

CCASE:
JOHN PAUGH V. METTIKI COAL
DDATE:
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TTEXT:

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

JOHN ERVIN PAUGH,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. YORK 86-9-D
MSHA Case MORG CD 86-14

METTIKI COAL CORPORATION,
RESPONDENT

CÄMine

DECISION

Appearances: W. Bryan Hall, Esq., Cumberland, Maryland,
for the Complainant; Thomas P. Gies and Susan
E. Chetlin, Esqs., Crowell & Moring, Washington,
D.C., for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant John Ervin Paugh against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Paugh filed his initial complaint with MSHA on May 5, 1986. Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and notified Mr. Paugh of this finding by letter of June 27, 1986. Mr. Paugh then filed a timely complaint with the Commission pro se, but subsequently retained counsel to represent him.

Mr. Paugh alleges that the respondent harassed him because of his concern for safety and because of his insistence on following safe work procedures, particularly with respect to the amount of air over his roof bolting machine and the spacing of roof bolts. Mr. Paugh contends that his discharge on March 10, 1986, was in retaliation for his safety concerns and complaints.

The respondent filed a timely answer to the complaint, and as an affirmative defense asserts that Mr. Paugh was discharged for fighting underground with another miner. A

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hearing was held in Cumberland, Maryland, and the parties have filed briefs and proposed findings and conclusions. I have considered these arguments in the course of my adjudication of this matter.

Issue

The critical issue in this case is whether Mr. Paugh's discharge by the respondent was prompted in any way by his engaging in protected activity, or whether it was the result of fighting in violation of company policy as claimed by the respondent. Additional issues raised by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 C.F.R. 2700.1, et seq.
Complainant's Testimony and Evidence

Ronald W. Smith, confirmed that he worked as a temporary roof bolter with Mr. Paugh and Mr. Beckman on foreman Randy Johnson's section until October, 1985, when he was laid off. He considered Mr. Paugh to be a good and fast roof bolter who was safety conscious and insisted on "doing things by the book" (Tr. 29, 52). Mr. Smith stated that Mr. Paugh insisted on maintaining the ventilation curtains to provide air over his roof-bolting machine, that he was "real strict on air" and complained to Mr. Johnson about the lack of air "at least once a day" (Tr. 29-32).

Mr. Smith confirmed that the scoop and feeder operators were responsible for maintaining the ventilation curtains to insure enough air on the section, and that air for the bolter was provided by a fan and tubing which had to be moved as the bolting cycle advanced. He estimated that the moving of the fan resulted in approximately 20 to 25 minutes down time for the bolter (Tr. 34).

Mr. Smith confirmed that he attended safety classes every Monday morning, and received instructions in roof and rib control, ventilation, and methane detection procedures (Tr. 39). When methane was detected, Mr. Johnson would

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instruct someone to tighten up the curtain or wash down the methane detectors on the mining machines (Tr. 39). Mr. Smith stated that he once complained to Mr. Johnson about "smoke from a diesel scoop," and that in 1982, he operated a scoop in cuts where the roof had not been bolted, sometimes on his own, and sometimes at the direction of mine superintendent Paul Tenney (Tr. 44-47). Mr. Smith also stated that Mr. Johnson instructed him to clean up some coal spillage or debris in an unbolted roof area, and that this was a "common practice to save time" (Tr. 48-51).

On cross-examination, Mr. Smith confirmed that when he had occasion to go under unsupported roof with his scoop, it was equipped with an overhead canopy which shielded him from any falls, and that the roof bolters were equipped with temporary roof support systems (TRS), which is considered to be equivalent to a supported top (Tr. 54). Mr. Smith further confirmed that on those occasions when Mr. Johnson asked him to work under unsupported roof, he refused, and Mr. Johnson would do the work himself (Tr. 59).

Mr. Smith conceded that he was aware of his right not to work in an area where there may be an imminent danger, and that he was aware of the respondent's "open door policy" to speak with mine management if he were not satisfied with his foreman's response to his safety concerns (Tr. 65). Mr. Smith confirmed that he stopped operating the smoking diesel scoop until it was repaired. However, when he complained to Mr. Johnson about the smoke, and he too "grouched" about it, but did not have the scoop repaired until 2 months passed and another scoop was brought in to the section (Tr. 69). He confirmed that the smoking scoop conditions prevailed "somewhere in 1984" for about 2 months, but after a new one was brought in, Mr. Johnson's section "was the cleanest and best section in the mine" (Tr. 72). Mr. Smith confirmed that he had no gripe against Mr. Johnson, and had no complaints about his safety procedures (Tr. 74). He also confirmed that Mr. Paugh was never disciplined because of his frequent complaints about the air (Tr. 75).

In response to further questions, Mr. Smith stated that Mr. Johnson was "quick tempered," that they sometimes argued over safety matters, and one argument over a cable splice resulted in Mr. Johnson's suspension for 2 weeks after Mr. Smith and another miner complained to management (Tr. 77). They also argued about the air, but Mr. Smith conceded that this was not entirely Mr. Johnson's fault because "the headings and things like that wasn't right" (Tr. 77). Mr. Smith explained that since Mr. Johnson was the section boss, he was

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the recipient of the complaints, and that he sometimes took care of the problems (Tr. 78). However, he could not recall any instances when Mr. Johnson totally ignored or did absolutely nothing about Mr. Paugh's safety complaints (Tr. 84).

Mr. Smith stated that Mr. Paugh and Mr. Johnson did not get along and "grouched" at each other (Tr. 85). In Mr. Smith's opinion, Mr. Paugh was right "90 percent" of the time with regard to his safety complaints to Mr. Johnson, and he recalled an incident in 1984, 2 years before Mr. Paugh's discharge, when Mr. Paugh bolted for a shift without an operative TRS, and then refused to continue bolting after arguing with Mr. Johnson (Tr. 88). On another occasion when Mr. Johnson and Mr. Smith would knock down curtains with their machines, Mr. Paugh would put them back up, and he and Mr. Johnson would argue over this (Tr. 89-91).

John Prinkey, rib bolter, confirmed that he has worked with Mr. Paugh on Mr. Johnson's section, but was not working on March 5, 1986, because he was off with a back injury (Tr. 96). He worked with Mr. Paugh and Mr. Beckman on the roof bolter, and Mr. Paugh would shut the bolter down and refuse to bolt while the ventilation fan was being advanced and there was no air over the bolter. When Mr. Paugh advised Mr. Johnson that he would not bolt without air, Mr. Johnson responded "well, you know, I can't force you" (Tr. 98).

Mr. Prinkey stated that Mr. Beckman spent time "prying and picking" down ribs which he believed were unsafe, and that this slowed the bolting crew down to the point where Mr. Prinkey complained to Mr. Johnson and to superintendent Steve Polce. Mr. Paugh and Mr. Beckman also argued about the situation, and Mr. Paugh told Mr. Johnson that Mr. Beckman was "goofing off" (Tr. 100). Mr. Prinkey and Mr. Paugh complained because they did not like to work overtime, and if they did not work fast enough to prepare the area for the next shift, they would have to stay to finish the bolting.

Mr. Prinkey considered Mr. Paugh to be a good roof bolter, and he knew of no instances where Mr. Paugh would put in extra roof bolts just to slow down (Tr. 101). Mr. Prinkey stated that Mr. Johnson never instructed his crew to bolt without air, but there were times when the fan would be moved, without notifying the crew, and this would result in an interruption to the air (Tr. 102).

Mr. Prinkey stated that after Mr. Paugh's discharge, Mr. Johnson stated that he "despised" Mr. Paugh (Tr. 103). Mr. Prinkey confirmed that Mr. Paugh tried to follow all

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safety rules, but conceded that "a lot of times, he probably did things wrong. I do things wrong" (Tr. 104).

On cross-examination, Mr. Prinkey explained the duties of his roof bolting crew. He conceded that at times Mr. Beckman was slowed down by water or when prying down a rib and numerous times he taunted Mr. Beckman and made fun of him for being slow, and they argued a lot over it (Tr. 106). Mr. Prinkey stated that no one in management ever forced Mr. Paugh to work when there was no air over the bolter (Tr. 106).

In response to further questions, Mr. Prinkey confirmed that Mr. Paugh's reluctance to work with no air over the bolter occurred during the interval when the fan was shut off and advanced, and that Mr. Johnson was upset because Mr. Paugh would not bolt without air (Tr. 110). However, Mr. Johnson never insisted that Mr. Paugh continue to bolt with no air, but generally griped about Mr. Paugh's unwillingness to do so (Tr. 110).

Mr. Prinkey stated that Mr. Beckman liked to work overtime, and it was his opinion that most of the time Mr. Beckman would "pick and pry" at the ribs deliberately to slow down the crew so he could work overtime. This resulted in arguments between Mr. Paugh, Mr. Prinkey, and Mr. Beckman (Tr. 111-112).

Jimmie K. Wolfe, confirmed that he had at one time worked with Mr. Paugh on Mr. Johnson's section as a bolter, and was aware of "discussions" between Mr. Paugh and Mr. Johnson over the lack of air over the bolter while the ventilation fan was being advanced. However, Mr. Wolfe was not aware that Mr. Johnson ever ordered Mr. Paugh to continue bolting without air (Tr. 116).

Mr. Wolfe stated that sometime in 1984 or 1985 Mr. Paugh and Mr. Johnson were involved in a dispute over a bolter which needed repairs, and Mr. Johnson lost his temper and he and Mr. Paugh exchanged heated words and foul language (Tr. 118). As a result of that encounter, Mr. Paugh advised Mr. Johnson that he would insist that he have air over his bolter, and that the relationship between the two changed and "they was sort of pretty much on edge with each other" (Tr. 120).

On cross-examination, Mr. Wolfe conceded that he was not assigned with Mr. Paugh on Mr. Johnson's section when the March, 1986, suspension and discharge of Mr. Paugh occurred, and since he was not on the section since the spring or summer

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of 1985, he had no opportunity to observe their relationship during the period in question (Tr. 122).

Mr. Wolfe stated that while riding home from the mine with Mr. Johnson after Mr. Paugh's discharge he stated to Mr. Johnson that "You will never convince me that you people did not take advantage of this to get rid of a guy that has caused you a hassle because of safety," and that Mr. Johnson responded, "Well, I will have to admit that it is a lot easier since he's gone" (Tr. 130). Mr. Wolfe stated that when he worked as a bolter, he continued to bolt while the fan was being moved, and did so because of "pressure from supervisors." Mr. Wolfe was of the opinion that anyone who inhibited production by complaining about safety was considered a "bawl baby," "complainer" or "troublemaker" (Tr. 131).

Mr. Wolfe stated that on those occasions when he was requested to continue to bolt with no air while the fan was being advanced, and refused, he was assigned to help move the fan. He also confirmed that when he complained to his section foreman about safety, his concerns "were taken care of more or less after the horse got out of the barn" (Tr. 134). As an example, he cited an instance when complaints were made about the remote control devices on a continuous-mining machine, and although mine management changed some parts in an attempt to find out why the device was malfunctioning, the miner was not taken out of service until after the miner operator Donnie Bray was injured when the malfunctioning device resulted in his being pinned against the rib and injured (Tr. 135-137).

Mr. Wolfe stated that he has been reassigned from one section to another, and found this unusual because most transfers involve the whole crew, and not just one individual. He conceded that management has the right to make such reassignments, and while he concluded that his transfer came about because he was "a complainer, concerned about safety," he did not complain because his reassignments placed him in a better working environment (Tr. 139).

Mr. Wolfe confirmed that he has been "a rank and file" miner since June 1979, but that he served as a foreman on the midnight construction shift for approximately 7 months prior to that time, and was taken off that job because management did not believe he was getting the job done. He denied that he holds any grudges against the respondent because of this, or because of the prior miner lay-offs, and confirmed that the company treats him well. However, when asked whether he "has an axe to grind" with the company, he responded "I

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ground it a long time ago" (Tr. 141). When asked whether he held his removal as a foreman against the company, he responded "I did for a while, but it was the best thing that ever happened to me" (Tr. 142). Mr. Wolfe also confirmed that even though he has been safety conscious and has filed safety complaints over the past 7 years, he has not been disciplined and still has a job (Tr. 146).

Donald W. Bray, continuous-miner operator, confirmed that he worked on Mr. Johnson's section with Mr. Paugh and Mr. Beckman. Mr. Bray confirmed that he was injured during the summer of 1985 when he was pinned against a rib when the miner remote control device malfunctioned. He also confirmed that he had experienced problems with trammings the machine and the remote control device prior to the incident, reported it to the head mechanic Tom Scott, and that Mr. Scott "did the best he could" in troubleshooting the problems and in his attempts to repair the devices. He considers Mr. Scott to be a good mechanic, and did not believe that he ignored his complaints, and that he attempted to find the problem and make the necessary repairs (Tr. 156).

Mr. Bray confirmed that the problems with the machine occurred over an extended period of time, but they "would come and go," and he believed the problems were being addressed, and that Mr. Scott was making an effort to find the problem. Once the accident occurred, the machine was immediately removed from service, dismantled, and thoroughly checked out (Tr. 164). Mr. Scott subsequently advised him that a short had been found in the machine boom wiring (Tr. 159).

Mr. Bray stated that he had no complaints about Mr. Johnson as a foreman, and considered him to be "fairly conscious safety wise." He confirmed that Mr. Johnson has never ordered or asked him to do anything that was unsafe, and stated "I don't think he would do that" (Tr. 157). He further stated that "sometimes maybe I've done stuff on my own that might not have been unsafe" but he never really told me, you know, to really put myself in danger or something like that" (Tr. 157).

Complainant's counsel proffered the testimony of Blaine Fike, and stated that if called to testify, Mr. Fike would testify that he was working on Mr. Johnson's section on March 5, 1986, and would confirm that Mr. Paugh would stop the bolter when there was no air while the fan was stopped and being moved, and that Mr. Johnson was suspended because of the faulty cable repair incident. Counsel also proffered

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the testimony of Terry Lucas, who was likewise working on Mr. Johnson's section on March 5, 1986. Mr. Lucas would testify that Mr. Paugh "made complaints about or said he would not work without air" (Tr. 165).

Respondent's Testimony and Evidence

Terry W. Lucas, testified that in 1980 he was working as a laborer on the same shift with Mr. Paugh and Mr. Harry Beckman. Mr. Lucas stated that while in the process of moving a cable, he and Mr. Paugh got into a dispute which resulted in a fight between them. He stated that Mr. Paugh hit him, and that he held Mr. Paugh down on the ground. Mr. Lucas stated that he "told John to behave, calm down . . . and after that, everything was all right." Mr. Lucas confirmed that he and Mr. Paugh were rolling around on the ground, and that Mr. Beckman had to separate them. The incident was never reported to the foreman, and Mr. Lucas never discussed it with him. Mr. Lucas further confirmed that he was aware of the company rule on fighting, and that it is an offense for which one may be fired (Tr. 178-179). Since that time, he has had no further disagreements with Mr. Paugh, and has since worked with him many times (Tr. 186).

Mr. Lucas confirmed that he was present during the shift when the incident of March 5, 1986, between Mr. Paugh and Mr. Beckman occurred, but that he did not personally observe what occurred. He found out about it when he learned that foreman Randy Johnson had taken them out of the mine. He asked Mr. Johnson what had happened, and Mr. Johnson replied "It's went too far this time. I've got to take them outside." When Mr. Lucas tried to talk Mr. Johnson out of taking them outside, Mr. Johnson replied "No, I've got to do my job. I've got to take them outside" (Tr. 187).

Mr. Lucas stated that after Mr. Johnson took Mr. Paugh and Mr. Beckman outside, he asked roof bolter Earl Sisler about the incident, and that Mr. Sisler told him that while he did not observe Mr. Paugh "go across the bolter," he heard "the ruckus," looked up alongside the bolter, and observed that Mr. Beckman had Mr. Paugh up against the rib "slugging him" (Tr. 187). Mr. Lucas reiterated that he did not personally observe the incident, and simply stated what Mr. Sisler told him about the incident (Tr. 187-189).

Complainant John Paugh was called as an adverse witness by the respondent. Mr. Paugh confirmed that general mine foreman Steve Polce telephoned him on March 10, 1986, and informed him that he was fired for fighting. Mr. Paugh also

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confirmed that he was aware of the company rule prohibiting fighting, and that if he engaged in fighting, it would be a reason for discharging him (Tr. 191).

Mr. Paugh confirmed that he does not like to work overtime, and that he began work on a new section of the mine on the Monday before his discharge. He also confirmed that he lives 32 miles from the mine, and prior to this time he had been car pooling "off and on," and that Mr. Polce informed him that in view of the fact that he might have to stay and work overtime if his roof bolting crew did not keep within two and one-half cuts ahead of the continuous miner, that he was to drive his own car to work (Tr. 192). Mr. Paugh stated that Mr. Polce's instructions was nothing new to him because he drove himself to work many times, and that he understood Mr. Polce to mean that he should not have to depend on a car pool if he had to work overtime (Tr. 193).

Mr. Paugh denied that he ever made any statements to Mr. Sisler about having to buy extra gasoline because of the necessity of driving his own car to work, but admitted that he told Mr. Sisler that "I wasn't crazy about working overtime" (Tr. 195). Mr. Paugh also denied telling Mr. Sisler that if he were required to work overtime he would make sure that he got more overtime (Tr. 195).

Mr. Paugh confirmed that he received a 40-hour safety training course when he was first hired, and that he participated in periodic safety meetings held every Monday morning before work (Tr. 195). He also confirmed that he was aware of his rights under the Act, and understood that he was not required to work under any unsafe conditions, and that there were several occasions when he turned off his roof-bolting machine as necessary, and did not work when he believed there was insufficient ventilation. On these occasions, while he did not continue to bolt, he performed other work.

Mr. Paugh stated that he refused to continue bolting a dozen times during the 2 or 3 years prior to his discharge, and that he worked on the bolting machine about 90 percent of the time during this period. His refusal to continue bolting was limited to those occasions when he did not believe that the ventilation over his bolting machine was adequate. Although he believed that the lack of ventilation was "always serious," he confirmed that with the exception of the dozen occurrences when he refused to operate the bolter, the ventilation was not such a serious problem as to cause him to discontinue bolting (Tr. 198).

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Mr. Paugh confirmed that he operated a roof bolter for 6 years, and that he was aware of the respondent's "open door" policy, and that if he had any problem with his foreman, he could talk to someone else in management (Tr. 198). He confirmed that as part of his safety training, he was told that the company wanted him to always be careful and look out for safety, and that as an underground miner, the company was concerned about his safety (Tr. 199).

Mr. Paugh confirmed that he was an experienced roof bolter, and he stated that under good conditions he was able to complete five cuts of coal a day during his bolting cycle, installing approximately four to six rows of bolts in each cut, with four bolts in each row, and that this is usually considered to be a good day's work (Tr. 199-200).

Mr. Paugh stated that he has complained about the lack of ventilation over his bolter, and has discussed the matter with general mine foreman Polce several times, and with superintendent Tenney a couple of times. He stated that over a period of 18 months, he discussed this with Mr. Polce three or four times in his office, and six or seven times underground (Tr. 202). On one occasion after speaking with Mr. Polce, Mr. Polce informed him that there were problems with the air, and said "If you can get it, get it, and if you can't, you can't." Mr. Paugh stated that he then "got the best air I could, . . . and later on, the air was down, and I complained to him again" (Tr. 201). Mr. Polce also told him that "we was having trouble getting enough air on the section" and that "it was hard to get enough air to the face. But it could be done" (Tr. 202).

Mr. Paugh stated that Mr. Polce told him that he wanted him to continue bolting even if he (Paugh) believed there was inadequate ventilation. Mr. Paugh stated that this occurred underground approximately a month before he was discharged. Mr. Paugh explained that on one occasion when the fan was down, he shut the bolter off, and proceeded to determine why the fan was down. Mr. Polce was there and advised him to keep bolting and that there was "plenty of air." Mr. Paugh stated that "I told him there couldn't be enough air there if the fan wasn't running." Mr. Polce took out his anemometer, and held it up, and Mr. Paugh stated that "it just barely turned." Mr. Polce then said "Yeah, there's plenty of air, get to bolting." However, the fan came back on, and Mr. Paugh started bolting again (Tr. 204).

Mr. Paugh stated that on occasions when the ventilation curtain was down in the roadways where the buggies and ram

cars operated, air was cut off from the face or the bolter, and Mr. Polce expected him to continue to bolt. Mr. Polce stated to him "Bolt, or you're going to be taken off the bolter or find another job," and Mr. Paugh informed Mr. Polce that he would not bolt without air. Mr. Paugh explained further that he and Mr. Polce would continue the argument, but that he did not bolt without air, and eventually Mr. Polce "would get around to getting the air" (Tr. 205).

Mr. Paugh stated that on another occasion in 1984 or 1985, after complaining to Mr. Polce, he was taken off Mr. Johnson's section for 7 months "to keep me and Randy Johnson apart" (Tr. 207). Mr. Paugh stated that when he complained to Mr. Johnson about the ventilation, "he would get in an uproar about it" (Tr. 208).

Mr. Paugh conceded that he had never been disciplined prior to his discharge, and he confirmed that he worked for Mr. Johnson for 3 to 4 years "off and on," and their relationship was not good for 2 years. Mr. Paugh stated that while Mr. Johnson never disciplined him during this time, he made him "do extra things," and because of his complaints, tried to limit his lunch hours to 10 to 15 minutes, rather than the usual half-hour. Mr. Paugh conceded that lunch hours may be shorter if work was required, and he also conceded that the "extra work" entailed other work assignments by Mr. Johnson when the roof bolter was down (Tr. 210). Mr. Paugh also conceded that other crew members were sometimes given other things to do. He also stated that Mr. Johnson would assign him to stack tubing, advance curtain, rock dust, and shovel the feeder while the bolter was down, while the other two crew members "were standing there watching the mechanic fix it." He asserted that this happened 8 to 12 times during the last year. He also conceded that at times when he and Mr. Prinkey were ahead of Mr. Beckman in their work, they would sit and drink coffee waiting for him to catch up, if there was nothing else to do (Tr. 212).

With regard to the altercation with Mr. Lucas in 1980, Mr. Paugh denied that he threw a punch at Mr. Lucas, but that "we wrestled." Mr. Paugh described the incident as "horseplay," and stated that he had forgotten the incident and could supply no details (Tr. 215). Mr. Paugh conceded that he failed to include in his complaint to MSHA that he was fired for fighting, and he did so "because I didn't think it would have anything to do with it" (Tr. 222). He conceded that Mr. Polce told him that he was being fired for fighting underground, but supplied him with no details. Mr. Paugh also stated that when Mr. Johnson took him out of the mine on

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March 5, he gave him no explanation or reason for doing so other than "he was just tired of the things that's being going on. He took us outside to discuss it" (Tr. 224). After Mr. Polce called him to inform him of his discharge, Mr. Paugh called Mr. Gearhart and advised him that he put his hand on Mr. Beckman's shoulder (Tr. 226). Mr. Paugh conceded that he said nothing to Mr. Gearhart about being fired for making any safety complaints (Tr. 228).

Mr. Paugh denied that Mr. Beckman had him against the rib "pounding" on him, and the only explanation he could give with regard to Mr. Sisler's testimony in this regard was that Mr. Beckman "knocked me against the rib when he went out past me" (Tr. 225). Mr. Paugh explained that he went around to Mr. Beckman's side of the bolter, and placed his hand on Mr. Beckman's shoulder to talk to him about the spacing of the roof bolts, and that Mr. Beckman "tore out past me and knocked me up against the rib" (Tr. 225).

Mr. Paugh further explained his encounter with Mr. Beckman as follows (Tr. 234-236):

Q. In fact, you were in a hurry to go over and talk to Mr. Beckman; weren't you? Because right after Randy had left it was right after Randy had told you to go back to work; wasn't it?

A. Yes.

Q. And it was right after you said to Mr. Beckman, "I'm going to get you, you son of a bitch"; wasn't it?

A. I don't recall.

Q. What do you recall saying, Mr. Paugh, at that point?

A. I think I called Harry a cry baby at that point.

Q. And you don't think you called him a cry baby, son of a bitch?

A. I don't remember.

Q. You might have; right?

A. That's possible.

Q. All right. Now, then, Mr. Sisler was at the back of the machine; was he not?

A. Yes, he was.

Q. And isn't it a fact that you walked right by Mr. Sisler on your way to get to Harry Beckman?

A. Yes.

Q. And isn't it a fact that, as you walked by Mr. Sisler, you said something like, "Harry is a cry baby?" "Harry is crazy?"

A. Yes; probably did.

Mr. Paugh confirmed that immediately prior to his encounter with Mr. Beckman, he and Mr. Johnson discussed the spacing of the roof bolts, and that he told Mr. Johnson "You cover your ass; I'll cover mine" (Tr. 255). Mr. Paugh confirmed that he and Mr. Johnson were angry, and that Mr. Johnson told him to put the bolts in "skin to skin," and to "Put as many as you want up, as long as you are safe" (Tr. 246-247). Mr. Paugh denied that he was upset with Mr. Beckman about "ratting on him" to Mr. Johnson, but admitted that he stated to Mr. Johnson "what's the problem? Is this cry baby complaining about me" (Tr. 237). Mr. Paugh denied that he pushed Mr. Beckman, and stated that he touched him hard enough so that he knew someone was behind him, and that he did so to get his attention over the noise of the machine (Tr. 244). Mr. Paugh stated further that he went over to Mr. Beckman's side of the machine simply to have "a business conversation" with him, and he confirmed that in a prior statement to MSHA he stated that he wanted to discuss the spacing of the bolts with Mr. Beckman (Tr. 250).

Mr. Paugh stated that after the incident with Mr. Beckman, Mr. Johnson and Mr. Beckman returned to the area where he had resumed working, and that Mr. Johnson asked him "what's going on." Mr. Johnson also asked Mr. Beckman whether he had told him the truth, and Mr. Paugh denied that Mr. Johnson asked him whether he had hit Mr. Beckman, but admitted that it was possible he told Mr. Johnson that he placed his hand on Mr. Beckman (Tr. 252-253).

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Mr. Paugh denied that he and Mr. Prinkey had ever taunted or made fun of Mr. Beckman in the past, and denied that they ever threw grease over the machine at him while having coffee while Mr. Beckman was working (Tr. 256-257). Mr. Paugh confirmed that the day before he was suspended, his bolting crew had to stay and work overtime because they were not caught up with the continuous-mining machine (Tr. 257).

Mr. Paugh testified as to his efforts to obtain employment since his discharge, and he also testified as to the incident concerning the broken down roof bolter. He denied that Mr. Johnson had asked him to tell the mechanic to fix the machine, and stated that Mr. Johnson asked him to tell Mr. Wolfe to tell the mechanic to fix it (Tr. 259-265).

On cross-examination, Mr. Paugh conceded that management's "open door policy" was a good one, but "sometimes it never worked." He stated that "I've seen guys go out to higher authorities before and complain, and come back to the mine site, and they would get transferred off of the section or put on dead work" (Tr. 266-267). He explained the roof bolting sequence he was following on March 5, 1986, confirmed that he argued with Mr. Beckman over the roof bolting pattern on that day, and stated that he went around the machine to speak with Mr. Beckman about it (Tr. 269).

In response to further questions, Mr. Paugh confirmed that he and Mr. Johnson had been at odds with each other "off and on" from 1984 until he was discharged, and that their arguments concerned the lack of air over the bolter and short dinner breaks, and that his complaints to Mr. Polce about Mr. Johnson resulted in Mr. Polce's transferring him to another section (Tr. 270, 272). Mr. Paugh denied any prior altercations with Mr. Johnson, except for disagreements and misunderstandings, and it was his impression that Mr. Johnson's work assignments were deliberately made to punish his bolting crew, and this is why Mr. Polce took him off the crew the first time (Tr. 274). Mr. Paugh confirmed that he and Mr. Johnson had exchanged strong words more than once, and when asked whether or not Mr. Johnson ever invited him to hit him, Mr. Paugh responded. "He could have. He's a pretty good instigator" (Tr. 274). Mr. Paugh denied that he "despised" Mr. Johnson, but he believes that Mr. Johnson "had a big part to do" with his discharge because he complained to the mine foreman and superintendent about him several times (Tr. 277).

Harry L. Beckman, roof bolter, confirmed that on Wednesday, March 5, 1986, he was working on a crew with

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Mr. Paugh and Mr. Earl Sisler, and that Mr. Johnson was their foreman. He recalled a meeting held on Monday, March 3, when work in the new section began, and confirmed that mine foreman Polce told the crew that they would have to drive their own cars to work and would have to stay and work overtime if they were more than 2 1/2 cuts behind the continuous miner. Mr. Beckman stated that Mr. Paugh later commented to him that he wanted more than an hour of overtime (Tr. 280).

Mr. Beckman confirmed that he had worked with Mr. Paugh since October, 1985, up to the time of his discharge, and he confirmed that Mr. Paugh drilled faster than he did and that he had trouble keeping up with him at times (Tr. 282-283). Mr. Beckman stated that on one occasion when he was behind, Mr. Paugh and Mr. Prinkey threw grease at him while he was working, but they stopped after it hit him in the face and he warned them that he would leave the mine if the grease hit him in the eye (Tr. 283).

Mr. Beckman confirmed that Mr. Paugh was a fast worker "when he wanted to be," and he explained the roof bolting procedures and Mr. Paugh's work (Tr. 285-287). Mr. Beckman stated that during the week in question, Mr. Paugh was "holding him up" and was "standing around and talking" rather than installing test holes. Mr. Beckman stated that Mr. Paugh told him that since he had to drive to work himself, "he wanted to fool around and get the overtime." Mr. Beckman complained to Mr. Polce and told him what Mr. Paugh had said, and Mr. Polce advised him that "he would keep an eye on us" (Tr. 288). Mr. Beckman stated that the crew had to stay and work an hour overtime on Tuesday, March 4, and that he told Mr. Johnson about it on Wednesday, March 5. He testified further as to the subsequent sequence of events (Tr. 292-295):

And then, Randy came up and I says "he said we was getting behind. I said, "Yeah, I know. John's over there fooling around." I said, "Now he's putting three (3) pins in where he only needs two (2)." And I said, "He's going to end up making us have to stay again today."

So, then, Randy went over and talked to him or something, and he shut the bolter off and said he would measure them, and then John "when he went up there, John said, "What's the problem? Who's holding me up; who's holding me up now?" And started hollering.

And he says, "Is he the problem over there, that cry baby, son of a bitch?"

Q. Who was he referring to when he said that?

A. To me.

Q. All right.

A. And Randy said--after he measured it and stuff, Randy said, "You guys do whatever you think is safe. I don't care how many bolts you put in to make it safe, but get back to work." And he said, "You guys think you can work together?"

A. Well, then, Randy left, and I started the bolter up, and then I went back to the controls, and John said something about--it sounded to me like, over the noise--like, "I'll get you, you son of a bitch," or something like that.

Q. Did you say anything back to him?

A. No. I just went, "Yeah," or something like that (indicating). I just started letting the TRS down and started tramping the bolter up, and then John came over and pushed--

Q. Let me stop you there. When he said, "I'm going to get you, you son of a bitch," where was he? Was he over on his side of the machine?

A. Yeah. He was up at his. He was just starting.

Q. I think your testimony was that you started to move the TRS.

A. Yes.

Q. Then, what happened after that?

A. Well, I was getting ready. I was starting to tram the bolter, and the next thing I knew, he said "You cry baby, son of a bitch," and hit me in the back and pushed me into the bolter and knocked my hat off. And I turned around, and I pushed him back like this (indicating), and the ribs ain't that wide (indicating), and I turned around real quick, and he started to lift his arms, and I grabbed his arms, because I thought he might be trying to hit me or something.

I just grabbed his arms and moved him aside, and I said "Get out." I said, "Get out of here," or something, and moved him to the side, and I went and got Randy Johnson.

Q. Okay. Did Mr. Paugh say anything to you as you were leaving to get Mr. Johnson?

A. No. I just took off.

Q. When did your hard hat fall off?

A. When he pushed me into the bolter.

Q. What part of your body hit the bolter?

A. It would have been my chest.

Mr. Beckman stated that he found Mr. Johnson within 5 minutes, and "I told him that John pushed me into the bolter, come over there and pushed me into the bolter; knocked my hat off." Mr. Johnson then proceeded with him to the bolter, shut it off, and told him and Mr. Paugh "I'm taking you outside. I can't put up with this stuff underground" (Tr. 296). Mr. Beckman stated that later, while he and Mr. Paugh were in the shower room, Mr. Paugh said to him "You had better tell no lies, or they will fire us both" (Tr. 297). Mr. Johnson later informed them that he had called Mr. Polce and informed them that they were both suspended pending an investigation and that he would escort them off the property (Tr. 297). Mr. Beckman confirmed that he and Mr. Paugh left the mine in their vehicles, and that Mr. Johnson followed them both off the mine property in his own vehicle (Tr. 298).

Mr. Beckman confirmed that after he was suspended, he was directed to appear at the mine on Friday, March 7, and he

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met that day with management representatives Mr. Gearhart, Mr. Polce, Mr. Tenney, and Mr. Bill Pritt. Mr. Beckman stated that after telling them what had occurred, he was told to go back to work that same day, and he did (Tr. 299).

Mr. Beckman confirmed that Mr. Paugh was in a fight with Mr. Terry Lucas in 1980, and he explained that while moving a belt, they exchanged words and Mr. Paugh jumped on Mr. Lucas and threw him to the ground, and they wrestled around until someone broke it up and told them to "straighten up or you're going to get fired." Nothing further was said about the incident, and it was not reported to the foreman because they would have been fired (Tr. 300).

Mr. Beckman confirmed that he has never been harassed by Mr. Johnson, that Mr. Paugh has never complained to him about being harassed by Mr. Johnson, and he could not recall Mr. Paugh raising any safety complaints during any of the Monday safety meetings (Tr. 301).

On cross-examination, Mr. Beckman confirmed that Mr. Sisler was filling in for Mr. Prinkey on the crew during the week in question, and he explained the work procedures and confirmed that for the 3 days during the week in question, Mr. Paugh seemed to be working slower than him (Tr. 301-306). He also explained the procedure for "spotting" and checking the bolting pattern, and confirmed that he wasn't too happy with the manner in which Mr. Paugh was helping him on the day in question (Tr. 308, 309-312).

Mr. Beckman confirmed that he complained a lot to Mr. Johnson and Mr. Polce about Mr. Paugh (Tr. 314). Mr. Beckman confirmed that he told Mr. Johnson that Mr. Paugh had pushed him against the bolter, but that he could have said that a "big hit on the back pushed me in" (Tr. 316). He also confirmed that he told the management team at the Friday meeting that Mr. Paugh "either hit me or pushed me in the back or something and knocked me into the bolter" (Tr. 318). Mr. Beckman confirmed that Mr. Paugh did not "strike him" and that they did not exchange blows. When asked whether they were in "a fight," he responded "No. I turned around and grabbed his hands because I didn't know if he was going to or not. I just grabbed his hands to try and protect myself" (Tr. 323).

Mr. Beckman stated that after he was suspended, Mr. Prinkey and other miners told him that he too would end up being fired, and that they harassed him because "I went and told on him for pushing me into the bolter." He stated

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further that the other miners "thought I ought to try to handle it underground and just left it go, . . . and a lot of them was . . . angry about it, and they gave me a rough time over it" (Tr. 320-321). As a result of this, he spoke with Mr. Gearhart a week or so later about it, and Mr. Gearhart stated to his (Beckman's) wife that "they can tell us who to hire, but they can't tell us who to fire," and that Mr. Beckman then told Mr. Prinkey about Mr. Gearhart's comment (Tr. 322).

Earl R. Sisler, confirmed that on March 5, 1986, he was working as a rib bolter installing rib boards on the same crew with Mr. Paugh and Mr. Beckman. Mr. Sisler confirmed that Mr. Polce advised the crew at the start of work on the new section that they would have to drive their own cars to work if they had to work overtime. Mr. Sisler said that Mr. Paugh stated to him on Monday or Tuesday evening of the week in question that "if he had to drive the car by himself, that he would work the overtime to get gas money" (Tr. 329-330). Mr. Sisler confirmed that the crew had to work overtime on Tuesday, March 4, because "things slowed down," but he did not complain to Mr. Johnson (Tr. 332). He confirmed that a few times, Mr. Beckman had his bolting work done, and the crew had to wait for Mr. Paugh to finish his bolting (Tr. 331). Mr. Sisler confirmed that Mr. Beckman complained to Mr. Johnson about Mr. Paugh's bolting, and he observed the three of them in a conversation on the day in question, but he could not hear what was said. After Mr. Johnson left the area, Mr. Paugh came around to Mr. Beckman's side of the machine, past Mr. Sisler at a pace "more than normal," and commented to him that "Harry's a damn cry baby" (Tr. 335). Mr. Sisler further explained (Tr. 335-336):

JUDGE KOUTRAS: But when Mr. Paugh came around the back of the machine and made the comment to you about Harry being a cry baby, what was his demeanor? I mean, was he angry; was he mad? Was he running towards Mr. A

THE WITNESS: He was upset.

JUDGE KOUTRAS: He was upset. What made you believe he was upset?

THE WITNESS: Well, just prior to that, when they were up at the front of the bolter, the talking alike I say, you could look up there

and seeÄlike John was talking back to the boss.

Mr. Sisler stated that he saw no punches thrown, and that he could only see Mr. Paugh and Mr. Beckman from the waist up over the machine, and that there was approximately 3 feet between the machine and the rib. Mr. Sisler confirmed that he did not see Mr. Paugh push Mr. Beckman, and when asked to account for Mr. Beckman's hat flying off, Mr. Sisler responded "he had to be pushed into the controls or Harry flinched." Mr. Sisler did not see Mr. Beckman go against the machine, and stated "all I saw was his hat came off, and then Harry turned and tried to secure John's arms," and he saw that Mr. Beckman had Mr. Paugh by the wrists against the rib (Tr. 337Ä341).

Mr. Sisler believed that Mr. Paugh had no reason to go to Mr. Beckman's side of the machine, and that if he wished to speak with him over the noise, he could have shut the machine off, or talked across the machine (Tr. 343). Mr. Sisler confirmed that he made no attempt to stop Mr. Paugh as he proceeded by him, because he didn't want to get involved, and he stated that "there was an indication . . . that something was going to happen" (Tr. 344). Mr. Johnson returned with Mr. Beckman within 3 or 4 minutes, and took them both out of the section (Tr. 345).

Mr. Sisler confirmed that he had worked for Mr. Johnson about 3 months, and had no safety complaints about him. He never previously observed Mr. Johnson harass Mr. Paugh, nor had he observed them arguing or exchanging words (Tr. 346). Mr. Sisler confirmed that he was interviewed by Mr. Gearhart, Mr. Polce, and Mr. Pritt about the incident in question, and told them his version of the event as testified to during the instant hearing (Tr. 349).

On cross-examination, Mr. Sisler explained the work performed during the period in question, and confirmed that the crew worked an hour overtime on Tuesday because they were behind and within one row of bolts of finishing the cut. He also explained the measuring of the cuts, and the bolting sequence which was followed (Tr. 353Ä359).

with Mr. Terry Lucas over the fighting incident because he did not believe it was any of his business, Mr. Lucas "might have mentioned it." When Mr. Lucas asked him whether any punches had been thrown, Mr. Sisler said "I just said yeah, because I didn't, you know, want to get involved."

Mr. Sisler confirmed that he did not actually see Mr. Beckman punching Mr. Paugh (Tr. 361). When asked why Mr. Lucas would testify that he did make such a statement, Mr. Sisler said "He probably really thought I meant it; . . . There was nothing to it. It was just more or less a joke, you know. I didn't want to get involved in it. I didn't want to say nothing in the respect that it would get anybody else in trouble" (Tr. 363).

When asked what he meant by the term "flinched," Mr. Sisler explained as follows (Tr. 364):

A. Well, if you get your back to someone and somebody comes up on you that you don't know is about (indicating), it would scare you, you know. It's out of the blue, you know; you're not ready for it.

Q. Are you saying you saw Mr. Beckman move and his hat fly off, and then you saw him turn around?

A. True.

Q. And then, you saw him get Mr. Paugh's arms?

A. True.

Section Foreman Carl Randall Johnson confirmed that he was suspended 2 or 3 years ago without pay for a week for making a temporary splice on a shuttle car cable, and for allowing men to roof bolt without a TRS system on the bolter (Tr. 6). Mr. Johnson confirmed that he was the section foreman on March 5, 1986, and that Mr. Paugh and Mr. Beckman were the roof bolters, and Mr. Sisler was the rib bolter. The crew was advised by mine foreman Steve Polce on Monday, March 3, that they would have to drive their own cars to work if they were behind more than 2 1/2 cuts in their work and had to stay and work overtime (Tr. 9). Mr. Johnson confirmed that the crew worked 1 hour overtime on Tuesday, March 2, because it got behind (Tr. 10). Mr. Beckman told him that overtime resulted from Mr. Paugh's "dragging his feet," and Mr. Johnson took this to mean that Mr. Paugh was slowing up in putting in roof bolts (Tr. 12).

Mr. Johnson stated that on Wednesday, March 5, Mr. Polce told him that Mr. Beckman had complained to him about Mr. Paugh's "foot dragging," and instructed him to "keep an

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eye on the bolters." Mr. Johnson went underground to tell Mr. Paugh that he was going to move the fan, and while he was there Mr. Beckman informed him that Mr. Paugh was putting in too many bolts and "dragging his feet." Mr. Johnson observed that Mr. Paugh was installing bolts in a three-bolt pattern, rather than the normal two-bolt pattern and asked him about it. Mr. Paugh responded to Mr. Johnson "You cover your ass, and I will cover mine." Mr. Johnson then told Mr. Paugh "if you need to put them in skin to skin, put them in skin to skin." Mr. Paugh told Mr. Johnson that the place he was bolting was too wide and needed an extra bolt, and Mr. Johnson took measurements and found that it was 1 foot wider than the customary 16 foot width. Mr. Johnson sensed there was friction between Mr. Paugh and Mr. Beckman, and left to move the fan (Tr. 14Ä18). Mr. Paugh accused Mr. Johnson of holding up the crew and stated "It ain't none of us" (Tr. 14Ä18, 21).

Mr. Johnson stated that while he was moving the fan, Mr. Beckman appeared and said "John hit me," and he "was emotionally shook up" and was "near to crying" (Tr. 19). Mr. Johnson took Mr. Beckman back to the bolter and asked Mr. Paugh whether he had hit Mr. Beckman and whether he had been on his side of the bolter. Mr. Paugh admitted that he went around the bolter to speak with Mr. Beckman, but denied that he had hit him, and gave no further explanation. Based on Mr. Beckman's account of the incident, Mr. Johnson concluded that he and Mr. Paugh had been fighting (Tr. 21). Mr. Johnson took them out of the mine and telephoned foreman Polce and informed him that they had been fighting underground. Mr. Polce instructed Mr. Johnson to inform them that they were both suspended, and to escort them off the mine, and that a company representative would contact them. Mr. Johnson informed Mr. Paugh and Mr. Beckman that they were suspended and he escorted them off the property in their vehicles (Tr. 22Ä26).

Mr. Johnson confirmed that he was interviewed about the fighting incident by mine management officials Gearhart, Pritt, and Tenney on Friday, March 7, 1986, and that he told them that Mr. Beckman and Mr. Paugh had been fighting underground. Mr. Paugh and Mr. Beckman were not present during the interview, and Mr. Johnson did not discuss whether or not they should be discharged (Tr. 28). Mr. Johnson did not know who made the discharge decision, but speculated that it was Mr. Polce or the other officials (Tr. 41).

Mr. Johnson confirmed that Mr. Paugh was a good worker, and that he did his work on his own without being told. Mr. Johnson denied that he ever harassed Mr. Paugh or asked

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him or any other crew members to return to work before their normal 30-minute lunch break ended. Mr. Johnson also denied assigning Mr. Paugh anymore work than anyone else was required to perform (Tr. 29).

Mr. Johnson confirmed that Mr. Paugh was concerned about maintaining the ventilation over his roof bolter, but denied that Mr. Paugh had ever made any safety complaints or that he had ever disciplined him for raising the ventilation issue (Tr. 33). Mr. Johnson stated that on one occasion Mr. Paugh became angry and threatened to hit him, and "I told him, if he wanted to hit me, to go ahead and hit me" (Tr. 34). Mr. Johnson could not recall any details of the incident. Mr. Johnson stated that on another occasion, he was angry with Mr. Paugh because of his failure to advise him that his bolter needed repairing before going to lunch (Tr. 30-31).

Mr. Johnson stated that while it was possible that he made a statement to Mr. Wolfe that his job was easier since Mr. Paugh's departure, he could not recall making the statement. Mr. Johnson stated further that during the conversation with Mr. Wolfe, Mr. Wolfe made the statement that the issue concerning Mr. Paugh's discharge "was not over yet," and that "If you are going to get the company, you've got to get them on a safety violation. This is the way you've got to get them" (Tr. 35).

Mr. Johnson denied that he has ever ordered anyone to work under unsupported roof. He confirmed that he has observed men doing this but has called them back. If any place needed to be scooped out under unsupported roof, he would do the job himself rather than have someone else do it (Tr. 40).

On cross-examination, Mr. Johnson confirmed that his prior suspension occurred in approximately March, 1984, and he did not know who had reported him to management. He also confirmed that the incident concerning Mr. Paugh's failure to notify him that his bolter needed repairs, and Mr. Paugh's threats to hit him occurred prior to his suspension. With regards to Mr. Paugh's prior threat, Mr. Johnson confirmed that he could tell by Mr. Paugh's demeanor that he was angry, and that his threat was only verbal. Mr. Johnson stated that he is larger in stature (5 foot 9 and weighs 260) than Mr. Paugh and could take care of himself, but denied that he was afraid of Mr. Paugh or would strike back if Mr. Paugh attempted to strike him (Tr. 41-48).

Mr. Johnson confirmed that during the time Mr. Paugh worked on his section he was transferred off several times during pillaring work when the bolters were assigned to other sections where bolting was required to be done. Mr. Johnson denied that Mr. Paugh was ever transferred off his section by Mr. Polce because he and Mr. Paugh could not get along (Tr. 48Å49). Mr. Johnson denied that he had ever ordered Mr. Paugh to rock dust, shovel the feeder, or hang ventilation curtain before his lunch break was over (Tr. 49Å52).

Mr. Johnson stated that he was not aware of any complaints made about him to Mr. Polce by Mr. Paugh. However, he was aware of an incident when the bolter was down, and Mr. Polce discussed it with Mr. Paugh and Mr. Beckman (Tr. 53Å54). Mr. Johnson stated that Mr. Beckman and Mr. Sisler complained to him on Tuesday, March 4, about Mr. Paugh's "foot dragging," and that Mr. Beckman complained to Mr. Polce about it (Tr. 58Å61).

Mr. Johnson stated that when Mr. Beckman told him that Mr. Paugh had hit him, he did not state that Mr. Paugh had pushed him into the bolter. Mr. Johnson conceded that at that time he knew that there was a company policy against fighting, and that it was an offense for which one could be discharged. However, he denied that the incident in question presented him with "a golden opportunity" to get Mr. Paugh fired (Tr. 75). Mr. Johnson could not recall whether he told the management disciplinary committee that Mr. Paugh denied hitting Mr. Beckman. He did tell them that Mr. Beckman stated that Mr. Paugh had hit him, and that Mr. Paugh claimed he laid his hand on his shoulder (Tr. 87).

In response to further questions, Mr. Johnson stated that Mr. Paugh "was a quiet person," but he has seen him upset. He denied that he and Mr. Paugh were constantly bickering or arguing over the lack of air over the bolter. He denied that Mr. Paugh complained about this, but admitted that he knew it was "a sore spot" with him because he had trouble with Mr. Paugh because he would not help move the fan. The fan weighed 600 pounds, and it was everyone's job to maintain the ventilation. However, there were times when Mr. Paugh was bolting and was not aware that the fan was down or being moved, and in such instances Mr. Johnson did not expect Mr. Paugh to continue bolting, but did expect him to help move the fan and restore the ventilation. Mr. Johnson stated that Mr. Paugh would know when its time to move the fan "when I let him know" (Tr. 99).

Mr. Johnson denied that he harassed Mr. Paugh, or that he assigned him other work when he was through bolting as a means of harassing him (Tr. 100). Mr. Johnson confirmed that on occasion when Mr. Paugh's bolting crew was caught up with its work, he would assign all of the crew to rock dust or whatever needed to be done, and he treated all of them equally (Tr. 106). Mr. Paugh did what was asked of him, and did not complain (Tr. 101).

Mr. Johnson confirmed that when Mr. Beckman told him that he had been hit by Mr. Paugh, he did not ask him where he was hit, and while he saw no physical evidence or bruises, Mr. Beckman was "emotionally upset" (Tr. 103).

Mr. Johnson stated that during the 2 or 3 years that Mr. Paugh worked for him, they "got along fairly well," and he considered Mr. Paugh to be "a better than decent worker who never said much" (Tr. 104). If Mr. Paugh complained about not being advised that the fan was being moved, or the lack of air over the fan, he complained to the "hourly men" and not to him (Tr. 105). Mr. Johnson had no knowledge of any complaints by Mr. Paugh to any MSHA inspectors (Tr. 105).

General Mine Foreman Steven B. Polce confirmed that on March 5, 1986, Mr. Johnson was Mr. Paugh's section foreman. Mr. Polce also confirmed that as mine foreman, his duties included taking care of personnel problems, and that Mr. Johnson and the other section foremen reported to him and reported any problems with their men to him (Tr. 107-110).

Mr. Polce confirmed that he met with the roof bolters and section foremen when the new KÄ8 section was begun during the week of March 3, 1986, and advised them that they had to arrange their own individual transportation to work because of the work requirements on the section (Tr. 110-111). Mr. Polce confirmed Mr. Johnson's shift worked 1 hour overtime on Tuesday, March 4, and that on Wednesday, March 5, Mr. Beckman told him that Mr. Paugh was intentionally "dragging his feet" and slowing down the roof bolting so that he would be "getting overtime for riding by himself." Mr. Polce stated that he then called Mr. Johnson to his office and instructed him to keep an eye on the bolting crew, and if there was a problem to try and straighten it out (Tr. 112).

Mr. Polce stated that he received a telephone call at his home on March 5, after arriving from work, and Mr. Johnson informed him that he had a problem with Mr. Paugh and Mr. Beckman in that they were fighting underground. Since fighting underground is against company policy for safety

reasons, Mr. Polce instructed Mr. Johnson to suspend Mr. Paugh and Mr. Beckman until further notice and to escort them off the property (Tr. 113). The next day, Mr. Polce informed personnel manager Gearhart and mine superintendent Pritt about what had happened, and Mr. Polce went underground to the area which had been mined the evening before, and measured the widths of the places and found them to be 17 feet wide with good top. Mr. Polce confirmed that he told Mr. Pritt and Mr. Tenney that Mr. Paugh and Mr. Beckman were fighting underground, and a meeting was arranged for Friday, March 7, "to get to the root of the problem" (Tr. 115).

Mr. Polce stated that he and Mr. Gearhart, Mr. Pritt, and Mr. Tenney met on Friday, and interviewed Mr. Johnson, Mr. Paugh, Mr. Beckman, and Mr. Sisler individually and out of each other's presence. The decision to discharge Mr. Paugh for fighting underground was a collective decision made on Friday by all of the management officials who did the interviewing, and Mr. Polce informed Mr. Paugh of the decision the following Monday, March 10, 1986 (Tr. 116-118).

Mr. Polce stated that he could not recall what was said during the interviews because Mr. Gearhart was taking notes, and he (Polce) made no notes. Mr. Polce could not recall what Mr. Paugh said in his defense, and that "the one that sticks out in my mind the most was Earl Sisler." Mr. Polce stated that Mr. Sisler's version of the incident was as follows (Tr. 116-117):

A. He told me about John Paugh leaving the right-hand side of his bolting machine and coming around the back of the bolter, and he said he was tired of the cry baby, bastard, or something, referring to Harry Beckman, and went on Harry Beckman's side of the bolter.

And Earl said whenever he looked up, that Harry's hat was knocked off, and he seen Harry turn around and, like, stop John Paugh from further attacking him, or whatever. And he seen Harry leave the roof bolting machine and go get Randy Johnson.

Mr. Polce stated that the only other reported fight at the mine which he was aware of concerned an argument which resulted in one miner swinging his dinner bucket at another miner, but the matter was resolved without further action after the miner who swung the bucket resigned his job (Tr. 118). Mr. Polce confirmed that in the event of a fight, only

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the aggressor would be fired, even if its the first offense, and the punishment for fighting is dismissal rather than a warning or a suspension (Tr. 120).

Mr. Polce stated that Mr. Paugh was a good worker "when he didn't want to drag his feet for certain reasons or take his time when it wasn't needed to be taken." He denied that Mr. Paugh had ever made complaints to him, or that he discussed the matter of lack of air over his bolter numerous times. On one occasion when he was underground and found that the bolter was shutdown, he asked Mr. Paugh about it, and Mr. Paugh informed him that the fan was down. When Mr. Polce proceeded to test the air with his anemometer, Mr. Paugh remarked "What are you getting all huffy about." However, the fan came on again, and that ended the matter (Tr. 121-122).

Mr. Polce confirmed that Mr. Paugh has been transferred from and back to Mr. Johnson's section, and that it is a normal practice to reassign bolters to other crews. Mr. Polce denied that he ever transferred Mr. Paugh because he could not get along with Mr. Johnson (Tr. 123, 125).

Mr. Polce stated that he has worked with Mr. Johnson for 8 years, visits his section every day if possible, and he considers him to be one of his best foreman in terms of safety, production, and cleanup of his section (Tr. 126). Mr. Polce has no knowledge of Mr. Johnson ever harassing Mr. Paugh, and confirmed that Mr. Paugh never discussed Mr. Johnson with him (Tr. 127).

On cross-examination, Mr. Polce confirmed that he was aware of Mr. Johnson's prior suspension, had no knowledge that he ever scooped under unsupported roof, and notwithstanding his prior suspension for a safety infraction, he still considers Mr. Johnson "one of my best foremen all around for his performance of what he does" (Tr. 128).

Mr. Polce confirmed that he was aware of the two prior incidents concerning Mr. Johnson and Mr. Paugh with regard to the bolter which needed repairs and Mr. Paugh's reported threat to hit Mr. Johnson. Mr. Polce also confirmed that he was aware of the prior discussions between Mr. Paugh and Mr. Johnson concerning Mr. Paugh's insistence for air over his bolter, and while he could not state whether they had more than one discussion, Mr. Polce stated "I remember the talk that there was a problem there" (Tr. 129). Mr. Polce

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also confirmed that he had heard that Mr. Paugh made a statement during the week of March 3, that if he had to work overtime, he would make sure he got enough to pay for his gas, because of having to drive by himself to work (Tr. 131).

Mr. Polce confirmed that the collective decision to discharge Mr. Paugh was made after an open discussion by those in attendance at the meeting, and the collective conclusion was "that it was in the handbooks that for fighting underground it's a discharge" (Tr. 136). Mr. Polce stated that at the time of the decision, he was aware of the different versions of the incident, including the assertion that Mr. Paugh hit Mr. Beckman, that Mr. Paugh had pushed Mr. Beckman into the bolter, and Mr. Paugh's denial that he hit Mr. Beckman, and simply went around the bolter to talk to him and placed his hand on Mr. Beckman's shoulder. He also recalled Mr. Beckman's statement that Mr. Paugh pushed him into the bolting machine while he was tramming it and that it knocked his hard hat off, and Mr. Sisler's statement that Mr. Beckman's hat was knocked off, and that he more or less turned around to protect himself by grabbing Mr. Paugh's arms. Mr. Polce stated that he saw no difference "if you're hit from the back or pushed from the back (Tr. 137-139), and that "If he was the aggressor, come around behind the man and pushed him in the back into a bolting machine, as far as I am concerned, that's it" (Tr. 150).

Mr. Polce stated that Mr. Beckman was not discharged because it was concluded that he was not the aggressor, and he denied that Mr. Beckman's complaint that Mr. Paugh was "dragging his feet" influenced his decision in this regard (Tr. 142). Mr. Polce admitted that he was aware that Mr. Paugh had in the past drilled more test holes than were necessary or installed additional support into good top that was unnecessary, and that he confirmed this during his visits to the section. He conceded that it is the roof bolter's responsibility to make sure the roof where he is working is safe and that he installs enough bolts to make it safe (Tr. 144). He also confirmed that Mr. Johnson "probably" told him that Mr. Paugh may have gotten behind in his work at times, and Mr. Polce has observed that Mr. Paugh would at times get behind the other bolter, and at other times, he would be ahead of the other bolter. However, Mr. Polce could not recall discussing this with Mr. Paugh (Tr. 154).

Mr. Polce confirmed that at the time the decision was made to discharge Mr. Paugh, he was unaware of any prior fight between Mr. Paugh and Mr. Lucas, and he learned of that incident during the week of the instant hearing (Tr. 146).

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Mr. Polce also confirmed that Mr. Paugh's prior "encounters" with Mr. Johnson never came up during the meeting of March 7, but that he was aware of them (Tr. 147-148).

Personnel Director Thomas Gearhart confirmed that the respondent's investigation of the incident which resulted in Mr. Paugh's discharge was accomplished through interviews on Friday, March 7, 1986, conducted by a "management team" consisting of himself, Mr. Polce, Mr. Pritt, and Mr. Tenney. The team interviewed Mr. Johnson, Mr. Beckman, Mr. Sisler, and Mr. Paugh separately in order to determine the facts, and while the question of the spacing of the roof bolts was discussed, Mr. Gearhart confirmed that he was only concerned about the fighting incident (Tr. 20-23; 167-168).

Mr. Gearhart stated that Mr. Paugh's version of the incident was that he simply walked around the bolter, past Mr. Sisler, laid his hand on Mr. Beckman's shoulder and asked him "Why are you mad?" Mr. Beckman's version was that while at the controls of the bolter which he was tramming, "I was either pushed or hit from the back. I don't know. It was behind me. And the next thing I knew, I was into the bolter, and I turned around and grabbed John Paugh's hands to restrain him. I grabbed his arms, went by him, and got the foreman" (Tr. 169).

Mr. Gearhart stated that Mr. Johnson stated that prior to the incident Mr. Beckman had complained to him "about John dragging his feet and the bolt spacing, the test holes," and that Mr. Johnson spoke with them and told them they would have to get along and to get back to work. Mr. Johnson then left the area, and Mr. Beckman came to find him and informed Mr. Johnson that Mr. Paugh had hit him. Mr. Johnson returned to the bolter with Mr. Beckman, and Mr. Paugh admitted that he had been on Mr. Beckman's side of the bolter, but denied hitting him (Tr. 170-171). Mr. Gearhart stated that after the interviews were completed, the decision was made to discharge Mr. Paugh, and he stated as follows (Tr. 171):

A. Okay. Then, we, in turn, decided if, in fact there was a fight, based on the information that we had gathered from the people that we interviewed. And we established the fact that, yes, there was a fight; John Paugh was the aggressor; and Harry Beckman had handled it the way he should, to go get the foreman and didn't return any blows- went to get the foreman, reported it.

Mr. Gearhart confirmed that Mr. Polce called Mr. Paugh on March 10, 1986, and informed him of the decision to discharge him. Mr. Gearhart also confirmed that Mr. Paugh called him after he was informed of his discharge, and said that he had simply laid his hand on Mr. Beckman's shoulder, and that he told him this again when he came to the mine to pick up his belongings. Mr. Gearhart stated that he informed Mr. Paugh that the matter had already been investigated and that he did not wish to rehash or discuss it further (Tr. 172). Mr. Paugh made no mention of any complaints (Tr. 173).

Mr. Gearhart confirmed that Mr. Johnson had been suspended for a safety violation, but that Mr. Paugh was not on his roof bolting crew when this occurred, and raised no concerns about Mr. Johnson (Tr. 181).

On cross-examination, Mr. Gearhart denied that Mr. Paugh was discharged for making safety complaints (Tr. 188). He confirmed that during the investigation of the fighting incident in question, he believed Mr. Beckman to be more credible than Mr. Paugh, and believed that Mr. Paugh lied when he said he went around the bolter simply to speak with Mr. Beckman (Tr. 191). He considered Mr. Beckman's statement that he did not know whether he was pushed or hit from behind by Mr. Paugh, and that he "was either hit or pushed" into the bolter (Tr. 194).

Mr. Gearhart confirmed that he was contacted by a state unemployment representative concerning the reason for Mr. Paugh's discharge, but denied that the representative made any statement to him that the incident as he described it did not sound like a fight. Mr. Gearhart stated that he told the representative that he did not intend to appear with witnesses at any unemployment benefits determination proceeding (Tr. 195). He earlier testified that he could not recall the exact words he used in describing the fight, nor could he recall stating to the representative that Mr. Paugh "had pushed another worker" or that he "had put his hand on another worker" (Tr. 24-25).

Mr. Gearhart confirmed that at the time the decision was made to discharge Mr. Paugh, the management team was not aware of the prior fight between Mr. Paugh and Mr. Lucas, and that this information was provided by Mr. Beckman after Mr. Paugh's discharge (Tr. 197-198). Mr. Gearhart also confirmed that Mr. Paugh never mentioned anything to management about any ventilation problems during his interview, and that he was not aware of any complaints made by Mr. Paugh, or any problems between Mr. Paugh and Mr. Johnson (Tr. 198, 200).

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Mr. Gearhart stated that the only statement made by Mr. Paugh during the interview was that he went around the bolter to talk to Mr. Beckman and laid his hand on his shoulder, and Mr. Gearhart did not believe him (Tr. 202-203). Mr. Gearhart confirmed that the management team discussed Mr. Paugh's version of the incident, and did not believe him. The team believed Mr. Sisler and Mr. Beckman, and considering all of the circumstances, including the fact that Mr. Paugh was angry, called Mr. Beckman "cry baby, son of a bitch, or bastard, or whatever expletive," and Mr. Beckman's hat flying off, the team concluded that a fight had taken place (Tr. 204-206).

John Paugh was recalled by the Court, and he confirmed that he was not working on Mr. Johnson's section at the time he was suspended for a safety infraction, but that Mr. Johnson's suspension was common knowledge at the mine (Tr. 213). Mr. Paugh confirmed that he never complained to Mr. Gearhart about any problems with Mr. Johnson, but that he did inform Mr. Polce that he could not get along with Mr. Johnson because he expected him to bolt when the line curtain or fan were down. On that occasion, Mr. Polce took him off Mr. Johnson's section for awhile, and then put him back after a layoff, and this was the only time that he was reassigned for complaining about Mr. Johnson (Tr. 214).

With regard to Mr. Johnson assigning him other work to do, Mr. Paugh stated as follows (Tr. 216-218):

Q. Well, let me ask you this. Now, if you complained to him or if you would tell him that you were not going to do any more bolting and you shut your bolter down until they move the fan, let's assume it took a half hour to move the fan. Okay? And while your bolter is down and while they are moving the fan up, he tells you to go over and do something else. "Keep occupied until we get the air back." Do you see anything wrong with that?

A. No, not a thing wrong with that.

Q. Is that the way it happened?

A. No. I usually helped with moving the fan when he didn't tell me to do something else.

Q. Well, can you give me an example of when you complained to him that you didn't want to

work, for example, in something that you thought was unsafe and he put you someplace else? Give me a for-instance.

A. Well, just the one thing, you know, when we was on line curtain. They would take the curtain down across the heading so the buggies could run that way. They would take the bolter's air away.

Q. That took your air away from where you bolted?

A. That's right.

Q. Then, what would happen?

A. He would say, "Well, if you don't want to bolt," he says, "go do this and do that." And I said, "Okay."

Q. Okay. So, that situation, you felt that you were exposed to some unsafe conditions; in other words, not enough air on the bolting section? Is that right?

A. Yes. It's unsafe.

Q. In other words, if the ventilation curtain is down to accommodate the buggy operators, that is going to affect the air where you are working on bolting; is that correct?

A. Yes.

Q. And you would tell him that?

A. Yes.

Q. And he would say, "Okay. You don't have to work there; I'm going to put you doing something else." Is that correct?

A. That's what he would do, yes.

Q. Now, is it possible that he assigned you to do this other work because he didn't want you working there in that dusty atmosphere where there wasn't enough air and because you

didn't want to, or he assigned you to do something else because he was punishing you for complaining?

A. Yes, I would use harassment, not punishment.

Q. You say it's harassment?

A. Yes.

Mr. Paugh conceded that other times when the ventilation curtain was down and his bolting machine was off during lunch break, Mr. Johnson would tell him "Go eat something" (Tr. 218). Mr. Paugh stated that over a period of 2 or 2 1/2 years, Mr. Johnson cut his lunch break short on three or four occasions and assigned him to "unnecessary things" such as rock dusting and shoveling the feeder (Tr. 220). When asked whether he believed that Mr. Johnson was "deliberately doing this to make it tough on you," Mr. Paugh responded "somewhat, yes." When asked whether Mr. Johnson would treat other miners the same way, Mr. Paugh responded "Just if they would give him a hard time on the same thing" (Tr. 220). He testified further as follows (Tr. 220-221):

Q. Could you relate these three (3) or four (4) instances to a hard time that you had given Randy Johnson? In other words, was there a hard time directly connected to him cutting your lunch break short to do what you have described as unnecessary work?

A. Yes. A lot of times when the bolter was down or there wouldn't be air to it, he would

Q. If the bolter is down and this is your regular shift, you would expect to do other work; is that right?

A. That's true.

Q. I'm talking about lunch break, your lunch break being cut short.

A. I've seen him before walk past the curtain that was down and come up and get me off the tool car at lunch time to go put the curtain back up.

Q. All right. Any other incidents where he got you off your lunch break to do something?

A. A lot of times, if he was wanting the section rock dusted quick, yes, he would.

Q. You say, "A lot of times." You earlier said three or four (4) occasions this happened.

A. Well, yeah. At lunch time, it would be a couple of times.

Complainant's Arguments

During oral arguments on the record at the hearing in opposition to the respondent's motion to dismiss the complaint (which was denied), and in support of his argument that a prima facie case of discrimination has been established, Mr. Paugh's counsel asserted that while there is no evidence that Mr. Paugh consistently insisted on doing his job safely during the entire 6 years of his employment with the respondent, he has established this fact for at least the 2 years immediately preceding his suspension and subsequent discharge on March 10, 1986 (Tr. 172-173). Counsel argued further that during this 2-year period, there were "bad feelings" and hostility between Mr. Paugh and his foreman Randy Johnson, probably rooted in the incident concerning a roof bolter which had not been repaired and the failure to promptly report this to Mr. Johnson. Counsel argued further that during this time Mr. Paugh had insisted on complying with safety regulations, particularly with respect to the amount of available air ventilation over his roof-bolting machine, and that there were many "discussions and arguments" between Mr. Paugh and Mr. Johnson over this issue (Tr. 170).

Counsel conceded that apart from the arguments with his foreman over the lack of air for the roof-bolting machine, there is no evidence of any harassment against Mr. Paugh. However, given the hostility by Mr. Johnson as evidenced by the "shouting matches" which resulted from Mr. Paugh's insistence that he have adequate ventilation, and coupled with the fact that Mr. Johnson "despised" Mr. Paugh, and stated to Mr. Wolfe that "things go a lot easier" after Mr. Paugh's discharge, counsel concluded that he has established a prima facie case of a discriminatory discharge (Tr. 175).

In his posthearing brief, counsel asserts that Mr. Paugh's protected activity was his compliance with safety

regulations; namely, his refusal to continue bolting when there was insufficient air over his bolter, his insistence on installing a sufficient number of roof bolts to secure the roof in his work area, and his refusal to work under unsupported roof. Counsel maintains that all of these safety concerns were communication by Mr. Paugh to his foreman Randy Johnson.

Counsel concludes that considering all of the evidence in this case, it is clear that the respondent seized upon the appearance of an altercation between Mr. Paugh and Mr. Beckman on March 5, 1986, as an excuse for discharging Mr. Paugh. In support of this suggested pretextual discharge, counsel relies on a statement filed by Personnel Director Gearhart with the MSHA investigator who investigated Mr. Paugh's complaint, in which Mr. Gearhart makes reference to "a credible allegation" by Mr. Beckman that Mr. Paugh "had also started a fight with another employee four or five years ago" (exhibit CÄ4; the Lucas incident). Since that prior incident was not known to the management team when it made its decision to discharge Mr. Paugh, counsel concludes that the respondent made it appear that Mr. Paugh had a history of fighting, and that it did so to support its pretextual decision to discharge Mr. Paugh for purportedly fighting underground with Mr. Beckman.

Counsel maintains that the preponderance of the evidence in this case proves that Mr. Paugh had engaged in protected activity, and that his discharge was motivated by that activity. Counsel further concludes that the evidence does not demonstrate that the respondent would have taken any adverse action against Mr. Paugh in any event for his unprotected activities alone.

Respondent's Arguments

The respondent argues that Mr. Paugh has failed to establish a prima facie case of discrimination because he did not engage in protected activity and, in any event, could not link that protected activity to any improper motive by the respondent. Respondent suggests that Mr. Paugh's entire case rests on nothing more than "fantastical allegations" of harassment, insufficient to sustain his ultimate burden of proof. Moreover, even if Mr. Paugh's testimony were credited such that he were able to prove a prima facie case of discrimination, respondent argues that it could successfully defend against such a prima facie case because substantial evidence in the record shows that Mr. Paugh was fired for one reason

wholly unrelated to any protected activity--fighting underground in contravention of company rules. Respondent concludes that firing an employee for a severe infraction of the company rules does not amount to illegal discrimination under the Act.

Respondent asserts that despite the vague allegations in his complaint, the record shows that Mr. Paugh did not make any protected safety complaints. With regard to Mr. Paugh's alleged ongoing complaints of insufficient ventilation at the working face, respondent maintains that the record demonstrates that he failed to make these complaints to the respondent's personnel, and never mentioned any safety related issues to personnel director Gearhart. And, despite Mr. Paugh's allegations that he constantly complained about safety, he never made safety complaints at the weekly safety meetings. Respondent, therefore, concludes that uncommunicated safety complaints do not constitute activity protected under the Act.

Respondent maintains that Mr. Paugh's March 5, 1986, comment to foreman Randy Johnson about spacing between the roof bolts did not constitute a protected safety complaint in that Mr. Paugh made the comment solely to "justify" the dilatory escapade in which he engaged, not to ensure a safe roof, but rather to ensure that he would be asked to work overtime for which he would be handsomely compensated. Respondent concludes that the Act was not meant to protect such pretextual and malicious conduct.

With regard to Mr. Paugh's asserted work refusal for safety reasons, respondent asserts that the Act only protects miners who refuse to work under conditions which they reasonably believe in good faith to be unsafe or unhealthful. Although recognizing that a miner may engage in affirmative self-help and refuse to work, respondent maintains that this may only be justified where the refusal is based on a reasonable, good faith belief that such affirmative action is necessary.

Respondent maintains that Mr. Paugh's action in first shutting off the bolter and subsequently protesting to mine foreman Polce that ventilation had subsided constitutes the kind of unreasonable affirmative self-help against which the Act was not meant to protect. Respondent asserts that Mr. Paugh's belief in the existence of a hazard--lack of ventilation--was not reasonable. Even though the fan shut down for a short time, Mr. Polce measured the air current over the bolter as well over the minimum requirement of

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3,000 cfm. The mere fact that the fan did not operate for several minutes did not render Mr. Paugh's belief a reasonable one, because the required air current of 3,000 cfm could still have been maintained even though the fan on the section was not working.

Respondent asserts that Mr. Paugh's self-help in shutting off the bolter was an unreasonable and excessive approach to the hazard he perceived because it prevented the other roof bolter and the rib bolter from performing their work even though the area was well-ventilated. Respondent believes that Mr. Paugh would have behaved reasonably if he had alerted the foreman to the ventilation problem he perceived and asked to be reassigned to other duties without preventing others from proceeding with their work. Under circumstances where mere communication and subsequent reassignment would have solved the perceived problem, respondent concludes that Mr. Paugh's defiant self-help was completely unwarranted.

Respondent maintains that Mr. Paugh has failed to establish by any credible evidence that he was harassed by the respondent because he made numerous safety complaints and that his testimony in this regard is fraught with inconsistencies, contradicts the testimony of other credible witnesses, and should not be credited. Respondent maintains that no one connected with the respondent was aware of any safety complaints, and section foreman Johnson and personnel director Gearhart testified that Mr. Paugh never approached them with complaints of any kind. Conceding that Mr. Paugh did discuss one perceived ventilation problem with mine foreman Polce when Mr. Paugh shut down his bolter, respondent asserts that Mr. Paugh's testimony of numerous ventilation complaints to Mr. Polce in his office during the 18 months prior to his discharge was contradicted by Mr. Polce who testified that he never even had an office, and that he was not in his current capacity for 18 months prior to Mr. Paugh's discharge.

Respondent denies that Mr. Johnson harassed Mr. Paugh by cutting his lunch hours, or that Mr. Paugh was transferred to alleviate any friction between them. Respondent believes that if Mr. Paugh were truly harassed, he would have complained to Mr. Gearhart, or at least brought it to management's attention during its investigation of the fighting incident. Since Mr. Johnson played no role in the discharge decision, and was in no position to retaliate, respondent cannot reconcile Mr. Paugh's silence with regard to his claims of harassment.

Respondent maintains that the only reason for Mr. Paugh's discharge was his fighting underground on mine property in

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violation of company rules, and that management's investigation revealed that Mr. Paugh had been the aggressor. Respondent points out that fighting is an offense for which discharge is an appropriate penalty, and that Mr. Paugh was fully aware of this fact. Respondent takes the position that there is no evidence of any discriminatory motive on its part, but acknowledges that indirect circumstantial evidence such as knowledge of the protected activity, hostility toward the miner because of the protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment of the complaining miner can be used to establish discriminatory intent.

As to the first factor noted above, respondent argues that it had no knowledge of Mr. Paugh's asserted protected activities. Despite Mr. Paugh's contentions that he routinely complained about safety matters, respondent asserts that its witnesses categorically denied that Mr. Paugh ever approached them directly with safety complaints.

With regard to the one instance where Mr. Paugh shut down the bolter and discussed the ventilation with Mr. Polce, respondent points out that even assuming that the shutting down of the bolter was protected activity, Mr. Polce was the only member of management's investigation team aware of this incident, and that at the time the decision was made to discharge Mr. Paugh the incident was not discussed and played no part in the discharge decision. Respondent suggests that the only arguable "safety complaint" of which management was aware, was Mr. Paugh's "self serving" statement on March 5, that the top needed additional bolts, even though everyone else believed that the top was sound.

Respondent views Mr. Paugh's allegations of management hostility towards him because of his safety concerns or protected activities as "incredible." Respondent argues that Mr. Johnson flatly denied any harassment of Mr. Paugh, and that other management and hourly personnel saw no evidence of any such harassment. Respondent concedes that Mr. Paugh was asked to perform other tasks while he was not bolting, but maintains that he was treated no differently than any other roof bolter. As for any transfers of Mr. Paugh to ease the alleged hostility between him and his foreman, respondent relies on the testimony of Mr. Polce and Mr. Gearhart that company policy dictates against such reassignments for personal disputes.

Respondent argues that even if Mr. Paugh did make safety complaints, management dealt with them in a responsible

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manner. Mr. Paugh's "complaint" about the spacing of the bolts on March 5, was answered by Mr. Johnson telling him to do what he thought was safe. Mr. Polce's response to Mr. Paugh's shutting off the bolter and questioning the ventilation with Mr. Polce, was immediately addressed by Mr. Polce when he investigated the problem by testing the air. With regard to Mr. Paugh's prior encounters with Mr. Johnson when he threatened Mr. Johnson, and Mr. Johnson took him to task for not promptly reporting the condition of a roof bolter which needed repair, respondent points out that Mr. Johnson handled these situations responsibly. Finally, respondent points out that Mr. Paugh admitted that prior to his discharge, he was never disciplined by the respondent or by Mr. Johnson during the time that he worked for him.

Respondent concedes that the "coincidence of time" factor is satisfied in this case only with regard to the roof spacing incident on March 5, 1986, which occurred 5 days prior to Mr. Paugh's discharge. Respondent suggests that there is no coincidence in time, however, between Mr. Paugh's discharge and his other alleged safety complaints.

Finally, respondent argues that there is no evidence of any disparate treatment in the manner in which it handled Mr. Paugh's fight with Mr. Beckman. To the contrary, respondent maintains that in making its determination in Mr. Paugh's case, it followed the same procedure it had previously used to investigate the only other reported case of fighting. In that instance, respondent points out that the individual believed to be the aggressor was suspended pending the outcome of a management investigation, and after a determination was made that no fight had occurred, the individual was reinstated. With regard to Mr. Paugh's purported prior fight with Mr. Lucas, respondent points out that since that incident was not reported to management, no investigative or disciplinary action was taken.

Summarizing the aforementioned four indicia of discriminatory intent, respondent takes the position that there is little, if any, indirect evidence that it discharged Mr. Paugh for engaging in protected activity, and that in view of the lack of any nexus between Mr. Paugh's claimed protected activity and the adverse action of discharge, respondent concludes that his claim must fail, *McClain v. Westmont Coal Co.*, 3 FMSHRC 2603 (November 1981) (ALJ Melick).

Respondent argues that even if Mr. Paugh's discharge were motivated in part by any protected activity on his part,

his unprotected activity was the preeminent cause of his discharge, and the fact uppermost in the minds of management was that Mr. Paugh instigated a fight underground. Upon reaching this conclusion after investigation, respondent maintains that management referred to the company handbook which stated that fighting underground is a dischargeable offense, and that it was on that basis alone that respondent discharged Mr. Paugh. Respondent concludes that since such a "proffered business justification is not plainly incredible or implausible, [therefore,] a finding of pretext is inappropriate." Chacon, supra, 3 FMSHRC at 2516, and that, terminating a miner who subjects others to needless risk of serious injury as a result of fighting underground represents a sound business practice, not a pretext for discrimination. See, e.g., McClain, supra., 3 FMSHRC at 2606.

Respondent asserts further that regardless of Mr. Paugh's protected activity, it would have discharged him anyway for violating company rules against fighting, and that such disciplinary actions have been affirmed in instances where it was established that a mine operator had "personnel rules or practices forbidding the conduct in question." Bradley v. Belva Coal Co., supra, at 4 FMSHRC 982, 993 (1983); Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (January 1981); Dickey v. United States Steel Mining Co., 3 FMSHRC 519 (March 1983).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C.Cir.1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to

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the affirmative defense. *Haro v. Magma Copper Company*, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, supra. See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir.1983); and *Donovan v. Stafford Construction Company*, No. 83-1566 D.C.Cir. (April 20, 1984) (specifically-approving the Commission's *Pasula*-*Robinette* test). See also *NLRB v. Transportation Management Corporation*, 458 U.S. 607, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C.Cir.1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir.1965):

It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

As we emphasized in *Pasula*, and recently re-emphasized in *Chacon*, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone.

Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminate, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed. (Emphasis added).

Mr. Paugh's Protected Activity

It is clear that Mr. Paugh had an absolute right to make safety complaints about mine conditions which he believed presented a hazard to his health or well-being, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C.Cir.1978); Chacon, supra. However, the miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir.1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

The fact that a mine operator addresses a miner's safety concerns or complaints, and which are later determined not constitute violations, or the fact that the complaining miner filed no safety complaints with any governmental enforcement agencies, does not remove the Act's protection from any preceding complaints, Sammons v. Mine Services Company, supra, at 6 FMSHRC 1396-97.

In this case, there is no evidence that Mr. Paugh has ever made any verbal or written safety complaints to any MSHA or state mine inspectors. Respondent's assertions that Mr. Paugh has not established that he made safety complaints

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to mine management are not well taken, and they are rejected. While it may be true that Mr. Paugh may not have articulated any safety complaints to his foreman Randy Johnson in any formalized way, it seems clear to me that his concern over the lack of adequate ventilation when the fan was being moved resulted in Mr. Paugh's refusal to continue bolting until the air was restored, and that this was communicated to Mr. Johnson. Notwithstanding Mr. Johnson's denials that Mr. Paugh ever complained to him, Mr. Johnson admitted that Mr. Paugh was concerned about the lack of adequate air coursing over his bolting machine while the fan was being moved, and knew that this subject "was a sore spot" with Mr. Paugh.

Mr. Smith, Mr. Prinkey, and Mr. Wolfe all corroborated the fact that Mr. Paugh was concerned about the lack of air over his bolting machine, communicated his concern to Mr. Johnson, and refused to continue bolting until the air was restored. Mr. Smith testified that Mr. Paugh complained often to Mr. Johnson about this matter, and Mr. Prinkey testified that Mr. Johnson became upset over Mr. Paugh's reluctance to bolt with no air over his bolter. Although mine foreman Polce denied any frequent complaints by Mr. Paugh with regard to the lack of air over his bolter, he did admit to one encounter with Mr. Paugh when he found that Mr. Paugh had shut down his bolter because of what he believed to be a lack of adequate ventilation, and this incident resulted in a discussion between the two of them over this issue. Although the matter may have been quickly resolved after Mr. Polce tested the air and the fan came back on immediately, the fact is that Mr. Paugh made it known to Mr. Polce at that time that he would not continue bolting while the fan was down and there was inadequate air over his bolter.

In view of the foregoing, I find Mr. Paugh's testimony concerning his encounters and discussions with his section foreman Johnson and mine foreman Polce over the lack of adequate ventilation over his roof bolter when the fan was down and being moved to be credible. I conclude that these discussions constituted "safety complaints" communicated verbally to mine management, and were therefore protected activity. I also conclude and find that Mr. Paugh's insistence on having adequate air over his bolting machine was communicated to both Mr. Johnson and Mr. Polce, and also constituted protected activity.

Although Mr. Paugh's original complaint asserts that he made safety complaints about the spacing of the roof bolts, I find no credible evidence or testimony to support this conclusion. The only credible testimony of record in this regard

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is the discussion which took place between Mr. Johnson and Mr. Paugh on March 5, 1986, shortly before the incident involving Mr. Beckman. Mr. Paugh believed that the width of the entry required him to install more bolts, and Mr. Johnson questioned this contention when Mr. Beckman accused Mr. Paugh of deliberately installing more bolts so that he could earn overtime. Mr. Johnson measured the width of the entry, and while he may not have been happy, he did agree that it may have been a foot too wide, and instructed Mr. Paugh to do what he had to do to make the place safe. In this particular instance, while it may have provoked Mr. Johnson, I do not believe that this incident escalated to the level of a "safety complaint" by Mr. Paugh.

With regard to Mr. Paugh's assertions made during the course of the hearing that he often complained to Mr. Johnson about the ventilation curtains being down while the equipment moved through the area where he was working, the record establishes that Mr. Johnson addressed these complaints. Mr. Paugh admitted that in each instance Mr. Johnson responded by assigning him to do other work until such time as the air was restored and specifically told him that he need not continue to bolt (Tr. 216-218).

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom., Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir.1985). The reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

In this case, the evidence establishes that Mr. Paugh refused to continue to operate his roof-bolting machine when he believed that the ventilation all over the bolter was inadequate because of the fan being shutdown and moved. Further, Mr. Paugh has also established through his own un rebutted credible testimony that he also discontinued bolting when the ventilation curtains were down because of the movement of equipment through his work area. Assuming that Mr. Paugh's work refusals in these instances were reasonable, it seems

clear to me that they constituted protected activity under the Act.

With regard to Mr. Paugh's refusal to continue bolting while the fan was down and being moved, respondent argues that Mr. Paugh acted unreasonably by discontinuing bolting, and that his shutting down of his bolter was unwarranted. On the facts of this case, I disagree. It seems clear to me that the purpose of the ventilation fan was to provide an uninterrupted flow of air to the work area when Mr. Paugh was bolting. Mr. Johnson conceded that there were times when Mr. Paugh was not aware of the fact that the fan was down while it was being moved. Absent any evidence to the contrary, I believe one can reasonably conclude that during the time the fan was down while it was being advanced, the air coursing over Mr. Paugh's bolting machine was interrupted, thus affecting both the quantity and quality of air passing over the bolter. Under the circumstances, there is a strong inference that in those instances where Mr. Paugh complained to Mr. Johnson about the lack of adequate ventilation over his bolter, Mr. Paugh's working environment was inadequately ventilated, and the respondent has produced no credible evidence to the contrary. Accordingly, I find that Mr. Paugh's refusal to continue bolting while the fan was down was reasonable, and constitutes protected activity.

Respondent's Alleged Hostility and Harassment of Mr. Paugh

During the course of the hearing in this case, Mr. Paugh's counsel asserted that with the exception of Mr. Paugh's discussions with Mr. Johnson concerning the issue of inadequate air ventilation over the roof-bolting machine, there is no evidence of any harassment of Mr. Paugh on the part of the respondent. Further, Mr. Paugh has conceded that at no time prior to his suspension and discharge was he ever disciplined by mine management because of his asserted safety complaints or other reasons.

Mr. Paugh initially testified that during a time span of 2 to 3 years prior to his discharge while working under Mr. Johnson's supervision, he complained to Mr. Johnson about the lack of adequate air over his bolting machine at least 12 times. As a result of these complaints, Mr. Paugh contended that Mr. Johnson "would get in an uproar about it," and would assign him "extra things" to do, e.g., rock dusting, shoveling at the feeder, stacking ventilation tubing, and advancing the ventilation curtain, while other members of the bolting crew were not assigned such work. Mr. Paugh also contended that Mr. Johnson tried to curtail his normal lunch

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break to 10 to 15 minutes as a means of harassing him, and that the extra work assignments were made to punish the roof bolting crew. In addition, Mr. Paugh contended that on at least one occasion, Mr. Polce transferred him off Mr. Johnson's section because of his "conflict" with Mr. Johnson.

When recalled later in the hearing, Mr. Paugh conceded that he never complained to Mr. Gearhart about his allegations of harassment by Mr. Johnson and that never told Mr. Gearhart about his "conflicts" with Mr. Johnson. While it is true that Mr. Paugh spoke with Mr. Gearhart after his discharge when he returned to the mine to pick up his personal belongings, and may have attempted to explain the matter further, and Mr. Gearhart would not listen, there is no evidence that Mr. Paugh communicated his allegations of harassment to Mr. Gearhart, or to Mr. Pritt or Mr. Tenney during management's investigation of the fighting incident.

With regard to his prior transfer from Mr. Johnson's supervision, Mr. Paugh testified that it came about as a result of his disputes with Mr. Johnson over the lack of air over the roof-bolting machine, and Mr. Paugh did not indicate that he complained to Mr. Polce that Mr. Johnson assigned him extra work or curtailed his lunch hours as a means of harassment or punishment.

When specifically questioned about his contention that Mr. Johnson curtailed his lunch break "a lot of times," and his implication that this occurred at least 12 times over the course of 2 to 3 years, Mr. Paugh conceded that it occurred 3 or 4 times. When pressed further, he stated that "it would be a couple of times." When asked whether he believed Mr. Johnson assigned him extra work to deliberately "make it tough on him," Mr. Paugh responded "somewhat." When asked whether he considered the extra work assignments as "punishment" for his complaints, Mr. Paugh responded "I would use harassment, not punishment." The only specific instances cited by Mr. Paugh in terms of curtailment of his lunch break were "a couple of times" when he was asked to re-hang a ventilation curtain and to rock dust.

I take note of the fact that in his initial complaint, as well as the statements made to MSHA's special investigator during the investigation of his complaint, while Mr. Paugh alluded to some extra work assignments, he did not allege that his lunch hours were curtailed. Ronald Smith, a friendly witness, testified that he was not aware that Mr. Paugh was ever disciplined for complaining to Mr. Johnson about the lack of air over his bolter, and he made no mention of any acts of

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alleged harassment of Mr. Paugh. Another friendly witness, Jimmie Wolfe, who testified that Mr. Paugh and Mr. Johnson were constantly at odds with each other over the issue of inadequate air over the bolting machine, made no mention of any acts of harassment on the part of Mr. Johnson. As a matter of fact, Mr. Wolfe confirmed that while he himself made many safety complaints to management, he was never subjected to any disciplinary action because of this. Further, the testimony of Mr. Sisler, Mr. Beckman, and Mr. Prinkey, all of whom served on Mr. Paugh's bolting crew under Mr. Johnson's supervision, is devoid of any indication of any harassment or extra work assignments by Mr. Johnson as a means of punishing the crew.

I find Mr. Paugh's contentions that his lunch hours were curtailed by Mr. Johnson to harass or punish him for his complaints to be equivocal and contradictory, and lacking in credibility. Mr. Paugh conceded that his regular lunch breaks may have been shortened at times because of normal work requirements, and that the "extra work" assignments were made during those periods when the roof bolter was down. Further, there is no evidence that Mr. Paugh was ever taken off the roof bolter and assigned other job tasks except for those occasions when the bolter was down for maintenance or because of Mr. Paugh's refusal to operate it while the fan was being advanced and the air was interrupted.

Although roof bolter and scoop operator Ronald Smith contended that Mr. Johnson expected him to work and clean up debris under unsupported roof, he conceded that when he refused, Mr. Johnson did the work himself, and Mr. Smith admitted that he sometimes worked under unsupported roof on his own. Further, Mr. Smith confirmed that after a new scoop was brought into the section in 1984 to cure a "diesel smoke" problem with an older machine, Mr. Johnson's section was the cleanest and best section in the mine. Mr. Smith also confirmed that he had no "safety gripes" against Mr. Johnson, and was not aware that Mr. Paugh was ever disciplined because of his safety complaints about the lack of air over his bolter (Tr. 72, 74-75). Mr. Smith also conceded that the lack of air was not entirely Mr. Johnson's fault, and he could recall no instances when Mr. Johnson totally ignored Mr. Paugh's complaints (Tr. 77, 84).

Rib bolter John Prinkey, who worked on Mr. Paugh's bolting crew, confirmed that while there were times when the crew was not aware of the fact that the fan was being moved, thereby interrupting the ventilation, Mr. Johnson never instructed the crew to continue bolting without air (Tr. 102).

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Roof bolter Jimmie Wolfe, who at one time had worked with Mr. Paugh on foreman Johnson's crew, testified that he was not aware that Mr. Johnson ever ordered Mr. Paugh to continue bolting without air (Tr. 116). Further, Mr. Wolfe, who at one time had been a foreman himself, confirmed that during his 7 years of employment with the respondent, he made safety complaints, but was never disciplined because of this and still has his job (Tr. 146).

Continuous-miner operator Donald Bray, who was injured when pinned against a rib in an accident caused by a defective remote control device on his machine, confirmed that Mr. Johnson never asked him to do any task which was unsafe or which would place him in danger, and in referring to Mr. Johnson stated "I don't think he would do that" (Tr. 157).

During his cross-examination of Mr. Johnson, Mr. Paugh's counsel stated as follows (Tr. 106-107):

BY MR. HALL:

Q. Mr. Johnson, everybody I have talked to in this case says that above ground you're one of the nicest and finest guys they have ever met.

A. How's that again? I didn't hear you.

Q. I said everybody I have talked to in this case says that above ground you're one of the nicest and finest people they have ever met, including John. And they also say that you run the best section; you've got the cleanest section underground. But when you go underground, you change. Is there a lot of pressure on you for production?

A. I won't say there's a lot of pressure. There is pressure. You know that is your job; that is one of your responsibilities, is the production. So, I'm sure that there is a lot of pressure.

Mr. Paugh conceded that other members of his crew were sometimes assigned other job tasks, and he confirmed that when his bolter or the ventilation were down, Mr. Johnson would invite him "to go eat something." He also confirmed that when he or Mr. Prinkey were caught up with their work and had nothing else to do, they would sit and drink coffee while waiting

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for Mr. Beckman to catch up with them. Mr. Paugh also conceded that he would expect to do other work while his bolter or fan were down, and did not consider it wrong to be assigned other work. He also conceded that in those instances when the ventilation curtains and fan were down, thereby reducing the available air over the bolting machine, Mr. Johnson agreed that he did not have to remain in the affected areas and would assign him other work to do until such time as the air was restored. Rib and roof bolters Prinkey and Wolfe testified that Mr. Johnson never instructed the bolting crew to continue bolting without air.

After careful consideration of all of the credible testimony and evidence presented in this case on the issue of the curtailment of Mr. Paugh's lunch hours as a means of harassment, I cannot conclude that this was in fact the case. I cannot conclude that Mr. Paugh was singled out by Mr. Johnson for extra work assignments or "special treatment" as a means of punishment or harassment for his safety complaints. I conclude and find that Mr. Johnson's work assignments with respect to Mr. Paugh constituted a reasonable exercise of Mr. Johnson's supervisory authority and discretion to assign other work while Mr. Paugh's bolting machine was idle, and that these work assignments were not discriminatory or made to punish or harass Mr. Paugh for any safety complaints.

In his initial complaint, Mr. Paugh alleged that his discharge resulted from a "conflict of interest" and "conflicts" with Mr. Johnson, and that certain unidentified "other persons," acting in concert with Mr. Johnson, retaliated against him because of his safety concerns and his insistence on following safety regulations.

There is no evidence in this case that Mr. Johnson was involved in the management decision to discharge Mr. Paugh, or that he had any input into that decision. Although Mr. Johnson suspended Mr. Paugh, he did so at the direction of Mr. Polce pending an investigation of Mr. Paugh's encounter with Mr. Beckman. In addition, the evidence establishes that Mr. Paugh had no connection with management's prior disciplinary action and suspension of Mr. Johnson for a safety violation, and there is no basis for concluding that Mr. Johnson harbored any ill will toward Mr. Paugh because of his suspension.

Two members of the management team that made the collective decision to discharge Mr. Paugh (Pritt and Tenney), did not testify in this case, and there is no evidence that they harbored any resentment or hostility toward Mr. Paugh.

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Personnel Director Gearhart, who has known Mr. Paugh since he first hired him, testified that at the time the decision was made to discharge Mr. Paugh, he was not aware of any prior safety complaints by Mr. Paugh, and was not aware of any differences between Mr. Paugh and Mr. Johnson. This testimony stands un rebutted, and there is no evidence that Mr. Gearhart harbored any hostility or ill will toward Mr. Paugh.

With regard to Mr. Polce, the fourth member of the management team that made the decision to discharge Mr. Paugh, the record suggests that Mr. Paugh and Mr. Polce have had their differences with respect to the lack of adequate air ventilation over the roof-bolting machine while the fan was down. I take note of the fact that Mr. Paugh's initial complaint does not allege that Mr. Polce harassed him or was hostile toward him. However, during the hearing, Mr. Paugh testified to several encounters he had with Mr. Polce with respect to the lack of adequate ventilation over the bolting machine while the fan was down, and Mr. Paugh contended that Mr. Polce insisted that he continue bolting without air, and that on one occasion, Mr. Polce told him that if he refused to continue bolting he would either be taken off the bolter or he could find another job. In addition, Mr. Paugh contended that on least one occasion Mr. Polce transferred him off Mr. Johnson's section in order to keep them apart and because of their personal differences.

Mr. Polce denied that he had numerous conversations with Mr. Paugh about the lack of adequate air over the bolting machine, or that Mr. Paugh complained to him about this. Mr. Polce also denied that Mr. Paugh was transferred from Mr. Johnson's section because of their differences, and maintained that the transfer of bolters was a "normal practice" dictated by regular work requirements. Mr. Polce admitted to one incident where Mr. Paugh shutdown the bolting machine because he believed the air was inadequate. Although the record suggests that this encounter may not have been cordial, the matter was resolved when Mr. Polce measured the air and the fan came back on and Mr. Paugh resumed bolting.

Mr. Polce conceded that at the time of the decision to discharge Mr. Paugh, he was aware of prior problems and conflicts between Mr. Johnson and Mr. Paugh, and knew of their prior encounters over the failure by Mr. Paugh to advise Mr. Johnson that his roof bolter needed repair, and Mr. Paugh's purported threat to hit Mr. Johnson. Mr. Polce was also aware of Mr. Paugh's reluctance to continue bolting with insufficient air, and that this issue was a "problem" between Mr. Johnson and Mr. Paugh.

Although Mr. Polce stated that he considered Mr. Paugh to be a good worker, he qualified his assessment of his work when he stated that this was true only when Mr. Paugh did not "drag his feet" or "take his time when it wasn't needed to be taken." Mr. Polce confirmed that there were times when he personally observed that Mr. Paugh would drill unnecessary test holes and install more bolts than were necessary, that Mr. Beckman had complained to him about this, and that Mr. Johnson "probably" told him that Mr. Paugh at times got behind in his work. Mr. Polce also admitted that he had heard about Mr. Paugh's purported statement that if he had to work overtime he would make sure that he got enough to pay for gas. As a matter of fact, Mr. Polce admitted that as a result of Mr. Beckman's complaints that Mr. Paugh was slowing his work down on purpose to earn overtime, he instructed Mr. Johnson to "keep an eye" on the bolting crew on March 5, in order to address any problems that may arise in this regard.

It would appear from all of the evidence in this case that Mr. Polce was the only member of the management team that made the decision to discharge Mr. Paugh who was aware of Mr. Paugh's prior encounters with Mr. Johnson, and the fact that Mr. Paugh may have been a "problem employee" in terms of his safety concerns. Based on this prior knowledge, one may speculate as to whether it influenced Mr. Polce's input into the decision to discharge Mr. Paugh. Assuming that it did, I find no evidence of any harassment of Mr. Paugh by Mr. Polce because of any past conduct or actions by Mr. Paugh. Mr. Paugh could not establish any instances or acts of harassment on the part of Mr. Polce. I conclude that Mr. Paugh's testimony that Mr. Polce threatened to take him off the bolter and suggested that he find another job if he did not wish to continue bolting with inadequate air is less than credible and self serving. There is no evidence that Mr. Polce ever carried out these purported threats, and Mr. Paugh admitted that notwithstanding his differences with Mr. Polce over the lack of adequate air over his bolter, Mr. Polce would eventually see to it that the air was restored. Further, in each instance when Mr. Paugh saw fit to discontinue bolting when the fan was down, he was always assigned other work to do, and there is no evidence that he ever continued to bolt against his will or was forced to do so when he believed the air was inadequate. This fact was corroborated by the testimony of members of his own bolting crew and others who were aware of Mr. Paugh's reluctance to continue bolting with insufficient air.

Although I conclude that Mr. Paugh's assertion that he was at one time transferred off Mr. Johnson's section because of friction between the two of them has a ring of truth about it, and find Mr. Polce's denials to be less than candid, I nonetheless cannot conclude that such a transfer constituted harassment. In my view, if Mr. Polce wanted to harass or punish Mr. Paugh for his reluctance to continue bolting with inadequate air, Mr. Polce would have kept Mr. Paugh under Mr. Johnson's supervision or permanently transferred him to less desirable work.

With regard to any hostility on the part of management towards Mr. Paugh, I find no credible evidence to support any conclusion that Mr. Gearhart, Mr. Pritt, Mr. Tenney, or Mr. Polce were hostile towards Mr. Paugh, and there is no evidence that Mr. Paugh's prior encounters with Mr. Polce and Mr. Johnson were considered or discussed by management at the time the decision was made to discharge him. In my view, the only evidence of any hostility against Mr. Paugh by management focuses on Mr. Johnson.

Notwithstanding Mr. Johnson's assertions that he and Mr. Johnson "got along fairly well" together, I conclude and find that the record supports a reasonable inference that there was open hostility between Mr. Johnson and Mr. Paugh at least during the last 2 or 3 years that Mr. Paugh worked under Mr. Johnson's supervision. As for Mr. Johnson, he admitted that at one time he invited Mr. Paugh to hit him after Mr. Paugh purportedly threatened to do so. On another occasion, Mr. Johnson admitted that he became angry at Mr. Paugh when he failed to advise him that his bolter needed repair. On yet another occasion on March 5, 1986, when Mr. Johnson confronted Mr. Paugh after he shutdown his bolter, an angry exchange occurred between the two of them, and I believe that Mr. Johnson's statement to Mr. Paugh to install the roof bolts "skin to skin" if he so desired was the result of Mr. Johnson's anger and frustration over what he obviously believed was a deliberate work slowdown by Mr. Paugh. This particular exchange was witnessed by Mr. Sisler who testified that it appeared that Mr. Paugh "was talking back" to Mr. Johnson. In addition, members of Mr. Paugh's bolting crew and others who have worked with him and Mr. Johnson corroborated the fact that Mr. Paugh and Mr. Johnson often argued about Mr. Paugh's reluctance to bolt with inadequate air.

With regard to Mr. Paugh, although Mr. Johnson described him as a "quiet" individual, the record supports an equally strong inference that he too had a temper and was hostile towards Mr. Johnson. In his initial complaint, Mr. Paugh

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attributed his discharge to his "conflicts" and "conflict of interest" with Mr. Johnson. Mr. Paugh admitted that "he had been at odds with Mr. Johnson" since 1984. He admitted that when Mr. Johnson confronted him about shutting down the bolter on March 5, he told Mr. Johnson "you cover your ass, I'll cover mine." When asked whether Mr. Johnson had ever invited him to hit him, Mr. Paugh stated "He could have have. He's a good instigator." Mr. Paugh also admitted to referring to Mr. Beckman as "a cry baby," and that it was possible that he referred to him as "a cry baby son of a bitch." Mr. Polce testified that during his discussion with Mr. Paugh when his bolter was shut off, Mr. Paugh remarked to him "what are you getting all huffy about." Mr. Lucas testified to a prior fight he had with Mr. Paugh, and that although Mr. Paugh described the incident as "horseplay," he admitted that they "wrestled." Taken as a whole, all of these prior incidents and encounters lead me to conclude that Mr. Paugh had a temper equally as volatile as Mr. Johnson, and that a serious personality conflict existed between the two of them.

Although I have concluded that a state of hostility existed between Mr. Paugh and Mr. Johnson prior to Mr. Paugh's discharge, as stated earlier, there is no evidence that Mr. Johnson participated in the management decision to discharge Mr. Paugh. While it is true that Mr. Johnson initially informed Mr. Polce that Mr. Beckman had told him that Mr. Paugh hit him, and repeated Mr. Beckman's allegation when he was subsequently interviewed by the management team during its investigation of the incident, but may not have informed them of Mr. Paugh's denials, I cannot conclude that Mr. Johnson exercised any prejudicial influence on the management team during its deliberations. In short, I find no evidence to establish any nexus between Mr. Johnson's hostility towards Mr. Paugh and his subsequent discharge.

Mr. Polce and Mr. Gearhart confirmed that the collective decision to discharge Mr. Paugh for fighting was made after consideration of all of the information provided by the principals, as well as the witnesses to the altercation, and that all versions of the incident were considered, including Mr. Paugh's. I find Mr. Polce's testimony that Mr. Paugh's prior encounters with Mr. Johnson were not discussed by management when it made the decision to discharge Mr. Paugh to be credible. Mr. Gearhart's un rebutted credible testimony reflects that at the time the decision was made to discharge Mr. Paugh, management was unaware of Mr. Paugh's prior fight with Mr. Lucas, and Mr. Gearhart had no knowledge of any safety complaints by Mr. Paugh or his prior encounters with Mr. Johnson. Under the circumstances, I find no credible

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basis for concluding that Mr. Johnson's hostility had any impact on the decision to discharge Mr. Paugh, and find no evidence to establish any nexus between Mr. Johnson's hostility and Mr. Paugh's discharge.

Respondent's Motivation for Discharging Mr. Paugh

The crux of Mr. Paugh's case is his claim that respondent's mine management seized upon the appearance of a fight between him and Mr. Beckman on March 5, 1986, as an excuse for discharging him because of his protected activities in insisting on compliance with the ventilation and roof support requirements of the law, his complaints in this regard, and his reluctance or refusal to continue roof bolting when he believed that the air over his bolter was inadequate. In short, Mr. Paugh views management's conclusion that he engaged in a fight with Mr. Beckman as a pretextual excuse to get rid of him because of his safety concerns.

In support of his pretextual discharge argument, Mr. Paugh relies on a statement by personnel director Gearhart to MSHA's special investigator during the post-discharge investigation of Mr. Paugh's complaint in which Mr. Gearhart states that Mr. Paugh "had also started a fight with another employee four or five years ago," (Exhibit CÄ4; Exhibit 5Ä1). Conceding that neither Mr. Gearhart or the management team which made the decision to discharge him were aware of this prior incident at the time the decision was made to discharge him, Mr. Paugh nonetheless argues that Mr. Gearhart made the statement to make it appear that Mr. Paugh had a history of fighting, thereby lending credibility to management's discharge decision. Further, during the course of the hearing, Mr. Paugh's counsel took issue with Mr. Gearhart's further statement to MSHA that "Both Earl Sisler and Harry Beckman have proved in Mettiki's experience, to be among the most credible members of it's hourly work force." Counsel suggested that this statement by Mr. Gearhart was a self-serving after-the-fact declaration to support management's belief that Mr. Sisler's and Mr. Beckman's version of the altercation which took place between Mr. Paugh and Mr. Beckman was true, while Mr. Paugh's version was a lie.

It seems absolutely clear to me from the evidence in this case that at the time management made the decision to discharge Mr. Paugh, none of the participants in that decision had any knowledge of Mr. Paugh's prior purported fight with Mr. Lucas. Under the circumstances, I find no basis for concluding that Mr. Gearhart's post-discharge statement to MSHA prejudiced Mr. Paugh or adversely impacted in any way on

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management's decision to discharge him. It would appear that Mr. Gearhart's statement was solicited by the special investigator during his fact-finding investigation. While it may be true that Mr. Gearhart's statement concerning Mr. Paugh's involvement in a prior fight may have in some way impacted on MSHA's determination not to pursue his case further, I find no basis for concluding that management relied on that prior incident to support its discharge decision. Mr. Paugh's complaint before this Commission and me has been adjudicated de novo, without regard as to what may have motivated MSHA not to initially pursue Mr. Paugh's complaint further.

Since the merits of Mr. Paugh's complaint is before me de novo, the respondent is free to introduce relevant and material evidence of Mr. Paugh's alleged propensity for fighting in further support of any conclusion that a fight more than likely took place on March 5, 1986. The respondent has done this through the testimony of Mr. Lucas, and as the trier of fact, I am free to assess Mr. Lucas' credibility, and to make my own independent judgment on this issue. The same can be said of the testimony of Mr. Sisler and Mr. Beckman. Having viewed them during their testimony at the hearing, I am free to assess their credibility independent of Mr. Gearhart's views as to their credibility and veracity. However, management was free to assess the credibility of Mr. Beckman and Mr. Sisler during its investigation of the March 5, 1986, fight in question, and as confirmed by Mr. Gearhart, management chose to believe Mr. Beckman's and Mr. Sisler's version of that incident, and rejected Mr. Paugh's version that he simply placed his hand on Mr. Beckman's shoulder while attempting to get his attention in order to engage him in a conversation.

The pivotal issue in this case is whether or not the respondent has established through a preponderance of the credible evidence and testimony that at the time management made the decision to discharge Mr. Paugh, it had reasonable grounds to believe that Mr. Paugh and Mr. Beckman engaged in a fight on March 5, 1986, and if so, whether or not its conclusion that Mr. Paugh was the aggressor, thus warranting his discharge for violating a company rule against fighting, is likewise reasonably supportable by a preponderance of the credible testimony and evidence.

Respondent's Employee Handbook Exhibit CÄ4, 9Ä2), at page 26, states that "No horseplay, fighting or other unsafe physical acts will be tolerated on Company property." Page 18 of the handbook, which explains in part major employee offenses that may result in a potential discharge of an

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employee specifically provides for discharge for "Violating safety rules or special hazard procedures, fighting or other acts which may have a serious affect on safety or continuity of the operation" (emphasis added).

The record establishes that the decision to discharge Mr. Paugh was made by management after an investigation of the fighting incident. The investigation consisted of interviews conducted by four members of an ad hoc management team consisting of mine foreman Polce, personnel director Gearhart, general mine superintendent Billy Pritt, and mine superintendent Paul Tenney. The team conducted interviews on Friday, March 7, 1986, and they interviewed Mr. Paugh, Mr. Johnson, Mr. Beckman, and Mr. Sisler, separately and out of each other's presence. Mr. Polce and Mr. Gearhart, were the only members of the management team who testified in this case. They confirmed that the decision to discharge Mr. Paugh was a collective decision made by the team. On the basis of the information developed during the interviews, the team concluded that Mr. Paugh and Mr. Beckman got into a fight on March 5, 1986, and that Mr. Paugh precipitated the fight and was the aggressor. Since fighting is contrary to company policy and is an offense which may result in the discharge of the offending employee, the decision was made to discharge Mr. Paugh for violating this policy, and Mr. Polce informed Mr. Paugh of the decision on Monday, March 10, 1986.

Mr. Beckman testified that as he started to tram his bolting machine, Mr. Paugh approached him from behind, called him "a cry baby son of a bitch," and either hit or pushed him from behind into the moving machine. Mr. Beckman further testified that when he was pushed into the machine, his hat flew off his head, and his chest hit the machine. Although Mr. Beckman confirmed that no blows were exchanged, and responded "No" when asked whether he and Mr. Paugh engaged in a "fight," he confirmed that he defended himself by grabbing Mr. Paugh's arms as he started to lift them, and that he did so because he believed that Mr. Paugh would try to hit him.

Mr. Sisler, who was eye witness to the encounter between Mr. Paugh and Mr. Beckman, testified that as Mr. Paugh passed by him on his way to where Mr. Beckman was working at more than a normal pace, Mr. Paugh appeared to be upset and stated to Mr. Sisler as he passed him that Mr. Beckman was "a damn cry baby." Mr. Sisler testified that from his vantage point, his view was partially blocked by the machine, and he could only see Mr. Paugh and Mr. Beckman from the waist up. Although he observed no punches being exchanged, and did not actually see Mr. Paugh push Mr. Beckman, he did see Mr. Beckman's hat

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fly off his head, and he concluded that Mr. Beckman had either been pushed into the machine by Mr. Paugh or that he "flinched," as if being caught by surprise by Mr. Paugh. After Mr. Beckman's hat flew off, Mr. Sisler saw Mr. Beckman grab Mr. Paugh by the wrists and hold him against the rib.

Mr. Lucas, who was present during the shift when the encounter between Mr. Paugh and Mr. Beckman took place, was not interviewed by the management team. Mr. Lucas confirmed that while he did not observe the incident, after learning that Mr. Johnson had taken Mr. Beckman and Mr. Paugh out of the mine, he asked Mr. Johnson for an explanation, and Mr. Johnson informed him that "It's went too far this time," and that he had taken them out of the mine because he was doing his job.

Mr. Lucas testified that after Mr. Johnson took Mr. Paugh and Mr. Beckman out of the mine, he asked Mr. Sisler about the incident, and Mr. Sisler told him that he observed that Mr. Beckman had Mr. Paugh against the rib "slugging him." When asked to explain Mr. Lucas' statement, Mr. Sisler stated that in reply to a question by Mr. Lucas as to whether any punches had been thrown, he replied in the affirmative, but did so more or less as a joke because Mr. Lucas initiated the conversation, and Mr. Sisler did not believe it was any of his business. Mr. Sisler further explained that he meant nothing by the remark and did not wish to see anyone get into any trouble. He reiterated that he saw no punches thrown between Mr. Paugh and Mr. Beckman.

Mr. Beckman and Mr. Sisler confirmed that when they were interviewed by the management team during its investigation of the incident in question, the information they gave with respect to what happened during the encounter between Mr. Paugh and Mr. Beckman was consistent with their testimony in this case. Having viewed them on the stand during their testimony in this case, I find Mr. Beckman and Mr. Sisler to be credible witnesses.

Mr. Polce testified that while he took no notes during the management interviews conducted as part of the investigation of the fighting incident, he specifically recalled Mr. Sisler's statements that Mr. Paugh had referred to Mr. Beckman as a "cry baby, bastard, or something" and that he saw Mr. Beckman's hat fly off and observed Mr. Beckman turn around to protect himself by grabbing Mr. Paugh's arms. Mr. Polce also recalled Mr. Beckman's statements that Mr. Paugh had pushed him into the bolting machine while he was tramming it and that his hat was knocked off. Mr. Polce

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testified that it made no difference to him whether Mr. Paugh "hit" Mr. Beckman from the back or "pushed" him from the back. As far as he was concerned, if Mr. Paugh was the aggressor and came around behind Mr. Beckman and pushed him into the machine "that's it" (Tr. 150). Mr. Polce confirmed that all versions of the incident including Mr. Paugh's, were considered by management during its investigation, and it was concluded that Mr. Beckman was not the aggressor.

Mr. Gearhart confirmed that management considered all versions of the incident, including Mr. Paugh's, but accepted Mr. Beckman's and Mr. Sisler's version of the event. Mr. Gearhart testified that considering all of the circumstances, including the fact that Mr. Beckman's hat flew off, that he was either hit or pushed into the bolter, the fact that Mr. Paugh was angry and cursed Mr. Beckman, and the fact that Mr. Beckman grabbed Mr. Paugh to restrain him, management concluded that a fight had taken place between Mr. Paugh and Mr. Beckman, and that Mr. Paugh was the aggressor. It was also concluded that Mr. Beckman had acted properly by not returning any blows and by seeking out his foreman to report the matter. Mr. Gearhart further confirmed that he personally found Mr. Beckman's version of the incident to be more credible than Mr. Paugh's, and he believed that Mr. Paugh lied when he stated during his interview that he went around to Mr. Beckman's side of the bolting machine simply to speak with him, and that he merely placed his hand on Mr. Beckman's shoulder.

In his posthearing brief filed on Mr. Paugh's behalf, counsel asserts that the respondent seized upon the appearance of a fight between Mr. Paugh and Mr. Beckman to support the discharge of Mr. Paugh. This suggests that either a fight did not take place, or that the respondent has made it appear that an otherwise innocuous disagreement between Mr. Beckman and Mr. Paugh was a fight in order to conceal its true motive in discharging Mr. Paugh because of his protected safety activities. In this regard, during the course of the hearing, Mr. Paugh's counsel made reference to a finding by the State of Maryland Department of Unemployment Insurance in connection with Mr. Paugh's unemployment benefits claim that the information provided by the respondent during the course of the processing of Mr. Paugh's claim was insufficient to substantiate the alleged fight. That "finding" is stated on a Notice of Benefit Determination form dated March 20, 1986 (Exhibit CÄ4, 8Ä1).

Mr. Gearhart conceded that he was contacted by a state unemployment agency representative, and confirmed that the

respondent declined to appear at any state proceeding challenging Mr. Paugh's unemployment claim. Mr. Gearhart confirmed that he spoke with the representative over the telephone, but denied that the representative expressed any opinion that the incident, as described by Mr. Gearhart over the telephone, "did not sound like a fight." Since the representative did not testify in this case, Mr. Gearhart's testimony stands unrebutted. With regard to the state unemployment compensation "finding," aside from the fact that it is not binding on me, I find no evidentiary support for the conclusion reached by the state representative and have given it no weight. Further, I find no basis for drawing any adverse inferences against the respondent simply because it declined to participate in the unemployment proceeding.

The evidence in this case establishes that immediately prior to the confrontation between Mr. Paugh and Mr. Beckman, Mr. Paugh and his section foreman Johnson engaged in a heated discussion over the spacing of the roof bolts, and Mr. Paugh was angry at Mr. Beckman for complaining to Mr. Johnson about his work. During his conversation with Mr. Johnson, Mr. Paugh referred to Mr. Beckman as "a damn cry baby." As soon as Mr. Johnson departed, Mr. Paugh lost no time in getting to Mr. Beckman, and Mr. Paugh admitted that he "was in a hurry" to get to Mr. Beckman. Although Mr. Paugh could not recall stating to Mr. Beckman "I'm going to get you, you son of a bitch," Mr. Paugh admitted that it was possible that he did make the statement, and that it was also possible that he referred to Mr. Beckman as "a cry baby" or "crazy." Mr. Paugh further admitted that in his earlier discussion with Mr. Johnson and in reference to Mr. Beckman, he stated to Mr. Johnson "what's the problem? Is this cry baby complaining about me?" Taking all of this into consideration, I conclude and find that Mr. Paugh was angry with Mr. Beckman, and that when he went over to Mr. Beckman's side of the bolting machine he acted as the aggressor, and did so with the specific intent to confront Mr. Beckman about his complaints to Mr. Johnson. I do not believe Mr. Paugh's assertion that he went around to Mr. Beckman's side of the bolter simply to engage him in a conversation over the spacing of the roof bolts or the positioning of the roof-bolting machine.

As stated earlier, the issue regarding the encounter between Mr. Paugh and Mr. Beckman, is whether or not the management team which concluded that a fight had taken place had a reasonable basis for making that conclusion. I take note of the fact that during the course of the hearing, Mr. Paugh's counsel observed and seemingly agreed with the testimony that Mr. Paugh went around to Mr. Beckman's side of the bolter;

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that "something happened between Mr. Paugh and Mr. Beckman;" that "there was a scuffle;" and that "some sort of altercation took place" (Tr. 71). Counsel's observations are consistent with the testimony of Mr. Beckman and Mr. Sisler, which I find credible, and inconsistent with Mr. Paugh's assertion that he merely laid his hand on Mr. Beckman's shoulder to get his attention, which I find less than credible.

The respondent's employee handbook does not define the term "fight" or "fighting." However, Webster's New Collegiate Dictionary defines the noun "fight" in part as "a hostile encounter," "a verbal disagreement," "argument." Black's Law Dictionary, 1968 Edition, defines the term "fight" in part as follows: "An encounter, with blows or other personal violence, between two persons The term does not necessarily imply that both parties should give and take blows. It is sufficient that they voluntarily put their bodies in position with that intent."

I take note of the fact that the respondent's safety rules and employee rules of conduct prohibits fighting or other unsafe physical acts or other acts which may have a serious affect on safety. The parties do not dispute the fact that fighting in an underground mine, particularly around moving machinery and equipment, could reasonably be expected to result in serious consequences to miners who engage in such conduct. In my view, the fact that the participants do not draw blood or strike or exchange blows with each other is irrelevant. I conclude that any encounters of the kind which has been described in this case, in which one party acts as the aggressor with the intent to inflict harm on the other party by either intentionally or unintentionally pushing him into a piece of moving equipment, or aggressively accosts him by placing his hands on him in such a manner as to cause him to fall against a piece of moving equipment, or exposes him to that potential hazard, constitutes an act of fighting, as well as an unsafe physical act affecting the safety of the miner who is on the receiving end of such an act and who did not act as the aggressor or otherwise initiate the encounter.

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence adduced in this case, I conclude and find that the respondent's decision to discharge Mr. Paugh, as articulated by the management team that made that decision on the basis of the information developed during the course of its investigation, was based solely on management's reasonable and plausible belief that Mr. Paugh had acted as the aggressor and had engaged Mr. Beckman in a fight. I find no credible basis for concluding that at the

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time management made the decision to discharge Mr. Paugh, it was otherwise predisposed to discharge Mr. Paugh because of his safety concerns, or because of any protected safety activities on his part. To the contrary, I conclude that the respondent has established a believable and plausible legitimate reason and cause to support the discharge, that it was justified in taking the disciplinary action as a reasonable exercise of its legitimate interests in disciplining its own work force, and that in doing so it was not motivated by Mr. Paugh's protected safety activities.

CONCLUSION AND ORDER

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

The respondent's counterclaim for costs and attorneys fees incurred in its defense of Mr. Paugh's complaint on the ground that Mr. Paugh intentionally and willfully omitted from his original complaint the fact that he had been discharged by the respondent IS DENIED.

George A. Koutras
Administrative Law Judge