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SLADE VANOVER V. SHAMROCK COAL
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SLADE VANOVER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 93-359-D
: BARB CD 93-06
SHAMROCK COAL COMPANY, :
Respondent :

DECISION

Appearances: Phyllis L. Robinson, Esq., Hyden, Kentucky, for
the Complainant;
Timothy L. Wells, Esq., Neville Smith, Esq., Smith
& Wells, Manchester, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination filed with the Commission on February 23, 1993, by the complainant against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3). The complainant asserts that he was last employed by the respondent as a Longwall Technician, and that in the course of his employment he complained to his supervisors about (1) excessive dust levels, (2) underground detonations while men were working at the face, and (3) the transportation of explosives on a mantrip. The complainant further asserts that he was constructively discharged and/or forced to resign on July 20, 1992, due to these safety complaints being ignored by the respondent.

The complainant filed his initial complaint with the Department of Labor, Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, the complainant filed a complaint with the Commission.

The respondent filed a timely answer to the complaint denying any discrimination, and asserting that the complainant voluntarily quit his job. A hearing was held in London, Kentucky, and the parties filed posthearing briefs which I have considered in the course of my adjudication of this matter.

Issue

The principal issue in this case is whether or not the complainant was constructively discharged by the respondent at the time he left his employment because of the alleged failure by the respondent to take any remedial action in response to his safety complaints. 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), and (2) and (3).
3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Complainant's Testimony and Evidence

The complainant Slade Vanover testified that he worked for the respondent for twelve and one-half years. He started as a roof bolter, and then worked as a continuous miner operator and a longwall shield technician, beginning in April, 1991. He received longwall training, knew how to perform that job, and he was comfortable doing that job (Tr. 13-18). He stated that when he left his job he realized that he was leaving "one of the best jobs in the area", and that "I thought about that real hard" (Tr. 20). In response to a question as to how long it took him to make his decision, he responded as follows at (Tr. 20):

A. Well, when I took my vacation two weeks prior to when I actually quit and I thought about it all-- I guess I waited till the last minute before I actually quit.

Q. Can you tell us why you left that job?

A. Because of conditions I was having to work in.

Mr. Vanover stated that he worked as a continuous miner operator for five or six years before becoming a shield technician, and that he made complaints about the dusty conditions. He stated that his complaints were taken care of "most of the time" (Tr. 16, 21).

Mr. Vanover stated that he made his initial complaint about the dust on the longwall in April, 1991, "the week or so we started running coal" on the day shift (Tr. 21). He stated that he complained to mine superintendent Ed Boylen, head maintenance

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foreman Jim Tye, longwall coordinator David Hensley, safety director Steve Shell, dust sampler Bill Sizemore, section maintenance foreman Hetch Begley, and supervisor Denny Osborne. He also complained to second shift supervisor Randy Turner and second shift maintenance foreman Wade Blevins (Tr. 22-24). Mr. Vanover stated that he worked for awhile on the second shift and then transferred to the first shift. He complained about the dust on both shifts (Tr. 24).

Mr. Vanover explained that the dusty conditions resulted from insufficient water to keep the dust down, and that "every once in awhile the air was insufficient to blow the dust out" (Tr. 24). In response to questions as to whether Mr. Boylen or Mr. Tye addressed his complaints, Mr. Vanover stated "Nothing, that I seen. They never took care of nothing, none of them didn't do nothing" (Tr. 24-25). He further stated that Mr. Blevins and Mr. Turner tried to control the dust by hanging ventilation curtains, but that they could not correct the lack of water because "they didn't have no help from the people that was running it" (Tr. 25).

Mr. Vanover stated that the shear cutting drum water pressure was supposed to be maintained at approximately 150 to 200 pounds on the sprays, but on one occasion when it was checked the pressure and was only 40 pounds, and foreman Begly "told them to go ahead and run anyway" (Tr. 26).

Mr. Vanover stated that air stream dust helmets were supplied approximately six months after longwall coal production started (Tr. 27). He confirmed that the helmets "helped considerably for a while", but were later insufficient because of the lack of daily filters (Tr. 28-29). Mr. Vanover stated that fellow miners Darryl Brock, James Hacker, Larry Smith, and Manford Roark also complained about the dust (Tr. 29).

Mr. Vanover stated that he also complained about working excessive hours, and at times, he worked seven days a week on ten and twelve hour shifts. He confirmed that the mine is nonunion, and that he was paid overtime and had no complaints about the pay (Tr. 30-31).

Mr. Vanover stated that on June 23 and 24, 1992, "shooting" took place underground, and that this scared him. He was working at the longwall face at that time and he "could feel the jar" of the shot, saw the smoke and dust coming toward him and could smell ammonia from the shot (Tr. 32). He stated that he complained about this but that "they shot the next day, too" (Tr. 33).

Mr. Vanover stated that on June 23, 1992, explosives were improperly handled while he was going out on a mantrip. He stated that "I didn't really know that they were on there at the

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time, till they took them off the motor". He explained that he observed Mark Griffy put a bag on the motor but he did not know what was in the bag at the time. He stated that the mantrip was going out with approximately 20 men in it and that "we just went out and they took the powder off". He confirmed that Mr. Griffey and other people told him that the explosives were on the mantrip and that they were transferred to another mantrip. He believed that explosives were required to be kept in self-containers and should not be transported on a mantrip. He stated that this incident scared him and that "I've dealt with powder before. It definitely scared me when I found out about it". (Tr. 34-35). Mr. Vanover stated that he complained about the explosives to Mr. Hensley and that Mr. Hensley said nothing about it and "just kind of shrugged his shoulders" (Tr. 35).

Mr. Vanover stated that he complained about the dust from the beginning of his work on the longwall section, and continued his complaints during the entire time that he worked there. He stated that the conditions did not improve and that "at times, they got worse" (Tr. 35). He stated that the longwall operated with less than 90 percent of the sprays being operative, that there were times when there was no water, and that the water was not always turned on before mining began (Tr. 36).

Mr. Vanover stated that before taking his vacation in July, 1992, he and Mr. Smith specifically complained about the water to Mr. Begley. Mr. Osborne stopped the shear and instructed Mr. Begley to check the water. Mr. Begley found 40 pounds of pressure on the drum and stated that he would fix it on the third shift. Mr. Osborne was told "to go ahead and run anyway", and it was not repaired the next day when he came to work. Mr. Vanover stated that the longwall shear cut in both directions and that he worked downwind of the shear and would be in more dust (Tr. 37).

Mr. Vanover stated that he took his vacation in order to consider whether he wanted to continue working for the respondent. He stated that he thought about "them shooting underground and just the dust. Just fresh air was a big key". These conditions scared him and he stated that "I figured either me or somebody else was going to get killed up there" (Tr. 38). He further stated that "It's just the way they was running, the way they was doing things. They was in a big hurry all the time to do stuff and they didn't take time to see what they was doing" (Tr. 39).

Mr. Vanover stated that he was afraid of a dust explosion, that it affected his health, and that "this is one of the reasons I quit when I did" (Tr. 39). He also had fears that miners would not be evacuated quickly if they were injured because a mantrip was seldom kept at the face area (Tr. 40). He confirmed that Mr. Griffey, a close friend, was killed in an accident at the longwall, but that this incident occurred approximately a month

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after he quit, and Mr. Vanover did not believe that it was the result of any of the conditions that he complained about (Tr. 41).

Mr. Vanover stated that he was afraid for his life at the time he quit his job. He stated that he has often observed sparks from the operating longwall shear and that he was concerned about the poor ventilation (Tr. 42). In response to a question as to whether any particular incident constituted the "last straw" that prompted him to say "this is it", he responded as follows at (Tr. 43-44):

A. Well, just that day where they checked the water and there was just forty pounds on it and they said to go ahead and run it anyway. And they give me and Larry a hard time over it. They said we was just trying to be deadbeats.

Q. Who gave you a hard time?

A. Hetch.

Q. Can you remember his words?

A. I can't remember his exact words. He just said, "Go ahead and run it."

* * * * *

Q. Were you also afraid when the blasting was going on?

A. Yes, Ma'am. I was more afraid then -- I almost quit then.

Q. While you were thinking about your decision, did you consider whether or not the ventilation might improve; the dust might be controlled?

A. No, I knew it wouldn't be.

Q. How did you know that?

A. I worked for them twelve and a half years. It never changed.

JUDGE KOUTRAS: You mean for twelve and a half years, these conditions went on like this?

THE WITNESS: Well, the things like dust and stuff, that was bad. They never did change.

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JUDGE KOUTRAS: In twelve and a half years?

THE WITNESS: Yeah.

Mr. Vanover stated that he threatened to quit to Mr. Begley and Mr. Osborne if the dust conditions were not remedied, and that "they made a joke of it" (Tr. 47). Mr. Vanover explained that he told them that " I would probably take them to court over it", but that he didn't know about which court because "I don't know much about this". He also stated that it "was just kind of a threat. I was trying to get them to do something" (Tr. 48).

Mr. Vanover explained that on the day he quit he started to go to work but instead went to the company office in Manchester and spoke to a lady (Barbara) who was working in the office and told her he was leaving his employment. Company Official Kenny Smith called him later to come back to the office. Mr. Vanover stated that he returned and told Mr. Smith that he quit "because of the dust and they wouldn't work on the water and stuff" (Tr. 49). Mr. Vanover identified a copy of a company "Separation/exit interview" form which states that he was leaving because of "working conditions too dusty at the face" (Exhibit C-A).

Mr. Vanover confirmed that he had previously refused to perform unsafe work 5 or 6 years before he quit, but that he never refused to do any work on the longwall (Tr. 52). He believed that he had no choice at the time he quit his job, and that "it was die or get out" (Tr. 53). He confirmed that he has a pending black lung claim against the respondent (Rejected Exhibit C-B; Tr. 55-56).

On cross-examination, Mr. Vanover stated that it took two or three months to set up the longwall after January, 1991, and that large fans were installed. He stated that he requested his vacation time three or four days before he took it (Tr. 63). He confirmed that the respondent took some corrective action concerning the problems on the continuous miner section, but he did not believe it did enough (Tr. 64).

Mr. Vanover stated that the longwall shields were in working order and had enough water, but he indicated that they were powered by different pumps (Tr. 65). He stated that the respondent used 8 inch water lines to supply the mine with water. He confirmed that the mine had fans large enough to provide the required ventilation and had the equipment and means to control the dust. In his opinion, "they simply didn't get it done" (Tr. 66).

Mr. Vanover stated that he transferred to the first shift in approximately March , 1992. He confirmed that when he worked on the second shift he made dust complaints to foreman Turner and

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that Mr. Turner "Tried to do what he could with them" (Tr. 67). He recalled that there were occasions when the longwall was shut down and production was stopped to repair the air and water on the second shift (Tr. 67-68).

Mr. Vanover stated that when Mr. Begley checked the water and found 40 pounds of pressure, production was stopped and Mr. Osborne did address his complaint that day (Tr. 69). Mr. Vanover also confirmed that there were several other occasions when Mr. Osborne and Mr. Turner stopped production at his request to address the lack of water (Tr. 70). He also confirmed that shear operators James Hacker and Bill Wilson shut the shear down due to a lack of water, and he was not aware that Mr. Hacker was ever disciplined for shutting down the shear (Tr. 71).

Mr. Vanover stated that when he moved to the first shift, he worked fewer hours than he did while on the second shift (Tr. 73). He confirmed that he bid for the longwall job and was informed that he would be required to work extra hours when the longwall was being moved or if there were any problems (Tr. 74-75). He further confirmed that the longwall was moved periodically and that more coal was produced on the second shift than on the first shift, and that the people on the second shift "made an attempt to treat you better" than on the first shift (Tr. 78).

Mr. Vanover confirmed that when he gave his deposition he stated that "Randy Turner and them, they was pretty good about, you know, trying to keep you out of the dust and stuff" (Tr. 80). Mr. Vanover confirmed that air stream helmets were furnished to him on both the first and second shifts, but he indicated that his helmet motor wouldn't work during the last few weeks of his employment (Tr. 81-82). He also confirmed that he started complaining about the availability of helmet filters and was not provided more than one filter "right at first" (Tr. 83).

Mr. Vanover stated that he was never told not to work downwind of the shear, but that Mr. Hensley, Mr. Boylen, and Mr. Sizemore told him not to work downwind when an inspector was on the section (Tr. 86). Mr. Vanover further stated that his job required him to be downwind at times, and that "sometimes it was a routine thing, sometimes it wasn't" (Tr. 86). When asked if he were there by his own choice as a matter of routine, he replied "I guess I was" (Tr. 86).

Mr. Vanover stated that when his work required him to be downwind of the shear he would ask the first shift shear operator, who he called "wolfman", to stop the shear for a few minutes, but he wouldn't and kept cutting (Tr. 87). Mr. Vanover could not recall ever asking Mr. Osborne or Mr. Turner to stop production while he was downwind of the shear (Tr. 87). He

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confirmed that the respondent's ventilation plan specified that no one be downwind of the shear, but stated that "it was expected of us" (Tr. 87-88). He further confirmed that there were times when he stayed downwind of the shear at the tailgate while the shear proceeded to the headgate to cut coal, to straighten the tail, or push the pan line out (Tr. 88-89).

Mr. Vanover stated that he knew that staying downwind of the shear was contrary to the ventilation plan, and he confirmed that no one ever told him to stay there (Tr. 90). He also confirmed that on one occasion Mr. Begley told him that "you ain't supposed to be back down there anyway", and that he made this statement when he (Vanover) complained about the dust and the lack of water (Tr. 90).

With regard to his complaint about shooting underground, Mr. Vanover stated that he complained to Mr. Hensley the morning after the first shot, but he could not state if his complaint on the second day was before the second shot was made. He confirmed that in his prior March 1993 deposition he stated that he complained after the second day, but that he could not now remember his deposition statement but "guessed" that "it's close to correct" (Tr. 94).

Mr. Vanover stated that "he kind of complained" to Mr. Hensley about the shots, and he explained that "I just told him I didn't like it" (Tr. 95). He reiterated that he could not remember whether he complained before or after the second shot was fired (Tr. 96).

Mr. Vanover explained why he believed the shots were dangerous, and he stated that he was concerned about an explosion and the dust (Tr. 97-98). He confirmed that in his deposition he stated that he was not concerned about a roof fall and that his biggest concern was the dust generated by the shots (Tr. 99-100). He believed that "the way they shot them" was a violation of "something" but he could not state with any certainty if it was illegal (Tr. 101). He could not recall if any further shots were fired subsequent to the two in question (Tr. 102).

With regard to his complaint concerning the transportation of explosives in a mantrip, Mr. Vanover stated as follows (Tr. 102-103):

Q. All you really saw wa a yellow bag on the man trip. Is that correct?

A. Yes, that is correct.

Q. And you don't know of your own personal knowledge what was in the bag.

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A. Well, I don't know whether it was the same bag or not, but prior to that evening, I seen the explosive in the bag.

Q. You don't really know if anything at all was in the bag, do you?

A. No.

Mr. Vanover confirmed that after he quit his job he met with Mr. Smith and Mr. Bauer at "Pete's Minimart" in Leslie County at their request and Mr. Bauer asked him why he had quit. Mr. Vanover stated that he explained his concerns, but he denied that Mr. Bauer offered to have a safety inspector return to the mine with him and to stay on the longwall section with him to determine if there were any problems. Mr. Vanover also denied that Mr. Bauer offered to go himself or to ask Lynberg Rice to go with him (Tr. 105-106). Mr. Vanover further stated as follows at (Tr. 106-107):

Q. What did he say when you made these complaints and told him why you quit?

A. He just said -- I don't remember exactly what he did say. He just said, "If we go back in there, and try to change things, will you come back?" And I told him things wouldn't change; they would be just like they was when I started.

Q. Did you understand him to mean that he would go back with you and try to help you change things?

A. No, sir, I didn't take it that way.

Q. In any event, he asked you if you would return to your employment if your concerns were addressed.

A. That would be a fair statement.

Q. What about Mr. Smith? Did he offer to go underground with you?

A. No, sir.

Q. Did he offer to speak to anybody at Shamrock on your behalf?

A. I don't recall it.

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Q. Did you tell Mr. Bauer and Mr. Smith under what circumstances you would return to Shamrock?

A. No, I don't believe so.

Q. Did you tell them that you were intending to enroll in college?

A. Yes, sir. I told them I thought about going to college.

Q. Did you tell them you were done with coal mining?

A. I told them I was done with Shamrock.

On redirect examination, Mr. Vanover stated that during his employment at the mine he did not believe that there was adequate ventilation to control the dust. He stated that the ventilation plan required 34,000 feet of air and that for the year and one half that he worked on the longwall, he believed that the air was adequate for only a one-month period (Tr. 114-117). Mr. Vanover confirmed that he was not aware of any violations that were issued for inadequate air, but the mine was shut down by the inspectors, and he did not know how many times this occurred (Tr. 118).

Mr. Vanover stated that he complained about inadequate air at the face, but that he never specifically mentioned the 34,000 foot plan requirement and never requested an air reading (Tr. 119-120). He confirmed that he has observed foreman take air readings, but did not know if they were taken each time he complained (Tr. 120).

Mr. Vanover had no knowledge as to whether anyone ever refused to work downwind of the shear, and he confirmed that he did not (Tr. 123). He also confirmed that he was not warned about the blasting that occurred on his shift (Tr. 123). Mr. Vanover believed that he met with Mr. Smith and Mr. Bauer before he filed his MSHA complaint in this matter (Tr. 124).

In response to further questions, Mr. Vanover confirmed that the incident concerning the alleged transportation of explosives in the mantrip occurred only one time, and that the underground blasting incident was the only time that had occurred on his shift (Tr. 130). He confirmed that he could not remember how he communicated his complaint concerning the transportation of explosives because "Larry (Smith) was already talking about it. What I complained about was them shooting underground" (Tr. 131). With regard to the detonations underground, he stated that "I knew they shot after I told him" (Tr. 131). He further stated that he wanted to quit over these two incidents and "figured it would happen again somewhere down the line" (Tr. 132).

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Mr. Vanover reiterated that when he met with Mr. Smith and Mr. Bauer after he quit he had not yet filed his MSHA complaint and did not tell them that he was thinking about filing a complaint. Although he had filed an unemployment complaint he was not certain whether he filed it before this meeting (Tr. 139-141). He confirmed that when he quit his job he withdrew his company paid profit sharing account of approximately over \$56,000 (Tr. 142-143). He confirmed that his unemployment claim was denied and that he received no benefits, and he did not know that it was denied because he left his work voluntarily (Tr. 144).

George D. Smith, testified that in June, 1992, he was employed by the respondent on the day shift. He stated that at the end of his shift and while travelling out of the mine on a mantrip he was seated on one end and heard someone at the other end state "Let's get that dynamite off the motor and put it on that other motor". He could not identify who made the statement (Tr. 146-148).

On cross-examination, Mr. Smith stated that he did not see the dynamite or any container that might have contained dynamite. He did not see Mr. Vanover on the mantrip, and he indicated that the other vehicle was a supply car locomotive and that it was parked at a switch ready to go to the face (Tr. 149-150).

Mr. Smith stated that he did not hear anyone say anything about the alleged transfer of the explosive bag and did not see the bag. (Tr. 152). When asked if someone stated "Let's get that bag off the motor", Mr. Smith replied "They might have said that" (Tr. 153).

Larry Smith testified that he last worked for the respondent on August 10, 1992, and that he voluntarily left his employment (Tr. 155). He confirmed that he worked on the longwall with Mr. Vanover for four or five months, and previously operated a continuous miner. He stated that he bid for the longwall job and performed various tasks (Tr. 156).

Mr. Smith testified that when the longwall was initially started, the water sprays and air on the section were erratic. He confirmed that he asked for and received an air stream helmet, and initially was supplied with filters, but later had to utilize used filters which were ineffective (Tr. 158).

Mr. Smith stated that he complained about the dust to Mr. Osborne, Mr. Shell, and Mr. Sizemore, and that they responded by telling him that "we'll take care of it" but that "we have to run coal". He stated that the respondent supplied air and water for the sprays when an inspector was in the mine, but that "after he left, you know, it was the same old thing" (Tr. 160). He

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confirmed that MSHA inspector Randy Cline issued some citations, but he did not know how many were issued (Tr. 160).

Mr. Smith stated that the longwall shear would make as many as 18 passes when an inspector was not present, and that the mine holds "two or three world records" for longwall production (Tr. 166). He stated that the water sprays worked intermittently from day to day and that three or four repairmen were working at the face on a regular basis, and that production was not stopped to repair the sprays (Tr. 168). He stated that the day he quit he complained to Mr. Begley about the spray pressure and that Mr. Begley cussed him (Tr. 169).

Mr. Smith stated that longwall repairs were made on the third shift, but at no time were the conditions "perfect" when he worked at the longwall and that there was "always something going wrong" (Tr. 171). He stated that he had to work downwind of the shear because it was cutting in both directions (Tr. 172). He confirmed that he complained to Mr. Sizemore and Mr. Shell about the water, the dust, the air, and the dust filters, and that "there was times they would correct it, you know, if an inspector was there" (Tr. 173-174). He also complained about broken roof shield protection, but that nothing was done about this (Tr. 176-178).

Mr. Smith stated that he never contacted an inspector about any of his complaints because "the word got back to the company", and he was not aware that he could make anonymous complaints and was afraid he would lose his job if he complained to an inspector (Tr. 183-184).

Mr. Smith confirmed that he complained once in June or July about shots being fired while the longwall was running and he received no warning about the shot (Tr. 184). With regard to the transportation of dynamite on a mantrip, Mr. Smith stated that it was in a yellow bag and placed on another motor which was going out of the mine (Tr. 185). He stated that "we didn't know it was on there till we got out and switched motors" (Tr. 186).

On cross-examination, Mr. Smith denied that Mr. Edward Bauer ever called him at home after he quit his job, but stated that Mr. Hensly and someone else asked him to come back to work. He confirmed that Mr. Bauer gave him his business card and told him to call him if he had any problems, but that he did not do so because he quit and "was relieved" (Tr. 192-193).

Mr. Smith confirmed that he filed an unemployment claim against the respondent but "gave it up" and never appeared for a scheduled hearing before a referee. He also confirmed that he made no complaints to MSHA or to any state regulatory authority about his problems (Tr. 196-197). Mr. Smith stated that his

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memory was clear about the dynamite being transported out of the mine after being moved from one motor to another (Tr. 199).

Mr. Smith stated that after he quit, he visited the MSHA office at Hyden and was interviewed and gave a statement about his complaints. Mr. Vanover's counsel characterized the "complaint" as an "informational complaint" concerning "safety to the other workers". Mr. Smith confirmed that he did not file a discrimination complaint because "It's not going to change. They're not going to do nothing no different" (Tr. 205).

Mr. Smith confirmed that he knew that the respondent's ventilation plan prohibited employees from being downwind of the shear, but stated that he needed to be there to perform assigned work. He confirmed that he has requested a boss to shut the shear down if there was insufficient air or water and that "sometimes they would, and sometimes they wouldn't" (Tr. 220-221).

Jim Tye was called as an adverse witness by the complainant, and testified that he has served as the longwall manager since September, 1992, and that prior to that time he was a maintenance foreman. He confirmed that he worked with Mr. Vanover, and although he confirmed that "we had problems on the wall on occasion", he denied that Mr. Vanover ever complained to him about the water (Tr. 229).

Mr. Tye stated that he was familiar with the ventilation plan and that he enforced it to the best of his ability even though it was not his direct responsibility (Tr. 229). He identified a copy of the longwall dust control plan (Exhibit C-B), and confirmed that it now provides for a minimum of 34,000 cubic feet per minute at the longwall, but that in April, 1991, it only required 24,000 or 25,000 (Tr. 230-231). He confirmed that the mine was out of compliance with the dust requirements at one time and was cited for that, and as a result of the citation, the longwall ventilation plan was upgraded to provide 34,000 feet of air (Tr. 231-232).

Mr. Tye confirmed that the dust control plan required that 90 percent of the water sprays be operational and he was not aware that the respondent has ever been cited for having less than 90 percent operational (Tr. 233).

Mr. Tye denied that Mr. Begley ever informed him that Mr. Vanover had complained to him. He stated that he did not know that Mr. Vanover quit his job until a couple of months after he quit (Tr. 234). He confirmed that he never spoke to Mr. Vanover about coming back to work (Tr. 234).

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Mr. Tye stated that there were always problems on the longwall, and he explained as follows at (Tr. 236):

Q. What did you consider the biggest problem?

A. Well, just the basics. We always have a problem with roof control. We always have a problem with ventilation. We always have a problem with the equipment. It's a continuous, never-ending job.

Mr. Tye stated that although Mr. Vanover did not complain to him about the dust, he spoke to Mr. Vanover about positioning himself to stay adjacent to the shields and not to work inby in the dust. If Mr. Vanover stayed outby the shields he would not be in the dust generated by the shear while it was cutting coal (Tr. 239-240).

Mr. Tye stated that the longwall is targeted for 24,000 tons of "raw product" per day on two production shifts. However this production schedule varies, but it is still high (Tr. 241).

Mr. Tye identified production tonnage estimates for March through July, 1992 (Exhibits C-D through H) (Tr. 243-247). He confirmed that as production increases, the amount of dust generated also increases, but this would depend on varying conditions (Tr. 248).

Mr. Tye stated that he does not travel with mine inspectors, and they are usually escorted by a shift foreman or a safety person (Tr. 250). He confirmed that at one time the shear cut in both directions, but after the adoption of a the new dust control plan, the shear now cuts in only one direction from tail to head (Tr. 253). He also confirmed that "trim cuts" and "step cutting" is done to keep the longwall face even. Further, "double cutting" is permitted under the plan for the first 120 feet to "square the face" (Tr. 254-257). Mr. Tye reiterated that he has spoken to Mr. Vanover about working downwind of the shear, and he confirmed that the ventilation plan does not permit anyone to be downwind of the shear and that he has cautioned Mr. Vanover about this (Tr. 258).

Mr. Tye identified a copy of the mine ventilation plan for October, 1991, and subsequent thereto, and he confirmed that the new plan became effective in June, 1992 (Exhibit R-12; Tr. 260-261). He confirmed that the new plan was adopted because of the ventilation problems experienced under the 1991 plan (Tr. 262). He stated that under the new plan, the number of water sprays and water pressure were increased, and one-way cutting was done (Tr. 263).

Mr. Tye stated that the respondent was out of compliance with its ventilation plan only one time under the October 23,

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1991, plan and it has been in substantial compliance with the current plan since that time (Tr. 264). He stated that the water pressure on the sprays is currently 200 p.s.i., and 220 gallons of water per minute is sprayed directly on the face as the coal is cut (Tr. 265).

Mr. Tye identified several invoices showing expenditures made by the respondent on certain devices designed to lessen the miner's exposure to dust, and he explained some of the equipment that has been purchased, including an expenditure of \$25,000 for a kit, spray beams, and dust helmets at a cost of \$532 each, and filters for the helmets (Exhibit R-14 Tr. 266-275). Mr. Tye also explained how water is brought into the mine (Tr. 275-276).

Mr. Tye stated that there have been occasions when shear operators and foremen have stopped production to make ventilation and water repairs and he has never reprimanded anyone for stopping production for this purpose (Tr. 276-277). Mr. Tye confirmed that on one occasion when Mr. Smith complained, the shear was shut down and a cracked drum was repaired (Tr. 278-279).

Mr. Tye confirmed that he was not aware that miners were working downwind of the shield, and that Mr. Vanover was not downwind when he spoke to him about properly positioning himself (Tr. 281). Mr. Tye stated that he did not go underground to confirm Mr. Smith's complaint about the 40 pounds water pressure and he had never previously heard about this allegation and only knew that a spray drum was cracked.

Mr. Tye did not know why it was necessary for anyone to work downwind of the shear while it is cutting, and company guidelines prohibit this (Tr. 293-294). He confirmed that the ventilation plan requires preventive maintenance when less than 90 percent of the water sprays are operational and that corrective action is taken when this is discovered by stopping the shear and taking care of any problem (Tr. 298). Mr. Tye again denied that Mr. Vanover ever complained to him about any dust or water problems (Tr. 299-302).

Daryl V. Brock, longwall technician and shear operator, stated that he has worked on the longwall from the beginning for two and one-half years and worked with Mr. Vanover. Mr. Brock stated that when the longwall was started in June or July, 1991, he complained to section foreman Randy Turner about excessive dust and that the dust conditions remained "severe" after that time, including July, 1992, when Mr. Vanover left his employment (Tr. 302-304). Mr. Brock confirmed that he uses a dust helmet and had problems when he first got one. However, filters are now readily available and he uses one per shift, and this was the case when Mr. Vanover left. He also confirmed that as a matter

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of practice, the shear is stopped for major repairs, but not for relatively minor repairs. (Tr. 305).

Mr. Brock stated that the shear does not now cut in both directions, and he indicated that it has "been awhile" since it cut in two directions. He could not recall if it cut in two directions at the time Mr. Vanover last worked at the mine (Tr. 306).

On cross-examination, Mr. Brock stated that there is currently ample water and air at the mine. He confirmed that on one occasion when he and Mr. Vanover complained to foreman Steve Shell while working on the second shift about the dust helmet filters Mr. Shell addressed their concerns, took care of the problem, and had "a positive attitude" (Tr. 307).

Mr. Brock stated that when Mr. Vanover left his job on the first shift he had not worked with him for four or five months and did not know what the conditions were on the shift (Tr. 308). Mr. Brock stated that there were air and dust problems at the time the shear cut in both directions, but when this practice stopped he agreed that ventilation was increased and water pressure on the face was increased. He confirmed that conditions are presently better (Tr. 309-310). He confirmed that he is the only member of his five-man crew who wears a dust helmet (Tr. 311). He also confirmed that everyone complained about the dust and water, including Mr. Vanover (Tr. 312-314).

Manford Roark, formerly employed by the respondent, stated that he left his employment on April 26, 1993, and worked on the second shift as a longwall technician. He did not work with Mr. Vanover when he left his job, but had worked with him before Mr. Vanover transferred to the first shift (Tr. 317-318).

Mr. Roark stated that the conditions on the longwall were "very dusty - most of the time. Sometimes it was normal conditions, not always" and that when an inspector was there "they bumped the water up, made sure we had air" (Tr. 318). He stated that when shooting was done on the second shift, production would stop and men were taken out by the shot area (Tr. 319).

On cross-examination, Mr. Roark denied that he would have testified in this case if he were not subpoenaed, and he confirmed that he has a pending claim against the respondent for workers' compensation benefits (Tr. 320). He also confirmed that he has advanced black lung and quit his job for his health (Tr. 321).

James E. Hacker, shear operator, testified that he worked with Mr. Vanover and heard him make complaints about the dust conditions to Randy Turner, but to no one else (Tr. 322). Mr. Hacker stated that Mr. Vanover complained about the dust

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and water, and he described the dust and water problems (Tr. 323-325). He was not aware that Mr. Vanover ever complained about insufficient air Stream helmet filters (Tr. 325). He confirmed that the air and water conditions have improved since Mr. Vanover left his employment (Tr. 326).

Mr. Hacker stated that it was a practice to stop the shear for repairs to the water supply and to clean the water sprays (Tr. 326). He confirmed that he did not work with Mr. Vanover at the time he left his job, but worked with him three or four months before he left (Tr. 327). Mr. Hacker stated that he would stop the shear if anyone told him it was too dusty and the respondent has never fired anyone for stopping the shear (Tr. 328). He confirmed that he did not wear an air stream helmet because it was too bulky (Tr. 328-329).

Mr. Hacker confirmed that Mr. Vanover complained to him about the water and air. He stated that the shear was cutting in both directions at that time, and that on one pass Mr. Vanover would be in by the shear, and on the second pass he would be behind the shear. However, the cutting plan was changed so that the Shear cut only one way and Mr. Vanover could not legally be behind the shear after this change was made (Tr. 331). However, he indicated that Mr. Vanover had to be there because "the shear would cut coal faster than the shields would advance" (Tr. 332).

With regard to any safety complaints, Mr. Hacker stated as follows at (Tr. 334-336):

- Q. Did you or Mr. Vanover -- You said Mr. Vanover did complain to Randy Turner.
- A. Yes, Sir. I've complained to Randy.
- Q. And what was his reaction?
- A. Randy told us that -- Randy would do what he could at the time. If we had an air problem, Randy would go over, make sure the curtains was up to where they needed to be. He would block all the air where the air would come down the face. And there has been times we still wouldn't have the minimum requirement.
- Q. What would he do with the water?
- A. He would do what he could. He would have the repairman -- which is something that me or him or nobody else on the production end knows anything about, is the fresh water pump. They would try to adjust the pressure.
- Q. While the shear was operating?

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A. Right. But we had a lot of problems. On the startup, we had a lot of dregs in the lines stopping our filters up and stopping our sprays up.

* * * * *

Q. So you're saying like day to day, there problems were on and off. Is that the way you would characterize it? They would have problems and try to address it?

A. Our section foreman would, Yes.

Q. Was that Turner?

A. Yeah.

Elmer R. Couch, Utility foreman, testified that he has held various jobs at the mine, and helped set up the longwall in 1991, and is familiar with its operation. He confirmed that he was familiar with the dust control plan (Tr. 341-342). Mr. Couch stated that he had no knowledge of the longwall conditions after July, 1992. He confirmed that he had no dust complaints while the longwall was being set up, and returned to work on the longwall two months ago (Tr. 346). Mr. Couch stated that it was not unusual to have dust downwind of the shear when rock is being cut, but the dust plan does not permit anyone to be downwind while the shear is cutting (Tr. 348).

Respondent's Testimony and Evidence

Edward Bauer, respondent's safety director, testified that longwall panel No. 1 was initially cut on April 22, 1991, and that four subsequent panels were cut during the period October 3, 1991, to the present (Tr. 14). He stated that he was familiar with the longwall shields and has observed the longwall in operation, and he confirmed that the roof control plan requires that longwall shields be installed at distances no greater than 18 inches apart (Tr. 16). He did not consider missing side shields to be more than an ordinary mining hazard, and he indicated that replacing a missing side shield before a longwall move would be extremely hazardous because the shield would have to be lowered, and this would expose a wider area of unsupported roof at the face (Tr. 18).

Mr. Bauer testified that he headed the respondent's investigation of the fatal accident concerning Mr. Mark Griffy, and also participated in the MSHA and state investigations. He believed that Mr. Griffy was properly trained, and he confirmed that no training citations were issued to the respondent as the result of this incident (Tr. 18-24). He also confirmed that he conducted an investigation into the underground detonations of June 23 and 24, 1992, and he confirmed that he first learned of

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these incidents during a discussion with Larry Smith on the longwall section in August, 1992 (Tr. 25). Mr. Bauer explained that he interviewed employees working on the section to determine what happened and that he requested a meeting and met with MSHA subdistrict manager James Ison on August 24, 1992. Mr. Bauer stated that his investigation disclosed that a single stick of an approved explosive was set off on the day shift in a confined charge approximately 100 to 200 feet outby the longwall face. Mr. Bauer stated that the area had been rock dusted and that proper methane and ventilation checks had been made before the shot. He further stated that a warning was given before the shot, and that the shot fireman gave the standard "Fire in the Hole" voice warning three times (Tr. 25-27).

Mr. Bauer produced a copy of a September 4, 1992, Memorandum from an MSHA inspector to Subdistrict Manager Ison concerning an anonymous telephone complaint received by MSHA concerning safety allegations at the respondent's mine during June 23 and 24, 1992. Mr. Bauer stated that he received the report from MSHA in his capacity of safety director (Tr. 27-29; Exhibit R-1). Mr. Bauer testified that Mr. Ison gave him a copy of the memorandum when he went to his office to discuss the detonation incident (Tr. 33).

Mr. Bauer acknowledged that the longwall had ventilation problems when an excessive dust violation was issued on August 28, 1991, and he explained the action taken by the respondent as a result of this violation. He stated that the mine ventilation was initially changed on October 31, 1991, and that the air velocity on the longwall face was increased from 23,000 c.f.m. to 25,000 c.f.m. A subsequent increase was made to 34,000 c.f.m., on December 3, 1991, and instead of cutting in two directions, the plan was changed to require cutting in one direction. He confirmed that the mine has not had additional problems staying in compliance since December, 1991. He confirmed that from March, 1992, when Mr. Vanover began working the first shift, until he left in July, 1992, only two ventilation violations were issued on the longwall section (Tr. 33-38).

Mr. Bauer confirmed that there are occasions when fewer passes of the longwall shear are made when an inspector is in the mine, and he gave some representative examples from his records, including production downtime (Tr. 52-56). Mr. Bauer stated that downtimes are caused by inspector safety meetings or inspections of the tailgate area which requires a stop in production (Tr. 56-57).

Mr. Bauer stated that he initiated the meeting at Pete's Minimart with Mr. Vanover on August 5, 1992, after assistant personnel director Kenny Smith advised him that Mr. Vanover stated that he left his employment because of excessive dust on the longwall section. Mr. Bauer confirmed that Mr. Smith was also present, and he explained what transpired during the meeting,

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including actions that he had taken and certain assurances that he gave Mr. Vanover concerning his dust concerns (Tr. 57-59). Mr. Bauer further explained as follows at Tr. 59-61):

A. After I explained to Mr. Vanover what we had done, we asked if he felt comfortable enough in returning to work at Shamrock, Yes.

Q. What was his reply?

A. He indicated, no, he wasn't.

Q. Did he tell you why he wasn't going to return to work?

A. He indicated he didn't think things would change. And at that point, I asked if we had a person in the safety department go with him -- I even said Steve Shell go with him, at the beginning of the shift, to take air readings and water pressure readings, would that make him feel any better about it?

Q. What did he say?

A. He indicated negatively. He just didn't think things could change. And I asked him, "What if I went in with you at the beginning of every shift to take air readings and water pressure readings?" I said, "We won't start till you feel comfortable."

Q. And the reply?

A. He wasn't interested.

Q. Did you offer anything else?

A. Yes. I finally said, "If Lynberg Rice goes in with you... and at that time, Lynberg was the general manager of operations. . . .If he goes in with you and we take air readings and water pressure readings and we don't start till you feel things are right, would you feel comfortable then?" He indicated he was done with coal mining.

Q. He didn't say what he intended to do?

A. During my conversation, he did not. During his conversation with Kenny Smith, he indicated --

* * * * *

THE WITNESS: After Kenny Smith had reiterated, or I stated, Mr. Vanover indicated he was going to get his money and go to college.

Mr. Bauer further explained that he learned of Mr. Vanover's dust complaint during the exit interview at the end of July, and that August 5, was the earliest date he could arrange a meeting with Mr. Vanover (Tr. 63). Mr. Bauer also explained the action he took after receiving Larry Smith's allegations concerning explosives allegedly carried on a mantrip. He confirmed that he conducted an investigation and also implemented a safe work instruction for handling explosives (Tr. 63-65; Exhibit R-3).

Mr. Bauer stated that he conducts safety training and instructions as part of his job, and that mine personnel are informed as to how to go about expressing safety complaints (Tr. 66-70). He confirmed that shot firemen are required to pass a state certification test, and they are required to have a certain amount of experience in the use of explosives (Tr. 70).

On cross-examination, Mr. Bauer responded to additional questions concerning the longwall section reports (Tr. 72-85). He further testified about the operation of the shear shields, and he confirmed that the longwall machinery is loud and that it is possible that no one heard the shot firer give his verbal warning before firing the shots in question (Tr. 95). He confirmed that his records reflect only one excessive dust violation on the longwall from April, 1991, through the end of July, 1992 (Tr. 95). He also confirmed that the first dust complaint that he was aware of was the one made by Mr. Vanover during his exit interview (Tr. 97).

Mr. Bauer reviewed certain longwall section reports and testified to certain air readings taken periodically during several months in 1991 and 1992, as well as intermittent dust sampling (Tr. 99-111; Exhibit C-J).

Mr. Bauer confirmed that any dust generated by the underground shot in June, 1992, would go by the longwall face (Tr. 113). Mr. Bauer testified about his investigation of the incident concerning explosives being transported on a mantrip. He stated that his investigation was inconclusive and that no one that he interviewed saw explosives or a detonator on the man trip (Tr. 114-117). He stated that Mark Griffey told him that a yellow brattice bag and a green and white coal sampling bag had been placed on top of a man trip, but that he did not see any explosives or detonators on the man trip (Tr. 119).

In response to further question, Mr. Bauer stated that 146 mine inspection shifts were conducted at the mine between January, 1992, and through the end of July, and that only two longwall ventilation citations were received during that time

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(Tr. 121). He stated that air readings are taken daily as required, and that the law does not require air readings to appear on longwall section reports, nor is a longwall section report required to be kept (Tr. 122). He identified copies of certain preshift reports (Exhibit R-5), and testified to several recorded air readings. He confirmed that 34,000 c.f.m. of air is required on the longwall face while coal is being mined, and he pointed out additional air reading notations in the preshift reports indicating compliance with the October, 1991, plan requiring 25,000 c.f.m. of air (Tr. 128). Mr. Bauer denied any knowledge of a foreman ever instructing anyone to stay downwind of the shearer while coal was being cut in order to do their job (Tr. 131).

Billie Sizemore, Safety technician, testified that his duties include the monitoring of dust surveys, assisting on safety plans, and accompanying inspectors. He explained the procedures for dust sampling on the longwall, and confirmed that there were dust problems in October, 1991. He also explained the remedial measures taken by the respondent, including the installation of a "spray arm" which provided additional sprays directly on the longwall cutter and the purchase of air stream helmets (Tr. 141-145).

Mr. Sizemore stated that he submits his dust sampling schedule to MSHA in advance of sampling and confirmed that inspectors accompany him during his dust sampling (Tr. 145, 148). He identified reports of dust samples he has submitted to MSHA, including samples for certain designated longwall areas, and he confirmed that the areas have been in compliance for at least a year and the periods shown on the reports (Exhibit R-6, Tr. 149-153).

Mr. Sizemore identified copies of bimonthly dust samples submitted to MSHA for a mechanized mining unit (M.M.U.) for the May/June 1991, sampling cycle, and he confirmed that the unit was in compliance and that the average dust concentration was 1.0, which is below the allowable limit of 2.0 (Exhibit R-7, Tr. 153-154). He identified additional sample surveys for July/August, 1991, and September/October, 1991, and January through June, 1992. He confirmed that the mine was in compliance with MSHA's dust standards during all of these periods, except for September/October, 1991, when there were problems with the face falling out and a lot of rock coming between the shields, and the ventilation plan was revised (Tr. 155-156). He stated that the respondent has not been out of compliance through the time Mr. Vanover left his employment (Tr. 157-158, Exhibit R-8).

Mr. Sizemore stated that the respondent spent \$17,347.04, for air stream helmets, filters, and replacement parts from October 1, 1992 to March 25, 1993 (Exhibit R-10, Tr. 160-162).

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On cross-examination, Mr. Sizemore testified further about his dust sample results and the production on the longwall (Tr. 163-169). He confirmed that dust complaints were made during September/October, 1991, and they were brought to his attention. He could not recall if the complaints were made by Mr. Vanover (Tr. 171).

Mr. Sizemore stated that according to the mine dust plan no one is supposed to be downwind of the shear when the shear is coming back to the headgate entry cutting coal. He has observed people working downwind of the Shear, and they were cited by an inspector on two occasions because of this (Tr. 171-172, 177-178).

In response to further questions, Mr. Sizemore could not deny that Mr. Vanover ever made any dust complaints, and stated that "I couldn't say he did either. I cannot remember whether he complained to me or not" (Tr. 182). He also could not recall Mr. Vanover complaining to any one else (Tr. 183). He confirmed that there were many complaints about the air during September/October, 1991, but after corrective action was taken by increasing the amount of air, installing additional sprays, and purchasing additional air helmets, the complaints decreased (Tr. 184). He stated that "people are going to complain no matter what you do", and that he has responded by going to the face to check the air and water pressure (Tr. 185). He denied that Mr. Vanover ever complained or spoke to him about transporting explosives underground or shooting underground (Tr. 185).

Hetch Begley, Jr., longwall maintenance foreman, testified that he worked with Mr. Vanover on the first shift at the time he left his employment. Mr. Begley stated that his job involves the maintenance and repair of longwall equipment, including the water sprays. He stated that he has repaired the water sprays on an average of 6 to 12 times a week and that the Shear is shut down when repairs are made (Tr. 187-188). He explained that he has responded to calls to make the repairs or has dispatched his maintenance personnel to do so.

Mr. Begley stated that Mr. Vanover complained to him on several occasions about the dust on the longwall, and that he responded by sending his maintenance people to address the problem. He denied that he ever told Mr. Vanover that repairs were not needed and to "keep running coal". He had no knowledge that any of his personnel ever stated this to Mr. Vanover, and indicated that he would not approve of this if they did (Tr. 190).

Mr. Begley stated that he has observed Mr. Vanover behind the shear, and informed him that it is not permitted by company rules and regulations (Tr. 190). He stated that there was no

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reason for anyone to be working behind the shear, and that if work is necessary at that location the shear is supposed to be stopped (Tr. 191).

Mr. Begley stated that on one occasion when Larry Smith complained about low water pressure shortly before he quit, he went to the tailgate and shut the shear down and personally checked the water pressure. After finding it in order, the shear was started up, and Mr. Smith complained again. Mr. Begley checked it a second time, and found that the pressure was low and he shut the shear down again and repaired a broken hose and missing spray (Tr. 193-194).

On cross-examination, Mr. Begley reiterated that Mr. Vanover complained to him about the water and dust on several occasions, but he could not recall the exact number (Tr. 198).

John F. Craft, longwall mechanic, testified that he worked with Mr. Vanover on the first and second shifts. He confirmed that the water sprays need servicing or repairs every shift and that Mr. Osborne, Mr. Begley, and the shear operators have been called upon to do this work. He stated that the shear must be shut down to do the work, and he has never told anyone that there were no problems and that they should just keep working. He has never refused to shut down the shear to make repairs, and that "I fix it when it needs fixing. That is my job. I try to find out the problem" (Tr. 203).

On cross-examination, Mr. Craft stated that the decision to shut down the shear is usually made by the production or maintenance foreman, including Mr. Osborne, Mr. Turner, and Mr. Begley (Tr. 203). He stated that the water sprays are regularly serviced twice a shift depending on when the belt is moved (Tr. 204). Mr. Craft confirmed that the broken headgate drum was repaired during the summer of 1992, and it took one to two weeks to receive a replacement part (Tr. 205).

Mr. Craft stated that Mr. Vanover complained to him about the dust and lack of water on the section, and he responded to Mr. Vanover's requests to check the water pumps (Tr. 205). He stated that the shields are maintained and repaired as needed, and he has never had to replace any shields. Side shields have to be maintained at least 18 inches apart, and they are replaced when there is a move to another panel (Tr. 207).

Doyle Roberts, lighthouse attendant, testified about his care and maintenance of the air Stream helmets and filters, and the procedures he follows for making them available to the workforce (Tr. 209-212). He identified several invoices for purchases of the airstream helmet filters that are stocked and available in the supply house and lamp house (Exhibit R-9,

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Tr. 212-215). He confirmed that he checks the helmet fans every two weeks and if anyone complains about the fans, he will issue a new one (Tr. 216).

On cross-examination, Mr. Roberts stated that he did not service Mr. Vanover's helmet, and testified further about his servicing of the filters (Tr. 217-220). He explained that he never worked with Mr. Vanover because they were on different shifts, and he was not certain that Mr. Vanover had a helmet (Tr. 221).

Denny Osborne, longwall production foreman, testified that he served in that position since the longwall was started in 1991, and has worked for the respondent for 16 years. He was Mr. Vanover's supervisor on the first shift. He confirmed that there were problems with the water supply sometimes, and that the equipment would be shut down to address the problems, depending on the particular problem. If a water line breaks, he would shut down the equipment, and he did so "probably twice a week" (Tr. 223).

Mr. Osborne could not recall Mr. Vanover ever complaining to him about the dust. He could not recall any dust problems in October, 1991, but did recall a change in the ventilation plan when the cutting was done one way from tail to head (Tr. 224). He denied that shield technicians on his section were required to work downwind of the shear to perform maintenance or to repair a shield problem. He has observed people downwind of the shear, but has informed them they are not to be there and has required them to move out (Tr. 225).

Mr. Osborne stated that the shear operators have the authority to stop the shear, and that the shield technician may request that this be done. He confirmed that he has stopped the shear to fix a dust or water problem (Tr. 226). He has observed Mr. Vanover stay at the tail section while another shield technician went with the cut, but he never warned him about this. He did not know whether Mr. Vanover wore an air stream helmet (Tr. 227). He stated that Mr. Vanover only worked on his shift as part of the crew for two or three months (Tr. 229).

On cross-examination, Mr. Osborne stated that Mr. Vanover took his vacation in July, 1992, and then quit, and he did not complain to him about the dust or lack of water before he took vacation or during the entire time he worked for him (Tr. 230, 234). He did not know why Mr. Vanover quit his job, and never discussed it with him. He knew nothing about any efforts to get Mr. Vanover to come back to work, and he considered him to be a good worker (Tr. 236).

Timothy W. Roberts, Shield technician, testified that he worked with Mr. Vanover on the first shift. He confirmed that

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there were problems with the water "sometimes", but that he never complained about the dust or water. He stated that when problems were encountered with the water the respondent "tried to get it fixed" and the shear would be shut down to make repairs. He could not recall Mr. Vanover ever complaining to him about the dust or water pressure (Tr. 239). Mr. Roberts recalled the underground shots on June 23 and 24, 1992, and he did not fear for his safety even though he was closer to the shot than Mr. Vanover (Tr. 239).

On cross-examination, Mr. Roberts stated that he knew that the shots would be fired because he was assigned to watch the break to make sure that no one came through the area. He was in fresh air at the time, and the dust from the explosion went down the longwall face and down the return where Mr. Vanover was working (Tr 241).

Mr. Roberts stated that as a shield technician he tries to keep up with the shear operator and that a couple of times he asked the operator to slow down. He confirmed that he has worked downwind of the shear because "sometimes the shields wouldn't operate right" and he needed to be there to make sure it was operating properly (Tr. 243).

Mr. Roberts recalled that Mr. Vanover and Larry Smith complained about the water pressure on the last days that they worked at the mine. He believed that Mr. Vanover complained to the maintenance foreman, but did not hear the actual complaint and only "heard people talking about him making a complaint" (Tr. 245).

Jeffrey S. Shell, Safety coordinator, testified that his duties include safety training of personnel working on the longwall, including Mr. Vanover. He stated that the training included an explanation of the procedures for making safety complaints and the protections afforded by the Mine Act for personnel making complaints. He also has instructed personnel not to be downwind of the Shear and to stay on the intake side, and he conducts annual refresher training once a year (Tr. 246-249).

On cross-examination, Mr. Shell stated that Mr. Vanover spoke about not having filters for the air steam helmets, but could not recall that he complained about the dust or inadequate water (Tr. 249).

Kenny Smith, assistant personnel manager, identified copies of Mr. Vanover's work time card records that are in his custody (Exhibit R-11). He also identified a copy of Mr. Vanover's exit interview that he prepared and confirmed that he made the notation "Too dusty at the face", and that this is what Mr. Vanover told him (Exhibit "A", Tr. 255). He also identified a job bid sheet and a job posting request for a first shift

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longwall technician position that Mr. Vanover made a bid for (Exhibit R-16, Tr. 258). He confirmed that the job posting specified that overtime work would be scheduled as needed, including Sundays (Tr. 258).

Mr. Smith stated that after conducting the exit interview with Mr. Vanover on July 28, 1992, he arranged a meeting with Mr. Vanover and Mr. Bauer at "Pete's minimart", and the three of them met there on August 5, 1992, at 11:00 a.m., Mr. Smith stated that he and Mr. Bauer spoke to Mr. Vanover about his dust complaints and his reasons for leaving his job (Tr. 261). Mr. Smith further explained as follows at (Tr. 261-262):

The first thing we asked him, said. "Would you consider to come back to work at Shamrock if the problems were fixed." And Slade said, "Don't much -- Don't think I'm interested in coal mining anymore," I believe is what he said.

And Ed said, "If I were to check into this and it were true, if a safety inspector went with you, would you feel comfortable with it? Then he said, well, how about myself, if I went with you?" and finally, Ed said "Even if Lynberg Rice goes with you, would you feel comfortable with it?"

And as I remember, Slade said, "I just think I'm through with mining coal." He said, "I'm going to go back to school." And at that time, I said, "Slade, where are you going to go to school?" And he said -- Maybe, I think he said he was going to Eastern.

There is a community college over at Manchester. Actually, it's a center for Eastern Kentucky University. And I asked Slade, I said, "if there is anything you need at Eastern, at Manchester, let me know. I'll be happy to help you or try to help you, if you need some classes or whatever."

And, at (Tr. 268-270):

Q. So you're telling me it's not unusual to meet with an employee when he claims that here is something that might affect the safety of the mine. Is that what you're telling me?

A. That is what I'm telling you.

Q. Did he ever complain to you before this exit interview or did you have any knowledge of any complaints he may have filed about dust or water?

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A. I had none, sir.

Q. How about explosives being transported on the man trip?

A. No, sir.

Q. How about detonations underground?

A. I had never talked to Slade, other than just in a casual manner, before July 28; I mean, just being at the mine site, hello, or whatever.

* * * * *

Q. So you had no inkling that Mr. Vanover was complaining or had any problems until --

A. Not until I talked to him on the twenty-eighth.

On cross-examination, Mr. Smith stated that he could not recall Mr. Vanover stating that "he did not think things would change" during their meeting of August 5, 1992 (Tr. 263). Mr. Smith confirmed that he does not administer the company profit sharing plan, and he "guessed" that it was a retirement fund that is based partially on company profits, and that the company guarantees payment of a percentage of an employees' salary to the plan (Tr. 264).

In response to further questions, Mr. Smith stated that he first heard about any dust complaints by Mr. Vanover on July 28, 1992, during the exit interview. He explained that Mr. Vanover's last day on the job was July 20 or 21, but since he had been on vacation, he did not learn that he had quit until he came in for the exit interview (Tr. 265).

Mr. Vanover was called in rebuttal, and stated that when he left his job he thought about going to college but decided not to because "I would have never made it" (Tr. 272). He confirmed that he told Mr. Smith and Mr. Bauer that he was thinking about going to college when he met with them, and that he had submitted the necessary paperwork to withdraw his profit sharing money which he thought about using for college (Tr. 274).

Mr. Vanover stated that he informed Mr. Osborne before he quit that he was going to take one week of vacation "to think about it, and if I didn't come back the second week, that I would probably quit" (Tr. 276). When asked if he told Mr. Osborne why he was thinking about quitting, Mr. Vanover stated "he already knew", and he confirmed that he had complained to Mr. Osborne and Mr. Begley about the dust, and "mostly about the water pressure" that was insufficient to control the dust at the face (Tr. 277).

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Mr. Vanover stated that he worked downwind of the shear to keep up with the shear operator every shift since the longwall was started even though it was contrary to company policy because "I took it that it was my job, that was the way that it was done" (Tr. 277-279). He stated that none of his foreman ever told him not to get out from the area downwind of the shear (Tr. 280).

Mr. Vanover stated that Mr. Begley responded to his dust and water complaints "a few times, but not every time" (Tr. 283). He also stated that he never attempted to shut the shear down himself but that others have done so when it was broken down or completely out of water (Tr. 284). He further stated that a few side shields close to the headgate and tailgate were replaced (Tr. 286).

Mr. Vanover stated that he did not actually see the dynamite on the mantrip, but had seen dynamite in a bag earlier in the day in another entry and he assumed that the person who had it was going to use it to shoot. Mr. Vanover stated that he left the entry to go to the face and saw the bag later, with another bag, on the mantrip. When asked if the bag could have been empty, Mr. Vanover responded "I suppose it could have" (Tr. 288-290). He confirmed that he did not know whether the bag was empty or full when he saw it on the mantrip, and that no one else said anything about it, except for Mark Griffy who commented that the bag was heavy and had something in it (Tr. 290).

When asked if his observation of the bag caused him to quit his job, Mr. Vanover responded "not exactly, but that helped" (Tr. 291). He confirmed that this incident occurred about a month before he quit (Tr. 291).

Larry Smith was called in rebuttal, and he stated that he heard Mr. Vanover make complaints to Mr. Osborne about the water or dust on "Any work day", but not every day (Tr. 294, 297). Mr. Smith stated that he quit his job after receiving a layoff notice (Tr. 301). He stated that he has no bad feelings against the respondent or Mr. Vanover, but commented that "I don't associate with either one of them, the company or him" (Tr. 302).

Findings and Conclusions

Fact of Violation

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.

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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 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, ___ U.S. ___, 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.

The Complainant's Protected Activity

I conclude and find that Mr. Vanover had a right to complain about mine working conditions and practices that he believed were hazardous to his safety and health, and that any such 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 Complainant's Complaint Communication to the Respondent

In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate any safety complaints to mine management in order to

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afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Company, 8 FMSHRC 303 (March 1986); Miller v. FMSHRC, 687 F.2d 194 (8th Cir. 1982); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097.

The evidence establishes that Mr. Vanover was assigned to the longwall section as a second shift shield technician in March or April 1991, and that he transferred to the first shift in March, 1992. He testified that he began complaining about the dust from the time he was assigned to the longwall until he left his job in July, 1992. This is consistent with his March 8, 1993, deposition testimony that he started complaining about the dust approximately a month or so after the longwall started in production (Tr. 8).

Mr. Vanover testified that his dust complaints were made to mine superintendent Ed Boylen, maintenance foreman James Tye, longwall coordinator David Hensly, Safety director Steve Shell, dust sampler Bill Sizemore, maintenance foreman Hetch Begley, and shift supervisor Denny Osborne.

Mr. Begley confirmed that Mr. Vanover complained to him on several occasions about the longwall dust and water problems. Mr. Tye testified that Mr. Vanover never complained to him and that he did not know that Mr. Vanover had quit until two months later. Mr. Sizemore testified that "everyone" complained about the ventilation when the longwall initially was put into production, but he could not recall that Mr. Vanover complained to him or anyone else. Safety coordinator Jeffrey "Steve" Shell testified that Mr. Vanover spoke to him about the lack of dust helmet filters, but he could not recall that Mr. Vanover complained about any dust or water problems. Mr. Osborne could not recall that Mr. Vanover ever complained to him about the dust.

Daryl Brock, longwall technician and Shear operator, testified that everyone complained about the water and dust, including Mr. Vanover. Longwall mechanic John Craft testified that Mr. Vanover complained to him about the dust and lack of water on the longwall section. Shield technician Timothy Roberts recalled that he heard from others that Mr. Vanover had complained about the water pressure on the longwall.

Mr. Vanover testified that he also complained about the longwall dust when he worked on the second shift, and that he complained to shift supervisor Randy Turner and shift maintenance

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foreman Wade Blevins. Mr. Turner and Mr. Blevins did not testify in this case. Shear operator James Hacker, who worked with Mr. Vanover for two or three months before he left the job, testified that he heard Mr. Vanover complain about the dusty conditions to Mr. Turner. Mr. Hacker stated that Mr. Vanover also complained to him about the water and ventilation.

Mr. Vanover testified that he complained about working excessive hours. However, I take note of the fact that his original discrimination complain is devoid of any such allegation. I also note the fact that Mr. Vanover voluntarily bid for the job, was compensated with overtime pay, and had no complaints about the pay (Tr. 30-31). Further, at the time the job was posted for bidding, the notice specifically stated that overtime work, including Sunday work, would be scheduled as needed, and that shift schedules may be rotated as necessary. These statements were included as part of the job requirements (Exhibit R-16), and this was confirmed by assistant personnel manager Kenny Smith (Tr. 258). Mr. Vanover himself confirmed that he was aware of these work requirements when he took the job (Tr. 74-75).

I find no credible evidence to establish that Mr. Vanover complained to management about working excessive hours. Even if he had complained, there is no evidence that any such work, even if it were performed, adversely affected Mr. Vanover's health or safety, or was in any way a reason for his leaving his job.

Mr. Vanover testified that after an underground shot was fired on June 23, 1992, he complained about this to Mr. Hensley the next morning, June 24, 1992, and that a second shot was fired that day (Tr. 33, 94). Mr. Vanover could not recall whether he complained before or after the second shot was fired, and when reminded of his deposition testimony that he complained to Mr. Hensley after the second day (Depo. Tr. 14), Mr. Vanover stated that he could not remember whether he complained before or after the shot on the second day and he "guessed" that his deposition testimony "was close to correct" (Tr. 94).

Mr. Vanover confirmed that he did not complain about the shot on June 23, after it occurred that day because he "didn't see anybody that day" (Tr. 95). He stated that the next day, June 24, he saw Mr. Hensley and "kind of complained about it to him" (Tr. 95). When asked to further explain his complaint to Mr. Hensley, Mr. Vanover stated that "I just told him I didn't like it" (Tr. 95).

Respondent's Safety Director Bauer testified that he first learned about the shots sometime in August, 1992, during a discussion with Larry Smith (Tr. 25). Mr. Hensley did not

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testify in this case, and Mr. Vanover's testimony concerning his "complaint" to Mr. Hensley concerning the underground shots in question is un rebutted.

Mr. Vanover testified on direct examination that he also complained to Mr. Hensley about the alleged transportation of explosives underground on a mantrip and that Mr. Hensley "didn't really say nothing about it. He just kind of shrugged his shoulders" (Tr. 35). However, in response to further bench questions, Mr. Vanover stated that he could not remember how he communicated his complaint, and he stated that Larry Smith "was already talking about it", and that he (Vanover) complained about the underground shots (Tr. 131).

Mr. Bauer testified that he learned about the incident in question from Larry Smith after August 5, 1992, (Tr. 61-65), and there is no evidence that Mr. Vanover ever complained to Mr. Bauer or anyone else about the matter.

I find Mr. Vanover's testimony to be rather equivocal and unconvincing to support any conclusion that he did in fact complain directly to Mr. Hensley about the transportation of explosives on a mantrip. Even if he had complained, it would appear to me that it reached management's attention after the fact, and that management responded reasonably when it learned of the incident. Safety Director Bauer testified credibly that he conducted an inquiry into the matter when it was called to his attention by Larry Smith, met with MSHA's sub-district manager to discuss the matter, and implemented a safe work instruction for handling explosives. I also take note of the fact that MSHA responded to an anonymous telephone complaint about the matter made on August 25, 1992, well after Mr. Vanover left his job, and conducted an investigation which included interviews with miners who rode the mantrip on June 23 and 24, 1992. All of the miners who were interviewed stated that no explosives were hauled on the mantrip on the days in question (Exhibit R-1).

Mr. Vanover confirmed that air stream dust helmets were made available at the longwall section and that they were of "considerable help" initially, but were later insufficient because of the lack of new filters every day. Mr. Vanover's complaint about the filters was voiced for the first time at the hearing in this case, and his original complaint did not include or mention any helmet problem. Although the evidence in this case reflects some initial periodic problems concerning a daily supply of fresh helmet filters when the helmets were initially made available on the longwall section, it also shows that helmets were available for use, and that additional helmets and filters were purchased and made available to all miners who wanted them.

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Safety Coordinator Steve Shell confirmed that Mr. Vanover spoke to him about not having helmet filters. However, I take note of longwall technician Brock's credible and un rebutted testimony that when he and Mr. Vanover complained to Mr. Shell about the lack of filters on the second shift, Mr. Shell displayed "a positive attitude", addressed their concerns, and took care of the problem (Tr. 307).

Aside from the apparently single isolated complaint to Mr. Shell while working on the second shift, I find no credible evidence that Mr. Vanover complained to mine management about any dust helmet problems at any time close to his quitting his job. Further, I cannot conclude that Mr. Vanover's rather brief concern about the lack of daily helmet filters, had any connection with his leaving his job. I further conclude and find that the respondent addressed Mr. Vanover's concerns by taking reasonably prompt efforts to secure additional helmets and filters, and to make them available to the lighthouse and supply personnel for distribution to the workforce as needed.

I conclude and find that Mr. Vanover timely communicated his complaints about the longwall dust and water problems to maintenance foreman Hetch Begley. I further conclude and find that Mr. Vanover's un rebutted statement to longwall coordinator David Hensley that he "did not like" the underground shooting that took place constituted a communicated safety related complaint. Both of these complaints met the "safety communication" requirements established by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982); Secretary ex rel John Cooley v. Ottawa Silica Company, 6 FMSHRC 516 (March 1984); Gilbert v. Sandy Fork Mining Company, supra; Sammons v. Mine Services Co. 6 FMSHRC 1391 (June 1984).

The Respondent's Responses to the Complainant's Complaints

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and has communicated this to mine management, management has a duty and obligation to address the perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard. Secretary v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'g Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

There is no evidence in this case that prior to leaving his job, Mr. Vanover ever refused to work because of his complaints. In a typical "work refusal" case, the critical issue presented is whether or not the complaining miner's belief that a hazard exists is reasonable and made in good faith. Secretary ex rel.

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Bush v. 997 (June 1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982). In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co. FMSHRC 1529, 1533-34 (September 1983); Haro v. Magma Copper Co., at 810. Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (July 1986). The Commission has also explained that "good faith belief simply means honest belief that a hazard exists". Robinette, supra at 810.

I conclude and find that Mr. Vanover's case is one of "constructive discharge". A constructive discharge occurs when a miner engaged in protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988) at 461-463. Whether such conditions are so intolerable is a question for the trier of fact, Simpson v. FMSHRC, supra, at 463. See also: Stenson Begay v. Liggett Industries, Inc., 11 FMSHRC 887 (May 1989), aff'd, Liggett Ind. v. FMSHRC, 923 F.2d 150 (10th Cir. 1991) of Secretary ex rel. Harry Ramsey v. Industrial Constructors, Inc. 11 FMSHRC 1585 (August 1989), rev'd, 12 FMSHRC 1587 (August 1990).

The Shot Firing Incident

Mr. Vanover confirmed that when he was assigned to the longwall he received longwall training, knew how to perform his job as a longwall technician, and felt comfortable doing his job (Tr. 13-18). Mr. Vanover's deposition testimony reflects that he was aware of the purpose of the blasting which took place on June 23 and 24, 1992, and he acknowledged that the conditions which required blasting had been known and discussed for a week or two (Depo. Tr. 13). When asked what he expected of Mr. Hensley, Mr. Vanover responded "They just shot two days, you know. They (sic) wasn't nothing to be done then. It was already over with" (Depo. Tr. 13).

Mr. Vanover's opinion that the shots were somehow "illegal" is unsupported. To the contrary, the credible and un rebutted evidence presented by the respondent establishes that proper safety procedures were followed in firing the shots, and that the respondent's shot firers are licensed and experienced. Shield technician Roberts, Mr. Vanover's fellow worker on the longwall, testified credibly that he was aware of the shots, that he was assigned to watch the break to insure that no one came through the area, and that he did not fear for his safety, even though he was closer to the shot than Mr. Vanover (Tr. 239).

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The credible and un rebutted testimony of respondent's safety director Bauer reflects that he conducted an investigation of the incident after learning about it during a discussion with Larry Smith in August, 1992. Mr. Baurer testified that he determined that a single shot of approved explosive was set off approximately 100 to 200 feet outby the longwall face, and that the area had been rock dusted and proper methane and ventilation checks were made before the shot was fired. He also testified that the standard voice warnings were made by the shot firer.

It would appear from the evidence in this case that the shot or shots which took place in June, 1992, were isolated and controlled incidents, and Mr. Vanover confirmed that he could not recall similar occurrences before or after the time these shots were fired. I also take note of the fact that this incident is not included among the previously noted anonymous complains lodged with MSHA on August 25, 1992, which included the use of explosives and the alleged transportation of explosives on a mantrip. I also note the absence of any testimony from any other miners working at the face at the time of the shots.

Mr. Vanover testified that his greatest concern was the dust generated by the shots in question. Mr. Roberts confirmed that the dust generated by the shots went down the return toward the face area where Mr. Vanover was working and that the dust lasted "maybe for a little while" (Tr. 240). Mr. Vanover was working at the longwall face while coal was being cut and he claimed that he could "feel the jar" of the shot, smelled the amonia used for the shot, and observed the dust generated by the shot coming down the face. There is no evidence that the work taking place at the face was interrupted, that the shots adversely affected the miners working at the face or placed them at risk, or that anyone complained.

Although Mr. Vanover testified that he "almost quit" when the blasting occurred because he was afraid (Tr. 44), he did not do so. Instead, he continued working after the shots were fired, and apparently made no further complaints about the matter. As a matter of fact, Mr. Vanover was unsure as to when he actually complained to Mr. Hensley, and as previously noted, Mr. Vanover acknowledged that he "kind of complained" to Mr. Hensley, and simply told him that he "didn't like it. It seems to me that if Mr. Vanover truly believed that the shots were life threatening and placed him at immediate risk, he would have protested more vigorously or at least decided that it was time to end his employment at that time. Instead, he continued working, requested to go on vacation two or three days before it was to begin, and then took a two-week vacation before deciding not to return to work. Under all of these circumstances, I conclude and find that Mr. Vanover's asserted fears regarding the underground

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shot firing in question are not reasonable or credible and were not, wholly, or partially, the proximate cause of this decision to quit his job.

The transportation of Explosives on a Mantrip

I have previously concluded that there is no credible evidence to establish that Mr. Vanover ever complained about the alleged transportation of explosives on a mantrip. Even if he had complained, I further concluded that the respondent acted with reasonable promptness in addressing the matter, and I took note of the fact that an MSHA inquiry failed to disclose any evidence that explosives were transported on a mantrip.

It is uncontradicted that the incident in question, if it occurred, was only a one-time occurrence that was not ignored by the respondent. Further, the evidence presented by Mr. Vanover regarding this incident is somewhat contradictory and raises doubts my mind as to whether any explosives were in fact transported on a mantrip. Mr. Vanover acknowledged that he never actually saw any explosives in the bag that was purportedly used to transport them, and he conceded that the bag could have been empty. Further, although Mr. Vanover testified that the explosives were being transported on an incoming mantrip, Larry Smith testified that they were being transported on a mantrip going out of the mine.

The incident in question allegedly occurred on June 23, 1992, and Mr. Vanover testified that it scared him when he found out about it at the time the bag purportedly containing the explosives were taken off the mantrip he was on that was going out of the mine, and transferred to another mantrip that was going to the face (Tr. 32-35). Mr. Vanover testified that he was told by others that the bag contained "powder" (Tr. 34). He also testified that he was on the mantrip with twenty other miners when the transfer was made. Miner George Smith, who was on the mantrip, testified that he assumed that Mr. Vanover was aboard, but did not see him. Mr. Smith testified that he did not see any dynamite or any dynamite container. Larry Smith, who was on the same mantrip, testified that the bag was transferred to a mantrip going out of the mine, and not to the face as testified by Mr. Vanover and George Smith.

Mr. Vanover testified that the incident "definitely scared" him when he found out about it because he "had dealt with powder before" (Tr. 34). He stated that he "wanted to quit" at that time because he believed it might happen again (Tr. 131-132). He then stated that "I don't know whether I would have quit over that incident" (Tr. 132). When called in rebuttal during the second day of the hearing Mr. Vanover was asked whether this incident caused him to quit his job. He responded "not exactly, but that helped" (Tr. 291). He also acknowledged that the

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incident occurred almost a month before he quit, but that "Just a little bit of everything, the dust and stuff", impacted on his decision to quit.

On the facts and evidence here presented, I conclude and find that the respondent did all that was possible to address the complaint brought to its attention by Larry Smith well after the alleged incident in question and after Mr. Vanover quit his job. I further conclude and find that Mr. Vanover's asserted fear over this isolated incident was less than reasonable, particularly since there is no credible, reliable, or probative evidence to establish that explosives were being transported on the mantrip. Even if they were, and even if I were to accept Mr. Vanover's contention that he was frightened, I would find that any fears he had at that time would not have extended to the time he made the ultimate decision to quit. In short, I reject as less than credible or reasonable Mr. Vanover's suggestion that his frightened state of mind when he learned that explosives were transported on a mantrip influenced his decision to quit, or caused him to quit his job approximately one month after that alleged event.

The Longwall Dust Problems

Mr. Vanover confirmed that he transferred to the longwall first shift in approximately March of 1992, some four months prior to his quitting on July 20, 1992. He testified that at the time he was contemplating whether to quit his job, he did not believe that the dust and ventilation conditions would ever improve because they had existed unchanged for the entire twelve-and-one-half years that he worked for the respondent (Tr. 43-44). I find this testimony to be rather incredible and totally lacking in evidentiary support. It is also contrary to Mr. Vanover's sworn deposition testimony of March 8, 1993, where he testified that prior to his assignment to the longwall section he never had any problems with the respondent regarding any safety matters and had no complaints before he took the job of longwall technician (Depo. Tr. 5). Mr. Vanover further testified that the first time he ever complained to anyone about dust was "shortly after" or "about a month and a half" after the longwall was placed in production (Depo. Tr. 8).

In stark contrast to his general overall indictment of the respondent's efforts to address his complaints, Mr. Vanover confirmed that foremen Blevins and Turner made an effort to control the dust by hanging ventilation curtains, and that Mr. Turner tried his best to address his dust complaints (Tr. 25, 67). Mr. Vanover also confirmed that there were several occasions when Mr. Osborne and Mr. Turner stopped production at his request to address the lack of water, and that shear operators James Hacker and Bill Wilson shut the shear down for a lack of water. During his deposition testimony, Mr. Vanover

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stated that "Randy Turner and them, they was pretty good about, you know, trying to keep you out of the dust and stuff" (Depo. Tr. 16).

Mr. Vanover testified that shortly before taking his vacation he complained to Mr. Begley about the lack of water pressure on one of the drum sprays. Mr. Osborne responded by stopping the shear and instructing Mr. Begley to check the water pressure. Mr. Begley found only 40 pounds of pressure and indicated that it would be repaired on the third shift and allowed it to continue to be operated. Mr. Vanover asserted that it was not repaired when he came to work the next morning, and he indicated that this incident was the "last straw" that prompted his decision to quit (Tr. 43-44). However, on cross-examination, Mr. Vanover admitted that longwall production did in fact stop and that Mr. Osborne addressed his complaint about the lack of water pressure (Tr. 69-70). Mr. Begley testified credibly that he checked the water pressure on two occasions on the day in question and that he shut the shear down and repaired a broken and missing water spray (Tr. 193-194).

Mr. Vanover confirmed that there were other occasions when Mr. Osborne and Mr. Turner stopped production of his request to address water problems, and that shear operators James Hacker and Bill Wilson also shut the shear down for similar problems (Tr. 69-70). Mr. Hacker confirmed that it was a practice to stop the shear to clean or repair the water sprays, and that he would stop it if anyone complained about the dust (Tr. 326, 328).

Mr. Vanover confirmed that the longwall shields were in working order and had sufficient water, that 8 inch water lines were used to supply the mine with water, and that the mine had fans large enough to provide the required ventilation and that the equipment and the means to control the dust were available (Tr. 65-66). Notwithstanding all of this, Mr. Vanover was of the opinion that the respondent just "didn't get it done" (Tr. 66).

Mr. Vanover's principal complaint about the dust appears to be the asserted lack of sufficient water pressure on the longwall sprays to keep the dust down. Mr. Vanover alluded to insufficient air, but he indicated that "every once in awhile the air was insufficient to blow the dust out" (Tr. 24). Although it is true that the longwall shear cut in both directions at one time, which increased the dust conditions, this practice was discontinued before Mr. Vanover quit and the dust control plan was amended and provided for face passes to be made in only one direction from the tailpiece to the headpiece, except for the last 120 feet at the tailgate where the cut is allowed to be made from the headpiece to the tailpiece.

Longwall manager Tye testified credibly that the new ventilation and dust control plan became effective in June, 1992,

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and that it was adopted because of the ventilation problems experienced under the 1991 plan. Mr. Tye confirmed that the new plan, which was in effect at least a month before Mr. Vanover quit, provided for an increase in the number of water sprays, increased water pressure on the sprays, and only one directional cutting on the face. Mr. Tye also confirmed that the respondent took additional measures to lessen the miner's exposure to dust, including the purchase of additional dust control and protective equipment. Under all of these circumstances, it appear to me that the dust conditions which had existed at one time on the longwall under the prior plan when two-directional cutting was being done, had improved at least a month or so before Mr. Vanover decided not to return to work.

Although shear operator Brock stated that the dust conditions were still "severe" at the time Mr. Vanover quit, he confirmed that "there is plenty of air and water currently" at the mine. He also confirmed that he worked on a different shift when Mr. Vanover left, had not worked with him for at least four or five months prior to his quitting, and that he had no personal knowledge of the mine conditions on the first shift at the time Mr. Vanover quit (Tr. 308). Mr. Brock also confirmed that at the time one-directional cutting was adopted, the respondent installed additional water systems and increased the water and ventilation pressures at the face (Tr. 309). Although Mr. Brock stated that it was dusty "when the first longwall panels were being mined", he confirmed that "step-by step" improvements were made and that the conditions "definitely improved" (Tr. 310, 314).

Heavy concentrations of dust downwind of a shear that is cutting coal at the face is not, in my view, unusual. The increased concentrations of dust downwind of the shear would appear to be a normal and inherent by-product of the longwall mining method in use, and the ventilation plan should provide the necessary provisions to insure adequate dust control. That is why I believe the respondent's longwall dust control plan (Exhibit G-B), prohibits longwall personnel from positioning themselves downwind of the shear while coal is being cut or downwind of the shields when they are being moved.

Larry Smith testified that the respondent would only respond to the dust and water problems when an inspector was present, and he suggested that he quit over these conditions. However, when called in rebuttal after the first day of the hearing, Mr. Smith admitted that he quit after receiving a layoff notice. He also confirmed that he filed an unemployment claim against the respondent but abandoned his claim after he failed to appear at a hearing before a referee. Having viewed Mr. Smith's demeanor in the course of the hearing, and notwithstanding his assertion that he had "no bad feelings" against the respondent, I believe that quite the opposite is true. Mr. Smith appeared hostile and

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antagonistic toward the respondent and I believe that he would color his testimony to place the respondent in the worse possible light. In short, I find him to be a less than credible witness.

Contrary to Mr. Vanover's suggestion that the respondent expected its employees to work downwind of the shear, the respondent's credible and unrebutted evidence establishes quite the opposite. Longwall manager Tye testified that he cautioned Mr. Vanover about going downwind of the shear and working there in the dust (Tr. 90, 239-40, 259). Mr. Tye believed that Mr. Vanover would not be exposed to excessive dust if he stayed outby the shear and the area downwind.

Mr. Begley and Mr. Osborne denied that anyone was required to be downwind of the shear in order to perform work. Mr. Osborne confirmed that he has observed people downwind of the shear and ordered them out after informing them they were not to be there (Tr. 225). Mr. Sizemore confirmed that on two occasions, an inspector has cited employees after observing them downwind of the shear.

Mr. Begley confirmed that after observing Mr. Vanover downwind of the shear, he ordered him out and informed him that this was not permitted (Tr. 190). Mr. Vanover confirmed that on one occasion Mr. Begley told him that he was not to be downwind of shear (Tr. 90).

I find no credible evidence to establish that Mr. Vanover was required or assigned to work downwind of the shear while it was cutting coal at the face. Although he suggested during his direct testimony that he was consistently required to work downwind of the shear in the dust, on cross-examination he testified that this only occurred "at times", and when asked if this were a matter of routine or personal choice, he replied "I guess it was" (Tr. 86). Further, when called in rebuttal during the second day of the hearing, Mr. Vanover changed his story and stated that he worked downwind of the shear on every shift since the longwall started in production because he thought this was part of his job (Tr. 278-279). I find Mr. Vanover's assertion that he was required to work downwind of the shear on every shift because he was required to as a part of his job to be lacking in evidentiary support, and it casts reasonable doubts in my mind on his credibility.

The respondent's credible evidence establishes that working downwind of the shear is contrary to the approved ventilation and dust control plan and company work rules. Mr. Vanover acknowledged that he was aware of these prohibitions, and I reject as less than credible his suggestion that he worked downwind of the Shear with the full knowledge and consent of management because it was expected of him or was required as part

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of his job. Indeed, Mr. Vanover testified that no one ever told him to go downwind of the shear (Tr. 90).

Mr. Hacker confirmed that Mr. Vanover would be downwind of the shear at the time it was cutting in both directions, but that it would be illegal for him to be there after the one-directional cutting was adopted (Tr. 330). Although Mr. Hacker believed that Mr. Vanover needed to be downwind to advance the shields and to keep up with his fast paced cutting, he confirmed that if asked to do so by the shield technician because of a dust or other problem, he would stop the shear (Tr. 328). He confirmed that he and Mr. Vanover are friends and that if Mr. Vanover wanted him to shut the shear down because of a problem he would have done so (Tr. 332).

While it may be true that some technicians had difficulty keeping up with the pace of the shear that was cutting the face, particularly during the time that cuts were being made in both directions, I find no credible evidence that Mr. Vanover had such a problem when he decided to quit. I take note of the fact that Mr. Hacker was not working on the same shift as Mr. Vanover at the time Mr. Vanover quit. Mr. Hacker indicated that he had not worked with Mr. Vanover for three or four months before he quit (Tr. 327). Under the circumstances, any problems that Mr. Vanover may have had keeping up with Mr. Hacker would have occurred well before he quit, and I find it less than credible and unreasonable for him to have believed that he would have encountered the same problems if he had returned to work.

The respondent has acknowledged that it had some longwall ventilation problems that resulted in an excessive dust violation on August 28, 1991. However, Mr. Bauer's credible and un rebutted testimony reflects that as a result of this violation, ventilation changes were made in October, and December, 1991, increasing the amount of air on the face, and the two-directional face cutting was discontinued. Mr. Bauer further indicated that only two dust violations were issued from March, 1992, when Mr. Vanover was first assigned to the first shift, until he left in July, 1992, and that the mine has been in substantial compliance with the dust plans since December, 1991. He also indicated that the mine received only one excessive dust violation on the longwall section from April, 1991, through the end of July, 1992.

Although Mr. Vanover indicated that "every once in awhile the air was insufficient to blow the dust out", there is no evidence that this was a problem when he decided to quit, and he confirmed that he was unaware of any violations issued at the mine for inadequate air ventilation (Tr. 118).

Safety technician Sizemore testified credibly about the remedial measures taken by the respondent as a result of the

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October, 1991, dust problems. With the exception of the September/October, 1991, dust sampling cycle on the longwall, Mr. Sizemore's un rebutted testimony reflects that the mine was in compliance with MSHA's allowable respirable dust limitations before and after the September/October, 1991, period, and from January through June, 1992. Under all of these circumstances, I have difficulty accepting as reasonable and credible Mr. Vanover's contention that he feared for his life because of the dust conditions on the longwall at the time he decided to quit his job.

The evidence establishes that Mr. Vanover's meeting with Mr. Smith and Mr. Bauer took place before he filed his discrimination complaint with MSHA. In the absence of any evidence to the contrary, I cannot conclude that the respondent had any ulterior motive in seeking the meeting other than to learn from Mr. Vanover why he left his job. Mr. Vanover could have refused to meet with Mr. Smith and Mr. Bauer, but he did not. I find Mr. Bauer's explanation as to why he sought the meeting to be credible and plausible. I also find that Mr. Bauer's offer to Mr. Vanover to return to work was bona fide and made in good faith.

After a careful review and consideration of all of the evidence in this case, I cannot conclude that the respondent maintained the longwall in such a condition, or allowed conditions on the longwall to deteriorate to the point where it would have made it intolerable for Mr. Vanover to continue on in his employment or to return to work.

The evidence in this case establishes that Mr. Vanover requested to take leave two or three days before he left work for a two-week vacation. At the conclusion of his vacation, and after waiting "until the last minute" (Tr. 20), he decided to quit his job. As a matter of fact, Mr. Vanover started to return to work, but instead, drove to the respondent's main office and told a lady in the office that he was quitting (Tr. 48-49).

Mr. Vanover asserted that he took his vacation to consider whether to return to work. Given the fact that his refusal to accept management's offer to return to work was based on his belief that nothing would ever change at the mine, I find it rather strange that Mr. Vanover needed more time to ponder the question. It seems to me that if he truly feared for his life, or truly harbored a fear that to return to work would place him at risk, he would have quit sooner than he did. His failure to do so casts doubts in my mind regarding the credibility and reasonableness of his asserted reasons for quitting and not returning to work.

During his direct testimony, Mr. Vanover acknowledged that when he met with Mr. Bauer and Mr. Smith he informed them that he

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intended to enroll in college and that he "was done with Shamrock" (Tr. 20). When called in rebuttal the second day of the trial, Mr. Vanover was rather equivocal and evasive about his plans to attend college, and although he admitted to a high school education, he indicated that he "would never had made it" in college and knew that he could not read or write well enough for college work (Tr. 272). Mr. Vanover asserted that he had been thinking about attending college "off and on" over a period of time (Tr. 274). It seems to me that if he had any reservations about his ability to succeed in college, he would have realized this sooner than he claimed he did.

I conclude and find that Mr. Vanover voluntarily quit his job for reasons other than a fear for his life, his health, or his safety. Having withdrawn approximately \$56,000, from his profit sharing account that was completely paid for by the respondent, I believe that Mr. Vanover decided it was time to end his mining career and to seek to enroll in college to further his education and to better himself.

ORDER

In view of the foregoing findings and conclusions, I conclude and find that Mr. Vanover has failed to make a case of discrimination pursuant to section 105(c) of the Act, and that he has failed to establish by a preponderance of the credible and probative evidence adduced in this matter that the circumstances under which he voluntarily quit his job and refused the respondent's offer to return to work constituted a constructive discharge within the meaning of the anti-discrimination provisions of the Act. Accordingly, his claims for relief ARE DENIED, and his complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge

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