

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400  
DENMR. COLORADO 80204

JUN 11 1981

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SECRETARY OF LABOR, MINE SAFETY AND )		
HEALTH ADMINISTRATION (MSHA), on behalf )	COMPLAINT OF DISCHARGE,	
of ROBERT E. STAFFORD, )	DISCRIMINATION OR INTERFERENCE	
Complainant, )		
v. )	DOCKET NO. WEST 80-289-DM	
WESTERN NUCLEAR, INC., )	MINE: Sherwood Project	
Respondent. )		
_____ )		

DECISION AND ORDER

Appearances:

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For the Petitioner

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For The Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE THE CASE

On April 9, 1980, the Secretary of Labor, Mine Safety and Health Administration [hereinafter "the Secretary"], brought this action on behalf of Robert E. Stafford [hereinafter "Stafford"] pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 5 801 et seq. (1978) [hereinafter cited as "the Act" or "the 1977 Act"]. In **his complaint**, the **Secretary** alleges that Respondent, Western Nuclear, Inc. [hereinafter Western Nuclear], unlawfully discriminated against Stafford by discharging him from his employment at Western Nuclear's Sherwood Project on September 19, 1979, in violation of the Act. The Secretary alleges that Stafford was engaged in activities relating to

health and safety protected by section 105(c) of the Act at the time of his discharge. / The Secretary's complaint seeks relief on behalf of Stafford in the form of a finding of discrimination, an order directing Western Nuclear to reinstate Stafford to his former position with back pay plus interest from the time of his discharge, an order directing Western Nuclear to clear the employment record of Stafford of any unfavorable references relating to his discharge, and that an appropriate civil penalty be assessed against Western Nuclear for its alleged unlawful interference with Stafford's exercise of rights protected by section 105(c) of the Act. Western Nuclear, on May 5, 1980, filed an answer to the complaint containing a general denial of all allegations and a prayer for relief seeking recovery of costs, expenses, and attorneys fees. Pursuant to notice, the matter came on for hearing on October 8, 1980, in Spokane, Washington. Submission of post hearing briefs was completed on January 7, 1981.

#### FINDINGS OF FACT

1. Western Nuclear is operator of an open pit uranium mine and mill processing plant in Wellpinit, Washington, known as the Sherwood Project.

2. Robert E. Stafford was employed by Western Nuclear at its Sherwood Project from July 31, 1978, to September 19, 1979, the date of his discharge.

3. Stafford was assigned to the General Mill Maintenance Department as a general laborer where he performed various jobs, such as sandblasting, carpentry, painting and industrial coatings. For this work, he received \$6.81 per hour.

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1/ Section 105(c)(1) of the 1977 Act, 30 U.S.C. § 815 (c)(1), reads in pertinent part as follows:

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

4. Stafford had a well-known reputation at the Sherwood Project for an interest in state unemployment compensation and in the **circumstances** under which 'one could qualify for such assistance.

5. Stafford-also had a reputation for disliking the task of sandblasting. Co-workers at the Sherwood Project generally shared that opinion.

6. On September 17, 1979, Stafford was part of a work crew assigned the task of sandblasting a mill yellowcake precipitation tank in order for repairs to be made to its inside surface.

7. The work crew consisted of Stafford, Audrey Grant, Richard Miller, **Allan** Rebillard and Maurice Clark. Clark was lead man for the group. He was responsible for all procedural activities of the crew, although his presence at the job site was only periodic and transitory. In Clark's absence, Rebillard, as senior man, was considered by the crew to be in charge and they followed his orders. Due to his seniority and experience, Rebillard was instructed to insure safety.

8. The mill yellowcake precipitation tank is a metal vessel with a height of approximately 22 feet and a diameter of approximately 28 feet. The uppermost section of the tank is cylindrical in form. At the eight-foot mark it tapers off into a cone, down a 45 degree slope, to a small drain port at the apex. The inverted cone has a vertical height of 14 feet.

In the center of the tank is a vertical shaft which rotates a network of suspended long and short rakes. The staggered rakes agitate the yellowcake solution by passing within 1/8 inches of the internal surface of the cone. The four rakes, two long and two short, are maintained in position by a series of rake arm supports. The **supports, made of 3 1/2** inch pipe, extend at right angles from the shaft out to the internal surface of the cone, where they are attached to the rake blades.

9. The procedures for sandblasting the inside of the tank were developed by **Clark**, as lead man, **and Edward** Jeffries, Mill Repair Foreman and supervisor of the work crew. The task was to be performed by crew members from a mobile, cage-like apparatus, known as a spider. The spider, supported by a cable, could be positioned at varying intervals around the tank's circumference and then operated along the tank's vertical axis. The crew members would thereby have access to all **internal** surfaces from the relative security provided by the spider. Procedures would be taken to insure worker safety from radiation hazards. Safety lines would be **worn** and tended.

10. On the morning of September 17, 1979, preparatory work for sandblasting the yellowcake precipitation tank was completed. Equipment **was** issued and assembled. The interior of the tank was washed down.

11. That same morning, Stafford held a conversation with Sherwood Project co-workers Craig Smith and George Hill. Segments of that conversation dealt with Stafford's opinion that sandblasting the yellowcake

precipitation tank was unsafe, that Stafford was considering quitting and that getting unemployment compensation was a concern.

12. Later that day, a bantam crane was used to position the spider apparatus inside the tank. The spider, however, was missing certain wheels used to balance the assembly. As a result, it operated in a clumsy fashion. Lead man Clark ordered that the spider be used in its present condition. Sandblasting operations commenced, with crew members taking shifts sandblasting from the spider. Wheels for the spider were subsequently located, but their installation did not perfect the stability of the mechanism. At some point in the day, an electrical short occurred in the spider assembly and it had to be taken from the tank and removed from service. The sandblasting operation was temporarily halted as a result.

13. In light of the spider malfunction, the crew looked for an alternate method to accomplish its task. Those members present, Stafford, Grant, Miller and Rebillard, considered a solution proposed by Rebillard. The suggested alternative was to use the spider as an inert basket to gain access to the tank, leave the spider, climb down onto the rake assemblies and sandblast off of them. Safety lines would be worn and tended. The crew members agreed to the proposal.

14. Rebillard then informed Clark of the crew member's concern for their safety while working from the spider and of the plan to gain access to the tank. At least some sandblasting was accomplished that day by the crew utilizing this method.

15. That afternoon, Stafford again spoke with Smith, who had examined the precipitation tank while in the area on another job. Safety, or lack thereof, was the subject of the conversation.

16. On September 18, 1979, the crew looked for a means of gaining access to those areas of the tank that had not, as yet, been sandblasted. Those members of the crew present, Stafford, Grant, Miller and Rebillard, talked the situation over and, at Rebillard's suggestion, agreed that crew members would ride the rake assemblies to get into a position to sandblast.

17. Crew members proceeded with the revised plan to complete their assigned task. Stafford, Grant and Miller took shifts of approximately 30 minutes duration, sandblasting from the rake assemblies. Each junior crew member was in the yellowcake precipitation tank three or four times per day. Rebillard positioned the crew member where sandblasting was required by activating the rake drive mechanism, transporting the individual to the desired location. Stafford was so transported.

18. Prior to crew members entering the tank, Rebillard had locked out the motor control switch for the rake drive, preventing its activation. He had also tagged the switch, stating that maintenance work was in progress. Rebillard would remove the lock just prior to activating the drive mechanism and, once the crew member was in position, would stop the rake drive and **immediately** replace the lock. This procedure deviated from Western Nuclear's lock and tag procedure then in effect, which required that the lock and tag should only be removed when the work was completed and the equipment was clear of personnel. The procedure employed by Rebillard likewise deviated from the **electricity** standard for metal and non-metallic open pit mines contained in 30 C.P.R. §55.12-16.<sup>2/</sup>

19. That same day, Stafford held a **conversation** with co-workers Smith and Hill. Quitting for a safety concern and unemployment compensation were subjects of discussion.

20. At approximately 8:00 a.m. on September 19, 1979, Bobby **Ridgeway** then Radiation Safety Officer with Western Nuclear's Sherwood Project, encountered Stafford near the yellowcake precipitation tank while on a walk around inspection. During that encounter, Stafford communicated to **Ridgeway** his apprehension of falling off of the rake assemblies.

21. Later that morning, Stafford held several conversations with Smith and/or Hill. Quitting, being fired, refusing to work, sandblasting, yellowcake hazards, riding the rake assemblies and unemployment compensation were topics of discussion in varying degrees.

22. On September 19, 1979, the crew as a whole began the day in the general maintenance shop. Stafford, Grant, Miller and Rebillard were present. Stafford asked Miller if he would take his shifts sandblasting. Miller said that he would, but Rebillard said that to **do** so would be **illegal** as crew members should each be in the protective hood assembly for only twenty minutes at a time. At this time, Clark walked in, asked what was going on and was told of Stafford's request. Clark instructed the crew to get things ready for work on the tank, which they did. Rebillard asked Stafford to go down into the **tank** first. Stafford refused, stating that he felt it was unsafe. Rebillard informed Stafford that he could either go in the tank first or go see Jeffries. Stafford chose to go see Jeffries.

23. At approximately 8:45 a.m., on September 19, 1979, Stafford went **to** Jeffries' office and told him that he wasn't going into the tank. Jeffries asked Claude Cox, Mine Safety Supervisor, and Ridgeway, as radiation supervisor, to check the yellowcake precipitation tank for air quality and the equipment being used for safety.

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**2/ Mandatory.** Electrically powered equipment shall be deenergized before **mechanical** work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

24. After being asked by Jeffries, Cox and Ridgeway physically examined the yellowcake precipitation tank. Cox observed the area and examined the equipment for safety. He asked Stafford, Miller and Rebillard, in the presence of Jeffries, what was unsafe. The only reply he received was from Stafford, who stated that he didn't want to get on and ride the rakes. Stafford was interrupted by Jeffries, who forcefully stated, "You were told not to ride the rakes, we don't want you to ride those rakes ." Cox, at this point, was unaware that people had been riding the rake assemblies. Ridgeway reported to Jeffries at the scene that the crew members were sufficiently protected from radiation hazards.

25. Jeffries then wrote out a discharge slip for Stafford based upon his refusal to perform his assigned duties.

#### ISSUES

By discharging him from his employment at the Sherwood Project for failure to perform his assigned duties, did Western Nuclear unlawfully discriminate against Robert E. Stafford in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977?

#### DISCUSSION

In its decision of Secretary of Labor on behalf of David Pusula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980), the Federal Mine Safety and Health Review Commission recognized the right of a miner to refuse to perform work and set forth the test to be used to determine whether or not the discharge of a miner for such refusal was discriminatory. The Commission held as follows:

"We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in

fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have **dis-**ciplined him in any event." Id. at 2799-2800. (Emphasis in original.)

#### A. Protected Activity

The Review Commission further refined the right of a miner to refuse to perform work in its decision of Secretary of Labor, Mine Safety and Health Administration (MSHA), ex rel. Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 3, 1981). Robinette resolved the question of whether good faith and reasonableness are components of protected activity. The Commission adopted a rule that required a miner to have a good faith, reasonable belief in a hazardous condition for the work refusal to be considered protected activity. Id. at 812.

"Good faith belief simply means [an] honest belief that a hazard exists." Id. at 810. The Commission determined that "[g]ood faith also implies an accompanying rule requiring validation of reasonable belief." Id. at 811. Validation could be achieved by "... a simple requirement that the miner's honest perception 'be a reasonable one under the circumstances.'" Id. at 812. (Emphasis in original:)

With regard to these issues, the evidence establishes that Stafford had a preoccupation with state unemployment compensation and in the circumstances under which one could qualify for such assistance. He also was known to have a distinct dislike for the task of sandblasting. Craig Smith testified in minute detail as to various conversations he had with Stafford in the three days preceding Stafford's discharge. In the majority of these conversations, issues of safety, termination of employment and unemployment compensation were subjects of discussion. Smith had no deep regard for Stafford and <sup>was</sup> of the opinion that Stafford was trying to draw a paycheck for no work. On cross examination by counsel for the Secretary, it ~~was~~ revealed that Smith's recollection of other events from his past association with Stafford could not be recalled in similar exacting detail. On the other hand, Stafford either denied or could not remember' conversations with Smith having taken place. After examining the testimony and demeanor of the witnesses, I find that conversations between Stafford and Smith did occur and that issues of safety, termination of employment and ~~unemployment compensation~~ were subjects of discussion. However, the testimony as to what was specifically said by whom and when it occurred is not entirely credible. I further find that it has been established by a preponderance of the evidence that Stafford held an honest belief that a hazard existed in riding the rake assemblies and that such belief was a reasonable one, involving substantial risk of injury through physical mutilation. There was clearly a violation of a mandatory safety standard and management was informed by Stafford of this situation, as is more fully set forth below. Under these circumstances, Stafford's refusal to perform work was a valid exercise of a statutory right afforded him by the 1977 Act and, as such, is entitled to 'protection.

As to other issues of protected activity raised in this case, section 105(c)(1) of the Act sets forth certain enumerated types of employee activity protected by a prohibition against discrimination or interference, including:

"... a complaint notifying the operator or the operator's agent... of an alleged danger or safety or health violation in a coal or other mine, . . . , or because of the exercise by such miner... on behalf of himself or others of any statutory right afforded by this Act ."

The **evidence** establishes that early on September 19, 1979, that Bobby Ridgeway, then Radiation Safety Officer with Western Nuclear's Sherwood Project, encountered Stafford near the yellowcake precipitation tank while on a walk around inspection. **Ridgeway** testified that at their meeting he greeted Stafford **saying**, "Good morning, 'Bob,'" and that Stafford responded with, "Well, I guess I am going to be fired." **Ridgeway** testified that he was concerned and wanted to know why. Stafford stated that he refused to go in the tank. When asked why, Stafford mentioned both his and his mother's concern about his exposure to high radiation. **Ridgeway** then proceeded to explain the relative safety of the assignment to Stafford. On cross examination by counsel for the Secretary, it was brought out that in an interview with Robert Chelini, the MSHA inspector investigating Stafford's discharge, that **Ridgeway** had stated that Stafford had told him that he was afraid he would fall [off of the rakes]. **Ridgeway** identified his voice on a tape recording of that interview. He testified that he could not remember Stafford telling him about his fear of falling, but that he could have told him. I find that Stafford did communicate his apprehension to **Ridgeway** and, under the broad language of section 105(c)(1), that the communication amounted to a colorable complaint of an alleged danger or safety violation.

The evidence further establishes that on September 19, 1979, after first refusing to enter the yellowcake precipitation tank, that Stafford went to see Edward Jeffries, the Mill Repair Foreman. Stafford told him that he wasn't going into the tank. **Jeffries** testified that he asked Stafford why and was told that Stafford had talked with his mother and that she had advised him against entering the tank because of the high radiation. Stafford testified that he complained to Jeffries about how he didn't believe that he should be riding the rakes in the manner the crew was employing because he thought that it **was** dangerous. Jeffries denied that Stafford mentioned this apprehension. According to Jeffries, the first indication that he received that employees were riding the rake assemblies came **from Mr. Che'lini**, the MSHA special investigator. I find that Stafford did mention these concerns to Jeffries, providing the grounds for those concerns. These communications constituted a safety 'complaint and, thus, were protected activity under the Act.

To satisfy himself, Jeffries asked Claude Cox, Mine Safety Supervisor, and Ridgeway, as radiation supervisor, to check the yellowcake precipitation tank for air quality and the equipment being used for safety. Cox and **Ridgeway** examined the tank and **Ridgeway** reported to Jeffries at the scene that the crew members were adequately protected from radiation hazards. Cox testified, that while on the scene and in the presence of Jeffries, he asked Stafford, Miller and Rebillard **what\*was \*unsafe**. The only reply he received was from Stafford, who stated that he didn't want' to get on and **ride** the rakes. Stafford was interrupted by Jeffries who forcefully stated, "You were told not to ride the rakes; we don't want you to ride



those rakes." Cox testified that at this point he was unaware that people had in fact been riding the rake assemblies. I find that Stafford's remarks were safety complaints and entitled to protection under the Act.

#### B. Motivation of Discharge

It is abundantly clear from the record that Stafford was discharged from his employment at Western Nuclear's Sherwood Project for his refusal to perform his assigned duties. That refusal has previously been determined to have been a valid exercise of Stafford's statutory rights and, hence, protected activity. Although Stafford's complaints may have played some part in his discharge, his refusal to work was ostensibly the cause. I find it has been established by a preponderance of the evidence that Stafford's discharge was motivated by this protected activity.

Although the record indicates that Stafford may have been less than a desirable employee, Western Nuclear has failed to show that it did in fact consider him deserving of discipline for engaging in any unprotected activity alone and that it would have disciplined him, in any event.

#### CONCLUSIONS OF LAW

1. Respondent Western Nuclear is a mine subject to the provisions of the 1977 Act.

2. At all times relevant to this Decision, Complainant Robert E. Stafford was a miner as defined in the Act and entitled to the protection afforded by the Act.

3. The presiding Administrative Law Judge has jurisdiction over the parties and the subject matter in these proceedings.

4. On September 19, 1979, Complainant Stafford engaged in the following activities, which are protected by section 105(c)(1) of the Act: complaints to Radiation Safety Officer Bobby Ridgeway concerning radiation and falling hazards ; complaints to Mill Repair Foreman Edward Jeffries concerning radiation and falling hazards; complaints to Mine Safety Supervisor Claude Cox concerning falling hazards; and refusal to perform assigned duties which necessitated his transportation on electrically operated mechanical equipment in a manner inconsistent with the intended use of that equipment.

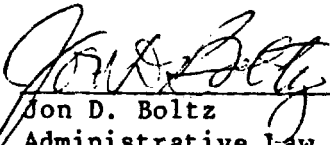
5. On September 19, 1979, Respondent Western Nuclear discharged Complainant Stafford from his employment, motivated in part by the protected activity described above.

6. Respondent Western Nuclear failed to establish that it did in fact consider Complainant Stafford deserving of discipline for engaging in any unprotected activity alone and that it would have disciplined him in any event.

7. Respondent Western Nuclear's discharge of Complainant Stafford on September 19, 1979, violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

ORDER

Accordingly, it is ORDERED: that Respondent Western Nuclear, Inc. offer to reinstate Complainant Robert E. Stafford to his former position, at his former rate of pay, with any adjustments in position or rate of pay to which he would have been entitled had he not been discharged; that Respondent pay to Complainant Stafford back pay in the form of gross pay less amounts withheld pursuant to state and Federal law, to be calculated from **the date** of his discharge to the date this Decision becomes final, less actual interim earnings, plus interest at the rate of 9 percent per annum; that Respondent shall expunge from Complainant Stafford's employment record any adverse references relating to his discharge and transmit to him a copy of his employment record reflecting the deletion of any adverse references relating to his discharge; and that Respondent shall pay a civil penalty in the amount of \$100.00 for its violation of the Federal Mine Safety and Health Act of 1977.

  
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Jon D. Boltz  
Administrative Law Judge

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