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JOHN GILBERT V. SANDY FORK MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JOHN A. GILBERT, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 86-49-D MSHA Case No. BARB CD 85-61
SANDY FORK MINING COMPANY, INCORPORATED, RESPONDENT	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF JOHN A. GILBERT, COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. KENT 86-76-D MSHA Case No. BARD CD 85-61 No. 12 Mine
v.	
SANDY FORK MINING COMPANY, INCORPORATED, RESPONDENT	

DECISION

Appearances: Tony Oppegard, Esq., and Stephen A. Sanders, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, for John A. Gilbert;
Carole M. Fernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
William A. Hayes, Esq., Middlesboro, Kentucky, for Respondent.

Before: Judge Melick

Background

On August 8, 1985, John A. Gilbert filed a complaint with the Department of Labor, Mine Safety and Health Administration (MSHA), alleging that on August 7, 1985, he had been discharged by Sandy Fork Mining Company, Incorporated (Sandy Fork) in violation of section 105(c)(1) of the Federal Mine

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Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." (FOOTNOTE 1) It is not disputed that the Secretary of Labor began his investigation pursuant to section 105(c)(2) upon receipt of that complaint.(FOOTNOTE 2) Subsequently, after the expiration of the 90Äday notification period following the receipt of that complaint provided under section 105(c)(3) of the Act the Secretary advised Mr. Gilbert by letter dated November 15, 1985, that the investigation of his complaint had not been

completed and that it had not yet been determined whether or not a violation of section 105(c) had occurred.(FOOTNOTE 3)

Thereafter, on December 23, 1985, Mr. Gilbert filed his own complaint with this Commission pursuant to section 105(c)(3) and Commission Rule 40(b), 29 C.F.R. 2700.40(b).(FOOTNOTE 4) Subsequently on February 24, 1986, the Secretary filed his own complaint with this Commission on behalf of Mr. Gilbert against Sandy Fork Mining Inc. under section 105(c)(2) and proposed a civil penalty for the alleged violation. On April 3, 1986, the Secretary filed a motion to dismiss maintaining that Mr. Gilbert's complaint filed under section 105(c)(3) (Docket No. KENT 86Ä49ÄD) should be dismissed as without a jurisdictional basis in light of the complaint filed by the Secretary on behalf of Mr. Gilbert (Docket No. KENT 86Ä76ÄD).

Motion to Dismiss

In his motion to dismiss the Secretary argues that he need not comply with the requirements of the Act that he make a determination as to whether or not discrimination has occurred within 90 days of his receipt of a complaint. He further argues that should the aggrieved individual file his own complaint under section 105(c)(3) after the statutory 90Äday period, that case will become null and void as lacking a jurisdictional basis if the Secretary later decides to file a complaint of his own under section 105(c)(2).

Indeed the Act itself does not provide express guidance as to the procedures to be followed by an individual complainant under section 105(c) in the event the Secretary does not make his decision (as to whether a violation of the Act

has occurred) within the 90Äday time frame set forth under section 105(c)(3).

It is clear however that Congress intended that the miner have the right to file a complaint on his own upon the failure of the Secretary to act within the prescribed 90Äday period. Indeed in recognition of this Congressional intent this Commission promulgated its Rule 40(b) under which the aggrieved miner is specifically provided the right to file his own complaint under these circumstances. Secretary on behalf of Hale v. 4ÄA Coal Company, Inc., 8 FMSHRC ÄÄÄÄ, Docket No. VA 85Ä29ÄD, slip opinion p. 3 n. 3 (June 25, 1986). This administrative interpretation is entitled to great weight. Chevron, U.S.A., Inc. v. National Resources Defense Council, 104 S.Ct. 2778 (1984); Manufacturers Ass'n v. National Resources Defense Council, 105 S.Ct. 1102 (1985); Federal Election Commission v. Democratic Senatorial Campaign Committee, 102 S.Ct. 38 (1981) and Zenith Radio Corp. v. United States, 98 S.Ct. 2441 (1978).

Such a construction is, moreover, consistent with the liberal construction to be accorded safety legislation. Whirlpool Corp. v. Marshall, 100 S.Ct. 883 (1980). More specifically this construction is essential to accomplish the objective of the statute and to avoid unjust and oppressive consequences to aggrieved miners where the Secretary fails to act within the prescribed time. Caminetti v. United States, 37 S.Ct. 192 (1917). Administrative notice may be taken of a recent case in which the Secretary delayed almost 4 years before deciding not to represent a miner on his 105(c) complaint. (Dan Thompson v. Cypress Thompson Creek, MSHA Case No. 82Ä27). The miner is seriously prejudiced by such delay as witnesses move, memories fade and documents are lost or destroyed, and may suffer unwarranted economic hardship. Such a result is clearly contrary to the objectives of the Act.

Under the circumstances it is clear that this judge has jurisdiction to entertain Mr. Gilbert's case (under section 105(c)(3) and Commission Rule 40(b)) as well as the Secretary's case brought on behalf of Mr. Gilbert under section 105(c)(2) of the Act. The Secretary's Motion to Dismiss is denied.

The Merits

In order to establish a prima facie violation of section 105(c)(1) of the Act, it must be proven by a preponderance of the evidence that Mr. Gilbert engaged in an activity protected by that section, that adverse action was taken against him and that this adverse action was motivated

in any part by that protected activity. Secretary on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir.1981). See also Boich 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. Gilbert maintains that he was unlawfully discharged on August 7, 1985, because of his refusal to operate a continuous miner on August 6, 1985, under conditions which he claims were unsafe. More specifically he argues that he refused to operate the continuous miner because of hazardous roof conditions at the face of the No. 3 entry in Sandy Fork's No. 12 mine, and that Sandy Fork subsequently discharged him without addressing his safety concerns. A miner's work refusal is protected under section 105(c) of the Act if the refusal is based on the miner's good faith and reasonable belief in a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 198); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); and Secretary v. Metric Constructors Inc., 6 FMSHRC 226 (1984) aff'd sub nom. Brock v. Metric Constructors Inc., 766 F.2d 469 (11th Cir.1985).

At the time of his discharge Mr. Gilbert had only 3 1/2 years experience as a coal miner and all of that was in the employ of Sandy Fork. He had been a continuous miner operator for 2 1/2 of those 3 1/2 years and was working in that capacity on August 6, 1985. As Gilbert and his crew were entering the mine on that date the miner operator on the previous shift warned them that the roof was "bad and breaking up." Gilbert and the other miner operator on his shift, Carmine Caldwell, then checked the section and the faces. According to Gilbert they checked the five headings and the No. 4 kickback.

Gilbert recalled that in the No. 3 entry there was a hill seam on the left side of the rib and a crack in the top having dirt or yellow mud in it. On the right side of the entry there was a fresh stress crack that had dropped 1/2 inch to 1 inch. According to Gilbert the No. 4 heading had previously been abandoned because of a hill seam that had dropped from 4 to 5 inches. Accordingly coal was being mined in the No. 4 entry by way of a kickback (See Appendix A & B attached). Gilbert recalled that in the crosscut approaching the No. 4 kickback there was also a hill seam 1/2 inch to 1 1/2 inches wide with mud in it.

Because of the top conditions Gilbert and Caldwell received permission from section foreman Willie Sizemore to "run together." Thus one operator could keep watch for the other rather than simultaneously operating both machines as

was customary. According to Gilbert, however, after examining the face areas he told his partner that he was going to refuse to cut coal because of dangerous conditions. Gilbert then left his job assignment to find his section foreman (Sizemore) and located him about 4 to 5 breaks from the face. Gilbert says that he told Sizemore he was afraid of the top and asked him what he would do about it. Sizemore responded that he would have crib blocks placed under the noted roof areas and would stand by and observe the roof as they worked. Gilbert was apparently dissatisfied and told Sizemore that they needed longer bolts or collars. However before Sizemore could take any remedial action Gilbert walked out of the mine.

Outside the mine Gilbert met Ed Spurlock the general mine foreman. Gilbert told Spurlock that he was afraid of the top and asked Spurlock how he intended to support the roof. Spurlock told Gilbert to check back the next day. Gilbert went home and returned the next day around 9:00 a.m. He later talked to Sandy Fork superintendent Willy Begley after Begley had been underground to inspect the area of Gilbert's complaint. Gilbert says that he told Begley that they needed collars and longer bolts for roof support in the area and asked Begley how they were going to support it. According to Gilbert, Begley responded that "they were supporting it the best way they could." Gilbert claims that he then requested to work at another mine or away from the faces at the No. 12 mine but Begley responded that the only job available was as miner operator at the No. 12 mine. Gilbert then handed over his safety equipment and left the mine.

According to Superintendent Begley, Gilbert visited him at his home on the evening of August 6. Gilbert said he was afraid of the top and wanted to know what Begley was going to do about getting him another job. Begley told Gilbert to meet him at the mine the next morning. Primarily because of Gilbert's complaint Begley entered the mine the next morning and examined all the faces. At a later meeting Gilbert again told Begley that he was afraid of, and would not work at, the No. 12 mine but would accept a transfer to another mine. Begley told Gilbert that the only work then available was at the No. 12 mine. According to the undisputed testimony of Begley, Gilbert could have even then returned to work at the No. 12 Mine but rather, walked off the job.

According to the undisputed testimony of section foreman Willie Sizemore, Gilbert and his partner were assigned to begin cutting the No. 4 kickback at the beginning of his shift on August 6, and there was 4 to 5 hours of work to be done in that entry "to catch the right side up." It is undisputed that Gilbert was to begin cutting with the continuous miner in the No. 4 kickback where the larger "X" appears on

Exhibit RÄ8 (Appendix A). It is further undisputed that Sizemore told Gilbert to complete the No. 4 kickback before moving to the No. 3 entry where the hill seam was. However before they even began cutting in the No. 4 kickback Sizemore met Gilbert coming out. Gilbert told Sizemore that he was afraid of the top in the No. 3 entry. Sizemore then told Gilbert that he was going to have cribs built on both sides of the No. 3 entry before they began cutting in that entry. Gilbert responded by saying that he wanted to talk to Superintendent Begley and Mr. Phipps and proceeded to leave the mine.

According to Sizemore, Gilbert never did state what he wanted done to make the roof safe and did not ask for alternate work.(FOOTNOTE 5) After Gilbert left the mine Sizemore spent the remainder of the shift building cribs in the No. 3 entry. Sizemore opined that Gilbert knew he would not force him to work under what Gilbert believed was unsafe roof because on prior occasions, when miners were concerned about roof conditions, Sizemore himself had worked the mining equipment.

Darrell Huff, a graduate mining engineer and Sandy Fork's chief engineer and acting safety director, examined the No. 4 kickback on the morning of August 7. He noted on Exhibit RÄ9 (Appendix B) the location of the hill seam in the crosscut approaching the No. 4 kickback. This testimony is consistent with the location of the hill seam in the crosscut described by Gilbert himself.(FOOTNOTE 6)

Within this framework of evidence I find that Gilbert did not at the time of his work refusal entertain either a reasonable or a good faith belief that to continue working in

the No. 4 kickback, as he was expected to do for some 4 to 5 hours at the commencement of his shift on August 6, 1985, would have been hazardous. It is not disputed that Gilbert was indeed assigned to cut coal in the No. 4 kickback for some 4 to 5 hours before moving on to the No. 3 entry which he claimed was then hazardous. Gilbert cites no specific hazard within the No. 4 kickback and indeed there is no credible evidence that any unusual hazard did in fact exist in the No. 4 kickback. Thus even assuming, arguendo, that a hazardous condition then existed in the No. 3 entry, Gilbert's refusal to work in the No. 4 kickback was not reasonable.

Moreover since there were still 4 to 5 hours of work to be done in the not unsafe No. 4 kickback Gilbert's refusal to perform work in that location demonstrated a lack of good faith. It was clearly premature for Gilbert to have excercised any work refusal for alleged hazards in the No. 3 entry some 4 to 5 hours before he would be expected to work in that entry and before any of the supplemental roof support promised by his section foreman had been erected. Indeed the uncontradicted evidence shows that section foreman Sizemore had assured Gilbert that before any work would be done in the No. 3 entry (the only entry about which Gilbert expressed any fears to Sizemore) he would have additional crib blocks set up for roof support. It was incumbent on Gilbert to at least wait and see what additional support would be provided before exercising a work refusal. Accordingly the work refusal was neither reasonable nor made in good faith.

I also observe that Gilbert had not been discharged and was given the opportunity to return to work on August 7, the day after he refused to work and walked out of the mine. At that time there had already been a roof fall in the No. 3 entry and conditions had significantly changed. Indeed it appears that when Gilbert was told on August 7, that he could return to his job in the No. 12 mine as a continuous miner operator he declined and insisted on being transfered to a different mine. At this time he had been given no specific work assignment and could not have known where in the No. 12 mine he would be working. Thus again he could not at this time have entertained a reasonable or a good faith belief that he would have been required to work in a hazardous condition.(FOOTNOTE 7)

In the context of whether Gilbert acted in good faith it is also significant that he had been, for some time before his work refusal, attempting to transfer to the day shift.

Indeed only a few weeks before he walked of the job Gilbert told coworker Harvey Gibbs that he wanted to work the day shift and told Gibbs that, if necessary, he would quit to get on the day shift. In addition, scoop operator Lonnie Cecil said that Gilbert told him on several occasions that he might have to quit to get on the day shift. Gilbert had also requested only the day before he walked off the job to transfer to the day shift. Thus it appears that Gilbert's refusal to work and his insistence on transfering to another mine may actually have been motivated by a pressing desire to work on a different shift.

In any event since I have found that Mr. Gilbert did not entertain either a reasonable or a good faith belief in any hazardous condition warranting a work refusal in the No. 4 kickback where he was expected to be working for 4 to 5 hours I do not find that his work refusal was protected under the Act. Moreover I find that Gilbert was never in fact discharged and suffered no adverse action by the operator. He gave up his job voluntarily on August 7, 1985, at a time when he was not faced with any specific designated hazard. See footnote 7, supra. Under the circumstances Mr. Gilbert's complaint of unlawful discharge must be denied and these cases dismissed.

Gary Melick
Administrative Law Judge

FOOTNOTES START HERE-

1 Section 105(c)(1) reads as follows:

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

2 Section 105(c)(2) reads in part as follows:

"Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days

after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint . . . . "

3 Section 105(c)(3) of the Act provides in part as follows:

"Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

4 Commission Rule 40(b) reads as follows:

"A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary."

5 In light of the undisputed evidence that Gilbert had some 4 to 5 hours of work then remaining in the No. 4 entry, an area he did not challenge as being unsafe, I find Sizemore's testimony (that Gilbert neither requested alternate work nor stated what additional roof control he desired) to be the more credible.

6 Indeed only one witness, MSHA Inspector Gary Harris, claimed that there was a hill seam existing in the No. 4 kickback where Gilbert was to begin working at the beginning of his shift on August 6. This testimony conflicts with that of both Gilbert and Huff. Inspector Harris testified that hill seams were required under the roof control plan to be strapped. Since there was no strapping in the No. 4 kickback Harris would undoubtedly have cited Sandy Fork for a violation of its roof control plan if indeed a hill seam existed in the No. 4 kickback. For these reasons I believe Harris was in error about the existence of an exposed hill seam in the No. 4 kickback.

7 This evidence also supports Respondent's contention that Gilbert was never actually discharged and therefore suffered no adverse action.

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APPENDIX A
TABLE

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APPENDIX B
TABLE