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ELMER STATON V. KAYNITE MINING  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

ELMER WAYNE STATON, COMPLAINANT	Complaint of Discrimination
v.	Docket No. VA 82-4-DM
KAYNITE MINING CORPORATION, RESPONDENT	East Ridge Plant

DECISION AND ORDER

Pursuant to notice the captioned discrimination complaint came on for an evidentiary hearing in Roanoke, Virginia on April 6 and 7, 1982.

At the outset of the hearing the trial judge heard argument on a motion by complainant's attorney for leave to withdraw and for a thirty day continuance to permit complainant to find new counsel. The latter motion was opposed by counsel for the operator. The matter was resolved when complainant agreed to proceed pro se and the operator agreed the trial judge might assist complainant in developing the facts. The operator also agreed to produce three witnesses complainant claimed he needed to present his case. (FOOTNOTE 1)

After extensive settlement discussions in which complainant offered to withdraw his request for reinstatement, the matter proceeded to hearing. As the evidence was developed several recesses were held for the purpose of allowing the parties to seek an accommodation and compromise of their positions. The trial judge participated fully in these discussions to the end that the rights of both parties would be protected and a fair resolution of the matter expedited. When a settlement could not be reached, the matter was recessed overnight and the taking of evidence continued the second day.

After hearing testimony from ten witnesses, including complainant the parties rested, waived further argument or the filing of post-hearing briefs, and requested an immediate bench decision. Whereupon, the trial judge rendered the following decision:

After considering and weighing the evidence, including the demeanor and credibility of the witnesses, I find a preponderance of the reliable, probative and substantial evidence shows that Elmer Wayne Staton's perception of an abnormally dangerous or hazardous condition at the fluid bed dryer at Kyanite Mining Company's East Ridge Plant on July 24, 1981 was reasonable under the circumstances.

In reaching this conclusion, I have credited fully not only Mr. Staton's testimony but also that of Wayne Davenport. I recognize other perceptions differ from that of the credited witnesses and that from a purely objective standpoint there is evidence to support the view that the perception of the credited witnesses was unreasonable. Nevertheless, under the evidentiary standard set by the Commission in the case of Thomas Robinette v. United Castle Coal Company, 3 FMSHRC 802, at 809-812 (1981), I feel constrained to hold that Mr. Staton's perception, as corroborated by that of Mr. Davenport, requires a finding that his refusal to work under the apprehension of a burn hazard was reasonable even though others, including the trial judge, might reasonably conclude his fear was unrealistic.

The premises considered, therefore, I hold that Mr. Staton's dismissal for refusal of the work assignment in question was unlawful under section 105(c) of the Mine Safety Law.

Accordingly, it is ORDERED that a finding of liability subject to immediate appeal be, and hereby is, entered and that further proceedings with respect to the relief requested by complainant be, and hereby are, stayed pending the outcome of such appeal.

Thereafter, the parties, without the knowledge or presence of the trial judge, adjourned to discuss further a settlement of this matter. They shortly advised the judge that a settlement had been reached and the record was reopened. At that time counsel for the operator stated that the matter had been settled on the following terms and conditions, namely that in return for the operator foregoing its right of appeal and the payment of a sum certain complainant had agreed to a dismissal of his complaint with prejudice. When complainant acknowledged for the record his understanding and acceptance of the terms of the settlement, the trial judge entered an order approving it and directed that subject to payment of the sum agreed upon and the furnishing of complainant's release for the record the matter would be deemed dismissed with prejudice.

