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(UMWA) v. KITT ENERGY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA, ON BEHALF OF OLIVER HARVEY, COMPLAINANT v. KITT ENERGY CORPORATION, RESPONDENT	DISCRIMINATION PROCEEDING Docket No. WEVA 85-61-D MSHA Case No. MORG CD 84-7 Kitt No. 1 Mine

DECISION

Appearances: Michael Aloi, Esq., Manchin & Aloi, Fairmont, West Virginia, for Complainant;
B.K. Taoras, Esq., Kitt Energy Corporation, Meadowland, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the complaint of the United Mine Workers of America (UMWA) on behalf of Oliver Harvey pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that Mr. Harvey was suspended without pay from the Kitt Energy Corporation (Kitt Energy) (FOOTNOTE.1) in violation of section 105(c)(1) of the Act. (FOOTNOTE.2)

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, it must prove by a preponderance of the evidence that Mr. Harvey engaged in an activity protected by that section and that his suspension

was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd Cir.1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.1983), and NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Harvey asserts that he refused to comply with his supervisor's work order on the morning of March 17, 1984, because he was afraid that to do so might overly strain the muscles in his back. His suspension based upon that work refusal, it is argued, was therefore based upon his exercise of an activity protected by the Act. A miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). In addition, a miner may under certain circumstances refuse to work on the basis of a perceived hazard arising from his own physical condition or limitations. Bjes v. Consolidation Coal Corp., 6 FMSHRC 1411 (1984).

Kitt Energy does not dispute that Mr. Harvey was suspended based upon his refusal to carry out his supervisor's work order but argues that Harvey did not entertain a good faith, reasonable belief that to carry out the work order would indeed have been hazardous. The operator also maintains that Mr. Harvey did not communicate his safety concerns to any representative of management in accordance with the Commission decision in Secretary ex rel. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982).

The evidence shows that Oliver Harvey, a miner employed by Kitt Energy since 1978, was assigned on the morning of March 17, 1984, to the work crew of section foreman Roger Davidson. Davidson and his seven member crew entered the mine shortly after midnight. After conducting his safety examination Davidson directed some of the work crew including Mr. Harvey to obtain supplies needed for the roof bolter. Without complaint Harvey helped load the supplies (including roof bolts, plates and 25 pound boxes of resin) onto a scoop. The supplies were then carried by the scoop and unloaded next to the roof bolter.

Davidson then directed four of the men, including Harvey, to bring ventilation tubes approximately 100 feet from the Number 3 entry to the Number 2 entry. After what Davidson felt was an inordinate amount of time and the miners had still not returned with the tubing, Davidson traveled to the Number 3 entry to find out what the problem was. He found the four miners sitting around the scoop arguing about

how to move the tubes up to the face. Some wanted to first empty the scoop of some coal spillage and others wanted to convey the tubes that had already been loaded.

Davidson was somewhat irritated over the delay and the continued inaction of the crew. According to Davidson the scoop would not in any event have been able to pass the parked roof bolter and it would have been faster to hand-carry the tubes. Davidson therefore elected to have the crew hand-carry the tubes. He divided the group into two pairs and directed them to carry two tubes each. The oval shaped tubes were 10 feet long and 18 inches wide at the widest point, were constructed of fiberglass and weighed 49 pounds. Two of the miners, Randy McAtee and Richard Bolyard, picked up two tubes and proceeded to carry them as directed but Harvey and John Howell proceeded to carry only one tube. Foreman Davidson again directed Harvey and Howell to take two tubes but they refused without trying. What then happened is in dispute.

Harvey alleges that he then told Davidson that he could not carry two tubes because his back was bothering him.(FOOTNOTE.3) Harvey says that he also told Davidson that he had taken off the day before because of his back. Harvey testified that he "knew if I would carry two tubes I would have to be carried out of the mine. I know the limits of my back." Harvey also admitted, however, that he thought Davidson was being unfair in making the men carry the tubes when he thought the scoop could have been used. He implied that Davidson was having a bad night and was taking-it-out on the crew. According to Harvey, conditions were also bad in the area expected to be traveled, including water, coal spillage, and a roof clearance of only 4 feet in some locations. Harvey conceded however that before his work refusal he had not actually seen the crosscut to be traveled and did not know how deep the alleged water was. Harvey also acknowledged that McAtee and Bolyard had successfully carried two tubes through that area without complaining.

Davidson testified on the other hand that the conditions in the area to be traveled were good. The coal height was 5.4 to 5.6 feet and the bottom was in "excellent" shape. The one puddle in the 18 foot wide crosscut was only 10 to 12 feet wide leaving a clear 6 foot walkway. According to Davidson, Harvey made no mention of his back in refusing to work but said only that there was no way that he was going to carry two tubes "in this top." After several refusals Davidson called outside to Terry Louk the assistant shift

foreman who told Davidson to repeat the order and to advise the miners that they faced suspension if they disobeyed. Howell and Harvey were so informed but continued to refuse the assigned task. It is not disputed that when Louk later appeared underground and gave Harvey and Howell a chance to explain their problem both said they had no problem and offered no explanation for their work refusal. Both Harvey and Howell were thereafter suspened with intent to discharge.

Even assuming, arguendo, that Mr. Harvey did communicate to his foreman in the manner alleged I do not find that he has met his burden of proving that he entertained a good faith, reasonable belief that to perform the requested work under the conditions presented would be hazardous. Robinette, supra.

Indeed, credible evidence does not exist to support Harvey's allegations of a bad back. Earlier on his work shift he helped load supplies, including 25 pound boxes of resin, without any apparent difficulty or complaint. In addition, although Mr. Harvey contends that he had been hospitalized for a back condition 4 or 5 years earlier and had reinjured his back the day before this incident, he provides no corroborating medical evidence. The absence of any medical corroboration to show the existence of a back condition at the time of his work refusal is particularly damaging to the credibility of his case. The fact that Harvey failed to report his alleged back "reinjury" on the day before his work refusal (as he admittedly knew was required by company policy) and his failure to have asserted this alleged condition as his reason for refusing to perform the assigned task when given an opportunity to do so in the presence of shift foreman Terry Louk, also reflects negatively on his credibility.

Harvey's past practices are also inconsistent with his present allegations. Harvey testified that because of his back problems he had on two occasions, in 1979 and again in 1980, told his then foreman, Lee Hawkins, before the corresponding work shift, that he did not know whether he could perform the job that day and purportedly told Hawkins that if he could not do the job he would go home. In contrast, at the beginning of the shift at issue herein, Harvey gave no such notice and made no such request of his foreman but rather waited until he was given an apparently unpleasant task before raising a complaint about his alleged bad back. If Harvey was in fact suffering from a back condition before his shift on March 17, it may reasonably be inferred from his past practices that he would have, as before, requested light work or other special consideration prior to the commencement of his shift.

The absence of good faith is also evidenced by the failure of either Harvey or his partner, Howell, to have even

attempted to carry two tubes. Indeed it may reasonably be inferred from Harvey's testimony that the real reason for their work refusal was their feeling that Davidson was being unfair in not allowing them to use the scoop to carry the tubes and that Davidson was somehow taking-it-out on them for having had a bad night.

Under all the circumstances it is clear to me that Harvey did not at the time of his work refusal entertain a good faith, reasonable belief that performance of the assigned task would have been hazardous within the meaning of the Act. Accordingly, the complaint herein must be denied and this case dismissed.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE:-

~Footnote_one

1 Mr. Harvey was initially discharged on March 17, 1984, but this discharge was subsequently modified in arbitration to a suspension without pay for 30 days.

~Footnote_two

2 Section 105(c)(1) of the Act provides in part as follows:

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discriminate against or otherwise interfere with exercise of the statutory rights of any miner . . . in any coal or other mine subject to this act because such miner . . . has filed or made a complaint under or related to this act, including a complaint notifying the operator or the operator's agent, . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise of such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

~Footnote_three

3 According to the testimony of Randy McAtee and John Howell at the arbitration proceedings, Harvey did in fact say to Davidson that he could not carry two tubes because of his back. Neither McAtee nor Howell testified in the case before me.