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SOL (MSHA) V. OTTAWA SILLICA
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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), ON BEHALF OF JOHN COOLEY, COMPLAINANT	Complaint of Discrimination and Discharge Docket No. LAKE 81-163-DM
v.	Michigan Division Quarry
OTTAWA SILICA COMPANY, RESPONDENT	

DECISION

Appearances: David F. Wightman, Attorney, U.S. Department of Labor, Detroit, Michigan, for the complainant Frank X. Fortescue, Esquire, Southfield, Michigan, for the respondent

Before: Judge Koutras

Statement of the Proceedings

This is a discrimination proceeding filed by complainant MSHA on June 19, 1981, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, on behalf of complainant John Cooley for an alleged act of discrimination which purportedly occurred on May 6, 1980, (FOOTNOTE a) when Mr. Cooley was discharged from his employment with the respondent for refusing to follow an order from his supervisor to perform a work task which Mr. Cooley contends was unsafe. Mr. Cooley alleged that he had previously been suspended on May 2, 1980, for refusing to follow the same order, and he contends that the discharge which followed violated certain rights protected under the Act.

Respondent filed a timely response to the complaint, and pursuant to notice served on the parties a hearing was held in Detroit, Michigan, during the term December 15-16, 1981, and the parties appeared and participated fully therein. Post-hearing arguments and proposed findings and conclusions were filed by the parties, and they have been considered by me in the course of this decision.

Issues presented

The principal issue presented for adjudication in this case is whether Mr. Cooley's suspension and subsequent discharge from his employment with the respondent was in fact prompted by protected activity under the Act. Specifically, the crux of the case is whether Mr. Cooley's refusal to perform or carry out an order by his supervisor which he (Cooley) believed constituted an unsafe work assignment insulated him from suspension or discharge, and whether his abusive language warranted his discharge.

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), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

Stipulations

The parties stipulated that respondent operates a mine within the meaning of the Act, that the Secretary has jurisdiction to initiate the complaint, and that I have jurisdiction to hear and decide the matter (Tr. 8-9).

Testimony and evidence adduced by the complainant

John W. Cooley, testified that he is married, completed his education through the ninth grade, and was employed by the respondent for 18 months prior to his discharge on May 6, 1980. He described his job classification as "laborer" and stated that this included such "typical" duties as draining out elevator pits, shoveling and loading sand, hosing down the floor, driving "bobcats", and other general cleaning duties. He confirmed that prior to May 1980, he had been disciplined to carry out orders from his supervisor and received a penalty of a week off without pay and placed on probation for 12 months. He had two weeks left on his probation time at the time of his discharge (Tr. 10-12).

Mr. Cooley confirmed that David Chalmers was his supervisory foreman for at least six months prior to his discharge in May 1980, and he believed Mr. Chalmers had a great disregard for his own safety and cited several examples of this (Tr. 13). Mr. Cooley confirmed that he bid on a dryer operator's job in April 1980, and prior to this time he worked on the No. 6 Dryer as a laborer, and his duties included lighting the dryer pilot light with a cigarette lighter or a burning piece of paper. He stated that he performed these duties for some eight months prior to his discharge and that he lit the pilot in the fashion described at least thirty times, and "sometimes two three times a day" depending on when it would go out (Tr. 14-15).

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Mr. Cooley identified exhibit G-9 as a sketch or drawing of the No. 6 Dryer which he made and he explained the location of the parts and described how he would light the dryer pilot light. He stated that the dryer was located on a second floor landing some eight feet off the ground, and he described where he would stand to light the pilot. He indicated that he would have to stand on his toes and lean over a railing to reach the pilot light location, and this position would expose him to a possible fall head first over the railing and through an opening to the steel floor below on the next landing. He also expressed concern over a "flash flame" from the pilot and indicated that "this is where I singed hair right off my knuckle" (Tr. 16-19). He also alluded to the fact that the floor where he had to stand to light the pilot was often slippery due to the presence of a thin coating of silica dust (Tr. 20).

Mr. Cooley stated that he was instructed in the method for lighting the dryer pilot with a burning piece of paper or cigarette lighter by Mr. Chalmers and by Bill Nivitt, who was his supervisor prior to Mr. Chalmers. He had observed Mr. Chalmers lighting the dryer with a piece of burning paper and when he advised Mr. Chalmers that he believed it was unsafe to light it in that fashion Mr. Chalmers inserted a wad of paper towels in the pilot and lit it. However, the paper did not catch fire and Mr. Chalmers tried it a second time, and after a while it caught and ignited the pilot (Tr. 21-22). Mr. Cooley expressed his concern over the lighting of the dryer pilot with a burning piece of paper as follows (Tr. 23-24):

> Q. Okay. What was your opinion of lighting the No. 6 pilot with a burning piece of paper?
>
> A. Dangerous, stupid.
>
> Q. Why do you say that?
>
> A. I respect things. I just, I have great respect for things that are supposed to be. They got the correct way to do it. I will put it like that. They got a correct way to do it. If they don't do it that way, don't do it.
>
> Q. What was the correct way to do it?
>
> A. That panel board. Like I say, you got three lights on there. This is time. You got your cleaning to make sure you clear it. All right. When that light goes off, the other one comes on and you push that, sending -- that sends the gas.
>
> When that light goes off, the other one comes on, you ignite it. That is the correct procedure.
>
> Q. That wasn't working?

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> A. No. And this made me believe that if this

wasn't working, it is sheer madness not to think that these others could malfunction. And what if they would? You would get a double dose of gas in there. Well, hey, you know.

Q. What were you afraid of?

A. Getting burned up or blowed up or great danger. That is what I was afraid of.

Q. Were you afraid of falling?

A. I stated before, I was. Falling through this opening hole in the floor, yes.

Q. You stated before that you bid on the drier operator job, why did you bid on the drier operator job if you thought it was unsafe?

A. Well, to get out of lighting the pilot.

Q. And?

A. It is much -- how should I say? -- strenuous, and it i a little more pay. But the main reason was to get out of lighting the pilot.

Q. Why did you think you would get out of lighting the pilot with a burning piece of paper if you bid on the drier operator job?

A. That was before when I was on labor. Marvin Phelps and Smock, they would call Chalmers and he would order me to go back there and light that while they worked the control panel.

Q. So the drier operator didn't usually have to hold the burning piece of paper?

A. No, no. I seen the times, one time during that week, me and Marv, I beat him to the control panel and he didn't say nothing but he looked like he was kind of disappointed about it, you know, about lighting, reaching over.

Mr. Cooley stated that after he received his bid as a dryer operator he received five days of training from Marvin Phelps, an experienced dryer operator who lit the No. 6 dryer with a piece of paper. During his training, Mr. Cooley stated that he lit it in that fashion on two occasions, but that he complained to Mr. Phelps as well as Mr. Chalmers that this was unsafe. He stated that he had also complained to Ken Smock and Sam Watson, two other dryer operators about lighting the pilot with burning paper (Tr. 27).

Mr. Cooley testified that when he went to work on Friday, May 2, 1980, the last day of his training week, the dryer was down due to a problem so he proceeded to the lunch room. His foreman told him to get to work so he proceeded to the dryer area where he performed some clean up work and lubricated the trunion. Foreman Chalmers then called Mr. Phelps with instructions to "fire up" the dryer and when he (Cooley) leaned over the railing to light it the hair was singed off the knuckles of his right hand and that point he decided that he would never again light the dryer with burning paper. After making his mind up to voluntarily withdraw his bid as a dryer operator and informed Mr. Chalmers that he was "pulling his bid" as a dryer operator and informed him that he wanted to go back to his laborer's job, and Mr. Chalmers said "ok". Later that day Mr. Chalmers called him and ordered him to light the No. 6 pilot, and Mr. Cooley refused. Mr. Chalmers reminded him that he was on probation, Mr. Cooley cussed and stated to Mr. Chalmers that he would not light it and Mr. Chalmers asked him to come to his office. When he arrived at the office, a union steward and safety man was present and Mr. Chalmers indicated that he wanted Mr. Cooley "off the property". Mr. Cooley thereupon was sent home, indicated to his union steward that he wished to file a grievance and left (Tr. 27-32). He has not been employed since that time (Tr. 32).

On cross-examination, Mr. Cooley testified that he has worked in other plant open areas other than the No. 6 Dryer, some of which he considered to be unsafe. He indicated that he did complain about one of these areas, but claimed that he was "in the dark" about any company safety meetings (Tr. 35). He believed the entire plant was unsafe and stated that he had called unsafe conditions to the attention of his supervisors in the past (Tr. 37-39). Mr. Cooley conceded that he complained to Mr. Chalmers about "doing laborer's work", such as cleaning around the dryer, when he was in fact a dryer operator trainee. He explained that he did not like working around a steel floor which had water on it and which was near the electrical dryer control panel. After he burned his knuckles, he decided he had had enough and he withdrew his bid, and he conceded that the pilot incident wasn't the controlling factor (Tr. 45-46). He also stated that he knew he was on probation and felt that management wanted to get rid of him. He also conceded cursing and using profane language when speaking with Mr. Chalmers, but insisted that he was not cussing "toward him" but was upset over the fact that he had withdrawn his bid (Tr. 46). He also conceded that rather than going to Mr. Chalmers' office he told him that he would meet him in the lunch room, and when he finally met him there Mr. Chalmers told him he wanted him off the property and that he was fired for refusing a direct order (Tr. 47-48). The following Monday, he met with Mr. Bentgen and his union stewards, and he confirmed that he filed a grievance and identified a copy of the grievance which a union steward prepared for him (Exhibit R-1; Tr. 47-53).

Mr. Cooley confirmed his prior probation before his discharge on May 2, 1980, and he also confirmed that he had other differences with company management while on probation and that

he was suspended for a week (Tr. 57-48). He explained that he was suspended for not following a supervisor's order and that he realizes that he could have been fired for that incident (Tr. 60).

Mr. Cooley testified that prior to May 2, 1980, he complained several times about the burner problem, and these complaints included complaints to his supervisors as well as to other dryer operators and a union safety man (Tr. 61-62). In response to further questions, he confirmed that he singed his knuckles on May 2, 1980, when he attempted to light the pilot with burning paper, and that coupled with the other problems he decided to bid off the job as dryer operator (Tr. 64). He stated that while he can read pretty well, he has difficulty in writing and has difficulty in expressing himself in writing (Tr. 65).

Hilliard W. Bentgen testified that he has worked at the quarry in question since February 1980, and is now the Industrial Relations Safety Director. He has served in this position since June 1980, and prior to that time was the Industrial Relations Supervisor. In 1980 the quarry had 90 employees and comprised 650 acres. The quarry mines and processes silica sand. He stated that in 1980 dryer operators were required to make written inspection reports, and he identified exhibit G-8 as the reports for March and April 1980 (Tr. 82-85).

Mr. Bentgen explained the procedures for terminating employees and he indicated that Mr. Cooley's probationary period was fixed by an Industrial Board decision. He identified exhibit G-1 as a letter sent to Mr. Cooley terminating his employment, and he confirmed that the letter stated that he was discharged for (1) refusal to follow the instructions of his foreman; (2) use of foul and abusive language in dealing with his foreman; and (3) his prior disciplinary record with the company. He also explained that the failure by Mr. Cooley to follow his foreman's orders was in connection with his refusal to assist in the lighting of the No. 6 dryer, and the charge of using foul and abusive language resulted from foreman Chalmers telling him (Bentgen) that Mr. Cooley used "violent profanity" against him over the telephone. Mr. Bentgen related the circumstances surrounding the discharge as follows (Tr. 88-89):

> Q. What was the subject of the conversation in which John Cooley used this profanity?
>
> A. Mr. Chalmers related to me that he had instructed Mr. Cooley to go assist in lighting the drier and this resulted in the profanity from Mr. Cooley.
>
> Q. How was he instructed to do it?
>
> A. I couldn't give his exact words. Mr. Chalmers informed me that he had merely instructed John Cooley to assist in lighting the drier.
>
> Q. How was he supposed to assist?
>
> A. I assume he was going to hold the burning piece of paper or whatever, to light the drier.
>
> Q. All right; thank you.

To your knowledge has anyone ever been fired for using profanity by Ottawa Silica Company?

A. Not to my knowledge, no.

Q. Had John Cooley used foul and abusive language without refusing to help Marvin Phelps light the No. 6 drier, with a burning piece of paper, would you have fired him?

A. In view of Mr. Cooley's prior record, yes, I would have.

Q. In view of his prior disciplinary record?

A. Yes, for insubordination. We tend to review the job refusal and insubordination, both as insubordination acts.

Q. You mean both the job refusal and the profanity?

A. Yes. It could be a job refusal one time, the profanity the next time.

Q. This was the same conversation, wasn't it?

A. I am talking about his prior instances.

Q. Prior instances?

A. Yes.

Mr. Bentgen testified that he investigated the circumstances surrounding the discharge of Mr. Cooley and that this consisted of conversations with the foreman and Mr. Cooley in the presence of union stewards. Based on the information which came out he made the decision to discharge Mr. Cooley. He believed that he asked Mr. Chalmers whether he told Mr. Cooley to light the pilot with a burning piece of paper, but could not recall what Mr. Chalmers' response was. He confirmed that Mr. Chalmers did not deny that he asked Mr. Cooley to light the pilot in that fashion and assumes that he did instruct him to do it in that fashion (Tr. 90). Later, during Mr. Cooley's grievance, Mr. Chalmers stated to him that Mr. Cooley had never informed him about any problems with the No. 6 dryer (Tr. 90). Mr. Bentgen confirmed that his investigation revealed that foremen had instructed people to assist the dryer operator in lighting the dryer with a burning piece of paper, and that the foremen themselves had done it this way. This occurred on five or six occasions during a two or three month period prior to Mr. Cooley's discharge. After MSHA's investigation of Mr. Cooley's complaint, he issued a memorandum instructing personnel not to light the dryer with a burning piece of paper and he did so because "it was unclear in my mind whether it was unsafe or not. I did not have the information or know-how" (Tr. 92). Mr. Bentgen conceded that he had his doubts and questioned the method of lighting the dryer with a burning piece of paper, and he was aware that employees were lighting it in that fashion (Tr. 92-92).

Mr. Bentgen admitted stating to MSHA investigator Russell Spencer that the lighting of the No. 6 dryer pilot with a burning piece of paper was an "unaccepted practice". He did not mean this to be interpreted as "unsafe", but rather, meant that there is a "preferable practice" or "better way" (Tr. 94). He explained his answer further as follows (Tr. 95-96):

> Q. You said it was an unaccepted practice by the management of Ottawa Silica? It was an unaccepted practice?
>
> A. Yes, for several reasons, not necessarily the safety factor. One, it took two men to light a drier that should have only taken one.
>
> Q. Right.
>
> A. I think in my mind at the time that that figured in there as important as any other reason.
>
> Q. That's right, because that might show it wasn't designed that way; it might be unsafe. Is that correct?
>
> A. That wasn't in my mind at the time.
>
> Q. That's right. You were saying it was an unaccepted practice, is that right?
>
> A. It is unacceptable.
>
> Q. Why wouldn't you accept it?
>
> A. For the reasons that I have stated.
>
> Q. That it would take two people to do the job of one, it wasn't designed that way?
>
> A. No, it wasn't.
>
> JUDGE KOUTRAS: The other answer is: after Mr. Anderson from MSHA called him, he got the word MSHA didn't look too kindly with lighting the paper, he is liable to get a citation so he issued a memorandum setting the company policy; isn't that possible?
>
> THE WITNESS: Yes.
>
> JUDGE KOUTRAS: Isn't that right?
>
> THE WITNESS: Like I say, I didn't know whether it was safe or not. I wasn't worried about the citation.

Mr. Bentgen stated that he was familiar with the burner on the No. 6 dryer and that the pilot is designed to be lit by one employee standing at a control penal about ten feet away, and he

identified exhibit G-2 as a

copy of the drier start-up procedures which were a part of the dryer operator's job description and they were in effect in May 1980 (Tr. 97). He confirmed that the procedures do not reflect that more than one person is required to light the dryer, and he also confirmed that the company did not contact the dryer manufacturer before ordering employees to ignite it by means other than the automatic controls (Tr. 98). He confirmed that the dryer procedures contain a notation indicating that the dryer purge was "jumped out", and he has not been able to contact any knowledgeable electricians or maintenance people to confirm that the purge was in fact bypassed as noted on the instructions (Tr. 99). He explained that the notation was typed on the exhibit in May 1978 by an individual who is no longer with the company, and Mr. Bentgen believed that the No. 6 purge had been repaired, and he could find "nothing to make me believe otherwise" (Tr. 99-100).

Mr. Bentgen identified a copy of a portion of the manufacturer's booklet concerning a flame scan burner dealing with the operation of the dryer burner, and he explained the purge system (Tr. 102-104). With regard to any purge bypass, Mr. Bentgen stated that his repair records do not reflect when the purge was repaired (Tr. 106), and he confirmed that Mr. Chalmers was fired by plant manager Terry Fester for poor work performance as a supervisor and for reporting to work on two occasions while intoxicated (Tr. 107). Mr. Bentgen identified exhibit G-4 as the labor-management agreement in effect between the union and the company in May 1980. The agreement became effective November 10, 1979, and it expires November 12, 1982 (Tr. 111).

On cross-examination, Mr. Bentgen stated that the No. 6 dryer had problems in that a deflector which was installed to concentrate the gas flame toward the igniter spark plug was removed, and fabricated replacements were constantly being removed by persons unknown (Tr. 115). To his knowledge, there have been no accidents connected with the No. 6 Dryer (Tr. 116). Mr. Bentgen stated that when he met with Mr. Cooley on Monday, May 5, 1980, Mr. Cooley said he refused to do the job for safety reasons and denied using foul and abusive language against Mr. Chalmers. He also stated that Mr. Cooley had never spoken to him about safety complaints, and that Mr. Chalmers had no authority to fire Mr. Cooley. He also indicated that when Mr. Cooley returned to the plant on Monday, May 5, he came in late in the afternoon as if he were going to work (Tr. 118), and he made the decision to fire him for the reasons stated earlier (Tr. 119). He explained the grievance procedures and detailed the three-steps involved in Mr. Cooley's grievance, and confirmed that it was rejected and his discharge was sustained (Tr. 119-124).

In response to bench questions, Mr. Bentgen stated that as of 1978, the notation on the dryer procedures reflecting that the purge was "jumped out" would inidcate to him that this was probably true (Tr. 127), and that for the period 1978 and 1979 it was probably "jumped out". However, he indicated that an electrician who had been at the plant for three years had no

knowledge that the purge was "jumped out" (Tr. 128). With regard to the meeting with Mr. Cooley and the union stewards, Mr. Bentgen stated that the chief steward told him he would not want to light the dryer with burning paper because he was not a dryer operator and knew nothing about it. Mr. Bentgen stated "I was of the same opinion at the time because

I didn't know anything about it", but he went on to state that he relied on the foreman's statement that he believed it was safe and "he was the expert at the time I consulted with him" (Tr. 135-136).

Responding to a question as to whether he believed the lighting of the dryer with a burning piece of paper was safe, Mr. Bentgen replied as follows (Tr. 136-137):

> Q. Do you still feel that the lighting of this burner by manual means is safe?
>
> A. There is a preferable method. I don't think it is unsafe. I have done it myself and I would do it again. Mr. Fortescue mentioned the fact that applying the flame to the gas, if there is a drier operator there and I am holding the burning piece of paper, he turns on the gas, there is a flame about that long comes out of the pipe, directed in that direction and I am standing here holding the paper with the flame; unless he were to turn the gas on, and holding it there for some period of time, which you cannot do, because there is a safety device for that, if there is no flame in the gas to the pilot. If this were to happen and then I were to light the flame, then there might be an explosion. But I can't imagine the safety devices that are put in there, the scanning devices on the pilot would cut the light off to the pilot, if there is no flame. The fact that the operator is standing there to turn the gas on while I have the flame to the pilot, I can't imagine any unsafety.
>
> Q. What if the purge is inoperative, if the purge is not operating?
>
> A. If the purge is not operating, I don't think there would be any chance of explosion from the pilot light. There may be a chance of explosion after the main burner is kicked on, if I were to walk away from the pilot. But I don't think I am qualified to answer that.

With regard to the company's motivation in discharging Mr. Cooley, Mr. Bentgen indicated as follows (Tr. 141-142):

> Q. Of course. This whole case is what the state of mind of Mr. Cooley was at the time of his alleged refusal to perform the task of lighting that pilot light by whatever means. You seem to take, some people seem to take the position here it was an act of insubordination, compounded by the fact that he had similar problems of an insubordinate nature in the past.

A. We believed at the time of discharge, and we still have the belief, that Mr. Cooley's job refusal was not, in fact, based upon a safety allegation, due to the fact that he did not mention anything about safety to the supervisor until after he was being sent home. That was our case through the Industrial Board; that was our belief at the time and still is.

Q. But you heard his testimony that he had complained to two or three drier operators before. In fact, he complained to Mr. Chalmers.

A. Mr. Chalmer denies that he ever made those complaints.

Q. I understand. So your position in this, as a result of conversations the following Monday, it would be the company's position rather, that Mr. Cooley brought in the question of not being safe as an afterthought?

A. That was the position. We always took the hypothetical position that, say the job was unsafe, would Mr. Cooley have been fired anyway because of the way he reacted? We decided that based upon his record of similar instances that he acted in the same way he had acted in all the other ways, and that was improper.

Q. Would you classify him as a hot head?

A. Yes. I think Mr. Cooley has a temper. Like I said, he has to work on it.

Q. You heard his testimony that his obscenities and his cursing, et cetera, were not directed at the individual but directed at the principle of his being forced to light this burner on several occasions?

A. The foreman does say he felt obscenities were directed at him rather than varied in nature.

Q. What is the company's present position again with respect to the refusal by an employee to light this burner manually? You say it is not an accepted practice and it would be subject to discipline?
A. That policy was issued when I had the doubt, prompted by Tom Anderson. I haven't retracted that policy. But that has never been a question, because the cowell has never been removed.

Mr. Bentgen detailed the prior disciplinary problems concerning Mr. Cooley which included suspensions and probation for insubordination, job refusal, and absenteeism, but he indicated that known of these

incidents were related to any safety complaints made by Mr. Cooley. He also indicated that during his tenure as the industrial relations officer he received no safety complaints from Mr. Cooley, nor was he ever advised that any such complaints were ever filed (Tr. 145).

Kenneth R. Smock testified that he is employed by the respondent as a dryer operator, and has served in that capacity "off and on about two years". Mr. Smock stated that during one of his breaks on Friday, May 2, 1980, he encountered Mr. Cooley, and was advised by Mr. Cooley that he had withdrawn his bid for dryer operator and "was back on labor". Since the dryer operator's job paid more money, he asked Mr. Cooley for an explanation as to why he had withdrawn his bid, and before he could answer he was summoned to the phone to answer a call from Dave Chalmers. Mr. Smock overheard part of what Mr. Cooley said, and it included some cussing by Mr. Cooley. Mr. Cooley hung the phone up, but Mr. Smock could not recall exactly what Mr. Cooley told him with regard to why he bid off the dryer operator's job (Tr. 149-150).

Mr. Smock stated that while Mr. Cooley was employed as a laborer had assisted him in lighting the dryer, as did another laborer. Although Mr. Smock knew that Mr. Cooley did not like lighting the dryer pilot with a burning piece of paper, he could not recall him specifically stating that he believed it was unsafe and Mr. Smock did not inquire as to the reasons why he did not like lighting it in that fashion (Tr. 150). Mr. Smock identified exhibit G-10 as certain dryer operator reports which he filled out during the period February through April 1980, and they were submitted to Mr. Chalmers (Tr. 151). Mr. Smock also stated that he had observed Mr. Chalmers light the dryers with a piece of burning paper and that this was before Mr. Cooley was fired (Tr. 151).

On cross-examination, Mr. Smock testified that he was assigned to the dryer a week or so before Mr. Cooley was fired, and at that time he was aware of the fact that the purge cycle had been "jumped out". He explained that the dryer would not light and that the wire had been burned off due to people putting paper in. The paper would ignite the wire, but if "someone stretched it out and ran it around the spark plug and it would work. It worked occasionally" (Tr. 152). He reported the matter by indicating that "pilot needs to be fixed" on his reports. He stated that the purge cycle was the "yellow light on the console" and when that indicator light would come on, this would indicate that the purge was completed (Tr. 153). He had reason to believe that the purge was not working because the pilot button would not light when it was depressed, and the burnt wire, coupled with sand and water which would get into the pilot, caused the problem. He also stated that the pilot deflector was missing, but he saw no one remove it, nor could he state why anyone would want to remove it (Tr. 154).

In response to bench questions, Mr. Smock stated that the telephone conversation between Mr. Cooley and Mr. Chalmers lasted

a few minutes and he only overheard Mr. Cooley speaking, and the explained what he heard as well as what followed later in the day (Tr. 156-157):

Q. Do you recall what the subject of the conversation was when he was cursing?

A. Yes. It was to light the pilot.

Q. Was it over the pilot light being difficult to light?

A. As near as I can remember, John didn't want to light it. I don't know what the reason was. I didn't hear it stated.

It could have been because he thought it was unsafe. But then again, it could have been that is the way John does things. He fails to get some things out. Maybe that was it. I don't know.

Q. Did Mr. Cooley say anything to you that day about his difficulty with the pilot light and the burner and that sort of thing?

A. Later on in the day, yes.

Q. But not prior to the conversation?

A. No, no, he didn't.

Q. What did he tell you later in the day?

A. He felt that it was unsafe. I had to leave. I had to go relieve the drier. I coundn't stick around, you know, to talk to him.

Q. Were you aware of the fact that he, or had he ever told you that he was burned or received some injury from trying to light the pilot before?

A. Yes. It does sort of ring a bell. It seems to me that he did tell me that but I don't know if it was after the phone call or a long time before, or what. I don't know. It has been so long.

Mr. Smock detailed the procedures he and Mr. Cooley followed while attempting to light the dryer pilot, and he indicated that 90% of the time it did not light. If Mr. Smock had no paper or matches, he would ask any laborer who happened by to assist him. Someone had to be at the control panel while the other person was at the pilot light location. He later developed his own system for lighting it by himself. He would insert a piece of paper into the pilot hole, light it, and he would then run over to the control panel while the paper was burning. He believed this practice was safe, and replied as follows as to how others may have felt (Tr. 159-160):

Q. Doesn't it strike you as unusual that Mr. Cooley is the only one that feels that this is unsafe to light it that way?

A. No, I have heard other people say they thought it was unsafe, but I never -- Put it this way: they haven't been around it as much as I have. I have been around it quite a bit more. I was on production relief, which I have to know how to operate the driers in case one of the operators don't show up, I have to take his place.

Q. How long was Mr. Cooley around at the time, prior to the time this happened?

A. Well, I really -- Well, he didn't know that much about it.

Q. You don't consider him to be as experienced as you?

A. No.

Q. In that situation do you find it unusual that he was reluctant, assuming that there were experienced persons to light it?

A. Not really.

James Marvin Phelps, testified that he has been employed with the respondent for two years and nine months. During the period Apil 1978 to May 2, 1980, he worked as a dryer operator and he was assigned the task of training Mr. Cooley as a dryer operator during the week when he was discharged. Mr. Bentgen assigned him the job of training Mr. Cooley and Mr. Phelps stated that the automatic lighting system for the No. 6 dryer was not working during the week in question and that it had not been working for two or three months prior to Mr. Cooley's discharge.

Mr. Phelps identified exhibit G-11 as copies of 10 reports he filed with the respondent with respect to his daily inspection of the No. 6 dryer, as well as other equipment for which he is responsible. The reports reflect dryer conditions which required maintenance and attention, and the reports are routinely made by him when he finds equipment in need of maintenance or repair.

Mr. Phelps stated that prior to his bidding on the dryer operator's job Mr. Cooley helped him light the No. 6 drier. Two people were required to light the dryer because the automatic lighting system was not working properly. One man was required to be at the control panel to activate certain buttons, and a second man was required to be at the dryer burner location in order to manually light the pilot light. Mr. Phelps would position himself at the control panel, and Mr. Cooley would light the pilot light by means of burning paper over the pilot light.

Mr. Phelps confirmed the fact that foreman Chalmers was aware of the fact that the automatic dryer lighting mechanism was not working and Mr. Phelps stated that he advised Mr. Chalmers of this fact. Mr. Phelps also confirmed that Mr. Cooley complained to him that lighting the dryer with paper was unsafe, but he did not know whether Mr. Cooley communicated this fact to Mr. Chalmers (Tr. 166-170).

On cross-examination, Mr. Phelps asserted that the problem with the automatic lighting mechanism for the No. 6 dryer was an "on and off" situation. He explained that the problems were intermittent and resulted from the fact that the metal covering over the pilot light area was being "ripped off". He reiterated the fact that Mr. Cooley complained about the unsafe practice of lighting the No. 6 dryer manually by use of a piece of paper.

Mr. Phelps stated that on May 2, 1980, when he came to work the dryers were out and no production was in progress. There was a problem with a crane and the dryers were not on. He received a call from Mr. Chalmers at approximately 5:30 p.m., and Mr. Chalmers instructed him to light the No. 6 dryer. He believes that Mr. Cooley assisted him in lighting the dryer at that time by means of a piece of paper. The pilot light subsequently went out and Mr. Chalmers called him a second time and instructed him to light the dryer. Mr. Cooley refused to help him and stated that it was unsafe. Mr. Phelps reported this to Mr. Chalmers and asked him to send someone to help him light it. Mr. Chalmers came and lit it himself and Mr. Cooley left the area and went to the cafeteria after advising Mr. Phelps that he was withdrawing his bid for the dryer operator's job.

Mr. Phelps stated that he was not present during the phone conversation between Mr. Cooley and Mr. Chalmers and he could not testify as to that conversation (Tr. 170-178).

In response to further bench questions, Mr. Phelps stated that he never attended any company safety meetings, and he believed the purpose of the dryer purge system "was to clean out, if there was any gases left in the line it would blow them out so there wouldn't be any built-up gas in there" (Tr. 181). As for any complaints made by others with regard to the dryer, and Mr. Cooley's reluctance to light it, he stated as follows (Tr. 179, 182):

> Q. Do you find it unreasonable -- This may be a difficult question for you to answer, but I still ask it anyway. Do you find it unreasonable for Mr. Cooley, under the circumstances to refuse to light it?
> A. If he thought it was unsafe, he thought it unsafe, you know. That's all.
>
> * * * * *
>
> Q. Have you ever heard of any other employees at this facility, at this organization, complain about the method in which the pilot light was being lit on this

burner or any other burner, for that matter?

A. None of the drier operators complained about it, you know. That wasn't the right way to do it, but we all do it. We didn't feel it was unsafe. Some of the other employees, you know, told us it wasn't safe, we shouldn't be doing it that way.

Q. Who were some of these other employees?

A. I can't really remember. Just people talking.

Q. Just general conversation and chit chat?

A. Right.

Q. Why would they talk to you about it?

A. I don't know. It would just come up, I guess.

And, at pages 183-184:

Q. I have a little difficulty in listening to the the testimony of witnesses today. Everybody seems to be talking to each other about the manner in which this thing is lit. Some people think it is safe; others don't.

A. That is not the right way to do it. It is not the safe way to do it, but I didn't feel I was in any danger.

Q. No. What I am saying: if employees, if this were a topic of conversation one would think at least some safety people would be involved or someone at least would mention it to somebody.

A. Well, they did, they did. The office knew about it, you know.

Q. Which office?

A. The management, I guess. The foreman knew about it, you know.

Q. Knew about what? Knew about the way it was being lit?

A. Yes, they knew the way it was being lit. They did do it; Chalmers did it.

* * * * *

Q. Did someone make a decision -- Did someone come in and look at these two driers, mangement came to the conclusion that it was safe. From that point it would be standard operating procedure to light it with a newspaper?

A. No.

Q. It was just what? It was an accepted practice?

A. I can't say what they were thinking. I don't know. I don't know why they didn't fix it sooner. They knew about it beforehand.

Q. Now, when this system is operating perfectly, with the use of the button, I assume there is no need to use a newspaper, right?

A. Right.

Q. It is all done automatically?

A. Right.

Q. Is that the better way?

A. It is the right way; it is a better way. It is easier.

Mr. Phelps stated that during the entire week that he trained Mr. Cooley on the No. 6 dryer, the pilot had to be lit by means of paper and that it would not light automatically (Tr. 198). He also indicated that the No. 5 dryer, which had the same ignition system as the No. 6 dryer, worked well and would light automatically (Tr. 201-202).

Kenneth Stumpmier testified that he has been employed by the respondent for over nine years, and approximately six years ago he worked as a dryer operator for about a year. He stated that he has observed David Chalmers' work habits and Mr. Chalmers "didn't have much regard for safety" (Tr. 203). He explained that Mr. Chalmers would do things that other employees would not do because of safety reasons. Mr. Stumpmier stated that he was a union steward in May of 1980 and on Friday, May 2nd of that year he spoke with Mr. Cooley in the lunch room and Mr. Cooley told him that Mr. Chalmers was sending him home because he would not light the No. 6 dryer with a piece of paper. After Mr. Cooley told him that he would not light it in that manner because it was unsafe, Mr. Stumpmier attempted to speak with Mr. Chalmers about the matter but he refused to speak with him (Tr. 203-205).

Mr. Stumpmier testified that he was at the meeting with Mr. Cooley and Mr. Bentgen on Monday, May 5, 1980, and he told Mr. Bentgen that he too would not light the No. 6 dryer with a burning piece of paper because he believed it was unsafe to light it in that fashion. A month later, Mr. Bentgen issued a memorandum stating that anyone found lighting the dryer with a burning piece of paper would be subject to disciplinary action, including discharge (Tr. 206).

On cross-examination, Mr. Stumpmier confirmed that Mr. Chalmers is no longer employed with Ottawa Silica and he believed

he was in Utah. In the past he never heard Mr. Chalmers order anyone to do anything unsafe

and when he was a dryer operator he experienced no problems in lighting the No. 6 dryer automatically. Mr. Cooley had not previously complained to him about any unsafe working conditions connected with the dryer. Although Mr. Cooley was "kind of mad" when he spoke with him on May 2, he could not recall his using any profanity (Tr. 208). He assisted Mr. Cooley in preparing his grievance a few days after his discharge, and he believed that Mr. Chalmers "had bad feelings toward John" (Tr. 213). However, he stated that this was only his opinion and he based it on the fact that Mr. Cooley and Mr. Chalmers did not "joke around together" as other workers and foremen do (Tr. 217).

MSHA Inspector Russel L. Spencer testified that he was employed as a special investigator and confirmed that he conducted an investigation in August, 1980, in connection with the discrimination complaint filed by Mr. Cooley. Mr. Spencer stated that he had never been to the quarry in question previously and that he observed the No. 6 dryer on two occasions during his investigation, once on August 20, and again on August 21, 1980. He described the area around the No. 6 dryer, and stated that he measured the distance from the railing position where one would stand to light the burner pilot light to the pilot light, and determined that it was 54 inches. The dryer is located on the second floor which is approximately eight feet about ground level, and adjacent to the railing is an opening or hole which measured 24 inches by sixty inches, and which is between the railing and the pilot light location. The floor was wet and sandy and he observed no deflector shield over the pilot light. Mr. Willard Stubblebine,an electrician, was with him at the time and he hung over the floor hole demonstrating how he would light the pilot light (Tr. 230-235).

Mr. Spencer testified as to his mining background and experience which began in 1951, and he stated that he has been a Federal mine inspector since 1970. His experience also includes employment as a state safety inspector with the Michigan Department of Labor (Tr. 242). Mr. Spencer stated that he did not believe it was safe to light the No. 6 dryer pilot with a burning piece of paper because the automatic ignition controls which were installed for the dryer were installed for that purpose. He also indicated that the dryer was not intended to be ignited manually, and that when he recently visited the dryer site on Monday, December 14, he attempted to reach the spark plug igniter from the position where persons using burning paper were standing, and he had difficulty doing it. He also believed that the area where he stood presented slip and fall hazards due to the wet floor and the proximity to the floor hole (Tr. 243-245).

On cross-examination, Mr. Spencer stated that he was not personally aware that the dryer had been substantially modified since he first observed it in August 1980, but that Mr. Bentgen informed him that this was the case. He also stated that he had not attempted to reach the pilot light in August 1980, when he was there, and that the floor hole conditions were based on his 1980 observations (Tr. 246-247).

In response to bench questions, Mr. Spencer stated that he observed no substantial changes in the dryer that may have taken place since August 1980, and that the operator controls have not been changed, and the location of the railing around the dryer has not changed within an inch or so. He also confirmed that he never inspected the plant in question other than to investigate Mr. Cooley's discrimination complaint (Tr. 249).

Mr. Spencer stated that he has inspected numerous sand and gravel and crushed stone mining operations covered by the Part 56 safety standards, and that those standards would apply to a silica sand operation such as those conducted by the Ottawa Silica company. He conceded that he is not familiar with the dryer in question, is not an expert, and he has never worked on such a dryer (Tr. 251). He was not aware of any mandatory safety standard which would apply to the dryer in question, and he indicated that the question of whether lighting it with a piece of paper was an unsafe act which would depend on such circumstances as to whether the floor was wet or slippery, whether the person extended himself over the railing, and whether safe access was provided. Also, consideration must be given to whether the dryer was intended to be ignited by paper, or whether the dryer could be considered as "defective equipment" under section 56.14-25 or 26. Other considerations would be whether the dryer purge cycle was burned out and the possibility of pre-ignition (Tr. 252-256).

Respondent's Testimony and Evidence

Willard Stubblebine, testified that he has been an electrician for 23 years, and has worked in that capacity for the respondent since January 2, 1979. He is responsible for the electrical performance of all of the equipment in the plant, including the dryers. Prior to May 1980, the No. 6 dryer had problems in that sand was getting into the burner, preventing the pilot light from lighting. If it does not light within 30 seconds, it shuts down. He fabricated a shield to hold back a pocket of gas which would facilitate lighting the pilot. The shields kept getting lost, so the men used paper to ignite the pilot. The purpose of the shield or deflector was to keep the sand out of the burner, and it was first installed on the dryer in early 1979. The dryer was not equipped with a shield when he first began working on it, and he fabricated them out of tin hose clamp, and he replaced it eight or ten times during the first half of 1980 (Tr. 261-264).

With regard to any complaints regarding the lighting of the pilot by means of burning paper, Mr. Stubblebine testified as follows (Tr. 265-266):

> Q. How would you find out that it had to be replaced?
>
> A. Normally the operators would complain about lighting it with the paper.
>
> Q. How would you find out about it?

A. I shouldn't say "operators complain;" they didn't complain to me. If they were complaining to the boss, I don't know. I would find out a lot of times by walking back. A kid that used to be on the third shift, Marshall, would tell me. He wasn't complaining. He used to like lighting it with a paper. He had his own little thing worked out. He didn't step over the railing like you, he draped a paper towel out of the burner or wired it up and the pilot would catch on fire and the burner would light.

I can't really remember operators complaining to me. I remember them telling me it wasn't working, but as far as reaching a real and heavy complaint, I don't know. Now, how often, you know, if they ever complained to the foreman, I don't know. A lot of time I think Russ Heyman may have mentioned it to me. Offhand I can't remember anybody coming over to the shop saying it is not working.

Q. Did anybody ever complain to you that they felt it was unsafe to light it by paper?

A. I can't say for sure because I hear so much junk in the lunchroom that don't mean nothing. I can't say.

Q. Did John Cooley ever complain to you?

A. No. John Cooley, I never talked to.

Regarding the lighting of the burner with a piece of paper or cigarette lighter, Mr. Stubblebine stated as follows (Tr. 266-267):

Q. Do you have an opinion as to whether or not it is safe to light the burner with a burning piece of paper or cigarette lighter?

A. Well, my opinion, you know, I don't think it is. What you are lighting is just the pilot. There is so much safety involved, to get the main gas open, you know, and I guess in extreme cases -- I don't know what the percentage would be -- the main burner may open sometimes, but I don't know.

I tried to light the main burner already without the pilot. I couldn't get it lit. You've got to get the pilot lit. You have to have your roof blower on. You have to have your combustion blower on. You have a high and low gas limit. You have an air limit from the combustion blower just to ignite your pilot. When you push the button to get your beep you have a Honeywell control unit and you have 30 seconds to light it. If it don't light it shuts down and starts pumping again. Okay?

> Now, once you get the pilot, I think within 15 seconds you got to have an established pilot within 15 seconds for the main gas to open, which is a motorized safety shut-off valve for the gas. Once you establish pilot, that opens. Now, I never seen one open without establishing a pilot, although I think, like I said, it is probably possible. I never saw it.
>
> Q. Do you believe it is safe or unsafe to to light it that way?
>
> A. I think it is safe.

Mr. Stubblebine testified that at the present time the No. 6 dryer purge cycle is working, but that in the past there was a problem with an electrical alloy which would affect the purge cycle. However, since 1979 he has never known the purge cycle on the No. 6 dryer to be "jumped out" (Tr. 268). Since May 1980, a new conveyor was installed alongside the dryer and the railing was moved back somewhat and made higher. Although the water and sand problems around the dryer were "bad" in 1979, it is now under control (Tr. 269-270).

On cross-examination, Mr. Stubblebine stated that while sand and water was present in the dryer area in May 1980, he observed no "build-up" of such materials. He indicated that it was a common practice to climb over the railing and stand on an adjacent I-beam next to the cover to light it. He also observed a foreman light the pilot with material wrapped around a hangar wire and he considered that to be the "worst way" to light it (Tr. 270-274).

Mr. Stubblebine stated he had heard talk among some employees that lighting the dryer pilot with paper was unsafe, but he believed the majority of talk is not by the dryer operators but by others. He also indicated that the dryer operators are normally responsible for lighting the dryers and that laborers would be expected to do this if they were assigned the job. He could not explain the notation on the dryer instructions (exhibit G-2) that the purged had been "jumped out". Even if it were jumped out, he would still not be reluctant to light it with a piece of paper. However, he has known of instances where the purge was "jumped" or "shorted" to save the three to five minutes waiting time for the purge cycle to start again.

Mr. Stubblebine explained the operation of the dryer purge system, and stated that if the pilot does not light the first time, another three or four minutes will pass before an attempt to again initiate pilot can be made. He indicated that "you just keep going until you get it lit", and "that is where you can run into a problem" (Tr. 279). He explained that he did not know what could occur with the dryer, but with a blast furnace, repeated attempts to initiate pilot could cause a gas build-up "inside the blast furnace that would blow". He believed any such gas build-up in the dryer would disperse into the air because it

is so open (Tr. 279).

When asked whether he knew what the instant case was all about, Mr. Stubblebine replied "I think it is something about John Cooley's discrimination", and he further stated as follows (Tr. 280-281):

> Q. Let me tell you what it is about so I can ask you this question. Put yourself in John Cooley's shoes and he is asked to light that pilot with a piece of paper and he refuses to do it because he thinks it is unsafe; not because you think it is unsafe. He thinks it is unsafe. And they tell John Cooley, you know, "Mr. Cooley, your job here is to follow instructions and when you are told to light the system, light the drier, you light the drier. If you don't that is insubordination, et cetera, and therefore you are subject to discharge for failing to follow orders." Leaving aside some other facts in this case that I haven't given you, putting yourself in Mr. Cooley's shoes, what would be your reaction to that situation?
>
> A. I would have to respect his opinion. If I thought it was unsafe to light it then I would have to have a case up myself, I guess, because I wouldn't light it if I felt it was unsafe.
>
> Q. But you personally don't think it was unsafe in this case?
>
> A. No.
>
> Q. I think that you have lit it, you have put the fire to the pilot many times?
>
> A. Not many times.
>
> Q. You have done it on occasion?
>
> A. Yes.

Discussion

In Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 14, 1980) (hereinafter Pasula), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. 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 provides (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 disciplined him in any event. Id. at 2799-2800.

Although upholding the Administrative Law Judge's decision that Pasula has a "right to walk off the job" for safety reasons, the Commission acknowledged that such a right is not explicitly covered by the plain language of the Act. However, relying on the legislative history, the Commission stated as follows:

> We must look to the entire statute, being mindful that the 1977 Mine Act is remedial legislation, and is therefore to be liberally construed. . . . In determining whether section 105(c)(1) protects Pasula's refusal to work, we consider it important that the 1977 Mine Act was drafted to encourage miners to assist in and participate in its enforcement . . . . The successful enforcement of the 1977 Mine Act is therefore particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction. The right to do so would be hollow indeed, however, if before the regular statutory enforcement mechanisms could at least be brought to bear, the condition complained of caused the very injury that the Act was intended to prevent. A holding that miners have some right to refuse work under the 1977 Mine Act therefore appears necessary to fully effectuate the congressional purpose.

Pasula was appealed to the United States Court of Appeals for the Fourth Circuit, and in an opinion filed October 31, 1981, 663 F.2d 1211, the Court reversed the Commission's decision after finding that Pasula's discharge was premised not on his walking off the job but on his closing down of a continuous mining machine. The Court observed that "Pasula was not disciplined because he refused to work but rather because he exceeded the scope of his right to walk off the job under the Mine Act."

In considering the effect of a previous arbitration decision which had denied Pasula's claims of discrimination, the Court made the following observations at 663 F.2d 1219:

> In this case, the considerations underlying the standards of gravity of injury in the Wage Agreement and in the statute are different. The Wage Agreement requires the arbitrator to determine whether the hazard was abnormal and whether there was imminent danger likely to cause death or serious physical harm. The underlying concern of the Mine Act, however, is not only the question of how dangerous the condition is, but also the general policy of anti-retaliation (against the employee by the employer). Because this is a major concern of the Mine Act, it requires proof merely that the miner reasonably believed that he confronted a threat to his safety or health. Those who honestly believe that they are encountering a danger to their health are thereby assured protection from retaliation by the employer even if the evidence ultimately shows that the conditions were not as serious or as hazardous as believed. Questions of imminence and degree of injury bear more directly on the sincerity and reasonableness of the miner's belief. (emphasis added)

In a detailed footnote at 663 F.2d 1216-1217, the Pasula Court discussed the right of a miner to refuse work, and although the Court did not state any specifics, it did agree that there was such a right in general when it stated:

> Thus, although we need not address the extent of such a right, the statutory scheme, in conjunction with the legislative history of the 1977 Mine Act, supports a right to refuse work in the event that the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health.

Id. at 1217 n. 6.

In Pasula the Commission established in general terms the right of a miner to refuse work under the Act, but it did not attempt to define the specific contours of the right. In several decisions following Pasula, the Commission discussed, refined, and gave further consideration to questions concerning the burdens of proof in discrimination cases, "mixed-motivation discharges", and "work refusal" by a miner based on an asserted safety hazard. See: MSHA, ex rel. Thomas Robinette v. United Castle Coal Company, VA 79-141-D, April 3, 1981, MSHA ex rel. Johnny N. Chacon v. Phelps Dodge Corporation, WEST 79-349-DM, November 13, 1981.

In Robinette, the Commission held that a miner may refuse and cease work if he acted in good faith and reasonably believed that the performance of the work would expose him to a hazard. The Commission also held that the right to refuse work may extend to shutting off or adjusting equipment in order to eliminate or protect against a perceived hazard. The facts presented in the instant case are similar to those presented in Robinette. Robinette complained about being taken off a job as a miner's helper and being reassigned as a conveyor belt feeder operator. Robinette ceased to operate and shut down the belt after his cap lamp cord was rendered inoperative and he could not see. Robinette and his section foreman exchanged heated words over the incident and Robinette uttered several cuss words. Robinette's prior work record included prior warnings for unsatisfactory job performance and insubordination, and his section foreman was not too enchanted with his work. The section foreman testified that "anytime Robinette had to do something he did not like, he usually messed it up".

The Judge who heard the Robinette case treated it as a "mixed motivation" discharge case. Although finding that Robinette's work was "less than satisfactory" and that he was "obviously belligerent and uncooperative" with his section foreman as a result of his change in job classification, Judge Broderick concluded that the "effective" cause of Robinette's discharge was his protected work refusal, and he rejected the operator's contentions that the primary motives for the discharge were insubordination and inferior work.

In Robinette, the Commission ruled that any work refusal by an employee on safety grounds must be bona fide and made in good faith. "Good faith" is interpreted as an "honest belief that a hazard exists", and acts of deception, fraud, lying, and deliberately causing a hazard are outside the "good faith" definition enunciated by the Commission. In addition, the Commission held that "good faith also implies an accompanying rule requiring validation of reasonable belief", but that "unreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection".

In fashioning a test for application of a "good faith" work refusal, the Commission rejected the "objective, ascertainable evidence" test laid down in Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1973), and instead adopted a "reasonable belief" rule, which is explained as follows at 3 FMSHRC 812, April 3, 1981:

> More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing corroborative

physical, testimonial, or expert evidence. The operator may respond in

> kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.
>
> * * * * * * * * * * * *
>
> In sum, we adopt a good faith and reasonableness rule that can be simply stated and applied: the miner must have a good faith, reasonable belief in a hazardous condition, and if the work refusal extends to affirmative self-help, the miner's reaction must be reasonable as well.

In MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, WEST 80-313-D and WEST 80-367-D, February 5, 1982, the Commission defined further the scope of the right to refuse work under the Act by adding a requirement that a statement of a health or safety complaint must be made by the complaining miner, and adopted the following requirement:

> Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the work, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances--such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal. (Emphasis added).

Respondent's arguments

In its posthearing brief, respondent argues that Mr. Cooley was discharged on May 2, 1980, because his conduct and language was so reprehensible that it could no longer be tolerated in the work place. Citing prior occasions of "foul temper" which caused disciplinary action to be taken against him, respondent points to the fact that Mr. Cooley was on probation at the time be "made such a spectacle" on May 2, 1980, that mine management could no longer countenance his presence.

Respondent maintains that there was absolutely no evidence produced at the hearing to indicate that the manner of lighting the No. 6 dryer was in fact unsafe, and that Mr. Cooley's co-workers Kenneth Smock, James Phelps, and Willard Stubblebine attested to the safety of the procedure used for

lighting the dryer with a burning piece of paper. Respondent asserts that Mr. Cooley concocted the alleged incident of the singed knuckles, and that his excuse concerning the unsafe method of lighting the dryer was an afterthought also concocted after conferring with his union representative.

Respondent asserts that other than Mr. Cooley's self-serving assertion, there is no evidence that he ever complained to anyone about the alleged safety hazard involved in lighting the dryer, that Mr. Cooley had often lit the dryer by means of burning paper in the past without incident, and that his refusal to perform the task assigned to him on May 2, 1980, for alleged reasons of safety was unreasonable and has no basis in fact. Respondent concludes that Mr. Cooley's lack of good faith concerning his purported fear of lighting the dryer with a burning piece of paper is demonstrated "by the vile manner in which he treated his supervisor and co-workers at the time of his discharge."

MSHA's arguments

In its posthearing brief filed in this case, MSHA argues that the right of a miner to refuse work under conditions which he reasonably and in good faith believes are hazardous has been affirmed and refined by the recent Commission decision in Michael J. Dunmire and James Estle v. Northern Coal Company, Docket No. WEST 80-313, 367-D (February 8, 1982) which interprets Pasula v. Consolidated Coal Co., 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981). MSHA asserts that under the Dunmire holding, refusal to work is in good faith when the miner has attempted to communicate his reasons for refusing to work to some representative of the mine at or near the time of his refusal. Further, MSHA argues that a miner's belief in the existence of a dangerous condition is reasonable if it is a belief that a reasonable man confronted with those conditions could draw; however, it need not be the only belief that a reasonable man could draw from those conditions. Moreover, MSHA states that Dunmire reaffirms the Commission's earlier determination in Robinette v. United Castle Coal Co., 3 FMSHRC 803, 809 (1981) that:

> Because this (the general policy of anti-retaliation) is a major concern of the Mine Act, it requires proof merely that the miner reasonably believed that he confronted a threat to his safety or health. Those who honestly believe that they are encountering a danger to their health are thereby assured protection from retaliation by the employer even if the evidence ultimately shows that the conditions were not as hazardous as believed.

MSHA argues that it is not essential that the condition which the miner fears be actually hazardous, but only that his belief in the existence

of a hazard be reasonable. After detailing the facts and circumstances concerning the manner in which Mr. Cooley was required and directed to light the dryer in question, MSHA concludes that Mr. Cooley's refusal to perform this task was based on his reasonable and good faith belief that it was unsafe.

In response to respondent's assertion that even though Mr. Cooley may have refused to light the dryer pilot for safety reasons, he would have been fired anyway because of his past disciplinary record and his abusive language to his supervisor Dave Chalmers, MSHA states that the respondent must establish this affirmative defense. In this regard, MSHA argues that the respondent has the burden of proving first, that John Cooley's use of profanity in his work refusal is not protected activity under the Act, and second, that had John Cooley never refused to light the dryer pilot with a hand held flame, Ottawa Silica would still have fired him for his use of profanity alone. Pasula v. Consolidated Coal Co. 2 FMSHRC 2786, 2800 (1980) rev'd on other grounds sub nom. Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (4th Cir. 1981). MSHA maintains that the respondent has failed to carry its burden on either of these points.

MSHA maintains that Mr. Cooley's profanity in communicating his refusal to work is protected activity under the Act. In support of this conclusion MSHA argues that Mr. Cooley is a poorly educated and unskilled miner and that he became upset after repeatedly being ordered to perform an unsafe act. Taken in this context, MSHA asserts that in as much as the profane language was used to communicate the refusal to work, it is part of the protected refusal to work itself. Further, MSHA maintains that the respondent has not met its burden of proving that it would have terminated Mr. Cooley for using abusive language alone, and points to the fact that the respondent could not identify any prior incident where it terminated an employee for using profanity. MSHA also argues that Mr. Cooley and Mr. Smock both testified that the profanity was directed at the unsafe act rather than at foreman Chalmers personally. As for Mr. Chalmers, MSHA makes reference to the record which reflects that Mr. Chalmers lacked sensitivity to safety hazards, that he performed several dangerous acts on the job, and that he was discharged by the respondent for reporting to work twice while intoxicated.

Findings and Conclusions

As indicated earlier, the critical issue in this case is whether Mr. Cooley's refusal to perform a job task which he believed to be unsafe, and which led to his discharge, was protected activity under the Act. Mr. Cooley claims he was ordered off the mine property by his supervisor after he refused to assist in the lighting of the No. 6 Dryer with a buring piece of paper and that he was subsequently discharged because of this incident. On the other hand, respondent maintains that Mr. Cooley was discharged because he failed to carry out a work assignment and used "foul and abusive" language when speaking with his supervisor about the incident. According to the testimony of Mr. Bentgen, the man who discharged

Mr. Cooley, mine management viewed the work refusal and the use of foul and abusive language as acts of insubordination. In addition, management also took into consideration the fact that Mr. Cooley had previously been disciplined for insubordination and work refusals (apparently unrelated to safety), and that he was on probation at the time of the work refusal which prompted his discharge. Under the circumstances, and in light of the precedent discrimination cases discussed above, it is necessary to explore the following issues raised in these proceedings:

1. Whether the lighting of the dryer in question with a burning piece of paper was an unsafe practice.

2. Whether Mr. Cooley made any statements to management concerning a safety complaint connected with the lighting of the dryer with a burning piece of paper.

3. Whether Mr. Cooley's safety concern connected with the lighting of the dryer with a burning piece of paper was made in good faith.

4. Whether Mr. Cooley's refusal to light the dryer with a burning piece of paper was reasonable, and if so, whether the work refusal is protected activity under the act.

5. Whether respondent has carried its burden of showing that Mr. Cooley's discharge was motivated by unprotected activities and that he would have been discharged for those activities alone.

Lighting the No. 6 Dryer with a burning piece of paper.

One critical issue presented in this case is whether or not the practice of lighting the dryer pilot light in question with a burning piece of paper was an unsafe practice. The record in this case reflects that there is a "right" and "wrong" way to initiate pilot for the dryer in question. The "right" way is by means of pushing certain buttons on a control panel which is located some fifteen or so feet from the area where the dryer pilot light is located. The testimony and evidence adduced in this case amply supports a conclusion that the "right" way to light the pilot in question is by the mechanical means of buttons located at the control panel, and that the lighting of the pilot by means of burning pieces of paper either stuffed into the pilot location or attached to an end of a wire and then inserted into the pilot light area is the "wrong" way to light it.

Although neither party called any expert witnesses to testify as to the engineering and mechanical operational parameters of the dryer in question, I conclude and find that the testimony and evidence adduced in this case supports the conclusion that the pilot light was never intended to be initiated or lit by means of a burning piece of paper,

and that this practice was unsafe. Aside from Mr. Cooley's opinion that the lighting of the dryer pilot with a burning piece of paper is "dangerous and stupid", dryer operator James Phelps testified that the use of burning paper was not the "right" or "safe" method for lighting the dryer, and former dryer operator Kenneth Stumpmier testified that it was unsafe to light it in that manner.

Company Safety Director Hilliard Bentgen conceded that the "preferable" method for lighting the dryer is by means of the control panel and not a burning piece of paper. Although he testified that he did not personally believe it was unsafe to light the dryer by means of burning paper, the fact is that after MSHA's investigation of Mr. Cooley's discharge Mr. Bentgen issued a memorandum prohibiting such a practice. Although Mr. Bentgen indicated that he was not an expert and was unclear as to whether such practices of lighting the dryer with burning paper was unsafe, he candidly conceded that he had his doubts and was aware of the fact that employees were in fact lighting it with burning paper. It seems to me that as safety director, Mr. Bentgen should have sought expert advice to resolve the question as to whether the lighting of the dryer with burning paper was safe or unsafe. A telephone call to the Manufacturer or references to the dryer operational manual would probably have answered this question. I simply cannot accept self-serving assurances that it was safe, nor can I accept the excuse or inference that persons unknown were removing a shield that had been fabricated to prevent the pilot flame from going out, particularly where the record shows that an identical No. 5 Dryer was experiencing no such difficulties.

Although company electrician Willard Stubblebine testified that he would not be reluctant to light the dryer with a burning piece of paper, he candidly conceded that he would have to respect Mr. Cooley's refusal to light it in that fashion if he thought it were unsafe. Mr. Stubblebine also candidly admitted that it was common practice for a person to climb over a protective railing adjacent to the dryer and stand on an I-beam so as to be closer to the pilot light area while attempting to light it. He also described an eyewitness account of a foreman's attempt to light the dryer with material wrapped around a wire hangar as the "worst way" to light it.

In addition to the testimony of the witnesses as to whether they believed the lighting of the dryer with a burning piece of paper was safe or unsafe, there are other factors present in this case which support the conclusion that it was unsafe. First there is the question of the so called "purge cycle". Although there is conflicting evidence and uncertainty as to whether the dryer purge cycle was in fact "jumped" or "shorted" out, I believe it is clear from the record that the purge cycle is a mechanical safety measure engineered into the dryer lighting sequence to prevent against the build-up of gasses. Although Mr. Bentgen conceded that he was no expert, he alluded to the fact that an inoperative purge could cause problems and present possible explosion hazards (Tr. 136-137), and he conceded that

the notation which appears on the dryer operator's job description (Exhibit G-2) that the "Purge is jumped out on No. 6, will be repaired" would lead one to believe that the purge cycle was inoperative.

Mr. Stubblebine indicated that problems can be encountered when an inoperative purge cycle causes repeated efforts to initiate pilot. Although he was not certain as to the dryer, he did state that repeated unsuccessful attempts to initiate the pilot light of a blast furnace could cause explosive build-ups of gas that would probably be dispersed near the dryer because it is an open area (Tr. 279). Dryer operator Kenneth Smock testified that he was aware the purge cycle was "jumped out", and that a burned out wire caused by paper being inserted near the pilot light ignition point, coupled with sand and water, made it difficult to light the pilot, and that he had reported the condition on his daily inspection report.

Although Mr. Cooley also indicated that he believed the manual lighting of the dryer also exposed him to a hazard of possibly slipping or falling on the floor or over a protective railing which was adjacent to and near the location of the pilot light because of the presence of water and sand which made the area slippery, I am convinced that his principal concern centers over the fact that he was directed and required to use a burning piece of paper in attempting to light the dryer pilot light and my decision regarding his complaint is based on this fact. Having visited the plant site in the company of counsel for both parties during the course of the trial in this case, it would appear to me that the nature of respondent's silica sand drying operation is such that water, moisture, sand and dampness is an ever present fact of life, and absent any evidence that respondent violated any mandatory safety standard dealing with the clean-up or control of such materials I have no basis for finding that the mere presence of such materials presented a hazard.

As for the positioning of the guardrail in question, since the time of Mr. Cooley's discharge modifications have been made to the positioning of that guardrail, and aside from any evidence of anyone climbing over it to reach the pilot, I cannot specifically conclude that the guardrail is all that critical to my decision. However, it seems clear to me that at the time of Mr. Cooley's discharge, requiring an employee to manually light the dryer by means other than the automatic control system and panel procedures could have possibly exposed an employee to any number of situations which may or may not have been hazardous, and I am convinced that the company's policy prohibiting the manual lighting of the dryer reflects in part some of these concerns.

Statement of a safety complaint

Respondent argues that only after Mr. Cooley was ordered off the property on Friday, May 2, 1980, by Mr. Chalmers did he assert that his work refusal was based on a perceived safety hazard. However, the record adduced in this case reflects that Mr. Cooley had previously complained about the hazards of lighting the dryer with burning paper. As a matter of fact, the record supports a conclusion that the practice of lighting the dryer with a burning piece of paper was well known to everyone at

the plant, including mine management.

Mr. Cooley testified that he had previously complained that the lighting of the dryer with burning paper was unsafe and that he complained to Mr. Chalmers, Mr. Phelps, Mr. Smock, and to another dryer operator by the name of Sam Watson. Mr. Smock confirmed that Mr. Cooley had often expressed his displeasure over lighting the dryer with burning paper, but he could not recall Mr. Cooley specifically stating that he was concerned about the safety of that procedure and he did not inquire further as to Mr. Cooley's reluctance to perform that task. However, he confirmed that when he overheard Mr. Cooley speaking with Mr. Chalmers over the telephone on Friday, May 2, 1980, his refusal to light the dryer "could have been because he thought it was unsafe", and that later that day Mr. Cooley did tell him that he felt it was unsafe.

Dryer Operator Phelps, the man assigned to train Mr. Cooley during his last week of employment, testified that Mr. Cooley complained to him during that time that lighting the dryer manually with burning paper was unsafe. Mr. Phelps also confirmed that the automatic mechanism for lighting the dryer was inoperative during the week of Mr. Cooley's training, and as a result, it took two men to light it. One man would stand at the control panel and the other would stand at the pilot light location with a burning piece of paper. He also confirmed that he had reported the inoperative automatic lighting mechanism to Mr. Chalmers, noted the conditions in his inspection reports, and that the lighting of the dryer with burning paper was the subject of general conversation among the employees and that company foremen and management knew about it.

Electrician Stubblebine confirmed that operators would complain about lighting the dryer with burning paper, and while they did not complain directly to him, it came to his attention more or less through lunchroom conversations. However, since he did not speak to Mr. Cooley, Mr. Cooley never complained to him.

There is nothing in the record to suggest that Mr. Cooley had ever complained to MSHA about the practice of lighting the dryer with burning paper, and Inspector Spencer testified that absent a finding that the dryer was "defective equipment" there is no specific safety standard covering this practice. Mr. Bentgen testified that Mr. Cooley had never previously complained to him about his being required to light the dryer with burning paper, and Mr. Bentgen stated further that during Mr. Cooley's subsequent grievance Mr. Chalmers informed him that Mr. Cooley has never complained to him that lighting the dryer with burning paper was unsafe. However, Mr. Bentgen confirmed that when he met with Mr. Cooley and his safety representative on Monday, May 5, 1980, Mr. Cooley informed him at that time that his work refusal was based on his safety concerns and it seems clear to me that Mr. Bentgen knew this before he made the decision to fire Mr. Cooley that same afternoon.

In view of the foregoing, I conclude and find that the record supports a conclusion that Mr. Cooley communicated his belief about the safety hazard presented to his supervisor Phelps

during the week of his training prior to his discharge, and that he also communicated it to safety director

Bentgen prior to his decision to discharge Mr. Cooley. Coupled with the fact that the practice of lighting the dryer with burning paper appears to have been general knowledge among the dryer operators and dryer laborers, there is a strong inference that Mr. Cooley also communicated his safety concerns directly to Mr. Chalmers, and that Mr. Chalmers chose to ignore them. In short, I conclude and find that the communications made by Mr. Cooley regarding his safety concern falls within the test enunciated by the Commission in the Dunmire and Estle case discussed above.

The reasonableness of Mr. Cooley's work refusal

Having concluded that the practice of lighting the dryer pilot light in question with a burning piece of paper was an unsafe practice, the next question presented is whether Mr. Cooley's belief that it was unsafe was reasonable, and whether his reluctance or refusal to follow this practice was made in good faith.

Mr. Cooley has a limited education, and after viewing him on the stand during the course of the hearing he impressed me as being candid and straightforward. Although his prior work record and differences with his supervisors, as reflected by the record and the testimony of several witnesses, lead me to conclude that he may be short tempered and lacking in self-restraint when dealing with co-workers and supervisors, he nonetheless impressed me as being sincere when he testified that he was frightened by the prospect of being required to light the dryer pilot light with burning paper and that his fears were heightened even more when he signed the hair of his fingers as the result of a "flash-back" from an unsuccessful attempt to initiate pilot with a burning piece of paper.

In addition to Mr. Cooley's testimony, electrician Stubblebine, who testified that he had no dealings with him, nonetheless respected his right to refuse to light the pilot with burning paper if he believed it was unsafe. As a matter of fact, Mr. Stubblebine commented that if he thought it was unsafe he too would refuse to light it in that fashion and that if the company disciplined him for this he would file a complaint as did Mr. Cooley.

Although dryer operator Smock expressed no fear at lighting the dryer with burning paper and fashioned his own "one-man operation" procedure for doing this, he confirmed that Mr. Cooley did not know much about the dryer operation and was not as experieinced as he was. Given these circumstances, Mr. Smock did not find Mr. Cooley's reluctance to light the dryer with burning paper to be unusual. Dryer operator Phelps gave similar testimony, and former operator Stumpmier testified that he too would refuse to light the dryer with burning paper because he believed it was an unsafe practice and so informed safety director Bentgen. He also confirmed the fact that approximately a month after Mr. Cooley's discharge Mr. Bentgen issued a memorandum stating that anyone caught lighting the dryer with a

burning piece of paper would be subject to company disciplinary action, including discharge, and the record reflects that this policy is still in effect.

Finally, although Mr. Cooley's former supervisor and foreman David Chalmers did not testify in this case, the record presented raises a strong inference that he was lacking somewhat in his appreciation for safe work practices. Mr. Cooley referred to several instances where Mr. Chalmers would perform dangerous acts, Mr. Smock confirmed that he personally observed Mr. Chalmers light the dryer with a burning piece of paper, and Mr. Stumpmier testified that Mr. Chalmers had little regard for safety and that when he attempted to discuss Mr. Cooley's refusal to light the dryer after he was ordered off the property, Mr. Chalmers would not speak with him.

Although Mr. Chalmers had ordered Mr. Cooley off the property after his refusal to light the dryer, Mr. Bentgen confirmed that Mr. Chalmers had no authority to discharge Mr. Cooley and that Mr. Bentgen discharged him after speaking with Mr. Chalmers. Mr. Bentgen also stated that his investigation confirmed that foremen made it a practice to instruct employees to assist in the lighting of the dryer with burning paper, that they themselves had engaged in this practice, and that Mr. Chalmers told him that he had instructed Mr. Cooley to assist in the lighting of the dryer and assumed that he would do so by holding the burning piece of paper. Mr. Bentgen also confirmed that Mr. Chalmers was subsequently fired for poor work performance and for reporting to work on two occasions while intoxicated.

Given all of the aforementioned circumstances, I conclude and find that Mr. Cooley had a good faith reasonable belief that the lighting of the dryer in question by means of a burning piece of paper presented a dangerous safety hazard which may have exposed him to injury, and that his good faith belief in this regard falls squarely within the test laid down by the Commission in MSHA ex rel Michael Dunmire and James Estle v. Northern Coal Company, WEST 80-313-D and WEST 80-367-D, decided February 5, 1982. By refusing to light the dryer as directed by his supervisor, Mr. Cooley eliminated any hazard to which he may have been exposed had he carried out the order, and, as stated by the Commission in Dunmire and Estle, supra, "avoidance of injury is the very reason the right to refuse work exists".

Whether respondent would have fired Mr. Cooley anyway for use of profanity.

Respondent maintains that Mr. Cooley was discharged because of his "bizarre" behavior and the use of "reprehensible and vile" language towards his supervisor Dave Chalmers. In addition, respondent asserts that Mr. Cooley treated his supervisor and co-workers in a "vile manner" at the time of his discharge, and that the record offers ample evidence that this behavior warranted his discharge.

The only specific conduct of record in this case deals with a telephone conversation which Mr. Cooley had with his supervisor David Chalmers. During that conversation, Mr. Cooley purportedly used profanity and made certain utterances which obviously

prompted his being initially sent home by Mr. Chalmers and then being discharged by Mr. Bentgen the following week.

However, there is nothing of record here that suggests that Mr. Cooley directed his remarks to his "co-workers". Further, the only witness to the one-sided telephone conversation was Mr. Smock. He testified that the telephone conversation lasted only a few minutes, and that the use of profanity by Mr. Cooley stemmed from his reluctance to light the dryer pilot light. Since Mr. Chalmers did not testify, and since no one but Mr. Cooley knows what Mr. Chalmers may have told him during that phone conversation, I have no way of knowing whether Mr. Chalmers' may have also said something to further provoke Mr. Cooley.

Respondent's conclusions that Mr. Cooley used "vile", "foul", and "abusive" language obviously is based on what Mr. Chalmers may have told Mr. Bentgen. There is no evidence or testimony that Mr. Cooley used this sort of language towards Mr. Bentgen or any other company official, and Mr. Cooley, as well as Mr. Smock, indicated that the cursing was directed at the method of lighting the dryer rather than at Mr. Chalmers personally. Considering the circumstances under which Mr. Chalmers left his employment with the respondent, and absent his testimony, there is a strong inference that Mr. Chalmers may not have been too enchanted with Mr. Cooley as an employee and may have said something to provoke Mr. Cooley's outburst.

After careful consideration of the record adduced here, I conclude and find that the use of profanity by Mr. Cooley during the telephone conversation in question was the direct result of his being required to light the dryer with a burning piece of paper, an act which I have found Mr. Cooley reasonably believed was unsafe. In these circumstances, I agree with MSHA's assertion that the use of profanity by Mr. Cooley was part of the protected work refusal itself, and I conclude and find that this was the case at the times the words were spoken on May 2, 1980.

While it may be true that Mr. Cooley may have bid off the job of dryer operator and decided not to pursue that job at the conclusion of his week of training, the fact is that what prompted his discharge was his refusal to assist in the lighting of the dryer with a burning piece of paper, a task that had been assigned to him on May 2, 1980, by his foreman. The purported basis for Mr. Cooley's discharge was his refusal to follow his supervisor's order to light the dryer with a burning piece of paper, the use of foul language towards this same supervisor over this work refusal, and Mr. Cooley's past disciplinary record with the respondent. Mr. Bentgen testified that he considered the use of foul language and the refusal to perform the assigned task to be acts of insubordination and that Mr. Cooley would have been fired anyway even if he had carried out the instructions to light the dryer. Mr. Bentgen reasoned that since Mr. Cooley had a prior record of work refusal and insubordination, and since he was on probation for these prior offenses at the time of the dryer incident, his discharge was justified. However, since I have concluded that the refusal to perform the assigned job task and the use of profanity were protected activities, they do not constitute acts of insubordination warranting a discharge under the Act. This being the case, Mr. Cooley's prior work record is

not controlling.

Respondent has not established that Mr. Cooley had ever been disciplined for using profanity, nor has it established that it has ever disciplined other employees for using profanity on the job. Since Mr. Bentgen had the final authority to discharge or otherwise discipline Mr. Cooley for the May 2, 1980 incident concerning the dryer, he had the opportunity to consider Mr. Cooley's reasons for refusing to light the dryer before making the decision to discharge him. Mr. Bentgen candidly conceded that prior to the decision to discharge Mr. Cooley he was made aware of the method of lighting the dryer by means of burning paper, yet he opted to discharge him for insubordination and his past record. Further, while it may be true that Mr. Cooley's grievance and arbitration (exhibit R-4) was denied and his discharge sustained, that decision is not binding on me, and since the arbitration decision contains no rationale or reasons explaining it, I have given it no weight. The critical question is whether the preponderance of the evidence adduced in the instant proceeding supports a conclusion that the respondent would have discharged Mr. Cooley in any event by reason of any unprotected activities alone. After careful review of the record, I conclude and find that the testimony and evidence adduced in this case does not support a conclusion that the respondent would have fired Mr. Cooley for the manner in which he communicated his work refusal to his supervisor. This is not to say that as a general rule an employer may never fire a miner for abusive language and conduct towards a supervisor. By the same token, a miner may not insulate himself against such conduct by hiding behind the Act. However, on the facts of this case, where there is a direct nexus between the conduct and a right protected under the Act, I simply cannot conclude that the discharge was justified.

Conclusion

On the basis of the foregoing findings and conclusions, including a preponderance of all of the credible evidence and testimony of record in this proceeding, I conclude and find that complainant John Cooley was unlawfully discriminated against and discharged by the respondent for engaging in activity protected under section 105(c) of the Act, and the complaint of discrimination IS SUSTAINED.

Remedies

In an Order I issued on February 26, 1982, extending the time for the filing of posthearing briefs and proposed findings and conclusions, I requested that the parties include as part of their posthearing briefs arguments concerning the remedies to be afforded Mr. Cooley in the event he prevailed in this matter. MSHA has included such proposed remedies as part of its posthearing submissions, but the respondent has not. Since the record reflects that MSHA filed its brief with me a month or so prior to the respondent, and served a copy on the respondent, I assume that respondent's counsel had an opportunity to review the proposed remedies. Since respondent has not commented on it, I assume further that it does not disagree with

the monetary information concerning back-pay, fringe benefits, etc., which MSHA has included as part of its argument. Further, I take note of the fact that Industrial Relations Director Bentgen testified as to the contractual pay and fringe benefit matters found in the wage agreement during the hearing and indicated that the contract is effective through November 12, 1982 (Tr. 111-112).

MSHA seeks Mr. Cooley's reinstatement to the position of dryer operator with seniority and all the prerequisites of seniority, back to the day of discharge, as well as back pay from the date of discharge, May 5, 1980, until reinstatement. MSHA asserts that Mr. Cooley's back pay can be calculated from the contract between the Ottawa Silica Company and the Teamster's Union (Exhibit G-4). Moreover, MSHA relies on the testimony at trial that the monetary value of the fringe benefit package under the contract is considered to be 52% of the base wage (Tr. 112), and includes the amount of back wages and fringe benefits which have accrued through March 30, 1982 as part of the requested remedy in this case. The requested remedies, up to the dates shown, are as follows:

Time Period	Rate of Pay	Hours/Wk	Basic Wage	52% of Basic Wage	Total
5/5/80-11/9/80	$ 7.26 hr.	40	$ 8,421.60	$4,374.23	$12,800.83
11/10/80-11/9/81	$ 7.96 hr.	40	$16,556.80	$ 8,604.53	$25,166.33
11/10/81-3/30/82	$ 8.66 hr.	40	$ 6,928.00	$ 3,602.56	$10,530.56
		Totals	$31,906.40	$16,591.32	$48,497.72

Civil penalty assessment question

The parties were permitted to make a record concerning those statutory factors found in section 110(i) of the Act dealing with the assessment of civil penalties for violations of the Act and the mandatory health and safety standards promulgated therein (Tr. 8-9), and MSHA's solicitor has included some arguments in support of its request for an assessment of civil penalties against the respondent for discriminating against Mr. Cooley. However, included in those arguments are new matters dealing with an alleged "knowing violation" by respondent's foreman, arguments concerning respondent's prior assessments history for certain violations of mandatory safety or health standards, and arguments concerning the effect of any civil penalty on respondent's ability to remain in business.

While it is true that I invited the parties to make such a record in this case, on reflection, and in light of the new matters pleaded, I decline to assess any civil penalty against the respondent at this time.

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However, MSHA is free to proceed in a separate civil penalty proceeding if it believes that this is appropriate. Since the Act, as well as the Commission's rules, provide specific steps to be taken in regard to civil penalty proceedings, I believe that it should proceed in a separate proceeding if it desires to seek a civil penalty for respondent's act of discrimination. MSHA's request for an assessment of a civil penalty in this case is DENIED, without prejudice to its filing a separate proceeding.

ORDER

1. Respondent IS ORDERED to reinstate Mr. Cooley to his former or equivalent position at the mine in question, with all of his seniority rights intact back to the date of his discharge, at the current prevailing wage and fringes pursuant to the contract between the respondent and the union (exhibit G-4).

2. Respondent IS ORDERED to pay to Mr. Cooley all back pay, including fringe benefits, from the date of his discharge to and including the time periods and in the amounts shown on MSHA's schedule of remedies ($48,497.72)

3. In addition to the back pay and fringe benefits shown in MSHA's schedule of remedies, respondent IS ORDERED to pay Mr. Cooley back pay and fringe benefits from March 30, 1982, up to and including the day he is reinstated to his job in compliance with this Order. In this regard, MSHA's counsel is directed to confer with respondent's counsel for the purpose of calculating the amounts due Mr. Cooley and to insure compliance with this additional back-pay and fringe benefits payment requirement.

Full compliance with this Order is to be made within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge

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~FOOTNOTE_ONE
a. MSHA's assertion in its original complaint that Mr. Cooley was discharged in 1981 appears to be a typographical error. The record in this case reflects 1980 as the correct year.