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SOL (MSHA) V. DRAVO BASIC MATERIALS AND
R & S MATERIALS
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

DISCRIMINATION PROCEEDING

Docket No. SE 90-86-DM
MD 90-03

v.

Selma Mine

DRAVO BASIC MATERIALS CO.,
INCORPORATED,

RESPONDENT

AND

R & S MATERIALS, INC.,
RESPONDENT

DECISION

Appearances: William Lawson, Esq., U.S. Department of Labor
Office of the Solicitor, Birmingham, AL, for the
Secretary;

R. Henry Moore, Esq., Buchanan Ingersoll, P.C.,
Pittsburgh, PA, for Dravo Basic Materials, Co.,
Inc.,

Harold Bowron, Jr., Esq., Balch & Bingham,
Birmingham, AL, for R & S Materials, Inc.

Before: Judge Fauver

The Secretary of Labor brought this proceeding on behalf of Alonzo Walker under 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., contending that he was discharged in violation of that section.

The original complaint was against Dravo Basic Materials Co., Inc., as was an application for temporary reinstatement, which was granted pending a hearing and decision on the merits of the complaint.

The case was set for hearing on the merits on May 22, 1990.

On May 14, 1990, the Secretary moved to amend the complaint to add R & S Materials, Inc., as a respondent and to assess a civil penalty for a violation of 105(c) of the Act.

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On May 21, 1990, Dravo filed an answer to the amended complaint in the event the motion to amend were granted, and R & S filed a motion to strike the motion to amend the complaint, also with an answer to the amended complaint in the event the motion to amend were granted.

On the same date, the judge held a telephone conference with the attorneys for the Secretary, for Dravo, and for R & S. The judge advised the parties that he would hear oral arguments the following morning on the Secretary's motion to amend the complaint and that, if the motion were granted, R & S would be entitled to a continuance to prepare for a hearing on the merits. R & S stated that it was desirous of proceeding with the hearing on the merits, scheduled for the following day, if its motion to strike the motion to amend the complaint were denied.

On May 22, 1990, after oral arguments, the motion to amend the complaint was granted. The amended complaint and Respondents' answers thereto were deemed to be filed on the dates they were previously received by the judge's office. In light of R & S's desire to proceed to hearing on the merits that day, and its waiver of procedural and due process objections, a hearing on the merits was held on May 22 and 23, 1990.

This decision is limited to the issue whether Walker was discharged in violation of 105(c) of the Act, reserving for a supplemental decision issues of successor in interest, damages, a civil penalty and other relief.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Finding of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. R & S Materials, Inc., operated an open pit sand and gravel mine, known as the Selma Mine, until January 12, 1990, when the mine was acquired from R & S by Dravo Basic Materials Co., Inc.,1

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2. At the beginning of the day on January 10, 1990, Alonzo Walker reported to work at the Selma Mine where he was employed as a dragline operator. To get to the dragline, Walker rode a motor grader driven by Jimmy Callen.

3. During the trip to the dragline, Callen asked Walker if he ever had problems of dizziness or shortness of breath while operating the backhoe, indicating that he had such ailments the day before. Walker replied that he did not have such problems with the backhoe but that he had not operated the machine for some time, approximately four or five months.² Callen, the regular motor grader operator, operated the backhoe a half shift the day before and at that time experienced difficulty in breathing and a burning sensation in his nose. He had not expressed such complaints previously on the backhoe or any other machine.

4. In the morning on January 10, Walker operated the dragline. Callen again was temporarily assigned to operate the backhoe, because the regular operator, Randy Hamilton, had not arrived at the mine. Callen again experienced difficulty in breathing and a burning sensation in his nose while operating the backhoe. The door to the backhoe was closed, so he opened it to get more air in the cab. This did not help.

5. During the morning, an MSHA mine inspector came to Callen's worksite as part of a mine inspection. He briefly looked at the backhoe, but did not inspect it for noxious fumes. He was not aware of Callen's complaints.

6. Callen operated the backhoe until lunch time, when he was relieved for lunch by Randy Hamilton, his supervisor.³ Callen told Hamilton that he was having trouble breathing and a burning sensation in his nose. Hamilton understood Callen's complaint to mean that his condition was a result of operating

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the backhoe (Tr. 248).4 Hamilton replied to Callen's complaint by saying that when the weather was hot and dusty he had similar symptoms while operating the backhoe. Hamilton did not offer to inspect the backhoe or have it tested for noxious fumes.

7. When Callen was relieved for lunch he went to the hopper area (where some of the employees generally met to eat lunch) to try to rest and to catch his breath. Walker was there and Callen again complained to him about his physical ailments while operating the backhoe. Walker advised Callen to go to the Mine Superintendent, Roger Campbell, and tell him about the beliefs he had concerning the backhoe.

8. Callen went to the office, and told Campbell that he could hardly breathe, that he had a burning sensation in his nose, that he needed to see a doctor, and that he believed "something was on [wrong with] the backhoe" (Tr. 116, 186, 369; Ex. C-9). Campbell immediately sent Callen to a hospital on workmen's compensation.

9. When Callen did not return to the backhoe after lunch, Hamilton went to the office and asked Roger Campbell what had happened to him. Campbell told Hamilton that Callen had been taken to the hospital. Both Campbell and Hamilton knew that Callen was taken to the hospital because he had breathing difficulties and a burning nose sensation while operating the backhoe.

10. After his own lunch period, Hamilton noticed the dragline was not operating and decided to assign Alonzo Walker to operate the backhoe the rest of the shift. Walker was in the hopper area where he, Robert Baldwin and Leon Kent had just eaten lunch.

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11. Hamilton went to the hopper area and told Walker that he wanted him to operate the backhoe. Walker asked him where Jimmy Callen was. Hamilton said he had gone to the hospital. Walker replied that he "would rather have somebody check it out because Jimmy was complaining about it" (Tr. 29-30). Hamilton replied that there was "nothing wrong with it," and Walker replied "I'd rather have a mechanic to check it out" (Tr. 30). Hamilton started walking toward his truck, and told Walker to either operate the backhoe or go to the house (meaning he would be fired). Walker then asked Hamilton where Superintendent Campbell was. Hamilton did not respond. Walker caught a ride on a dump truck down to the dragline, to operate that machine.

12. Hamilton left the hopper area, looking for Campbell. He found him and told him Walker refused to run the backhoe. Campbell, with Hamilton, proceeded to the dragline to talk to Walker. At the dragline Campbell asked Walker why he did not operate the backhoe and Walker said there was a problem with the backhoe, that "Jimmy Callen got sick on the backhoe" (Tr. 32) and he wanted to have it checked out. Campbell said there was nothing wrong with it and to either run it or look for another job. Walker did not run the backhoe, and understood he was fired. He went to the office, where Campbell gave him a termination slip that stated the following reason for his discharge: "Asked to run backhoe and refused." Ex. C-2. When Walker read the form he said there were two other men who could run the backhoe and asked Campbell, "if there ain't nothing wrong with it [the backhoe], how come they couldn't run it?" Tr. 35. Campbell then instructed his secretary to type the following additional language on the slip: "Dragline operator. Alonzo Walker stated that there were four other men capable of running backhoe." Tr. 35; Ex. C-2. Walker, however, had not stated four other men were capable of running the backhoe. Also, he had asked Campbell to put his safety complaint about the backhoe on the personnel form but Campbell did not do so.

13. R & S Materials, Inc.'s Safety Manual, handed to each employee, stated in Rule No. 3(b):

It shall be the duty of every employee to promptly report to his supervisor any hazardous condition or practice that may cause injury or property damage.

14. Callen stayed in the hospital about a week. His medical problem was apparently a lung disorder, which was treated. He returned to work and was operating the backhoe and other equipment without difficulty at the time of the hearing.

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15. At the request of Mine Superintendent Campbell, MSHA tested the backhoe for noxious fumes on January 12. The tests were negative.

DISCUSSION WITH FURTHER FINDINGS

The central issue is whether Walker was unlawfully discharged for engaging in a protected refusal to work under 105(c)(1) of the Act.⁵

A miner may refuse to work under that section if he has a good faith, reasonable belief that a hazardous condition exists. Northern Coal Company, 4 FMSHRC 126, 128 (1982). The "belief must be reasonable, and . . . miners may rely on such indications of conditions as seemingly trustworthy reports from others and earlier conditions in the mine." Id. at 136.

Where practical, a miner refusing work should communicate to a representative of the operator his belief that a hazardous condition exists. "Simple, brief communication will suffice, and the 'communication' can involve speech, action, gesture, or tying in with others' comments." The purpose of the rule "is promoting safety and [the Commission] will evaluate communication issues in a common sense, not legalize, manner." Id. at 133, 134.

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To determine "reasonableness" of a work refusal, the miner's safety concern 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. Union Carbide Corp., 5 FMSHRC 993, 997-98 (1983); River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (1983); Haro v. Magna Cooper Co., 4 FMSHRC 1935, 1944 (1982). "Good faith belief simply means honest belief that a hazard exists." United Castle Coal Company, 3 FMSHRC 803, 810 (1981).

Generally, in order to establish a prima facie case of discrimination under 105(c) a complaining miner bears the burden of proving that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. 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); Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (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 and would have taken the adverse action on those grounds alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magna Copper Company, supra. The ultimate burden of persuasion does not shift from the complainant. United Castle Coal Company, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983) (where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act).

Applying these principles, I find that Walker had a good faith, reasonable belief that operating the backhoe presented a hazard and he communicated that belief to his supervisors by his refusal to operate the machine until his employer had it checked out for hazardous conditions.

The supervisors and Walker were all aware that Callen had complained of dizziness, breathing problems, and a burning sensation in his nose while operating the backhoe, and that he was sent to the hospital because of this condition.

It was reasonable for Walker to believe that the backhoe presented a hazard and may have been leaking fumes or had other

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defects that caused Callen's condition. Walker was protected by 105(c) of the Act in requesting that the machine be checked for hazards before he would operate it. Walker was not a mechanic and did not have the training, skills, or equipment to test the machine for noxious fumes, emissions, or other hazards that may have caused Callen's symptoms. He was not trained or qualified to judge whether Callen's condition was due to defects of the backhoe or to independent health causes such as a heart attack or a lung disease. He was therefore not obligated to examine the backhoe to determine whether it was safe. Nor was he required to operate it and "wait and see" if he would become sick and require hospitalization. It was not reasonable for his supervisors to order him to run the machine without adequate tests to ensure his safety.

The hospital physician who examined Callen suggested that the equipment and work area be checked for possible noxious fumes or chemicals that could cause Callen's condition. When the Mine Superintendent checked the equipment and work area, he saw nothing wrong but still could not determine whether or not odorless noxious fumes were escaping from the equipment. He therefore requested MSHA to bring in an expert with the proper technical skill and equipment to test for noxious fumes.

The fact that such tests proved negative does not alter the reasonableness and good faith of Walker's work refusal. As stated, a good faith belief "simply means honest belief that a hazard exists." *United Castle Coal Co.*, supra, 3 FMSHRC 803, 810 (1981). It does not require objective proof that a hazard actually existed.

Hamilton testified that Walker did not ask him to check out the backhoe, but merely stated he "runs the dragline, not the backhoe" (Tr. 24). I do not find this testimony to be credible. Other witnesses corroborated Walker's testimony that he asked Hamilton to check out the backhoe. On balance, I credit Walker's testimony as to what he stated to Hamilton. Respondent contends that noise at the hopper may have drowned out Walker's responses to Hamilton, and that Walker had a duty to make any safety complaint clearly heard and understood by his supervisor. I find the noise factor to be a non-issue in this case. Hamilton said he had no difficulty hearing the words of Walker. Walker had no difficulty hearing Hamilton. The difference between them is their testimony of what was said, and I find Walker's testimony to be more credible and convincing than Hamilton's.

Campbell testified that when Callen complained to him about difficulty in breathing and a burning sensation in his nose Campbell did not know that Callen was complaining about the backhoe. I do not find this testimony to be credible.

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Campbell's secretary, Annette York, testified that she was present when Callen came in and complained to Campbell about the ailments he was suffering from operating the backhoe. Tr. 368, 369. Campbell's testimony is also refuted by MSHA Inspector Kelly, who testified that on January 12 he interviewed Campbell and Campbell stated that Callen had told him he had trouble breathing and a burning sensation in his nose while operating the backhoe and had tried operating the backhoe with the door open but that did not help. Tr. 186, 187; Ex. C-9, p.3. Finally, Campbell's testimony is refuted by Callen himself, who testified that he told Campbell that he believed there was "something on [wrong with] the backhoe" (Tr. 116).

Campbell also testified that Walker flatly refused to operate the backhoe, with no explanation. Tr. 459-461. I do not find this testimony to be credible and reasonable. When Campbell approached Walker at the dragline, this was Walker's last chance to plead his case for refusing to operate the backhoe. He had asked Hamilton where Campbell was, indicating his desire to discuss the situation with him. I credit Walker's account of his statements to Campbell, both at the dragline and in Campbell's office.

On balance, I find that a preponderance of the reliable evidence proves that Walker's work refusal was protected by 105(c) of the Act. His discharge was therefore a violation of that section.

CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. The discharge of Alonzo Walker on January 10, 1990, by R & S Materials, Inc., violated 105(c)(1) of the Act.

ORDER

1. This decision shall not become a final disposition of this matter until a supplemental decision and final order are issued.
2. The parties shall have until September 5, 1990, to submit proposed findings and conclusions, with supporting arguments, concerning:
 - (a) Issues of liability of Respondent Dravo Basic Materials, Co., Inc., as a successor in interest.
 - (b) Civil penalty or penalties to be assessed under 110(i) of the Act.

(c) Relief to be accorded to Alonzo Walker.

(d) Any other matters the parties believe should be addressed to reach a final disposition of this proceeding.

3. If necessary, a supplemental evidentiary hearing will be held on factual issues raised in the parties' proposals on damages.

4. The previous order of temporary reinstatement shall remain in force pending a final decision.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

1. Further findings of fact concerning the issue of Dravo's responsibility as a successor in interest are deferred pending further proceedings.

2. All employees would occasionally operate other equipment, on an as-needed basis.

3. Randy Hamilton was a working foreman who regularly operated the backhoe. In the absence of the Mine Superintendent, Hamilton was in charge of the mine.

4. At the previous hearing on the application for temporary reinstatement, Hamilton had testified that Callen asked him whether he had shortness of breath or a burning sensation in the nose while operating the backhoe. Transcript in Docket No. SE 90-63-DM, page 59. At the hearing on the merits, he first testified that Callen did not associate his symptoms with operating the backhoe (Tr. 246), but when confronted with his earlier testimony, Hamilton acknowledged that he understood Callen's complaints to be directed at the backhoe. "I figured it was about the backhoe since he was on it and everything." Tr. 248.

5. Section 105(c)(1) provides:

"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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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."