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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF F. FREDERICK PANTUSO, JR., COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. WEVA 84-193-D MSHA Case No. HOPE CD-83-33 No. 28 Mine
v.	
CEDAR COAL COMPANY, RESPONDENT	

DECISION

Counsel: (FOOTNOTE.1) Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Complainant;
Joseph M. Price, Esq., Robinson & McElwee, Charleston, West Virginia, for Respondent.

Before: Judge Steffey

Explanation of the Record

The complaint in this proceeding was filed on April 26, 1984, by counsel for the Secretary of Labor pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). A nearly identical complaint was filed on September 6, 1983, before the West Virginia Coal Mine Safety Board of Appeals. A 9-day hearing before the WV Board was held on October 11, 24, 26, 27, 29, November 16, 17, 21, and December 2, 1983, resulting in 1,116 pages of transcript and 36 exhibits, of which 17 were

marked as complainant's (FOOTNOTE.2) exhibits, 12 were marked as respondent's exhibits, and 7 were marked as the Board's exhibits. The Board also received in evidence a statement by Ed Ramsey, a senior pit foreman, but the Board did not give the statement a specific exhibit number (Tr. 436-437). The Board excluded Complainant's Exhibit 5 and it does not exist in the copy of the record which is before me (Tr. 280; 803). The Board reserved Board Exhibit No. 2 (Tr. 650) for the purpose of receiving in evidence a miner's manual which was to be supplied by witness Gary Browning, but that exhibit was never thereafter discussed and there is not a Board Exhibit No. 2 in the copy of the record supplied to me.

The person or persons who transcribed the record prepared neither an index of exhibits nor an index of witnesses. Moreover, the transcript was not bound in folders and consists of a 5-inch stack of transcript pages which must be handled like reams of paper which one is stacking in a duplicating machine. For the Commission's convenience, in the event a petition for discretionary review is granted, an index of the witnesses is given below:

Witnesses	Transcript Pages
Robert H. Bess, UMWA Field Representative	19 to 60
William Bolts Willis, UMWA Safety Representative	60 to 95
Patsy Pauley, Security Guard	95 to 99
Fortunato Frederick Pantuso, Drill Helper	108 to 236
Lester Kincaid, UMWA Inspector	243 to 269
Richard Brown, West Virginia Surface MineInspector	270 to 305
Billy J. Christian, Loader Operator	306 to 311
Robert DeWeese, Dozer Operator	311 to 327
Gary Browning, Drill Operator	328 to 354; 633 to 719
Ed Ramsey, Senior Pit Foreman	372 to 486; 490 to 494
Charles Gordan Wiseman, WV Surface Mine Inspector	495 to 557
William Lane, Mechanic and Mine Committeeman	558 to 579
Jerome Lee Workman, Jr., Core Drill Crew Foreman	602 to 629
Darlene Harmon, Secretary	721 to 726

Harper C. Evans, Surface Mining Engineer	727 to 780
Emory Ray Neely, Security Officer	782 to 791
James Steven Mink, Safety Inspector for Cedar Coal	794 to 883
Burl Allan Holbrook, Senior Pit Foreman	884 to 948
Allan E. Tackett, Senior Pit Foreman	949 to 1002
Leonard Acree, Grader Operator	1003 to 1008
Jerry Wesley Deems, Personnel Manager	1009 to 1018
Meredith E. Kirk, Manager of Surface Mines	1020 to 1072
William Ray Frame, Maintenance Foreman	1073 to 1080

It should also be noted that Respondent's Exhibit 3 is a mine map which was the subject of testimony by many of the witnesses. The copy of R Exhibit 3 submitted with my copy of the record was not reproduced so as to show the colors of markings made by some witnesses. The original copy of R Exhibit 3 had an access road to a drill bench marked in yellow, whereas the copy of R Exhibit 3 submitted to me shows the access road in purple. A great deal of the testimony refers to the "left" bench or pit and to the "right" bench or pit. The Chairman of the WV Board aptly described the left bench or pit as resembling a snake and described the right bench or pit as resembling a rock (Tr. 733). Therefore, some of the transcript shows adoption of the Chairman's description of the left bench or pit and refers to it as the "snake pit". Nearly all of the testimony is related to events which occurred in the left pit.

A final word of explanation about the exhibits should be made. Inspector Wiseman and witness Bess made some photographs. Those photographs were reproduced for my copy of the record simply by using the duplicating machine for that purpose. Even the original photographs were described by the witnesses as being of poor quality (Tr. 277; 772; 1036). Therefore, it is not surprising that the copies of those photographs provided as a part of the record before me are absolutely worthless and the considerable amount of testimony related to them is likewise worthless. Some photographs were marked as Board Exhibit 1A, etc., some were marked as Exhibit 14A, etc., and others were marked as Exhibit 15. I have physically placed them in the manila folders marked "Board's Exhibits", and "Petitioner's Exhibits" but they were not marked with any exhibit numbers when I received the record and it is impossible to determine from the descriptions in the record which picture any witness is talking about on any occasion. Therefore, for the aforesaid reasons, I find that the photographs are useless for making any findings of fact in this proceeding.

Use of the Above-Described Record for Rendering the Decision in This Proceeding

After I had issued a prehearing order on July 3, 1984, I received a conference call on July 27, 1984, from counsel for the parties explaining that Pantuso had initiated four different kinds of proceedings against Cedar involving four different agencies or courts. At the time of the conference call, a decision had been rendered in only one of the four proceedings and that was an arbitration decision which was favorable to Cedar except that the arbitrator held that a 90-day suspension, rather than discharge, was a reasonable disciplinary action (C Exh. 2). At the time of the conference call, the hearing before the WV Board had been completed and had been recorded on 67 cassettes, but no transcript of that hearing had yet been made. Therefore, the parties requested that they be permitted to examine the transcript of the hearing held before the Board as soon as it could be obtained with the possibility that they would be able to enter into some stipulations which might avoid the holding of an additional hearing before me. I granted the parties an extension to January 15, 1985, within which to obtain and examine the transcript of the hearing held before the WV Board.

On January 18, 1985, counsel for the parties placed another call with me in which it was explained that the transcript of the hearing before the WV Board did not become available until the middle of January and that an additional 60-day extension of time was needed for the Secretary's counsel to examine the lengthy transcript which had just become available. I then granted a further extension of time to April 1, 1985.

Thereafter, I received a copy of a letter written on April 11, 1985, to the Secretary's counsel indicating that the parties had been unable to agree upon any stipulations and had decided to submit the case to me for decision based upon the entire record before the WV Board. Although counsel for Cedar had requested that a copy of the record be made for both me and the Secretary's counsel, only a copy for the Secretary's counsel was made and it was not until I wrote a letter to counsel for the parties on July 25, 1985, that they became aware of the fact that the Board had not yet provided me with a copy of the record, even though the Secretary's counsel had received a copy in early June 1985. A copy of the record was finally mailed to me on August 27, 1985.

On that same day, August 27, 1985, I issued an order outlining the matters to be discussed in the parties' briefs

and providing for simultaneous initial and reply briefs to be mailed on October 11, 1985, and October 31, 1985. Thereafter, I issued on October 4, 1985, an order granting a request for extension of initial and reply briefing dates to November 12, and 29, 1985.

The parties have agreed to have me decide the issues in this case entirely on the basis of the record resulting from the hearing held before the WV Board. In one of the conference calls, I suggested to counsel that it might be unwise for me to try to decide a complicated case based on a record before another agency because it would deprive me of the opportunity to observe the demeanor of the witnesses for determining credibility and would prevent me from being able to ask any clarifying questions. My reluctance to agree with their decision to use the WV Board's record was overcome when counsel pointed out to me that a hearing before me would be associated with about 5 weeks of hearing because each counsel would attempt to test the credibility of nearly all witnesses by use of their testimony previously given before the WV Board. Therefore, I have agreed to use the record before the WV Board to decide the issues in this proceeding. Much of my decision rests on a finding that Pantuso and his primary supporting witness, Browning, gave testimony which must be greatly discounted as being incredible. Since my credibility findings are not accompanied by an opportunity to observe the demeanor of the witnesses, I recognize that the Commission, if it is so inclined, could, upon review, disagree with my credibility findings, although I have been analyzing transcripts of hearings since 1956 and feel that I am relatively skilled in that endeavor.

Briefs

Counsel for Pantuso filed her initial and reply briefs on November 12 and November 29, 1985, respectively. Counsel for Cedar filed his initial and reply briefs on November 14 and November 29, 1985, respectively. Both counsel complied with my order of August 27, 1985, by discussing the criteria which the Commission uses in determining whether a violation of section 105(c)(1) of the Act has occurred. In Jack E. Gravely v. Ranger Fuel Corp., 6 FMSHRC 799, 802 (1984), the Commission restated those criteria as follows:

> Under the analytical guidelines we established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir.1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981),

> a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., --- U.S. ----, 76 L.Ed2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983) (specifically approving the Commission's Pasula-Robinette test).

Findings of Fact

On the basis of a detailed and extensive analysis of the testimony in this proceeding, I find that the credible evidence establishes the following essential facts. My reasons for rejecting Pantuso's and Browning's version of the statements which occurred on September 1, 1983, at the time Pantuso was suspended subject to discharge are explained in considerable detail in the portion of this decision which hereafter appears under the heading of "Consideration of the Parties' Arguments".

1. Fortunato Frederick Pantuso, the complainant in this proceeding, was a helper to the operator of a surface drill at the No. 28 Mine of Cedar Coal Company (Tr. 108). Cedar, at the time of Pantuso's discharge, was involved in the production of coal which entered or affected interstate commerce and was, therefore, subject to the Federal Coal Mine Health and Safety Act of 1977 and to the regulations promulgated thereunder. Jurisdiction is alleged in paragraphs 3 and 4 of Pantuso's complaint and admitted in Cedar's answer to the complaint.

2. Pantuso was a helper for Gary Browning who operated the drill in the left pit for the period from August 22 to September 1, 1983 (Tr. 111; 328-329). Pantuso had worked for Cedar for about 7 years and he had been a safety committeeman for Local 1766, UMWA, for about 2 or 3 years prior to his discharge and had been an alternate safety committeeman for several years prior to that (Tr. 108-109). Browning was

an alternate safety committeeman and both Pantuso and Browning were very active in reporting alleged safety violations to Cedar, UMWA, the West Virginia Department of Mines, and the Mine Safety and Health Administration (Tr. 122; 126-127; 152-158; 329; 338-339; 341-342).

3. Nearly all of the testimony in this proceeding deals with events which occurred in the left and right pits of Cut No. 28. Pantuso and Browning, however, worked only on the left drill bench during the 2 weeks preceding Pantuso's discharge. The work in Cut No. 28 was under the supervision of three senior pit foremen, Burl Holbrook, Ed Ramsey, and Allan Tackett. All three pit foremen were equal in rank and they shared responsibility for all operations in Cut No. 28, subject to the overall supervision of Meredith Kirk who was manager of surface mines. While the senior pit foremen were equal in rank, they had a loose division of work responsibility. Since Holbrook had been in charge of opening Cut No. 28, he worked on the topmost productive area in Cut No. 28 and assigned the work each day from a portal which was normally referred to as Burl's (or Holbrook's) portal (Tr. 372-374; 884; 891; 1040; 1050). Ramsey had been working for Cedar longer than Holbrook and Tackett and Kirk considered Ramsey to be his liaison man for directing the work in Cut No. 28 (Tr. 1049). Tackett had some blood clots in his legs and was off from work from August 9 to August 29 and reported back to work on August 30 (Tr. 950). Since Tackett had not worked in Cut No. 28, he performed various types of supervisory duties, depending upon the circumstances existing at any particular time. Ramsey had primary responsibility for the so-called mid-level producing area and shared with Holbrook responsibility for directing work in the utmost bottom pit of Cut No. 28 (Tr. 373-374).

4. All supervisory and union employees working in Cut No. 28 reported for work by passing through the Chelyan Gate where a guard wrote on a form the exact time when each employee's vehicle passed through the gate (Tr. 95-97). The supervisory personnel drove company vehicles which were numbered and union employees drove their own vehicles which had affixed to them an employee sticker number assigned by Cedar. The guard at the gate had a list of all the numbers assigned to Cedar's vehicles and a list of numbers assigned to union employees' vehicles (Tr. 782-785). It is possible to determine exactly when any person reported for work by ascertaining that person's vehicle number and noting his or her time of passing through the Chelyan Gate (Tr. 786; RExh. 10). There is a sign at the gate which directs all vehicles to stop so that the vehicle numbers may be noted by the guard, but a complete stop is not required provided the driver of the vehicle slows down enough for the guard to

ascertain the number of the vehicle as it passes through the gate (Tr. 789). Pantuso refused to slow down sufficiently for the guard to obtain his vehicle number so that it was necessary for the guard to report Pantuso to the head security guard who in turn reported the matter to Cedar's personnel manager, Deems (Tr. 788). Deems reported the problem first to Kirk and then requested the assistance of UMWA's field representative, Bess, who succeeded in getting Pantuso to slow down sufficiently for the guard to obtain his vehicle number as he entered the Chelyan Gate (Tr. 1010).

5. After the employees working in Cut No. 28 enter the Chelyan Gate, they have to drive 9 miles to reach the portal where they are assigned to their specific jobs for the day (Tr. 1011). There is a parking lot at the portal where the employees may leave their personal vehicles and be transported in a vehicle belonging to Cedar to their specific working sites (Tr. 954). Employees are allowed to drive their personal vehicles to their working sites if the roads over which they travel are considered free enough from mud and rough places to permit them to reach their working sites without experiencing damage to their vehicles (Tr. 310-311; 395-396; 485; 895; 953; 1030). One miner's personal vehicle was damaged by a rock going through a cab window (Tr. 460). On another occasion, a dozer operator was traveling with his blade in a raised position up a ramp and failed to see an employee's vehicle which had been driven to his working site. The result was that the dozer did serious damage to the vehicle (Tr. 484). After that, Cedar adopted a policy of allowing employees to drive their personal vehicles to their working sites only if the supervisors approved it. Kirk took the position that the supervisor, by approving an employee's practice of driving to his working site, was responsible for any damage which that vehicle might incur (Tr. 1062-1063).

6. Although Pantuso liked to drive his Jeep to the left drilling bench where he was working (Tr. 134), he had not always driven it to the left bench (Tr. 120), and he had previously filed a grievance on behalf of himself and others in which he sought to be reimbursed for damage caused to his vehicle by driving it to work over rough roads (Tr. 154; 965; CExh. 10F). His vehicle was inspected for damages by the security officer (Tr. 789) and Pantuso admitted that his Jeep was not damaged (Tr. 159). He also requested in his grievance that Cedar provide him with a rental car for the purpose of driving to work in the event his personal vehicle should be damaged and have to be taken to a garage for repair (Tr. 161). Since Cedar was required by article XXI(a) of the NBCWA to provide all employees with transportation from the portal to their working sites (Tr. 1012;

CExh. 13), management was reluctant to allow Pantuso to drive his Jeep to the left bench when the roads were in a rough or muddy condition because of the grievance he had filed seeking damages if his vehicle should be damaged by driving it to his working site. Water came out of the mountain and ran in three places across the access road which Pantuso had to travel in driving his Jeep to the left drilling bench (Tr. 166; 333; 952). Pantuso constantly complained about the muddy condition of the road leading to the left bench. He admitted that even though the company often used a dozer or grader to scrape the road into a smooth condition, the road reverted to its previous muddy and rutted condition as soon as one or two vehicles passed over it (Tr. 196).

7. The significant events preceding Pantuso's discharge on September 1, 1983, occurred on the 2 days preceding his discharge, that is, August 30 and 31, 1983. Pantuso and Browning, the drill operator, rode to work together in Pantuso's Jeep (Tr. 351). On August 30 they were late for work as usual (Tr. 167), but Pantuso explained that "[T]he reason we do get to work about every day late is because the company doesn't require us to go to work until daylight, that's why we have always gotten there pretty late and nothing was ever said" (Tr. 133). While the lights on the drill to which Pantuso was assigned had plenty of illumination to enable him and Browning to see the drill itself and operate the drill, its lights did not shine high enough upon the embankment near the drilling bench to permit them to see the exact condition of the 15-foot highwall and embankment until about 6:45 or 7 a.m. when sufficient daylight became available to make the condition of the embankment readily observable (Tr. 133; 236; 335; 951).

8. On August 30 it was foggy early in the morning and Pantuso and Browning sat in the Jeep at the portal until about 6:45 a.m. before even attempting to drive to the left drilling bench (Tr. 127; 951). Their excuse was that it was too foggy to see to drive the short distance from the portal to the drilling bench despite the fact that they had just driven 9 miles in dark and foggy conditions from the Chelyan Gate to the portal (Tr. 167; 1011). They complained to both Tackett and Ramsey about the muddy and rough condition of the road which they had to travel to get to the drilling bench (Tr. 127; 410). Toward the end of the shift they observed a truck driver named Harold Hall who had returned from the hospital after getting an examination to determine whether he had suffered any ill effects from having been exposed to fumes in the cab of the R-50 Euclid which he had been operating (Tr. 128; 1042). Hall was sent to the hospital twice but the examinations at the hospital showed that he

had nothing discernibly wrong with him (Tr. 853). Pantuso asked to see the preshift report which Hall had made on his truck that day and Pantuso became involved in an argument with Holbrook and Tackett over Pantuso's claim that the senior pit foremen were required to pick up the preshift reports each morning before any of the equipment was put into service. Holbrook expressed doubt as to Pantuso's claims, but after he had read the applicable West Virginia regulations on the subject, he found that Pantuso was correct (Tr. 128; 251; 333-335; 338-339; 413-414; 635). On the evening of August 30 Pantuso called Bolts Willis, a UMWA safety representative, at home to advise him that he was coming by his office the next day to report some alleged safety violations so that Willis could request that the alleged violations be checked by a West Virginia inspector (Tr. 132).

9. It is customary for Kirk to have a meeting of all foremen on every other Tuesday and one of those meetings was held on Tuesday, August 30 (Tr. 415; 884; 953). Among the things discussed at the meeting was the fact that several employees, including Pantuso and Browning, were reporting late for work (Tr. 953). Kirk ordered the foremen to notify all employees that if they continued that practice, they would not be allowed to work on any day they were late (Tr. 133; 636; 953). Another matter discussed at the meeting was the fact that complaints had been received about the rough condition of the access road to the left bench in Cut No. 28 and Kirk recalled that Pantuso had filed a grievance on behalf of himself and others requesting payment for damages inflicted to vehicles as a result of driving them to their work sites (Tr. 154; 965; CExh. 10F). Therefore, Kirk ordered the foremen to transport miners to their work sites if road conditions might damage their vehicles (Tr. 1023).

10. On Wednesday, August 31, Holbrook took some miners to their working places. Since Pantuso and Browning had not yet reported for work at the portal, he asked Tackett to wait for them at the portal and take them to their working place on the left bench in the truck which had been assigned to Tackett by Cedar. When Pantuso and Browning arrived, Tackett first advised them that if they were late again they would not be allowed to work (Tr. 954). He then asked them to get into his truck and he would take them to the left bench. Pantuso refused to get into Tackett's truck and stated that he would drive his Jeep to the left bench. Tackett then gave Pantuso a direct order to get into his truck, but Pantuso again refused. Tackett thereafter gave him a second direct order to get in his truck and Pantuso refused for a second time. A mine committeeman named William Lane happened to overhear the orders and refusals and asked Tackett

to let him talk to Pantuso privately. In a private conversation, Lane explained to Pantuso that it was advisable for him to obey the direct order and then file a grievance alleging discriminatory treatment because Cedar allowed some miners to drive their own vehicles to their working places. Pantuso agreed to follow Lane's advice and he and Browning got into the truck with Tackett, but Pantuso filed a grievance alleging discriminatory treatment by Cedar (Tr. 134; 559-560; 636).

11. On August 31, during the short ride with Tackett from the portal to the left bench, both Pantuso and Browning continued to make oral complaints. They noted that the access road was still rough and muddy. They requested that a light plant (generator) be provided on the bench to direct light on the embankment near the drill bench because they were being transported to the bench before it became daylight. They wanted to know if Tackett had preshifted his truck although it was one which Tackett drove back and forth to work and which was regularly inspected by the State of West Virginia. They objected to Cedar's failure to have berms even at places where drains were being installed. They also claimed that they had no way to communicate with the mine office in case of injury and contended that an ambulance would be unable to get to the bench in case of an emergency. They additionally wanted to know why Pantuso could not drive his Jeep to the left bench and Tackett explained that Cedar believed the rough and muddy road about which they were complaining might damage Pantuso's Jeep (Tr. 135-136; 171-173; 341-342; 636; 955-956).

12. When Pantuso and Browning preshifted their drill which had been brought to the left bench from another area, they enumerated a large number of items which needed routine maintenance and listed other items, some of which were already being repaired (Tr. 336-337; RExh. 4). A mechanic named Frank Wright and his helper, Steve Donato, who was also a UMWA safety committeeman, came to the left bench and worked on the drill assigned to Pantuso and Browning for most of the day (Tr. 425; 636; 687; 957-958). Consequently, Pantuso and Browning had nothing to do but talk about alleged safety violations to their supervisors. One action taken by Browning was to wave for his foreman, Ramsey, to come to the bench. When Ramsey arrived, Browning asked him to transport him to a portable toilet which was located a short distance from the bench. Ramsey did so, but as soon as he had brought Browning back to the bench, Pantuso also asked to be taken to the toilet. Ramsey refused because he felt that they were deliberately harassing him. Even Pantuso admitted that the toilet was no more than a half mile

away, while Ramsey and Tackett said it was not more than 165 to 300 yards from the place where the drill was situated (Tr. 136; 168-169; 173; 425; 655-656; 963). In any event, Pantuso added to his list of complaints the failure of Cedar to provide a portable toilet on the left bench where he was working.

13. At various times during the day on August 31 Pantuso and Browning discussed alleged safety violations with Ramsey and Tackett. During one of the discussions, Pantuso stated that the material falling from the embankment and 15-foot highwall, along with the lack of a short-wave radio for communication, poor access road, failure to provide a light plant or generator on the bench, and lack of a portable toilet on the bench were grounds for a double withdrawal under article III(i) of the National Bituminous Coal Wage Agreement (NBCWA) (FOOTNOTE.3) (Tr. 136). A "double withdrawal", according to Pantuso, means that "as a safety committeeman, I have the power to danger that area off and withdraw all the people out of that working area" (Tr. 137). Pantuso admitted that Ramsey never did reply to his claim that he could withdraw and he stated that he was "pretty sure [Ramsey] understood it" (Tr. 137). Browning likewise agreed that if Ramsey heard the alleged threat of a double withdrawal, he gave no response to it (Tr. 342-343).

14. On Thursday, September 1, 1983, Pantuso and Browning arrived at the portal about 5:55 a.m. (Tr. 142; 351). There are six steps leading into the trailer which constitutes the portal (Tr. 959). Pantuso was at the top of the steps (Tr. 142) and Browning was just inside the door of the portal when Ramsey started up the steps (Tr. 441; 643). Ramsey stated that Pantuso was going to be working with another drill operator, Charles Wiseman (also known as "Sug"),

that morning (Tr. 143; 959). Pantuso wanted to know why he was being switched to work as Wiseman's helper instead of Browning's and Ramsey explained to Pantuso that he had previously acted as Wiseman's helper and they had performed well together and that he believed it was desirable to assign him again to work with Wiseman (Tr. 442). Ramsey also stated that Pantuso would be transported to his working site, but Pantuso refused that suggestion, saying that he would drive his own Jeep (Tr. 960). Holbrook was inside the portal and heard Pantuso say that he would take his own Jeep. Since Holbrook had heard about Pantuso's refusal to ride with Tackett on the previous morning and had been critical of Tackett's handling of that refusal, Holbrook stated in no uncertain terms that Pantuso would be given a direct order to ride in a Cedar-owned vehicle to his working place (Tr. 886). It was then about 5:58 a.m., so Browning reminded Holbrook that he couldn't give direct orders yet as it was not starting time (Tr. 143; 648). Holbrook agreed and said that he would give Pantuso a direct order after he had held a safety meeting which had been postponed from the first part of the week because the generator for the portal had not been working (Tr. 441; 886).

15. It was necessary for Holbrook to ask the miners to be quiet while he conducted a safety meeting pertaining to the use of hard hats (Tr. 892). Browning observed that Holbrook was one of the worst offenders in that respect and stated that he ought to wear a hard hat while conducting a meeting on that subject (Tr. 352). Only 6 minutes were required for Holbrook to read the materials which had been prepared concerning hard hats. When Holbrook had finished his safety talk, he asked if there were any questions. No one responded. Browning then asked if there were any safety problems to be raised and no one replied to his question (Tr. 352; 960). At that point, Holbrook said to Pantuso that he was giving him a direct order to get in the truck with a foreman and be transported to his working site. Pantuso refused the order and stated that he would take his own Jeep. Holbrook gave Pantuso a second direct order to get in the truck and Pantuso refused that order also. By that time, Holbrook was clearly agitated and walked over to the top of the stairs and stated that he was giving Pantuso one more direct order to get in the truck with Tackett and be transported to his working place. When Pantuso refused that order also, Holbrook told him he was suspended subject to discharge and that he would be expected to attend a meeting about the matter at 8 a.m. in Kirk's office (Tr. 144; 353; 443; 887; 960).

16. Pantuso said that if he was no longer working for Cedar, he did not have to attend any meeting and Holbrook told him that he should get off Cedar's property until time for the meeting. Holbrook considered calling a security guard so as to have Pantuso removed from mine property but failed to follow up on that threat when he realized that no guard would be available at 6:10 a.m. (Tr. 353; 887; 960). The senior pit foremen then went about their supervisory duties and refused to discuss the suspension with any of the miners prior to the meeting which had been scheduled for 8 a.m. (Tr. 144; 353; 445; 887; 961).

17. Pantuso, Browning, Lane, and some other miners gathered outside Kirk's office in time for the 8 a.m. meeting, but Lane had called Bess, their UMWA field representative, and had advised Bess that Pantuso had been suspended for trying to withdraw himself and others under article III(i) of the NBCWA (Tr. 26; 247; 563). Bess had other commitments which prevented his being able to attend the meeting. Therefore, Bess called Lester Kincaid, a UMWA inspector, and asked him to attend the meeting. It was about 7 a.m. when Kincaid received the call from Bess. The short notice period made it impossible for Kincaid and some of Cedar's personnel to be in Kirk's office by 8 a.m. Consequently, Kirk went out of his office and advised Pantuso and the other miners waiting outside his office that the meeting would be delayed about a half hour. Browning told Kirk that there were always delays when they were on union time and Pantuso said that the meeting would not have been necessary if Cedar had taken care of its safety obligations. Kirk had turned to go back into his office and did not hear what had been said and asked that it be repeated. Pantuso repeated his statement and Kirk told Pantuso that he would have him removed from the property if he heard any more outbursts from him. In making that statement, Kirk shook his finger at Pantuso who stated that he would knock Kirk's nose off if Kirk didn't get his finger out of his face (Tr. 178). Pantuso advanced toward Kirk with sufficient indication of striking him to result in Browning's testifying "[A]t that time Bill Lane, Frank McCartney, and a couple of other guys grabbed [Pantuso] and moved him back and I stepped between them" (Tr. 355; 565; 888; 919; 1022). Kirk added to the reasons for Pantuso's discharge the fact that he had threatened to strike a supervisor (Tr. 1023; CExh. 1).

18. The meeting scheduled for 8 a.m. did not start until about 8:45 a.m. Tackett and Holbrook stated at the meeting that Pantuso had been suspended solely for refusing to obey Holbrook's orders directing Pantuso to get into a truck owned by Cedar and be transported to his working site,

whereas Pantuso and Browning, much to Tackett's and Holbrook's surprise, claimed that Pantuso had objected to being driven to his working site because he had told Ramsey he would withdraw himself and everyone from working on the left bench until such time as the alleged dangerous conditions discussed with Ramsey on August 31 had been corrected. Pantuso and Browning, therefore, took the position that Holbrook had suspended Pantuso for refusing to work in a dangerous area and that Pantuso's refusal to get into the truck had to be sustained under article III(i) of the NBCWA (Tr. 148; 179; 262; 355; 935-936; 961-962; 1022; 1059-1060).

19. Pantuso, as noted in finding No. 8 above, went to see the UMWA safety representative, Bolts Willis, after work on August 31 (Tr. 64). Pantuso's complaints to Willis about the alleged unsafe highwall, lack of communications, muddy and rough access road, Workman's failure to preshift, lack of a light plant, failure to provide a portable toilet on the left bench, and fumes getting into the cabs of some trucks, were made the subject of a request for an inspection by the West Virginia Department of Mines (Tr. 141; 348). A West Virginia inspector named Gordan Wiseman came to Cut No. 28 on September 6, 1983, to check on the condition of the highwall in the left pit, but found no violations because no miners were working on the left bench except two dozer operators who were pushing spoil off the bench in the area where the alleged unsafe conditions existed (Tr. 497-500). Kirk advised Wiseman that it was his intent to make a safety bench at the bottom of the highwall once the loose materials then on the bench had been removed (Tr. 975; 1039-1041). That procedure was acceptable to Wiseman (Tr. 528).

20. Wiseman and another WV inspector, Richard Brown, returned on September 12, 1983, to check on the condition of the left bench and found that the 15-foot highwall (Tr. 317) about which Pantuso had complained in August now had become a 40-foot highwall instead of the 15-foot highwall which existed on September 1 when Pantuso was discharged (Tr. 518). The increased height of the highwall resulted from the dozer operators' having removed the loose materials which they were pushing when Wiseman was there on September 6 and 7, 1983 (Tr. 536; 777). Wiseman issued a withdrawal order on September 12 because Cedar had failed to erect danger signs along the portion of the 40-foot highwall above which all loose spoil had not been completely removed by the dozer operators (Tr. 536-538; CExh. 4). A drill on the bench was in a working position, but Cedar's foreman, Tackett, at the beginning of the shift, had instructed the drill operator to stay at least 30 feet from the portion of the highwall where the imminent danger was

subsequently cited by Wiseman (Tr. 969). Wiseman agreed that the drill could be safely operated at the place where it was located (Tr. 523; 547). Inspector Brown also signed the order and he agreed that the order had been issued because of Cedar's failure to erect danger signs along the 200-foot dangerous area of the highwall and not for Cedar's having drilling equipment situated outside the area of imminent danger (Tr. 279; 287).

21. The 40-foot highwall which existed on September 12 made the possible falling of rock or dirt from the highwall at that time much more hazardous than rock falling from the 15-foot highwall which existed on September 1 when Pantuso was discharged (Tr. 1057; 1066). Pantuso conceded that all his complaints about Cedar's failure to provide him with a smooth access road, a light plant, a portable toilet, and communication facilities would not constitute an imminent danger justifying withdrawal if the left bench had not been threatened by a dribbling of loose rocks and dirt from the embankment above the 15-foot highwall which existed on September 1 (Tr. 199). The only unsafe aspect of the embankment at the time of Pantuso's discharge, however, consisted of a crack in the loose material in the embankment which had been pointed out to Pantuso by a dozer operator named DeWeese when he was cleaning the left bench on August 20 for the purpose of making the bench smooth for future drilling operations (Tr. 109; 148; 317; 380; 384). When Pantuso was discharged on September 1, the condition of the highwall had not changed from the way it looked on August 20 when the crack was first pointed out to Pantuso by DeWeese (Tr. 401; 403; 957-958; 1051-1066). Moreover, Ramsey had entered in the preshift book on August 19 that the loose material in the embankment should be kept under observation and his entries in the onshift and preshift reports of September 1 show that Ramsey still did not consider the loose materials on the embankment to be unsafe (Tr. 405; CExhs. 12 and 12A). Therefore, the preponderance of the evidence does not support Pantuso's allegations that the condition of the highwall on September 1 warranted his taking the position that he had withdrawn himself and all other miners from working on the left bench at the time he was discharged on September 1 for refusing to obey Holbrook's order directing him to get into Cedar's truck and be transported to his working site.

Consideration of Parties' Arguments

As indicated on pages 5 and 6 above, the Commission has held that a complainant establishes a prima facie case of discrimination if he shows that he engaged in a protected activity and that some adverse action against him was motivated in any part by that protected activity. If a miner

succeeds in establishing a prima facie case, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. Cedar's initial brief (p. 12) assumes, arguendo, that Pantuso's discharge was motivated in part by his protected activities, but claims that his complaint should be denied because Cedar's affirmative defense showed that Pantuso would have been discharged in any event because of his unprotected conduct of refusing to obey Holbrook's direct order to get in the truck with Tackett and threatening to knock Kirk's nose off (Finding Nos. 15 and 17 above).

If Pantuso's complaint could be sustained at all, it would have to be upheld on his claim that he refused to be transported to his working site on the morning of September 1, 1983, not because he wanted to take his own Jeep to his working site, but because the conditions which existed on the left bench on the morning of September 1 constituted an imminent danger which required him to withdraw himself and all other miners under article III(i) of the NBCWA (Finding No. 13, n. 3 above). One of the Commission's most detailed discussions of the grounds which constitute a basis for withdrawal under the Act appears in Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982). In that case, the Commission held that the miner's refusal to work must be based on a good-faith belief that hazardous conditions exist and that the unsafe conditions must be communicated to the operator at the time the refusal to work is made, or must be communicated "reasonably soon" thereafter. If Pantuso's and Browning's testimony could be believed, their testimony satisfied all the prerequisites of the rationale enunciated by the Commission in the Northern case. The primary job of a Commission judge, however, is the making of a detailed analysis of the record to determine whether a complainant's presentation is credible. My analysis of the record will hereinafter show that Pantuso's and Browning's testimony constitutes a complete fabrication unworthy of acceptance.

Pantuso's Complete Lack of Credibility

About 30 miners were present at the portal when Holbrook gave Pantuso orders to get in the truck with Tackett and be transported to his working site (Tr. 319). Yet only Pantuso's buddy, Browning, was willing to corroborate Pantuso's claim that he raised the defense that he was refusing to go to the working site because conditions there constituted an imminent danger. Even Browning and Pantuso failed to agree on the exact time when Pantuso raised that defense.

Pantuso testified unequivocally that he did not raise the defense of withdrawal before the safety meeting started at 6 a.m. (Tr. 215), whereas Browning testified that Pantuso did raise the defense of withdrawal prior to the commencement of the safety meeting (Tr. 643; 696).

The only miners, Christian and DeWeese, who were actually present at the safety meeting and who testified on Pantuso's behalf, other than Browning, claimed that both Holbrook and Pantuso were shouting at each other and making so much noise, they could not understand what was being said (Tr. 307; 318). DeWeese admitted on cross-examination that he was within 35 feet of two people shouting at each other and yet could not discern who was speaking or determine what the discussion was about (Tr. 319). All three foremen, Holbrook, Tackett, and Ramsey, were present and all three testified unequivocally that no issue of safety was ever raised until, to their surprise, Pantuso and Browning belatedly raised that issue at the time a meeting was held at 8 a.m. in Kirk's office (Tr. 445; 447; 893; 898; 961). While I am aware that the three foremen would naturally be inclined by self interest to support management's position that Pantuso was discharged for refusing to obey a foreman's direct order to get in a truck for transportation to his working site, the fact that 30 miners heard the discussion between Holbrook and Pantuso and only Browning was willing to support Pantuso's version of the shouting match makes Pantuso's version unacceptable, particularly when one considers the many other incredible aspects of Pantuso's and Browning's testimony.

Perhaps the single aspect of Pantuso's and Browning's fabrication which is least credible is their claim that they went to the left bench on the morning of September 1 and made a preliminary examination of the conditions so that they would be in a position to withdraw when it came time for them to go to their working site. They contrived that story because they knew that a question would be raised as to how they could claim, before even going to the left bench, that conditions there constituted an imminent danger requiring them to withdraw themselves and all other miners from reporting to work at that site. For the aforesaid reason, they testified that they had come in early on September 1 so as to have time to drive to the left bench and examine the conditions there to determine whether Cedar's management had corrected the hazardous conditions which they had reported to Ramsey before quitting time on the previous day, August 31 (Tr. 141; 351).

The guard at the Chelyan Gate entered Pantuso's and Browning's arrival time as 5:22 a.m. (Tr. 97). They claimed

that it was a distance of 3 or 4 miles from the gate to the place where they turned off the main road onto the access road leading to the left bench and that the driving time to that point was 10 minutes. That means that they would have reached the access road at 5:32 a.m. (Tr. 203). Pantuso claimed that he drove to the left bench, inspected it in the dark with the lights of his Jeep and was back on the main road within a period of from 7 to 10 minutes (Tr. 205-206). Browning testified that it would take 4 minutes to drive to the portal from the place where the access road joins the main road (Tr. 645). Browning also testified that it would take 4 or 5 minutes to drive from the main road to the left bench, 3 or 4 minutes to inspect the bench conditions, 3 or 4 minutes to drive back to the main road, and 4 minutes to drive to the portal, or a total of 14 minutes to complete the inspection of the left bench and drive to the portal from the site where their Jeep was located at 5:32 a.m. Using the longest times given by Pantuso would have placed him and Browning at the portal at 5:46 a.m., whereas he claims that they arrived at the portal at 5:55 a.m. Using Browning's longest times would have placed them at the portal at 5:50 a.m.

The above testimony would not have been as devastating as it was if it had not been for the fact that they had failed to think through the driving times prior to cross-examination and therefore tried to minimize the driving time more than they would have had to minimize it if they had actually made a preinspection of the left bench prior to the time they arrived at the portal on September 1. The devastating part of their testimony on cross-examination is that they had claimed in their direct testimony that the access road was so muddy and rough that they could not get through the mud without shifting into four-wheel drive (Tr. 124; 196; 342; 635). When it came to explaining how they could have made such a fast trip to the left bench and back, however, Pantuso said that the road was "pretty smooth" (Tr. 206), that he was able to drive over it in two-wheel drive, that he could drive at a speed of from 25 to 30 miles per hour (Tr. 207), and that he "didn't have no problems" (Tr. 208).

Pantuso testified that nothing had been done to the access road between August 31 and September 1 (Tr. 207). Yet he found that the road was miraculously "pretty smooth" the next morning and could be traveled at a speed of from 25 to 30 miles per hour without having to resort to four-wheel drive at all. One of the reasons that he claims he wanted to drive his own Jeep to the left bench, instead of riding in a Cedar-owned truck, was that he would not have a means of transportation off the bench in case of an emergency. He claimed that an ambulance would be unable to get to the left

bench because the access road was impassable (Tr. 172). Yet if the road was in as fine a condition as Pantuso found it to be on September 1, an ambulance would have had no trouble whatsoever in traveling over the road to get him if he or any other miner had been injured while working on the left bench.

Moreover, Pantuso had claimed on August 31 that he needed a light plant or generator to reflect light on the highwall because the lights on the drill did not shine on the highwall itself (Tr. 135). If, as Pantuso claimed, the lights from a Jeep permitted him to see the highwall "real clear" on the morning of September 1, it is extremely doubtful that he really needed a light plant to enable him to inspect the highwall. Pantuso had succeeded in getting the foremen to admit that the drill had to be preshifted and that the preshift report had to be picked up by a foreman before any actual drilling could be started (Tr. 900; 953). By the time the drill had been preshifted and the preshift report had been picked up, there would have been plenty of natural light to enable Pantuso to inspect the highwall and determine whether it exposed the miners to any hazardous conditions.

There was other testimony which controverted Pantuso's and Browning's claim that they had made a preinspection of the left bench before arriving at the portal on September 1. Ramsey, a senior pit foreman, came in the Chelyan Gate at 5:16 a.m. on September 1 and was on the left bench to do a preshift inspection about 5:30 a.m. on September 1. He testified that he did not see the lights of any other vehicle while he was there (Tr. 466-467). Since it was still dark and since both Pantuso and Browning testified that they were on the left bench at the same time Ramsey was there, it would have been impossible for them to have been there using the lights on the Jeep to inspect the highwall without having been seen by Ramsey and without their having seen Ramsey. Neither Pantuso nor Browning, however, mentioned having seen the lights of any other vehicle while on the left bench.

Pantuso and Browning both stated that Pantuso had stopped the Jeep in the vicinity of the intersection of the access road and the main road so that Browning could tie his shoes (Tr. 207; 642). I have ridden in many Jeeps on all sorts of roads and I have never seen a road so rough that I could not have tied my shoes without having the driver stop the Jeep for that purpose. Therefore, I wondered why they would have concocted such a farfetched reason for stopping the Jeep until I read the testimony of Frame, the maintenance foreman, who testified that he saw Pantuso's Jeep

parked near that intersection at 5:50 a.m. on September 1 (Tr. 1075-1076). I then realized that Pantuso and Browning were aware of the fact that someone else had seen them parked near the access road to the left bench on September 1 and they had to contrive some excuse for having been stopped at that location.

Another aspect of Frame's testimony was absolutely devastating to Pantuso's and Browning's claim that they had made a preinspection of the left bench. Frame stated that he was impressed by the fact that Pantuso's Jeep was very clean when he saw it parked near the access road at 5:50 a.m. on September 1. Frame also testified that he saw no mud on Pantuso's Jeep when he saw it parked at the portal about 5:56 a.m. and saw no mud on the Jeep when he again saw it parked outside Kirk's office about 8:30 a.m. (Tr. 1079-1080). Frame said that there was no way that Pantuso could have driven his Jeep on a two-way trip through the mud on the access road without having mud on it from one end to the other (Tr. 1077). All witnesses, including Pantuso and Browning, uniformly agreed that the access road was muddy because water ran across it in three places (Tr. 166; 333; 952).

Another aspect of Pantuso's testimony which shows lack of credibility is his statement that he could drive from the Chelyan Gate to the portal in 10 minutes (Tr. 170). Deems, the personnel manager, testified that he had measured the distance from the Chelyan Gate to the portal with the odometer on his vehicle and had found it to be 9 miles (Tr. 1011). He said that if he drove the distance faster than normal, he could do it in 13 minutes which would be an average of 42.8 miles per hour. To travel the distance in 10 minutes, as claimed by Pantuso, would amount to an average speed of 54.5 miles per hour. Pantuso's claim that a road located entirely on Cedar's mine property can be safely traveled at an average speed of 54.5 miles per hour is just another reason to doubt his credibility.

There are many other reasons for doubting Pantuso's credibility. In an effort to maximize the danger inherent in drilling on the left bench, Pantuso stated that Ramsey ordered him and Browning to drill some "dummy" holes near the 15-foot highwall. He used the word "dummy" to designate holes which would be drilled but not filled with explosives. The idea was that other holes drilled farther from the highwall would be shot, but the dummy holes would create a place for the earth to break far enough from the highwall to form a safety bench, that is, a place which would catch any rocks and dirt that might fall from the highwall and prevent such material from falling into the area where

miners were working (Tr. 113-114). Pantuso testified that the shot foreman then came in and filled the so-called dummy holes with explosives and shot them along with the other holes and destroyed the safety bench which would otherwise have been created (Tr. 121).

Browning and Ramsey, on the other hand, both testified that the drilling of the dummy holes was authorized by Ramsey at Pantuso's and Browning's suggestion (Tr. 343; 384) and both Ramsey and Browning testified that they did not really think drilling dummy holes to form a safety bench at that time was a good idea because they were drilling in soft earth which would not form a solid area to serve as a safety bench (Tr. 359; 385; 407). Kirk testified that he authorized the dummy holes to be shot because they were in such soft earth that they would not be "worth a quarter" and that he had authorized the foremen to make a safety bench after they had sunk to a lower level where solid rock would be encountered (Tr. 975; 1040; 1054).

The preponderance of the evidence, therefore, fails to support Pantuso's claim that Cedar disregarded safety considerations and shot the dummy holes and thereby deprived him and Browning of a safety bench which they would otherwise have had.

Pantuso also tried to maximize the hazardous nature of drilling on the left bench by claiming that the highwall was 60 to 70 feet high prior to his discharge on September 1 (Tr. 184). Yet WV Inspector Wiseman checked the left bench on September 6 after Pantuso's discharge and testified that the highwall was 15 feet high at that time (Tr. 518; 523). Therefore, the highwall could not have been 60 or 70 feet high prior to Pantuso's discharge. When WV Inspector Brown examined the left bench on September 12 after the dozers had removed all materials drilled by Pantuso and Browning, the highwall was, in his opinion, about 60 feet high (Tr. 287). Cedar's engineering witness, Evans, using precise data, testified that the highwall was 15 feet high prior to Pantuso's discharge and 40 feet high on September 12 (Tr. 777).

As to Pantuso's claim that the left bench was an unsafe place to work because he had no means of communication in case of an emergency (Tr. 136), he admitted on cross-examination that all of the foremen had short wave radios in their trucks and that "you see foremen all the time around there" (Tr. 235). Moreover, Browning was able to use a hand signal on August 31 to get Ramsey to come to the left bench solely to transport him a short distance to the toilet (Tr. 423-425). Since Browning demonstrated that it was easy to

get a foreman's attention, Pantuso's claim that he was working at an isolated place where he could not obtain help in case of an emergency is another claim which is not supported by the preponderance of the evidence.

While Pantuso claimed that he consistently drove his Jeep from the portal to the left bench prior to August 31, he also testified that he was "pretty sure" he had his own transportation (Tr. 115) and he further testified that on August 26 he volunteered to drive his Jeep because Ramsey's Cedar-owned vehicle could not travel over a steep place in the access road (Tr. 120). If he had consistently been driving his own Jeep each day, there is no reason for him to have had to "volunteer" to use his Jeep on August 26 and it would have made no difference to him whether Ramsey's vehicle could travel the access road or not.

It is a fact that Complainant's Exhibit 1 is dated August 31, 1983, although it is Cedar's written notice of Pantuso's suspension subject to discharge which was actually given to Pantuso on September 1, 1983. Pantuso testified that the date of August 31 on the suspension notice showed that Cedar had planned on August 31 to discharge him when he came to work on September 1 and that there was no secretary at the mine on September 1 to type the notice of suspension (Tr. 217). Darlene Harmon, Kirk's secretary, testified that she actually typed the notice of suspension on September 1 but made a typographical error and typed the date of August 31 by mistake. She said that she distinctly recalled the date because the next day, September 2, was her birthday and that she remembered doing the typing on the day before her birthday (Tr. 722). Therefore, Pantuso fabricated a story to support his claim that the notice of suspension was prepared in advance of the actual discharge.

Pantuso also testified that he was just doing "dead" work on the left bench (Tr. 202) and that the drill broke down so often that he could not recall having worked there for a full 10-hour day (Tr. 187). The detailed time and attendance records submitted by Cedar, however, show that Pantuso worked four 10-hour days on the left bench on August 22 through August 25 (BExh. 7).

Pantuso testified that he had successfully withdrawn because of hazardous conditions prior to September 1 pursuant to article III(i) of the NBCWA (Tr. 219). If he had withdrawn in the past, he undoubtedly knew what to say on September 1 to make Holbrook aware of his claim that he had withdrawn from working on the left bench and therefore could not accept transportation to the left bench where an imminent danger allegedly existed. Of course, he was actually going to be transported to the right bench.

Pantuso claimed that Ramsey's telling him on September 1 that he would be working with Wiseman, instead of Browning, did not mean to him that he would be drilling on the right bench where Wiseman's drill was located (Tr. 146). He based the aforesaid claim on a second unsupported assertion that Cedar "was in violation" on the right bench too and that Wiseman's drill would have had to be moved to the left bench because his and Browning's drill was still under repair and would not be available for use on September 1 in any event (Tr. 147). If Pantuso's and Browning's drill were still being repaired so that it could not have been used, there was no reason for Pantuso to claim that he had withdrawn on September 1 to keep from working under a hazardous highwall because no drilling would have been done in any event until another drill could have been moved to the left bench. That would have given Pantuso plenty of time within which to make certain that no miners were required to work on the left bench until the alleged imminent danger could have been eliminated.

Browning's Defiance of Cedar's Orders and Lack of Credibility

Pantuso and Browning rode back and forth to work each day in Pantuso's Jeep (Tr. 141; 351). Therefore, they had plenty of time to plot how they would interfere with Cedar's operations and do as much or as little work as they wished (Tr. 482; 613). Cedar's foremen testified that two drills had burned up when they accidentally caught on fire and that after that happened, Kirk put out a written order stating that drilling helpers should remain outside the cab so that they would be in a position to observe the drill at all times and advise the drilling operator of any hazards because a drilling operator was slightly injured by the fire which suddenly occurred on one of the drills (Tr. 398; 976; 1025; RExh. 5).

Since Pantuso and Browning enjoyed each other's company, they did not like to be separated and Browning frankly testified that he instructed Pantuso to ignore Kirk's order and remain in the cab with him because it was too dark for Pantuso to see the wall in any event (Tr. 335). By the time they had preshifted the drill and the preshift reports had been picked up by a foreman, there was plenty of daylight for Pantuso to keep a watchful eye on the highwall (Tr. 900). The foremen stated that drilling helpers frequently did not have much to do and that they liked to remain inside the cab which was air conditioned in the summer and heated in the winter. One reason that the drill helpers liked to drive their own vehicles to the drilling bench was that it gave them a place to sit. The result was that the foremen found them asleep in their vehicles at times when they were supposed to be observing

conditions on the drilling bench and on the drill itself (Tr. 461-462; 478; 976).

If Cedar's management had set out to find a pretext for discharging Pantuso solely because of his safety activities, it could have made an excellent case for discharging both him and Browning because of their admitted refusal to follow Kirk's written order that Pantuso remain outside of the drill's cab.

One of the ways in which Pantuso tried to shed some credibility on his claim that he had withdrawn from the left bench on September 1 under article III(i) of the NBCWA was to have supporting witnesses testify that Holbrook was very unstable and was likely to fly into a rage at the least provocation and thereby refuse to listen to what any miner might be saying to him (Willis at Tr. 67; Lane at Tr. 566-568). Billy Christian, a loader operator, testified that Holbrook had shouted at him one day when he was complaining about some defects on his loading machine and that Holbrook's verbal assault caused him to remain silent about his safety problems (Tr. 306-307).

Holbrook's defense to Christian's allegations was an explanation to the effect that he was simply trying to stop Christian from a bad habit. That habit was described as follows: Christian would complain at a safety meeting that he had some defects in his loading machine. Holbrook would instruct a mechanic to repair the defects. In the meantime, Christian would start operating the loading machine despite its defects. Then when the mechanic came to make the necessary repairs, Christian would refuse to stop the loading machine long enough for the mechanic to repair it. Later, however, if Kirk or a safety committeeman happened to come near Christian's loader, he would stop it and complain about the defects in his loader and claim that the foreman would not correct the defects. Holbrook gave the name of one of the mechanics who reported such an encounter with Christian (Tr. 905-906) and described a similar incident, involving a safety committeeman, which had occurred just a week prior to the holding of the hearing before the WV Board (Tr. 942).

Pantuso's efforts to vilify Holbrook are largely, if not entirely, overcome by other uncontroverted testimony in the record. For example, just prior to Pantuso's discharge on the morning of September 1 Holbrook demonstrated an unusual amount of self control. Browning testified that when Holbrook first started to give Pantuso a direct order to get into Tackett's vehicle for transportation to his working site, Browning interrupted him to remind him that it was only 5:58 a.m. and that Holbrook could not give any direct orders before working time which did not start until 6:00 a.m. (Tr.

351). Holbrook admitted that Browning was right in making that observation and stated that he would give the direct order after he had held the safety meeting (Tr. 886).

Despite the fact that Holbrook was holding a safety meeting regarding the wearing of hard hats inside the portal building away from any hazards of falling rocks, Browning interrupted him again to note that he ought to put on a hard hat before conducting the safety meeting (Tr. 352). Holbrook again agreed that Browning was correct because he was one of the worst offenders in failing to wear a hard hat (Tr. 890). Browning further showed accommodating aspects of Holbrook's character by testifying that Holbrook had been "nicer" to him than any other foreman. On one occasion, Browning said that Holbrook had volunteered to guard his vehicle when he had had to leave it unattended at a time when it contained some sports equipment which could have been stolen through a broken window which then existed in the vehicle. Browning also testified that Holbrook had allowed him to drive his own vehicle to his working site when other foremen had refused to allow him to do so (Tr. 360).

It is clear from the record, therefore, that Holbrook was not so unstable in character that he would have discharged a miner who was trying to explain to him that the area where he was being sent to work was so hazardous that he was withdrawing himself and all other miners from that area under article III(i) of the NBCWA.

At all times in evaluating the credibility of Browning's and Pantuso's withdrawal claims, one has to bear in mind that Pantuso was initially suspended subject to discharge solely because he refused to get into the truck with Tackett for transportation to his working site. Once Pantuso had pushed Holbrook over the edge of forbearance and had been suspended, Pantuso and Browning were forced to fabricate retrospectively a safety-related justification for Pantuso's refusal to obey Holbrook's thrice-repeated direct order for Pantuso to get into the truck with Tackett for transportation to his working site (Tr. 887). It must be recalled that Browning was present when Pantuso allegedly told Ramsey on August 31 that he would have to withdraw himself and others from working on the left bench if Ramsey had not corrected all of the safety complaints which Pantuso had pointed out to Ramsey on August 31 (Tr. 136). Since Browning was an alternate safety committeeman who could withdraw under article III(i) just as well as Pantuso, Browning had to invent a reason for his not having withdrawn on September 1 after Pantuso was suspended. Browning was just as fully aware of the alleged hazardous conditions on the left bench as Pantuso was (Tr. 647). Yet, after Pantuso was discharged, Browning

announced to Ramsey that he was going on union time in order to assist Pantuso in defending himself at the meeting which Holbrook had stated would be held at 8 a.m. (Tr. 354; 672; 961).

In going on union time to assist Pantuso in holding his job, Browning abdicated his responsibilities as an alternate safety committeeman by failing to find out if the other miners who were scheduled to work on the left bench on September 1 were actually going to that allegedly hazardous place to work (Tr. 686; 718). If conditions on the left bench had really constituted an imminent danger, as Pantuso and Browning claimed, those dangers were not eliminated when Pantuso was suspended subject to discharge. The primary obligation on Browning at the moment of Pantuso's suspension was not in defending Pantuso from being discharged, but making sure that no other miner was forced to work in the extremely dangerous conditions which allegedly existed on the left bench. Of course, Pantuso did not actually raise a withdrawal defense, except as an afterthought, to justify his refusal to obey Holbrook's direct orders. Therefore, no thought was ever given to the matter of paramount importance which was assuring that other miners would not work in an area of imminent danger.

Browning realized that he had to contrive some excuse to explain why he had abdicated his duties as an alternate safety committeeman. Therefore, he introduced into his direct testimony a conversation which he and Pantuso had allegedly had on the morning of September 1 when they were making the claimed preinspection of conditions on the left bench prior to reporting for work at the portal. According to that conversation, Pantuso had told Browning that since Browning was only an alternate safety committeeman, Pantuso would have to be the spokesman for initiating withdrawal when the time came for them to go from the portal to their working area (Tr. 351). On cross-examination, Browning explained in detail the provisions of article III(i) of the NBCWA (Tr. 712-713) and he knew perfectly well that he had authority to invoke the provisions of that portion of the NBCWA. Therefore, the conversation in which Pantuso explained to Browning that only Pantuso could initiate a withdrawal, even if it had occurred, was no excuse for Browning's failure to perform the withdrawal which he and Pantuso had allegedly decided to implement on the morning of September 1. After all, Browning had never been backward or hesitant about exercising the functions of a safety committeeman on other occasions despite the fact that he was only an "alternate" safety committeeman (Tr. 329; 341; 343; 348).

Another excuse raised by Browning for his failure to withdraw all miners from the left bench after Pantuso's suspension was that he would have had to call for a safety committeeman to inspect the area and that would have necessitated his calling Pantuso who had already been disqualified from acting because of his suspension (Tr. 704). That was a lame excuse because there were other safety committeemen present at the time of Pantuso's suspension and one of them could have been called. Besides, at the time of Pantuso's suspension, about 30 miners were present at the portal (Tr. 319) and Cedar would have had to honor a bona fide withdrawal made under article III(i) of the NBCWA by going through all consultation steps required by that article.

Another difficulty which Pantuso and Browning had to overcome in fabricating their claim of withdrawal from the left bench is that they agree that Ramsey had advised Pantuso that he would be working with Wiseman, not Browning, that morning (Tr. 142; 353). They claim that they had just finished inspecting the left bench and they knew that the drill Wiseman would be operating was located on the right bench, not the left bench (Tr. 353). They had not made an alleged preinspection of the right bench and could not claim that conditions on the right bench also constituted an imminent danger, although Pantuso did say that Cedar was "in violation" on the right bench (Tr. 147). Therefore, they claimed that Wiseman's drill would have to be moved to the left bench in any event because the drill normally operated by Browning on the left bench was still undergoing repairs (Tr. 146). The net effect of their contentions was that Pantuso was still withdrawing from the left bench when he raised that as a defense because Pantuso knew that sooner or later he would be working with Wiseman on the left bench.

The credibility of Browning's testimony is eroded by some of the same infirmities which destroy Pantuso's credibility. Browning, for example, also emphasized the terrible condition of the access road on and before August 31, but found those conditions did not prevent Pantuso from driving over the road in two-wheel drive when they made their alleged preinspection of September 1 because Browning was forced to concede that the access road would have had to have been in relatively good shape in order for them to have traversed it as rapidly as they claimed in order to get to the left bench, inspect it, and return to the main road so as to arrive at the portal by 5:55 a.m. (Tr. 333; 342; 635; 645).

Browning also destroyed the credibility of his account of the events which occurred just prior to Pantuso's suspension on September 1 by recalling that Pantuso had withdrawn outside the portal before the safety meeting began even though Pantuso unequivocally stated that he did not withdraw until sometime during his conversation with Ramsey after the safety meeting started and perhaps in his alleged safety protests to Holbrook after the safety meeting had been concluded (Tr. 143; 215; 643). Browning also could not explain how he heard part of what Pantuso was saying to Ramsey and not hear all of that conversation in view of the vital interest he had in making sure that Ramsey was aware of the extreme importance of Pantuso's withdrawal from the imminent danger which allegedly existed on the left bench at that very moment. Browning and all witnesses agree that the safety meeting did not last for more than 5 or 6 minutes (Tr. 214; 961). During that time, Browning interrupted Holbrook on one occasion, talked to other miners despite Holbrook's telling all the miners to be quiet, and had time to ask if there were any safety problems to be discussed after the meeting. His conduct during and after the safety meeting supports a conclusion that he was not paying any attention to anything which Pantuso might have been saying to Ramsey because he was listening only to the prepared statement read by Holbrook and had nothing in particular on his mind about safety at the time Holbrook asked if there were any questions and and when he himself got up and asked if there were any safety matters to be raised (Tr. 352-354; 660; 699).

At one point in his direct testimony, Browning inadvertently told the truth by saying that he heard Ramsey tell Pantuso that he would not be going into "that" pit (Tr. 353). The context in which Browning used the word "that" meant the "left" pit and that statement, if it had been left undisturbed, would have destroyed both his and Pantuso's claim that Pantuso thought he would eventually be going to work in the left pit despite the fact that Ramsey had advised him that he would be working with Wiseman instead of Browning. Browning's attorney was alert, however, and succeeded in getting Browning to amend his testimony so as to say that Ramsey only told Pantuso that he would be working with Wiseman without specifically stating that Pantuso would be working in the right pit instead of the left pit.

Browning testified that no shots were set off on the left bench between August 26 and the time when the West Virginia inspector came to inspect the left pit on September 6 (Tr. 345), but the blasting log shows that a shot was set off on the left bench on September 2 (Tr. 768; RExh. 9).

Pantuso's and Browning's Abuse of Their Positions as Safety Committeemen

Cedar's reply brief (p. 13) emphasizes the fact that Pantuso and Browning abused their positions as safety committeemen by reporting alleged violations which did not exist. There is considerable merit to the above contention. On one occasion, Pantuso requested that the Mine Safety and Health Administration (MSHA) of the U.S. Department of Labor conduct an investigation pursuant to section 103(g) of the Act with respect to 80 alleged violations of the mandatory health and safety standards (Tr. 181). Browning testified that he and three other safety committeemen spent 3 days with four MSHA inspectors checking Cedar's mine and equipment to determine whether the violations existed (Tr. 329; CExh. 11). Respondent's Exhibit 2 consists of 69 statements written by MSHA's inspectors finding that 69 of the 80 alleged violations did not exist and the record is not clear as to whether the remaining 11 actually existed (Tr. 858).

Pantuso's attorney tried to defend Pantuso's having reported at least 69 violations which did not exist on the ground that Cedar had corrected them between the time he requested the section 103(g) inspection and the time when they were checked by the four inspectors (Tr. 823-827), but he merely confused matters by introducing Complainant's Exhibit 17 which dealt with a different section 103(g) inspection requested by Pantuso 10 days after he had been discharged (Tr. 865). The three alleged violations discussed in Exhibit 17 were not found to exist when they were checked by MSHA.

While it may be true that Cedar had corrected 69 of the 80 alleged violations prior to the time when the MSHA inspectors made their examination of the mine, the fact remains that the 80 alleged violations resulted from a quarterly inspection which the union made pursuant to the NBCWA and normal procedure was for Cedar to be given 5 days within which to correct an alleged violation before any other action was taken (Tr. 859). It is not clear from the record that Pantuso gave Cedar a period of 5 days to correct the alleged violations before requesting that an inspection under section 103(g) of the Act be conducted. If Pantuso did not eliminate violations corrected within 5 days before requesting the section 103(g) inspection, he certainly wasted a lot of time by four MSHA inspectors in checking nonexistent violations.

On another occasion, Pantuso and Browning decided that Cedar was not correcting some alleged violations as fast as they wanted them corrected, so they went on union time and

drove around Cedar's mine to find 35 alleged violations (Tr. 828; 860) which Pantuso reported to UMWA so that the West Virginia Department of Mines could be asked to check them (Tr. 153; C Exh. 10(C)). The WV Department of Mines found that 20 of the 35 alleged violations did not exist (Tr. 211). Cedar was not given any notice that the 35 alleged violations had been reported and had no opportunity at all to correct any of them prior to the inspection. Therefore, at least 20 of the 35 alleged violations did not exist at the time they were reported by Pantuso.

In order for Pantuso to sustain his complaint in this proceeding, he needed to prove, among other things, that he was engaged in a protected activity at the time of his suspension subject to discharge. He failed to prove that he was engaged in any protected activity when he refused to obey Holbrook's direct orders or when he threatened to knock Kirk's nose off. Reporting nonexistent violations to MSHA and the WV Department of Mines did not help to prove engagement in a protected activity at the time Pantuso was suspended subject to discharge.

The Question of Ramsey's Credibility

The arbitrator referred to Ramsey's having been unsure at the arbitration hearing as to whether Pantuso ever said anything about withdrawing from the left bench on August 31, the day before he was discharged (Arb.Dec. or CExh. 2, pp. 5 & 15). Ramsey stated that he had not given any thought to the matter at the time he was first asked that question because he did not understand why a withdrawal statement on the previous day was in any way related to Pantuso's refusal on September 1 to obey Holbrook's direct orders to get in the truck with Tackett for transportation to a completely different working site on the right bench (Tr. 434). Ramsey said that after he had given the matter some thought, he decided that Pantuso did say something on August 31 about the fact that he could withdraw from the left bench (Tr. 427-428; 481; 490-494).

It has been my experience that the most credible witnesses are sometimes uncertain about statements which may have been made, but which they did not consider to be significant at the time they were said. The mere fact that Ramsey was willing to amend his testimony to say that Pantuso may have mentioned on August 31 that he could withdraw shows the effort of a witness to be fair and truthful and does not indicate that he was trying to misrepresent the actual facts. Ramsey was also unsure about the dates on which certain other events occurred. For example, he could not be certain when the last shot on the left bench was

fired until his counsel referred to the blasting log (Tr. 452). Ramsey was also easily confused by counsel. At one point, he was persuaded by Pantuso's counsel to concede that he may have gone to the 24/48-hour meeting, although he first stated that he was not present (Tr. 447). Ramsey did not attend the 8:45 a.m. meeting held on September 1, 1983 (Tr. 935), and could have had the two meetings confused. As hereinafter pointed out, the two meetings were even confused by Cedar's counsel when Cedar's reply brief was written.

Ramsey prepared a statement about the events of August 30, 31, and September 1, prior to the hearing held before the WV Board. That statement was received in evidence by the Board (Tr. 437) and it does not refer to any statement by Pantuso on August 31 that he could withdraw and that is a further indication that Ramsey did not consider the statement, if made, to be anything more than a part of Pantuso's and Browning's having raised dubious safety complaints to retaliate for Kirk's having issued the written directive on August 24 that drilling helpers were thereafter to remain outside the cabs on the drills in order to observe any safety hazards which might develop (Tr. 427).

As compared with Ramsey's uncertainty about when some events actually happened, Pantuso had memorized every detail of what happened on August 30, 31, and September 1 to such an extent that he even corrected Cedar's counsel when he made a mistake as to a date in his question (Tr. 168). The ability of a witness to be certain about every small detail is more likely to indicate fabrication than is the inability of a witness to recall with certainty whether a specific statement was ever made. After all, both Pantuso and Browning conceded that if Ramsey ever heard Pantuso say anything on August 31 about withdrawing, he made no reply to indicate that he had heard the remark (Tr. 137; 342-343). It is, therefore, not surprising that Ramsey had difficulty in recalling whether anything about withdrawing was ever said by Pantuso on August 31.

The Arguments Advanced in Pantuso's Initial Brief Must Be Rejected for His Failure To Analyze the Record Correctly

Pantuso's initial brief is 31 pages long. The brief relies primarily on Pantuso's and Browning's testimony as the source of its statement of the facts. Since I have already shown in this decision that Pantuso's and Browning's lack of credibility makes it impossible to accept their testimony, Pantuso's brief is necessarily erroneous in the allegations which are set forth as facts on pages 1 through 13. Some of the erroneous statements are discussed below.

On page 2, the brief purports to cite Willis and Browning as witnesses, but transcript pages 38 and 284 cited on that page, refer to testimony given by Bess and WV Inspector Brown, not Browning, who was Pantuso's buddy and the only witness who supported his claim of having withdrawn at the time of his suspension and discharge. The first part of Pantuso's brief tries to show that the left bench where Pantuso was working from August 22 up to his discharge was an extremely hazardous place to work, but that claim was thoroughly discredited by nearly all the witnesses, including the two WV inspectors, as I have shown in the 21 findings of fact which are set forth on pages 6 through 16 of this decision.

Pantuso exaggerated the conditions which he discussed throughout his testimony. For example, on page 2 of his brief he tries to show that DeWeese called his attention to the fact that the highwall on the left bench was falling in. All that DeWeese actually told him was that he had seen a crack in the sloping embankment above the 15-foot highwall which then existed and that Pantuso should keep an eye on the highwall while working on the left bench. Pantuso had not even seen the crack until it was pointed out to him by DeWeese and the only reason DeWeese saw it was that he was operating a dozer within 2 or 3 feet of the 15-foot highwall and his tractor was high enough to make his eyes about even with the top of the highwall so that he could observe the crack in the embankment at a point which was about 10 feet above the highwall. The only material which had fallen from the highwall was coming from the sloping embankment above the highwall and there was such a small amount of material that it only took DeWeese 25 to 30 minutes to clean off the bench so that initial drilling could be started on the left bench (Tr. 324-325). At no time while Pantuso worked on the left bench was there ever a crack in the highwall itself. All of the cracks and claimed hazards in the highwall were in old spoil which had been made above the highwall as a result of prior mining (Tr. 741; 749; RExhs. 6 & 7).

On page 3 of Pantuso's brief, he cites Ramsey's testimony to support a claim that the drill was moving in the direction of the area where the crack mentioned by DeWeese existed, but the testimony cited is on page 393 and examination of that testimony shows that Ramsey was confused by having been shown some pictures made on September 12 to show what sequence of drilling existed on August 20. Between August 20 and September 12, two different shots had been set off on the left bench and the level of the bench had been lowered about 25 feet by having two dozer operators push away all the loose earth resulting from those shots. The direction of drilling discussed by counsel at pages 393 to

395 is impossible to determine because the Chairman of the WV Board and counsel for the parties discuss exhibits in terms, such as "here", which are not subject to clear interpretation by anyone who was not present in the hearing room at that time.

The photographs which are a part of this record were all made on September 12 which was 11 days after Pantuso's discharge and after the dozer operators had lowered the level of the bench by 25 feet. As I stated at the outset of this decision (p. 3 above), the pictures are completely void of interpretation because of their poor reproduction and I have not based any findings of fact on what may or may not be determinable from the originals of those pictures. Even the original photographs were criticized by the witnesses as being of poor quality (Tr. 277; 772; 1036).

On page 4 of Pantuso's brief, he concentrates on showing that Holbrook is a person given to rages who will not listen to people when they try to talk to him. I have already dealt with that claim in the preceding part of this decision (pp. 25-26) and it should not be given any credence as the incident involving Billy Christian is presented in a greatly biased manner.

Pantuso's brief (p. 5) primarily deals with an exaggerated description of the terrible condition of the access road leading to the left bench. I have already shown in this decision (pp. 19 and 28) that both Pantuso's and Browning's description of the access road must be completely rejected because of their claims that it could be traveled easily and speedily on September 1, but was almost impassable the day before, despite the fact that no work had been done on it between 2 p.m. on August 31 and 5:40 a.m. on September 1.

On page 6 of his brief, Pantuso repeats how serious conditions on the left bench were as of August 30, but what he fails to make clear is that he had already done all the drilling in the area where dirt from the embankment occasionally fell on the left bench and that those holes, including the so-called "dummy" holes, had been shot on August 26 (Finding No. 21, RExh. 9). Therefore, on August 30 Pantuso was in no danger whatsoever from anything unusual and all his discussion of the terrible conditions which existed on August 30 are simply exaggerations made to support his claim of withdrawal on September 1 when he was discharged.

Pantuso's brief (p. 7) makes the astonishing claim that management was discriminating against him by suddenly on

August 31 telling him that in the future he would be expected to report for work on time instead of coming in late as he admitted had been his practice. As I have previously explained (Finding Nos. 9 and 10), it had been called to the attention of Kirk that some miners, including Pantuso and Browning, were regularly reporting late for work and Kirk had instructed the foremen to start enforcing the requirement that miners report to work on time.

Pantuso's brief (p. 8) cites Browning's testimony at page 568, but the witness who was testifying on page 568 was Lane. Lane was not discussing the subject attributed to Browning on that page, but on page 559 Lane does say that Pantuso claimed a need for having his own means of transportation. Nevertheless, Lane did not think that was a sufficient reason to refuse to obey a direct order by Tackett that he and Browning get into Tackett's Cedar-owned vehicle for transportation to their working site. That is the reason that Lane advised Pantuso to ride with Tackett and file a discrimination grievance.

Pantuso's brief (p. 8) continues with an exaggerated description of the hazardous conditions which allegedly existed on August 31, but I have shown on pages 20 and 22 of this decision that those claims are not supported by the preponderance of the evidence.

Pantuso's brief (p. 10) incorrectly states that when Pantuso arrived at Kirk's office for the 8 a.m. meeting held on September 1 that Pantuso tried to explain to Holbrook at that time that his suspension was safety-related. Pantuso cites transcript page 887 in support of that claim, but on that page Holbrook was discussing events which occurred at the portal just a few minutes after Holbrook had told Pantuso that he was suspended subject to discharge pending a further determination at a meeting in Kirk's office which was to be held at 8 a.m. Pantuso was given full opportunity to advance his claims of safety at the meeting which was postponed until Kincaid, a UMWA inspector, could travel to Kirk's office to attend the meeting (Tr. 247).

Pantuso's brief (p. 11) cites Lane's testimony at transcript page 887, but Holbrook was testifying on that page of the transcript. The testimony which Pantuso apparently intended to cite appears on page 565 of the transcript. Also on page 11 of his brief, Pantuso claims that Ramsey discussed a conversation at the 24/48-hour meeting, but Ramsey did not think that he was present for the 24/48-hour meeting and the discussion about whether any area on the left bench should be blocked off occurred before the 24/48-hour meeting. Additionally, Pantuso incorrectly states on page 11 that the

"shooter" of explosives, Paul Harold, expressed to Ramsey a belief that the left bench was unsafe. Ramsey's exact testimony on page 448 with respect to Paul Harold is as follows: "His opinion that the drill bench wasn't unsafe" (Tr. 448).

Pantuso's brief (p. 12) improperly relies upon the testimony of WV Inspector Wiseman to support his claim that conditions on the left bench constituted an imminent danger on September 1, the day of Pantuso's discharge. As I have previously explained in Finding Nos. 19 and 20, Wiseman inspected the left bench on September 6 and found no violation of any safety standard, much less the imminent danger which Pantuso alleges existed. On September 6 Wiseman did not even go on the left bench to make his examination (Tr. 521). He stated unequivocally that the two dozer operators who were working on the left bench were not exposed to any imminent danger even though they were working in the precise area where Pantuso claimed conditions were hazardous. While Wiseman did say that he would have issued an imminent-danger order if a drill had been working on the left bench, he never did explain why it was safe for the dozer operators to work there in perfect safety but would have been unsafe for drilling to be done in the same place (Tr. 522).

It is also incorrect for Pantuso to rely upon Wiseman's issuance of an imminent-danger order on September 12 to support his claim that an imminent danger existed on September 1 because the imminent-danger order was issued solely because Tackett had failed to erect danger signs near the place where materials occasionally fell from the embankment above the highwall which was then 40 feet high, but which was only 15 feet high on September 1. As I have already explained in Finding Nos. 19 through 21, circumstances on the left bench had changed considerably between Pantuso's discharge on September 1 and the issuance of the imminent-danger order on September 12. Moreover, Wiseman did not stop the drilling operator from continuing to work because Tackett had instructed him to stay outside the area of imminent danger. Consequently, even if Pantuso had still been working on the left bench on September 12, he would not have had to stop working because of the issuance of the imminent-danger order. Therefore, it is a complete distortion of the facts in this case for Pantuso to argue that conditions on the left bench on September 1 constituted an imminent danger.

Pantuso's brief (pp. 15-18) endeavors to establish the fact that Pantuso had refused to obey Holbrook's order because of his concerns related to safety, but the arguments are based on the facts erroneously stated in the first part of the brief. Since I have shown that conditions on the

left bench did not constitute an imminent danger or even expose him to any unusual hazard, as claimed by Pantuso, his argument that his discharge was motivated by his safety activities must be rejected.

Pantuso's brief (p. 19) cites the Dunmire and Estle case which I referred to on page 17 of this decision. Pantuso claims that he communicated his concerns about the safety of the left bench to Ramsey and Holbrook at the time of his suspension, but as I have shown on pages 17 to 24 of this decision, that claim has not been proven. It is true that Pantuso raised a safety-related defense at the meeting scheduled to be held at 8 a.m. Raising the defense within 2 hours after the suspension would probably satisfy the criteria expressed by the Commission in the Dunmire and Estle case, but the Commission also held that the refusal to work in a dangerous place should be based upon a reasonable belief that the hazard actually existed. The preponderance of the evidence, however, shows that the alleged hazardous conditions did not exist and Pantuso and Browning could not really have had a good-faith belief that the left bench was so dangerous that they could not work there. Moreover, as I have noted on pages 24, 28, and 29 of this decision, Pantuso had been ordered to go to the right bench to work with Wiseman, instead of Browning whose drill was on the left bench. Pantuso did not even allege that conditions on the right bench were so hazardous that he had withdrawn from working on the right bench. He did allege that Cedar was in violation on the right bench, but the only specific claim he made as to the right bench was lack of a light plant (Tr. 147). As I have already shown on page 20 above, by the time the drill operators had finished their preshift examinations and the preshift reports had been picked up by a foreman, there was enough daylight to enable the miners to observe the condition of the highwall. He also claimed that Wiseman's drill would have to be moved to the left bench, but that was based on a supposition which was never proven.

Pantuso's brief (pp. 20-25) is devoted to an argument showing that Cedar's defense in this proceeding is only pretextual and cannot be considered as a showing that Pantuso would have been discharged for his unprotected activity alone even if one were to concede that he proved that his discharge was motivated in any way by his protected activities. In this proceeding, it is Pantuso who has raised the issue of safety as a pretext to support his claim that he was engaged in a protected activity at the time of his discharge. As I have noted in Finding No. 6 of this decision, Pantuso had filed a grievance on behalf of himself and others seeking damages if their vehicles became damaged by

driving over Cedar's roads. Pantuso also sought to have Cedar supply him with a rental car if his Jeep had to be repaired. Therefore, Cedar had a justifiable reason for ordering Pantuso to get into a Cedar-owned vehicle for transportation to his working site. The fact that no other miner had been ordered to accept transportation in a company-owned vehicle is immaterial because Pantuso is the one who had made an issue of being reimbursed for any damages which his Jeep might incur from being driven over Cedar's roads. Management gave a justifiable reason for insisting on transporting Pantuso to his working site any time the road was considered to be rough enough for Pantuso's Jeep to become damaged. Cedar should not be continually exposed to having to defend itself against grievances filed by Pantuso to collect payment for any damages that might incur as a result of his driving his own Jeep to his working site when it could avoid that sort of grievance simply by transporting him in a company-owned vehicle.

While I have shown on pages 19 and 28 above that Pantuso contradicted himself by saying the access road was very rough and muddy up to September 1, but was in fine shape on that day because of his unsupported claim that he gave the left bench a preliminary inspection before reporting for work at the portal, Cedar's foremen consistently agreed throughout the hearing that the access road was muddy and rutted and that there was a possibility that Pantuso's Jeep could receive some damage by being driven over the access road (Tr. 420; 896; 952).

Pantuso's brief (p. 24) attempts to defend his threat to knock Kirk's nose off as being a justifiable act because his threat was provoked by Kirk's having shaken his finger at Pantuso when Pantuso claimed that the meeting about his suspension subject to discharge would not have been necessary if Kirk had paid attention to Pantuso's safety complaints. Kirk had come out of his office to advise the miners that the meeting scheduled for 8 a.m. would be delayed. Kirk testified that he answered a number of questions before he threatened to have Pantuso removed from the property if he heard any more outbursts from him. The meeting was being held to give Pantuso an opportunity to explain his conduct and Pantuso should have been willing to wait a reasonable period of time for additional personnel to travel to the meeting site. After all, part of the delay was necessary so that the UMWA inspector called by Lane, a mine committeeman, could be given time to get to Kirk's office.

Pantuso tried to minimize his threat to knock Kirk's nose off by claiming that he made the statement to Browning,

rather than to Kirk. Browning's testimony fails to support Pantuso's claim that his action did not constitute an assault because Browning testified that "Bill Lane, Frank McCartney, and a couple of other guys grabbed Fred [Pantuso] and moved him back and I stepped in between them" (Tr. 355). If Pantuso's conduct had not been extremely aggressive, there would not have been a need for four miners to restrain him while another miner stepped between him and Kirk. Pantuso, on a prior occasion, had been suspended for 5 days when he became involved in a fight with another miner (Tr. 915; 1005; 1010). On that occasion, Pantuso claimed that the other miner was the aggressor (Tr. 151), but the other miner was the one who had to go to the office and have blood washed from his face (Tr. 917).

Therefore, I must reject Pantuso's arguments to the effect that he satisfied the criteria of the Dunmire and Estle case by proving that he had a bona fide belief that he was being ordered to work under hazardous conditions. I also believe that Cedar's evidence satisfies the test of showing that Pantuso would have been discharged for his unprotected activities alone even if it had been proven, which was not the case, that Pantuso's discharge was motivated in any part by his protected activities.

The last portion of Pantuso's brief (pp. 26-31) is devoted to a discussion of the additional interest which is due on the back pay for which Cedar has already reimbursed Pantuso pursuant to an order of the WV Board. It is unnecessary for me to consider any "relief" issues in view of the fact that my decision fails to find that a violation of section 105(c)(1) of the Act has been proven.

The Arguments Advanced in Cedar's Initial Brief Are Based on a Predominantly Correct Analysis of the Evidence and Should Be Accepted

There are few factual errors in Cedar's initial brief. There is one on page 5 which is probably a typographical error, but it should be noted lest it be misleading. On that page, Cedar inadvertently stated that Pantuso arrived at the portal at 6:55 a.m. on September 1, 1983, the day of his discharge. As I have noted many times before (e.g. Finding No. 14), his arrival time was 5:55 a.m.

Cedar's initial brief (pp. 10-11) refers to the holding of the 24/48-hour meeting provided for under the NBCWA as having been held on September 1, 1983. That is incorrect as witness Bess stated that the 24/48-hour meeting was held at 2:25 p.m. on September 2, 1983 (Tr. 54) and Cedar's counsel pointed out at the hearing that the 24/48-

hour meeting was held on September 2, 1983 (Tr. 448). Also the arbitrator stated on page 2 of his decision that the 24/48-hour meeting was held on September 2, 1983, and on page 6 of his decision, he noted that Cedar held an investigative meeting on the morning of September 1, 1983 (CExh. 2, pp. 2 & 6). Deems explained the difference in the two types of meetings (Tr. 1013; 1016).

Cedar's initial and reply briefs are both written with skill and attention to detail, but it almost appears as if two different attorneys may have written them on behalf of Mr. Price because on page 12 of Cedar's initial brief, Cedar enters into a lengthy discussion in which it is willing to assume, arguendo, that Pantuso's discharge was motivated, in part, by his having engaged in protected activity, but in Cedar's reply brief, Cedar appropriately argues that Pantuso failed to prove that his discharge for refusal to obey Holbrook's order and for his threat to knock Kirk's nose off was in any way motivated by a protected activity.

Pages 24 to 30 of Cedar's initial brief are devoted to arguing "relief" issues and assessment of a civil penalty. Inasmuch as my decision denies Pantuso's complaint, it is unnecessary for me to discuss that portion of Cedar's brief.

Pantuso's Reply Brief Correctly Argues Two Legal Points

Pantuso's reply brief fails even to discuss the many weaknesses in his presentation which were pointed out in Cedar's initial brief. The 5-page reply brief does, however, correctly deal with two legal issues which were advanced in Cedar's initial brief. Pages 1 through 3 of the reply brief correctly state that the Commission and its judges are not bound by an arbitrator's findings. Pantuso properly notes that the Commission held in its Pasula decision, cited on page 5 above, that a judge should give the arbitrator's decision weight if there is congruence between the issues raised under the Act and those raised under the NBCWA.

I believe that my decision in this proceeding gives the arbitrator's decision as much weight as it is entitled to receive when the vast difference between the record which was before the arbitrator is compared with the record which is before me. The record before the arbitrator was never transcribed and he erased the tapes before Cedar's counsel could obtain them for the purpose of having them transcribed (Tr. 1092). Therefore, the only way I can evaluate the evidence which was before the arbitrator is to assume that his decision discusses the primary points raised by the witnesses.

The most obvious difference between the record before the arbitrator and the one before me is that the 1,116 pages of transcript which comprise the testimony before me resulted from 9 days (FOOTNOTE.4) of hearing, whereas only 1 day of hearing was held before the arbitrator (CExh. 2, p. 3). Without attempting to cover all the differences between the record before the arbitrator and the record before me, the following points come readily to mind:

Pantuso and Browning apparently did not claim before the arbitrator that they had gone to the left bench on the morning of September 1, 1983, to make a preinspection of the conditions on the left bench.

Pantuso does not appear to have claimed before the arbitrator that he tried to tell Holbrook that he had withdrawn because of the hazardous conditions which existed on the left bench.

Pantuso admitted in the hearing before the arbitrator that he had not given Ramsey any reason for claiming that he was withdrawing and the arbitrator held that Pantuso could not sustain a case of withdrawing under article III(i) of the NBCWA on the basis of alleged hazards which had only been communicated on a previous day.

No WV inspector seems to have testified in the hearing before the arbitrator, but he still relied upon orders introduced at his hearing or on statements by witnesses pertaining to actions taken by a WV inspector. Nevertheless, the arbitrator found that a WV inspector believed that an imminent danger existed on the left bench on September 6 and that he failed to issue an imminent-danger order on that day because Kirk had told him no one was working on the left bench. In this case, however, a WV inspector testified that he observed two dozer operators working on the left bench on September 6 and that they were not exposed to an imminent danger even though they were working in the area of the so-called slip which Pantuso claimed to be very hazardous. Also

in this case, the WV inspector stated that his order of withdrawal issued September 12 did not apply to the area where the drill was being operated on that day. Furthermore, there was extensive evidence in this case showing beyond any doubt that conditions on September 12 had changed greatly from the way they were on September 1. Consequently, what might have been held to be an imminent danger on September 12 did not even exist on September 1 when Pantuso was discharged (Finding Nos. 19-21 above).

The arbitrator does not appear to have had before him the extensive evidence which exists in the record before me showing that Pantuso had a proclivity for reporting nonexistent violations to both MSHA and the WV Department of Mines (Pages 30-31 above).

The arbitrator did not have the extensive evidence which exists in this case showing that Pantuso's allegations about having no means of communication or nearby toilet facilities were without actual factual support (Finding No. 12 and pages 21-23 above).

There was apparently no evidence before the arbitrator showing that Pantuso and Browning had refused to follow Kirk's written directive that helpers to the drill operators should remain outside the cab of the drill so as to be able to keep an eye on the drill and surrounding area to make sure that no hazardous conditions were developing which might threaten the safety of the drill operators.

There was apparently no evidence in the arbitration case showing that Pantuso's primary reason for refusing to ride with Tackett was his determination to drive his own Jeep to the working site despite the fact that he had filed a grievance seeking to be reimbursed for any damages which his Jeep might incur as a result of driving it to his working site. His grievance also sought to have Cedar provide him with a rental car to drive to work while his Jeep was being repaired (Tr. 161).

The arbitrator apparently did not have evidence before him showing that Pantuso had been told by Ramsey that Pantuso would be working with Wiseman, instead of Browning, which meant that Pantuso would not be working on the left bench in any event.

While the arbitrator mentioned several times in his decision that there was conflicting evidence, he did not try to reconcile the conflicting evidence and made his findings on the basis of evidence as to which there was no conflict. Despite the limitations which that placed on his

findings, he held that Cedar had carried its burden of proving that Pantuso committed the offenses of thrice refusing a direct order and did threaten to strike a supervisor. While he held that those offenses were sufficient cause to merit discharge, he said that he thought the offenses were associated with enough safety concerns to justify a 90-day suspension instead of discharge.

If the arbitrator had had the extensive evidence before him which has been presented in the record before me, it is highly likely that he would have upheld the discharge as justified because he placed more weight on some sort of evidence concerning a WV inspector's actions than would have been warranted if he had had the testimony of the two WV inspectors who testified in this proceeding.

In Pantuso's reply brief (pp. 3-4), he correctly argues that a complainant has a right under the Act and its legislative history to refuse to work in an area which confronts him with a threat to his health and safety and that he does not have to show in a proceeding under section 105(c)(2) of the Act that he would be exposed to the imminent danger which is required to permit a miner to withdraw himself and others under article III(i) of the NBCWA. Of course, as I have shown in my decision, Pantuso did not prove that he would be exposed to any hazards beyond those normally incurred in working in a surface coal mine if he had obeyed Holbrook's order and had ridden with Tackett to the right bench to work with Wiseman. Moreover, neither Pantuso nor Browning showed, after Holbrook had suspended Pantuso subject to discharge, the slightest concern on September 1 about the fact that other miners were scheduled to go to work on the left bench where the alleged imminent danger still existed (Pages 26-28 above).

The Arguments in Cedar's Reply Brief Are Supported by the Record

Pages 1 through 12 of Cedar's reply brief are devoted to showing that Pantuso's initial brief contains many factual errors as well as a failure to consider all the evidence, rather than just the portions which support the arguments which Pantuso makes in his initial brief. I find that Cedar's analysis of the factual aspects of Pantuso's initial brief is correct and Cedar's comments augment my finding on pages 32-39 above that the arguments in Pantuso's initial brief should be rejected for his failure to make a correct analysis of all the evidence.

The only factual error I detected in Cedar's reply brief (pp. 10-11; 17) is the same one I noted in Cedar's initial brief, that is, the failure to realize that the

24/48-hour meeting pertaining to Pantuso's suspension subject to discharge occurred on September 2 rather than September 1 when Cedar's own investigative meeting was held (Tr. 54; 448; 1013; 1016).

Summary

The 21 findings of fact on pages 6 through 16 above are based on all of the credible evidence introduced by the parties. They show that Pantuso failed to prove that a violation of section 105(c)(1) occurred when Pantuso was discharged on September 1, 1983. When Pantuso refused to obey Holbrook's thrice-repeated direct order to get into the Cedar-owned vehicle with Tackett for transportation to the right bench, he failed to raise any claim that he was refusing the direct order because he had withdrawn from working on the left bench under article III(i) of the NBCWA. Even if it had been proven that some unusual hazard existed on the left bench, Pantuso had not been asked to go to work on the left bench and the convoluted reasoning used by Pantuso to claim that he would eventually have ended up working on the left bench because his and Browning's drill was still being repaired is not supported by the preponderance of the evidence. If one uses Pantuso's argument that he would eventually have been working with Wiseman on the left bench, that alleged hazardous eventuality would not have occurred until Wiseman's drill could have been moved from the right to the left bench. That would have given Pantuso ample time within which to have invoked the provisions of article III(i) of the NBCWA and for the union and Cedar's management to have engaged in all the conferences required before a withdrawal can be carried out under that article.

The preponderance of the evidence, however, shows that no hazards existed on the left bench which would have been adequate to justify refusal to obey an order which would, at most, under Pantuso's argument, have sometime during the day have placed him on the left bench. He had already testified that on the morning of September 1, the road was easily subject to travel by a vehicle having only two-wheel drive. Browning's summoning of Ramsey to transport him to the toilet on August 31 showed that it was easy to obtain transportation off the bench in case of emergency or to find a means of communicating with the foremen in case of an emergency. Even if the repairs on Browning's drill had been completed at sometime during the shift on September 1, the drill would not have been operated under the area where rocks and dirt sometimes fell from the embankment above the 15-foot highwall which then existed. According to the testimony of the WV inspectors, the imminent-danger order issued on September 12 pertained only to Cedar's failure to

erect danger signs and not because a drill was being operated outside the area of the designated imminent danger. On September 12 the highwall had been increased to a height of 40 feet which made the falling of any rocks much more hazardous than they would have been on September 1 when the height of the wall was only 15 feet.

The preponderance of the evidence, therefore, does not support Pantuso's claim that he had a reasonable basis, under the Commission's Dunmire and Estle decision, to warrant a refusal to obey Holbrook's order that Pantuso get in the truck with Tackett for transportation to the right bench where no hazards had been alleged on August 31 or September 1. Even if Pantuso had been ordered to go to the left bench, the conditions there were not hazardous enough to justify a refusal to ride to the left bench. Finally, Pantuso did not have any safety-related excuse for threatening to knock Kirk's nose off just prior to the investigative meeting held at 8:45 a.m. on September 1, 1983.

The real pretext in this proceeding is Pantuso's claim that his refusal to obey Holbrook's order was motivated by safety-related considerations. A pretextual claim that a complainant was engaged in a protected activity is no more entitled to be upheld than an operator's pretextual claim for having discharged a miner. I find that Pantuso failed to prove that he was engaged in a protected activity when he was discharged for refusing three direct orders and for having threatened to strike a supervisor.

WHEREFORE, it is ordered:

For the reasons hereinbefore given, Pantuso's discrimination complaint filed on April 26, 1984, in Docket No. WEVA 84-193-D, is dismissed for failure to prove that a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 occurred.

Richard C. Steffey
Administrative Law Judge

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FOOTNOTES START HERE:-

~Footnote_one

1 I have used the term "counsel" above, instead of the customary term "appearances", because I am deciding this case on the basis of a record which resulted from 9 days of hearing before the West Virginia Coal Mine Safety Board of Appeals. Ms. Rooney did not appear before that Board and no hearing has been held before me. An attorney named Roger D. Forman appeared before the WV Board on behalf of Mr. Pantuso. Mr. Price appeared before the WV Board on behalf of Cedar Coal Company and he also represents Cedar in this case. Mr. Forman is not involved in representing Mr. Pantuso in this proceeding.

~Footnote_two

2 They are actually marked as "Petitioner's" exhibits, but I am referring to them as "Complainant's" exhibits in order to be consistent with the terminology used in our proceedings.

~Footnote_three

3 "(1) No Employee will be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. When an Employee in good faith believes that he is being required to work under such conditions he shall immediately notify his supervisor of such belief and the specific conditions he believes exist. Unless there is a dispute between the Employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary Employees, including the involved Employee." [Paragraphs 2 through 5 of article III(i) provide detailed procedures to be followed when there is a disagreement as to whether an imminent danger exists.]

~Footnote_four

4 Pantuso's brief (p. 13) fails to show that the last day of hearing was held on December 2, 1983. Cedar's reply brief (p. 20) refers to the hearing as having lasted 12 days, but I have summarized each and every day of the hearing and the total number of hearing days is 9. If 12 days of hearing were held before the WV Board, 3 of those days of hearing were not transcribed. Since no one cites a transcript page which is higher than 1,116, I am confident that the transcript mailed to me constitutes the entire record on which the parties rely.