CCASE:
BRADLEY S. CRAIG v. ARCH OF ILLINOIS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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5203 Leesburg Pike
Falls Church, Virginia 22041

BRADLEY S. CRAIG, COMPLAINANT
v.
ARCH OF ILLINOIS, INC., RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. LAKE 91-38-D

Captain Mine

DECISION

Appearances: Bradley S. Craig, pro se, DuQuoin, Illinois, for Complainant;
David S. Hemenway, Esq., Thompson & Mitchell, St. Louis, Missouri, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant Craig contends that he was constructively discharged from his job as a utility machine fill-in (UMFI) worker by Respondent Arch, because of activity protected under the Mine Act. Respondent contends that Craig voluntarily terminated his employment and that his termination was unrelated to any protected activity. Both parties engaged in pretrial discovery. Pursuant to notice, the case was called for hearing in St. Louis, Missouri, on March 26, 1991. Bradley Craig testified on his own behalf and Brenda Craig and Bobby Gene Craig testified on his behalf. At the conclusion of Complainant's case, Respondent made a motion to dismiss which I denied on the record. Respondent called Gregory Bigham, Benny R. McElvain, Allan Schulz, and Hubert Place as witnesses. Both parties have filed Post Hearing Briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

I

At all times pertinent to this proceeding, Respondent Arch of Illinois (Arch) was the owner and operator of the Captain Mine, a surface mine located in the State of Illinois. Complainant was employed by Arch from July 1976 to October 18, 1990 as a miner. The Captain Mine produces approximately 6 million tons of coal a year from two pits. The pit in which

Craig worked was about 5600 feet long, with a highwall of between 20 and 40 feet. The coal bench is about 90 feet wide and the dragline bench from about 110 feet to 140 feet wide below the first coal seam.

Craig was hired in July 1976 as a drill helper. He received orientation and on the job training. He continued as a drill helper until November 12, 1976, when he became a driller. He continued as a driller until June 2, 1979, when he bid for a job on railroad maintenance. He remained on that job until April 1980. From April 3, 1980 to November 17, 1982, he worked as a belt wagon operator. From November 17, 1982 to August 22, 1987, he went back on railroad maintenance. Thereafter he was a belt repairman until January 12, 1988. He then returned to railroad maintenance work until April 18, 1988, when the job was eliminated. He then became an UMFI worker until October 18, 1990.

II

An UMFI employee may be assigned to different jobs on different days - wherever they are needed. One of the jobs an UMFI may be required to perform is that of a pumper. A pumper is required to set and take out pumps and to monitor the pumps which are set. He hooks the hoses and the electric cable to the pump which is set in the area where the water is to be pumped out. The job requires physical exertion, but very little skill. On January 12, 1989, Arch sent a memorandum to all classified employees setting forth the criteria for job testing. The job of pumper lists the experience required as "experience in pumping." (R. Ex. 4). On March 20, 1989, it sent out another memorandum entitled "Changes in Experience Requirement." It listed the different jobs at the Captain Mine including the job of pumper which it states requires 1 month pumping experience. (Comp. Ex. 3).

Craig had been assigned to the pumper job between 6 and 12 times beginning in August 1989. On August 21, 1989, he was assigned to a pumper's job and received new task training as a pumper from Pit Foreman Allan F. Schulz. Craig signed MSHA Certificate of Training form that he had completed the new task training. (R. Ex. 3). Thereafter he was assigned to pumper duties on September 13, 1989, February 27, 1990, May 17, 1990, August 24 and 25, 1990, October 16, 17, and 18, 1990. (R. Ex. 5). Before October 1990, he never set up a pump completely by himself, nor did he ever take one out. He did however work with others in setting up and taking out pumps. He was never classified as a pumper.

On October 16, 1990, he was assigned as a pumper and was task-trained for the job by Pit Foreman Benny McElvain. McElvain testified that it was his practice to task-train any employee

assigned to a new job if he is unsure of the employee's experience. He showed him how to hook the hose to the pump truck, and to attach the hoses and cable to the pump. He completed a certificate of training on an MSHA Form, which Craig signed attesting that he had completed the training. (R. Ex. 2).

III

On October 17, 1990, Craig and another UMFI employee, Olan Thompson, were assigned to pumping duties in the 2750 pit of the Captain Mine. Allan Schulz was the foreman. It was raining heavily, and Craig and Thompson were directed to set a pump. Craig testified the Thompson actually set the pump, hooked it up and started it. Craig helped drag the hoses and lines. He also testified that he had to go under the swing of the dragline to get to the pump, but he "didn't squawk safety that night, I just wanted to get the job done, get the hell out of there, and get up to the top and get on some clean clothes because I was drenched to the bone." (R. 20). Setting the pump took from 30 minutes to an hour.

When Craig arrived at the mine on October 18, he was told by Pit Foreman Benny McElvain that he was to be the pumper on his shift. Craig testified that two pumps were set in the sump and McElvain told his to hook the hoses and electric cables to them. He also testified that the pumps were down a "real steep bank . . . and one of them was setting at a real awkward angle." (R. 33). Before Craig and McElvain left for the worksite, Craig told McElvain that he "could be hurt down here," (R. 145), referring to the pumper's job.

McElvain testified and I find as a fact that the hoses were already attached to the pump, but had been taken apart at the "parting" in order to load out the coal. Craig's assigned task was to splice the ends of the hoses together and plug the cable into the pumps. Craig told McElvain that he was not qualified to be the pumper and asked for another job. McElvain told him that he didn't have anyone else to do the job and that Craig would have to do it. Craig asked for help and McElvain sent Joe Summers, a heavy equipment operator who helped him drag the cable and hoses to where they were to be hooked up, but Summers did not offer to help Craig hook up the cable and hoses. Craig again asked McElvain for a different job and McElvain again refused. There is no evidence that Craig made specific safety complaints to McElvain at that time. He merely reiterated that he disliked and did not have the skill to perform the pumper's job.

After further discussion, McElvain took Craig in his truck to the Shift Superintendent Steve Bigham. Craig told Bigham that he didn't like to pump and asked for another job. Bigham told him that he was the only person available and capable of pumping at the time and that he would have to perform the duties of a

pumper. Craig also told Bigham that the pumping job was not safe. After further discussion, Bigham asked Craig if he wanted a union representative or safety committeeman to come to the area. Craig, who testified that he was under great mental stress at the time, rejected the offer because he "just wanted out of there." (R. 44). Bigham then gave Craig a direct order to perform the job of pumper or be suspended with intent to discharge. When Craig again raised a safety issue, Bigham again asked if he wanted a safety committeeman or pit committeeman. Craig again said no. Craig than said he wanted to sign a quit slip. McElvain took him to the office where he signed a separation form in which he checked the type of separation as elective layoff. (R. Ex. 1). The fact that Craig signed a voluntary separation from does not establish that he was not the recipient of adverse action: in fact he was terminated for refusing to perform certain work, and whether the termination took the form of a quit slip or suspension with intent to discharge is irrelevant under the Mine Act. Before signing the separation form, Craig asked for an union representation. Bigham refused because he "saw no need after twice before refusing a safety committeeman and a pit committeeman to have any other representation there." (R. 124). Craig testified that he assumed when he signed the separation form as an elective layoff, he would be entitled to unemployment benefits and continuation of medical insurance for 1 year.

The weight of the evidence establishes and I find as a fact that Craig's work refusal was based on his dislike for the pumper's duties, and his belief that he was unable to perform them. His reference to alleged unsafe aspects of the job was not a significant factor in his refusal to perform the duties assigned him.

Following his separation, Craig was very distraught and depressed. He was seen at the Perry County Counseling Center because of "his emotional reaction to losing his job." He exhibited symptoms of depression. (Comp. Ex. 1). He consulted the Union President after his separation, but was told that since he signed the quit slip, there was nothing the union could do.

IV

Beginning in January 1988, Complainant Craig was enrolled in a program at the Logan College/Wabash Valley College in Carterville, Illinois, for an associate degree in coal mine technology. Arch paid his tuition. By October 1990, Craig had completed 61 hours of a required 70 hours. He was given credit by the college for his annual retraining at the mine.

Complainant has not worked since his separation from Arch. He attempted to find employment and filed applications with a large number of prospective employers between October 23, 1990 and January 16, 1991.

ISSUES

1. Whether Complainant was constructively discharged or otherwise discriminated against because of activity protected under the Mine Act?

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

CONCLUSIONS OF LAW

I

Respondent Arch is subject to the provisions of the Mine Act in the operation of the Captain Mine. Complainant Craig was employed by Arch as a miner, and is protected under Section 105(c) of the Act. I have jurisdiction over the parties and subject matter of this proceeding.

II

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 (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 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. Refusal to perform hazardous work can be protected activity under the Mine Act.

Generally, 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 (1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982).

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 (1983); Secretary ex rel. Pratt v. River Hurricane Coal Co. 5 FMSHRC 1529, (1983); Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982); Robinette, supra. The Commission has also explained that "[g]ood faith belief simply means honest belief that a hazard exists." Robinette, supra, at 810.

III

Although the Commission has declined to articulate a standard as to how severe a hazard must be to trigger a miner's right to refuse to work, see Secretary/Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983)), it is clear that the refusal to work must involve a hazard beyond the hazards inherent in the mining industry or the job itself. Simmons v. SOCCO, 4 FMSHRC 1584 (1982); Runyon v. Big Hill Coal Co., 8 FMSHRC 1441 (1986).

IV

The evidence in the present case establishes that complainant refused to perform the work of a pumper. He was told that if he continued to refuse to perform the work, he would be discharged. Rather than accept a discharge which he believed would "mess up" his "good record over the past fourteen years," he signed the "quit slip." (R. 46-47). A miner who resigns because of intolerable conditions may be found to have been constructively discharged. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988). If the operator maintains conditions so intolerable that a reasonable miner would feel compelled to resign, he is constructively discharged.

What were the conditions at the Captain Mine which precipitated Craig's resignation? First and foremost, Craig disliked the job of pumper and felt that he was not capable of performing its duties. Secondly and more by way of a post-discharge rationale, he complained of a steep slope going down to the pumps, rocky, wet ground, and the dangers of a fall of ground from the highwall. These conditions are not hazards beyond those

inherent in the job itself. Complainant's distaste for the duties of the pumper, and his lack of skill and ability to perform the job are not intolerable safety hazards, or in fact hazards at all. I find, based on the testimony of McElvain and Bigham that the highwall did not pose a hazard to the pumper, nor did the slope to the pumps. From Craig's point of view, these conditions were not such as to cause a reasonable belief that they were safety hazards. I conclude that Craig's work refusal was not based on a reasonable good faith belief that the work he as asked to perform was hazardous, but rather on his long-held dislike for the pumper job, and his belief that he was unable to perform the duties of the job. His safety rationale was not made in good faith. Therefore, I conclude that Craig has failed to establish that his termination was the result of activity protected under the Mine Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the complaint of discrimination is DISMISSED.

James A. Broderick
Administrative Law Judge