

CCASE:  
THOMAS J. MCINTOSH v. FLAGET FUELS  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
2 Skyline, 10th Floor  
5203 Leesburg Pike  
Falls Church, Virginia 22041

THOMAS J. MCINTOSH,  
COMPLAINANT

v.

FLAGET FUELS, INC.,  
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 90-113-D  
MSHA Case No. BARB CD 90-06

No. 1 Surface Mine

DECISION

Appearances: Tony Opegard, Esq., Appalachian Research &  
Defense Fund of Kentucky, Inc., Lexington,  
Kentucky, for the Complainant.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3). The complainant filed his initial complaint with the Mine Safety and Health Administration (MSHA), and after completion of an investigation of the complaint, MSHA advised the complainant by letter dated January 26, 1990, and received by the complainant on February 1, 1990, that the information received during the investigation did not establish any violation of section 105(c) of the Act. Thereafter, the complainant filed a complaint with the Commission.

The respondent filed a timely answer denying any discriminatory discharge, and after denial of its motion to dismiss on the ground that the complaint was untimely filed, the case was docketed for hearing in Hazard, Kentucky, on August 20, 1990. The respondent's subsequent motion for a continuance was granted, and the case was redocketed for hearing on November 27, 1990. The respondent's counsel withdrew from the case, and the scheduled hearing was again continued on motion by the complainant, and the case was subsequently heard in Hazard, Kentucky, on March 14, 1991. The complainant appeared, but the respondent did not, and the hearing proceeded in its absence. The postal

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service certified mailing receipts reflect that the respondent has received all notices and amended notices of hearing issued in this matter, but it has filed no explanation for its failure to appear at the hearing or to otherwise defend the complaint.

The complainant alleges that he was discharged by the respondent from his employment as a bulldozer operator on or about December 8, 1989, because of his refusal to operate a bulldozer he reasonably and in good faith believed to be unsafe and because he had voiced safety complaints about said bulldozer to the respondent's vice-president.

#### Issues

The issues in this case include the following: (1) whether the complainant was engaged in protected activity when he complained about the bulldozer in question and refused to operate it because he believed it was unsafe; (2) whether his work refusal was reasonable; and (3) whether he timely communicated his safety complaints to mine management or to the respondent.  
Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. 2700.1, et seq.

#### Complainant's Testimony and Evidence

Thomas J. McIntosh, the complainant in this case, testified that he had worked for the respondent for 1 year and 4 months before he was discharged on December 8, 1989, for "for refusing to run an unsafe dozer." At the time of his discharge he was working at the respondent's Kentec stripping operation which is located in Perry County, and he was employed as a bulldozer operator doing reclamation work at the site. He worked the day shift from 7:00 a.m. to 5:00 p.m., and he explained the work that he was performing with the Caterpillar DSL bulldozer (Tr. 13-16).

Mr. McIntosh confirmed that he worked at the Kentec location for 5 months prior to his discharge and that he operated the bulldozer the entire time. Mr. McIntosh stated that when he was initially assigned the bulldozer he learned that it had a bad oil leak and he needed to check the transmission oil level closely because the machine "would fly out of gear with you" (Tr. 17). He explained the operation of the transmission, and he stated

that when the machine was operated on a steep grade, the transmission oil would either go to the rear or the front and the transmission "starts sucking air and it will fly out of neutral" (Tr. 18). When this occurred, he had no control over the machine because the loss of oil pressure results in "freewheeling," and if he were in first gear going up a slope and the transmission slips out of gear, the machine "just automatically goes backward with you" and "could very easily jar you off of it" because it was an open-cab dozer (Tr. 20). Since the oil pressure brakes work in tandem with the transmission, "you can mash them as hard as you want to and it won't slow down until you get off of the slope or level out" (Tr. 21).

Mr. McIntosh stated that he experienced a problem with the bulldozer flying out of gear during the entire 5 months he was at the Kentec site, and since there were other employees always working around him, he believed that the condition of the bulldozer posed a danger to himself and other employees (Tr. 21). He confirmed that he complained about the condition of the dozer four times to his foreman Randall Smith, and asked him to repair it. Mr. Smith would tell him that he "would get to it as soon as he could," but that the problem was never repaired. However, he and the mechanic Lewis Baker attempted to find the oil leaks, and repaired one or two of them, but the major leak was never repaired and he had to overfill the transmission oil while working on a steep grade (Tr. 23).

Mr. McIntosh stated that the last day he worked at the site was on December 1, 1989, when he was operating the dozer doing reclaiming work. He was pushing a load of dirt up a deep slope and when he was approximately 20 feet from the top of the slope, the machine "hung up in gear on me and sat there and just jumped right straight up and down and dug two big trenches there" (Tr. 24). He tried to put the gear shift in neutral by hitting it with his foot because the transmission was stuck in forward gear, and it went into reverse and he "went about 175 or 180 feet, flying" in a backward direction down the slope and was not in control of the machine (Tr. 25). After the machine leveled out at the bottom of the slope he was able to stop it with both feet on the brake pedals (Tr. 26).

Mr. McIntosh stated that the incident scared him and after telling Mr. Baker what had happened they began working on the problem for approximately an hour and a half. In order to get the shifting lever out of neutral they had to bend it and cut a piece out of the shifting housing. This temporary repair was done so that he could finish his work that day, and until the machine could be fixed properly. He confirmed that Mr. Baker found the problem, and that four bushings were needed to hold the gear shifting lever straight so that it would not wobble. After continuing to work on a smaller slope area, the transmission started sticking and hanging in gear again, and he could not stop

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the machine again as it proceeded down the slope, and he again believed that he and everyone around him were in danger (Tr. 30-32). He confirmed that the machine weighs 32 tons, and is 26 or 27 feet long with a blade 18 feet wide and 5 feet high. There were generally four or five people working near him sowing seeds and doing other work. However, these people were not behind his machine because he warned them to stay out from behind him because he did not know when the machine would fly out of gear (Tr. 34-35).

Mr. McIntosh stated that after regaining control of the dozer after the second incident on December 1, at the Kentec site, he trammed it to the level service area and parked it and shut it down because it was unsafe. Mr. Baker had left the site earlier to go to another job, and there were no other mechanics at the site. After he parked the machine, production superintendent Tim Fugate and reclamation engineer Glen Blevins arrived, and he told Mr. Fugate about the problem with the dozer. Mr. Fugate told him to "use your judgment. You know the machine, what is safe and what is not" and told him to get together with the mechanic to find out the problem and that he (Fugate) would order any parts that were needed to repair the machine. Mr. McIntosh told Mr. Fugate that Mr. Baker already knew about the machine gear problem, but that he would tell him to buy the parts. Mr. McIntosh subsequently told one of the laborers who was going to the other site where Mr. Baker was working about what Mr. Fugate had told him (Tr. 38).

Mr. McIntosh stated that his next scheduled day of work was Monday, December 4, 1989. He called in and spoke with "parts man" Fitz Steele, and asked him whether the dozer had been repaired. Mr. Steele informed him that parts were on order but that the machine had not been repaired. Mr. McIntosh did not work that day, and called in again on Tuesday, December 5, and was again informed by Mr. Steele that the dozer had not been repaired. Mr. McIntosh did not work that day either, and he confirmed that he received no pay for both days because he is only paid when he works. He confirmed that he would have gone to work if the dozer had been repaired (Tr. 38-39).

Mr. McIntosh stated that he next reported for work on Wednesday, December 6, and he arrived 5 or 10 minutes before 7:00 a.m., to find out if the dozer had been repaired. He spoke to his foreman Randall Smith and explained his prior problems and incidents with the machine. Mr. Smith asked him if he was going to operate the dozer that day and Mr. McIntosh informed Mr. Smith that he would run it when it was repaired. Mr. Smith explained to him that Mr. Baker would be at another job all day and that there were no other mechanics at the Kentec site. Mr. McIntosh then left the site and went home, and he confirmed that he would have worked if the dozer had been repaired.

Mr. McIntosh stated that he next reported for work on Thursday morning, December 7, and spoke with Mr. Smith again. Mr. Smith confirmed that the dozer had not been repaired, and Mr. McIntosh again informed him that he would run it when it was repaired. Mr. Smith then told Mr. McIntosh that "he wasn't going to pay me to sit in my truck while someone else done my job" (Tr. 43). Mr. McIntosh confirmed that he did not know whether anyone else operated the dozer during the days it was out of repair and he did not stay at the site to find out (Tr. 43-43)

Mr. McIntosh stated that after speaking with Mr. Smith on December 7, he left the site and went to the respondent's office in Hazard and spoke with company vice-president Glen Phillips. He confirmed that he told Mr. Phillips about the problems with the dozer and the prior incidents with the machine on the slopes. Mr. McIntosh confirmed that this was the first time he spoke with Mr. Phillips and that Mr. Phillips told him that he was not aware of the problem with the dozer but would check into it (Tr. 46-47).

Mr. McIntosh stated that he next reported for work on Friday, December 8, and since there was an ice storm that day, he and foreman Smith were the only ones at work because they had four-wheel drive vehicles. Mr. Smith pulled his vehicle next to Mr. McIntosh's and stated "You went and talked to Glen Phillips, haven't you?" Mr. McIntosh confirmed to Mr. Smith that he had spoken with Mr. Phillips. Mr. McIntosh stated that Mr. Smith's "face turned real red and he got mad there," and when he asked Mr. Smith whether he was going to repair the dozer, Mr. Smith replied "no, and furthermore, you no longer have a job here" (Tr. 47). Mr. McIntosh then left the site and again went to Hazard to speak with Mr. Phillips. Mr. Phillips acknowledged that he knew that Mr. McIntosh had been fired by Mr. Smith, but informed him that he had to back up his foreman, and since he was told that he (McIntosh) was a good worker, he (Phillips) would give him a good recommendation (Tr. 48).

Mr. McIntosh stated that prior to his discharge by Mr. Smith, he had never had any disciplinary problems with the respondent, and had never been disciplined or warned about his job performance. He confirmed that he got along fine with Mr. Smith and the rest of the foremen, always did his work assignments, and never refused to perform any assignment prior to December 1, when he parked the dozer (Tr. 48). Mr. McIntosh confirmed that Mr. Smith alone fired him, and that Mr. Phillips simply told him that he would have to back Mr. Smith up and he said nothing to him about what Mr. Smith may have told him about why he fired him (Tr. 49-50). Mr. McIntosh also confirmed that during his conversations with Mr. Smith during December 6 through 8, Mr. Smith never told him that he would repair the dozer or that the machine had been checked out and was safe to operate (Tr. 50). Mr. McIntosh further confirmed that the only reason

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for his refusal to operate the dozer was the fact that it was flying out of gear and sticking in gear (Tr. 51).

Mr. McIntosh confirmed that he earned \$8 an hour straight time, and time-and-a-half, or \$12 an hour, for overtime which he earned on occasions. He stated that it took him about a month to find another job, made a diligent effort to find work after his discharge, and he identified several coal companies where he tried to find work. He worked for Vires Coal Company, but left after he was called back to Arch Minerals where he worked from August until October 26, 1990, when he was laid off again (Tr. 52-53). Mr. McIntosh confirmed that he had no reason to believe that Mr. Phillips did not give him a good work recommendation, and that he (McIntosh) did not tell other potential employers that he had been fired, and Mr. Phillips did nothing to prevent him from getting work. Mr. McIntosh confirmed that he was out of work for a month or so subsequent to his discharge, and has been out of work and drawing unemployment since October 26, 1990 (Tr. 55). He confirmed that the respondent's operation was non-union, and that he had no medical insurance, leave, or other benefits, other than his pay check (Tr. 58).

Mr. McIntosh confirmed that he had trouble with the dozer during the 5-month period prior to his discharge, and that the conditions worsened during the week before he was fired. He also confirmed that he had not refused to operate the dozer earlier because "they probably would have fired me. And I had to keep on working. I have got a family to support" (Tr. 58). He did not know if Mr. Smith would have fired him if he had not spoken to Mr. Phillips (Tr. 59). He confirmed that Mr. Smith never said anything to him about calling in on Monday and Tuesday, December 4, and 5, rather than reporting for work (Tr. 60). Mr. McIntosh believed that one of the reasons Mr. Smith fired him was because he complained to Mr. Phillips about the dozer, and his conclusion in this regard is based on the fact that Mr. Smith "turned as red as pickled beet," and "got real mad and real nervous and started jerking around" when he confirmed that he had spoken to Mr. Phillips (Tr. 61). Mr. McIntosh confirmed that other than his complaints to mine management, he did not report the dozer condition to any MSHA or state inspectors (Tr. 61).

Lewis Baker, testified that he was formerly employed by the respondent as a mechanic for 2 years until approximately June, 1990, when he was laid off. He worked at the respondent's Brown's Fork and Kentec sites, and worked with Mr. McIntosh at the Kentec job doing reclamation work. He confirmed that Mr. McIntosh was having problems with the dozer that he was operating and told him that it was "hanging in gear." Mr. Baker further confirmed that the gear shifter bushings on top of the transmission were worn out and that he had to adjust the linkage and bend the shifter because it was sticking when the gears were worked. He stated that part of the shifting housing of the

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dashboard had to be cut out to allow the shifter to go forward into neutral gear. The dozer operator has to be able to put the machine in neutral, and if he cannot "it will go over a cliff with you. You can back over a highwall or anything with it" (Tr. 67).

Mr. Baker stated that prior to the time that he and Mr. McIntosh worked on repairing the dozer, it had been leaking oil for over a month and that "when it leaks down so low and get on a slope or anything, your transmission won't pick it up. Your pump won't pump. It goes just like it is out of gear and you ain't got no brakes" (Tr. 68). He confirmed that the repairs that he and Mr. McIntosh made to the dozer were temporary repairs and that he needed bushings to take the slack out of the transmission linkage so that it could be adjusted. He confirmed that the required bushings were ordered by Fitz Steel (Tr. 70).

Mr. Baker stated that the day that he and Mr. McIntosh repaired the dozer at the Kentec site was his last day of work at that location because he was called to the Brown's Fort site to do mechanic work after people were laid off there. He returned to the Kentec site for one day a month later after Mr. McIntosh was fired to pull the transmission out of the dozer that Mr. McIntosh had problems with and it was sent to Western Branch Diesel to be rebuilt. Mr. Baker confirmed that he never received or installed the bushings which had been ordered for the dozer in question (Tr. 71-72).

Mr. Baker confirmed his "hearsay" understanding that Mr. McIntosh was fired for refusing to operate the dozer because it was hanging in gear, and that Mr. Smith informed him that he fired Mr. McIntosh for refusing to run the dozer, and that Mr. McIntosh had told him that it was unsafe to run. Mr. Baker believed that the dozer was unsafe to run and he stated that he would not have operated it in the condition that it was in (Tr. 75).

Fitz Steele, a witness subpoenaed but not called to testify by the complainant, was called as a witness by the presiding judge. Mr. Steele stated that he was formerly employed by the respondent at the Brown's Fork site, and that he did not work with Mr. McIntosh at the Kentec site. Mr. Steele stated that he was the "parts man" responsible for taking equipment orders from the mechanics who worked at both sites and ordering the parts. He "guessed" that he had ordered parts for the dozer operated by Mr. McIntosh at the Kentec site in December, 1989, and he confirmed that he gave a copy of an order for parts to the MSHA investigator who investigated Mr. McIntosh's complaint (Tr. 77-79, exhibit C-A).

Mr. Steele confirmed that there was only one D8 dozer at the Kentec site, and he believed that the "Roller A" part shown on



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the order invoice dated December 11, 1989, was for that dozer. Mr. Steele could not specifically remember whether or not Mr. McIntosh ever complained to him about the dozer, but he recalled "something about a linkage, something like I had ordered because it was something that goes on top of the transmission, about shifting, something like that" (Tr. 80). Mr. Steele also stated that while he was not sure, Mr. McIntosh "come over and said that he had told Randall that Randall needed to get the parts but now, I hadn't heard about it" (Tr. 80).

Mr. Steele stated that when he previously worked at the Kentec site sometime in 1988 or 1989, he saw the dozer in question every day and commented "I hated that dozer. I hated all of their equipment, to tell you the truth" (Tr. 81). He confirmed that he had never operated the dozer, but could tell its condition by looking at it.

#### Complainant's Arguments

The complainant's counsel waived the filing of any posthearing brief and was allowed an opportunity to make an oral closing argument at the conclusion of the hearing (Tr. 85-87). Counsel argued that the uncontradicted evidence in this case establishes that the complainant had a problem with the bulldozer flying out of gear for several months prior to December 1, 1989, when it began sticking in gear and creating a safety hazard because of the inability of the complainant to control the machine. As a result of this problem, the complainant slid backwards down two slopes. Although the mechanic (Lewis Baker), made some temporary repairs on December 1, the problem reoccurred later in the day, and it became necessary for the complainant to park the machine.

Complainant's counsel pointed out that December 1, was the last day that the complainant worked, and that the testimony of the mechanic establishes that no repairs were made to the bulldozer during the week preceding the complainant's discharge on December 8, 1989. Counsel concludes that the complainant had a reasonable, good faith belief for parking the dozer on December 1, and that the belief remained reasonable and in good faith during the following week because the complainant was never told that any repairs had been done, nor did he assume that any repairs had been made to the machine. As further evidence of the complainant's good faith and reasonableness, counsel cites the fact that the complainant travelled 25 miles to Hazard to complain to company vice-president Phillips that the dozer had not been repaired and that he wanted it repaired, and that Mr. Phillips advised him that he would look into the problem.

Counsel asserted that when the complainant reported for work on December 8, the first thing that was brought up by foreman Smith in an angry tone of voice was the fact that the complainant had spoken with vice-president Phillips. Counsel concludes that

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Mr. Smith was upset that the complainant had gone over his head and that this was part of the reason why he discharged the complainant that day. Counsel points out that at no time during December 6, through 8, did Mr. Smith ever indicate that the dozer was safe to operate, that any repairs had been made, or that it was in any different condition other than what the complainant had left it a week earlier. Counsel argued that it is clear from the case law that when a miner makes a good faith, reasonable safety complaint, the mine operator has a corresponding duty to address the complaint. In the instant case, counsel concludes that the respondent failed to address the complainant's safety complaint and that foreman Smith discharged the complainant for his work refusal and for complaining to Mr. Phillips, and that this action was in violation of section 105(c) of the Act.

#### Findings and Conclusions

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 (1) 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, \_\_\_ U.S. \_\_\_, 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.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent.

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Secretary on behalf of Chacon v. Phelps Dodge corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). As the Eight Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

It would indeed be the unusual case in which the link between the discharge and the [protected] activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

Mr. McIntosh's Protected Activity

It is clear that Mr. McIntosh had a right to make safety complaints about any equipment which he believed presented a safety hazard, and that under the Act, these complaints are protected activities which may not be the motivation by mine management for any adverse personnel action against him; Secretary of Labor ex rel. Pasula v. Consolidation Coal Co.,

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2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a section foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. The miner's safety complaints must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

A miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that his continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984); aff'd sub nom. Brock v. Metric Constructors Inc., 766 F.2d 469, 472-73 (11th Cir. 1985). However, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that hazardous conditions exists. In a number of safety related "work refusal" cases, it has been consistently held that a miner has a duty and obligation to communicate his safety concerns to mine management in order to afford the operator with a reasonable opportunity to address them. See: Secretary ex rel. Paul Sedgmer et al. v. Consolidation Coal Company, 8 FMSHRC 303 (March 1986); Simpson v. Kenta Energy, Inc. & Roy Dan Jackson, 8 FMSHRC 1034, 1038-40 (July 1986); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 9 FMSHRC 992 (June 1987); Miller v. FMSHRC, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984); Charles Conatser v. Red Flame Coal Company, Inc., 11 FMSHRC 12 (January 1989), review dismissed Per Curiam by agreement of the parties, July 12, 1989, U.S. Court of Appeals for the District of Columbia Circuit, No. 89-1097).

In Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'd Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987), it was held that a violation of section 105(c) is established when a miner has a reasonable, good faith belief that certain work conditions are hazardous, communicates that belief to mine management, and management does not address his safety concerns in a manner sufficient to reasonably quell his fears.

As indicated earlier, the respondent received the notice of the hearing by certified mail, but failed to appear at the

hearing to defend the complaint, and no one purporting to represent the respondent appeared at the hearing. Although three individuals who identified themselves as employees of the respondent appeared at the hearing (Tim Fugate, Glen Blevins, and Randall Smith), it was not clear who instructed them to appear, and none of these individuals purported to represent the respondent in this matter. Further, they entered no appearances in any representative capacity for the respondent, and they were not called to testify in this matter. In view of the respondent's failure to appear, or to otherwise inform me that it did not intend to appear, the hearing proceeded in its absence, and the complainant put on its case. Under the circumstances, I conclude and find that the respondent has waived its right to be heard further in this matter and I have rendered my decision on the basis of the testimony and evidence adduced by the complainant in support of his case.

The credible testimony of the complainant McIntosh, corroborated by mechanic Baker, establishes that the bulldozer operated by Mr. McIntosh on December 1, 1989, had a mechanical problem and was in need of repair in order to render it safe to operate. The evidence clearly establishes that the transmission and gear system problems attested to by Mr. McIntosh resulted in the machine moving unexpectedly backwards and out of control while Mr. McIntosh was operating the machine on a slope. Mr. McIntosh and Mr. Baker made some temporary repairs to the machine so that Mr. McIntosh could complete his work. However, after putting the machine back into operation, the problem reoccurred, and the machine again moved backwards down the slope and out of control. Mr. McIntosh then concluded that the machine was unsafe to operate and that to continue to operate it under the condition that it was in would place him and other employees who were working near the machine at risk. Mr. McIntosh then stopped work, trammed the machine to a level area, and shut it down and parked it. Under all of these circumstances, I conclude and find that Mr. McIntosh had a reasonable good faith belief that to continue to operate the bulldozer under the condition that it was in on December 1, 1989, ("flying out of gear" and the transmission "sticking and hanging in gear") would expose him and other miners working around him to dangerous safety hazards and injuries if he (McIntosh) were propelled out of the machine or if the machine struck anyone while it was out of control.

The credible testimony of Mr. McIntosh further establishes that on Monday, December 4, 1989, his next scheduled work day, and again on Tuesday, December 5, 1989, Mr. McIntosh telephoned the mine to inquire as to whether or not the bulldozer in question had been repaired. After he was informed that parts were on order, but that the dozer had not been repaired, Mr. McIntosh did not report for work on either day. Had the dozer been repaired, Mr. McIntosh would have reported for work. However, since he was informed that it had not been repaired, I find that it was not

unreasonable for Mr. McIntosh to conclude that the machine was in the same unsafe condition as it was when he shut it down and parked it the previous Friday, December 1, 1989. Under the circumstances, I conclude and find that Mr. McIntosh's refusal to report for work on these 2 days to operate the dozer was reasonable, and that his decision in this regard was prompted by his safety concerns and a reasonable good faith belief that to operate the dozer before repairs were made would place him at risk and expose him to possible injury.

The credible testimony of Mr. McIntosh further establishes that he reported for work on Wednesday, and Thursday, December 6, and 7, 1989, and spoke with his foreman Randall Smith. Mr. McIntosh explained his prior problems with the dozer to Mr. Smith, and after learning that the dozer had not been repaired, Mr. McIntosh informed Mr. Smith that he would not operate the machine until it was repaired, and Mr. McIntosh did not work either day, but he was ready to work if the machine had been repaired. Under the circumstances, I conclude and find that Mr. McIntosh's continued refusal to operate the dozer in question until it was repaired and rendered safe was reasonable and that his decision in this regard was based on a reasonable good faith belief that to operate the machine before it was repaired would place him at risk. I further conclude and find that Mr. McIntosh's refusal to operate the dozer during the period December 4, through December 7, 1989, until it was repaired, and his decision to shut down and park the dozer on December 1, 1989, constituted protected work refusals pursuant to the Act.

Mr. McIntosh's credible and uncontroverted testimony further establishes that he timely communicated his safety complaint or safety concern with respect to the unsafe condition of the dozer in question to mine management prior to his discharge by foreman Smith on Friday, December 8, 1989. Mr. McIntosh's initial complaints concerned a leaky transmission condition which resulted in a loss of oil and oil pressure, causing the transmission "to fly out of gear," and which resulted in a "free-wheeling" of the machine. This was communicated to foreman Smith at least a month or more prior to December 1, 1989, and although Mr. Smith assured Mr. McIntosh that the problem would be addressed, the machine was never repaired. Mr. McIntosh's subsequent complaints about the condition of the dozer were communicated to production superintendent Fugate and reclamation engineer Blevins on December 1, 1989, after Mr. McIntosh shut down and parked the machine, and again on December 6, and 7, 1989, when he went to the work site and informed foreman Smith about the condition of the dozer and advised him that he would not operate the machine until the repairs were made. Mr. McIntosh's further safety complaint communication to mine management was made on December 7, 1989, when he visited the respondent's office and informed vice-president Phillips about the condition of the dozer.

There is no evidence that Mr. McIntosh was ever offered other work in lieu of operating the dozer in question, and his uncontroverted testimony establishes that he was always ready, willing, and able to work and operate the machine if it had been repaired. Further, Mr. McIntosh's credible and uncontroverted testimony establishes that at no time during their conversations on December 6, through 8, 1989, did Mr. Smith ever indicate to Mr. McIntosh that he would repair the dozer or that it had been checked out and found safe to operate. Although there is some evidence that the dozer gear bushings may have been ordered, mechanic Baker confirmed that the parts were never received or installed. Although Mr. Baker confirmed that he and Mr. McIntosh had made some temporary repairs to the dozer on December 1, 1989, before the machine was shut down and parked, he confirmed that no permanent repairs were ever made to the machine and that the transmission was subsequently removed for rebuilding after Mr. McIntosh was discharged. Mr. Baker also believed that the unrepaired dozer was unsafe to operate and he confirmed that he would not have operated it in the condition that it was in.

Under all of the aforesaid circumstances, I conclude and find that Mr. McIntosh's safety complaint and concern with respect to the hazardous condition of the dozer which he was expected to operate was timely communicated to mine management and that management had a reasonable opportunity to address his safety concerns and timely repair the dozer. I further conclude and find that Mr. McIntosh's safety communications met the requirements enunciated by the Commission in *Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126 (February 1982), *Secretary on behalf of John Cooley v. Ottawa Silica Company*, 6 FMSHRC 516 (March 1984); and *Gilbert v. Sandy Fork Mining Company*, supra.

Based on the credible and uncontroverted testimony of Mr. McIntosh, I conclude and find that Mr. Smith discharged him on December 8, 1989, in part because of his refusal or failure to operate the dozer in question. I further conclude and find that there is a strong unrebutted inference, based on Mr. McIntosh's credible testimony concerning Mr. Smith's demeanor and agitated state at the time he discharged him, that Mr. Smith also decided to discharge Mr. McIntosh because he had spoken to company vice-president Phillips and complained to him about the dozer. Inasmuch as Mr. McIntosh had a protected right under the Act to refuse to operate the dozer under the circumstances which prevailed at the time of the discharge, and since he also had a further protected right to complain to Mr. Phillips about the unsafe condition of the dozer, I further conclude and find that Mr. McIntosh's discharge was illegal and in violation of section 105(c) of the Act. Accordingly, his discrimination complaint IS SUSTAINED.

ORDER

1. Respondent IS ORDERED to reinstate Mr. McIntosh to his former position with full backpay and benefits, with interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.

2. Respondent IS ORDERED to expunge from Mr. McIntosh's personnel file and/or any company records any reference to his discharge of December 8, 1989.

3. Respondent IS ORDERED to reimburse Mr. McIntosh for all reasonable expenses incurred by him in the institution and prosecution of his discrimination complaint, including reasonable attorney fees.

At the close of the hearing in this matter on March 14, 1991, the complainant was afforded an opportunity to file his request for relief and his counsel stated that he would file a statement of back pay and attorney fee petition within thirty (30) days (Tr. 93). As of this date, no such filing has been forthcoming. Under the circumstances, I retain jurisdiction in this matter until the remedies due the complainant are finalized. Until these determinations are made, and pending a finalized dispositive order by the undersigned presiding judge, my decision in this matter is not final. Counsel for the complainant IS ORDERED to file his relief petition immediately upon receipt of this decision.

George A. Koutras  
Administrative Law Judge