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RICHARD BJES V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RICHARD E. BJES, COMPLAINANT	Discrimination Complaint
v.	Docket No. PENN 82-26-D
CONSOLIDATION COAL COMPANY, RESPONDENT	Laurel Mine

DECISION

Appearances: Carson Bruening, UMWA District #2, Edensburg, Pennsylvania,
for the complainant Jerry E. Palmer, Esquire, Pittsburgh,
Pennsylvania, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complaint was filed with the Commission after the complainant was advised by MSHA that its investigation of his complaint did not disclose any discrimination under the Act.

The complaint filed by Mr. Bjes in this case states as follows:

I was removed from the mine at 7:30 p.m. on July 30, 1981, and informed that I was being suspended with intent to discharge effective immediately for refusing to run a shuttle car, that in the opinions of the mine safety committee, Federal Inspector Charles Burke and myself was a hazard to myself and members of my crew. The problem was caused by my size and the lack of room in the car. A safety grievance and a regular grievance were then filed which sent the case into arbitration. The arbitrator's decision was that I would be suspended for 30 working days. I feel that my individual safety rights were violated and that I was disciplined illegally under Federal law protecting my right to a safe working place.

Respondent filed a timely answer denying that it had discriminated against Mr. Bjes, and asserting that the action taken against him was a result of insubordination because of his failure to comply with a direct management order to operate the shuttle car in question.

~2044

A hearing was conducted in this matter in Pittsburgh, Pennsylvania, on April 6, 1982, and the parties appeared and participated fully therein. The parties filed post-hearing briefs, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The principal issue presented in this case is whether Mr. Bjes' refusal to operate the shuttle car in question was protected activity under the Act, and whether respondent's disciplinary action taken against him for this refusal is discriminatory under the Act. Additional issues raised by the parties are identified and discussed in the course of this decision.

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.

Complainant's Testimony and Evidence

Richard Bjes testified that on July 30, 1981 he was ordered to operate the number 9 shuttle car, but he found it uncomfortable and he was unable to reach the brake pedal with his leg and he could not steer with his hand because his leg was in the way. He advised the shift boss of his difficulties, but was told to try and operate it anyway and he operated the machine for the remainder of the shift. However, the machine had to be shut down for repairs for two hours because he ripped off some motor hoses while trying to maneuver the machine in the section. The car in question is a low profile machine and then he experienced difficulty in reaching the controls so as to facilitate backing in and out of areas where pillar extraction was taking place. After the shift was over he discussed the matter with a safety committeeman and with mine foreman Hofrichter. After his discussion with Mr. Hofrichter, he was under the impression that someone else would be assigned to the low profile machine and that he (Bjes) would be assigned to a high profile car which had more room under the operator's overhead canopy.

After returning to work the next day, Mr. Bjes stated that he told the section boss that he was not going to operate the low profile car and that he was supposed to operate the high profile one instead. After checking with the office, his boss told him he was to operate the low profile machine, and when Mr. Bjes refused to operate it Mr. Hofrichter and the safety committeeman came to the section and Mr. Bjes demonstrated

~2045

the problem he had operating the machine. They did not agree with him, and federal inspector Charles Burke was called to the scene to look at the machine with another safety committeeman, and Mr. Bjes claims they agreed with his position that he could not safely operate the low profile shuttle car. When he asked management to assign him to other duties pending a resolution of the dispute, he was informed that he was under suspension with intent to discharge and was sent home (Tr. 15-19).

Mr. Bjes stated that after returning to work after his suspension, he was assigned to the same low profile shuttle car and attempted to operate it. He did so because he lost his arbitration case concerning his initial refusal to operate the machine. He ran the car for two hours but was injured when he struck his knee on the steering wheel while attempting to stop the machine while pulling in behind a continuous mining machine. He suffered a fractured knee cap and torn ligaments, underwent an operation, and was incapacitated for five months. Mr. Bjes stated further that Inspector Burke's accident report reflected that the injury was caused by his leg being positioned above the steering wheel, and instead of going outside the wheel when he attempted to stop the machine, his leg went inside, thereby causing his injuries (Tr. 20).

On cross-examination, Mr. Bjes confirmed that he had worked for the respondent for some six years. He also identified the machine he refused to operate as a standard low profile shuttle car, and stated that there were two additional cars operating in the section at the same time, one a low profile machine and one a high profile machine. Prior to July 1981, he operated a scoop in the four east section, but would "fill in" as a shuttle car operator when the regular operator did not show up for work. He estimated that he operated a shuttle car on and off for six months prior to July 1981, but always on a "fill in" basis. His regular job classification was as a scoop operator and he operated a scoop 95 percent of the time and the shuttle car five percent of the time (Tr. 25).

Mr. Bjes confirmed that prior to July 1981, he operated the other low profile number 10 car, and while he complained to management that the machine was too small, he did not invoke his safety rights. He also stated that he regularly operated the high profile number four machine until July 27 or 28 when the regular operator returned to work, and he (Bjes) was reassigned to the low profile car. Mr. Bjes confirmed that he understood that seniority on his crew dictated that he would be required to operate the number 9 shuttle car, but that he decided it was unsafe during the course of the shift and not when the regular operator (Wall) returned to work (Tr. 27-29).

Mr. Bjes indicated that the number 9 machine was not defective, and he explained how he tore the hose off the machine on July 28th while operating it in the section. He reported the damage to section foreman Wayne Ross, and he stated that Mr. Ross told him to get off the machine because he could not steer it around the corner. Mr. Bjes also confirmed that when he met with

Mr. Hofrichter, both he and safety committman John Adams were left with the impression that he could switch to the higher profile machine (Tr. 34).

~2046

Mr. Bjes stated that he is six feet one and a half inches tall and weighs 195 pounds, and that he has observed shuttle car operator Richard Shaffer operate the low profile machine. Mr. Shaffer is six feet, three or four inches tall and weighs 200 pounds, and Mr. Bjes stated he has observed him operate the machine, but does not believe he can do it safely since he does not consider it safe "when you have to operate it with your knees under your chin" (Tr. 35).

Mr. Bjes stated that at the time Mr. Ross removed him from the machine he did not tell him of his injury and that Mr. Ross assigned him to some belt work. Mr. Bjes walked to the belt and commenced shovelling work, but did not report his injury because "if we would report every little injury we get during the course of the shift we wouldn't get any work done" (Tr. 37). He indicated that at the time of his injury he thought he had simply "twisted his knee up a little bit" and commented that this "happens all the time in the mines" (Tr. 37).

On redirect, Mr. Bjes stated that a "few people" had previously been removed from shuttle cars because of their size and inability to operate the machines, and that there had never been any questions about it and no disciplinary action was ever taken against them. He confirmed that Consol did not contest his injury compensation claim, and that mine management found that the cause of the accident was that he was "injured while operating the shuttle car and my left knee struck the steering wheel" (Tr. 38-39).

In response to bench questions, Mr. Bjes identified one Mike Wyatt as an operator taken off the same machine two years ago because he could not safely operate it. He also stated that "everybody that run that shuttle car complained that it was too small no matter what their size was" (Tr. 40). He also indicated that the problems with low profile shuttle cars has been discussed at union safety committee meetings and that he invoked "his individual safety rights and I got fired for it so I guess everybody is afraid to do anything" (Tr. 43). He also confirmed that "nobody ever refused to run it because it was unsafe. Everybody just went ahead and said, I guess I'll just run it, to keep out of trouble" (Tr. 43). He described his actions after he was injured as follows (Tr. 44-46):

JUDGE KOUTRAS: And then you went ahead---

THE WITNESS: I went home.

JUDGE KOUTRAS: No, what was the---

THE WITNESS: They carried me out on a stretcher.

JUDGE KOUTRAS: Let me see if I can---you hit your knee on the shuttle car and you go off. And were you assigned to shovel coal then?

~2047

THE WITNESS: I couldn't do it, that's why I was only there for such a short time and I was looking for the boss and couldn't find him so I went and sat by the pole until he came back.

JUDGE KOUTRAS: Okay, so you weren't assigned to shovel coal for any extended period of time?

THE WITNESS: No.

JUDGE KOUTRAS: Okay.

THE WITNESS: I didn't even finish what I was supposed to do.

JUDGE KOUTRAS: And then you were carried out of the mine on a stretcher?

THE WITNESS: Yes, sir. To the hospital.

JUDGE KOUTRAS: And you were diagnosed as having a fractured knee cap?

THE WITNESS: At the emergency room they diagnosed it as a possible fracture and torn ligaments with sprain or something.

JUDGE KOUTRAS: It wasn't actually torn ligaments of fracture, just possible but, in any event you were incapacitated, right?

THE WITNESS: Right.

JUDGE KOUTRAS: How long were you off work?

THE WITNESS: Five and a half months I think it was.

JUDGE KOUTRAS: Due to that injury?

THE WITNESS: Yes, sir. I ended up getting operated on and the recovery after that.

Mr. Bjes stated that his salary as a scoop operator was the same as that of a shuttle car operator. He also indicated that he volunteered to accept other work after refusing to run the shuttle car, and that he would also accept a lower paying job or take alternate work while his dispute was being resolved (Tr. 52).

Richard Borella, testified that he is employed by the respondent and also serves as chairman of the mine safety committee. He confirmed that prior to the instant litigation, Ray Siefert was taken off the shuttle car because he could not operate the car safely and efficiently due to his size and he was not disciplined for this. Mr. Borella confirmed that he was present on July 30, 1981, in the section in question with Federal inspector Charles Burke and Mr. Bjes. Mr. Bjes demonstrated the problem he was having with the shuttle car in question. Mr. Bjes had great difficulty in reaching the brake, and when he did so his left foot would get above the steering wheel itself which in turn created a problem in steering the machine. Mr. Borella stated that Inspector Burke indicated to him that because of his (Borella's) size, he couldn't run the machine safely. Mr. Borella indicated that Mr. Burke sat in the machine and also took some measurements, and commented that it was possible to make some modifications to the machine to alleviate the size problems (Tr. 54-56).

Mr. Borella confirmed that after Mr. Burke looked at the machine, he (Borella) advised Mr. Bjes that he agreed with his conclusion that he could not operate the car safely, and that he did so on the assumption that the machine could be modified to permit Mr. Bjes to operate it safely. Mr. Borella also indicated that he made his recommendations concerning machine modifications to Mr. Hofrichter. When Mr. Hofrichter rejected his recommendations as invalid, he (Borella) advised Mr. Bjes that he should not operate the machine and indicated that "we will go through whatever actions being necessary to alleviate this problem" (Tr. 57). Mr. Borella confirmed that he was not disciplined for advising Mr. Bjes not to operate the machine, and he believed that he acted within his jurisdiction as a safety committeeman in advising Mr. Bjes not to operate the machine (Tr. 59). He also confirmed that he specifically suggested to Mr. Hofrichter that Mr. Bjes be taken off the machine, reassign him to another machine, or assign him other work (Tr. 60). However, management believed they had the right to assign him to the same machine, and he confirmed that the arbitrator denied Mr. Bjes' relief because the arbitrator did not believe that his operation of the machine constituted an imminent danger (Tr. 62).

Mr. Borella confirmed that he was aware of the fact that Mr. Bjes was injured upon his return to work, but does not have a copy of the accident report. He also confirmed that some modifications were made to the machines but that operators still complained with operational problems while running them. Management took the position that they could purchase any equipment they desired, and the union's position was that the men would operate the machines if they can do so safely (Tr. 63). He believed that Mr. Bjes had a legitimate reason for refusing to operate the machine even though the arbitrator did not believe that an imminent danger existed under the contract, and he believed "it was just foolish to even consider to make somebody do something that they feel is unsafe when there is a way that can be alleviated (Tr. 65).

On cross-examination, Mr. Borella stated that it was not necessary to purchase low profile shuttle cars for the four east section. The

~2049

mine has two low profile cars and they both operate in that section, and have been continuously operating in the section since July 1981 (Tr. 66). The low profile cars in question have been the subject of discussions at union meetings and "just about everybody that run them has some problems because of their size. But, Rich's was getting to the point that it was unsafe, totally unsafe" (Tr. 67). Some of the operator's are smaller in stature than Mr. Bjes, and some are larger, and he conceded that none of the other operators have invoked their safety rights (Tr. 68). He believed Mr. Bjes acted in good faith in asserting his rights, and he described some of the problems in operating the low profile car (Tr. 69-71). He conceded that Mr. Bjes' complaint about the car in question seems to be peculiar to him and that no one else complained to the point where they intended to shut the machine down and invoke their individual safety rights (Tr. 74). He concurred in Mr. Bjes' judgment that he could not operate the machine safely (Tr. 74). He confirmed that Mr. Seifert is six feet five inches tall and weighs 260 pounds and is significantly larger than Mr. Bjes (Tr. 75).

Respondent's Testimony and Evidence

Wayne T. Ross, section foreman, testified that Mr. Bjes was first assigned to his crew on Monday, July 27, 1981, and that the next day the crew was working in the four east section on retreat mining work. He identified a scale map of the section (exhibit R-1), and testified as to where mining work was taking place, including the areas where the shuttle cars were operating (Tr. 114-119). Mr. Ross indicated that three shuttle cars were operating on the section at that time, and he identified them as car numbers four, nine, and ten. The number four car is the high profile off-standard car, the number nine is a low profile standard car, and the number ten is a low profile off standard car. On July 28th, cars four and nine were used and the mine operator purchased the two low profile cars because of the height of the coal. Mr. Bjes was operating the number nine car on July 28th, and Tim Peterman was operating the number four car, and he did not make the initial car assignments. The senior operator has his choice of cars (Tr. 119-121).

Mr. Ross testified that during the shift on July 28, Mr. Bjes advised him that he was running his machine only in low gear, and Mr. Ross believed that it was due to a bad trammer. He observed nothing out of the ordinary with regard to the manner in which Mr. Bjes was operating the machine and he observed him make two or three trips prior to his making the statement concerning low gear. Mr. Bjes also stated to him that he "could not understand why the company buys junk", and when afternoon shift foreman Bill Ross visited the section that day he discussed Mr. Bjes' comments with him (Tr. 124). Mr. Wayne Ross confirmed that the machine was down during the shift, and a report he identified reflected that it was down for 45 minutes because of a damaged hydraulic hose on the torque converter, and he explained that the damage occurred when the machine ran over a large lump of coal on the tram road (exhibit R-2; Tr. 125). Mr. Ross identified a schematic drawing of the shuttle car, explained where the damage

was sustained, and indicated that it was not caused by the car running into the coal rib (exhibit R-3; Tr. 127).

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Mr. Ross testified that his crew worked again on July 29th in the four east section and before the shift began he discussed Mr. Bjes' comments made the day before with Mr. Hofrichter and Mr. Hofrichter responded "we will just have to see how it goes" (Tr. 128). When the shuttle cars did not show up, Mr. Ross went to locate them and found Mr. Bjes and Mr. Peterman engaged in a conversation. At that time Mr. Bjes advised him that he was not going to operate the number nine car because it was unsafe and this was the first time Mr. Bjes had made that claim to him. When he asked Mr. Bjes to explain, Mr. Bjes told him that he was having trouble working the pedals, and he refused to operate the machine and advised Mr. Ross that he was invoking his individual safety rights. Mr. Peterman then refused to operate machine number nine and stated that "if Bjes didn't have to run number nine car he didn't have to run it either" (Tr. 129). However, Mr. Peterman agreed to operate the machine after Mr. Ross advised him he was going to find out what was going on.

Mr. Ross stated that his crew worked again on Thursday, July 30, and that he discussed Mr. Bjes' refusal to operate his machine with Mr. Hofrichter, and the three of them had a meeting that same day. Mr. Bjes was assigned alternate work, and during the rest of the day meetings were held between representatives of the safety committee, mine management, and a federal inspector. At no time did Mr. Ross hear Mr. Bjes offer to operate the number 10 shuttle car. Mr. Ross expressed an opinion that Mr. Bjes operated the number four car safely during the entire shift of July 28, and he saw no problems with Mr. Bjes operating the car. Another operator, larger than Mr. Bjes, operated the number nine car without any problems for two or three months in the section and he identified him as Dave Monteith.

Mr. Ross stated that Mr. Bjes returned to work on September 14, 1981 and was assigned to his crew on the same four east section operating the number nine shuttle car. Mr. Peterman was operating the number four car at this time. After a couple of trips, the miner operator (Cecil Wall) asked him to take Mr. Bjes off the car because he (Wall) thought that Mr. Bjes was not trying to operate it safely during the retreat mining which was going on. He immediately removed Mr. Bjes from the machine and explained to him that Mr. Wall had complained that he wasn't trying to operate it safely, and Mr. Ross agreed with Mr. Wall that this was the case (Tr. 133). Mr. Ross then reassigned Mr. Bjes to labor work shovelling the belt, and Mr. Bjes did not inform him about any injuries at that time (Tr. 134).

Mr. Ross stated that after assigning Mr. Bjes to belt work, he observed him walking toward the belt area and that he was "walking fine". About an hour later when he discovered that the belt was not running, he went to see why and observed Mr. Bjes sitting by the power center. Mr. Bjes advised him that he had injured his knee and Mr. Ross summoned shift foreman Bill Ross to come to the area and take Mr. Bjes away. Mr. Bjes was taken away on a stretcher and Mr. Wayne Ross could not explain how Mr. Bjes was injured, but he did not believe he was injured on the steering wheel of the car because Mr. Bjes had complained that

his knee was positioned above the steering wheel (Tr. 135). Mr. Wayne Ross confirmed that Bill Ross is his brother (Tr. 137).

~2051

On cross-examination, Mr. Ross confirmed that Mr. Bjes had never previously refused to run equipment or to do what was expected of him during the time that he worked for him. He also denied that mine management had never warned him to "watch out" for Mr. Bjes (Tr. 138). In explaining Mr. Wall's complaints about the manner in which Mr. Bjes operated the machine, Mr. Ross stated as follows (Tr. 141-142):

JUDGE KOUTRAS: Mr. Wall was running a continuous mining machine?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Mr. Bjes was running a shuttle car?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And the two work in tandem? The loading process?

THE WITNESS: Yes, sir. Once Mr. Bjes got three quarters loaded he put on a big show, crawled out of the buggy--

JUDGE KOUTRAS: Now, wait a minute, don't characterize him as a big show just tell me what he did.

THE WITNESS: Okay, he took his time changing around positions in the seat.

JUDGE KOUTRAS: Okay.

THE WITNESS: Mr. Wall felt that it was unsafe. He didn't want to do it that way.

JUDGE KOUTRAS: Do what? Change seats?

THE WITNESS: No, the way he was doing it.

JUDGE KOUTRAS: And how was that?

THE WITNESS: You can't turn around and you can turn around quick, which is the way you have to do it. But, Mr. Bjes didn't want to do it quick. He wanted to take his time.

Mr. Ross confirmed that Mr. Peterman was not disciplined for initially refusing to run his machine because he gave him a second opportunity, as he did Mr. Bjes, and he ran it (Tr. 143). He confirmed that in retreat mining the continuous miner operator wants the shuttle car to get out as quickly as possible because all the coal is gone and it will cave in, and the fact that one car operator is not as swift as another is cause to take him off the car. When asked to explain why Mr. Bjes could not move in and out as quickly as other operators, Mr. Ross stated that it was his opinion that Mr. Bjes did not want to because he did not

want to run the number nine car and Mr. Ross believed he was "sluffing off" and wanted to make an issue over it. However, he could not explain why Mr. Bjes had not done this earlier (Tr. 145-146).

~2052

Mr. Ross did not dispute the fact that when Mr. Bjes operated the number four shuttle car, his knee was up in his face, but he disputed Mr. Bjes' claim that he had difficulty in reaching the brake pedal (Tr. 150). Mr. Ross also confirmed that he looked at Mr. Bjes' knee when he claimed he had been injured, observed a red mark but nothing unusual, and noticed no swelling (Tr. 151). Mr. Ross did not follow up on Mr. Bjes' condition after he was taken away on a stretcher, and he subsequently learned that he had fractured his knee cap (Tr. 151). Regarding Mr. Peterman's reluctance to operate the shuttle car, Mr. Ross stated as follows (Tr. 152-153):

JUDGE KOUTRAS: Okay, this conversation with Mr. Peterman now, I take it since Mr. Peterman had seniority on Mr. Bjes, that he would have the selection of which machine to operate, correct?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And when Mr. Bjes suggested that he wasn't going to operate the number nine machine, you wanted to get on with your production, you wanted to get the matter resolved, you wanted to go ahead, you suggested that Mr. Peterman make a switch for the time being, is that the way it was?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And Mr. Peterman did not object?

THE WITNESS: At first he did, yes.

JUDGE KOUTRAS: And that's when he made the comment, well, if he doesn't have to run it, why do I?

THE WITNESS: Right.

JUDGE KOUTRAS: And his reluctance to run it would be on what, do you have any idea as to why Mr. Peterman made that statement? Did he independently believe that he would be unsafe? Or is it simply that how come you are treating him different than me?

THE WITNESS: I feel that it was like, you know, why should he get special treatment. If he doesn't have to run it why should I? There was no question of safety with Mr. Peterman at all.

JUDGE KOUTRAS: And so, he made the agreement to make the switch?

THE WITNESS: Yes, he did.

~2053

William A. Ross, shift foreman, testified that he has known Mr. Bjes for six years and that Mr. Bjes worked for him from time to time as a general laborer during weekend "dead work". He confirmed that he went to four east section on July 28, 1981, spoke with section foreman Wayne Ross, and observed Mr. Bjes operate the shuttle car. He observed nothing unusual while observing him load three shuttle cars and watching him unload the cars at the dumping point. He then flagged him down and inquired about the "problems" he was having with the car and Mr. Bjes explained that he couldn't run the car in second gear. When Mr. Bjes began to show him by moving his feet, Mr. Ross was called to the phone and left the area (Tr. 160). He next returned to the section on July 30, in the company of Inspector Burke and safety committeeman Borella. He heard Mr. Burke comment that he observed no imminent danger and that he (Burke) saw no reason why Mr. Bjes or anyone else could not operate the car safely. He has observed other men bigger than Mr. Bjes operate the number nine car with no problems, and he never heard Mr. Bjes volunteer to operate the number ten car (Tr. 161).

On cross-examination, Mr. Ross explained that "running the car in second gear" means that the car is operated in a faster mode. Mr. Ross stated further than when Mr. Bjes told him he was not going to run the car in second gear, he said nothing to him and had no time to evaluate the situation. However, he did recall Mr. Bjes explain that he could not reach the machine brake pedals while driving the machine faster (Tr. 166-167).

Thomas Hofrichter testified that in July 1981, he was the mine foreman and acting superintendent at the mine in question, and that he is still serving as acting superintendent. He confirmed that he suspended Mr. Bjes in July 1981, with intent to discharge him, and he identified letters given to Mr. Bjes concerning the suspension and discharge (Exhs. R-4, R-5). He also confirmed that Mr. Bjes was discharged for insubordination for refusing to operate the number nine shuttle car in the four east section. Mr. Hofrichter also identified a copy of the "employee conduct rules" which are posted at the mine (Exh. R-6), and indicated that rule No. 4 covers insubordination for refusal to perform work assigned or to comply with a supervisor's direction (Tr. 168-170).

Mr. Hofrichter confirmed that Mr. Bjes filed a grievance concerning his suspension and that it went to arbitration. He indicated that Mr. Bjes received a thirty-day suspension rather than being discharged, and that the arbitrator issued this penalty because it was a first time offense, no previous bad work record by Mr. Bjes, and the arbitrator's "confusion" as to whether the case before him was a safety grievance or an arbitration case (Tr. 171).

Mr. Hofrichter testified that he first learned of any potential problem with the shuttle car in question on Wednesday, July 29, 1981, when Mr. Wayne Ross advised him that Mr. Bjes was having a problem with the car. Mr. Bjes came to see him in the company of safety committeeman

~2054

John Adams and advised him that he was having problems operating the number nine car and asked if there was something he could do to alleviate the problem. During the ensuing discussions, problems concerning the machine seat location and canopy heights were discussed, as well as whether or not Mr. Bjes could be switched to another car. Mr. Hofrichter advised Mr. Bjes that he would look at possible solutions, including to switch Mr. Peterman, but indicated that Mr. Peterman was the senior man and would have the choice as to which car to operate (Tr. 173). The next day, Mr. Ross advised him that Mr. Bjes refused to run the car and had indicated that Mr. Hofrichter told him that he did not have to because he would switch to another car. Mr. Hofrichter advised Mr. Ross that this was not the case, and that he told Mr. Bjes that he was to operate the car until a solution to the problem was reached. Another meeting was held that day with Mr. Bjes, and union and management people were present. Mr. Bjes again stated that he would not run the car because he did not believe it was safe, and Mr. Hofrichter advised him that his intent was not to effect an immediate switch, and that Mr. Bjes was to operate the car until the problem was solved. Mr. Bjes then informed him that he was invoking his safety rights and refused to operate the machine (Tr. 174-175).

Mr. Hofrichter stated that after the aforementioned meeting, the union representatives advised him that they would summon Federal Inspector Burke to the mine to look at the machine. Later that day, he entered the mine with the union safety committeemen and, a company maintenance foreman, and Mr. Bjes was summoned to the face area where the number nine shuttle car was parked. The operator pulled it back into the roadway and Mr. Bjes sat in the car and demonstrated his problem with operating the machine. Mr. Bjes sat in the seat facing inby, and operated the brake pedal, the tram, and the steering wheel. He then sat in the seat facing the opposite direction (outby) and did the same thing. However, at that point Mr. Bjes advised him that he had no problem in that position, but that his problem was in sitting facing inby, and in that position he experienced a problem in turning the seat and that he couldn't stand the canopy when he turned. Safety committeeman Adams was asked whether he saw any imminent danger connected with the problems demonstrated by Mr. Bjes and replied "no". Mr. Hofrichter then climbed into the car and had no problems with it and he stated that he "really didn't understand the problem" (Tr. 177-178).

Mr. Hofrichter stated that when Inspector Burke arrived to look at the car in question, he announced that he was there to determine whether an imminent danger existed and he proceeded to climb into the car and take measurements. He also asked Mr. Bjes to demonstrate any problems, and Mr. Burke then concluded that no imminent danger existed, and advised Mr. Bjes that it was safe for him or anyone else to run the machine (Tr. 179). Safety committeeman Borella also agreed that no imminent danger existed, but Mr. Hofrichter conceded that both Mr. Borella and Mr. Burke did comment that some "hazards" and "problems" did exist with the operation of the machine. He explained that these problems were in connection with the canopy height, the seat location, and the

possible relocation of the machine brake pedals, but that Mr. Burke advised him there was nothing he could do about these items and that it was "between you and the men as far as what solutions you come up with" (Tr. 180). Mr. Hofrichter explained what transpired next, as follows (Tr. 181-182):

We went through the discussion and we really couldn't resolve the problems at hand, there really wasn't anything that since Rich had run the car before that there was anything that was abnormally hazardous to him in operating that car. And he could continue to operate that car until such a time that we could look at the possibility of making it more comfortable for him by making these changes.

At that time I had made the decision that it's safe for Rick Bjes to run that car and he was in turn going to. There was still more discussion among all the people there because, as I say, there were eight people. I tried to communicate with all the people that were there at the time. So then Wayne Ross came up to me and asked well, what are we going to do? I said, as far as I'm concerned we've been through it all and Rich is going to run that shuttle car. In the mean time Rick Borella, John Adams had walked down the track and I went over to Rich and said, you know we have been through this all now, it's time to get on the shuttle car and go.

He said, no, I'm not running that shuttle car, it's not safe for me to run. He left, he went down the track and got Rick Borella and John Adams, they came back up and asked me are you suspending Rick with the intent to discharge. I said, yes, I am. Because we've been through the full gambit, I've done everything that I thought was physically and practical at the time and it's been resolved and Rich is to get back on the car. Rick said that as a member of the safety committee that he was recommending that Rich not run that car. Now, is a good time to tell him that I had already made the decision that Rich was going out of the mine and so we proceeded out of the mine then.

Mr. Hofrichter indicated that the number nine and ten shuttle cars were practically identical, and that at no time did Mr. Bjes offer to operate the number ten car, and his refusal to operate one car was the same as not operating the other one (Tr. 183). Mr. Hofrichter believed that Mr. Bjes would have encountered no hazards in operating either car, and he indicated that people of his size have operated both cars on a regular basis with no problems (Tr. 186-187). When asked whether he believed that Mr. Bjes was acting in good faith when he refused to operate the car, Mr. Hofrichter replied (Tr. 187):

A. No, not at all.

Q. What is the basis for your opinion?

A. It was right at the time that Wayne Ross was the new section foreman, Rich Bjes was just in the process of just being bumped back from the number four shuttle car to the number nine shuttle car.

He saw the potential of operating number nine car until he was able to bid off. And there really that many bids available, there weren't any bids available at the time and he could see himself positioned in four east, in a retreat section, under Wayne Ross operating number nine. And it was not something that he totally chose to do and this was his only way out.

On cross-examination, Mr. Hofrichter testified as to the dimensions of the machine, and he confirmed that at the time of the meetings underground with the union representatives, safety committeeman Borella did recommend that Mr. Bjes be removed from the machine in question in accordance with the contract terms (Tr. 193-201). When asked to explain why some machine operators were permitted to be taken off their cars, while others were not, Mr. Hofrichter responded as follows (Tr. 204):

A. It's a simple fact that the eyes of managers same as all the other foremen at that mine to make the decisions as far as what is safe and what is not safe, what is practical, what is efficient for the operation of the mine. You see a guy operate and say yes, he can run a machine or no, he can't run a machine. That's managements decision to make that determination. And in the case with the other ones it was decided that they weren't capable of running the machine, so they were taken off.

Joseph Grosholz, section foreman, testified that Mr. Bjes worked under his supervision from October 1980 to July 1981, in the four east section. He was initially classified as a scoop operator but operated a shuttle car on and off filling in for the regular operator. Sometime in January 1981, Mr. Bjes asked to be assigned to the number four shuttle car since he had seniority over the operator at that time. Mr. Hofrichter approved the switch and Mr. Bjes was assigned as a shuttle car operator. He operated the number ten car at times, and it too was a low profile car. The number ten and nine cars were originally in the section, but after the number four car was purchased, it replaced the number ten car which was taken out of service to use as a spare. Mr. Bjes operated the number ten car without any problem and never claimed it was unsafe (Tr. 229-234). Mr. Grosholz indicated that there is no basic difference between the operating parameters of the number nine and ten shuttle cars other than the fact that one is a standard car and the other an off-standard (Tr. 235).

Discussion

As indicated earlier, the issue presented in this proceeding is whether Complainant Bjes' refusal to run the No. 9 shuttle car at the Laurel Mine on Thursday, July 30, 1981, is protected by 105(c) of the Act. Refusal to perform work is protected under section 105(c)(1) of the Act, if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom nsolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982). Further, the reason for the refusal to work must be communicated to the mine operator. Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

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

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 the 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 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 word "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.

Complainant's arguments

In his post-hearing arguments, complainant's representative argues that Mr. Bjes opted to invoke his individual safety rights and refused to operate the shuttle car in question after encountering conditions on the shuttle car which severely limited his ability to operate it. After several near accidents, Mr. Bjes felt strongly that to operate this piece of equipment would in all probability lead to a serious injury or death to himself or to another member of his crew. In support of this conclusion, complainant's representative points to the fact that upon his return to work following his 30-day suspension Mr. Bjes suffered a serious knee injury as a result of operating the shuttle car in question. Complainant suggests that Mr. Bjes' refusal to operate the shuttle car is protected by Section 105(c) of the Act, as well as Article III, Section (i) of the National Bituminous Coal Wage Agreement of 1981.

In further support of his case, complainant's representative argues that respondent Consolidation Coal Company, as well as the arbitrator who heard Mr. Bjes' grievance, misinterpreted the aforementioned contract provision by concluding that an employee has to be exposed to an "imminent

~2060

danger" before he can invoke his individual safety rights and refuse to operate a piece of equipment that he believes is hazardous.

With regard to the testimony by several Consol witnesses at the hearing that they operated the shuttle car in question without invoking their individual safety rights, complainant's representative asserts that individual safety rights are dependent on what an individual miner believes may be dangerous, and not what a collective group of miners believe. Further, the representative points to the fact that since two employees were removed from the shuttle car in question upon request, while Mr. Bjes' request was denied, this raises an inference that "the company had a vendetta on Mr. Bjes". The representative suggests that the only reason other employees declined to exercise their individual safety rights was out of fear of "the exact repercussions experienced by Mr. Bjes".

Finally, complainant's representative points out that two other employees had approached and complained to Richard Borella, Chairman of the Mine Safety Committee, about the operation of the shuttle car in question, and that even though MSHA Inspector Charles Burke had observed that the car presented "a potentially dangerous situation", and made certain corrective recommendations, Mine Foreman Hofrichter ignored them, even after Chief Mechanic Bill Young stated that any repairs would be minor.

Complainant's representative seeks the following remedies:

1. Reimbursement of all lost wages incurred as a result of Mr. Bjes' suspension.
2. All record of discipline involving this matter be removed from Mr. Bjes' file.
3. Mr. Bjes not be required to operate this piece of equipment in the future.

Respondent's arguments

Respondent argues that in order to determine whether Mr. Bjes validly exercised his right under section 105(c) of the Act on Thursday, July 30, 1981, by refusing to operate the No. 9 shuttle car, it must first be determined whether he was acting in good faith, and if so, whether he had a reasonable belief that his operation of the shuttle car posed a hazard.

Respondent submits that upon an analysis of the testimony and documentary evidence in this case, it seems clear that Mr. Bjes was not acting in good faith on Thursday, July 30, 1981, and the preceding two days, and that he has failed to present substantial evidence to prove that he was acting in good faith when he refused to operate the No. 9 shuttle car. Although he asserted at the hearing that he was sincere in his belief that operating the car posed a hazard, respondent submits that Mr. Bjes cannot point to other evidence that would lend support to

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~2061

assertion of good faith, and that the very nature of the inquiry, i.e., whether an individual acted in good faith, requires the Judge to look to circumstantial evidence and possible motives to account for why an individual acted as he did. In this case, respondent asserts that the circumstantial evidence and motivation behind Mr. Bjes' refusal to operate the machine prove that he was acting in bad faith.

In support of its position in this matter, respondent states that on the surface, this case may appear similar to the case of Pasula v. Consolidation Coal Company, 2 MSHC 1001 (Review Commission 1980). In that case, the operator of continuous mining machine refused to operate the equipment after running it for an hour and a half. The machine had been damaged in a roof fall and had been repaired wherein several gears had been replaced, and the operator complained that it was making excessive noise which was hurting his ears and giving him a headache. He made this complaint immediately to his section foreman, and the Commission held that this was a valid exercise of his right to refuse to do work posing a hazard beyond the hazards normally encountered in underground mining.

Respondent maintains that the instant case is distinguishable from the Pasula case, in that in Pasula there was never a question about the sincerity of the operator's motivation, whereas in this case the motivation of Mr. Bjes is subject to question. Although Mr. Bjes argues that he was motivated out of concern for his safety and the safety of his fellow miners, respondent says Mr. Bjes invoked his safety right because having found the No. 9 car to be uncomfortable, he realized he would have to operate it until he could bid to another job.

In support of its conclusions that Mr. Bjes' motivation is suspect, respondent points to the uncontroverted evidence that Mr. Bjes operated the No. 10 shuttle car on numerous occasions, and that Safety Committeeman Borella conceded that his investigation disclosed Mr. Bjes' operation of the No. 10 car prior to July of 1981. Respondent also points to the testimony of one of Mr. Bjes' former supervisors, Joseph Grosholz, that Mr. Bjes operated the No. 10 car for him when the No. 9 car was down.

With regard to Mr. Bjes' contention that the No. 9 and 10 cars, even though they are both low profile cars, are different because one is a standard car and the other an off-standard, and that the tram pedals and steering wheels are in different positions, respondent asserts that its witnesses were of the opinion that there was no difference between operating the No. 9 and 10 cars, and that this testimony is supported by Exhibit No. 9, comparing the various dimensions of the respective compartments and the distances between the pedals on the two shuttle cars.

In response to Mr. Bjes' attempt to prove his good faith by showing that he in fact offered to operate the No. 10 car instead of the No. 9 car,

~2062

respondent points to the fact that Mr. Bjes did not initially testify on this point but did so in rebuttal after Mr. Borella testified, and that Mr. Bjes admitted that he did not direct this offer to any member of mine management. Respondent submits "that it is incredible that Mr. Bjes would make such an offer and not press mine management for an answer in this situation and it is questionable why Mr. Bjes waited until Thursday, July 30, 1981, to make such an offer if he ever did."

Respondent suggests that consideration be given to Mr. Bjes' timing in invoking his rights under section 105(c) of the Act. In this regard, respondent states that Mr. Wall, who was the miner operator, returned to work the week of July 28, 1981, and consequently, every member of the crew was bumped back. Mr. Bjes was bumped from the senior shuttle car operator to the junior one. His senior, Mr. Peterman, chose the No. 4 car that Mr. Bjes had operated since January so Mr. Bjes was forced to operate the low-profile cars. Since the No. 10 car was the older one, the No. 9 car was used, and Mr. Bjes realized that he would be forced to operate the No. 9 car which by his own admission (with which Mr. Peterman apparently concurred) was more uncomfortable than the No. 4 car until he was able to bid to another job. Thus, respondent concludes that his right to refuse unsafe work afforded him with an opportunity to remove himself from an uncomfortable situation.

Further, respondent contends that Mr. Bjes failed to exercise his right immediately. On Tuesday, July 28, 1981, when he was first assigned to the No. 9 car, he operated it for the entire shift, and did not tell his immediate supervisor, Wayne Ross, that he believed it was unsafe for him to operate the machine. Mr. Bjes merely stated that he would not run the car in second gear. Although he did show the shift foreman, William Ross, that he was having a problem with the pedals, he did not state that it was unsafe for him to operate the machine, and both of his supervisors observed him operating the machine and did not believe that he was running it unsafely. In these circumstances, respondent questions Mr. Bjes' sincerity.

Summarizing its defense in this case, respondent maintains that the record does not demonstrate that Mr. Bjes was exercising his right in good faith, and that given the fact that he operated the No. 10 car and the timing of his exercise of his rights, his motivation in this case is very suspect. Even assuming that one can find that Mr. Bjes was sincere in his belief, respondent submits that it was not a reasonable one in that he operated the No. 10 car in the past and never complained about that car even though the weight of the evidence is that the No. 9 and 10 cars are similar. Further, respondent points to the fact that miners larger than Mr. Bjes operated the No. 9 without alleging that their size prevented them from operating the car safely, and Mr. Bjes did not testify that he had a physical limitation that limited the flexibility and use of his legs that would distinguish him from those other miners.

Finally, the respondent submits that little weight should be

given to the injury Mr. Bjes received on September 14, 1981.
Respondent maintains

~2063

that Mr. Bjes' failure to tell Wayne Ross of the incident when Mr. Ross removed him from the No. 9 car and his ability to walk to the belt line raise serious questions regarding Mr. Bjes' story about how and when that accident occurred. Respondent suggests that Mr. Bjes could very well have stumbled on a lump of coal and found it convenient in light of his complaint with MSHA to claim that his knee bumped the steering wheel of the shuttle car, and that his version of what happened is subject to further question when one considers that his alleged problem with operating the No. 9 car was that his knee was above the steering wheel.

Findings and Conclusions

As indicated earlier, the critical issue in this case is whether Mr. Bjes' refusal to operate the Number 9 Shuttle Car when ordered to do so was protected activity under the Act. Mr. Bjes claims that he could not operate the shuttle car safely, and that management's insistence that it could be operated safely and that he should operate it, exposed himself and his fellow crew members to possible injuries. On the other hand, the respondent maintains that the shuttle car could be operated safely by Mr. Bjes, that he operated a similar car in the past with no complaints, that other miners of comparable size and weight operated the car in question with no safety complaints, and that Mr. Bjes complaint really resulted from his displeasure over having to operate a low-profile machine which he found uncomfortable. Under these circumstances, and in view of the guidelines set down in the discrimination decisions previously discussed, it is necessary to explore the following issues:

1. Whether Mr. Bjes registered and communicated any safety complaints with the operation of the shuttle car in question.
2. Whether Mr. Bjes' safety concerns connected with his being requires to operate the shuttle car in question were made in good faith.
3. Whether the refusal by Mr. Bjes to operate the shuttle car in question was reasonable, and if so, whether the work refusal is protected activity under the Act.
4. Whether respondent has carried its burden of showing that Mr. Bjes' suspension for insubordination was motivated by unprotected activities and that he would have been disciplined anyway for refusal to operate his shuttle car.

Statement of a Safety Complaint

The record in this case establishes that as early as July 28, 1981, Mr. Bjes had complained to his section foreman Ross that he was having difficulty operating the low profile No. 9 shuttle car. That initial

~2064

complaint was not specifically framed in terms of any safety difficulties, but rather, had to do with Mr. Bjes' claim that he could only run the car in low gear because of his claimed difficulties in reaching or manipulating some of the controls. These complaints carried over to the next day when Mr. Ross and mine superintendent Hofrichter discussed the matter further. These complaints blossomed into a full-blown safety complaint on July 30, when Mr. Hofrichter, Mr. Bjes, safety chairman Borella, MSHA Inspector Burke, and possibly a few others had a meeting or get-together to explore the difficulties that Mr. Bjes claims he was having with the operation of the shuttle car in question. At that meeting Mr. Bjes decided to invoke his individual safety rights and specifically advised mine management that his refusal to continue to operate the No. 9 shuttle car was based on the fact that he (Bjes) did not believe he could operate it safely.

In view of the foregoing, I conclude and find that the record in this case supports a conclusion that Mr. Bjes communicated his belief about the safety hazard presented in his operation of the shuttle car to his section foreman and to the acting mine superintendent prior to his proposed discharge and subsequent suspension.

Whether the Safety Complaint was Made in Good Faith

Respondent suggests that Mr. Bjes' complaint was motivated by his desire to avoid operating a low profile machine which he found to be uncomfortable while awaiting a successful bid on another job. Further, respondent suggests that Mr. Bjes' complaint is a sham, that he concocted a story of safety concerns, and that the injury which he suffered after his return to duty after serving his 30-day suspension was the result of his striking his knee on something other than a shuttle car. Respondent also points to the fact that Mr. Bjes' claimed willingness to operate the No. 10 shuttle car was made for the first time in rebuttal during the course of the hearing, and only after the subject was brought up by his witness Borella.

Having viewed Mr. Bjes on the stand during the course of the hearing in this case, I find him to be a straightforward and credible witness. I believe that he was sincere when he initially complained about the cramped shuttle car kitchen and the fact that he had problems reaching some of the controls. I am not persuaded by the fact that other shuttle car operators may have found no difficulties when they operated the machine. The issue is whether Mr. Bjes' difficulties were reasonably related to any real safety concerns, and whether he was sincere in articulating those concerns. Although it may be true that Mr. Bjes' purported offer to operate the No. 10 shuttle car may have been made belatedly during the course of the hearing, well after the fact, it seems clear to me that Mr. Bjes' decision on July 30, not to operate the car was influenced to a great degree by some input from MSHA Burke after his examination of the car in question, as well as by safety committeeman

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Borella who advised or implied to Mr. Bjes that he had an absolute right to invoke his individual safety rights and could refuse to operate the machine in question. Given all of these circumstances, I conclude and find that the safety complaint made by Mr. Bjes was made in good faith, and was not made to avoid operating the shuttle car to which he was assigned until something better could come along.

The Reasonableness of Mr. Bjes' Refusal to Operate the Shuttle Car

The record in this case reflects that at the time of his discharge Mr. Bjes had worked for the respondent for some six years. There is nothing to suggest that prior to the incident over the shuttle car that Mr. Bjes was other than a good worker, that he was a chronic complainer, or that he had ever refused a work assignment.

In addition to the testimony by Mr. Bjes with regard to the difficulties he was experiencing in operating the shuttle car in second gear (fast mode), there is the testimony by safety committeeman Borella that after Mr. Bjes demonstrated his difficulties in operating the machine on July 30, in the presence of MSHA Inspector Burke, he (Borella) agreed with Mr. Bjes' assessment that his continued operation of the shuttle car in question presented a safety hazard. Mr. Borella communicated his agreement directly to Mr. Bjes and advised him that he could invoke his individual safety rights and refuse to operate the machine. Mine Superintendent Hofrichter confirmed that Inspector Burke sat in the machine in question, took some measurements, and advised him that "it could be hazardous" and that he should address the problems dealing with the machine seats, pedals, and the overhead canopy.

Prior to July 30, Mr. Bjes advised shift foreman William Ross that he has having a problem operating the No. 9 shuttle car. Although Mr. Ross indicated that he saw nothing unusual about the manner in which Mr. Bjes was running the car on July 28, he confirmed that when he flagged Mr. Bjes down to inquire about any problems Mr. Bjes did tell him that he could not operate the car in second gear because he could not reach the brake pedal. Just as Mr. Bjes was about to demonstrate his difficulties, Mr. Ross was called away to the telephone and left the area, and did not return until the July 30 meeting in the section.

Section foreman Wayne Ross confirmed that as early as July 28, Mr. Bjes would only run the machine in low gear. He also confirmed that continuous mining machine operator Wall had complained about Mr. Bjes "taking his time" while changing his seat position in his car during the loading process while in retreat mining, and that Mr. Wall considered this to be unsafe since he wanted the shuttle cars to come in and out quickly during the loading process. Although Mr. Ross indicated that Mr. Wall complained about the manner in which Mr. Bjes operated the shuttle car, and attributed certain statements in this regard to Mr. Wall, Mr. Wall was not called as a witness and did not

testify. Under the circumstances, I have given little weight to
Mr. Wall's purported

~2066

characterizations as the difficulties encountered by Mr. Bjes in operating the car on that day, and I accept Mr. Bjes' testimony that the configuration of the machine, coupled with its operational limitations restricted his movements while seated at the controls, thereby contributing significantly to his inability to reach the brake pedals.

In view of the foregoing, I conclude and find that Mr. Bjes' safety concerns over his inability to operate the number 9 shuttle car safely were reasonable. Under all of these circumstances, I conclude that Mr. Bjes had a good faith reasonable belief that if he were forced to continue to operate the shuttle car in question on July 30, this would have presented a serious safety hazard to himself and to at least the miner operator in the section, and possibly to other miners who may have been working on the section in close proximity to where he was required to operate the machine. Although the injury which he suffered to his knee came after he served his suspension and returned to work, it does bolster his argument that requiring him to operate the shuttle car while he was cramped into the operator's kitchen with his knees in his face presented a real safety hazard. Although respondent believes that the injury may have been caused by Mr. Bjes falling and striking his knee on a piece of coal, the fact is that his testimony that he struck it on the steering wheel of the machine remains unrebutted, and respondent's own accident report, exhibit C-3, reflects that the knee injury occurred when Mr. Bjes attempted to stop the car while making a turn and struck his knee on the steering wheel. The report also reflects that the car struck the coal rib when the brakes were applied.

Respondent's defense

Respondent's defense in this case rests on an assertion that Mr. Bjes' refusal to operate the shuttle car was based on his dislike for a machine which he found to be uncomfortable. In support of this theory of its case, respondent maintains that Mr. Bjes deliberately went out of his way to conjure up excuses for not operating the machine, including a suggestion or inference that his fractured knee-cap was self-inflicted. Respondent also attempted to show that the No. 9 car was similar to another car which Mr. Bjes may have operated without any difficulty, that other miners of comparable size operated the same or similar shuttle without any difficulty and without filing any safety complaints, and that Mr. Bjes was observed operating the very same car without any difficulty before he made his safety complaint.

As indicated earlier in this decision, the issue presented in this case is whether Mr. Bjes reasonably and in good faith believed that the operation of the shuttle car in question presented a safety hazard to him. The fact that other miners of similar size and weight may have had no problems with the car in question is not that critical. While this factor may weigh on the reasonableness of Mr. Bjes' safety concerns, I have found that these concerns were reasonable. Further, I rejected the

"laundry list" of miners who respondent claimed were able to safely operate the car (exhibit 0-1), and I note that none of these miners were called to testify.

With regard to the operational differences in the two low profile shuttle cars, no. 9 and no. 10, respondent takes the position that the two machines are so similar, that there are no differences in the two from an operator's point of view. The testimony and evidence adduced by the respondent on this issue consists of opinions by Mr. Hofrichter and section Grosholz, as well as the diagrams and measurements of the three shuttle cars being used in the section (exhibits O-3, O-7, and O-9). Neither Mr. Hofrichter nor Mr. Grosholz were offered as expert witnesses, and there is no testimony or evidence that they have operated the shuttle car in question. Further, while the measurements of the No. 9 and No. 10 machines are close, there are some differences in the brake pedal distances from the operator's seat, as well as in the height of the operator's seat. In addition, one car is a standard car, and the other one is an off-standard car. Thus, to this extent there are some operational differences, and I accept as credible Mr. Bjes' assertions that he was experiencing difficulties in operating the No. 9 car, and reject the respondent's assertion that since the cars are so similar Mr. Bjes cannot be believed.

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 Mr. Bjes has satisfactorily established that requiring him to operate the No. 9 shuttle car in question under the circumstances here presented constituted a safety hazard to himself, and possibly to his fellow miners. I further conclude and find that Mr. Bjes promptly made his safety concerns in this regard known to mine management, that his complaints in this regard were reasonable and made in good faith, and that his refusal to operate the car in question was protected activity under section 105(c) of the Act. Under the circumstances, I further find and conclude that his initial discharge, subsequently reduced to a 30-day suspension, constituted unlawful discrimination under the Act, and his complaint of discrimination filed with this Commission IS SUSTAINED.

Remedies

The record in this case reflects that Mr. Bjes' initial discharge from his job was modified after it went to arbitration and the arbitrator reduced the penalty to a 30-day suspension (exhibit C-4). After serving his suspension, Mr. Bjes returned to work until the September accident in which he injured his knee. He was incapacitated and did not work for four or five months. Upon his return to work after recuperating from his injuries, he was not required to again resume operation of the No. 9 shuttle car. Further, as of the date of the hearing in this case, counsel stated that the mine has been out of production and everyone working there has been laid off. Assuming that Mr. Bjes is called back to work, he indicated that because of his seniority he probably would not be again assigned to operate that low profile machine and that he would be entitled to bid on a

better job (Tr. 258-259).

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The parties were in agreement that the relief requested by Mr. Bjes in this case is the reimbursement of his lost wages during his 30-day suspension period, and an assurance from mine management that he not be required to operate the same shuttle car which prompted his instant discrimination complaint (Tr. 259). In his post-hearing arguments, Mr. Bjes' representative requested the following remedies:

1. Reimbursement of all lost wages incurred as a result of Mr. Bjes' suspension.
2. All record of discipline involving this matter be removed from Mr. Bjes' file.
3. And most importantly, Mr. Bjes not be required to operate this piece of equipment in the future.

ORDER

1. Respondent IS ORDERED to compensate Mr. Bjes for the period of his thirty-day suspension by paying him in full the salary which he would have received had he not been disciplined. Payment is to be made for the thirty working days Mr. Bjes was off respondent's payroll, commencing on July 30, 1981, and ending on September 14, 1981. The rate of pay should be at the rate of pay Mr. Bjes was earning at the time of the suspension, and counsel for the respondent and Mr. Bjes' representative are directed to confer with each other for the purpose of calculating the amount due Mr. Bjes and the manner in which payment shall be made.

2. Respondent IS FURTHER ORDERED to remove all references of Mr. Bjes' disciplinary action in this case from his official mine and company personnel records.

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

Complainant's request that I order the respondent not to require Mr. Bjes to operate the No. 9 Shuttle Car at any time in the future IS DENIED.

George A. Koutras
Administrative Law Judge