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JOHN A. GILBERT V. SANDY FORK MINING
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

JOHN A. GILBERT,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 86-49-D
BARB CD 85-61

SANDY FORK MINING COMPANY,
RESPONDENT

No. 12 Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA)
ON BEHALF OF
JOHN A GILBERT
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 86-76-D
BARB CD 85-61

No. 12 Mine

v.

SANDY FORK MINING COMPANY,
RESPONDENT

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Hazard, Kentucky, for John A. Gilbert;
Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Secretary of Labor;
Ronald E. Meisburg, Esq., and C. Gregory Ruffenach, Esq. Smith, Heenan and Althen, Washington, D.C., for Sandy Fork Mining Company, Inc.

Before: Judge Melick

These cases are before me upon remand by the United States Court of Appeals for the District of Columbia Circuit in *John A. Gilbert v. FMSHRC*, 866 F.2d 1433 (1989) and upon subsequent direction by the Commission on June 28, 1990, to resolve several specific issues.

The facts and procedural history of these cases are set forth in detail in previous decisions. See 9 FMSHRC 1427 (1987) and 12 FMSHRC 177 (1990). In brief, following an initial evidentiary hearing, this judge determined that Sandy Fork Mining Company, Inc. (Sandy Fork) had not violated Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act". 8 FMSHRC 1084 (1986). That decision was affirmed by the Commission but was subsequently

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reversed by the Court of Appeals which remanded the cases for resolution of several specific questions. The Court explained:

On the record as we understand it, it is plain that Gilbert made a good faith attempt to communicate his reasonable fears to management. What is not clear, however, is whether management addressed Gilbert's concerns in a way that his fears reasonably should have been quelled. In other words, did management explain to Gilbert that the problems in his work area had been corrected? Or did management indicate to Gilbert that he would be assigned to another area in the mine that was free of safety problems? Or did management indicate to Gilbert that the situation was unsettled, and that he should wait five hours (until the start of his assigned shift) before inquiring further about safety conditions in his area? These questions must be answered by the Commission in order for it to determine whether the management at Sandy Fork reasonably addressed Gilbert's fears on the morning of August 7. If management effectively "stonewalled" Gilbert in responding to his inquiries on the 7th, then his continued fears regarding work hazards were reasonable, and his refusal to return to work cannot be viewed as either unreasonable or in bad faith. On remand, the commission will be required to make the necessary factual findings to address these issues.

These specific questions all relate to the larger issue of whether Gilbert's refusal to appear for work on August 7, was supported by the requisite good faith, reasonable belief in a hazard--an issue on which the Complainant bears the burden of proof. Secretary on behalf of Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall 663 F.2d 1211 (3rd 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981).

In its initial decision following remand of this case the Commission reviewed the applicable discrimination law cited by the Circuit Court:

We note initially that the court endorsed several important principles of Commission discrimination law. Citing Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983) and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981), the Court agreed with the Commission that section 105(c) of the Act "protects a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous." 866 F.2d at 1439. The Court subscribed as well to the

Commission's view that in analyzing whether a miner's fear is reasonable, the perception of a hazard must be viewed from the miner's perspective at the time of the work refusal. 866 F.2d at 1439, citing Secretary on behalf of Pratt v. River Hurricane Coal Company, 5 FMSHRC 1529, 1533-34 (September 1983) and Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982). The Court also approved Commission holdings that to be accorded the protection of the Act in engaging in a work refusal, a miner need not objectively prove that an actual hazard existed and, further, that a good faith belief simply means an honest belief that a hazard exists. Id., citing Secretary on behalf of Hogan & Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1072-73 (July 1986); Pratt, supra, 5 FMSHRC at 1533-39, Haro, supra, 4 FMSHRC at 1943-44; and Robinette, supra, 3 FMSHRC at 810.

To determine whether substantial evidence supported the Commission's conclusion that Gilbert's August 7 work refusal lacked the required basis of a good faith, reasonable belief in a hazard, the Court adopted Commission guidelines for assessing a miner's "good faith". 866 F.2d at 1440. First, the court indicated that, where reasonably possible, a miner refusing work should ordinarily communicate or attempt to communicate to some representative of the operator his belief in the safety or health hazard at issue and, second, when a miner has expressed a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to address the perceived danger. 866 F.2d at 1440, citing, Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133 February 1982); Bush, supra, 5 FMSHRC at 997-98; Secretary v. Metric Constructors, Inc., 776 F.2d 469 (11th Cir. 1985); Hogan and Ventura, supra, 8 FMSHRC at 1074. Applying these principles, the Court found that the record did not support the Commission's determination that on August 7 Gilbert did not entertain a good faith, reasonable belief that he would be required to work in a hazardous area. 866 F.2d at 1140-41.

The Commission, in its initial decision on remand also reviewed the Court's evaluation of the evidence:

The Court presented its view of the evidence. Among other things, the court noted that Gilbert was working in an area of the mine in which it appeared to him that the prevailing roof conditions placed his safety in jeopardy; that he left work on August 6 with management's permission; that when he returned to work on the morning of August 7 he learned from other

miners of a roof fall that had occurred overnight in the area where he had been working; and that when he inquired of management representatives what had been done to address the unsafe conditions, they "refused to address his concerns." 866 F.2d at 1440-41. The Court found that Gilbert's "initial fears" on August 6 were reasonable and that on August 7 "he made a good faith attempt to communicate his reasonable fears to management." 866 F.2d at 1441.

The Court, however, stopped short of outright reversal of the Commission's decision, stating that it was not "clear" whether "management addressed Gilbert's concerns [on the morning of August 7] in a way that his fears reasonably should have been quelled." 866 F.2d at 1441. See also 866 F.2d at 1441 n.11. The Court explained:

In other words, did management explain to Gilbert that the problems in his work area had been corrected? Or did management indicate to Gilbert that he would be assigned to another area in the mine that was free of safety problems? Or did management indicate to Gilbert that the situation was unsettled, and that he should wait five hours (until the start of his assigned shift) before inquiring further about safety conditions in his area? These questions must be answered by the Commission in order for it to determine whether the management at Sandy Fork reasonably addressed Gilbert's fears on the morning of August 7. If management effectively "stone-walled" Gilbert in responding to his inquiries on the 7th, then his continued fears regarding work hazards were reasonable, and his refusal to return to work cannot be viewed as either unreasonable or in bad faith. 866 F.2d at 1441.

The parties now before me on remand requested to submit these issues on the existing record without further evidentiary proceedings. The essential existing evidence in this regard was summarized by the Commission in its February 16, 1990, decision:

There is no question on this record that mine management was aware of the roof problems in the area where Gilbert was working and was taking steps to address the problems. As the judge found, and as we noted, when Gilbert brought the conditions that he perceived to be hazardous to the attention of his section foreman on August 6, the foreman responded

that he would add more cribs to support the roof and that he would stand by and watch while coal was cut. 8 FMSHRC at 1089; 9 FMSHRC at 1330. Gilbert then went outside the mine and repeated his concerns to the general mine foreman, who told Gilbert that he would not insist that he resume work and that Gilbert should go home and return the next day to meet with Phipps, the general manager, and Begley, the mine superintendent.

When Gilbert returned on August 7, Phipps and Begley were underground conducting an examination of the roof, and Gilbert was told by another miner that a roof fall had occurred in the mine during the night. After Phipps and Begley emerged from the mine, Gilbert talked separately with each of them.

Gilbert talked first with Phipps. Both Gilbert and Phipps testified that Gilbert told Phipps that he was afraid of the roof. Tr. I 39-40; III 89-92. Gilbert asked Phipps what management was going to do about the roof and how the roof would be supported. Tr. II 39-40. Gilbert testified that Phipps responded that "they [were] supporting what they could." Tr. I 39-40. Similarly, Phipps stated that "primarily" he told

Gilbert that the mine roof was all the top that the mine had. Tr. II 127. Both Phipps and Gilbert testified that Phipps asked Gilbert if he had any ideas for dealing with the roof (Tr. I 40; III 91), and Gilbert testified that he offered a few suggestions (Tr. I 40). Phipps further stated that he did not try to "convince" Gilbert that the roof was safe and that, although management was pursuing several approaches for alleviating the roof problems, he did not discuss those initiatives with Gilbert at that time. Tr. III 127-28. Gilbert then engaged Begley in a similar brief conversation. Gilbert and Begley also agreed that Gilbert told Begley that he was afraid of the roof. Tr. I 40-41; II 109. Gilbert testified that Begley replied that "that's all they can do . . . that's all the top they [had]." Tr. I 41. Begley stated that he did not recall telling Gilbert anything about the top on the morning of August 7. Tr. II 111-12. Begley's recollection was that he and Gilbert discussed Gilbert's possible job transfer rather than roof problems. Id. After these two conversations, Gilbert left the mine.

The Court rejected the judge's and Commission's determinations that in leaving the mine at this point, some five hours before his shift was scheduled to

begin and before he had been told the specific area of the mine to which he would be assigned, Gilbert acted precipitately and unreasonably. 866 F.2d at 1140. Instead, the Court has directed us to determine whether management explained to Gilbert that the problems in his general work area had been corrected, or had indicated that he would be assigned to another area of the mine free of safety problems, or had suggested that the situation was unsettled and that he should wait until the start of his assigned shift before inquiring further about safety conditions in his area. 866 F.2d at 1441.

Within the limited scope of review on this remand and considering the uncontradicted and credible evidence it must be concluded that Gilbert's safety concerns were indeed not addressed in a manner sufficient to reasonably quell his fears at the time of his meetings with Phipps and Begley on August 7 five hours before the beginning of his shift. To paraphrase the Commission in its February 16, decision, given the Court's belief that Gilbert did not act precipitately and its finding that he entertained a good faith, reasonable belief in a hazard, I feel similarly constrained to conclude that Gilbert's departure from the mine and decision not to return for the beginning of his work shift on August 7, constituted a constructive discharge in violation of section 105(c)(1) of the Act.

ORDER

Sandy Fork Mining Company, Inc. discharged Complainant John A. Gilbert on August 7, 1985, in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977. Accordingly the appropriate parties hereto are directed to attempt to reach stipulations regarding the criteria for assessing civil penalties under section 110(i) of the Act and damages and costs including attorneys fees, within 20 days of the date of this decision. If the appropriate parties are unable to reach stipulations as to these issues, hearings will be held on the remaining issues on December 11, 1990 at 11:30 a.m. in London, Kentucky. The courtroom in which the hearings will be held will be designated at a later date. This is not a final decision in these cases and no final decision will be issued until such time as all issues relating to civil penalties costs and damages are resolved.

Gary Melick
Administrative Law Judge