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GILBERT WISDOM (MSHA) V. F & W MINES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
FALLS CHURCH, VA
April 30, 1990

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF GILBERT WISDOM, Complainant	DISCRIMINATION PROCEEDING
v.	Docket No. SE 89-102-DM
	MD 88-60
F & W MINES, INC., Respondent	State Road 520 Plant

DECISION

Appearances: Glenn M. Embree, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for the Complainant; James E. Foster, Esq., Foster & Kelly, Orlando, Florida, for the Respondent.

Before: Judge Maurer

This proceeding concerns a discrimination complaint filed by the Secretary of Labor (Secretary) on behalf of the affected miner, Gilbert Wisdom, 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".

On May 1, 1989, a Discrimination Complaint was filed with the Commission alleging that Mr. Wisdom was unlawfully discriminated against and discharged by respondent on April 4, 1988, for engaging in an activity protected by section 105(c)(1) of the Act. More particularly, the Complaint alleges that Wisdom's discharge on April 4, 1988, was the direct result of his refusal to perform work (operate a machine) which he believed to be unsafe.

Pursuant to notice, a hearing on the merits was held in this matter on August 17, 1989, in Orlando, Florida. Post-hearing proposed findings and conclusions were filed by the Secretary on October 18, 1989, and by the Respondent on November 15, 1989. Subsequently and pursuant to motion which was granted, the Secretary filed a response to the Respondent's proposed findings and conclusions on March 30, 1990. I have considered these submissions along with the entire record in making this decision.

Findings of Fact

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, substantial and probative evidence establishes the following findings of fact:

1. Respondent, F & W Mines, Inc. (F & W) is a Florida corporation engaged in the open pit mining of shell. This shell is sold primarily as a road base material in a geographically limited area, primarily due to the cost of transportation. However, it was used in portions of Florida State Road No. 434. Furthermore, some of the equipment and supplies used in the respondent's mining operation were manufactured and purchased outside the state of Florida.

I will deal with it later in this decision, but suffice it to say for now that I am not going to have any trouble finding this operation to be a "mine" within the meaning of the Act, nor deciding the interstate commerce issue in favor of federal jurisdiction.

2. Until his termination on April 4, 1988, Gilbert Wisdom's primary duties were to operate F & W's Koehring 866 backhoe, excavating shell.

3. The Koehring 866 backhoe is a very large, tracked machine approximately 14 feet wide and 25 feet long, with an arm or bucket that extends 25 to 30 feet and has a capacity of approximately four yards of material. This machine was used to excavate shell by traversing it back and forth in parallel fashion along the edge of the pit previously created by the last pass. The depth of these excavations ranged from 3 feet to a maximum of 15 feet with an average excavation depth of four to five feet.

4. For approximately three or four months prior to his termination, complainant had had some problem operating the equipment because of the "brakes". According to the company mechanic, however, the problem was with the tracking system, not the brakes. In any event, whatever the precise cause, the crux of the complainant's work refusal is contained in his testimony at Tr. 74-75:

> Q. Now, as you were moving the machine down the rows, what use did you have to make of the brakes in the operation of the piece of equipment?
>
> A. Well, to keep it from pulling you into the pit, you had so much power with your boom. If you had no

power to lock the machine, it would just pull you over into the pit. It would move the machine.

Q. Now, was one brake just not operating?

A. One brake was hanging up at first, and it was stretching the drive chain out, and it broke. They ordered a new drive chain. When they were putting it on, to keep them from having to buy another chain and stretching it out, they released the brakes totally, so there would be no more problem with chains stretching out and such, or pulling me sideways. Then I would have an equal pull or an equal lack of pull.

* * * * * * *

Q. Both sides were released. Now, once both sides were released, what problems would that cause in terms of the operation of the backhoe?

A. Well, it slowed production. They told me to either turn the machine perpendicular to my cut -- and I tried that, and it did work when you were digging straight ahead of you. But when you turned toward your -- 45 to 90 degrees, it would still pull you towards the pit. So, that didn't work.

I talked to the mechanic. He said, "Try digging mounds in front of you." It would also pull it, either up on top of the mound or pull it through the mound. That didn't work well either.

Q. So, after that did there come a time when the brakes were tightened back up?

A. No, sir.

Q. So, from that point on, you continued to operate it without brakes?

A. Yes, sir.

Q. Now, for approximately how long did you operate this piece of equipment without brakes?

A. I guess three or four months -- three months.

5. Over this period of time the problem with the backhoe became progressively worse and basically one side of the

backhoe's braking and/or tracking system wasn't locking while the other side was. The result was that the backhoe was being pulled toward the pit and complainant feared that he might be pulled into the pit.

6. In response to his complaints, management told him that parts to fix the tracking system were on order and that the company was contemplating trading the machine for a new one or shutting it down and refurbishing it. He had the impression they were just putting him off.

7. Four or five days prior to April 4, 1988, the backhoe also developed a leak in an air diaphragm that controlled the swing arm. The air diaphragm was designed to act as a buffer to control the stopping of the swing arm. With a hole in it, it caused the swing arm to be slower to react because it was losing air pressure to the swing control. The response is slower between the operator and the swing arm and the swing arm itself moves slower. This loss of control or mushiness of the control caused the complainant to twice hit the side of a truck he was loading with the machine. This could obviously present a hazard to others in the vicinity.

8. Complainant has had a long medical history of having migraine headaches. The stress of operating this machine in the condition it was in exacerbated his headaches and also caused panic attacks and high blood pressure. His doctor advised him to change his situation at work or do whatever else it took to bring his blood pressure under control and alleviate his headaches.

9. On April 4, 1988, the Complainant told his immediate supervisor that he believed the equipment was unsafe to operate in the condition it was in and that it constituted a hazard to his health and safety and the safety of others and he refused to operate it. He was therefore fired after refusing to reconsider his action.

DISCUSSION WITH FURTHER FINDINGS

Respondent maintains that although this backhoe was not in perfect condition it was not unsafe to operate. Respondent points out that the other employees of F & W who operated it did not think it was unsafe, and the complainant himself operated it in this imperfect condition for three to four months without incident.

The superintendent, Carlton Prevatt, has known the complainant for twenty years and is a close personal friend of his older brother, who is coincidentally a former owner of F & W. Mr. Prevatt testified and I believe him that he would not have

permitted the complainant to operate a piece of mine equipment which he (Prevatt) believed to be unsafe. He knew the machine was "tired", but did not think it to be unsafe.

This was also generally the testimony from the company mechanic who knew exactly what was wrong with the equipment and understood what the effect of the malfunctioning equipment would be on its operation. He also operated the equipment himself, allegedly without incident or difficulty.

Mr. Baxter, who was the one who actually ordered the complainant to start up the backhoe and start digging and also was the one who fired the complainant when he refused to do so testified. He was shocked at the complainant's refusal. He thought he was joking at first, but he refused a second time. Baxter himself had operated this equipment during this same period of time and likewise did not think it to be unsafe.

Unfortunately for respondent in this case, refusal to work cases turn on the miner's belief that a hazard exists, so long as that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982).

Generally, in order to establish a prima facie case of discrimination under section 105(c) of the Mine Act a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); SecretarY on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511, (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically approving the Commission's

Pasula Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Additionally, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (September 1983): Haro v. Magna Copper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. The Commission has also explained that "[g]ood faith belief simply means honest belief that a hazard exists." Robinette, supra at 810.

Thus, the principal question for decision here is did Gilbert Wisdom reasonably and in good faith believe that he was going to be required to operate a piece of equipment which was deleterious to his health or safety.

If a miner refuses to work only after an operator has failed or refused to respond to a reasonable complaint regarding an unsafe work condition, it is not likely that the miner has acted in bad faith. Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989).

Good faith must be viewed from the miner's perspective. Pratt, supra at 1533. In this case, it is generally acknowledged that the equipment was in the condition the complainant says it was in. Furthermore, I have found that the complainant on numerous occasions did complain to his supervisor as well as the company's mechanic concerning the way the backhoe handled, if not specifically stating that it was unsafe, per se. Adjustments were made, parts were ordered, but no real attempt to fix the machine ever materialized. I therefore find that in his mind, at least, there was an honest belief that a hazard existed, which he could no longer cope with.

The other part of the question for decision is whether his belief that a hazard existed was a reasonable one under the circumstances. One must remember that objective evidence of an actual hazard is not required.

Respondent's starting position in this case is that the backhoe was "tired"; there were some maintenance and handling problems with it. It maybe even was frustrating or a nuisance to operate, but it was not unsafe. Although not expressed per se, my impression of respondent's next line of argument is that even if the machine was a little unsafe, where's the harm? "Complainant did not have a reasonable fear of injury or death". Resp. Brief at 11. No harm-no foul! But this is not the test. Just about any conceivable "hazard" will do so long as the complainant holds a good faith, reasonable belief in its existence. Complainant is not required to be in fear of serious bodily injury or violent death. Much less has been held to be sufficient.

I would agree that the record is devoid of any objective evidence that the complainant's continued operation of the backhoe would have subjected him to any greater hazard than the particular stress-related disorders to which he was predisposed or perhaps a hard jolt if the machine did get pulled down into the pit, which it never did. However, that is not determinative. Neither is the fact that ostensibly nobody else saw any problem with operating the backhoe just the way it was. What is important is if the complainant himself reasonably and in good faith believed that the continued operation of the backhoe was hazardous to his health (mental or physical).

There is a Commission decision which has many similarities to this case. In my opinion, it is on point and directs a favorable decision for the complainant in this case by analogy.

Secretary ex rel. Cooley v. Ottawa Silica Company, 6 FMSHRC 516 (1984) involved a miner's work refusal. It also involved a malfunctioning piece of equipment. That operation involved drying sand in a large natural gas-fired dryer. The dryer had an electric spark plug that ignited the pilot light, when it worked. When it didn't, the pilot was ignited manually, by holding a piece of burning paper to it. Cooley had been directed to ignite the pilot manually on over thirty prior occasions and had always done so, although he complained throughout this period to his foreman and his fellow workers that this was unsafe.

The last time Cooley manually lit the pilot, he singed the hair on the knuckles of his right hand and he resolved that he would not light the pilot manually again. Later that same day,

he was called upon to manually light the pilot. He refused. He reasoned that if th@t were the proper way to light the pilot, the dryer would have been supplied with "a carton of matches and a bale of paper". His supervisor, like our Mr. Baxter, again ordered him to perform the task. He again refused and he was fired.

As in our case, the other employees who worked with the dryer, didn't see any problem with manually lighting the pilot and did so themselves routinely.

On these facts, the Commission found that Cooley had a good faith, reasonable belief that a hazard existed and found that his work refusal was protected. No greater hazard then singed knuckle hair was ever identified.

Wisdom basically followed the same track as Cooley. He reluctantly went along for a time operating the malfunctioning equipment, but complaining constantly to supervisors and fellow workers. The piece of equipment in both cases was not operating as it was designed to; it was being jerry-rigged to keep it going. Finally, one day Cooley singed his knuckle hair and Wisdom began to have stress-related problems and both resolved that they would not operate: the equipment again, despite the fact that none of their fellow employees had a problem doing what they perceived to be unsafe. Subsequently, they both refused to operate the equipment for basically the same reason, as near as I can tell, and both were fired.

Good faith belief and reasonable belief in the hazards of the workplace are largely credibility issues and subjectively, I find the complainant herein to be a credible witness. As I found earlier in this opinion, there were difficulties in operating this backhoe and the tension caused by having to fight the machine could very well be the cause of his migraine headaches and panic attacks. He thinks so and testified to that effect. Respondent has not refuted this testimony.

I also believe the witnesses who testified that operating his backhoe was not unsafe were sincere. For them, it was not a problem. They could cope with the trackage problems and the difficulty with the swing arm. The more objective case that this was an unsafe piece of equipment is definitely harder to make, but then there is no requirement that the reasonableness of Wisdom's belief be verified objectively. See Robinette, 3 FMSHRC at 911-12.

Turning belatedly to the issues concerning jurisdiction, such as whether this operation is a mine and the interstate commerce question, I conclude that the shell is a mineral and its

extraction is mining within the meaning of the Act. I further conclude that the respondent's mining activity affects commerce within the meaning of the Act, and.ultimately I find the respondent to be subject to the jurisdiction of the 1977 Mine Act.

The definition of "coal or other mine" found in 3(h)(1) of the 1977 Mine Act is as follows:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

The definition of "coal or other mine" is further clarified by the Legislative History of the Act. The Senate Report No. 95-181 (May 16, 1977) provides that:

> [I]t is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possibly (sic) interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 602, reprinted in [1977] U.S. CODE CONG. & ADMIN. NEWS 3401, 3414.

As a remedial statute, the Act has been given broad interpretation and has been found to apply to a broad spectrum of activities, including prospecting, assessing value of ore bodies and quarrying in one's backyard. Marshall v. Wait, 628 F.2d 1255, 1258 (9th Cir. 1980) (backyard rock quarry is within the definition of a mine); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980) (sand and gravel preparation plant is a "mine" within the meaning of the Act); Secretary of Labor v. Cyprus Industrial Minerals Corporation, 3 FMSHRC 1 (January 1981), aff'd by the Ninth

Circuit Court of Appeals, December 28, 1981, Cyprus Industrial Minerals v. FMSHRC and Donovan, 2 MSHC 1554 (digging of a tunnel to assess the value of talc deposits within the definition of a "mine").

Respondent's geologist testified that the shell excavated by F & W Mines is not a mineral within the generally accepted definition of that term as used by geologists. He also testified that sand, gravel and limestone were not minerals as those terms are used by geologists.

A mineral is defined in general terms as "any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil." Black's Law Dictionary, Rev. 4th Ed. (1968).

For our purposes, this general definition is precise enough. Moreover, sand, gravel and limestone have previously been held to be minerals within the meaning of the Act, notwithstanding that they also do not fit precisely within that term as used by geologists.

Therefore, I specifically find and conclude that respondent's excavation of shell materials by open pit extraction is "mining" within the meaning of the Act.

Article I, Section 8, Clause 3, of the Constitution gives Congress the power to "regulate commerce ... among the several States." The U.S. Supreme Court has a long history of upholding Federal regulation of ostensibly local activity on the theory that such activity may have some affect on interstate commerce. Local activities, regardless of their size and their appearance as purely intrastate, may in fact affect interstate commerce if the activity falls within a class of regulated activity. See: Wickard v. Filburn, 317 U.S. 111 (1942); Fry v. United States, 421 U.S. 542 (1975). In Perez v. United States 402 U.S. 146, 155 (1971), the court held that where a class of activities is regulated and that class is within the reach of Federal power, the courts have no power to exclude "as trivial" individual instances of the regulated activity.

Perez, supra, held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce if the activity is included in a class of activities which Congress intended to regulate because that class affects commerce.

Mining is among those classes of activities which are covered by the Commerce Clause of the United States Constitution and thus is among those classes which are subject to the broadest reaches of Federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907, (W.D. Pa, 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act, and court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979).

A state highway department operating an intrastate open pit limestone mine, the product of which is crushed, broken and used to maintain county roads was held to be subject to the Act. Ogle County Highway Department, 1 FMSHRC 205 (January 1981).

A crushed stone mine operation was held to be subject to the Act because the sales of rock products, as well as the use of equipment manufactured out of state, affected commerce within the meaning of the Act's jurisdictional language. Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982).

The cited cases support my conclusion that respondent's extraction and processing of the shell material clearly affects commerce within the meaning of the Act.

Conclusions of Law

1. The Commission has jurisdiction over this proceeding.

2. The discharge of Wisdom by respondent on April 4, 1988 violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977.

ORDER

It is ORDERED that:

1. Complainant shall file a detailed statement within fifteen (15) days of this Decision, indicating the specific relief requested. The statement shall be served on the respondent who shall have fifteen (15) days from the date service is attempted to reply thereto.

2. This Decision is not final until a further Order is issued with respect to complainant's relief. In the event that a contested issue of fact arises as to the proper type or quantum of damages due the complainant, a hearing on that issue or issue

will be required, and it will be held at 10:00 a.m., on Friday, June 1, 1990, in Orlando, Florida. The specific courtroom in which it will be held will be designated, if necessary, at a later date.

As an optional method of compliance with this order, the parties may submit a joint proposed order for relief. Respondent's stipulation of the terms of a relief order will not prejudice its rights to seek review of this decision.

Roy J. Maurer
Administrative Law Judge

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