

CCASE:
GARY HENSLEY V. HARLAN WALLINS COAL
DDATE:
19860502
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GARY HENSLEY,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 86-3-D
MSHA Case No. BARB CD 85-59

HARLAN WALLINS COAL COMPANY,
RESPONDENT

No. 1 Mine

DECISION

Appearances: Gary Hensley, Wallins, Kentucky, pro se;
Karl Forester, Esq., Forester, Forester,
Buttermore, & Turner, Harlan, Kentucky, for
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Gary Hensley against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Hensley filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and Mr. Hensley filed his pro se complaint with the Commission. A hearing was conducted in Duffield, Virginia.

The complainant alleges that he was discharged by the respondent for refusing to do work in the underground mine operated by the respondent. The complainant maintains that he was hired as an "outside man," had no prior underground mining experience or training, and that the respondent's request for him to work underground made him nervous.

Issue

The issue in this case is whether the complainant's refusal to follow the instructions of mine management to do

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work in the underground mine was protected activity under section 105(c) of the Act.

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) and 110(a) and (d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Procedural Matters

The hearing in this case was scheduled to begin at 9:30 a.m., on March 26, 1986, and the parties were so informed by my notice of hearing of February 21, 1986. In view of the fact that the complainant failed to appear at the appointed hour, I delayed the beginning of the hearing until 9:55 a.m., and made an attempt to contact the complainant by telephone at his residence but no one answered the phone. The respondent's counsel moved to dismiss the complaint because of the failure of the complainant to appear and prosecute his complaint. I reserved my ruling on the motion and closed the hearing at 10:00 a.m. After this was done, the complainant appeared, and the hearing was reconvened at 10:10 a.m. The complainant explained that he arrived late at the hearing because he was looking for a witness but could not find him. I advised the parties that I intended to proceed with the hearing, and respondent's counsel declined my invitation to comment and did not object (Tr. 3A9).

The record in this case reflects that the respondent was initially represented by Counsel Rodney E. Buttermore, Jr., of the firm Forester, Forester, Buttermore & Turner, Harlan, Kentucky. Mr. Buttermore filed his notice of representation and filed all prehearing pleadings on behalf of the respondent. On Monday, March 25, 1986, the day before the hearing, my secretary received a telephone call from Mr. Buttermore's secretary or associate informing her that Mr. Buttermore was out of the country, would be unable to attend the hearing, and a continuance was requested. I telephoned Mr. Buttermore's office and discussed the matter with Mr. William Forester, a member of the firm. Mr. Forester could offer no explanation as to why Mr. Buttermore had not informed me earlier of his departure from the country, and expressed his apologies. I informed Mr. Forester that I intended to proceed with the hearing as scheduled, and he assured me that someone from his office would

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appear to represent the respondent. Mr. Karl Forester, a member of the firm, appeared on March 26, 1986, and represented the respondent in this matter. Under the circumstances, I have substituted Mr. Forester as counsel of record in this case, and have not heard further from Mr. Buttermore. Prior to the commencement of the hearing, Mr. Forester was afforded an opportunity to review the official file in this matter, and he did so.

Discussion

Mr. Hensley filed his discrimination complaint with MSHA's District 7 Office on July 25, 1985. His complaint states as follows:

On July 13, 1985, I reported for work as usual. The mines was going to do dead work. When I got there (2d shift), the section boss, Don Curtis, told me they wanted me to go inside to help clean up, shovel and stuff like that. I told him I was not going inside cause I had never worked in the mine before and had never had any training. Curtis asked me if I wanted to tell him to tell Jr. (Cletis Robbins), I told him no, I'd tell him, which I did. Robbins told me I could either go inside or go home cause they were not running coal and had nothing for me to do on the outside. I told him Okay and left.

By letter dated September 4, 1985, MSHA's district manager advised Mr. Hensley that MSHA conducted an investigation of his complaint, and that based on its review of the information gathered during the investigation, MSHA determined that a violation of section 105(c) of the Act had not occurred. Mr. Hensley was informed of his right to pursue the matter further with the Commission.

By letter dated September 29, 1985, Mr. Hensley filed his complaint with the Commission. His letter states in pertinent part as follows:

I was hired by Gus Robbins (Cletis Robbins, Jr., brother and his boss). Gus told me when I was hired my job was to run the end loader and to answer the outside phone, watch the outside belt head and grease. I was the outside man.

About 3 or 4 weeks before I was fired on a Saturday evening on 2nd shift, Gus Robbins asked if I had any inside training or worked inside before. I told him no. He told me to go get a light and hard hat and go inside. I did not answer him right away. One of the workers told me if I wanted to keep my job I better go inside the mine and work so I did. This left no one outside that night to answer the phone or anything. I worked 9 or 10 hours inside that night with the electrician. I came outside about 2 or 3 a.m. with one of the ram car drivers to throw the disconnects in with a hot stick. The power was off most of that night inside the mines. I thought that was the last and only night I would have to go inside and work. I was not hired as an inside coal miner. This inside mining work made me nerves (sic) and worried me.

Testimony Presented by the Complainant

Complainant Gary Hensley testified that on July 13, 1985, he reported for work on the second shift and was advised by foreman Don Curtis that Mr. Cletis Robbins wanted him to go in the mine and work that evening. Mr. Hensley told Mr. Curtis that he did not care to work inside the mine because he had no underground training or experience. He reminded Mr. Curtis that he was hired to work outside the mine answering the mine phone or doing what was needed on the outside. Mr. Hensley confirmed that he then spoke with Mr. Robbins and told him that he did not care to go underground to work, and that Mr. Robbins responded "Well, go home. You're fired" (Tr. 11-12).

Mr. Hensley stated that a month or so prior to his discharge Mr. Robbins asked him if he had any underground experience or training and that he told him that he did not. Mr. Hensley stated that he had not previously worked around coal mines and that his job with the respondent was his first mining job. He confirmed that he had driven a coal truck since he was 18 years old (Tr. 12).

Mr. Hensley stated that on one prior occasion before his discharge he did work underground at Mr. Robbins' request, and that this was the same night that Mr. Robbins asked about his training. Mr. Hensley stated that he worked underground that night because he needed the job and was afraid of being fired. He confirmed that no coal was being mined that night

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and that he performed "dead work," helped an electrician "a little bit," and helped move a belt structure (Tr. 13).

Mr. Hensley stated that he was first employed by the respondent in May, 1985, and that he was hired as an "outside man" earning eight dollars an hour. His last day of employment was July 13, 1985, the evening he was fired (Tr. 15). He confirmed the accuracy of his prior statement in the complaint filed with the Commission which indicates that Mr. Robbins told him he could either go inside the mine or go home because the mine was not running coal that day and there was nothing for him to do on the outside, and that he (Hensley) replied "Okay" (Tr. 15-16).

Mr. Hensley confirmed that when Mr. Robbins fired him it was done orally and he was not given anything in writing. He stated that he was concerned about working underground even though coal was not being mined because no one would be on the outside to contact in the event of an emergency. He confirmed that he voiced no objection to working underground on the prior occasion because one of his friends told him that if he refused, he would be fired. He also stated that since he had never worked underground before "I just went ahead and went to see what it was like anyway" (Tr. 18).

Mr. Hensley stated that since his discharge he has been employed as a tractor trailer truck driver on a part-time basis for a friend from October, 1985, to the present (Tr. 20).

On cross-examination, Mr. Hensley stated that his last day of employment was a Saturday, and while the mine was closed for vacation the week before, he did not believe it was closed for the week immediately preceding his discharge. He confirmed that the mine was not running coal on July 13, the day he was fired, and that he was asked to go inside to shovel muck (Tr. 20). He explained that he was asked to go inside the underground mine to shovel under the belt line and to clean up the trash. He was told that once he was through with that work, he was to ask Mr. Curtis what else was needed to be done. He confirmed that he chose not to go inside and work (Tr. 21).

Mr. Hensley reviewed a copy of his July 25, 1985, statement made to MSHA, and confirmed that it does not contain a statement that he had been fired. He explained that he did state that he had been fired and "They just didn't write it on there, I guess" (Tr. 22). He stated that the following Monday he telephoned Gus Robbins to make sure he knew about

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Cletis Robbins firing him, and that Gus Robbins stated that "whatever Junior says is what goes" (Tr. 23).

Mr. Hensley confirmed that at no time did he complain to mine management or to MSHA about any danger or unsafe conditions in the mine, and that he was treated just as the other workers at the mine were treated. He denied that when he was hired he told Mr. Gus Robbins that he had worked "over on the north side of Pine Mountain" (Tr. 23). He also denied that he told Cletis Robbins "I aint going to muck that belt" when they had the conversation on July 13 (Tr. 23).

Mr. Hensley confirmed that he did work underground on another occasion with Gus Robbins during vacation and that he had forgotten about it. He stated that the work entailed pulling a miner cable (Tr. 23-24). In response to further questions from the bench as to why he believes he has been discriminated against by the respondent, Mr. Hensley responded as follows (Tr. 24-27):

A. Well, the way I figured it, I was hired for outside - outside man. They asked me to go underground. I never had no training or any experience underground. I didn't feel I should've been underground.

Q. The couple or three times you were underground, they weren't running coal. Right?

A. Right.

Q. They just wanted you to go in there and muck?

A. Yes.

Q. Which, I understand, is kind of a nasty job, isn't it?

A. Yeah. But I never mucked none. Both times, I never mucked no coal both times I went underground.

Q. What's involved? All you do is take a shovel and shovel it?

A. Shovel under the belt and throw it up on top of the belt.

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Q. How much training do you need for that?

A. None. I done that outside.

Q. If you did it outside, why would you be reluctant to do it inside?

A. The mine just scared me. I didn't like it inside.

Q. Even though it was dead work and no coal being run?

A. Right.

Q. Did you believe, when you took the job there, there was a possibility you'd be called on to do work other than just outside work?

A. No, I didn't, because when Gus came down to my house and hired me, I asked him what I had to do. He said, "All you have to do is run the endloader and answer the phone, take care of what needs to be done outside."

Q. Where did you operate the endloader, outside?

A. Yeah.

Q. All the time?

A. Yeah, backing coal back on the belt line.

Q. Mr. Forester asked you a question about the one time you were underground working at the portal. The portal is the entrance to the mine, right?

A. Yeah.

Q. Is that where you were working?

A. No.

Q. You never worked near the portal?

A. Yeah, I shoveled coal.

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Q. How far into the mine did you go?

A. I really don't know exactly, but it took - we rode back in a ram car back to where the old miner was and stuff. I was back where the miner was that one night I went in - where they had the miner and stuff.

Q. Did you help the electrician?

A. Yes.

Q. Did you at any time complain to anybody that was there? Did they have a section foreman there?

A. Yeah, Don Curtis.

Q. Did you say anything to them?

A. No. No, I didn't want to get fired or nothing, you know. I wanted to keep working.

Respondent's Testimony

Gus Robbins, confirmed that he is the president of the respondent coal company, and that he has 10 years of mining experience. He described the mine as a conventional coal mining operation using a continuous miner. The mine works two shifts a day, and the coal is mined during the second shift, and loaded on trucks on the day shifts. The coal is transported to the belt line by tractors, and once out of the mine, it is hauled to a processing plant by truck. The mine has been in operation for approximately 4 1/2 years, and it employs 20 miners.

Mr. Robbins stated that he hired Mr. Hensley in May, 1985 to replace an outside man who had quit. Mr. Robbins stated that Mr. Hensley was previously employed as a truck driver hauling coal from the mine, but that he was laid off. Mr. Hensley asked him for a job, and Mr. Robbins went to his home and hired him. Mr. Robbins stated that when he hired Mr. Hensley, he explained that his primary job would be outside work, but made it clear to him that there would be occasions when he would be required to check the belt line and to keep it clean and free of muck at the portal and mouth of the drift. Mr. Robbins indicated that he explained the duties of the job to Mr. Hensley, instructed him as to what would be

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required of him, and took him to the mine and explained the safety precautions to him (Tr. 32).

Mr. Robbins stated that during the vacation period for the first week of July, 1985, the mine was down and did not produce coal. However, work had to be done to clean up the belt line, the air courses, and to generally "get the mine in shape" to resume production after vacation. Mr. Robbins stated that he posted a notice on the mine bulletin board stating the work that would be required during the vacation period, and that this work was done on the first shift. Although Mr. Hensley normally worked the second shift, he was asked to work the first shift to help out during the vacation period.

Mr. Robbins stated that at the time he asked Mr. Hensley to help out during the vacation week, he asked him if he had prior underground experience. Mr. Hensley told him that he "had a little time across the mountain," and Mr. Robbins took this to mean that he worked at mines at Pine Mountain. Mr. Robbins stated that he advised Mr. Hensley that he would be working with the vacation crew cleaning up the air courses and helping to drag cable for a continuous miner which was brought in to help clean up the mine. Mr. Robbins stated that Mr. Hensley agreed to do this work and at no time complained to him about the work, or the fact that he would be required to be underground. Mr. Robbins stated that when he informed Mr. Hensley that he would be underground helping to keep the cable out of the way, Mr. Hensley responded "Yeah, no problem. I don't care" (Tr. 35).

Mr. Robbins stated that Mr. Hensley worked for 3 days underground during the vacation period in question, and that he helped drag the continuous miner cable. He also was in and out of the mine getting tools and otherwise helping Mr. Robbins who was performing maintenance work on the continuous-mining machine. In addition to Mr. Robbins and Mr. Hensley, there were three other miners and a foreman present on the first shift during the vacation work. Mr. Robbins stated that during this period Mr. Hensley did not complain about the work, voiced no safety or other concerns about being underground, and in fact stated that he had no problem in pulling the cable.

Mr. Robbins produced copies of the mine payroll records for the vacation period in question, and he confirmed that the records reflect that Mr. Hensley worked 30 hours that week. Although the records do not reflect the number of days worked, Mr. Robbins stated that he can personally confirm

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that Mr. Hensley worked at least 3 days during this period, and that he was in and out of the underground mine helping him. Mr. Robbins also confirmed that no coal was mined during this time, and that the work performed by Mr. Hensley was confined to general clean-up duties, dragging or moving a cable, and bringing tools in and out of the mine.

Mr. Robbins stated that he was not present on Saturday, July 13, 1985, when his brother Cletis, or "Junior," spoke with Mr. Hensley about his refusal to muck the belt. Mr. Robbins denied that Mr. Hensley was fired, and he stated that had he been fired, his "time clock" work record would have been so noted. Mr. Robbins stated that it was his opinion that Mr. Hensley voluntarily quit his job. He confirmed that the mine work records reflect that Mr. Hensley worked 60 hours for the week ending July 13, 1985, and that he worked 30 hours for the week ending July 6, 1985 (Tr. 40).

In response to questions by Mr. Hensley, Mr. Robbins confirmed that he spoke with Mr. Hensley by telephone on Monday, July 15, and that Mr. Hensley asked him if he had been fired. Mr. Robbins stated that he informed Mr. Hensley that "he needed to get with Cletis Robbins. To my knowledge, he hadn't told me anything about it if he fired anybody, and he needed to see Cletis Robbins" (Tr. 37).

Cletis Robbins, Jr., testified that he has 10 years of mining experience and that he is the mine superintendent. He confirmed that he is the brother of Gus Robbins, and is known as "Junior." He stated that he worked the first shift and part of the second shift. Mr. Hensley worked the second shift (Tr. 44).

Mr. Robbins stated that he was on vacation during the first week of July, 1985, and returned the following week. He confirmed that on Saturday, July 13, 1985, he determined that work had to be performed underground on the belt line while coal was not being produced, and he instructed section foreman Don Curtis to inform Mr. Hensley that he would be expected to "muck out the belt" at the portal and under the belt as required. Mr. Robbins estimated that there was 8 to 10 tons of coal which had to be cleaned up, and the only way to do this was to shovel or "muck it" manually. Most of the work was required to be done at the portal or close to it.

Mr. Robbins stated that after he advised the second shift crew as to the work that was expected to be done, Mr. Hensley informed him that he would not do the mucking work. Mr. Robbins stated that he informed Mr. Hensley that this was

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the only work available for him and that he was expected to do it. Mr. Hensley refused, and Mr. Robbins stated that Mr. Hensley simply "turned around and left." Mr. Robbins denied that he ever told Mr. Hensley that he was fired. Mr. Robbins explained his conversation with Mr. Hensley as follows (Tr. 45Ä46):

A. And when he came in, he told me, "I'm not going to muck that belt." I just turned around and told him, I said, "Well, that's all I've got for you to do." And he said, "Well," he said, "That's okay," and he turned around and left and I never seen him again.

Q. You heard his testimony that you fired him at that time. Did you or did you not?

A. I never did tell him he was fired.

Q. Now, you indicated you told him that he would be - or Don Curtis told him he would be mucking the belt at the portal. What is a portal?

A. That's a canopy going back into the mines.

Q. And you were talking about the belt that carried the coal out of the mine?

A. Yes.

Q. How much work was there to be done there?

A. I'd say about eight or ten ton.

Q. How was this work to be done?

A. With a shovel, manually.

Q. Was this location very near the entry of the mine or the portal of the mine?

A. Yes.

Q. Had it been daylight at the time, could the work have been done without even having a light - a cap and light?

A. It could've been until it got dark.

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Mr. Robbins stated that prior to July 13, he never assigned Mr. Hensley to underground work, but that he always mucked around the belt, answered the outside phone, and operated a loader outside. Mr. Robbins stated that these duties were not full-time duties and that Mr. Hensley would be expected to do other work assigned to him (Tr. 47).

In response to questions by Mr. Hensley, Mr. Robbins confirmed that Mr. Hensley never complained about his outside work or the belt mucking work at the portal. He conceded that at the time Mr. Hensley refused to work on the belt on July 13, he (Robbins) told him to "go home." Mr. Robbins stated that the outside job vacated by Mr. Hensley was left open for a week before someone was hired to fill the job (Tr. 48).

Don Curtis, respondent's section foreman, testified that he has 18 years of mining experience and is a certified mine foreman. He confirmed that he was on vacation during the mine vacation week and that he worked the second shift during the period May through July, 1985. On Saturday, July 13, 1985, the second shift was in the process of cleaning and dusting the underground belts and no coal was being mined. He assigned men to clean up all along the belt line, and he intended to assign Mr. Hensley to clean the first belt next to the outside drift mouth of the mine. However, as soon as he told Mr. Hensley that he was going inside the mine to clean and muck the belt, Mr. Hensley informed him that he was not going. He heard Mr. Hensley inform Cletis Robbins that he would not work on the belts and Mr. Robbins told Mr. Hensley that there was no other work to do that evening. Mr. Curtis did not hear Mr. Robbins tell Mr. Hensley that he was fired (Tr. 49-52).

Mr. Curtis stated that Mr. Hensley worked one prior evening underground while a section was being moved. Mr. Hensley did not complain to him about working underground on that occasion, never complained about any safety problems, and never complained that the company was discriminating against him in any way (Tr. 52-53).

Mr. Curtis stated that on July 13, he had no idea why Mr. Hensley was reluctant to do the mucking work and that Mr. Hensley gave him no reason. He simply told him that he was not going to do the work (Tr. 54).

Mr. Hensley was recalled, and he stated that after his termination he did not speak with anyone about getting his

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job back, and he stated that he did not wish to go back and work underground. He stated that when he refused to work on July 13, it was his understanding that he was asked "to go inside and start at the portal and go all the way through." The work would normally entail shovelling coal on the belt, and since he usually averaged 3 hours a night shovelling coal which had fallen off the belt at the outside portal, he did not consider the work hard and it did not bother him. The coal would often accumulate knee deep in that location as it came out of the mine and he often spent three or four times a night shovelling it (Tr. 57).

Mr. Hensley confirmed that at the time Mr. Gus Robbins assigned mine personnel to work inside the mine during vacation he (Robbins) explained to everyone what had to be done. Mr. Hensley explained further as follows (Tr. 58-59):

A. Yes, he explained it. He said he wanted to pull a cable behind the miner and the man that was there that run the miner was the day shift foreman, and he kept me outside as much as he could because he knew I didn't like going inside. I stayed out one day and taped up cable and stuff for the miner. He done that to keep me from going inside because he knew I didn't like going inside.

Q. But the time you went inside, did you, in fact, take care of the cable?

A. Yes.

Q. Do you recall Mr. Robbins' testimony about him requiring you to go in and out to carry tools?

A. Yes, I carried tools to him several trips.

Q. That did happen?

A. Yes.

Q. So, I take it in a nutshell, your reluctance was to be underground - regularly working underground?

A. No.

Q. You didn't like that?

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A. No.

Q. And you feel even though you were required to be underground at times when coal was not being run - when they actually were not in production, but just bringing tools in and out, that that caused you some problem, too?

A. Yeah. I didn't like going in underground. It shook me up. I was scared of it.

Q. Well, now when you were first hired, you heard the testimony of Mr. Robbins that he indicated to you that most of the time, you'd be expected to work outside, but there were occasions when they may have to call on you to do work -

A. He never said that to me. He just told me what I stated awhile ago about just running the highlift and taking care of anything outside. He never mentioned anything about going in underground.

Q. Well, let's assume you had no work outside to do on a given day - had that ever happened?

A. They'd break down at night sometimes and wouldn't run no coal, and I'd just stay outside. They'd come out and get parts. I'd get the parts for them.

Q. What would you be doing?

A. I would grease, check oil and stuff. Grease the outside belt line, fuel the highlift up.

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768, (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211

(3d Cir.1981); and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). Secretary on behalf of Jenkins v. Hecla Day Mines Corporation, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983); and Donovan v. Stafford Construction Company, No. 83-1566, D.C.Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 468 U.S. 128, 76 L.Ed.2d 667 (1983).

One critical issue in this case is whether or not Mr. Hensley was discharged because of his refusal to perform work assigned to him by foreman Don Curtis and/or mine superintendent Cletis Robbins. The respondent suggests that Mr. Hensley voluntarily quit his job and was not fired, and Gus and Cletis Robbins testified that they never specifically told Mr. Hensley that he had been fired. Mr. Hensley's first complaint to MSHA on July 13, 1985, contains no assertion that he had been fired. Mr. Hensley's complaint letter of September 29, 1985, to the Commission contains a passing reference to the purported firing.

Mr. Hensley's termination occurred on a Saturday. It is clear that it came about as a result of Mr. Hensley's refusal to work underground cleaning the belt, and after some conversation between Mr. Hensley and Cletis Robbins. Mr. Hensley's earlier statement to MSHA is that when Mr. Robbins advised him that there was no outside work to be done and gave him a choice to either go underground or go home, Mr. Hensley responded "o.k." and opted to go home. Mr. Robbins' testimony at the hearing is consistent with this earlier version. However, at the hearing, Mr. Hensley testified that when he opted to go home rather than work underground, Mr. Robbins told him that he was fired. Mr. Hensley made no attempt to get his job back, did not report to work on the following Monday, but instead telephoned Gus Robbins to inquire as to whether he knew that Cletis Robbins had fired him. Gus Robbins' response was "whatever Junior (Cletis) says goes." Foreman Curtis confirmed that after Mr. Hensley's work

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refusal, Cletis Robbins told him there was no other work that evening, and Mr. Curtis did not hear Mr. Robbins say that Mr. Hensley had been fired.

Gus Robbins testified that when Mr. Hensley telephoned him on Monday, July 15, Mr. Hensley asked him "Was I fired?" (Tr. 37). Mr. Robbins stated that Cletis Robbins said nothing to him about firing Mr. Hensley, and that his work records do not reflect that he was discharged. Cletis Robbins testified that after he told Mr. Hensley to go home, he got his dinner bucket and went home, and he heard nothing further from him. Mr. Robbins also testified that Mr. Hensley's job was left open, and a week passed before it was filled. He denied that he hired a replacement that same weekend (Tr. 48).

After careful consideration of all of the testimony in this case, I cannot conclude with any degree of certainty that Mr. Hensley was in fact directly fired by mine superintendent Cletis Robbins. However, on the basis of the circumstances surrounding this incident, including Mr. Robbins' statements and actions when he gave Mr. Hensley the option of working underground or going home, I conclude that Mr. Hensley was "constructively discharged" by Mr. Robbins on July 13, 1985. Given the option of working or going home, Mr. Hensley's choice of the latter, his failure to report for work the next available work day, and his subsequent telephone call to Gus Robbins lead me to conclude that Mr. Hensley had reasonable grounds for believing that he had been discharged.

It is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d 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). Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226 (Feb. 1984), aff'd sub nom., Brock v. Metric Constructors, Inc., 3 MSHC 1865 (11th Cir.1985). 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).

Although not directly stated as such, Mr. Hensley's complaint implies that his work refusal of July 13, was based on the fact that he lacked prior underground experience and training. In his original written complaint to MSHA,

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Mr. Hensley stated that he informed mine foreman Don Curtis that he would not help shovel the belt and clena up underground because he lacked training and had never been in the mine before. However, the evidence adduced in this case reflects that prior to July 13, Mr. Hensley worked underground in the mine on several occasions without voicing any objections concerning safety or lack of training.

Gus Robbins testified that he hired Mr. Hensley because "he seemed like a pretty good guy who wanted to work" (Tr. 31). Mr. Robbins explained that he knew Mr. Hensley as a truck driver who regularly hauled coal from the mine, and that when he was laid off from his driver's job he (Hensley) asked him for a job. Mr. Robbins further explained that he went to Mr. Hensley's home to hire him, and then took him to the mine to explain the work expected of him and to familiarize him with the mine and to explain mine safety precautions.

Gus Robbins testified further that answering the telephone and operating an endloader were not full-time duties, and that Mr. Hensley was expected to do other work as assigned, i.e., checking the belt line as it entered the mine to insure that it was working, and mucking the belt. Mr. Robbins confirmed that Mr. Hensley had always mucked around the belt by the portal, and that this was part of his job. Mr. Robbins impressed me as a credible witness, and his testimony regarding the work expected of Mr. Hensley when he was first hired was confirmed by Mr. Hensley's testimony that he often spent 3 hours an evening shovelling and mucking the belt area near or inside the portal and that he did not consider this to be hard work.

There is no evidence in this case that Mr. Hensley ever communicated his fear of underground work or lack of training to the respondent. There is nothing in the record to support Mr. Hensley's assertion that his failure to object to working underground prior to July 13, was because of his fear of being fired. As a matter of fact, Mr. Hensley's prior written complaints made no mention of this concern on his part, and he testified that when called upon to work underground the first time, he did so "to see what it was like" (Tr. 18). Further, the evidence in this case establishes that at no time during his employment with the respondent did Mr. Hensley ever complain about his asserted fear of working inside the mine. He filed no safety complaints with MSHA or mine management, never expressed any concerns for his safety, and never objected to working underground. Mr. Hensley confirmed that he was treated like all other miners, and there is no evidence of any animosity towards him or mistreatment by mine management.

The evidence in this case establishes that at no time was Mr. Hensley asked or required to work underground while the mine was in production. During the vacation period Mr. Hensley worked with Mr. Gus Robbins underground while no coal was being mined. Mr. Robbins stated that he posted a notice at the mine informing mine personnel of the work to be done cleaning up the air courses, moving a miner in, and "getting the mine in shape." Although Mr. Hensley normally worked the second shift, which was the production shift, he was assigned to the first shift to help do the vacation week "dead work." Mr. Hensley confirmed that Mr. Robbins explained what work was to be done during this time, and at no time did he voice any safety or lack of training concerns.

Although Mr. Hensley testified that he only worked one day underground during the vacation period, the credible testimony of Gus Robbins indicates otherwise. Mr. Robbins testified that he personally worked underground with Mr. Hensley periodically for at least 3 days during the vacation period, and the mine records establish that during that week Mr. Hensley worked a total of 30 hours.

Mr. Robbins testified that during the vacation work, Mr. Hensley help to pull the miner cable to keep it clear of the miner which was mucking. Mr. Hensley did not object, and instead stated that he had "no problem and didn't care." When the miner experienced some hydraulic problems, Mr. Hensley was in and out of the mine periodically assisting Mr. Robbins by bringing in tools and parts as required by Mr. Robbins while he was repairing the miner. Mr. Robbins stated that Mr. Hensley was in and out of the mine "numerous times" during this period, and that they were no further than 450 to 500 feet inside the mine. Mr. Hensley confirmed that he was in and out of the mine helping Mr. Robbins, and there is nothing to suggest that he voiced any safety or lack of training concerns.

Mr. Hensley's contention that he had no prior training and no formal underground mine training while employed by the respondent stands un rebutted. The respondent produced no testimony or evidence to establish that Mr. Hensley received any formal training while in its employ. I take official notice of MSHA's training requirements found in Part 47, Title 30, Code of Federal Regulations, and recognize the fact that placing an untrained miner underground may constitute a violation of MSHA's mandatory safety or training requirements. However, there is no evidence in this case that the respondent has ever been cited for any such violation, and there is

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no evidence that Mr. Hensley ever requested training and was denied it, or that he ever lodged any complaints with management concerning his lack of training.

With regard to Mr. Hensley's prior mining experience, his assertion that he had no such experience and had always worked as a coal haulage truck driver stands unrebutted by the respondent. Although Gus Robbins alluded to certain statements attributed to Mr. Hensley that he previously "had a little bit of time across the mountain" (Tr. 35), that statement was not further explained, and there is no credible evidence supporting any inference or interpretation that this statement, if made and standing alone, indicates that Mr. Hensley had prior underground mining experience.

Taken at face value, the lack of training and prior underground experience could conceivably support an inference that Mr. Hensley's refusal to work underground on July 13, was out of concern for his safety. However, given the fact that Mr. Hensley voiced no safety concerns when he refused to work, the fact that he had previously worked underground without objections, the fact that his previous work was always done when the mine was down and out of production and while he was under the direct supervision of an experienced mine foreman and mine operator, and the fact that Mr. Hensley had never voiced any safety complaints or concerns when asked to perform certain intermittent work underground leads me to conclude that any claim by Mr. Hensley that his work refusal was prompted out of concern for his safety is unsupported.

There is no evidence in this case that the underground work required of Mr. Hensley exposed him to any safety hazards. The record establishes that in each instance when he was assigned underground work, it entailed trips in and out of the mine bringing in tools, cleaning up the belt, assisting in the dragging of a cable, and helping an electrician take some equipment outside. In each instance, the mine was not producing coal and was down for "dead work." Mr. Hensley was apparently provided with a hard hat and cap light, the mine operator had briefed him on safety precautions when he was first hired, and he was always under the supervision of experienced mine personnel. Further, Mr. Gus Robbins' unrebutted testimony, which I find credible, reflects that when the mine was down during the vacation week for "dead work," Mr. Robbins posted a notice on the bulletin board announcing the work to be done, and that when he explained this to Mr. Hensley he did not object, and stated that he didn't care and had no problem.

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I believe that the crux of the dispute in this case lies in the fact that at the time he was first hired, Mr. Hensley believed that his job would only entail work outside the mine. His earlier complaint statements reflect his understanding that the job would only require him to answer the telephone, operate an endloader, and do other outside work.

In his complaint to the Commission, Mr. Hensley makes no mention of the fact that he worked underground during the vacation period which was testified to during the hearing. In referring to the one prior occasion when he did work underground, Mr. Hensley alluded to the fact that he was not hired as an inside man, and that he believed that this would be the last and only time he would be asked to work inside the mine. In response to questions during the hearing as to why he believed he was discriminated against, Mr. Hensley indicated that since he was scared of being underground and that "it shook him up," he was reluctant to work underground on a regular basis, even during the time when the mine was out of production and only "dead work" such as belt cleaning and mucking was being done. Under these circumstances, I conclude that even if he had formal training, Mr. Hensley would still be reluctant to work underground because of his personal dislike for the underground environment and his preference to do the outside work for which he believed he was originally hired. I further conclude that Mr. Hensley's refusal to work on July 13, was based on his belief that mine management's work assignments requiring him to go inside the mine when it was out of production were becoming more and more routine and that unless he resisted, he would soon find himself performing more work which he did not believe should be assigned to him as an "outside man."

In view of the foregoing findings and conclusions, I cannot conclude that the record in this case supports a conclusion that Mr. Hensley's refusal to follow mine management's work assignment on July 13, 1985, was based on a reasonable good faith belief on his part that the performance of the work would expose him to any underground safety hazards. I further conclude and find that Mr. Hensley's assertion that his work refusal was prompted by his lack of training and experience is not bona fide. Accordingly, the complaint IS DISMISSED, and the requested relief IS DENIED.

George A. Koutras
Administrative Law Judge