FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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AUG 12 1986

MARTHA PERANDO, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. YORK 85-12-D
	:	MSHA Case No. MORG CD 85-17
METTIKI COAL CORPORATION, Respondent	:	

DECISION

Appearances: Martha Perando, Deer Park, Maryland, pro se; Timothy Biddle, Esq., and Lisa B. Rovin, Esq., with Susan E. Chetlin, Esq., on the brief, Crowell & Moring, Washington, DC, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the complaint by Martha Perando under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discrimination and discharge by the Mettiki Coal Corporation (Mettiki) in violation of section 105(c)(1) of the Act.1/

1/ Section 105(c)(1) of the Act provides 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.

In order to establish a prima facie violation of section 105(c)(1) Ms. Perando must prove by a preponderance of the evidence that she engaged in an activity protected by that section and that the discriminatory action taken against her was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. 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 Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case. A miner's "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Such a "work refusal" may be based upon a perceived hazard arising from the miner's own physical condition or limitations. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (1984).

As noted in the decision denying Mettiki's motion to dismiss (8 FMSHRC 364) Ms. Perando first alleges that she suffered unlawful.discrimination when she was given less pay upon her transfer from underground work to surface laboratory work after Mettiki officials were informed that she could no longer work underground because of a health impairment, industrial bronchitis, contracted as a result of her underground work at Mettiki.

In this case I find that Ms. Perando had indeed contracted industrial bronchitis from her exposure to coal dust while working at the Mettiki underground mine beginning October 1, 1980. The award to Ms. Perando of Worker's Compensation based on this claim is not disputed and the medical evidence of record supports this finding. Because of this medical impairment, in May 1984 two physicians (Drs. James Raver and Karl E. Schwalum) told Mettiki officials and Ms. Perando that she could, in effect, no longer work in Mettiki's underground coal mine and that she should be placed in a job in which she would not be exposed to coal dust. More specifically this information was reported in a May 14, 1984, letter from Dr. Raver to Mettiki personnel manager Thomas Gearhart.

In a subsequent letter dated June 25, 1984, and also received by Gearhart, Dr. Raver again concluded that Ms. Perando was suffering from industrial bronchitis. He opined that it was "moderate to severe and [was] disabling in terms of her normal ability to work." Dr. Raver also concluded that it "most likely would remain a chronic condition and [would] not clear or be 'cured'."

As a result of this medical data Mr. Gearhart offered Ms. Perando a job transfer to the surface laboratory in September 1985. Gearhart then knew that she was unable to work underground because of the hazard of coal dust exposure to her health. It is not disputed that Ms. Perando accepted a transfer to the surface laboratory and began working at that job on September 27, 1985, at a reduced rate of pay.

While it is apparent that Ms. Perando never "refused" to work underground in the traditional sense, she knew, based on the medical evidence, that she should no longer work underground because of the hazard presented to her from coal dust exposure and Mettiki knew this too. Thus her medically substantiated inability to work underground was the functional equivalent of a work refusal. Since Ms. Perando had been apprised by her physicians of her medical condition and of the "disabling" consequences of continued underground work, her work refusal was also based upon a good faith and reasonable belief in the hazard.

This refusal was also communicated to the mine operator by the doctors' reports to Personnel Manager, Thomas Gearhart. Moreover in recognition of the health hazard presented to Ms. Perando by underground work and in apparent recognition of its obligation to address this danger, Mettiki offered her the outside job in the laboratory. See Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983).

By reducing Perando's pay in the laboratory however (apparently from $520.20 to $383.20 per week), I find that Mettiki did in fact unlawfully discriminate against her because of her work refusal. 2/ Under the circumstances I find that Ms. Perando is entitled to damages amounting to the pay differential between her underground job and her laboratory job for the period of her employment in the laboratory.

Ms. Perando next claims that she was discriminatorily charged with unexcused absences because she filed an application for Worker's Compensation. She seeks to have all such unexcused absences expunged from her personnel file. The record shows that she had received a copy of the Mettiki employee handbook in August 1984 which included a requirement for telephoning the mine office at least one half hour before the employee's work shift when reporting in sick. Perando knew that she was therefore required to call the office by 6:30 a.m. on the days that she was reporting sick and

2/ The fact that Ms. Perando may have failed to formally protest this pay reduction to Mettiki officials before filing her claim of discrimination under the Act would not constitute any consent to, or waiver of, such discrimination.

acknowledges that the requirment applied equally to all employees and not just to her.

Ms. Perando also admits that there were occasions when she failed to call in as required and she does not therefore dispute the corresponding unexcused absences. She is not however specific in her testimony as to which unexcused absences, if any, remain to be challenged. She has no independent recollection of, nor adequate corroboration for, the dates on which she allegedly tried to call in but was unsuccessful and for which she now claims she was charged with unexcused absences. under the circumstances neither the allegations nor the evidence is sufficient and her complaint in this regard must therefore be dismissed.

Ms. Perando alleges, lastly, that she was unlawfully discharged on March 27, 1985, while off work under a doctor's care. As explained at the hearings on Mettiki's Motion to Dismiss she is here claiming that she was discharged because she had a serious medical condition caused by Mettiki (industrial bronchitis) and that she could not and would not work because of the hazardous health environment presented in the laboratory where she had been transferred from her underground job. This complaint was also construed as a work refusal in the face of conditions alleged to be hazardous to her health.

As previously indicated Ms. Perando did indeed contract industrial bronchitis from her underground coal mine employment and she was thereafter transferred to the surface performing work in the Mettiki testing laboratory. She claims that the laboratory environment, *even* after the installation of a special ventilation hood, was such that her symptoms of industrial bronchitis returned with "a lot of pain" and "heavy pressure" on her chest accompanied by difficulty in breathing. Between January 21, 1985 and the date of her termination on March 27, 1985, she admitted being absent from 2 to 5 days a week. Shortly before her termination Ms. Perando told Personnel Manager Gearhart that she did not know when she would be able to return to work and that she was not then able to work at all. According to Gearhart she was thereafter discharged because she had not reported to work for a significant period of time.

The record shows that coal samples are tested in the Mettiki laboratory as a quality control measure. According to lab supervisor Anne Colaw the moisture, sulfur and ash content of the coal is measured in the lab and its "BTU's and volatility" are determined. According to Colaw the lab was kept clean and, when testing was performed, only about 1 gram of coal was tested at any one time and that was tested in an enclosed area separated from the area where Ms. Perando was assigned before her discharge.

The results of dust sampling performed in the laboratory are not disputed. On September 25, 1984, only .4 milligram of respirable dust per cubic meter was found. Subsequent tests performed during regular lab activities on October 1, 1984, on samples taken from various parts of the laboratory showed respirable dust ranging from .1 to .3 milligram per cubic meter. Samples taken from the laboratory on March 11, 1985, showed respirable dust ranging from .1 to .2 milligram per cubic meter with .4 milligram per cubic meter in the area of the hood. It is not disputed that .1 milligram of respirable dust per cubic meter is equivalent to the amount of dust found in the *'ambient air" of a normal environment. Indeed Ms. Perando concedes that she knew the respirable dust levels in the lab were within the "normal range."

Considering that Ms. Perando knew that there were no abnormal dust levels in the lab and considering that she had the same alleged symptoms of her illness whether or not she was working in the lab I cannot conclude that her belief that the lab environment was hazardous was either reasonable or held in good faith. I note moreover that she continued to have the same symptoms even a year after leaving the laboratory.

Her lack of a good faith belief that the lab presented a hazardous health environment is also demonstrated by the fact that she wore her respirator only part of the time she was working. In addition her practices became such that co-workers could determine in advance when she would not be working a full day by the fact that she would appear on those days without her lunch. It may reasonably be inferred from this practice that she may have been malingering. Under the circumstances I find that Ms, Perando's alleged inability to work in the lab was not based on either a reasonable or a good faith belief in a hazardous condition. Her complaint in this regard of discrimination under section 105(c)(1) of the Act is accordingly denied.

The complaint herein is thus granted in part and denied in part and further proceedings may be necessary to establish corresponding damages, costs and interest. The parties are accordingly directed to confer regarding these matters and to advise the undersigned on or before August 25, 1986, whether further evidentiary hearings will be required or whether those matters can be stipulated.

Gary Melick
Administrative Law Judge

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