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SOL V. PEABODY COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
ON BEHALF OF  
JOHN GRIFFIN,  
COMPLAINANT

Complaint of Discharge,  
Discrimination, or Interference

Docket No. LAKE 81-159-D

v.

Baldwin No. 1 Mine

PEABODY COAL COMPANY,  
RESPONDENT

DECISION

Appearances:

Miguel J. Carmona, Esq., and Thomas P. Piliero, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
for Complainant  
Thomas R. Gallagher, Esq., St. Louis, Missouri,  
for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

This case involves a claim by John Griffin, an employee of Respondent, that he was suspended for 3 days without pay for an incident on December 20, 1980, which he alleges was activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The case was heard in St. Louis, Missouri on October 20, 1981 and in Falls Church, Virginia on December 15, 1981. John Griffin, William Pillers, Leonard Krantz, Doug Rushing, Daniel Seiver and Arthur Grigg testified for Complainant; John Laughland, John Hull, Martin Sommer, Darryl Kirkman and Thomas Zweigart testified for Respondent. Both parties have filed posthearing briefs. Having considered the record and the contentions of the parties, I make the following decision:

FINDINGS OF FACT

1. Complainant John Griffin was at all times pertinent to this proceeding employed by Respondent as a miner, more specifically as a repairman.

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2. On December 20, 1980, Thomas Zweigart section foreman asked Chief Electrician Darryl Kirkman for a repairman to work on his unit.

3. John Griffin was assigned to work with Zweigart's unit. Upon receiving the assignment, he passed a remark indicating that he intended to disrupt activities in Zweigart's unit.

4. Griffin rode in a mantrip to the face area with the unit crew.

5. The area had been heavily rock dusted before the crew arrived, and considerable dust remained in the air.

6. After foreman Zweigart checked the face areas, the crew went up to the faces where the air was relatively clear. Zweigart decided to ventilate the section and purge it from dust and at the same time move the continuous miner into the next room to get it ready for producing coal.

7. In order to energize the miner, Zeigart instructed Griffin to turn the power on to the unit. It was customary for the repairman assigned to a production unit to turn on the power.

8. Griffin refused to turn on the power stating that it wasn't safe because of the dust. He later stated that the dust made it impossible for him to inspect the cables which he felt should be done before energizing the unit.

9. In the mine in question it was not customary for the repairman to inspect the cables before turning on the power to the unit. Each equipment operator inspected the cable to his own piece of equipment and notified the repairman of any defects.

10. Griffin later stated that the dust concentration made it difficult to breathe and unhealthy to walk to the transformer to turn on the power.

11. Foreman Zweigart then ordered Griffin to turn on the power and when he refused, Zweigart called the mine manager, John Laughland. Laughland asked about the dust and instructed Zweigart to order Griffin again to turn on the power. When he refused, Laughland instructed Zweigart to have Griffin removed from the mine and turn on the power himself, which Zweigart did.

12. The Mine Superintendent John Hull was informed of the incident and he prepared a written 5-day suspension with intent to discharge. Hull and Laughland met Griffin inside the mine. Griffin admitted that he was wrong and that he should have turned on the power. He requested that the disciplinary action be reduced to a 3-day suspension. Because he admitted his error, Hull changed the letter to show a 3-day suspension.

ISSUES

1. Was Complainant suspended for activity protected under section 105(c) of the Act?

2. If the answer to the previous question is in the affirmative, what remedy should be awarded?

DISCUSSION WITH CONCLUSIONS OF LAW

In the case of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2 BNA MSHC 1001, the Commission held that refusal to work in conditions believed to be unsafe or unhealthful is protected activity under the Act. It further held that a prima facie case of a violation of section 105(c)(1) is made out if it is shown that the adverse action complained of was motivated in any part by the protected activity. The employer may affirmatively defend by showing that he would have taken the adverse action for unprotected activity alone. In the case of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 812, 2 BNA MSHC 1213, it was further held that refusal to work is protected if the miner "has a good faith, reasonable belief in a hazardous condition."

The record here shows that there was excessive rock dust in the air at the time and place involved in this case. It further shows, however, that the section foreman did not intend to begin production prior to clearing the air. He ordered the power turned on in order to move the miner and intended to clear the air and ventilate the unit while the miner was being readied.

Based on all of the testimony, I conclude that Complainant did not refuse to perform work because of a good faith belief that doing so threatened his health or safety. I find that the reason Complainant gave for his refusal was in fact a sham. My conclusion is based on my observing Complainant's demeanor on the witness stand as well as the answers he gave. I credit the testimony of Martin Sommer and Darryl Kirkman concerning Complainant's remarks when he was assigned to the section. I generally credit the testimony of John Hull and John Laughland concerning the issuance of the disciplinary suspension, and decline to credit Complainant's version of this occurrence. I conclude that Complainant deliberately attempted to disrupt the activities of the section in the hope that he might obtain time off. The dust in the atmosphere and its alleged relation to health and safety was used as a pretext.

Since a good faith believe in the existence of a health or safety hazard is required to find protected activity, it is unnecessary to discuss other aspects of the Pasula test.

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I conclude that Complainant's suspension did not result from activity protected under the Mine Safety and Health Act.

ORDER

Based upon the above findings of fact and conclusions of law, the above proceeding is DISMISSED.

James A. Broderick  
Administrative Law Judge