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DONALD DENU V. AMAX COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

DONALD F. DENU, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. LAKE 88-123-D
v.	VINC CD 88-08
AMAX COAL COMPANY RESPONDENT	Ayrshire Mine

DECISION

Appearances: Donald F. Denu, Rockport, Indiana,
pro se;
D. C. Ewigleben, Esq., Amax Coal Company,
Indianapolis, Indiana for Respondent

Before: Judge Melick

This case is before me upon the complaint by Donald F. Denu 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 that Amax Coal Company (Amax) discriminated against him on February 27, 1988, in violation in section 105(c)(1) of the Act, after he refused to work under conditions he considered to be unsafe.(FOOTNOTE 1) More specifically Mr. Denu maintains that he suffered unlawful interference when Amax Electrical Supervisor Vernon Knight threatened to discipline him for insubordination and when Brent Weber, another Amax Supervisor, threatened him by stating that his actions could result in his discharge. It appears that Mr. Denu is also complaining that he suffered discrimination because he was instructed to attend a meeting concerning possible disciplinary action. He was told at this meeting that no disciplinary action would be taken for his work refusal.

In order to establish a prima facie violation of section 105(c)(1) Mr. Denu must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that he suffered adverse action that 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 F2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). 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 F2d 194 (7th Cir. 1982); Robinette, supra. Proper communication of a perceived hazard is also an integral component of a protected work refusal and the responsibility for the communication of a belief in a hazard underlying a work refusal lies with miner. See Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (1987).

The evidence shows that the Complainant was an experienced electrician, having 20 years practice in the field with nine years as an electrician in the mining industry. He also holds training certificates from the Department of Labor, Federal Mine Safety and Health Administration (MSHA) for high and medium voltage electrical work at underground and surface mines. On February 27, 1988, Mr. Denu was working the 4:00 p.m. to 12:00 midnight shift at the Ayrshire Mine and at around 6:00 p.m. was preparing with

another electrician, Harrison Key, to disconnect and move the power cable, running about 1,000 feet between the 6,900 volt substation and the 6,900 volt switch box, to allow the dragline to tram north along the bench (See Exhibit R-2).

According to Denu, he and Key proceeded to the 6,900 volt substation in preparation to pull the power from the cable and to disconnect the cable head. They were waiting for the dragline to move close to the cable and then for instructions from the electrical supervisor Vernon Knight or the second shift superintendent Brent Weber or from the dragline crew before killing the power. Vernon Knight then called on the two-way radio and told them to wait at the bench and that he was bringing two other employees, Don Kozar and Don Gehlhausen, to kill the power. Shortly thereafter Knight radioed again and directed Key and Denu to return to the bench to disconnect the cable head at the 6,900 volt switch box. During this conversation Denu apparently asked Knight if he would be allowed to make a "visual disconnect" of the cable at the substation and Knight responded that he would not.

Denu later radioed Knight advising him that in order for him to disconnect the cable at the switch box he would need to verify that the cable was disconnected and "locked out" at the substation. Denu claims he then told Knight that he was refusing to unplug the cable at the switch box. Knight apparently then radioed Weber and told Denu to meet them at the bench. When Knight and Weber arrived at the bench Knight told Denu that he would have to discipline him for insubordination. Knight explained that he had been directed to do so by Chief Electrician, Larry Ashby. Weber then apparently asked Denu if he knew the consequences of his actions. Weber disputes Denu's claim that this was stated in a threatening manner.

Denu testified that it was around this time that either Weber or Knight then radioed Kozar and Gehlhausen directing them to disconnect the cable at the 6,900 volt substation. Denu testified that after they performed the disconnect Kozar called and said "the head is out and lying on the ground". There is no dispute that Kozar's statement indicated that the subject cable had not only been disconnected but that the cable head that connects the cable to the substation was lying on the ground.

According to Denu, Knight again asked if he would unplug the head from the switch box. Denu again refused stating that he felt that it was unsafe and not according to proper

lockout procedures.(FOOTNOTE 2) Knight again informed Denu that he would have to discipline him for insubordination. Weber also again asked Denu "do you know what the consequences are of your actions?" Denu again refused to perform the task and Knight then instructed Harrison Key to disconnect the cable from the switch box. Key, who testified that he did not find the procedure to be unsafe, complied. After the disconnect Denu put on a pair of "hot gloves" and assisted in moving the cable. Shortly thereafter Weber purportedly told Denu to meet with Larry Landes the Human Resources Manager the next day at 4:00 p.m. to determine if any disciplinary action would be taken.(FOOTNOTE 3)

Denu testified that he had also requested that a safety committeeman be present when he refused to disconnect the cable from the switch box but one was not immediately provided. Later at approximately 10:00 p.m. Bob Lee, the second shift Safety Committeeman, along with Knight and Weber met in the shop area. Weber again asked if Denu knew the consequences of his actions. Denu asked what the consequences were and Weber purportedly responded "up to and including discharge". Knight apparently also repeated that he would have to discipline Denu for insubordination. Following the meeting with Landes and others, Landes informed Denu there would be no discipline for his actions.

Under the specific facts of this case I find that Denu did in fact entertain a reasonable, good faith belief that a hazardous condition existed at the time he was directed to

disconnect the power cable at the 6,900 volt switch box. There is no dispute that it would have been extremely hazardous and likely to result in severe burns and/or electrocution to have disconnected the cable at the switch box if the cable had remained connected and energized at the substation or had been reconnected and reenergized. There is, similarly, no dispute that Denu was aware of these hazards. Not only was Denu an experienced electrician but as a safety committeeman was also aware through MSHA "Fatalgrams" of the potentially fatal consequences in similar if not identical situations.

Denu explains that unless the same person who disconnects the cable at the switch box is the same person who deenergizes, disconnects and locks out the cable at the substation with his own lock he cannot be assured that the cable will remain deenergized at the switch box. Indeed even if the cable has been disconnected at the substation if it has not been properly locked out it could be intentionally or unintentionally reconnected. The evidence is undisputed that attempting to disconnect a 6,900 volt energized cable at the switch box would likely result in severe burns and electrocution.

While, under the circumstances of this case, the chances may not have been great that at the time Denu was directed to disconnect the cable at the switchbox the cable had not been deenergized, disconnected and not reconnected, the danger of serious injury or electrocution was a near certainty if the cable at the substation had been inadvertantly reconnected and reenergized. Particularly considering these extreme consequences I conclude that Denu did entertain a reasonable, good faith belief in a hazard. Indeed in issuing a subsequent directive to miners on disconnect procedures at the mine it is apparent that Amax itself recognized some of the same hazards that concerned Mr. Denu.

In reaching my conclusion herein I have not disregarded the evidence that Denu had been told by MSHA Inspector Deuel almost a year earlier that "visual disconnects" were not in his opinion in violation of the law. However Inspector Deuel also apparently told Denu that he nevertheless would not want to perform the noted procedure without a visual disconnect and lockout of the cable. I have also not disregarded the

evidence that Denu knew that only one cable exited the substation and that it is likely that he also knew that this was the same cable running to the switch box. Nor have I disregarded the evidence that Denu knew that two miners, Kozar and Gelhausen, were at the substation for the purpose of making the disconnect and through direct radio communication from Kozar was told that the cable exiting the substation had been disconnected. Denu admits that he was told by Kozar that "the head is out and lying on the ground". However the serious hazards, previously discussed, are not significantly diminished by these considerations.

Don Kozar, also testified that when the cable is disconnected at the substation the lights on the equipment in the pit and on the bench, including lights on the switch box itself, are extinguished. More specifically, Kozar recalled that on the occasion at issue when he and Gelhausen disconnected the power at the substation he saw the lights go out on the switch box. Kozar conceded however that the extinguishment of the light is not a certain method of determining whether the cable is completely deenergized. The evidence shows that liquid switches such as used at this substation have been known to malfunction allowing a cable to remain energized even after the switch has apparently been disengaged. It is apparent from the record that Denu was also aware of this problem at the time of his work refusal.

Thus under all the circumstances I conclude that Mr. Denu did in fact entertain a reasonable, good faith belief in a hazard at the time of his work refusal. Amax argues however that even assuming the validity of Denu's work refusal, Denu suffered no related discrimination or interference within the meaning of section 105(c)(1). Amax points to the statement by its human resources manager, Larry Landis, at the conclusion of the disciplinary meeting that no action would be taken against Denu. I find however that threats of disciplinary action and discharge directed to a miner exercising a protected right clearly constitute unlawful interference under section 105(c)(1), whether or not those threats are later carried out. Such threats place the miner under a cloud of fear of losing his job. In addition, while under such threats, a miner would be even less likely to exercise his protected rights when future situations might clearly warrant such an exercise. Indeed Denu opined that because of threats to other miners under similar circumstances in the past, Amax had coerced those miners into performing unsafe tasks. Such threats therefore clearly run counter to the objectives of Section 105(c). Accordingly, Mr. Denu has met his burden of proving his complaint of discrimination.

ORDER

The Complaint of Discrimination is GRANTED. The parties are hereby directed to confer regarding the amount of costs and damages and report to the undersigned on or before March 15, 1989, as to whether such costs and damages can be stipulated.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FOOTNOTES START HERE
~FOOTNOTE_ONE

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 or 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.

~FOOTNOTE_TWO

2. While it appears from the credible evidence that Denu, at the time of his work refusal, communicated what he believed to be the hazard with only the generalized explanation that he needed to make his own "visual disconnect" at the substation before disconnecting the cable at the switch box, it is clear from the preceding history that Amax officials clearly knew the scope of Denu's position, including the need for him to perform his own lockout of the cable at the substation. It is not disputed that on several occasions over the previous weeks Denu had discussed his position in this regard with Knight and that Knight had thereafter discussed the matter with his supervisor. Under the circumstances it is clear that the "communication" requirement has been met.

~FOOTNOTE_THREE

3. There is some disagreement over the precise date of this meeting. However, for purposes of this decision the precise date of that meeting is immaterial.