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MICHAEL P. DAMRON V. REYNOLDS METALS  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

MICHAEL P. DAMRON,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. CENT 89-131-DM

v.

Sherwin Plant

REYNOLDS METALS COMPANY,  
RESPONDENT

DECISION

Appearances: Michael LaBelle, Esq., Powers and Lewis,  
Washington, D.C., for Complainant;  
Jean W. Cunningham, Esq., Richmond, Virginia,  
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged by Reynolds Metals Company (Reynolds), on September 7, 1988, from his job as a hydrate area helper because he refused to perform work that he reasonably and in good faith believed to be dangerous, and that his refusal was protected under the Federal Mine Safety and Health Act of 1977 (the Act). Reynolds contends that Complainant was discharged for failure to obey a direct order, and that the task he was ordered to perform was not dangerous. Pursuant to notice, the case was heard on November 28 and 29, in Corpus Christi, Texas. Richard W. Spencer, Robert H. Lehman, Dalma Edward Rogers, Pete Zamora, Guy Asher, Paul Bucey, Michael P. Damron, and Bobby Tucker testified on behalf of Complainant. Thomas Glenn Reynolds, Arlon Boatman, Amos Stanley Millsap, Kennedy Wayne Haley, Bobby Joe Sasser and Darrell M. Harriman testified on behalf of Reynolds. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties, in making the following decision.

FINDINGS OF FACT

At all times pertinent to this proceeding Reynolds was the owner and operator of an alumina plant in Corpus Christi, Texas, known as the Sherwin Plant. The plant processes bauxite into aluminum ore, called alumina.

Prior to September 7, 1988, Complainant was employed as a laborer at the Sherwin plant for more than 9 years. In 1988, he worked as a hydrate area helper. Among the duties to which he was assigned was the operation of a ball mill which pulverized scale coming from the precipitation area. The scale, taken from the alumina tanks, is fed on to a conveyor belt from a hopper, and travels up the belt to the ball mill which crushes it to powder. The ball mill operator is required to maintain the conveyor belt with a head and a tail pulley at either end, and to remove foreign objects from the belt. A magnet is affixed to the belt, at about its midpoint, and the belt shuts down automatically when any metallic object passes under the magnet. The ball mill operator is required to remove and discard the metal, and restart the belt. He is also required to remove and discard other nonmetallic foreign objects from the belt to prevent them from passing into the ball mill. Two bins are provided near the magnet where the metal and nonmetal objects are deposited. A majority of the mill operator's work time is performed at or near the magnet. The ball mill and belt are located outside and immediately below the operating floor where the kilns are located. The operating floor is open and is approximately 30 feet above the ground where the ball mill is operated.

In about 1984, the then operator of the ball mill, Robert Lehman, asked to have overhead protection erected because of falling objects coming from the operating floor. These included filter cloths, caustic metal, bolts, valves and trash. About two or three weeks after this request, a 6-foot high scaffold was erected, 6 feet square, covered with three 2 x 12 boards and a piece of plywood on top of the boards. Lehman later enclosed the area to keep out the cold, the caustic and the dust. After about two years, Reynolds tore down the shelter because "it was an eyesore and they didn't want visitors to see it." (R. 54). However, it was replaced by a new similar shelter after two or three days. This remained in place until September 1988.

During the period from 1984 until September 1988, on numerous occasions large cloth filters weighing in excess of 100 pounds were dropped from the operations floor to the ground below by operations employees. Metal rods, pieces of scaffold boards, bolts, tools, and pieces of corrugated metal siding also fell or were dropped; liquid hydrate spilled from the upper floor to the ball mill area. The ball mill operators were aware of these occurrences and at least on some occasions reported them to supervisory personnel. Therefore, I find that Reynolds was aware that objects fell or were thrown from the calcinator floor or the floor where the numbers 8 and 9 kilns were located, to the ground below in the area of the ball mill.

On August 31, 1988, a regular Mine Safety and Health Administration (MSHA) inspection took place at the Sherwin plant. The inspector found missing guards on the two tail pulleys on the conveyor belt of the ball mill. A section 104(d) order was issued because Respondent had been cited previously for the same violation. Complainant Damron was operating the ball mill at the time and was inside the shelter. The MSHA inspector pointed out that an electrical extension cord running to the shelter was not properly grounded. He also commented that the shelter area was dirty, and the chair on which Damron sat was broken. No citations were issued for any conditions in the shelter. The following day, September 1, the shelter was taken down by Respondent.

On the day the shelter was torn down, Complainant protested the action to Glenn Reynolds, the General Supervisor in the precipitation and calcination areas of the plant. He also contacted Paul Bucey, the Union Safety Committee Chairman and requested a safety procedure meeting. Such a meeting was held on Friday, September 2. Complainant and the Union representatives contended that a safety issue was involved because of objects falling or being thrown from the upper floors, and caustic liquid spilling on to the area where the ball mill operator worked. The company representatives agreed to erect a barrier against the handrail of the upper floor and to erect a metal shed over the area where the magnet was located to protect the ball mill operator. Complainant sought a wooden overhead structure until the metal shed could be completed. Complainant testified that the company agreed to this proposal, but the company representatives testified that they specifically denied the request on the ground that it would "create more hazards than what we take care of." (R. 382). There may have been a misunderstanding of what was agreed to, but I find as a fact that the company did not accede to Complainant's request that a temporary wooden overhead structure be erected over the ball mill pending the erection of the metal shed. The company did agree not to operate the mill until the guardrail barrier was erected. On Monday, September 5 (Labor Day), a number of sheets of plywood were stacked up inside the handrail of the floor above the ball mill. The ball mill operator (Robert Lehman) was instructed to attach the sheets of plywood to the handrail with pieces of wire. No other overhead protection was in place. Lehman operated the mill by stepping away from the belt 15 or 20 feet. Operating from this position he was unable to remove nonmetallic foreign objects from the belt. Complainant worked on the next shift and was told by his foreman Arlon Boatman that he was going to have to run the mill. Boatman had not been present at the safety procedure meeting, and was not aware of what had been agreed upon. He assigned Complainant to work on certain problems in the "tray area," and he discussed with management people what had taken

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place at the safety meeting. At the beginning of his shift on Tuesday, September 6, Complainant again worked on the trays. During discussions between Boatman and Complainant, Boatman told Complainant he would direct the overhead operators to be careful in hosing down the upper floor and to inform Boatman if they had to remove objects from the floor. He also told Complainant that he could operate the mill by turning the belt switch on, and then stepping back away and monitoring the belt from a distance. Complainant protested that he could not operate it in that manner because the metal detector does not always stop the belt when metal objects come up, and this could result in severe damage to the mill. Boatman told Complainant "that should anything go through the detector, if for any reason it failed and we did get metal in the mill, that it would be my responsibility." (R. 352). Boatman explained that a metal shed was being constructed which would be placed over the metal detector area. Because of the need for workers in the tray area, Complainant continued on that job and did not run the ball mill on Tuesday, September 6 (he worked a double shift 4:00 p.m. to midnight and 12:00 to 8:00 a.m., Wednesday). On Wednesday, September 7, on the day shift, Lehman was discharged for refusing to run the ball mill.

On Wednesday, Complainant reported to work on the afternoon shift. Boatman gave him a direct order to run the ball mill. Complainant refused because "I feel it's unsafe." (R. 231). Respondent gave him a suspension with intent to discharge. Complainant filed a grievance under the union contract which ultimately resulted in an arbitration proceeding. As a result of the arbitration decision, Complainant was reinstated without back pay.

General Superintendent Reynolds was at the Plant on Monday, September 5, because of severe tray problems. He was approached by Complainant Damron who told him that the company had agreed at the safety procedure meeting to erect a plywood overhead shelter for the ball mill. Reynolds denied that the company made such an agreement, and told Complainant that a metal structure was being constructed. Reynolds further testified:

And I told him that, if he had any real safety concerns regarding the operation of the belt line, without that temporary shed, that he should go outside the building, down the tunnel, and operate the belt standing in that position. And that as metal came up the belt, he could shut the belt down and remove it. (Tr. 319).

On rebuttal, Complainant referred to this testimony:

Q. Mr. Damron, did you hear testimony earlier by Mr. Reynolds that indicated that he had given you the

option of working down in the pit next to the conveyor belt of the ball mill?

A. Yes, I heard what he said. It's not true, he never given [sic] me any options, just to do it or else.

\* \* \*

Q. Did anybody other than Mr. Boatman, ever suggest to you any other way of operating the ball mill, other than standing by the magnet?

A. No, they didn't. Nobody but Mr. Boatman. (R.460).

I find as a fact that Reynolds did tell Complainant that he could run the mill away from the building, "down the tunnel."

Boatman was asked whether on Wednesday when Complainant was terminated he would have permitted Complainant to operate the mill "from outside the building." He answered:

I would have allowed him to operate that mill as I had directed him to, which would have been under normal conditions, as we had been operating . . .

Q. And had he objected to working or standing at the magnet, what about that?

A. No. Because the situation, as far as me as a representative of the company, and as a supervisor, that if I gave him the direct order to operate the facility under normal conditions, standing where he needed to, if he needed to stand at the metal detector, if he needed to clean conveyor belts, tail pulleys or whatever, it would be the general operator, the regular operation of the facility. (R. 353).

This testimony is ambiguous on the issue of whether Boatman would have permitted Complainant to monitor the belt from a distance--away from the building as he indicated on Monday, September 5. However, he did not withdraw his authorization given two days before that Complainant could have operated the ball mill away from the belt. Nor did Complainant testify that he understood that it had been withdrawn.

Subsequent to Complainant's discharge (within a matter of a few days), the permanent metal barrier was in place inside the handrail of the operating floor and the metal shed was erected over the magnet area where the ball mill operator worked.

1. Was Complainant's work refusal, for which he was discharged, protected activity under the Act?

2. If so, to what remedies is he entitled under the Act?

#### CONCLUSIONS OF LAW

##### I

Complainant and Respondent are protected by and subject to the provisions of section 105(c) of the Act. Complainant is a miner; Respondent is a mine operator. I have jurisdiction over the parties and subject matter of this proceeding.

##### II

In order to establish a prima facie case of discrimination under the Act, a complaining miner must prove that he was engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. In order to rebut the prima facie case, the operator must show either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. Secretary/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 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). Secretary/Wayne v. Consolidation Coal Co., 11 FMSHRC 483 (1989).

##### III

A refusal to perform work is protected activity under the act if the miner has a good faith, reasonable belief that the work he refuses to perform is hazardous. The burden of proof is on the miner to establish both the good faith and the reasonableness of his belief that a hazard existed. Robinette, supra; Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC 993 (1983); Biddle, Means and Levine, Protected Work Refusals Under Section 105(c)(1) of the Mine Safety and Health Act, 89 W.Va. L. Rev. 629 (1987).

##### IV

The reasonableness of the miner's belief in the hazardous nature of the work is not determined by whether a hazard objectively exists, but by the miner's reasonable perception of a hazard. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982); Secretary/Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983). Respondent's witnesses here denied that there was a safety hazard

resulting from falling or thrown objects to a ball mill operator without overhead protection. But the weight of evidence contradicts Respondent's position. I have found as a fact that on numerous occasions objects fell or were dropped or spilled from the operating floor to the ball mill area. A hazard existed objectively. The extent of the hazard, that is, the frequency or likelihood of falling objects landing in the ball mill area is a matter of dispute. From the perspective of the ball mill operators, including Complainant, the hazard was real, and their perception of the hazard was reasonable.

V

The miner's work refusal must be made in the good faith belief that a hazardous condition obtained. Good faith "simply means honest belief that a hazard exists." Robinette, supra, at 810. Good faith requires the miner to inform the mine operator of his belief in the safety hazard to give the operator the opportunity to correct the condition. Secretary/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982). See also, Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989).

Complainant's safety concerns were communicated in a formal safety meeting with Respondent. Respondent addressed the concerns by agreeing to put up a permanent barrier along the handrail of the operating floor above the ball mill and to erect a metal shed for the mill operator at or near the magnet. Although neither of these were completed at the time of Complainant's work refusal and discharge, a plywood barrier was in place at the handrail, and a permanent metal barrier as well as a metal shed were being constructed. Complainant knew that these would be erected in a few days and would provide him more protection than the shed which had been torn down. Superintendent Reynolds told Complainant that he could operate the mill from "down in the tunnel," where he would not be exposed to falling objects. Foreman Boatman told him he could operate from outside the belt area, and that he (Boatman) would take the responsibility if metal objects got into the mill.

Did these instructions, coupled with the erection of a barrier at the handrail overhead, and the planned erection of a metal shed, address the perceived hazards so as to make the work refusal in bad faith? Ordinarily a ball mill operator, wherever he stations himself at the beginning of his shift, must spend a substantial part of his time at or near the magnet where the belt control is located. However, Respondent Reynolds through Superintendent Reynolds and Boatman gave Complainant clear permission to operate the mill from outside the area of danger during the short period while the shed was being erected. Respondent addressed Complainant's reasonable fear of a hazard, and his refusal to work thereafter is not shown to be in good faith.

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I conclude therefore that Complainant Damron's refusal to operate the ball mill on September 7, 1988, was not based on a reasonable, good faith belief that the work was hazardous. Respondent's action in discharging him was not in violation of section 105(c) of the Act.

Based on the above findings of fact and conclusions of law,  
IT IS ORDERED:

1. Complainant's discharge on September 7, 1988, was not in violation of section 105(c) of the Act.

2. The Complaint and this proceeding are DISMISSED.

James A. Broderick  
Administrative Law Judge