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LOUIS HENDERSON V. LORING QUARRIES  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

LOUIS E. HENDERSON, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. CENT 83-48-DM
LORING QUARRIES, INC., RESPONDENT	MD 83-13
	Loring Mine

DECISION

Appearances: Bryan E. Nelson, Esq., Alder, Nelson & McKenna,  
Kansas City, Kansas, for the Complainant;  
Kenneth J. Reilly, Esq., Boddington & Brown,  
Kansas City, Kansas, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed pro se after the complainant was advised by MSHA that its investigation of his complaint disclosed no discrimination against him by the respondent. Subsequently, the complainant retained private counsel to represent him in this proceeding.

The basis for Mr. Henderson's discrimination complaint is the assertion that he was discharged by the respondent because of his refusal to work in an area which he believed to be hazardous, and his summoning of certain MSHA inspectors to the mine to investigate his safety complaint. Respondent denies any discrimination, and asserts that Mr. Henderson was discharged for insubordination and that his discharge was solely because of a legitimate business purpose and not because of any protected activity on Mr. Henderson's part.

The matter was heard at Kansas City, Missouri on December 6, 1983, and the parties have filed posthearing proposed findings and conclusions which I have considered in the course of this decision.

Issue

The critical issue presented in this case is whether Mr. Henderson's discharge was in fact prompted by any protected activity under section 105(c)(1) of the Act. Specifically, the crux of the case is whether the discharge was in retaliation for any safety complaints made to MSHA, or whether it was justified because of insubordination, as claimed by the respondent.

Applicable Statutory and Regulatory Provisions

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

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

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

Louis E. Henderson, Jr. testified that he was first employed by the respondent on September 2, 1981, and that his last day of employment was November 25, 1982. He confirmed that he is unemployed and that his last position was as a "powder man" (Tr. 6). He stated that when he was discharged by the respondent he was told that he was being fired "for negligence of equipment, which consisted of a low tire on my air compressor" (Tr. 6). He confirmed that he inspected the equipment which he used to perform his duties on a daily basis, and he testified as to his training as a powderman for the respondent (Tr. 9-11).

Mr. Henderson explained that the mine in question is a limestone mine, and he indicated that he began working in the respondent's open pit mine but later moved underground where a new mine was being started (Tr. 12). He indicated that "it had about two shots taken out of the fact before I started it," and he described the mine entry as a 13-foot wide entrance, and as one advanced into the mine the float-to-ceiling height was approximately 11 1/2 to 12 feet. In November 1982, the mine had six or eight headings (Tr. 14).

Mr. Henderson identified the general mine superintendent as Bill Feathers, and he confirmed that Mr. Feathers was the person who hired and fired him. He identified the quarry owner as Ron Stanley, and the mine mechanic as Steve Folsom. Mr. Henderson stated that it was his job to report any low tire on his equipment, and Mr. Folsom was the person who would take care of it (Tr. 17). Tires were inflated by Mr. Folsom by means of an air hoze connected to the compressor used by Mr. Henderson (Tr. 18).

~1170

Mr. Henderson described the limestone mine seam as eight to ten inches thick, and that after every shot he indicated that one could see the seam sag and that it sometimes separated from the ceiling. He stated that after the driller drilled the shot holes it was his job to load the shot and to detonate it with an electrical charge after testing the circuit. The shot was actually detonated while he was located several pillars away, but during the loading process he would be under the seam (Tr. 18-19). After blasting, approximately 12 feet of material would be removed, and the seam extended out from the fact for a distance of 12 feet after each shot. He described the seam as follows (Tr. 20-21):

Q. And this limestone seam that you described, how would that appear after a blast?

A. Well, you could plainly see it--it was up there. You could plainly see a seam between the ceiling and the limestone seam.

Q. How far did it extend from the fact?

A. About 12 foot, about.

Q. In other words, it would be pretty much be the extent of the area you blasted out?

A. Oh, yes, yes. Then you would set off the next shot. That seam would fall and there would be another one. This was after every shot.

Q. Now, tell us what else you observed about that seam. Can you give us any idea of how much space there was between the ceiling and the top of the seam?

A. Well, it depends. Sometimes it would look like it was tight, flush up against the ceiling. Other times I could get up on my loader bucket and I could stick my hand back there. It had sagged down eight or ten inches. I could stick a crowbar in there and I couldn't pry it down, but you could see it moving up and down, back and forth, all over. It was pretty loose.

Mr. Henderson testified that he first became concerned with the roof seam sometime in October 1982. At that time,

~1171

after returning from lunch, he found slabs of rock lying around his truck. The rock did not damage his truck, and he stated that the seam was 12 feet out by the face, and that the last five feet fell on the truck. He estimated the width of the seam which fell at ten feet (Tr. 24).

Mr. Henderson stated that the second seam fall incident occurred sometime between November 12 to 15, 1982. He loaded one-half of the heading and pulled out. Thirty seconds later the roof seam fell. He explained that he had "pulled out" in order to prepare the second half of the heading for loading of dynamite. He had "pulled out" for a distance of some 10 yards (Tr. 25-26).

Mr. Henderson testified that when the first fall occurred on his truck he told only the driller about it. However, when the second fall occurred, he immediately advised quarry owner Ron Stanley about it, and Mr. Stanley advised him not to go under the roof seam if he believed it was dangerous, and Mr. Stanley also stated that "I'll guarantee you'll never hear me say anything if you don't go under it" (Tr. 27).

Mr. Henderson stated that after informing Mr. Stanley about the fall, Mr. Feathers came to look the area over. Mr. Henderson indicated that he simply wanted to show Mr. Feathers where the seam had fallen because he had previously asked the drillers and loader operators to try to pull down the seam with the loader bucket or to "tap it down" (Tr. 28).

Mr. Henderson described the seam which fell as the seam "that hangs up there after every shot." He confirmed that he did not inform Mr. Stanley or Mr. Feathers about the rock which fell on his truck. He explained that "I was scared of losing my job, didn't want to stir up trouble and everything." He then said that efforts would be made to take the loose material down with a drill or loader, and he confirmed that efforts were made to do this (Tr. 30-31). When asked whether he had inspected the rock seam which fell on his truck, he replied that "I looked." He also indicated that he had no equipment or crowbars to scale the material down, but that he was given a crowbar after the second fall occurred (Tr. 32).

Mr. Henderson testified that after Mr. Feathers came to the scene of the second fall, the following occurred (TR. 33-35):

A. He said, "Are you scared to go under this half of this heading that you're loading?" and I said, "Yes, I am," and he was standing right underneath it. He said that you could get killed just as easy driving down the interstate as you could up here loading in something like this, which was crazy to me. I don't see--

JUDGE KOUTRAS (Interrupting): Just relate what he said now.

THE WITNESS: That's what he said.

JUDGE KOUTRAS: O.K.

BY MR. NELSON:

Q. Did you have any other conversation?

A. No. I asked him if he would get me some sort of a pry bar so I could try to test it, and he said, "Yes," and he brought me up a little crowbar. It's about three feet long.

\* \* \* \*

Q. What instructions, if any, did Mr. Feathers give you so far as working under the seam?

A. He told me to test it with the crowbar from then on. This was after the second incident.

Q. And what, if anything, were you to do after you tested it?

A. I don't know, really. He just told me to test--

JUDGE KOUTRAS (interrupting): No. Now, Mr. Henderson, after you tested it, if you found out that it was loose, what, in your experience, would you do, would you continue to work under it? What do you mean, you don't know?

THE WITNESS: You couldn't tell sometimes that it was loose.

\* \* \* \*

JUDGE KOUTRAS: Assuming that you took the pry bar and started beating on the thing or prying on it and it didn't move, what would you do?

THE WITNESS: Well, I would have to go under it, I guess.

JUDGE KOUTRAS: What do you mean, you would have to? You would load it, wouldn't you, you would continue loading the shot if it was tight?

THE WITNESS: Well, the one that fell, though, Your Honor, was tight, too, though.

JUDGE KOUTRAS: O.K., but I am trying to understand what you would do as a reasonable person if you found that you had to go into an area after testing it and found that the roof was sound. That's your job to go under there, isn't it?

THE WITNESS: Not if I feel it is a hazard.

Mr. Henderson stated that later in the day after the second fall he called MSHA Inspector Jim McGee at his Topeka office after the roof seam had fallen and after he had spoken to Mr. Stanley and Mr. Feathers, and that he did so because "they weren't scaling it down to my satisfaction, to where I thought it was safe" (Tr. 37). Mr. Henderson then loaded the second half of the shot, and after he and Mr. Feathers tested it and found it "to be O.K.," he shot it down and then went home (Tr. 38).

Mr. Henderson stated that he returned to the mine the next day but refused to go under another heading because upon observation he believed that "it hadn't been pecked or tried to scale down at all." He confirmed that he tried to scale the roof material down while up in the bucket and that he "pecked around a bit." He indicated that it "seemed tight," and that he tested it with the bucket and pry bar, but that he still refused to go under it because he was afraid that it might come down again. He advised Mr. Feathers that he did not want to go under the roof, and he stated that Mr. Feathers "got irate with me, got mad," but that he did not instruct him to go under the roof (Tr. 41). He then called Mr. McGee later in the day or that evening and advised him about his refusal to go under the roof seam (Tr. 42).

~1174

Mr. Henderson stated that when he called Inspector McGee he asked him to send an inspector to the mine to "look at the situation." Mr. McGee dispatched Inspectors Caldwell and Williams to the mine on a Friday morning, and they looked at the situation which concerned him, as well as "the mine as a whole." Mr. Henderson stated that he did not go with the MSHA inspectors, and that the second heading which concerned him had not been shot down or loaded out and that it was "still hanging." Mr. Henderson was then summoned to the mine office with Mr. Stanley and the two inspectors, and he indicated that the inspectors told him that his complaint was justified, and that "there is a potential hazard there" (Tr. 44).

In further explanation of the events after the inspectors came to the mine, Mr. Henderson testified as follows (Tr. 46-48):

Q. Did you look at it with the inspectors?

A. No; I wasn't up there with them when they looked at it.

Q. O.K. When you refused to go under there, how far did that extend or stand out from the face?

A. Well, this particular heading, I believe, had only had one shot taken out of it, so there was about 10 feet of overhanging rock hanging there of the seam.

Q. And is it your testimony that 10 feet was overhanging when you refused to go under it?

A. Yes, I would say about that. I believe there was only one shot out of it.

Q. Now, what happened after the conversation you had with the inspectors? You have already told us that they said yes, there was a possible hazard.

A. Well, they told Mr. Stanley and me that I was responsible along with the foreman to make a safe working place. I said, "Yes, that is fine," and he told Mr. Stanley that I was protected by the Justice Department, and all this stuff.

Q. Did they make any recommendations as to what should be done?



A. O.K. They said we should get sort of a mechanical scaler, maybe build some sort of a canopy over the bucket that I was working out of--my lift--and there was a couple other suggestions, but it was along those lines.

Q. Did they make any suggestions as to whether or not it should be scaled each time blasting was done?

A. No, I don't believe so.

Q. Was that the first time--when was the first time that you were informed that it was your responsibility to check that seam?

A. When they came, when the mine inspectors came down.

Q. Nobody told you that before that?

A. No. They showed me right out of the rule book.

Q. And if you found or considered it to be a problem from your inspection, what was your understanding then of what was to happen?

A. Well, I was to get with the superintendent or the foreman, you know, whoever the supervisor was, to try to work out a solution to the problem, try to scale it down somehow.

Q. Another possible alternative was to put some kind of canopy over the truck?

A. Right, among other things.

Q. What other things?

A. Like a mechanical scaler or something.

Q. You didn't have a mechanical scaler in there, apparently?

A. No, not at all.

Q. What devices did you have available to scale it?

A. Just a crowbar.

Q. What about the company as a whole, what devices did they have to scale it?

A. Well, they tried to use a loader bucket sometimes to pull it down with, tried to run a drill steel in between the seam and ceiling to peck down some of it, but that's about it. That's all they had. They weren't really scaling machines or anything.

Mr. Henderson asserted that approximately a week after he called the MSHA inspector, he had a conversation with Mr. Feathers, and Mr. Feathers told him he "was making waves and didn't have to call the MSHA inspectors down" (Tr. 48). Mr. Henderson stated that he had the conversation with Mr. Feathers after showing him a piece of rock which had fallen from the roof. He explained the background and the conversation as follows:

JUDGE KOUTRAS: You mean you walked into some place and found a rock that had fallen, and you picked it up?

THE WITNESS: What I was trying to do, Your Honor, was just show him how thick the seam was, Your Honor.

JUDGE KOUTRAS: But that wasn't the rock that fell the time that you pulled it after loading, was it?

THE WITNESS: No.

JUDGE KOUTRAS: This was just a rock some place?

THE WITNESS: No, it was off the ceiling.

JUDGE KOUTRAS: Off the ceiling?

THE WITNESS: Right, it was off the ceiling.

JUDGE KOUTRAS: You just wanted to show him a representative sample if a rock fell?

THE WITNESS: It was a big rock.

JUDGE KOUTRAS: I can take judicial notice that if a big rock falls on you, it is liable to kill you. Is that what you were trying to impress him?

THE WITNESS: I was trying to tell him what would happen if it fell.

Q. This was a piece of seam?

A. A piece of the seam, right.

Q. O.K. Now, tell us about the conversation.

A. Well, I informed him I had called the MSHA people in Topeka; and he got pretty irate about that. He said, "You didn't have to call them people." He said, "I don't want you making waves around here," and that sort of thing. That's all I can remember specifically.

Q. How long did that conversation take?

A. How long did it last?

Q. Yes.

A. Less than five minutes.

Q. O.K., and what did you do after that?

A. I packed up my stuff, talked to Mr. Stanley.

Q. Did you tell Mr. Stanley you had called?

A. Yes, I informed him that I had called, too.

Q. What did he say?

A. He didn't say much. I can't remember what he said.

Mr. Henderson stated that after his conversation with Mr. Feathers, he began having "problems," and he described them as follows (Tr. 53):

A. Well, just little subtle hints, you know, and stuff just like I said, I made waves and things like that.

MR. REILLY: I am going to object--

JUDGE KOUTRAS (interrupting): Mr. Henderson, what I am interested in is was all this coming from Mr. Feathers.

THE WITNESS: Yes.

JUDGE KOUTRAS: When you say subtle, what? Just give me a for instance. You come to work in the morning and what would happen?

THE WITNESS: Oh, just--I don't know, just like I told you, he said I was making waves, causing trouble.

BY MR. NELSON:

Q. How many times did he say that?

A. Twice, I believe. This is all within a week--

Q. (Interrupting) You have got to be specific about these things that were said.

JUDGE KOUTRAS: It is not necessary for him to be that specific, counsel. His testimony is that subsequent to the time he called the inspectors, Mr. Feathers was giving him a "hard time" by reminding him on at least two occasions that he was a troublemaker, making waves. Is that the essence of it?

THE WITNESS: Yes.

Mr. Henderson stated that he was discharged approximately two weeks after the inspectors came to the mine, and that he was told that he was being fired for "negligence of equipment," and he described the incident which precipitated his discharge as follows (Tr. 54-57):

A. O.K. I got to work in the morning at 7:30, looked over my equipment, noticed I had a low tire on my air compressor--

Q. (Interrupting) Now, where was your equipment?

A. It was parked down in the mine.

Q. How did you inspect it, with your light and all that?

A. Yes, with my head lamp.

Q. When you find a low tire, what do you do?

A. I told Steve Folsom, the mechanic, about it, that I needed an air hose.

Q. Now, what did you have to do to tell Steve about it?

A. He was right there--he just happened to be there, starting up the dump trucks and stuff. They park them down in the mine when it is cold.

Q. How low was the tire?

A. Oh, I would say it was maybe half low, not low enough to where it would really hurt anything. If you would have run it a long distance, it might of.

Q. So what did you do?

A. I told Steve Folsom that I needed an air hose.

Q. What did he tell you?

A. He said he was busy, that he was starting up the dump trucks and stuff, getting them warmed up. I said, "O.K., I'm going to limp on down here to the powder house, I'm going to start making my shots up, go down there real slow. When you get time, come down there and we will air it up." He said, "O.K. Fine."

Q. O.K., now, why did you go ahead and start work when you had a low tire?

A. Well, because it is a pretty pressing--see, I was the only powderman at the time. I was keeping the whole place running. To keep them in rock, you have to get started early in the morning and get right to it or you will fall way behind and be there until midnight.

Q. You were there a long time, then?

A. Oh, yes, every day.

Q. Now, is that the reason that you went ahead and started work?

A. Yes.

Q. Were you concerned that you might cause damage to the tire?

A. No, not at all.

Q. Why not?

A. Because I was watching it, making sure that I wasn't going to hurt anything.

Q. O.K., and then what took place after that, you went up to the powder house?

A. I was down at the powder house making up my shots, and here come Mr. Feathers, pulled up--I didn't even know what was going on--pulled up, jumped out of the truck, started cussing at me--I'm not going to repeat what he said--but started cussing and told me, you know, get out, said I was fired, you know. He said that is what he was going to put on the report is negligence of equipment, and I said, "Why?" and he says, "Because you didn't air that tire up," and I said, "Well, you know, that's not much to fire me on, you know," and he said, "Get out, get out of my sight before I do something I'm sorry for." He did assault me, but there was no witnesses.

Q. What do you mean, he assaulted you?

A. Grabbed me, threatened to hit me.

Mr. Henderson testified that he was aware of other incidents of equipment misuse but that no action was taken against the employee. He cited an incident involving a pick-up truck which was during too fast colliding with a dump truck, but that nothing was done about it. He also stated that he has observed "trucks hot-rodded around," but he was not aware of any other employees being fired or disciplined over these incidents (Tr. 58). He confirmed that employees had been "talked to" by supervisors, and that he had been previously warned by Mr. Feathers about "driving too fast" sometime in late September or early October 1982. He denied that any other disciplinary action had ever been taken against him for misusing equipment (Tr. 59). He believed he was fired because he called the MSHA inspectors and because other employees had not been disciplined for "things a lot worse," and he was fired over a low tire on his compressor (Tr. 60).

On cross-examination, Mr. Henderson identified exhibit R-1 as his handwritten complaint filed in this matter (Tr. 62). He confirmed that his first experience with a rock fall occurred in October 1982 when he began to experience some rock ledge formation that continued to cling to the ceiling after blasting. He confirmed that he did not inform Mr. Feathers

~1181

or Mr. Stanley about this incident and they did not know about it. After the second incident on or about November 18, 1982, he told Mr. Stanley about it. Mr. Stanley told him in no uncertain terms that he was not to go under any roof which he considered to be in an unsafe condition. Mr. Stanley also advised him that at no time would he ever be in trouble for not going under any unsafe condition (Tr. 65).

In response to further questions, Mr. Henderson testified as follows (Tr. 66-70:

Q. So the first time you ever complained to any official at the quarry, either your superintendent or his superior, about the problem, the responses were, "Don't go under anything that you consider to be an unsafe condition, and I'll come up right away and take a look at it with you?"

A. No, that's what Mr. Stanley said. Mr. Feathers didn't say anything.

Q. Mr. Feathers said, "I'll be right up and look at it," didn't he?

A. No, he didn't say that.

Q. He came right up and looked at it, didn't he?

A. It was later, about two hours later, that afternoon. He said, "Let's go take a look at it," and that's what we done.

Q. And at that time, as far as you were concerned, the condition was not unsafe, was it?

A. Yes, I was pretty scared then.

Q. I didn't ask you whether you were scared. I asked you if it was an unsafe condition.

A. Out there then, after the second time? Yes, I would consider it.

Q. Did you take a bar and try to pry it down to see if any rock came down?

A. Yes.

Q. Did any rock come down?

A. No.

Q. Did the ledge wiggle in any way?

A. Wiggled a little.

Q. I think you previously testified it appeared tight to you?

A. It appeared tight, but the edge of it wiggled a little bit; but the seam as a whole was tight, seemed tight.

Q. And at that time, you were handed a bar or given a bar by Mr. Feathers so that you could, and were instructed to test it any any time you felt it needed to be tested?

A. Right.

Q. And did you do that again?

A. Did I test before I went under these headings again?

Q. Right.

A. Yes.

Q. You only went under the heading one more time, didn't you?

A. Well, yes, O.K., yes, the one where there was one shot out, yes, one shot out. Then I refused.

Q. The next day you went back to Mr. Feathers and said, "I'm not going to go back under that thing again?"

A. Right.

Q. In fact, Mr. Feathers said, "Did you test it with your bar," didn't he?

A. I can't remember.

Q. And you said, "No," didn't you?

A. I can't remember whether he asked me or not.

Q. And after you said no, then he got angry with you for not having tested it as he had instructed you the day before, didn't he?

A. No.



Q. The day you refused to go under it because--right, the next day.

A. Right, yes, I had a conversation with him. That's when he got mad.

Q. And he got mad because you hadn't tested the ceiling with the bar, didn't he?

A. I can't remember that. If that is what it was over or not, I can't say.

Q. Mr. Feathers, when you told him that you called MSHA, said, "Why did you call them, why didn't you come to me first so we could correct any situation that you found to be unsafe," didn't he?

A. I can't remember exactly what he said now.

Q. Isn't that approximately what he said to you?

A. I can't say for sure. I'll say maybe that's what he said, I don't know. It's hard to remember conversations way over a year ago.

Q. When Mr. Feathers had the conversation with you about--when he was talking with you about how you might get killed on the highway, he was trying to calm you down, wasn't he?

A. No.

Q. You were very excited, weren't you?

A. No.

Q. He wasn't trying to calm you down?

A. No.

Q. He didn't state--

A. (Interrupting) He was trying to rationalize me going under that ceiling again, and I wasn't going to do it.

Q. And you didn't view that as an effort to calm you down?

A. No, not at all.

Q. Were you upset?

A. Yes, but I wasn't hysterical or anything like that.

I was concerned, very concerned.

Q. Do you have a temper, Mr. Henderson?

A. When I am pushed, just like anybody else, I guess.

Mr. Henderson stated that he could not recall the conversations with Mr. Feathers at the time he advised him that he would not go under the roof, and he stated that he was not sure whether Mr. Feathers tested the roof and that nothing came down (Tr. 71). He conceded that all of the events surrounding his complaining spanned a period of eight days from November 18 to November 26, 1982 (Tr. 71).

Mr. Henderson stated that he could not remember running the compressor on a flat tire in the past. While he indicated that he would not disagree with any testimony that he did, "I would just say I can't remember" (Tr. 73-74). With regard to his encounter with Mr. Feathers over the compressor tire, he stated as follows (Tr. 74-76):

Q. What was it you said to Mr. Feathers that made him so irritated after he called--

A. (Interrupting) After he called me a little f \* \* \* er, I called him a mother f \* \* \* er, and that is when he grabbed me and threatened to hit me, and he said I was fired before that.

Q. He said you were fired after you said, "F\* \* \* you, you old f \* \* \* er," didn't he?

A. He grabbed me, he tried to grab me; and that is when I got mad. He reached over the tongue of the air compressor and tried to grab me. He assaulted me. He actually bodily touched me, and that is when I got mad, and I was trying to defend myself any way I could. I didn't want to get in a hassle down there in the mine. I had dynamite strung all over the place trying to make up my shots, and that's when he came--  
\* \* \*

Q. After you said what you said to Mr. Feathers, he said, "You are fired. Get out of here?"

A. Right.

Q. And then you went down to the shop, didn't you?

A. After he threatened to grab me, after he grabbed me, I said that.

Q. Then you went down to the shop, didn't you?

A. Right.

And, at (Tr. 79-80):

Q. So Mr. Stanley said, "Well, calm down now, calm down. Let's see if we can't get this worked out," didn't he?

A. Right.

Q. He said, "I hate to see people get fired," didn't he?

A. That's right, that's what Mr. Stanley said, something to that effect.

Q. Something to that effect. He said, "You sit down in this room, and I will go get Bill and we will see if we can straighten this out," didn't he?

A. Yes.

Q. So at some point, you and Mr. Stanley and Mr. Feathers were all sitting in the car, weren't you?

A. Yes; this was over at the office.

Q. And at that point, Mr. Stanley was trying to resolve the whole situation so you weren't fired and you were calmed down and Bill was calmed down, didn't he?

A. What Mr. Stanley said was that he had to back up his superintendent, his foreman, whatever decisions he made. That's about all he said.

Q. At one point while you were sitting in that car, didn't you actually go beserk?

A. No, I didn't.

Q. You're sure you didn't?

A. No.

Q. Didn't you become almost incoherent?

A. No, not at all.

Q. And at that point, didn't Mr. Stanley then fire you?

A. No.

Q. Didn't Mr. Stanley then say, "You're gone. I can't even talk to you?"

A. No.

With regard to his allegations of harassment by Mr. Feathers, Mr. Henderson testified as follows (Tr. 84-88):

Q. At no time did anyone at the quarry tell you that you had to work under what you considered to be an unsafe condition, did they?

A. They didn't directly say that, no.

Q. Now, you said that for the week-long period in between when you called MSHA and when you got fired, Mr. Feathers impliedly did this and suggestedly did that. Do you recall any single instance where Mr. Feathers said anything to you?

A. Well, it's just the main instance that I remember, is when I told him that I had called MSHA, you know, and I told him no, that I wasn't trying to cause any trouble, and that is when he got mad.

Q. That's the only time you can recall Mr. Feathers saying--

A. (Interrupting) That's the only time I can recall any out and out harassment or anything like that.

Q. As a matter of fact, your complaint doesn't even mention any further communication with Mr. Feathers throughout the period of time from the day that you had this conversation with him until the day you were fired, does it?

A. Well, I was in close contact with him all the time. He was the superintendent, and he come up to check on you, see how you were doing, things like that.

JUDGE KOUTRAS: No. His question was from the time you fired--I mean from the time you called MSHA until the time you were fired, your complaint doesn't say anything about the needling, the purported needling, that Mr. Feathers subjected you to.

THE WITNESS: No, there's no real--I couldn't really peg anything down to it.

BY MR. REILLY:

Q. There wasn't anything he said to you that was actually directed to any of the events that occurred with MSHA?

A. Oh, no, not directly, no.

Q. He never criticized you or chastized you in any way, did he?

A. Except for that one time--well, twice.

Q. You have already indicated except for the time when you just told him that you called MSHA, right?

A. Right; and he got mad, and he got mad the time I wouldn't go back under that second half of the ceiling that fell.

Q. Other than that, there was never any comment by anybody at the quarry to you about having called MSHA, was there?

A. Not directly, no.

Q. Not even indirectly, was there?

A. That's debatable.

JUDGE KOUTRAS: Was there or wasn't there, Mr. Henderson?

THE WITNESS: I would say yes, some things were.

BY MR. REILLY:

Q. What?

A. Just by increased workload, things like that, you know.

Q. What was your increased workload?

A. Working overtime, you know, and things like that.

Q. What was the overtime you worked, Mr. Henderson?

A. Oh, I don't know. I was putting anywhere from 55 to 60 hours a week in.

Q. We are only talking about a one-week period here, Mr. Henderson; how many extra hours did the quarry make you work because you called MSHA?

A. Well, I can't prove that.

JUDGE KOUTRAS: Hold it, counsel. Do you like to work overtime?

THE WITNESS: When I can, yes, sometimes.

JUDGE KOUTRAS: Did you ever refuse to work overtime?

THE WITNESS: No, I didn't.

JUDGE KOUTRAS: Did they ever order you to work overtime?

THE WITNESS: Sometimes, yes, I had to.

JUDGE KOUTRAS: I mean during this week.

THE WITNESS: I had to.

JUDGE KOUTRAS: I get the impression you're trying to convince me they punished you by making you work overtime, is that a fact?

THE WITNESS: I had to. I had to work overtime because I was the only powder man, and I had to get the rock down on the floor. I couldn't say no. They would say, "Hit the road. We will get somebody else."

JUDGE KOUTRAS: You got paid for it, didn't you?

THE WITNESS: Right.

JUDGE KOUTRAS: Are you trying to convince me that this operator, because of your complaint to the two inspectors, punished you by making you work overtime?

THE WITNESS: Well, I can't say that that was a punishment, no. I think some of it was.

JUDGE KOUTRAS: Why was some of it?

THE WITNESS: I don't know.

JUDGE KOUTRAS: What leads you to conclude that part of the requirement you work overtime was in punishment?

THE WITNESS: Well, it was not only overtime, it was subtle things that were going on.

JUDGE KOUTRAS: All right, Mr. Reilly.

BY MR. REILLY:

Q. What were the other subtle things, Mr. Henderson, can you name one?

A. No.

In response to question from the bench concerning his safety concerns, Mr. Henderson testified as follows (Tr. 95-100):

JUDGE KOUTRAS: All right, Mr. Henderson. Let me just ask you a couple of questions now. At the time when that half a header fell as you were pulling back, it's my understanding you went back and checked that area with a bar and found that maybe one of the corners may have been loose but it was all tight, it was tight, correct?

THE WITNESS: After one half of it fell?

JUDGE KOUTRAS: Right.

THE WITNESS: Yes. We went up in the bucket, I pried on it a little bit. It would wiggle a little bit but it seemed tight.

JUDGE KOUTRAS: But that is not the area where you refused to go under, is that right?

~1190

THE WITNESS: No.

JUDGE KOUTRAS: Did you actually go back under the second half of this header after you went up and tested it, the half of the header that you were working on after you pulled out, 30 seconds after you pulled out approximately 10 yards, it fell?

THE WITNESS: Right.

JUDGE KOUTRAS: And that caused you some problem, right?

THE WITNESS: Right.

JUDGE KOUTRAS: You reported that?

THE WITNESS: Right.

JUDGE KOUTRAS: Then Mr. Feathers gave you a pry bar?

THE WITNESS: Right.

JUDGE KOUTRAS: And you went back, and he came back up there a couple hours later and observed it, is that correct?

THE WITNESS: Yes. He was with me.

JUDGE KOUTRAS: He was with you. You tested it with a pry bar?

THE WITNESS: I went up with it, stuck it back up in there in that corner, and it wouldn't budge.

JUDGE KOUTRAS: Now, at that point in time, did you make a decision that that header that was remaining that you went up and tested was unsafe?

THE WITNESS: Well, I was taking a chance, really.

JUDGE KOUTRAS: Forget that. Answer my question. If you tested it with a bar and found that it was sound, then what else, what other alternative did you have?

THE WITNESS: Well, I am not going to say it was sound.



JUDGE KOUTRAS: Did you test it with a pry bar?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you determine after testing that it was not safe?

THE WITNESS: Yes and no. I decided I wanted to finish the job and get out from underneath it, O.K.?

JUDGE KOUTRAS: Why didn't you decide that it was unsafe and tell Mr. Feathers that you were not going to finish the second half of the shot?

THE WITNESS: I don't know. I felt under pressure at the time.

JUDGE KOUTRAS: You felt under pressure?

THE WITNESS: Right.

JUDGE KOUTRAS: And you went ahead and shot it down?

THE WITNESS: I already had half of it loaded. I felt I would go ahead. I was more or less taking a chance.

JUDGE KOUTRAS: You were taking a chance even though your pry bar test indicated that it was sound?

THE WITNESS: Right.

JUDGE KOUTRAS: Now, the next day is when you called the MSHA people?

THE WITNESS: Right.

JUDGE KOUTRAS: All right, but the next day when you reported to work, you went to another location in the mine, correct?

THE WITNESS: Yes.

JUDGE KOUTRAS: And you found a ceiling?

THE WITNESS: Yes.

JUDGE KOUTRAS: Did you test the ceiling?

THE WITNESS: Yes.

JUDGE KOUTRAS: With what?

THE WITNESS: Well, I went up and pecked it a little bit.

JUDGE KOUTRAS: Pecked it with what?

THE WITNESS: With the crowbar.

JUDGE KOUTRAS: With the crowbar that you wtil had from the day before?

THE WITNESS: I believe it was the same one.

JUDGE KOUTRAS: All right, and you pecked around, and what did you find?

THE WITNESS: It seemed tight.

JUDGE KOUTRAS: It seemed tight?

THE WITNESS: Right.

JUDGE KOUTRAS: Why didn't you go ahead and load that shot?

THE WITNESS: Well, because the other one seemed tight, too, and you can't tell when these things are going to fall.

JUDGE KOUTRAS: It could fall today, it could fall tomorrow, right?

THE WITNESS: Right.

JUDGE KOUTRAS: And what means do you have for determining whether the area is safe before you go in there?

THE WITNESS: You don't.

JUDGE KOUTRAS: You just told me. What's the normal procedure for testing for soundness of a ceiling or a roof in that situation?

THE WITNESS: The only way I know is to test it with a bar.

JUDGE KOUTRAS: All right.

THE WITNESS: And the tension on that ceiling, you could not pry it down with a bar. I never had been able to get anything down with a bar. The fact is you can't--they can wiggle it around with a loader bucket. You can see it working up and down, and sometimes it won't fall, sometimes it will.

JUDGE KOUTRAS: Are you suggesting that a roof area that's tested with a bar and appears to be sound should be taken down anyway?

THE WITNESS: Yes, oh, yes.

JUDGE KOUTRAS: To make it 100 per cent safe?

THE WITNESS: Yes, absolutely.

JUDGE KOUTRAS: Is that the way it's normally done?

THE WITNESS: It should be.

JUDGE KOUTRAS: Why do you take something down if you sound it and find it is sound?

THE WITNESS: Who wants to mess around with somebody's life?

JUDGE KOUTRAS: Who wants to mess around underground in a mine to begin with? I'm not trying to be facetious, but I'm trying to understand it here. Were there any citations issued in this case to the mine operator for failing to sound the roof?

THE WITNESS: I don't believe so, no.

Mr. Henderson testified that prior to November 1982, he had loaded probably 50 to 100 shots, but that he did not always test the ceiling "because I didn't always have time. It takes time and I was busy. It's a heck of a schedule I was on" (Tr. 101). Mr. Henderson indicated that the responsibility for checking the ceiling is his as well as the superintendent's (Tr. 102). When asked what he would do if he checked the roof and found that it was not safe, he replied (Tr. 103-105):

JUDGE KOUTRAS: What would you do if you found it was not sound?

THE WITNESS: Sometimes, regrettably. I would go under and do it anyway.

JUDGE KOUTRAS: You would take the chance anyway?

THE WITNESS: Take a chance.

JUDGE KOUTRAS: Whose fault is that?

THE WITNESS: That would be mine. That is the reason why I complained about this, is because if I would have gotten crushed under there, it would have been my fault anyway.

JUDGE KOUTRAS: You wouldn't be here to complain, would you?

THE WITNESS: Yes.

JUDGE KOUTRAS: Isn't that true--what I'm trying to understand is to what degree do you believe that the mine operator has to go to make an area absolutely fail-safe under all conditions.

THE WITNESS: He should buy a scaling machine and scale it down, make it safe.

JUDGE KOUTRAS: How about building a net or putting a canopy?

THE WITNESS: That wouldn't do any good with 10 tons of rock. It would smash it flat.

JUDGE KOUTRAS: Is there anything in the regulations--now, you mentioned the federal standards. What is your understanding of what these federal laws require as far as testing and scaling?

THE WITNESS: All I know is what the mine inspectors showed me when they came out that day.

JUDGE KOUTRAS: What did they show you?

THE WITNESS: They showed me a section in there--I can't remember the section--like I said, it was my responsibility, along with the foreman or the superintendent, to make sure it was a safe working place.

JUDGE KOUTRAS: All right. Let's assume the section foreman and the mine superintendent determined that it was a safe working place?

THE WITNESS: Yes; but they never did, though. That's the thing, they rarely ever checked on it. They didn't even care.

JUDGE KOUTRAS: How do you know that on this day when this roof fell they didn't check it?

THE WITNESS: Well, I was working up there all day long, and I didn't see anybody go under the header.

JUDGE KOUTRAS: How about the second fall where you sounded with the bar and found it sound?

THE WITNESS: You are talking about the second half of the room that fell?

JUDGE KOUTRAS: Right.

THE WITNESS: I don't know if it was tested or not.

JUDGE KOUTRAS: And then the next day, you found the ceiling that you also said was sound, but you didn't want to go under it?

THE WITNESS: I thought it was. I wouldn't want to take a chance the next day.

JUDGE KOUTRAS: And what did you want the mine operator to do?

THE WITNESS: Scale it down.

When asked to clarify his prior statement in his complaint to MSHA that Mr. Feathers attempted to scale down the ceiling, Mr. Henderson stated as follows (Tr. 111-112):

BY JUDGE KOUTRAS:

Q. Part of your statement, you said that after you refused to go under the ceiling and after you had this conversation--or at least wanted Mr. Feathers to look at it--you said something to the effect in your statement--and I am quoting: "So the next day he did make an attempt to scale the ceiling, and I told him I appreciated it."

Can you elaborate on that? You seem to indicate in your original statement that Mr. Feathers at some point in time made an attempt to scale the ceiling and you had told him you appreciated it.

That part there, what's that all about, was this when you went back to examine the ceiling, and is that the time that he came up to look at the second half of the header, or precisely what did you have in mind with that?

A. I don't remember him trying to scale it down, I really don't.

Q. Is that your statement there?

A. Yes. This has been so long ago, all this--

Q. (Interrupting) Mr. Henderson, now wait a minute.

A. I'm not denying he did, O.K.? I am trying to remember all this stuff as it comes up, but it is hard to remember, it really is. If I made it there, then he probably did try to scale it down.

\* \* \* \*

Q. You may not be able to answer this, but which ceiling were you referring to?

A. I guess it was the one that I refused to go under. I told you all it only had one shot taken out of it.

Steven H. Folsom, testified that he is employed by the respondent as a maintenance mechanic. He testified as to the incident concerning the low air pressure on Mr. Henderson's vehicle, and he confirmed that the tire looked flat and that he advised Mr. Henderson that he would look at it. However, before he could take care of the problem, Mr. Henderson left the area with the truck, and he observed him later in the shift in a conversation with Mr. Feathers about the tire, but did not hear what transpired (Tr. 113-117).

Mr. Folsom had no personal knowledge of any other employee actually being fired because of "negligence of equipment," although he was aware of the fact that other employees had abused equipment which required him to repair it (Tr. 117). He had no personal knowledge that the tire which Mr. Henderson drove on actually caused any damage (Tr. 118).

On cross-examination, Mr. Folsom confirmed that a tire on a compressor truck in the past had been ruined by someone driving it with low air pressure, but could not state whether

~1197

Mr. Henderson was involved in that incident. He did confirm, however, that the rim had to be straightened and that a new tire had to be installed to replace the damaged one (Tr. 119). He confirmed that he spoke with Mr. Henderson after he observed him speaking with Mr. Feathers, and that Mr. Henderson told him that he had been fired. Mr. Henderson was upset, but he had no other detailed conversation with him over the incident (Tr. 119). He confirmed that he had previously put air in compressor tires in the shop, and that he had previously performed this service for Mr. Henderson in the past (Tr. 121).

Terry Acock, testified that at the time Mr. Henderson was discharged he was employed at the quarry as a driller. He testified as to an accident which he (Acock) had with a truck which he had been driving when it collided with another vehicle, and that Mr. Feathers accused him and the other man of driving too fast. He was not fired over the incident, and knows of no one else who was fired for not taking care of equipment or for damaging equipment. However, he confirmed that he was discharged by the respondent, but that the reason for the discharge was not related to the maintenance of equipment (Tr. 121-123).

On cross-examination, Mr. Acock confirmed that he did not intentionally run into the truck in question and that it was an "accident." He did not curse Mr. Feathers, nor did he argue with him (Tr. 124).

William E. Feathers, quarry superintendent, testified as to his background and experience. He testified that Mr. Henderson said nothing to him about any rock fall which he may have experienced in October 1982, and he explained the procedures followed at the mine to scale down any rock which may remain after a shot (Tr. 128-134).

Mr. Feathers stated that sometime between November 16 and 20, 1982, Mr. Henderson came to him on a Thursday and showed him a rock which he threw at his feet and stated "You see this rock? That could kill a person." Mr. Feathers asked him to explain, and Mr. Henderson told him that the rock had fallen from a ceiling where he was working, and that he was not going back into the mine to work (Tr. 135). Mr. Henderson then explained to him that he called MSHA, and when Mr. Feathers inquired as to why he had not first brought the matter to his attention or to the attention of Mr. Stanley, Mr. Henderson did not reply (Tr. 136).

Mr. Feathers stated that he never asked Mr. Henderson "to go into any condition that he felt was unsafe," and he indicated that at any time an employee believes a condition is unsafe

~1198

they would come to him because "that's my job" (Tr. 137). Mr. Feathers stated that he and Mr. Stanley examined the area that Mr. Henderson complained about, and they found that "a chunk" of the ceiling had fallen out for a distance of some five feet, but that the rest of the ceiling was tight. Mr. Feathers checked the ceiling with a bar, which is the standard method for doing so, and he determined that it was safe (Tr. 138). Since it was the end of the work shift, there was no question raised at that time about Mr. Henderson going back to work, and the conversation ended (Tr. 138). The next day was a Friday, and since Mr. Feathers was not at work, he did not see Mr. Henderson again until the following Tuesday (Tr. 139).

Mr. Feathers stated that when he next spoke with Mr. Henderson on the Tuesday following the rock fall incident, Mr. Stanley had given him a seven-foot bar to use in scaling the ceiling and that Mr. Henderson had it in his truck. After examining the ceiling that Tuesday, Mr. Feathers found that it was "tight" and found nothing that he believed to be unsafe (Tr. 141). Later that week, Mr. Henderson told him that he had refused to "load a room," and when asked whether he had checked the ceiling, Mr. Henderson replied "no," and Mr. Feathers commented "What do you think we bought that bar for you, just to haul around and look at? We bought it for you to use." Mr. Feathers stated that he then went back and checked the room that Mr. Henderson was complaining about, but it was not the same room that he had complained about on the previous Thursday. He found that it was "tight" and found nothing unsafe (Tr. 141). Mr. Feathers explained further as follows (Tr. 142-143):

JUDGE KOUTRAS: Excuse me just a second now for interrupting your narrative, but was that the same ceiling that he had refused to go under?

THE WITNESS: No, no, no, sir.

JUDGE KOUTRAS: This was another location?

THE WITNESS: Yes. This was the whole mine in general that he told me to go up, and there was one particular area over there in the east wing that he wanted me to try and knock down, and so I went over and tried scaling it; but while I was up there, I went around and checked all of them and tried knocking down all the loose rock that I possibly could, and Louis came--I thought it was a good gesture--he came; and after he seen me doing it, he said, "I appreciate you doing it," and I said, "That is what we want to do," to try to make the place safe to work.



BY MR. REILLY:

Q. Was that the complete conversation?

A. That's the last conversation I had with Louis about the ceiling.

Q. That's the one he is referring to here in his complaint where he was you did make an attempt to scale the ceiling and he told you he appreciated it.

A. I imagine.

Q. That's the one he is referring to?

A. Yes.

Mr. Feathers testified as to the incident which occurred on the morning of November 26, with respect to Mr. Henderson's driving his truck with the air in the compressor truck tire low. He indicated that this was not the first time this had happened, and that on a prior occasion Mr. Henderson had ruined a tire by driving on it without air, and that he (Feathers) had warned him about this practice (Tr. 144-145). Mr. Feathers stated that when he discussed the matter with Mr. Henderson on November 26, Mr. Henderson swore at him, then Mr. Feathers told him that he was fired. Mr. Feathers conceded that he was angry and that he told Mr. Henderson "you're fired because you are going to cause me to do something we both might be sorry of" (Tr. 145). Mr. Feathers denied grabbing, touching, or attempting to swing at Mr. Henderson, and he stated that he fired Mr. Henderson because he swore at him. After he told him that he was fired, Mr. Henderson left the area (Tr. 146).

Mr. Feathers stated that after firing Mr. Henderson, he encountered Mr. Stanley at the entrance of the mine and informed him what he had done. Mr. Stanley informed him that he wanted "to talk the matter over," and they went to the mine office to speak with Mr. Henderson. The three of them then sat in a car outside the office to discuss the matter further, and Mr. Stanley was attempting to reconcile the matter. However, Mr. Henderson began criticizing Mr. Feathers' work and abilities as a supervisor. At that point, Mr. Feathers commented that "there was no way" he and Mr. Henderson could continue to work together and still have the cooperation needed to do the work (Tr. 148), and he described what happened next as follows (Tr. 149-150):

~1200

Q. O.K. Did Ron say something to Mr. Henderson at that point?

A. Well, Ron's gesture was that he was trying to impress upon him that if there would be some kind of more or less reconciliation between the two of us, he could continue to work there; and I knew that this was Ron's intentions and his own personal feelings that we could reconcile this difference, and I wanted to hear his opinion is because the reason why I wasn't saying anything. I knew Louis is--well, it may be said maybe nobody really knows Louis--I thought that I did and I had a working relationship between him, and he did--and as far as powdering, he was a good powderman. I never had to get onto him for speed or anything, and we did maintain, I thought, a fairly decent working relationship, and I wasn't in no way looking forward to firing him and going out and finding a new powderman and bringing him in and spending 40 hours retraining somebody to take his job. That's nothing to look forward to because there is--

Q. (Interrupting) Did Mr. Henderson become enraged in the car?

A. Yes.

Q. And did Ron say, "That's it. You're out?"

A. Yes.

Mr. Feathers testified as to the incident concerning a truck accident involving Mr. Acock, and he confirmed that Mr. Acock was not fired, did not swear at him when he discussed the incident with him, and he confirmed that Mr. Acock did not intentionally wreck the truck, and in fact, apologized over the incident (Tr. 152).

On cross-examination, Mr. Feathers confirmed that during the cleanup procedures after a shot is fired, the loader operator is protected by an overhead canopy on his vehicle when he goes in to scale the area, and that his risk would be less than that of a powderman (Tr. 156). When asked whether he would have preferred that Mr. Henderson sit idly by while awaiting someone to air up the tire on the compressor, Mr. Feathers answered that Mr. Henderson could have left the compressor and gone ahead with his work without "endangering the tire" (Tr. 157). Mr. Feathers again denied provoking Mr. Henderson, or that he ever threatened or cursed him (Tr. 158). He denied that he accused Mr. Henderson of being a "troublemaker," or that he criticized him for calling in the inspectors (Tr. 159-160). He also denied that he fired Mr. Henderson for complaining to MSHA (Tr. 162).

~1201

Ronald H. Stanley, owner and manager of the quarry in question, testified that he has operated the facility for eight years. He confirmed that he works at the quarry on a daily basis, and he identified the quarry superintendent as Bill Feathers. Mr. Stanley confirmed that Mr. Henderson worked for him as a powderman, and he confirmed how rocks are scaled and the procedures followed by the loader operator after a shot is fired (Tr. 166-168).

Mr. Stanley confirmed that he first learned of any problems with Mr. Henderson on November 18, and that Mr. Henderson did not inform him of any prior problems which he may have had in October. He described his first encounter with Mr. Henderson as follows (Tr. 169):

A. It's foggy, but to the best of my knowledge, we were loading an outside shot, and we needed Louis's caps to load it, and so I was up preparing the holes to load them. Louis came down and we had already started a few holes before Louis had mentioned--he said, "You know, some ceiling fell up there," and I said, "I don't know." He said, "Well, it did and it just scared the hell out of me." I said, "O.K., let's finish this shot, and we will get up there and look at it. Don't go in or anything if you don't think it's safe, obviously," and we went ahead and finished the shot, and I think we shot it--I might have went somewhere--in the meantime, Louis had told Bill about it.

Mr. Stanley stated that after finishing the shot in question, he went to the area where Mr. Henderson had indicated had previously fallen, and he found that approximately half of a ten-foot ceiling had fallen. After examining the area, he (Stanley) and Mr. Feathers, considered that it was safe, and as far as he knew Mr. Henderson had not called MSHA that day about this prior fall (Tr. 170). The next day, Mr. Henderson informed him that he had called MSHA, and Mr. Stanley stated that he told Mr. Henderson that he thought this was a "great idea" because of ceilings which had hung after six or eight months. Mr. Stanley stated further that he personally called an MSHA inspector to send some inspectors to the mine to check the mine ceilings because he did not want Mr. Henderson to work in areas which had not been inspected (Tr. 171).

Mr. Stanley confirmed that MSHA had previously inspected his mine, had been in the "upper mine" areas which concerned Mr. Henderson, and no one ever mentioned anything about the

~1202

seams which concerned Mr. Henderson. Mr. Stanley denied that he ever asked Mr. Henderson to go into any mine area which he or Mr. Feathers considered to be in an unsafe condition (Tr. 172). Mr. Stanley indicated that his instructions were that all walls were to be scaled with bars, and that if Mr. Henderson believed they were still unsafe he was to tell him or Mr. Feathers about it (Tr. 173). After the aforesaid incident. Mr. Stanley had no further contacts with Mr. Henderson. concerning any work refusals, nor did he have any conversations with him about the condition of the mine ceiling until the day of his discharge (Tr. 173). With regard to what transpired at the time of the discharge, Mr. Stanley stated as follows (Tr. 173-174):

A. I don't know how I knew he was fired. I was just driving through the mine, and Louis--I think he was in the shed changing clothes or putting in his timecard--and I asked, "What is going on?" and he said, "I got fired." He was upset but not vocally upset, and I said, "Oh, hell. Why don't you get in the car, go over to the office, get a pickup, go to the office. I will get Bill and we will come over to the office and talk. So I had to run Bill down; and I asked Bill what happened, and he said, "Well, he just cussed me out, drove with a flat tire, and I fired him," and I said, "Well, let's go over and talk to him," and I said, "If we go over and talk to him and we get this straightened out, would you hire him back?", and Bill said "Yes," which is hard to do because I stand behind Bill. That's his responsibility. So I said, "O.K., so let's at least go over and try to talk it out." Bill got in the car. Louis got in the car in front of the office. Bill was kind of being quiet, and it's real hard to start a conversation, and Louis really got upset as far as I'm concerned, just went totally--he told one specific thing I remember definitely. He said, "Bill doesn't care how many men are killed out here as long as we get production." Well, that pissed me off because I know Bill cares about somebody's life, but he said he doesn't care if a man gets killed every day as long as we have production, and I said, "Louis, I know better than that," and as the conversation went on and on, Louis got hotter than hell, and I started getting made, and I said, "O.K., that's all. Forget it. You are gone," and that is the last I can remember.

~1203

Mr. Stanley stated that at the time of the discharge the question of Mr. Henderson calling MSHA never came up, and that Mr. Feathers said nothing about Mr. Henderson being "a troublemaker." As a matter of fact, Mr. Henderson stated that he had no problems with Mr. Henderson in the past and that he heard through hearsay that Mr. Feathers had in the past talked him out of quitting his job because others were "needling" him about working overtime. Mr. Stanley stated further that he never "punished" Mr. Henderson by requiring him to work extra hours, and he indicated that Mr. Henderson liked extra hours and "worked all the hours he could get" (Tr. 175).

On cross-examination, Mr. Stanley denied that Mr. Henderson told him that Mr. Feathers "grabbed him" or "started to hit him" (Tr. 176). He confirmed that Mr. Henderson worked at the quarry for about a year, and that matter concerning Mr. Feathers' talking him out of quitting occurred six to eight months into his employment (Tr. 176).

In response to bench questions, Mr. Stanley confirmed that he went to the area where the ceiling fell with the MSHA inspectors after Mr. Henderson called them, and that the area had already been shot and was "gone" (Tr. 177). He confirmed that the inspectors looked at the ceiling conditions of the entire mine in the areas where the ceiling is left after the shots are fired, and they inspected approximately 12 headings. Mr. Stanley suspected that Mr. Henderson was concerned generally about all of these ceiling conditions, and he stated further as follows (Tr. 179-181):

JUDGE KOUTRAS: All right. Now, what did the inspectors have to say about the conditions that they viewed, the general--

THE WITNESS: They said if it hangs back 10 foot, it's pretty bad even though you can get a bucket up there and you can lift. I have seen them lift the whole machine off the ground trying to pull it down; and there's two other things we can do. We can drill our top holes a little closer to the ceiling, and then it will break back. On half the shots, you may get a ledge only this far. You may get a foot. Some of them cling straight back to the face; but on ones that hang back, they said you have just got to try and make sure everybody tries harder to get it done the best they can; and when Louis comes up there to check with a bar and let somebody know if he doesn't feel it is safe, is their opinion.

JUDGE KOUTRAS: So, theoretically, is it your position that if none of this was done to your satisfaction, he would consider any roof area in that mine to be unsafe and he would probably refuse to work any place, or is that being unfair?

THE WITNESS: I don't know his frame of mind at the time. I'm sure that day he was nervous. He didn't want to go anywhere in the mine.

JUDGE KOUTRAS: If half a header fell, I can understand his being a little nervous about that. You probably should have given him the rest of the day off or something, but what I am trying to understand is the facts of this case. Now, let me ask you this. At that point in time, was your mine operating under a particular written plan for the scaling of walls, or do you simply refer to the mandatory standards?

THE WITNESS: The standards, but our own standards.

JUDGE KOUTRAS: Your own procedures as testified?

THE WITNESS: The man that is on the loader has been in limestone mines for 40 years, and he is kind of an old hand on ceilings. He is the first one in the room; and when he says it is unsafe or it needs picking, we kind of use him for a guide. I have been in mines for 20 years. He is kind of the old salt of the mines, and then the driller has been there a long time; and then after those two get through with it, we consider it safe--I do unless someone comes around and tells us.

JUDGE KOUTRAS: Who is the person responsible for making the examination required under the mandatory standard?

THE WITNESS: Bill, Mr. Feathers.

JUDGE KOUTRAS: What is your track record, have you ever had any fatalities or accidents at that mine involving roof falls?

THE WITNESS: No fatalities. We had a rock fall. A guy skinned his arm one time off to the side.

JUDGE KOUTRAS: Have you ever had any citations issued to you for violations of mandatory standards dealing with underground ground support as found in Part 57 of the Regulations?

THE WITNESS: No.

JUDGE KOUTRAS: Did any citations or violations result of MSHA's, Mr. McGee's, visit to your mine?

THE WITNESS: No, as far as I know, no.

When called in rebuttal, Mr. Henderson stated that he had a good working relationship with Mr. Stanley. He also indicated that he had a similar good relationship with Mr. Feathers "until the time I turned him in to MSHA" (Tr. 136). When asked to elaborate, he explained as follows (Tr. 126-127):

Q. Now, what do you mean, real good, did you get along well?

A. Got along with him just fine as far as--I don't know--no hassles or anything like that, no arguments really.

Q. And what change did you notice in your relationship with Mr. Feathers after you made your complaint?

A. Just some sarcastic--short with me all the time, stuff like that.

Q. That's what you were describing earlier about the incident?

A. Right.

MR. NELSON: Thank you.

CROSS-EXAMINATION

BY MR. REILLY:

Q. Can you recall what sarcasm Mr. Feathers expressed to you on any given occasion between November 18 and November 26 of 1982?

A. Not any outright hostility or anything like that.

Q. Can you recall any instance when he was short with you, can you tell the Court a specific instance when he was short with you between November 18 and November 26, 1982?

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A. Not a specific instance, no.

MR. REILLY: No other questions.

JUDGE KOUTRAS: Mr. Henderson, you said up until the time you turned him in to MSHA. Now, when you called the MSHA inspectors, you just wanted them to come out to examine the workplace, right?

THE WITNESS: Right.

JUDGE KOUTRAS: How did that translate to turning him in, did you mean by that since he was in charge of the mine as the superintendent there, that he was responsible?

THE WITNESS: Well, I didn't mean it to sound like I was turning him in. I just wanted somebody to come out and look at the mine.

JUDGE KOUTRAS: When you called the MSHA people, did you mention Mr. Feathers' name?

THE WITNESS: I don't think I did.

JUDGE KOUTRAS: You just wanted the inspectors to come out to look at the scene?

THE WITNESS: Right.

On the evening prior to the scheduled start of the hearing, it was called to my attention that complainant's counsel had "requested" the appearance of two MSHA inspectors for testimony at the hearing. Although no subpoenas had issued for their appearance, they appeared voluntarily at the hearing, and were accompanied by a representative from the Labor Department's Kansas City Regional Solicitor's Office (Tr. 110). Since this is a "private" discrimination matter, the Solicitor's representative was prepared to interpose an objection to the service of the subpoenas on the inspectors in question in accordance with the applicable Departmental policy.

By agreement and stipulation of the parties, the inspectors were not called to testify and they were excused (Tr. 110). Complainant's counsel stated the following terms of the stipulation in lieu of the inspectors' testimony (Tr. 108-109):



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The two inspectors are Dean William and Lloyd Caldwell, and I would expect them to testify that they were notified of this problem Mr. Henderson has described at the mine, and they went out to inspect the mine. They observed a condition at the point where Mr. Henderson said that he refused to work where the seam had been scaled down to six to eight feet from the face. They considered that any problem that had existed had been solved by that scaling down. However, they did make recommendations that the seams routinely be scaled down after the blast or that a protective shield of some kind be constructed for the vehicle and for Mr. Henderson's safety.

They would also testify that they did consider this particular seam to be potentially dangerous after blasting although they didn't observe it other than in the scaled-down condition it was in when they arrived. They would further testify that it is the duty of the miner to inspect and that if the miner, after inspecting considers a condition to be hazardous or dangerous, that it is then the responsibility of the owners or supervisors to see that the condition is corrected before the miner goes underneath it, and I think we can get the citations for that from the Federal Register.

Respondent's counsel pointed out part of the stipulation should include the fact that when the MSHA inspector's came to mine in response to Mr. Henderson's request, they issued no citations for violations of any mandatory safety or health standards, and found no condition which was in any way hazardous to Mr. Henderson's health (Tr. 110).

#### Findings and Conclusions

The complainant alleges that his discharge was discriminatory in that it was in retaliation for his complaining to MSHA inspectors about certain mine conditions which he believed were hazardous. In his posthearing brief, complainant's counsel states that he is also claiming that Mr. Henderson's discharge was in retaliation for exercising his right to reasonably refuse work under conditions he considers "eminently dangerous." Further, although Mr. Henderson's original complaint made no mention of any harassment by mine management, he raised this issue during the course of the hearing. Finally, Mr. Henderson argues that prior to his discharge no one else was terminated for misuse of equipment. At page seven of his brief, Mr. Henderson's counsel asserts that "the record abounds with evidence of misuse of equipment by other employees."

Alleged Harassment and Intimidation

I find nothing in the record to support Mr. Henderson's assertion that Mr. Feathers harassed or intimidated him because of his exercise of any protected safety rights. Mr. Henderson could cite no specific instances of hostility or intimidation, and he simply concluded that Mr. Feathers accused him of "making waves" and "causing trouble."

Mr. Henderson asserted that Mr. Feathers retaliated against him for complaining to MSHA, and he inferred that this took the form of requiring him to work overtime. However, Mr. Henderson could not substantiate this claim, and I conclude and find that the record here does not support any such conclusions.

I conclude and find that any "hostility" shown by Mr. Feathers towards Mr. Henderson resulted from their encounter over the low air pressure in the compressor tire, as well as their obvious dislike for each other stemming from that incident, as well as Mr. Henderson's "opinions" concerning Mr. Feathers' supervisory talents as related to Mr. Stanley during their conversation after the discharge. After viewing the witnesses during the hearing, I find Mr. Feathers' account of the incident over the tire to be credible and believable, and I believe that he was provoked by Mr. Henderson's conduct, and reacted accordingly. Further, I take note of the fact that Mr. Henderson is much younger and physically larger than Mr. Feathers, and that after considering their testimony and viewing them on the stand, I simply do not believe Mr. Henderson's assertion that Mr. Feathers was the aggressor during their encounter over the tire incident.

With regard to any intimidation or harassment against Mr. Henderson by the quarry operator (Stanley), for safety reasons, there is absolutely no evidence to suggest this was the case. To the contrary, while it is true that Mr. Stanley ultimately discharged Mr. Henderson, the record shows that Mr. Henderson was tolerant and charitable towards Mr. Henderson, and even suggested that he and Mr. Feathers attempt to reconcile their differences, and Mr. Stanley attempted to mediate their differences. However, based on Mr. Stanley's testimony, which I find credible and believable, Mr. Henderson became argumentative, and after questioning Mr. Feather's supervisory abilities, Mr. Stanley supported Mr. Feather's version as to why he proposed to discharge Mr. Henderson, and Mr. Stanley finalized the action by firing Mr. Henderson.

Alleged Work Refusal for Safety Reasons

Mr. Henderson testified as to two rock falls which occurred in his work area. The first occurred sometime in October 1982, when a rock ledge formation remained on the ceiling after he had finished blasting the area. After returning to the area after his lunch break, he found some slabs of rock lying around his truck. The rock did not damage his truck, and he estimated that the last five feet of the seam which was some 12 feet outby the face, had fallen.

Mr. Henderson testified that the second rock fall occurred sometime between November 12 to 15, 1982. After loading on half of the heading, he withdrew for a distance of 10 yards, and while preparing to set off the shot some thirty seconds later, the roof which he had loaded fell.

Mr. Henderson conceded that at no time did anyone ever direct or order him to work under any conditions which he believed were unsafe. As a matter of fact, when the first fall occurred, Mr. Henderson admitted that he did not tell Mr. Feathers or Mr. Stanley about it. When the second fall occurred, he testified that he told Mr. Stanley about it, and Mr. Stanley advised him not to go under any roof seams which he believed were dangerous. Mr. Henderson also indicated that Mr. Feathers came to the area to look it over, and that Mr. Feathers provided him with a bar to test the roof. He also indicated that Mr. Feathers instructed him that he was to test the roof with the bar from that point on. Mr. Henderson also confirmed that after both he and Mr. Feathers tested the second half of the shot area and found it to be safe, Mr. Henderson loaded it, shot it down, and then went home.

Mr. Henderson stated that the day after the second fall occurred, he returned to work but refused to go under another heading because, upon visual observation, he did not believe that any attempts had been made to scale the roof. He tested it himself with a pry bar, and after "pecking around a bit" with the bar from a bucket, he found that the roof was tight, but he still refused to go under it because he was afraid that it might fall. At that point in time, Mr. Henderson claims Mr. Feathers became "irate." However, Mr. Henderson conceded that Mr. Feathers did not instruct him to go under the roof, and Mr. Henderson claims he then telephoned MSHA Inspector McGee the afternoon or evening after he returned to work to advise him about his refusal to go under the roof and to ask him to send an inspector to the mine to "look at the situation."

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Mr. Henderson asserted that two inspectors came to the mine, but that he did not go with them to the area which concerned him, and he claims that the inspectors met with Mr. Stanley, and told him (Henderson) that his complaint was justified and that there was a "potential hazard there." However, Mr. Henderson also stated that the inspectors told him that he and the foreman had a joint responsibility to see to it that the working place was safe.

Mr. Henderson's counsel stipulated that after the MSHA inspectors came to the mine and inspected the area which concerned Mr. Henderson, the inspectors were of the opinion that any concern on Mr. Henderson's part had been resolved by the scaling of the area. As a matter of fact, the stipulation suggests that at the time the inspectors looked at the area which concerned Mr. Henderson, the area had been scaled down and the inspectors had no basis for making any determination as to whether the area was in fact hazardous. This probably explains why no citations or violations were ever issued by the inspectors.

When asked about his prior statement in his complaint that Mr. Feathers attempted to scale down the ceiling which he complained about, Mr. Henderson at first claimed that he could not remember making such a statement. He then acknowledged that he did make the statement, and he also admitted that the ceiling in question was the same one which he initially refused to work under.

Mr. Henderson conceded that when he first informed Mr. Stanley about his safety concern with respect to his working in any areas of the mine which he believed were not safe, Mr. Stanley advised him not to work in any such areas. Mr. Henderson also confirmed that Mr. Stanley told him that he would never question his decision in this regard, and even offered to go with him to inspect any areas of the mine which he (Henderson) believed were hazardous.

With regard to Mr. Feathers, Mr. Henderson conceded that Mr. Feathers agreed to inspect the areas which he (Henderson) believed were hazardous, and both Mr. Feathers and Mr. Stanley inspected these areas, tested them with a bar, and found that they were "tight" and safe. As a matter of fact, Mr. Henderson himself tested the areas with a bar and found that they were tight. It would appear to me that Mr. Henderson's concern for the stability of the ceiling stemmed from the fact that since part of a ceiling fell near his work area in the past, he was concerned that it might fall again. However, on the facts of this case, I conclude and find that this concern on his part was unreasonable.

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Mr. Henderson confirmed that prior to November 1982, he had loaded 50 to 100 shots, but did not always test the roof because he did not have time. He acknowledged that testing the roof was part of his responsibility, and he admitted that if he tested the roof and found it not to be sound he would still take a chance and go under it.

Refusal to perform work is protected under section 105(c)(1) if it results from a good faith belief that to go ahead with the assigned work would expose the miner to a safety hazard, and if the belief is a reasonable one. Secretary of Labor, ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (October 1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 302, 2 BNA MSHC 1213 (April 1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). Further, the reason for the work refusal must be communicated to the mine operator. Secretary of Labor ex rel. Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982).

On the facts of the instant case, there is absolutely no credible evidence to even suggest that Mr. Henderson's discharge was in any way connected with his alleged refusal to perform work which he believed was hazardous. Prior to the hearing in this case, Mr. Henderson never directly asserted that his "work refusal" motivated his discharge, and his counsel raised this issue during and after the hearing. Even if I were to conclude that Mr. Henderson's claim in this regard was a viable one, I would still reject it.

While it is true that Mr. Henderson's refusal to work under conditions which he believes to be hazardous is protected activity, the refusal must be reasonable. In this case, it appears to me that Mr. Henderson wanted mine management to guarantee that a mined-out roof would never fall, regardless of the area of the mine where Mr. Henderson happened to be at any given time. I find Mr. Henderson's position in this regard to be unreasonable, and for the reasons which follow, I conclude that the respondent promptly addressed Mr. Henderson's safety concerns, and did all that was reasonable to accomodate him.

Based on the credible testimony and evidence adduced in this case, Mr. Henderson's perceived safety concerns were immediately addressed by mine management, and management did everything reasonably possible to insure that Mr. Henderson had a safe working environment. The particular area which concerned Mr. Henderson was inspected and scaled by mine management, and Mr. Henderson was provided with a scaling bar and detailed

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instructions as to the procedures which he was to follow to insure that the roof was sound. Mine management never instructed Mr. Henderson to work in any hazardous areas, and the mine operator himself (Stanley) instructed Mr. Henderson to withdraw from any areas which he believed were hazardous. Further, by his own admissions, Mr. Henderson, on many occasions, often took chances in working under roof conditions which were less than desirable, and he never complained or brought these conditions to the attention of his supervisors. Under the circumstances, Mr. Henderson's assertions that his discharge was out of retaliation for his refusal to work under dangerous conditions are without foundation, and they are rejected. I conclude and find that on the facts of this case, Mr. Henderson's asserted refusal to work for safety reasons was unreasonable, and therefore not protected activity.

#### Mr. Henderson's Safety Complaints and the Alleged Retaliation for those Complaints

It is clear that a miner has an absolute right to make safety complaints about mine conditions which he believes present a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against an employee; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall 663 F.2d 1211 (3rd Cir.1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to establish a prima facie case a miner must prove by a preponderance of the evidence that: (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. Further, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

As indicated above, Mr. Henderson's complaints about certain working conditions which he believed were hazardous were promptly and properly addressed by mine management. Further, under the facts of this case, I cannot conclude or find that Mr. Henderson's complaints or fears of perceived hazards were reasonable. While it is true that there were two rock falls in and about his work area, he failed to bring the first one to anyone's attention until well after the fact. As for the second one, once called to mine management's attention, the problems were immediately addressed.

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With regard to Mr. Henderson's calling the MSHA inspector's to the mine, once there, they inspected the area and found that any loose rock had been scaled. While it is true that the inspectors may have made certain recommendations, the fact is that no citations or violations were issued, and there is no credible evidence that mine management disregarded MSHA's suggestions or attempted to avoid corrective action. As for any suggestion that Mr. Feathers or Mr. Stanley retaliated against Mr. Henderson for summoning the inspectors, I find absolutely no evidence of record, either direct, or indirect, to support any such conclusion or finding. Accordingly, Mr. Henderson's assertions in this regard are rejected.

#### Alleged Disparate Treatment

At page seven of his posthearing brief, Mr. Henderson's counsel states that "no one was previously terminated from the mine for misuse of equipment, despite the fact that the record abounds with evidence of misuse of equipment by other employees." However, counsel fails to cite any such evidence as part of his arguments, nor has he cited any references to the record to support his conclusions. Counsel simply asserts that "the attitude of Mr. Feathers regarding Mr. Henderson's complaint, Mr. Feathers' attitude at the time of termination, and the relationship in time between the refusal to work and termination establish complainant's burden of proof that he was discharged in violation of 30 U.S.C. 815(c)(1)."

Mr. Henderson alluded to an accident involving a Mr. Acock in which he struck a dump truck with his pick-up truck while driving too fast, and he indicated that Mr. Acock was not terminated (Tr. 57). Mr. Henderson also mentioned that he had observed trucks "hot-rodded around," and indicated that he was not aware of anyone being fired for misuse of equipment (Tr. 58). However, Mr. Henderson conceded that he has heard supervisors speak to other employees for this conduct, and he admitted that he had previously been verbally warned by Mr. Feathers about driving too fast (Tr. 59).

Although mechanic Steve Folsom testified that in the 5 years he has worked for the respondent few employees have been fired, he did indicate that "most of them quit." However, he did indicate that a truck driver named "Tracy" was dismissed for "tearing up the transmission" (Tr. 117).

Terry Acock, formerly employed by the respondent as a driller, testified about the accident referred to by Mr. Henderson. Mr. Acock indicated that he did not intentionally run into the truck in question, and that it was an "accident."

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He confirmed that Mr. Feathers accused him and the other driver of speeding, but that he was not fired over that incident. Mr. Acock confirmed further that he was subsequently discharged by the respondent, but for reasons unrelated to the accident in question (Tr. 123).

Mr. Feathers explained the circumstances surrounding the accident involving Mr. Acock. He stated that Mr. Acock did not intentionally wreck the truck, and that he apologized for the incident and did not curse him or abuse him. Under these circumstances, he did not believe that the facts surrounding the Acock accident were the same as those which prevailed when Mr. Henderson deliberately operated his compressor truck with low tire air pressure (Tr. 152).

Aside from the accident involving Mr. Acock, Mr. Henderson was unable to document any instances of disparate treatment. To the contrary, the record here suggests that at least one employee was discharged for damaging a truck transmission, and that others, including Mr. Henderson, were verbally warned and cautioned by Mr. Feathers about speeding and other such incidents. Given the fact that the respondent's quarry operation is a small, non-union operation, the fact that the respondent has not generally fired many employees is not critical. As confirmed by Mr. Folsom, employees usually quit rather than being fired, and since Mr. Henderson has the burden of proof here, it was incumbent on him to establish any disparate treatment by a preponderance of credible evidence. This he has not done. Accordingly, his arguments in this regard are rejected.

#### Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the complainant here has failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief are DENIED.

George A. Koutras  
Administrative Law Judge