nailed into timbers along the sides, Williams testified that the sides of the curtains were nailed into the coal itself. When pressed as to whether there were any timbers along the sides of the curtains, Williams said that he did not remember (Tr. 1210). Williams said that they nailed the curtains to timbers or crib blocks at the bottoms if they needed it and then he said that all of them were nailed at the bottom so far as he could remember (Tr. 1210). Williams' credibility was further eroded by the fact that he claimed to have been able to know for certain that the mine superintendent, Blankenship, walked behind his roof-bolting machine on Monday, January 18, 1982 (Tr. 1219). He said that he recognized Blankenship because his roof-bolting machine has "lights all around" it and he could identify Blankenship by his white hat (Tr. 1220). When Blankenship testified, he brought his black hat into the hearing room and stated that he had had that same black hat for the 18 years during which he has been working in coal mines (Tr. 2010-2011).

Kevin Harvey was a shuttle car operator on the 3B Section on Monday, January 18, 1982 (Tr. 1222). He claims to have heard Pittman call the mine foreman, Thomas, to state that they lacked sufficient air and that they were going to need blocks to get adequate ventilation (Tr. 1224). After Pittman had called Thomas, Harvey said that he went across the pillared-out area and checked the curtains, but they were fairly tight and there was not much more they could do to them (Tr. 1226). After production was stopped by Blankenship on Monday, Harvey believes that he checked the curtains in the Nos. 5 and 6 entries along the pillared-out area, but he could not say who helped him check the curtains and he could not say whether or not he helped place plastic curtains over the unplastered cinder block stoppings which Toney and his three helpers had stacked before production was stopped by Blankenship (Tr. 1235).

Randy Dale Workman was a shuttle car operator (Tr. 1158) and he testified that he recalled working on both Friday and Monday, January 15 and 18, 1982 (Tr. 1159). He testified that he and the other shuttle car operator went to the Nos. 1 and 2 entries and checked the curtains at the pillared-out area. They then returned to the face area and wondered where everybody else was and then went back to the pillared-out area and checked the curtains in the No. 3 entry. Workman recalled vividly that some of the curtains were * * * flying loose, some hanging down, some had to be hung back, some had to have stuff put on the bottom of them to hold them down so the air

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wouldn't blow them away" (Tr. 1161). He testified that they then ran coal all day Friday under very dusty conditions (Tr. 1162).

When Workman arrived on the section on Monday, he believed that nothing had been done to improve ventilation because there was no more air on Monday than there had been on Friday (Tr. 1166). On cross-examination, Workman stated that he was just as certain about what had happened on Friday as he was about what had happened on Monday (Tr. 1172). At that point in his cross-examination, Consol's attorney introduced documentary evidence (Exhs. T, U, and V) showing unequivocally that Workman had been absent from work on Friday, January 15, 1982 (Tr. 1173) Pittman's counsel subsequently stated that Pittman had checked his records and that Pittman's records also showed that Workman was not present on Friday (Tr. 1287).

After Consol's counsel had introduced evidence showing that Workman was absent, he asked the following question and received the following answer from Workman (Tr. 1178-1179):

Q Let me ask you this question, Mr. Workman. * * *
[W]ould the reason you're recalling all these events on Friday be because you and the other members of the crew got together on what testimony you'd be offering on the events of Friday and Saturday and on Monday?
A It could possibly--like you said, it could have happened on Monday.

Pittman's counsel thereafter introduced as Exhibit 23 a statement which Workman had given to an MSHA investigator on March 31, 1982, before Pittman's counsel was retained to represent Pittman in this proceeding. Exhibit 23 shows that Workman erroneously represented in a statement given just 2 1/2 months after Pittman's discharge that he recalled working on Friday, January 15, 1982 (Tr. 1179).

The detailed review above of the testimony of both Pittman and his crew supports a conclusion that Pittman and his crew performed, at most, a cursory examination of the curtains along the pillared-out area. The fact that they could not state for certain which curtains they purported to have built or examined shows that Pittman and his crew simply concluded that the reason for their failure to have an adequate air velocity on their section was based on Pittman's mistaken conclusion that only the construction of cinder-block permanent stoppings would provide an adequate amount of air for the new area which Pittman began to drive on Friday, January 15, 1982.

Pittman's Erroneous Claim that Permanent Stoppings Were Required

Pittman's entire case hangs on his claim that it was impossible to obtain an adequate air velocity on his 3B Section until permanent stoppings could be constructed of cinder blocks. He does not deny that he knowingly produced coal on both Friday and Saturday without having an adequate amount of air to carry the dust from the working faces. The only defense he has for deliberately violating the mandatory health and safety standards is that he called Thomas, the mine foreman, and told him that he had "no" air and asked Thomas to send in cinder blocks for constructing permanent stoppings. As I have shown above, he did not really make a concerted effort to provide air by using the curtains which had already been hung. He stated that he knew that some of the air was escaping down the belt entry to the track, but he did not tighten the curtains inby the belt entry for the purpose of preventing the loss of air down the track (Tr. 279). The scoop operator, Simms, testified that even after permanent stoppings had been constructed and plastered subsequent to Pittman's discharge, there was still an air problem because

* * * evidently it [air] was coming back down toward the power box and the belt entry" (Tr. 1017). Consequently, even if permanent stoppings had been constructed before Pittman began driving the new places to the right of the pillared-out area, construction of those permanent stoppings would not have solved the ventilation problem on Pittman's 3B Section because the air was being lost down the belt or track entry rather than being sucked into the pillared-out area as Pittman claimed.

The plain facts were correctly stated by Blankenship, the mine superintendent, when he explained that all but one of the temporary stoppings which existed on Friday, when Pittman started asking Thomas to send in cinder blocks, had already been constructed while the miners were pulling pillars. Therefore, on Friday, January 15, 1982, when Pittman's crew began to drive the new entries to the right of the pillared-out area, only one additional temporary stopping needed to be hung and that was in the area next to the half block of the No. 5 pillar which had been left standing in the pillared-out area when the miners withdrew from that area to start the new entries to the right of the pillared-out area (Exh. 21; Tr.1992).

Simms also testified that he had constructed a stopping out of conveyor belting in the No. 2 entry just inby the belt tailpiece and that he had done so in order that he could run the scoop through the stopping made of belting without tearing down the stopping (Tr. 992). When Blankenship shut down production on Monday, after finding Pittman's crew running coal with inadequate ventilation, he, the mine foreman (Thomas), and the belt foreman (Jerry Toney) only had to put curtains over the widely spaced belting in the No. 2 entry and hang additional curtains in the No. 3 entry just inby the tailpiece

in order to restore a proper amount of ventilation to the working faces (Tr. 156; 1705-1706; 1897; 2008-2009). There can be no doubt but that a proper amount of ventilation was provided in a period of about 15 minutes because Blankenship's and Thomas's testimony to that effect is supported by the testimony of the operator of the continuous miner who said that the dusty conditions under which he had been cutting coal up to about 2 p.m. on Monday ceased to exist after Blankenship stopped production and worked on the ventilation system (Tr. 1120).

It should also be noted that all of the permanent stoppings which Pittman wanted constructed had been dry stacked, but not plastered, at the time Blankenship found Pittman's crew producing coal without adequate ventilation (Tr. 1042; 1701). Although the permanent stoppings had not been plastered, the testimony of the scoop operator, cited above, shows that even after the permanent stoppings had been properly plastered, all the section foremen still had to maintain a constant vigil over all parts of their ventilation system to keep air from leaking down the track. It is clear that the reason Pittman lacked an adequate amount of air for ventilating his section was the result of his own negligence in failing to make certain that the temporary stoppings in by the tailpiece were properly secured to prevent air from leaking down the belt entry to the track.

The claim in Pittman's initial (pp. 19-37) and reply (pp. 6-16) briefs that Thomas was solely responsible for the lack of ventilation on Pittman's section is incorrect. Fox, Pittman's own expert witness, testified that it was the responsibility of the section foreman to see that his section was operating with adequate ventilation and that it was his responsibility to maintain all the curtains and other ventilating devices in every part of his section so as to assure that his crew would be working in a safe and healthful environment (Tr. 1087-1088). Pittman's claim that he was not responsible for any part of the ventilation system except that on the working section or the portion in by the tailpiece was largely refuted by the testimony of Thomas Anderson, an operator of a continuous miner, who was called by Pittman as a rebuttal witness. Anderson testified that he and Pittman walked into the mine instead of riding the mantrip and that Pittman wrote his initials in the belt entry to show that he was firebossing the belt (Tr. 2236). Moreover, Pittman's preshift examinations for both Friday and Monday show entries to the effect that the "[t]rack [was] safe for travel" (Exh. 18, pp. 53 and 65). It is true, as hereinafter explained, that Pittman claims McConnell put entries in the fireboss book which he did not give to McConnell, but the fireboss book has numerous other entries which are attributable to Pittman, without any alleged connivance by McConnell, and he makes the comment that the track was safe to travel in most of his reports. Those fireboss entries and Anderson's testimony are rather conclusive proof

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that Pittman recognized, prior to his disclaimers of responsibility made in this proceeding, that he was responsible for all parts of the ventilation system on the 3B Section. His disclaimer of responsibility is also refuted by his assertion that he "required" the construction of a stopping across the belt entry outby the tailpiece (Tr. 279).

The preponderance of the evidence supports a finding that Pittman was incorrect in claiming that he could not obtain a proper amount of air to ventilate his section because of the mine foreman's failure to send in cinder blocks for construction of permanent stoppings on Friday or Monday as soon as Pittman requested them.

Pittman's Falsifying of the Preshift-Onshift-and-Daily Report

Pittman's claim that he did not have an adequate amount of air to ventilate his section on Friday and Monday, January 15 and 18, 1982, was rather effectively destroyed by the entries in the preshift-onshift-and-daily report book, or fireboss book, which is Exhibit 18 in this proceeding. The book shows that even though Pittman claimed not to have the required velocity of 9,000 cubic feet per minute of air at the last open break and the required velocity of 3,000 cubic feet per minute at the working faces, he had called out a preshift report to another section foreman, Dennis McConnell, on Friday to the effect that he had a volume of 9,000 cfm at the intake and that on Monday he reported to McConnell that he had an intake velocity of 13,780 cfm and a last-open-break velocity of 9,600 cfm (Exh. 18, pp. 53 and 65). Although Pittman signed the book on each of those dates to show that he had made the preshift report entered on pages 53 and 65 of the book, he testified that he had reported "no" air to McConnell and that McConnell had said he had to have an entry for the book and that McConnell had written in the book the volumes just given above (Tr. 106; 159) even though Pittman had given McConnell no figures whatsoever (Tr. 106; 159). Pittman's excuse for having signed the entries made by McConnell was that he thought of his family and the economic conditions which prevailed at the time and went ahead and signed the book for fear he would be fired for failing to sign (Tr. 166). Pittman also testified that he made an onshift report on page 52 of the fireboss book without showing a lack of ventilation and that he signed the pages on which McConnell had entered erroneous air velocities because Thomas, the mine foreman, had instructed him never to show a ventilation violation in the fireboss book. According to Pittman, Thomas gave the aforesaid order because Warren Sharpenberg, a mine official, always read the fireboss books and objected to seeing any entries in the book pertaining to ventilation violations because such entries meant a reduction in the volumes of coal which would have been produced if the violations had not occurred

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(Tr. 211; 214-215; 341; 344). Pittman additionally tried to justify his signing for air velocities which he had never reported by contending that Thomas was so anxious to have him report to Blankenship's office after he came out of the mine on January 18, the day of his discharge, that he did not have time even to read the air velocities which McConnell had voluntarily entered on page 65 of the fireboss book. Pittman claimed that he did not even know what velocities McConnell had entered in the book until his counsel in this proceeding obtained a copy of the fireboss book through discovery procedures (Tr. 228).

The excuse given by Pittman for deliberately and knowingly falsifying the fireboss book will not withstand close analysis for at least five reasons. First, his claim that Thomas had ordered him not to show ventilation violations in the fireboss book is not consistent with his admission on cross-examination that there were at least three pages of the fireboss book which fail to show any air readings at all (Tr. 229). Failure to show any air readings at all would be the same as showing violations of the ventilation standards which, in turn, would have raised the ire of Sharpenberg, and would have been contrary to Thomas's alleged instructions that no ventilation violations be shown in the fireboss book.

Second, since Pittman had achieved at least an average amount of production on both Friday and Monday, January 15 and 18, his reporting of a lack of adequate ventilation would not have upset Sharpenberg because the ventilation violation had no adverse effect on production. Third, his claim that Thomas rushed him so much on Monday that he did not have time to examine page 65 of the fireboss book before signing it is completely refuted by the fact that he took time to make an entry on page 65 in his own handwriting stating "Talked with pin crew on roof and rib control from 8:40 to 8:50". That entry is exactly 2 1/2 inches below the air velocity entries made by McConnell on the basis of Pittman's preshift report. It is inconceivable that Pittman would have been so rushed on Monday that he could not take time to read the air velocity volumes written by McConnell and yet had time to write a report to the effect that he had talked to the "pin crew" about roof and rib control.

Fourth, Pittman could explain the fact that McConnell, the evening-shift section foreman, and Stover and Wriston, two UMWA firebosses, obtained air velocities of at least 9,000 cfm on the same days on which he claimed there was "no air" by saying that they had entered fallacious velocities in the fireboss book because they were afraid they would lose their jobs if they had made truthful entries of air velocities (Tr. 230). That contention is contrary to the main argument in Pittman's reply brief (pp. 2-5) pertaining to credibility because I am

there asked to rule that UMWA witnesses are more likely to be telling the truth than managerial employees, who are at the mercy of Consol, as compared with UMWA employees who are protected by the provisions in their Wage Agreement. Assuming that McConnell is in the category of managerial employees whose statements cannot be believed, Stover and Wriston, who made the other entries in the book showing air velocities of at least 9,000 cfm, are both UMWA employees and have no reason to be afraid of telling the truth if their credibility is to be judged by the criterion expressed in Pittman's brief. Yet both of those UMWA firebosses testified under oath that they had actually obtained the readings of 9,000 cfm or more on the days when Pittman claimed there was "no air" on the 3B Section (Tr. 1405-1407; 1434). There may be times when a complainant in a discrimination proceeding is the only witness who is telling the truth, but the circumstances in this case do not support a finding that Pittman's claims of "no air" on Friday and Monday are to be accepted rather than the readings of three other mine examiners who obtained readings of from 9,000 to 9,800 cfm on the same days that Pittman claims there was "no air" on the section.

Fifth, Pittman's claim that he never did get an adequate amount of air on Monday is contrary to the statements he made in his complaint filed with MSHA and in a statement given to MSHA's investigator after he had filed his complaint with MSHA (Exhs. F and Q). In his statement to the MSHA investigator, he stated that Blankenship stopped production on Monday, that his men placed plastic curtains over the cinder block permanent stoppings which Toney and his men had stacked and "[w]e got the air we needed and started to run again" (Exh. F, p. 14). In his complaint filed with MSHA, he stated that "I stopped the miner and they finished the stoppings and got air to the working face" (Exh. Q). When asked about the aforesaid inconsistencies between his testimony in this proceeding and his statement made to MSHA's investigator, Pittman stated that he did not mean for those statements to be interpreted as an agreement on his part that he thought there was an adequate amount of air after Blankenship stopped production and worked on improving ventilation (Tr. 302-303). Assuming, arguendo, as Pittman contends in his reply brief that managerial witnesses cannot be believed, Green, the UMWA continuous-miner operator, testified that the dust problem which he had encountered during the shift on Monday was eliminated after Blankenship had production stopped until improvements could be made in the ventilation system (Tr. 1120).

For the reasons given above, I find that Pittman's acts of signing entries in the fireboss book which he claims were false is just another reason to doubt the truthfulness of his contentions in this proceeding. Pittman stated during cross-

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examination that he knew that he could have voided the entries in the fireboss book with which he disagreed and could have written a new page on which he could have made truthful and accurate statements (Tr. 211). If, as Pittman claims, he did not have time on Monday, the day of his discharge, to look at the air velocities on page 65 of the fireboss book before he signed that page to show agreement with the entries, or if he signed because he feared he would be discharged if he made corrected entries, there was certainly nothing to keep him from going back after his discharge on Monday and voiding page 65 so that he could enter truthful air velocities on a corrected page.

Pittman's Claim that Air Measurement at Last Open Break Cannot Be as Great as Intake Air Measurement

One of the reasons given by Pittman for his assertion that McConnell had made a false entry in the fireboss book when he reported an air velocity of 9,100 cfm for both the intake and return measurements was that there is no logical way to explain how air can travel the 300-foot distance from the intake to the return without losing even 1 cubic foot per minute in velocity. Pittman compared the velocity in the air at the intake with the velocity at the return with the difference in air velocity which one experiences if he stands 2 feet from an electric fan as compared with standing 30 feet from the same fan (Tr. 222-223). Assuming that Pittman's argument is valid, his criticism would not have applied to the readings of the two UMWA preshift examiners because Wriston obtained an intake reading of 9,800 cfm and a return reading of 9,000 cfm and Stover obtained an intake reading of 9,700 cfm and a return reading of 9,000 cfm (Tr. 226).

At the end of the first day of testimony, Consol's counsel notified Pittman and his counsel that he would ask Pittman questions the next day about some fireboss entries showing that Pittman himself had reported on several occasions intake readings which were lower than the return readings (Tr. 233). The next day, as promised, Consol's counsel introduced, as Exhibits I through F, preshift reports showing that Pittman and other mine examiners had obtained intake readings which were up to 2,500 cfm lower at the intake than they were at the return (Tr. 241-248). Five of the preshift reports (Exhs. I, K, L, M, and N) show that Pittman reported larger return air measurements than intake measurements in the first 2 weeks of October 1981.

Pittman conceded that he had testified on the previous day that all readings showing an equal or greater air measurement for the return than for the intake were falsifications, but he said that his testimony to that effect applied only to the conditions which existed in the 3B Section on Friday and

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Monday, January 15 and 18, 1982, prior to the time that permanent stoppings were constructed (Tr. 249). Pittman then said that he could explain why his return readings in October 1981 were greater than the intake. His explanation was that in October 1981 the 3B Section was being developed in the area which is shown in red on Exhibit 21 in this proceeding. At that time, according to Pittman, the air coming into the 3B Section was going so completely to some punchouts at the outcrop of the mine, that it was necessary to place stoppings over the punchouts to restrict the flow of air through the punchouts so that air could be directed to the working faces (Tr. 251). Pittman further explained that in October 1981 there were permanent stoppings between the Nos. 4 and 5 entries which forced air to go to the working faces and pass along the last open crosscut so as to bring about a higher reading at the return than at the intake of the entries then being mined (Tr. 261-270). Pittman also claimed that in October 1981 they had three sets of check curtains across the belt and that they were working about six or seven breaks away from the belt so that the air was forced along the permanent stoppings to the working faces (Tr. 274-275).

Pittman's efforts to explain why he was properly reporting truthful return readings higher than the intake readings in October 1981 but that McConnell had to be reporting false readings in 1982 if he reported return readings equal to or greater than the intake readings were not convincing because one of his own crew members (Simms) testified that even after the permanent stoppings requested by Pittman were constructed in the 3B Section, air continued to leak down the belt and track entry so that the section foremen had to maintain a constant vigil over check curtains inby the tailpiece to prevent air from leaking down the belt entry instead of going to the working faces (Tr. 1017). On January 18, 1982, when Blankenship, the mine superintendent, caught Pittman producing coal without adequate ventilation, it was necessary only to rehang or adjust two check curtains near the tailpiece to provide an adequate volume of air to the working section, as I have explained on page 19, supra. It is obvious that Pittman was continually failing to assure that the check curtains inby the tailpiece were properly hung during his shift, whereas McConnell was maintaining proper check curtains near the tailpiece when he was supervising the 3B Section. That difference between the Pittman's and McConnell's method of operating the section would account for the fact that McConnell obtained adequate ventilation for operating the 3B Section, whereas Pittman could not do so. The foregoing assertion is supported by the fact that Pittman's own explanation as to why accurate return readings larger than intake readings could be obtained in October 1981, but could not be obtained on January 15 and 18, 1982, included an assertion that the check curtains at the belt had to be maintained in 1981 to direct air to the working faces (Tr. 272).

Seven witnesses called by Consol disagreed with Pittman's claim (Tr. 224) that it would have been impossible on January 15, 1982, for McConnell to have obtained a return air reading which was the same as the intake reading (Tr. 1340-1341; 1409; 1436-1437; 1598-1599; 1652; 1956; 1997). Blankenship, for example, testified that he could see no reason why air which was leaking out by the Nos. 2 and 3 check curtains and going down the belt entry could not also leak back across and get into the return in sufficient quantity to affect the air reading obtained in the return entry (Tr. 1997).

Based on the discussion above, I find that Pittman failed to prove that there is no logical explanation for the fact that McConnell obtained a reading in the return on January 15, 1982, which was the same as the reading he reported for the intake entry (Exh. 18, p. 55).

Pittman's Work Record Prior to his Discharge on January 18, 1982 Performance Ratings

Pittman's initial brief (pp. 3-4) refers to some of Pittman's early performance ratings after he became a section foreman for the purpose of showing that Pittman was considered by Consol's management to be an outstanding section foreman. The review of Pittman's work record, hereinafter given, shows that Consol's management, in the beginning, expected Pittman to develop into a competent and dependable section foreman, but his performance of his position as section foreman deteriorated for about 2 years preceding his discharge on January 18, 1982.

Pittman began working for Consol on May 15, 1976, as an assistant section foreman (Tr. 24). He was promoted to section foreman in August 1976 (Tr. 27; 31). His first performance rating was given on February 11, 1977, and ranked him as 16th in ability in a list of 20 section foremen. The rating also considered his ability in such factors as quality of work, quantity of work, job knowledge, cooperation, dependability, relations with employees, attitude, attendance, leadership, and initiative. Five adjectival ratings are used to describe an employee's ability with respect to the aforesaid factors. They are outstanding, above average, average, below average, and marginal. Pittman was given an average rating as to all factors except "quality of work" as to which he was rated as below average. The rater's comments were: "Production oriented--his relationship with his employees prevents him from getting dead work done. May be promotable in time. Still learning his present job" (Exh. 10; Tr. 33). Pittman testified that he did not understand why the rater mentioned his inability to get "dead work" done because he says he was as able to get dead work done as any other section foreman (Tr. 35). He also said that no supervisor had mentioned to him anything about his inability to get dead work done (Tr. 36).

Pittman's second performance rating is dated January 16, 1978. It rates him as 13th from the top in a list of 20 section foremen and rates him as average in all categories of the factors given above. The rater's comments were that Pittman "[i]s improving; has good attitude. Needs more experience; tries hard" [Punctuation added.] (Exh. 11). Pittman's third performance rating is dated January 18, 1978. It rates him as 12th in a list of 24 section foremen and gives him a rating of above average in quantity of work, job knowledge, and relations with employees, below average in dependability and initiative, and average in all other factors. The rater's comments were that Pittman "is a young, competent foreman. He seems to know his job and his employees well. He can be hard headed at times, sometimes needing guidance and motivation" (Exh. 12; Tr. 38).

Pittman's fourth performance rating is dated January 29, 1979, and rates him as eighth in a list of 17 section foremen. He is given an above average rating in the factors of quantity of work, cooperation, dependability, and relations with employees and average in all other factors. The rater's comments were that Pittman "is a good section foreman. He gets along well with his people and creates no problems as an employee" (Exh. 13; Tr. 40). Pittman's fifth performance rating is dated January 22, 1980. Apparently Consol discontinued its practice of giving its section foremen an overall ranking because the rating consists of only one sheet evaluating the employees in the factors given above in one of the five adjectival ratings also given above. The fifth rating gives Pittman an above average rating in the factors of quality of work, quantity of work, cooperation, dependability, relations with employees, and initiative, and average in the other four factors. The only comment made by the rater was that Pittman is a "very good section foreman" (Exh. 14; Tr. 41).

Pittman's sixth performance rating is dated February 1981 and rates Pittman as above average in quantity of work, job knowledge, cooperation, dependability, leadership, and average in all other factors. The rater's comments are that "Mr. Pittman is a young foreman who doesn't always give a maximum effort. Sometimes it seems as if he is afraid of making people mad by telling them what to do. He is very mild mannered" (Exh. 15; Tr. 42). Pittman's last performance rating was written only 15 days before his discharge. It is dated January 3, 1982, and rates him as above average in job knowledge, below average in attitude, attendance, and leadership, and average in all other factors. Also, whereas in all other performance ratings, Pittman had been rated as average in promotability, he is rated as poor in promotability in the sixth performance rating. The rater's comments are that "Mr. Pittman could be a very good foreman, but lacks initiative to improve on job performance. His attendance has to be watched very close" (Exh. 15A; Tr. 44).

Pittman's seventh and final performance rating is dated January 29, 1982, and was written after he had been discharged on January 18, 1982. It is written on an evaluation form which seems to be designed for use in making a final evaluation of an employee who has been discharged. The form provides for an overall rating of above average, average, or poor. Pittman was given an overall rating of poor. The form rates employees as either satisfactory or unsatisfactory. Pittman was given a satisfactory rating as to being safety minded and having ability to learn and was given an unsatisfactory as to all other factors hereinbefore discussed. He was given a rating as to initiative of below average, and the rater checked a block showing that he would not rehire Pittman. The rater's comments are: "[h]ad problems getting him to work regular. Suspended 5 days for violation of roof control plan and discharged for ventilation problems" (Exh. 16; Tr. 46).

My detailed review of Pittman's performance ratings shows that when he began working as a section foreman, he was considered to have a potential for becoming an outstanding employee, but it is quite obvious that the supervisory personnel at the Rowland No. 3 Mine became increasingly critical of Pittman's abilities as a section foreman. Pittman reached the zenith of his performance when he was rated in January 1980. The next two ratings for 1981 and 1982 show that his supervisors were becoming doubtful of his abilities to function as a competent section foreman. I shall hereinafter review various events which occurred during the 5 years and 8 months of his tenure as a section foreman. Those occurrences show that Pittman was less than a model employee and provide enlightenment for the fact that his performance ratings became increasingly critical of his abilities during the last 2 years of his employment.

Pay Increases

Pittman's initial brief (p. 5) states that Consol gave Pittman pay increases each year that he worked for Consol. It is a fact, however, that Pittman's merit increases were slightly less than the average increase received by the other section foremen for the last 2 years of his employment (Exh. AA). Therefore, Pittman's merit increases do seem to have been slightly less than the average merit increase during the 2 years when his performance ratings indicated that his superiors were becoming more critical of his abilities than they had been during the first 3 years of his employment. Since all of Pittman's performance ratings had classified him as average in promotability up to the one he received 15 days prior to his discharge, it is not surprising that he received the same or nearly the same average increase which the other section foremen were getting. The fact that Pittman was receiving average salary increases each year can be used as evidence to show that Pittman was not discriminated against during the last 2 years

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of his employment as much as it can be used by Pittman in his brief for the purpose of arguing that Pittman was a section foreman devoid of fault right up to the day of his discharge.

Excessive Preworking Sessions Concluded with Prayer

The chief electrician once complained to Thomas, the mine foreman, that Pittman had held a prayer meeting on his section before going to work which lasted for 1 1/2 hours (Tr. 1781). Pittman agreed that he had held conferences with his crew before work, but he said the meetings he had were the safety meetings which were required to be held every Monday and that his prayers did not last for more than 1 or 2 minutes. Pittman also said that he was warned not to have prayer before work on at least two occasions by Thomas, but he said that the men asked him why he had stopped having prayer before work and that it also bothered his conscience not to have the prayers, so he resumed having prayers before work on Mondays after he had held the required safety meetings despite Thomas's instructions to cease having prayers (Tr. 122; 191; 399-400).

Pittman's crew members testified that Pittman's prayers did not last longer than 3 minutes and that they either did not object to the prayers or wanted him to keep having prayer (Tr. 479; 1153; 1235; 2230). Blankenship, the mine superintendent, testified that he instructed Thomas to advise Pittman that a short prayer was permissible but that a long prayer meeting was forbidden. So far as Blankenship knew, Pittman had stopped having long prayer meetings (Tr. 1981-1982). Inasmuch as Blankenship is the supervisor who discharged Pittman, I find that Pittman's discharge was in no way motivated by the fact that Pittman was having a brief prayer on Monday mornings after he had finished holding the required safety meetings. That conclusion is supported by the fact that Blankenship believed that Pittman had stopped having objectionable long prayer meetings prior to the time of his discharge. It hardly needs to be pointed out, but there is nothing in section 105(c)(1) of the Act which makes prayer a protected activity.

Pittman's Insistence upon Doing Classified Work and Riding with a UMWA Employee

Thomas also objected to the fact that Pittman performed manual labor, or classified work, which is normally done by UMWA employees (Tr. 428). Pittman testified that he worked right along with his crew and that they did not object to his doing so (Tr. 398). Jerry Toney, the belt foreman, stated that he had had grievances filed against him when he performed work normally done by UMWA employees (TR. 1736-1737). Here, again, Pittman was consistently doing work which was contrary to his instructions and there is nothing in section 105(c)(1) which protects his performance of manual labor. His doing

manual labor in violation of the mine foreman's instructions may be one of the reasons that Blankenship, the mine superintendent, and Thomas became less pleased with his work during the last 2 years of his employment.

Thomas testified that Pittman rode to work with a UMWA employee and that he asked Pittman not to do so because he felt that Pittman might disseminate to the UMWA crewman (Simms) policy matters which were discussed in meetings attended only by managerial employees and that he felt that it was preferable for the section foremen to avoid fraternizing with UMWA employees (Tr. 1781-1782). Pittman ignored Thomas's instructions not to ride with the UMWA employee and he continued to ride with him up to the time of his discharge (Tr. 396; 1044). There is nothing in the record to show that Pittman's continued riding to work with a UMWA employee contributed to Pittman's discharge and, even if there were a connection between the discharge and Pittman's riding with a UMWA employee, there is nothing in section 105(c)(1) which makes the choice of a person's method of getting to work a protected activity under the Act.

Pittman's Foot Injury and Consol's Report of No Lost Time

Pittman says that in October 1981 his roof-bolting crew had a mechanical problem with the roof-bolting machine. He tried to help them repair the machine which was, he agrees, an instance when he was doing UMWA work instead of supervisory work. The defective component of the roof bolter fell on Pittman's foot so that he had to have it examined by a physician (Tr. 201). Blankenship testified that he personally looked at Pittman's foot after it was injured and that he could see no discoloration or break in the skin and no swelling (Tr. 2051). Blankenship said that Pittman had requested a week off without pay so that he could do some work on his house and that the request had been denied (Tr. 2050). Blankenship felt that Pittman had feigned the injury in order to take a week off anyway and he insisted that Pittman report to work the next day after the injury. Pittman's foot was eventually placed in a walking cast and Pittman reported to work nearly every day during his recuperation from the accident, but for a few weeks he did such work as calibrate equipment and collect materials needed for a retraining course (Tr. 202-203; 2027).

Pittman's reply brief (pp. 1-2) argues that Blankenship was as guilty of falsifying Consol's report of no lost working days as a result of Pittman's foot injury as Pittman was in signing the fireboss book when it contained incorrect air measurements. Exhibit 29 is a report of personal injury dated October 27, 1981. It indicates that Pittman's foot was injured on October 20, 1981, and shows that Pittman returned to his permanent job in full capacity although Consol's attorney asked questions at the hearing indicating that Consol considered Pittman's work for a short time after the accident to be only

"light duty work" (Tr. 202). The statement given by Pittman to MSHA's investigator indicates that Pittman was required to do work in the mine office and check on spare parts, etc., while his foot was in a cast and the statement claims that Thomas, the mine foreman, required Pittman to return underground and resume his duties as section foreman on November 23, 1981, even though the doctor had recommended that he not return to active duty prior to November 30, 1981 (Exh. F, pp. 7-10). The physician's report of Pittman's injury shows "localized swelling and tenderness" and states that "X-rays show no definite evidence of fracture" (Exh. G). The doctor's report also reveals that a walking cast was placed on Pittman's foot from November 2 to November 20, 1981, and indicates that the doctor did not intend to refer him back to work until November 30, 1981 (Exh. G).

As to the claim in Pittman's reply brief (pp. 1-2) that Blankenship falsified the report of injury (Exh. 29) just to keep from reporting lost time as a result of an injury--a report which might have impaired Consol's good safety record at the No. 3 Mine--it can hardly be said that Blankenship misrepresented the facts as he believed them to be with respect to Pittman's foot injury because Blankenship sincerely believed that Pittman was feigning the injury and insisted that Pittman report for work the next day after the accident despite the fact that Pittman's foot was eventually placed in a walking cast. Blankenship also defended his reporting that Pittman returned to his permanent job in full capacity by claiming that Consol did not have anyone for assignment to preparing materials for retraining classes and that if he had not asked Pittman to do that type of work, he would have had to ask a person doing some other permanent job to do that work on an interim basis (Tr. 2027).

Pittman's claim of discrimination with respect to his foot injury is a very appealing one because the physician's reports do show that Pittman's foot was placed in a walking cast and that the physician recommended that Pittman not work for several weeks. Despite the physician's instructions, Blankenship agrees that he insisted that Pittman come to work throughout the recuperative period. In discrimination cases, it is generally necessary to prove that an employee has been a victim of discriminatory treatment by inferences to be drawn from actions which appear to have no real basis for their occurrence apart from some unexplained prejudice which can be attributed to nothing other than an unlawful animus toward an employee because of actions which are protected under the Act. In this proceeding, however, Consol's animus toward Pittman has been explained by Consol's evidence showing that Pittman continued to act in ways which displeased Consol's management. Pittman continued to ride to work with a UMWA employee; Pittman continued to perform manual labor instead of adhering to his

supervisory duties; and Pittman, as will hereinafter be explained, did other acts which caused management to doubt his ability to do his job conscientiously and safely.

While I personally might not have considered some of Pittman's acts as being censurable, I can at least understand why Consol's management issued the instructions he was given. None of Pittman's censurable conduct consists of activities which are protected under section 105(c)(1) of the Act. The record in this proceeding does not show that Pittman has ever engaged in any safety-related acts other than his having called Thomas, the mine foreman, on January 15 and 18, 1982, for the purpose of advising Thomas that he had no air on his section. As has been demonstrated above, Pittman's claims that he had no air on his section was the result of his own failure to erect curtains in by the tailpiece to keep the air which was undeniably on the section from leaking down the belt and track entry instead of being directed to the working faces. Therefore, management's animus toward Pittman, if any, cannot be shown to relate to activities which are protected under the Act and it is not possible for me to find that management's alleged animus toward him was the result of anything other than his insistence on doing unprotected acts his way instead of the way management wanted them done.

Pittman's Taking of a Day Off to Attend Church Service

On one occasion, Thomas, the mine foreman, was absent when Pittman wanted to request a day off to attend a special church service. He or his shift foreman asked Larry Hull, the superintendent who preceded Blankenship in that position, for the day off. Hull testified that he denied the request because of a shortage of personnel (Tr. 1461), whereas Pittman claims that Hull granted the request (Tr. 196). In any event, Pittman did not report for work on the day he had requested to be absent. Pittman claims that Thomas became upset when Pittman failed to show up for work and called Pittman at home on Saturday to order him to report to Hull's office on Monday before going into the mine because he might be fired for taking the day off (Exh. F, p. 4).

The shift foreman, Rudy Toney, testified that Pittman had asked for a day off and that he had checked with Hull about the request and Hull had denied the request, but Pittman took the day off anyway. Toney stated that Pittman then called him on Saturday and asked him to intercede with Hull because Pittman was afraid that he might be fired for having taken the day off. Toney then called Hull and asked Hull if he planned to discharge Pittman for taking the day off and Hull stated that he was going to discuss the matter with Thomas and decide the question on Monday (Tr. 1302-1303). Thomas testified that he asked Hull not to discharge Pittman because he felt that discharge would have been excessively harsh in that instance (Tr. 1780).

The credibility of the witnesses here should be decided in Consol's favor. Hull testified that when they were discussing Pittman's having taken the day off on Monday Pittman explained that he had been working on his house and that when his wife reminded him that it was time to go to work, he just decided that he would not go to work (Tr. 1462). It is doubtful that Hull, if he were fabricating a story, would conjure up a conversation with Pittman's wife if that had not been mentioned by Pittman himself in an effort to explain his taking of a day off after his request to be absent had been denied.

Pittman's claim that Thomas called him on Saturday to tell him he would probably be fired is not convincing because Thomas was consulted about the matter only after Rudy Toney had called Hull in response to Pittman's phone call indicating that he was expecting to be discharged for taking the day off. It is unlikely that Thomas would have called Pittman on Saturday to warn him he might be discharged on Monday and then recommend to Hull that Pittman not be discharged, especially since Toney had testified that Hull had indicated to him that his decision with respect to discharging Pittman would be made after he had consulted with Thomas on the following Monday. Finally, if Hull had actually granted Pittman's request for a day off, there would have been no reason for him to deny that he had ever granted that request or tell Toney that he would have to consult with Thomas before determining whether Pittman should be discharged for taking a day off from work.

The outcome of Pittman's having taken the day off indicates that Consol's management was at least reasonable on one occasion in doing no more than warn him that no further taking of days off without permission would be tolerated.

Pittman's Roof-Control Violations

Blankenship testified that Pittman had failed to follow the roof-control plan on at least three occasions. The first time occurred when Pittman was near an outcrop in the mine. When outcrops are being approached, the roof-control plan requires that additional support be set in the form of one row of posts and establishment of a 16-foot roadway. Pittman had set the required row of posts but he had set them against the rib and the roadway was 18 to 19 feet wide. The row of posts is needed to warn the miners as to whether the road is becoming unstable and if the posts are set against the rib, as Pittman had set them, they do not perform the function of providing a warning of unstable roof when cutting toward an outcrop (Tr.1982).

Pittman's second violation of the roof-control plan occurred when the continuous-mining machine was covered up by a massive roof fall. When Blankenship inspected the site of

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the roof fall, he found that a large solid rock had fallen on the left side of the continuous miner in such a way that he could see along the right side of the miner almost to the cutting head and Blankenship did not find any timbers at all along the side of the miner, whereas the roof-control plan requires the setting of a double row of timbers along both sides of the miner. Additionally, the roadway outby the miner is required to be no more than 14 feet wide, but Pittman's roadway timbers were more than 14 feet apart. Blankenship gave Pittman a verbal warning at that time (Tr.1964-1965).

Blankenship testified that occurrence of several roof falls on top of the continuous miners caused him to require that a crib be set on each side of the miner before a pushout was made. About a month after the continuous miner on Pittman's section had been covered up by a roof fall, Blankenship inspected Pittman's section and found that he had completed a pushout without setting a crib on either side of the miner. Also Pittman had set the timbers in the roadway 21 feet apart, instead of 14 feet apart, as required by the roof-control plan. Blankenship suspended Pittman for 5 days for the third violation of the roof-control plan (Tr.1966-1967).

Pittman does not deny that he failed to erect one of the cribs which Blankenship had instructed him to set, but he and the operator of the continuous miner tried to excuse their failure to follow the roof-control plan by arguing that they did not have enough crib blocks on the section to construct the second crib and they claim that the roof was so unstable that there was more danger in the roof falling if they delayed the pushout until crib blocks could be obtained for building the crib than if they just went ahead with completion of the pushout with the cluster of timbers which they had used in lieu of the crib (Tr. 48-51; 190-191; 392-393; 2204-2205). Pittman also complains that Blankenship would not talk to his crew who would have supported his contentions with respect to the lack of crib blocks and his use of a cluster of timbers in lieu of a crib (Tr. 52). Blankenship stated that he did not need to interview Pittman's crew when the physical evidence at the scene of the roof-control violations provided him with irrefutable proof that the violations had occurred (Tr.1967).

There is clearly a lack of merit to Pittman's excuses in this instance. There was no obvious reason or explanation for Pittman's failure to have on the section the materials required to support the roof (Tr. 2226-2227). Pittman has on his section at all times a scoop, or unitrak, as well as a scoop operator, to haul supplies from the track unloading point to the working section (Tr. 982; 989; 997). Consol has a two-man crew whose sole function consists of hauling supplies to the three working sections in the mine (Tr. 844-845;

1697). Pittman was negligent in failing to have an adequate supply of crib blocks on his section. When it is considered that roof falls still account for a large percentage of the fatal accidents which occur in underground coal mines every year, Blankenship was certainly justified in refusing to accept Pittman's feeble alibis in this instance.

Pittman's Claim that he was Ordered to Produce Coal without Adequate Ventilation

Pittman's case would have been strengthened if he had had any corroboration at all to support his claim that Thomas, the mine foreman, and Jerry Toney, the belt foreman who was in charge of constructing permanent stoppings on Pittman's section, ordered him to produce coal with knowledge that Pittman did not have adequate ventilation. The two miners (Kincaid and Moore) who were on the phone and actually overheard both Pittman and Thomas talking only heard Pittman say that he did not have adequate ventilation (Tr. 134-135; 806). They also heard Thomas advise Pittman about his need to recheck his curtains, but neither of them heard Thomas tell Pittman to go ahead and produce coal without adequate ventilation until permanent stoppings could be constructed (Tr. 137; 811).

Although Randy Workman did testify that he heard Toney order Pittman to produce coal while the permanent stoppings were being constructed (Tr. 1165), his credibility was completely destroyed when it was shown that he was absent from work on the day during which he had vividly recalled what had happened on Pittman's section (Tr. 1177-1179). At least one miner (Harvey) on Pittman's section claims to have overheard Pittman talking on the phone and heard Pittman tell Thomas that he lacked sufficient air, but he only heard Pittman's side of the conversation and did not know what Thomas may have said to Pittman (Tr. 1224). Moreover, his credibility was impaired by his inability to recall for certain what he had done to the ventilation system on January 18, 1982 (Tr. 1226; 1235).

Pittman contradicted himself so much about what Toney said and when he said it, that Pittman's claim that Toney ordered him to produce coal cannot be accepted as a truthful assertion. Some reasons for the aforesaid conclusion are: First, Pittman said that his crew had refused to run coal until they saw Toney come in with cinder blocks to construct stoppings, but subsequently Pittman said that he could not recall whether production had been started before or after Toney arrived on the section (Tr. 287-288). The dispatcher sheet, of course, shows that production started at 8:42 a.m. and that Toney did not arrive until 9:51 a.m. (Exh. C). Second, Pittman could not recall whether he had told Toney that he had inadequate air at the time he claims that Toney ordered him to

produce coal (Tr. 360). If Toney did not know that the section had an inadequate supply of air at the working faces, he could not possibly have ordered Pittman to produce coal with knowledge that Pittman did not have adequate ventilation at the faces. Third, Pittman stated that his complaint (Exh. Q) filed in this proceeding was incorrect to the extent that it states that Toney gave him a choice of having his men help construct permanent stoppings or run coal because his testimony in this proceeding to the effect that Toney gave him no choice but to run coal is the correct version of what happened (Tr. 301). Of course, Toney and Thomas both deny that they ever ordered Pittman to produce coal without having adequate ventilation (Tr. 1700; 1809).

The discussion above shows that a preponderance of the evidence fails to support Pittman's claim that Thomas and Toney ordered him to produce coal with knowledge that he had inadequate ventilation at the working faces.

Pittman's Lack of a Watch for Purpose of Taking Air Measurements

Pittman's credibility was rendered an additional blow when Blankenship testified that when he found the operator of the continuous-mining machine cutting coal on Pittman's section in dust so thick that Blankenship could hardly detect the light on the machine, he stated that he asked Pittman to take an air reading and Pittman replied that he could not take a reading because he did not have a watch (Tr. 2006-2007). Thomas, who was not present when Pittman told Blankenship that he lacked a watch for taking an air reading, subsequently asked Pittman to take an air reading and Pittman also told Thomas that he could not take an air reading because of a lack of a watch (Tr. 1899).

After production had been stopped and air had been restored by installing curtains in the Nos. 2 and 3 entries in by the belt tailpiece, Blankenship asked Pittman to take an air reading and he was able to do so. Only about 15 minutes had elapsed between the two requests and Blankenship explained Pittman's ability to take an air reading after he had made the second request, as compared with the first, by stating that he was not surprised by Pittman's ability to comply with the second request that he take an air reading because he had not believed Pittman when he told him in the first instance that he lacked a watch for taking an air reading (Tr. 2010).

Pittman claimed that he did not recall ever having told Blankenship that he had no watch to take an air reading and that even if he did not have a watch, he could have borrowed a watch from one of the miners (Tr. 305-306). Failure to have a watch could only have meant that Pittman could not have taken an air reading at any time during the shift. Since Pittman had claimed that he did not have even enough air to turn

his anemometer, it is possible that he could have worked for the entire shift without bothering to ask any of his men to lend him a watch. Pittman's credibility is further eroded by the lack-of-a-watch episode because if he really did not have a watch, then he never did make a conscientious effort to determine how much air he had at the main intake entry and follow through to determine exactly where he was losing his air, as Blankenship did after stopping production, or he really did have a watch and just gave his lack of one as an excuse to keep from having to admit to Blankenship that a proper test for air would have shown that he lacked adequate ventilation at the working faces.

The Alleged Conspiracy

Pittman's initial (p. 36) and reply (pp. 6-15) briefs claim that management set Pittman up for discharge by asking him to produce coal without adequate ventilation so that he could be caught operating in violation of the law and thereby provide management with an excuse for discharging him. That claim will not survive close scrutiny for a number of reasons. First, if Thomas, the mine foreman, had deliberately set Pittman up for discharge, it would appear that the ideal time to have done so would have been on Friday, January 15, 1982, when Pittman first ran his section with inadequate ventilation. Thomas had not at that time had the permanent stoppings constructed and, according to Pittman, knew that Pittman was operating without adequate ventilation. Thomas had planned to have cinder blocks taken to Pittman's 3B Section on Saturday and had to know that there was a strong possibility that permanent stoppings might become constructed and provide Pittman with an adequate air velocity for the 3B Section by Monday. Thomas knew from examining the fireboss book on Monday that the mine examiners were getting readings of 9,000 cfm or more at the last open break and would have had no reason to expect that Pittman would be operating his section on Monday with inadequate ventilation. Therefore, the ideal time to have caught Pittman producing coal with inadequate ventilation would have been on Friday.

The second defect in Pittman's conspiracy theory is that on Monday morning Thomas did send in both cinder blocks and the crew of miners needed to construct stoppings. Thomas was advised on Monday morning that Blankenship was going to visit the mine on Monday afternoon. Thomas advised Pittman of that fact about noon. Thomas knew that Pittman would be expecting both him and Blankenship on Monday afternoon. If Thomas had intended to set Pittman up for discharge, it is highly unlikely that he would have provided Pittman with advance warning that he was coming in with the superintendent to check the conditions on Pittman's section.

The third defect in Pittman's conspiracy theory is that Pittman himself testified that he was notified about noon that Blankenship and Thomas would be coming to his section (Tr. 362). The record provides no satisfactory explanation of why Pittman would have failed to take action to make sure that he had adequate ventilation before Blankenship and Thomas arrived. The least that Pittman would have been expected to do upon receiving the advance warning about the inspection would have been to remind Thomas that he was producing coal without adequate ventilation as Thomas had asked him to do and inquire about the wisdom of his continuing to produce coal without adequate ventilation at a time when Blankenship would be visiting the section. Pittman claims that he did not close down in order to obtain adequate ventilation because he already knew that both Blankenship and Thomas had a low opinion of his abilities as section foreman and that they would have been as likely to fire him for shutting down production long enough to establish ventilation as they would for his continuing to produce coal with inadequate ventilation (Tr. 418-419). That contention lacks merit because, according to Pittman's claim, Thomas had ordered him to produce coal with inadequate ventilation and there is no reason for him to have been reticent about reminding Thomas that he was producing coal without adequate ventilation and asking Thomas if he could stop production until the permanent stoppings had been completed, especially in view of the fact that construction of the permanent stoppings was nearing completion by the time Pittman received advance notice of Blankenship's and Thomas's arrival on the section.

The fourth defect in Pittman's conspiracy contention is that effectuating the conspiracy would have had to be dependent upon Thomas's having the cooperation of several persons who did not work on Pittman's shift. The reason for the aforesaid statement is that all persons who examined the 3B Section on Friday and Monday obtained an air reading of 9,000 cubic feet or more at the last open break. Those mine examiners were McConnell, the section foreman who was in charge of the crew which produced coal in Pittman's 3B Section on the 4 p.m.-to-midnight shift on Friday, and the UMWA firebosses (Stover and Wriston) who examined the mine on Saturday, Sunday, and Monday. In order for the alleged conspiracy to be carried out, the cooperation of McConnell, Stover, and Wriston would have had to have been obtained because Pittman claims that those individuals were falsifying the air measurements of at least 9,000 cfm which they were entering in the fireboss book (Exh. 18, pp. 53-63). If the cooperation of those mine examiners had not been obtained, their readings would have been less than 9,000 cfm, according to Pittman, and would have corroborated Pittman's claim that no one could have obtained adequate air readings prior to the time that the permanent stoppings were constructed. It is highly unlikely that McConnell's, Stover's,

and Wriston's cooperation in making false entries in the fireboss book could have been obtained without at least one of them having made inconsistent statements which would have cast doubt on their credibility. Yet all three of them provided some of the most convincing statements which were made in this proceeding.

The fifth defect in Pittman's conspiracy theory may be based on the testimony of Blankenship, the mine superintendent, who testified that he did not decide to visit the Rowland No. 3 Mine until Monday morning. He said he did not think there was any merit to Pittman's conspiracy claim because Thomas knew his feelings about mine safety and health and that Thomas would never have knowingly taken him on a section producing coal with inadequate ventilation. Blankenship stated that if he had ever been convinced that Thomas and Jerry Toney had anything whatsoever to do with Pittman's having produced coal without adequate ventilation, he would have discharged all three of them (Tr. 2017; 2020).

For the reasons given above, Pittman's claim that his discharge was based on a conspiracy by Thomas to have him produce coal without adequate ventilation, so that he could be caught operating his section in violation of the law, must be rejected.

Pittman's Allegations as to Disparate Treatment

Pittman's initial brief (pp. 35; 39-40) argues that his discharge showed disparate treatment because discipline at the No. 3 Mine was "uneven, whimsical, and discriminatory" and that no one else had been discharged for admitting that he had produced coal with inadequate ventilation. Consol's counsel submitted extensive evidence showing that Blankenship, the superintendent, did not tolerate safety violations, absenteeism, or irresponsible conduct (Tr. 1463; 1961). Blankenship, for example, suspended Bill Blevins, a section foreman, for 5 days for irregular work and discharged him for ventilation violations and failing to establish centerlines on his section (Tr. 949; 1325; 1342; 1466; 1793; 1968). Blevins was discharged just 3-1/2 months before Pittman's termination occurred (Tr. 815; 1326; 1795; 1969). The day of Blevins' discharge, Thomas referred to Blevins' discharge and warned Pittman that he would receive the same treatment if his performance did not improve (Tr. 299-300; 1794).

Blankenship and Thomas provided other examples of persons who have been disciplined at the No. 3 Mine. Keith Hartzog, a maintenance foreman, was given a 5-day suspension for a safety violation (Tr. 1797; 1969). Allen Powers, Jr., a section foreman, was given a 5-day suspension for a safety violation (Tr. 1970; 1797). Sidney Federoff was discharged for coming to work

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intoxicated (Tr.1970). Mark Fink was required to forfeit a 1-week vacation because of absenteeism and was discharged for lying about the taking of an emergency medical technician test and for having a bad attitude in general (Tr.1971-1972). Elbert Young, a UMWA roof-bolting machine operator, was suspended for 5 days over a safety violation (Tr.1973-1974; 1798-1799). Alexander Williams, Oakley Gore, and Jerry Williams, UMWA employees, were all suspended for 17 or 18 days for carrying smoking materials into the mine (Tr.1974).

Additionally, it should be noted that Blankenship was going to discipline Pittman's continuous-mining machine crew on January 18, 1982, the day of Pittman's discharge, when he caught them cutting coal without adequate ventilation, but they were saved from disciplinary action because they told Blankenship that they had complained to Pittman about the lack of ventilation and he had asked them to operate the miner despite the lack of sufficient ventilation (Tr. 233; 1135; 2002). Although Blankenship did not discipline the miner crew at that time, he warned them that if he caught them in a similar situation at a subsequent time, they would be disciplined (Tr. 1137; 2001).

Pittman tried to show that two other section foremen, Delp and Grabosky, were not disciplined despite the fact that citations were issued by an MSHA inspector when he caught them operating without the required volume of air at the working face (Exhs. 24, 25 & 27). Both Blankenship and Thomas defended the failure to discharge Delp and Grabosky by pointing out that each violation has to be evaluated on its own merits and they correctly noted that neither Delp or Grabosky had run their sections for a long period of time, as Pittman had, with knowledge that there was inadequate air on the section (Tr.1938; 2000). It was also noted by Thomas that a different response was called for based upon an employee's past record. There was no showing that Delp or Grabosky had records comparable to Pittman's poor record. The only section foreman with a record comparable to Pittman's was Blevins and he, like Pittman, had been warned of possible discharge for prior offenses and he, like Pittman, had been suspended for 5 days before he was discharged. Blankenship discussed Pittman's prior record with him on the day of his discharge and his prior record was a factor in Blankenship's decision to discharge him (Tr. 188; 1902-1903; 2013).

The preponderance of the evidence, therefore, shows that Pittman did not receive disparate treatment when he was discharged for producing coal without adequate ventilation.

Pittman's Allegations Regarding Thomas, the Mine Foreman

Large parts of Pittman's initial brief (pp. 19-30) and reply brief (pp. 6-15) consist of an attempt to show that Thomas, the mine foreman, was incompetent, lacked credibility, and refused to defend Pittman when Blankenship, the mine superintendent, caught Pittman operating his section without adequate ventilation because Thomas knew he would have been discharged along with Pittman if he had admitted that he knew Pittman was operating the 3B Section without adequate ventilation. I have already shown under the 17 headings hereinbefore given that Pittman failed to prove a prima facie case of discrimination because, while he did show that he had engaged in the protected activity of reporting to Thomas that he lacked an adequate velocity of air on his section, he failed to prove that his discharge was in any way motivated by the fact that he had reported inadequate ventilation and had asked Thomas to send cinder blocks to the section for construction of permanent stoppings. Therefore, I do not feel that I am obligated to enter upon an extended discussion of Thomas's alleged shortcomings because, even if Thomas were as poor a foreman as Pittman's briefs contend he was, the preponderance of the evidence would still support a finding that Pittman failed to prove that his discharge was motivated by Pittman's protected activity of having reported to Thomas on January 15 and 18, 1982, that he did not have adequate ventilation on his 3B Section. Nevertheless, the review of the evidence, hereinafter given, shows that Thomas was not the incompetent foreman which Pittman's brief claims he was.

Thomas's Illness

It is a fact that Thomas was in poor health in 1981 and 1982, that he had undergone a triple heart bypass operation shortly after Pittman's discharge on January 18, 1982, that he had been on an extended period of sick leave up to the time of the hearing in this proceeding, and that he had decided to retire, effective June 1, 1983 (Tr. 1776-1777). It is also true that he may have relied extensively on Jerry Toney, the belt foreman, for obtaining detailed information about the conditions in the mine during 1981 and 1982 (Tr. 1693; 1751; 1907). It is likewise true that Jerry Toney was made acting mine foreman in April 1982 when Thomas was forced to take extended sick leave for heart surgery (Tr. 1693). Pittman did not succeed, however, in demonstrating that Thomas never went underground to examine conditions in person. The dispatcher (Roger Toney) testified that Thomas went underground with Blankenship about once each week and that Thomas always accompanied MSHA inspectors when they made their frequent inspections of the mine (Tr. 2188; 2190).

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Thomas had had 42 years of experience as a mine foreman and had worked at least 11 years for Consol (Tr. 1777-1778). As a senior employee, he would have been entitled to take an extended period of sick leave before determining whether his health would force him to retire. Therefore, I reject Pittman's claim that Consol kept Thomas on sick leave at full salary until his testimony in this proceeding had been given just to assure that his testimony would be wholly in support of Consol's position in this proceeding.

Thomas's Credibility

Thomas worked on Saturday, January 16, 1982. The next day was Sunday and the mine was idle. Both parties stipulated on the record that Thomas was not required, since the mine was idle on Sunday, to make a preshift examination on Saturday (Tr. 1430; 1887), but he did fill out a page in the fireboss book indicating that he had patrolled the 3B Section, that he had seen no violations, that he believed the air velocity was sufficient, and that he thought the section was safe to mine (Exh. 18, p. 59). Thomas explained that he did not take an air reading because he was not obligated to make a formal preshift examination before an idle shift and that he had deliberately not gone to the face areas of the 3B Section (Tr.1915-1916). He also stated that he walked into the mine instead of riding a track vehicle, because he wanted to examine some sections of the track which might need to be repaired (Tr. 1886-1887). The walk to the 3B Section is a round-trip distance of about 1 mile and it takes less time to walk in than it does to ride because of the difference in route which can be taken by a person on foot as compared with a vehicle traveling on the track (Tr.1919; 2229). The dispatcher who testified on Pittman's behalf did not work on Saturday when Thomas walked into the mine and therefore could not testify as to whether Thomas walked into the mine or not (Tr. 2191).

Thomas seemed to be somewhat embarrassed when cross-examined about not having made an actual air measurement even though he was not required to do so in view of the fact that the mine was idle on the succeeding shift (Exh. 18, p. 60). Nevertheless, Pittman's brief failed to demonstrate by a preponderance of the evidence that Thomas falsified his entries in the fireboss book or violated any regulations. Therefore, I disagree with Pittman that Thomas's credibility was adversely affected by his fireboss entries associated with his having "patrolled" the 3B Section on January 16, 1982.

Thomas's Alleged Production Goals and Cover-Up

Pittman's efforts to detract from his own shortcomings by emphasizing Thomas's deficiencies are not persuasive.

Pittman claims that his constant complaints of a lack of ventilation on Friday, Saturday, and Monday, January 15, 16, and 18, 1982, were a tremendous irritant to Thomas because Thomas was so anxious to maintain a record of high production from the No. 3 Mine that he could not give Pittman's complaints the attention that they deserved because precious production time would have been lost and coal output would have declined. It is further argued that since Thomas had ordered Pittman to go ahead and produce coal without adequate ventilation so as to achieve high production goals, Thomas could not run the risk of admitting to Blankenship that he knew Pittman was producing coal without adequate ventilation because such an admission might well have resulted in his own discharge as well as Pittman's.

The aforesaid arguments are not convincing for a number of reasons. First, the comments in Pittman's 1977 performance rating state that management considered Pittman to be "production oriented" (Exh. 10; Tr. 34). Since one would assume that all management personnel are production oriented, it is surprising that Pittman's supervisor would have bothered to note that Pittman was production oriented unless he had observed that Pittman had an unusual proclivity for achieving high production. Additionally, one of the shift foremen, Rudy Toney, testified that Pittman was known to be a foreman with a good production record and that he had recommended that Pittman not be fired for taking a day off without obtaining advance permission because he believed that Pittman's good production record justified his being given another chance (Tr. 1304). Since Pittman already had a reputation for achieving high rates of production, it is unlikely that Blankenship would have been unduly critical of Pittman if his production had been down a little below average because he had had to spend more time than usual on January 15 and 18, 1982, in establishing adequate ventilation on his section.

A second reason for rejecting Pittman's arguments about Thomas's obsession with production is that, even with the inadequate ventilation which undeniably existed during Pittman's entire shift on Friday, January 15, and up to about 2 p.m. on Monday, January 18, Pittman's section produced 109 shuttle cars of coal on Friday and 100 shuttle cars on Monday (Exhs. A and C; Tr. 832-833). Production of 100 shuttle cars is considered to be a normal producing day (Tr. 341; 353; 885; 1655). Yet Pittman said that it was so dusty that the roof bolters had to stop working from time to time just to allow the dust to abate and that would have retarded normal production activities (Tr. 411). As I have hereinbefore demonstrated on page 20, supra, it should not have taken Pittman more than 15 minutes to find and correct the cause of his inadequate air supply at the working faces, if he had been the competent section

foreman which he claimed to be. If Pittman had spent the short time needed to obtain the required amount of air on his section, the miners would not have had to shut equipment down from time to time just to allow the dust to abate and Pittman's production for Friday and Monday would probably have been even greater than the 109 and 100 shuttle cars, respectively, which he did achieve with inadequate ventilation.

The foregoing conclusions are supported by the fact that McConnell, the section foreman on the 4-p.m.-to-midnight shift was able to obtain a required air velocity on his shift which followed Pittman's shift (Exh. 18, p. 55). The only explanation that Pittman could give for the fact that McConnell had obtained adequate ventilation, while Pittman could not, was that McConnell had entered a false air measurement in the fireboss book because he, like Pittman, was afraid that he would be discharged if he had reported the true inadequate reading which Pittman is certain he actually obtained. I have already demonstrated under the heading of "Pittman's Falsifying of the Preshift-Onshift and Daily Report", supra, pages 21-24, that the preponderance of the evidence does not support Pittman's claim that everyone but Pittman was lying about the actual air readings which they were obtaining on the 3B Section.

For the reasons given above, I find that the preponderance of the evidence shows that Thomas, despite his ill health in 1982, was performing his duties as a mine foreman in a reasonably satisfactory manner and that he gave convincing explanations for the priorities he gave to the types of work which were done on Friday, Saturday, and Monday, January 15, 16, and 18, 1982. For example, since it has been shown above, pages 19-21, that temporary curtains along the pillared-out area were adequate for providing adequate ventilation on the 3B Section on both Friday and Monday, Thomas properly directed Pettry and MacDaniel (Tr. 849; 879) to go to the 3A Section and install new trailing cables on shuttle cars rather than haul cinder blocks to Pittman's 3B Section. That change in plans on Saturday was justified because defective trailing cables may result in electrocution (Tr. 1797; 1810-1811), whereas, according to the fireboss book and the testimony of at least three witnesses, the temporary stoppings already in existence in the 3B Section were providing at least 9,000 cfm of air at the last open break (Exh. 18, pp. 55-57; Tr. 1405; 1434; 1648).

Therefore, Pittman's claims that Thomas subordinated all safety regulations which might have interfered with his goal of high coal production and that Thomas's ill health made him so sensitive to Pittman's complaints about inadequate ventilation and requests for cinder-block stoppings that he wanted to discharge Pittman for having annoyed him with such safety considerations on Friday, Saturday, and Monday, must be rejected as not being supported by the preponderance of the evidence.

Cases Cited in Pittman's Reply Brief Do Not Apply to Facts in this Proceeding

Pittman's reply brief (p. 5) argues that Pittman was discharged because he had merely followed his supervisor's instructions and that the complainant in Judge Fauver's decision in *Roger D. Anderson v. Itmann Coal Co.*, 4 FMSHRC 963 (1982), was discharged for the same reason and was ordered to be reinstated by Judge Fauver. In the Anderson case, a preshift examination had not been performed during the 8-hour period preceding Anderson's shift which began at 4 p.m. on a Sunday. An MSHA inspector wrote an unwarrantable failure order because Anderson admitted that he knew a preshift examination had not been made during the preceding shift, but that he understood that the Federal regulations and Itmann's policy required the making of only one preshift examination every 24 hours on weekends. Anderson was discharged because of his admissions to the inspector. Judge Fauver held that Anderson's replies to the inspector's questions were a protected activity under the Act and that it was a violation of section 105(c)(1) of the Act for Itmann to discharge Anderson for that protected activity.

In this proceeding, as I have shown on pages 19-26 and 35-36, *supra*, Pittman was discharged because he knowingly operated his section without having adequate ventilation and the preponderance of the evidence fails to support Pittman's claim that Thomas, the mine foreman, had ordered him to operate his section without having adequate ventilation. In the Anderson case, it was shown that Itmann's policy was to require only one preshift examination during each 24-hour period on weekends and Anderson was discharged for admitting that he knew that no preshift examination had been made during the preceding 8-hour period and for stating that it was Itmann's policy to require only one preshift examination during each 24-hour period. The Anderson case is inapplicable to the facts in this proceeding because Pittman failed to prove that it was Thomas's or Consol's policy to order section foremen to produce coal without adequate ventilation.

Pittman's reply brief (pp. 10 and 15) also argues that Blankenship, the mine superintendent, failed to make an adequate investigation before discharging Pittman, and that if he had made an adequate investigation, he would have found that both Thomas and Toney had ordered Pittman to produce coal without adequate ventilation and would have found it necessary to discharge them also because Pittman was merely carrying out their instructions when he operated without adequate ventilation on both Friday and Monday. Pittman states that Judge Fauver found that Itmann had not made an adequate investigation before discharging Anderson in the Anderson case, *supra*, and that I had made a similar finding in my decision issued

