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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), EX REL PHILLIP DENNIS IRVIN, ET AL.,	Complaint of Discharge, Discrimination, or Interference Docket No. LAKE 82-5-D Eagle No. 2 Mine
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v.

PEABODY COAL COMPANY,
RESPONDENT

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S.
Department of Labor, Chicago, Illinois, for Complainants
Thomas R. Gallagher, Esq., and Michael O. McKown, Esq.,
St. Louis, Missouri, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding is an action brought by the Secretary of Labor on behalf of 70 miners employed in February 1981 at Respondent's Eagle No. 2 Mine alleging that the named miners were discriminated against in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Pursuant to notice, a hearing was held in St. Louis, Missouri, on February 18, 1982. Forrest A. Younker was called as an adverse witness by Applicants and Ownly Franklin Williams, Phillip Dennis Irvin, William Henry Gibson and Narnie E. Nangle testified on behalf of Complainants. Forrest A. Younker testified on behalf of Respondent. The parties agreed that the depositions of Narnie E. Nangle, Robert Walker and Mike Wolfe may be received as evidence. Sixteen joint exhibits were admitted, and 2 additional exhibits were offered by Applicants and admitted. Posthearing briefs were filed by both parties.

Based on the entire record and considering the contentions of the parties, I make the following decision:

Findings of Fact

1. At all times pertinent to this decision, Respondent was the operator of an underground coal mine in Gallatin County, Illinois, known as the Eagle No. 2 Mine. Respondent is a large operator.

2. The Complainants herein were miners employed at the Eagle No. 2 Mine.

3. There were three shifts in the subject mine, denominated A, B, and C. The hours were 8 a.m. to 4 p.m., 4 p.m. to 12:01 a.m. and 12:01 a.m. to 8:00 a.m. respectively.

4. Three shower room facilities were maintained at the mine, one for male employees, one for female employees and one for foremen.

5. The male employee's shower room was approximately 40 feet long, 12 feet wide and 7 feet high. The floor and walls were concrete. There were two doors and no windows. On February 12, 1981, there were three fluorescent lights in the room suspended from a metal ceiling, each with two bulbs, a metal casing and a plexiglass bottom. There were four ventilation fans and two floor drains with metal grates. There were approximately 25 to 30 shower heads.

6. Above the shower room on a metal floor was a 3,000 gallon water tank and four electrically operated water heaters.

7. On February 12, 1981, during the C shift (12:01 a.m. to 8:00 a.m.), a leak developed in the hot water tank. Repairs were begun on the tank before 8:00 a.m., and hot water was not available for the C shift employees. The employees on the A shift were assured that the tank would be repaired prior to the completion of their shift, and entered the mine on the basis of that assurance. The tank was repaired about 10:00 a.m. but developed another leak at about 11:00 a.m. This leak could not be repaired without completely draining the tank and making showers unavailable for both the A and B shift employees. A trough was made to drain the leaking water down through the roof into the shower room.

8. The leaking water entered the fluorescent light fixtures at the north end of the room. Water collected in the fixture and dripped down on to the floor of the shower room. The wire was cut to the light but the power remained on.

9. Representatives of the miners were concerned about the danger involved to those who might shower in these circumstances and had a meeting with mine management, commencing at about 3:55 p.m., February 12. The B shift employees did not enter the mine at the beginning of the B shift because of this controversy.

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10. The Mine Superintendent and the Representatives of the miners discussed some alternative solutions to the problem: (1) drain the tank in order to repair it. However, this would make the shower unavailable to all the employees on the three shifts. (2) Use the female employees' and foremens' shower rooms. However this would provide only 11 shower-heads for 77 employees on the B shift. (3) Cut off the power and install a temporary lighting system using cap lamps. The third alternative was proposed by the Superintendent to the employee representatives but they rejected it and called State and Federal inspectors.

11. The State inspector arrived at the mine at about 6:00 p.m. He found some "irregular things" in one of the heaters which were repaired immediately. He stated to the miners representatives that he saw nothing wrong in using temporary lighting in the shower room until the tank was repaired on the weekend.

12. The miners on the B crew were not satisfied, refused to go to work and left the mine premises.

13. A federal inspector arrived at the mine at about 10:30 p.m. At that time the power had been cut off to the flourescent lights and certain conditions respecting the heater had been or were being taken care of. The federal inspector stated that he would have no objection to the use of battery operated cap lamps to provide light for the shower room.

14. Complainant William Gibson who worked on the C shift rode to work with five other employees from their homes in Kentucky (about 80 miles or more to the mine). Because the shower room was not available the previous morning, Gibson called the mine office before leaving for work on January 12 (he was to work 12:01 to 8:00 on January 13) and was assured that the tank would be repaired in time for his shift.

15. When Mr. Gibson and his crew arrived at the mine, the tank was still being worked on, and the lights in the shower room were off. Because he objected to these conditions, Mr. Gibson and eight others from the C shift (calling themselves "the boys from Kentucky") refused to go underground and went home "for safety reasons."

16. The other members of the C shift worked their regular shift and took showers afterwards using camp lamps for lighting.

17. The employees on B and C shifts were not paid for the shift in which they refused to work. Each also received a letter of warning of disciplinary action.

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18. William Gibson received a written notice of suspension with intent to discharge.

19. Gibson filed a grievance which went to arbitration. Gibson was reinstated pursuant to an arbitrator's award.

20. Prior to the hearing in this case, the letters of discipline issued to the Complainants herein were rescinded and removed from their employment records.

STATUTORY PROVISION

Section 105(c)(1) of the Act provides:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment 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, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

ISSUES

1. Were Applicants disciplined by Respondent for activity protected under the Mine Act?
2. If so, what is the remedy for the violation?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977, and the undersigned has jurisdiction over the parties and subject matter of this proceeding.

2. Applicants, miners on the B and C shifts, failed to establish that their refusal to perform work on February 12 and 13, 1981, resulted from a reasonable, good faith belief that it was hazardous to do so.

DISCUSSION

Refusal to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall, ____ F.2d ____ (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981). I conclude that the objections raised by the B shift miners to showering in a room where water was running through electric light fixtures were reasonable and were made in good faith. Respondent concedes that at that time the miners had a good faith reasonable belief of the possibility of a shock hazard. However, Respondent offered an alternative, i.e., cutting off the electricity and using temporary lighting in the form of cap lamps. This proposal removed the potentially dangerous condition and provided shower facilities which were adequate. The State mine inspector stated that he could see nothing wrong with the proposed temporary lighting. The refusal of the B shift employees to work under these circumstances became at that point unreasonable and therefore was not protected by the Act. See Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539 (1981). The electricity had been removed from the fluorescent lights and the water heater was being repaired at the time the C shift employees refused to go into the mine. Both the State and Federal inspectors had indicated that the condition was no longer a hazard. I conclude that the refusal of the miners on the C shift to go to work was unreasonable and not protected under the Act.

3. The failure of Respondent to pay Applicants for the time they did not work on February 12 and 13, 1981, was not a violation of section 105(c)(1) of the Act.

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ORDER

Based on the above findings of fact and conclusions of law
IT IS ORDERED that this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge