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DONALD RUNYON V. BIG HILL COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DONALD E. RUNYON,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 86-58-D

BIG HILL COAL COMPANY,
RESPONDENT

PIKE CD 85-17

No. 4 Mine

DECISION

Appearances: Joe Friend, Esq., Pikeville, Kentucky,
for Complainant;
Charles E. Lowe, Esq., Pikeville, Kentucky,
for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Donald E. Runyon, against the respondent, Big Hill Coal Company [hereinafter the "Company"], pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) [hereinafter referred to as the "Act"]. Mr. Runyon initially filed his complaint with the Department of Labor's Mine Safety and Health Administration (MSHA) on September 20, 1985, alleging that he was discharged from the Company's No. 4 Mine on August 18, 1985, because he refused to work underground in the mine. He went on to state that he was hired as an "outside man" and thus when he was abruptly informed one morning that he was to work underground, he refused because he felt this mine was unsafe. At that point, he allegedly was told he was no longer needed. Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and thereafter Mr. Runyon filed his complaint with the Commission, pro se. By his complaint, he sought reinstatement, back pay and recovery of "all losses and expenditures" incurred as a result of his discharge.

Pursuant to notice, this case was heard in Paintsville, Kentucky, on July 8, 1986. Donald E. Runyon testified on behalf of himself. Dean Francis, Curtis Francis, and Joe Tackett testified on behalf of the respondent.

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I have carefully considered the entire record and the contentions of the parties, and make the following decision.

DISCUSSION AND FINDINGS

The complainant testified that he began his employment with the Company in February of 1984, and that he was a welder who worked primarily on the surface but who had gone underground when the job required it some ten times or so during the year and a half he worked there. His employment with the Company terminated on or about August 19, 1985.

He described the sequence of events which immediately led to the termination of his employment. That conversation with Mr. Dean Francis, Company supervisor, is reported at Tr. 63A64:

A. He said, "Get your hard hat and a light and go underground."

Q. And what did you tell him, if anything?

A. I told him I'd rather not go underground.

Q. Did you tell him why?

A. No, sir.

Q. And then what did he say, if anything?

A. He asked me was I refusing to do my job. I said, "No," I said, "I'd rather not go underground." He said, "Well, then, you're refusing to do your job," and I said, "No, I'm not refusing to do my job." He said, "Well, then, we don't need you." I said, "Well, does that mean I'm fired or what?" He said, "You just fired yourself."

Q. Did he at any time tell you that you were fired?

A. No. That was what he said. He said I fired myself.

Q. And what did you do then, if anything?

A. I just got my stuff together and left.

Q. Where did you go to?

A. I went home.

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Complainant contends he refused to go underground on August 19, 1985, because: (1) the ventilation fan was vibrating and he was of the opinion that if it shut down the men, including himself, would not be withdrawn from the mine; and (2) there had been, in his opinion, two methane ignitions at this mine during the time he worked there, one in February or early March of 1985 and another on May 9, 1985.

Mr. Dean Francis testified for the respondent. His version of the August 19 conversation with the complainant is essentially corroborative (Tr. 88-89):

A. Mr. Runyon come in and I told him--I said to get him a light and stuff; I had a job I wanted him to do. So, he said, "I'm not going underground." And I said, "Why not?" He said, "I'm just not going underground." I said, "Well, are you refusing to do your job?" But before he said he wasn't going underground, he said he didn't have a hard hat. I said, "I have a hard hat in my truck," which I do. I carry two all the time. Then, after that--

Q. He told you he hadn't brought his hard hat with him?

A. Right.

Q. And you told him that you had one in your truck?

A. Yes, sir.

Q. To go get it?

A. Right.

Q. Did he go get it?

A. No. He started to walk off, then he turned back around and he said, "I'm not going inside."

Q. And then what did he do, if anything?

A. Well, then, he turned around. He said--I asked him--I said, "Gene, are you refusing to do your job?" And he said, "I'm not going underground." Then, he turned around and said, "Are you firing me?" I said, "No, I'm not firing you." I said, "You're firing yourself. You're refusing to do the job you were hired for."

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Mr. Francis did disagree, however, with the complainant's assertion that the May 1985 incident referred to above was a methane ignition. He maintains that it was a "blown out shot". He also generally disagreed that the mine was unsafe. He cited the fact that one miner breaking his leg was the only accident that occurred in the mine during Mr. Runyon's tenure there.

Mr. Curtis Francis, also a supervisor at the Company's mine, testified that the complainant never told him he was afraid of anything at the mine until two weeks prior to the hearing in this case. On the 26th of June 1986, he stated the complainant told him he wanted to settle the case and had said, "I'm just going to tell you the truth.... I'm scared to go in the mines anymore" (Tr. 169).

Under the Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd. Cir.1981); Secretary on behalf of *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. See also *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C.Cir.1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's *Pasula-Robinette* test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-403 (1983).

Further, 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 (3rd. Cir.1981); Secretary of Labor/*Robinette v.*

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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).

Therefore, the initial issue presented for decision is whether Runyon had valid safety concerns. For the reasons that follow, I conclude that he did not.

The complainant's concern about the ventilation fan vibrating on the morning of August 19, 1985, was unfounded for the simple reason that it had been fixed on August 16, 1985, and was no longer vibrating. However, it is true that Runyon might reasonably have believed that it was still vibrating. This was a new fan that had been installed some three weeks earlier and although it was operating, sucking air out of the mine, it was vibrating because of a cracked weld joint. Runyon's concern was that "anything vibrating like that can go down ... and it could go down any time" (Tr. 48). He further speculated that if the fan shut down, and "if I was in there ... I wouldn't be called out ..." (Tr. 48). This series of speculations does not rise to the status of a good faith, reasonable belief that a safety hazard existed. I further note that complainant introduced no evidence as to the likelihood that such an equipment failure would occur in the first place, thereby giving rise to the feared sequence of events.

As to the two previous instances of methane ignitions (February and May of 1985), complainant has failed to connect them up with his refusal to go underground in August of 1985. The testimony was that the mine is adequately pre-shifted and fire-bossed every day and the complainant does not contest that. I therefore find that this contention likewise does not form a good faith, reasonable belief that a safety hazard existed on the morning of August 19, 1985.

In summary, there is no evidence in this record that the underground work requested of Mr. Runyon would have exposed him to any safety hazards.

I conclude from the totality of the evidence adduced at the hearing in this case that Mr. Runyon had a generalized fear of going underground into this or any other coal mine. His actual grievance in this case is that he believed that he had an outside job on the surface and was reluctant to work underground because of his fear. He wanted to perform only the work on the surface for which he thought he had been hired. Unfortunately, the Company required his services underground from time to time, including the morning in question.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all the evidence in this record, I cannot conclude that Mr. Runyon's refusal to perform his work assignment on August 19, 1985, was based on a reasonable good faith belief on his part that that work would expose him to any underground safety hazards. A miner's belief in a hazard must be reasonable. Unreasonable, irrational, or completely unfounded work refusals do not warrant statutory protection. Robinette, 3 FMSHRC at 811. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Judge