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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION ON BEHALF OF PAUL H. BROOKS, Applicant	:	TEMPORARY REINSTATEMENT
	:	Docket No. WEVA 93-31-DM
	:	NE-MD 92-03
	:	Greystone Quarry and Plant
v.	:	
RONALD B. SNYDER AND R.B.S. INCORPORATED, Respondents	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Applicant:
David J. Hardy, Esq., Jackson & Kelly, Charleston, West Virginia for the Respondents.

Before: Judge Barbour

On October 28, 1992, the Secretary of Labor ("Secretary") file an application for an Order requiring Respondents Ronald B. Snyder and R.B.S. Incorporated ("R.B.S.")(Footnote 1) to reinstate Paul H. Brooks to the position that he held immediately prior to his discharge on July 30, 1992, or to a similar position at the same rate of pay, and with the same or equivalent duties. The Application was supported by the affidavit of James E. Betcher, Chief, Office of Technical Compliance and Investigation Division, Metal and Non-Metal Safety and Health Division, Mine Safety and Health Administration ("MSHA") and by a copy of the original complaint filed by Brooks with MSHA.

In a letter filed on November 9, 1992, counsel for Respondents requested a hearing on the Application. As the result of a November 10, 1992 telephone conversation involving counsels and myself, the parties agreed to November 24, 1992, as

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1Ronald Snyder is the president of R.B.S. Incorporated.

the date for the hearing. Therefore, the requested hearing was held pursuant to notice on that date in Beckley, West Virginia.(Footnote 2) As yet, the hearing is not transcripted.

Prior to counsels' opening statements and to the taking of testimony, I orally summarized the pleadings, and I stated that the issue to be resolved at the hearing was narrow - - whether Brooks' complaint was "not frivolous brought" as that term
is used in Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). I also stated my understanding of the law to be that I was not required to determine the merits of Brooks' discrimination complaint but solely to determine whether the complaint was frivolous; that is to say, whether it was clearly without merit, clearly fraudulent or clearly pretexual in nature.

THE TESTIMONY

THE APPLICANT'S WITNESSES

The Secretary, on behalf of Brooks, presented her case through the testimony of Brooks and of Larry W. Brendle, a special investigator for MSHA who investigated Brooks' discrimination complaint for the Secretary.

Brooks testified that until his discharge on July 30, 1992, he had worked as the operator of a front end loader ("loader") at the Greystone Quarry and Plant.(Footnote 3) He stated that on the morning of July 30, 1992, he was loading limestone from a muck pile into a waiting truck and that he was concerned about the condition of the highwall above him. He described the highwall as being cracked from top to toe and as being topped by overburden

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2Although Commission Procedural Rule 44(b), 29 C.F.R. 2700. 44(b), requires that a hearing be held within ten (10) days of the receipt of a request for hearing, November 24, 1992, was the earliest date available to try and to hear the Application. Therefore, compelling reasons existed to extend the time within which the hearing was conducted.

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3The facility is a limestone quarry located near White Sulphur Springs, West Virginia. The quarry is owned and operated by R.B.S. and was generally described by Snyder as being approximately "U" shaped, as having a limestone highwall topped by overburden ranging in depth from 0 feet to 80 feet and as being mined in a step-like series of three benches each of which measures approximately 70 feet in height. Witnesses for both parties essentially agreed that limestone is mined at the quarry in the following sequence: the face of the highwall is drilled and blasted, the resulting muck pile is loaded into a waiting truck by a loader and the limestone is trucked from the pit.

(including broken rock) that was soft and saturated with water. According to Brooks the overburden was unstable and some had fallen previous to July 30.

Brooks described the muck pile that he was loading as being approximately 45 feet high. In addition to the highwall, he stated that he was concerned about material coming off of the muck pile. According to Brooks, both the highwall and the muck pile were too high for him to have easy visibility of their tops from his seat in the loader's cab. Brooks stated he was concerned that if the loose, unconsolidated material fell from the highwall he would be unable to get out of the way.

Brooks further stated that he had other visibility problems in that a cab protector above the windshield of the loader also restricted his view upward.(Footnote 4)

Brooks testified that on July 28, an effort had been made to scale the loose, unconsolidated material on top of the highwall, but that he believed the result was only to loosen the overburden further and to make it more likely to come down. He described himself on July 30, as being tense and uncomfortable and unable to do his job. As a result, Brooks claimed that he drove the loader out of the pit, parked it and spoke with his foreman, John Harless.

According to Brooks, he told Harless that he did not want to return to work at the muck pile because the highwall was unsafe and the muck pile was too high for the visibility he required. He stated that he offered to do other work - - specifically, to help get the loose, unconsolidated material down from the highwall. In Brooks' version of the events, Harless told him to wait. Shortly after that, Snyder arrived.

Brooks stated that Snyder asked him what was going on? Brooks responded that the company needed to take care of the highwall, that it was unsafe and that it needed to be scaled. Brooks testified that Snyder asked him several times if he were going to go back to work at the muck pile and load the truck. Brooks indicated to Snyder that he would have to think about it. (Brooks explained that he was "thinking about his life.")

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4Brooks described the cab protector as offering protection to the windshield from falling or flying rock and as consisting of a series of metal bars extending about 5 inches from the top of the cab over the windshield and being about 3 1/2 inches thick. Snyder testified that the cab protector was not new and had been standard equipment on the loader since the first day the loader was operated at the quarry.

Brooks testified that Harless said to Snyder that while Brooks was thinking they should go into the pit and look at the situation. Brooks indicated that the two men went to where he had been working but that he did not see them look at the highwall, rather that they looked at the muck pile. Brooks stated that when they returned, Harless asked him if he had made his decision and that Brooks responded he was still thinking. He also stated that he told them he would help Harless get the loose material down from the highwall, but that until he was told what to do he would stay put.

According to Brooks, it was at this point that Snyder told him that he was fired. Brooks stated he shook hands with Snyder, told him that it had been a pleasure working for him and said that if Snyder ever needed him again to just give him a call.

Brooks testified that after he was fired he filed a discrimination complaint with MSHA, as well as a safety complaint about the hazardous nature of the area where he was working.

Brooks was persistent in maintaining that the condition of the highwall was the source of his safety concerns. He stated that if the highwall had been safe he would not have had any concerns and would have continued to work.

The Secretary then called Brendle to testify. Brendle stated that he went to the quarry on August 11, 1992, to view the area where Brooks had been working. While at the quarry, Brendle issued a Section 107(a), 30 U.S.C. 817(a), imminent danger closure order with an associated Section 104(a), 30 U.S.C. 814(a), citation alleging, among other things, that approximately 40 feet of unconsolidated dirt and stones (the overburden) at the top of the south wall section of the highwall constituted an imminent danger and a violation of mandatory safety standard Section 56.3131.(Footnote 5) G. Exh. 4. Brendle maintained

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5The standard states:

Pit or quarry wall perimeter.

In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

30 C.F.R. 56.3131. R.B.S. is contesting the validity of the order/citation, including the alleged violation of Section 56.3131.

that the edge of the area encompassed in his order/citation was even with the muck pile Brooks was loading and that the conditions he cited endangered Brooks.

Brendle also testified that as a result of Brooks' safety complaint, MSHA Inspector Carl Sneed had gone to the quarry the day after Brooks was fired (July 31, 1992) and had issued a Section 107(a) imminent danger withdrawal order with an associated Section 104(a) citation that cited a violation of mandatory safety standard Section 56.3200.(Footnote 6) Gov. Exh. 3. This order/citation stated in part that loose, unconsolidated material, was present along the top of the catch bench in the west section of the pit for approximately 100 feet. Inspector Sneed did not testify, but Brendle stated that he understood Sneed's order/citation to have been issued for the same general area of the quarry that he, Brendle, had cited.(Footnote 7) Brendle believed it was possible that Brooks had been endangered by the conditions cited by Sneed, but he did not know for certain. Brendle stated that in any event, the condition of the highwall that he cited on August 11 was "atrocious."

Brendle testified that on July 30, Brooks was working under overburden that consisted of large stones and fill dirt made loose by rain. In addition, Brooks had the highwall to his right as he worked, and Brendle believed that because he had to turn to his right to look at the highwall and because of the highwall's height, Brooks' vision was obscured and he could not detect any loose material that might be coming down near him. Brendle also believed it possible that the cab protector further obscured Brooks' vision. Brendle feared that any falling loose material could travel up to 150 feet from the base of the highwall if the

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6The standard states:

Correction of hazardous conditions.

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and when left unattended a barrier shall be installed to impede unauthorized entry.

30 C.F.R. 56.3200. R.B.S. is also contesting the validity of this order/citation, including the alleged violation of Section 56.3200.

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7There was confusion about directional references at the quarry. Sneed referred in his order/citation to the west section of the pit, Brendle referred in his testimony to the south wall section, and Snyder, if I understood him correctly and who I assume knows best, spoke of the area involved as the southeast corner of the pit.

material hit something on the way down and bounced. In Brendle's opinion, Brooks clearly was working within a distance from where he could have been injured by falling material.

Brendle also stated that Snyder told him he had fired Brooks because Brooks said that he would not load any material piled higher than the windshield of the loader, and because Brooks expected to be paid on July 30 for a full day, even though he had stopped operating the loader around noon. Finally, Brendle stated that after Inspector Sneed had issued the order/citation on July 31, Sneed allowed the muck pile on which Brooks had been working to be totally cleared. (In other words, Sneed allowed normal work to continue in the area where Brooks had been working.) Brendle explained that he did not agree with Sneed's decision in this regard, that he had called Sneed at the time he, Brendle, issued his order/citation to express his disagreement and to advise Sneed of what he was going to do, and that in so doing, he found out that Sneed had not inspected the top of the highwall prior to issuing the order/citation on July 31. Nonetheless, Brendle stated that it was possible Sneed was in a better position to evaluate the conditions under which Brooks had worked on July 30 than he, Brendle, was.

THE RESPONDENTS' WITNESSES

After the Secretary rested, the Respondents presented their case through the testimony of three witnesses: Snyder, Harless and Ricky Massey, a fill-in laborer. Not surprisingly, they offered a different version of events.

Snyder stated that around 11:00 A.M. on the morning of July 30, 1992, he was at his office when he received a telephone call from Harless. Harless informed Snyder that Brooks was refusing to load anything higher that the windshield of the loader. According to Snyder, muck piles at the quarry are typically 40 to 45 feet high. Thus, of necessity, a loader operator must load material that is higher than the windshield. Therefore, Snyder asked Harless if he was sure Brooks had said that he would not load such material, and Harless replied, "Yes." Harless suggested to Snyder that he come to the quarry and talk to Brooks.

Once at the quarry, Snyder found Brooks and the parked loader outside of the work area. Snyder asked Brooks what the problem was and Brooks replied, "It's the same old s__t, Harless doesn't know what he is doing." Snyder said to Brooks that

Harless had told him that Brooks refused to load anything higher than the windshield of the loader. Snyder asked Brooks two or three times if this were true, and Snyder answered, "Yes."(Footnote 8)

Harless then suggested that he and Brooks look at the area and see what the problem was. Snyder stated that he and Harless went to the muck pile and that he did not see anything that he believed was unsafe. Snyder expressed the opinion that there was nothing inherently unsafe about loading material that was higher than the cab or the windshield of a loader.

After Snyder and Harless returned from the muck pile, Snyder stated that he asked Brooks again if he would not load material that was piled above the cab of the loader, and Brooks stated that he would think about it. After he had thought about it, Brooks indicated to Snyder that he had come to the quarry that day expecting to work and that he intended to be paid for a day's work. Snyder responded, "No you're not," or words to that effect, and told Brooks that he was fired. Snyder stated that he discharged Brooks for two reasons: (1) for refusing to load material higher than the windshield of the loader, and (2) for demanding a days's work when he had not worked a full day. Brooks was paid to the time he was fired - - approximately 12:00 P.M. - - and left the quarry.

During cross-examination, Snyder stated that he was certain that in the course of their conversation on July 30, Brooks had not made any statement about his safety and the condition of the highwall. However, counsel for the Secretary read to Snyder from a transcript of Snyder's unsworn interview with Brendle concerning Brooks' discharge. In the transcript, Snyder was quoted as telling Brendle that Brooks had said to him, "It's the same old s__t, Harless doesn't know what he is doing and I am not going to risk my safety or life under the highwall." Snyder indicated that he had made the statement to Brendle.

Snyder also stated that at no time during his conversation with Brooks did Brooks offer to do other work. Snyder stated that, in fact, there was nothing unsafe about loading material piled higher that the cab of the loader and that July 30 was the first time Brooks had ever stated he would not load such material.

Snyder also stated the he believed the area encompassed by Sneed's order/citation of July 31 was at least 200 feet from where Brooks was working on July 30; and that the area

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8I asked Snyder if he had questioned Brooks as to why Brooks would not load higher material, and he stated that he had not. He explained that he could not foresee any conditions under which the practice to which Brooks objected would be hazardous.

encompassed by Brendle's order/citation of August 12, although it extended somewhat closer to the area where Brooks was working was nonetheless 150 feet away from Brook's work station.

Snyder maintained that on July 30, Brooks was not in any danger. The overburden under which Brooks was working had been stripped back. It was not loose or unconsolidated. To support his opinion he noted that after issuing his order/citation, Sneed had permitted the entire muck pile on which Brooks was working to be loaded and that it took approximately 40 hours to do so.

Jimmy Harless, Brooks' supervisor, testified next. He stated that scaling on the highwall had been underway prior to July 30, and that on July 30 the area scaled was about 200 feet from where Brooks was located and that any material knocked loose came down on a barricaded bench, not near Brooks. Harless testified that on July 30 he was advised by the driver of the truck Brooks was loading that Brooks wanted to talk to him. Brooks told Harless that he would not load anything above the height of the loader's windshield.(Footnote 9)

According to Harless, Brooks made no reference to safety concerns about the highwall or the muck pile. However, on cross-examination, Brooks' counsel asked Harless about the following exchange during Harless' unsworn interview with Brendle:

> Q. On July 30 . . . Brooks . . . said that he did no feel safe working at the highwall . . . and he was . . . fired that day. Do you want to . . . tell me what you know?
>
> A. The part of the highwall that he was talking about, he was approximately 300 to 400 feet away from it and the shot he was mucking out, there was no big stuff over his head. Then he told me he was not going to load anything over windshield height . . .

Resp. Exh. 3. Harless agreed that this is what he had said.

Harless stated that after talking to Brooks he called Snyder, who came to the quarry to talk to Brooks. During their conversation, Snyder stated to Brooks that Harless had told him Brooks had refused to load anything above the height of the loader's windshield, and Snyder asked, "Is that what you said?" Brooks responded, "Right." Snyder let Brooks know that he wanted

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9Harless noted that because muck piles at the quarry are usually piled well above windshield height, it would have been impossible to operate a front end loader at the quarry under Brooks' restrictions.

Brooks to return to work, and Brooks stated that he would have to think about it. Snyder and Harless then went to look at the area where Brooks had been working, and according to Harless, did not see anything that was unsafe.

When the two returned, Brooks told Snyder that he had not made up his mind about whether he would return to work, and he indicated he would continue to sit and draw his pay. Harless stated that Snyder said, "No you won't.", and Snyder fired Brooks.

Harless agreed with Snyder that Sneed's order/citation of July 31 covered an area that was approximately 200 feet from Brooks, and that although Brendle's order/citation of August 12 was more inclusive, the area concerned was still approximately 150 feet from where Brooks had been working on July 30. Harless believed that the conditions referenced in both order/citations could not have endangered Brooks.

Ricky Massey was the last to testify. He stated that he had known Brooks "for years." He also stated that on July 30, scaling was being conducted on the highwall, but in an area that was barricaded and that was removed from where Brooks was working. The scaling did not endanger Brooks. He agreed with Snyder and Harless that the conditions cited in the July 31 and August 12 order/citations were physically distant from where Brooks had been working and would have posed no danger to him.

THE ISSUE

The essence of Brooks' complaint is that he engaged in protected activity - - i.e., a protected work refusal - - and that his subsequent discharge was motivated by that activity. A miner has a right under Section 105(c) of the Mine Act to refuse work if the miner has a good faith, reasonable belief that such work is hazardous. Secretary on behalf of Pasula v. Consolidation Coal Co.., 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211, 1216 N.6, 1219 (3rd Cir. 1981); Miller v. Consolidation Coal Co., 687 F.2d 194-195 (7th Cir. 1982). A good faith belief "simply means honest belief that a hazard exists." Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 807-12 (April 1981).

As previously stated, the standard of review in this proceeding is whether the Secretary's legal theory, as well as the Secretary's factual assertions, are not frivolous. See Jim Walter Resources, Inc., v. FMSHRC, 920 F.2d 738,747 (11th Cir. 1990). Although the Secretary's legal theory of a protected work refusal may or may not be sustained at a trial on the merits, it is certainly an arguable legal position given the testimony of Brooks that he refused to continue loading because of his concern

about the dangers presented by the highwall, his testimony that he expressed those concerns and the undisputed factthatimmediately subsequent to his refusal he was terminated.

While there is an obvious disagreement over whether, in fact, Brooks was in any danger on July 30 and/or reasonably could have believed himself to be in any danger, there is no doubt that some parts of the highwall contained loose, unconsolidated overburden, and I believe that resolution of questions about the actual conditions under which Brooks was working and/or reasonably believed he was working require credibility determinations and factual findings more appropriately made after a full trial of the issues. Further, the same is true concerning whether, as required by the Mine Act, Brooks "communicate[d] . . . his belief in the safety . . . hazard at issue." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982); See also Simpson v. FMSHRC, 842 F.2d 453, 459 (D.C. Cir 1988).

Thus, I conclude that while there is conflicting testimony on these fundamental issues, it cannot be found that the Secretary's legal theory of discrimination and her factual assertions are clearly fraudulent, clearly without merit or clearly pretexual. Therefore, I find that Brooks' complaint is "not frivolously brought" and that Brooks is entitled to temporary reinstatement.

While I can well understand that such reinstatement may seem an unwarranted intrusion on R.B.S.'s prerogatives to control the makeup of its workforce, it is important to remember that the right to temporary reinstatement and the "not frivolously brought" standard represent the judgement of Congress on the protection individual miners should be afforded as the result of playing their part in ensuring the safety of mining facilities and how the risk of possible discharge should be born. See Jim Walter Resources, 920 F.2d at 748 n. 11.

ORDER

Respondent is ORDERED to immediately reinstate Paul H. Brooks to the position from which he was discharged on or about July 30, 1992, or to an equivalent position, at the same rate of pay and with same equivalent duties.

David F. Barbour
Administrative Law Judge
(703)756-5232

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