CCASE:
SHERRLL STEVEN REID V. KIAH CREEK
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SHERRELL STEVEN REID, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 92-237-D
v.	:	
	:	No. 1 Mine
KIAH CREEK MINING COMPANY, Respondent	:	

DECISION

Appearances: Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Incorporated for Complainant.
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C. for Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by Sherrell Steven Reid, (Complainant) on January 21, 1992, which alleges, in essence, that he was discharged by Kiah Creek Mining Company, (Respondent) in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Respondent filed an answer on February 3, 1992, and the case was subsequently assigned to me on February 20, 1992. On March 2, 1992, in a telephone conference call initiated by the undersigned with counsel for both parties, the parties indicated that they wanted to explore settlement of this case. In a subsequent conference call on March 11, 1992, the parties indicated that they were not able to settle this case, and it was agreed that it be set for hearing June 10-11, 1992, and a Notice was issued on March 13, 1992, to that affect. On May 15, 1992, Respondent filed a motion to continue which was not opposed by Complainant. The Motion was granted and the matter was rescheduled for hearing on September 15-17, 1992. The case was subsequently heard on those dates in Paintsville, Kentucky, and also on October 1, 1992, in Louisa, Kentucky.

The parties were granted time to file post hearing briefs three weeks after receipt of the transcript of the hearing. The hearing transcript was received in the office of Administrative Law Judges on October 23, 1992. On December 2, 1992, Respondent's counsel filed a statement indicating he and complainant's counsel agreed to request an extension until January 15, 1993 for the filing of Briefs. This request was

granted. On January 15, 1993, Complainant's counsel sent by facsimile a request for an extension to February 8, to file his brief due to "caseload demands", and indicated that Respondent's counsel did not object to this request. This request was granted, but it was indicated that no further extensions will be granted. On February 4, 1993, Complainant's counsel sent by facsimile a request for an extension until February 17, 1993, to file his brief citing that he was overwhelmed by his caseload commitment. The request was granted. Respondent filed its Brief on February 5, 1993, and Complainant filed his brief on February 9, 1993. On March 3, 1993, Complainant's Reply Brief was received. Respondent's Reply Brief was received on March 5, 1993.

Findings of Fact and Discussion

Charles Steven Reid (Footnote 1), a miner, had been employed by Respondent at its No. 1 underground mine for approximately for four-and-a-half months until he was fired on August 13, 1991. According to Reid, no one prior to August 13, 1991, including his foreman William E. Whetsel, had complained to him or issued any warning about the quantity of his production.

On the evening shift August 13, 1991, Reid's Section was involved in pillar mining. According to Reid, he was instructed by his foreman, William Whetsel, to cut into the heading at the No. 4 entry towards the old works. Reid indicated that during the shift he indeed made such a cut, and also cut into the heading toward the old works at entry No. 3. Essentially, he testified that, for safety reasons, he cut into these two headings for only 14 feet, removing 9 car loads of coal. He indicated that he did not cut any further for fear of encountering methane, black damp, or water, which are all found in the old works. Also, he testified that when he took the first cut off entry No. 5, he cut only 13 or 14 feet deep. He indicated that he was concerned about the hazards of a roof fall due to a crack in the roof. In addition, the third cut that he took extended only 14 feet, as he heard thumping which he said was indicative of a bad roof. Reid indicated that for the same reasons, and also due to dribbling from the roof, his fourth cut was limited to only 13 to 14 feet. He also limited his fifth cut to only 14 feet, as he felt that cutting any further would be hazardous.

During the shift Whetsel did not reprimand Reid for any of his actions. After approximately 6 hours into the shift, Whetsel ordered the crew to go above ground early. According to Reid,

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1The complaint identifies the Complainant as Sherrell Steven Reid. At the hearing, the Complainant gave his name as Charles Steven Reid.

after the crew reached the surface, Whetsel told him that "...there's no use for you to come out tomorrow because I've got nothing for you to do on the second shift any more" (Tr.91). In addition, Reid said that Whetsel told him "you didn't get enough coal worth s__t out of them places" (Tr. 91). Reid testified that he told Whetsel as follows: "You and I know that the top is bad up there and if I cut them any deeper, I would have endangered my life."(sic) (Tr. 91) He said that in response Whetsel told him that he had dry chained.

In contrast, Whetsel indicated that at the end of the shift he told Reid that he (Reid) was dry chaining and that he was not needed any more. According to Whetsel, he discharged Reid because he "felt we could run coal better then what we did" (Tr. 63). On cross-examination, Whetsel indicated that he told Sammy Fraley, Jr., Respondent's superintendent, that he had fired Reid, and that were only nine cuts taken, and only 95 car loads produced. In this connection, Reid indicated that when he spoke to Fraley after being fired by Whetsel, the latter told him that Whetsel had indicated that he had fired Reid for dry chaining, and not getting enough coal. According to Reid, Fraley indicated to him that the production reports showed 9 cuts and 95 loads, and that it was his position to support Whetsel. Fraley did not specifically rebut this testimony of Reid.

Whetsel indicated that on August 13, 1991, he had timed Reid, and it was taking him 85 seconds to load a buggy, whereas the normal time is approximately 30 seconds. According to Fraley, when Whetsel called him on the evening of August 13, to tell him that he had fired Reid, Whetsel told him that he had discharged Reid for dry chaining, and that he was taking up to 85 seconds to load a buggy.

Essentially, it is Complainant's position that because he had engaged in protected activities, any of his actions that resulted in decreased coal production constituted a justified work refusal, and hence these activities are protected. Hence, an analysis must be made of Reid's activities to determine if these activities are protected, and if his conduct can be termed a work refusal.

Protected Activities

The first cut that Reid took on the evening of August 13, off of the No. 5 entry, (see Complainant's Exhibit No. 2) was only 13 to 14 feet deep, resulting in a quantity of coal which filled only 8 cars. According to Reid, in essence, he did not cut any deeper because there was a crack in the roof. He indicated the crack was 2 to 3 inches below the level of the rest of the roof. He also observed draw rock, approximately 6 inches to 1 1/2 feet thick, and saw pieces of coal dribbling down from the roof. In contrast, James Burlin Adkins the chief electrician

on the day shift, testified that he was in the area in question between the day shift and evening shift on August 13, and did not see any cracks in the roof of the No. 5 heading. To the same effect, Michael Taylor, the miner operator on the day shift on August 13, described the roof on the No. 5 entry as being of sandstone. He said that there were no problems, and that he had not observed any cracks. Rodney Coleman, who assisted Reid on the evening shift of August 13, 1991, moving cables of the miner, also described the roof as being of sandstone. He said that he did not remember any cracks or defects in the roof. He was asked whether he heard any thumping of the top, or saw any dribbling on the ribs in the number five entry, and he said he did not remember "seeing anything" (Tr.157) I find this testimony to be insufficient to rebut the positive testimony of Reid as to his observation of cracks in the roof in the evening of August 13.

Reid also limited the length of cuts No. 3 and 4 that he took (See Respondent's Exhibit No. 2), and thus decreased production due to the conditions of the roof which he described as very bad. He said he had heard thumping, and observed dribbling. Goebel Burke, Michael Taylor, Whetsel, and Fraley, all essentially described the roof at the working face as being of sandstone, and in good condition. However, no witnesses specifically contradicted or impeached Reid's testimony as to the conditions that he observed in the roof on the evening of August 13, when he took cuts 3 and 4. In this connection, Larry Haley, the shuttle operator on Reid's shift, said that the roof in the No. 5 entry was cracked real bad and was ready to fall out. Paul Helton, who previously, worked as an MSHA inspector and roof control specialist, testified that, in general, a miner operator is in the best position to know how safely a cut can be made. Taylor who runs a miner, testified to the same effect.

The key issue for resolution is whether Reid's failure to take full cuts, constitutes a valid work refusal protected by the Act. It is well established that under Section 105(c) supra, a miner has the right to refuse to perform work which he reasonably believes poses a safety hazard. (See, Robinette, 3 FMSHRC 803 (1981), Pasula, 2 FMSHRC 2786 (1981)). Within the framework of the facts set forth above, I find that Reid reasonably believed that cuts deeper than the cuts he had made in the areas referred to as No. 1, 3 and 4 in Respondent's Exhibit No. 2, posed a discrete safety hazard considering the roof condition observed by him. According to Reid, he pointed out the cracks in the roof to Whetsel, and the latter told the crew to watch the cracks. In contrast, Whetsel indicated that he did not discuss the roof conditions with Reid on August 13. Even if Reid's version is found more credible, his prima facie case is beset with difficulty, inasmuch as, at no time during the work shift of August 13, did he communicate to Whetsel or any one else in management that he refused to cut beyond 13 or 14 feet in the areas in question due to safety concerns with the conditions of

the roof.

In Leeco, Inc. v. Ricky Hays, 965 F.2d 1081 (D.C. Cir., 1992), the D.C. Circuit Court considered the appeal of an operator from a decision by Commission Judge Koutras who had found that a miner who was fired for not performing one part of his job, was discriminated against under Section 105(c) supra of the Act, where he had unsuccessfully complained to a supervisor about the dangers performing this task, even though he did not bring to his employer's attention the fact that he was refusing to perform this task. The court in Leeco, supra, in remanding to the Commission for reconsideration of how the miner's conduct therein qualified as an activity protected under Section 105(c) of the Act, specifically held that it was "...unable to sustain the ALJ's conclusion that such a concealed stoppage is protected by the Act." (Leeco, supra at 1085.) The court, in Leeco, supra at 1085 indicated, in essence, that to conclude that a failure to perform a job amounted to the same thing as a communicated refusal because the operator was already aware of safety related complaints "...obviously represented a significant extension of, if not a departure from pre-existing law... ." The Court in Leeco, supra, at 1084 in its review of existing law noted as follows:

> So far as we can tell in all prior Commission and court decisions upholding a miner's right to refuse unsafe work, the miner has expressly or implicitly made his employer aware of the fact that he would not continue to perform his assigned task. See, e.g., Gilbert, 877 F.2d at 458. Price v. Monterey Coal Co., 12 FMSHRC 1505 (1990); Secretary ex rel Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (1983); Bush, 5 FMSHRC at 997; Haro v. Magma Cooper Co., 4 FMSHRC 1985 (1982); Secretary ex rel v. Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126 (1982); Robinette, 3 FMSHRC at 807.

Hence, as explained in Leeco, supra, existing law has not recognized a miner's right to refuse unsafe work in a situation where the miner has not made his employer aware that he would not continue to perform his assigned task.

Thus, in light of existing law, I cannot find that the scope of protected activities set forth in section 105(c) of the Act supra, extends to a miner who has not communicated his work refusal for safety related concerns to his employer. Accordingly, I conclude that complainant has not established that his actions in not cutting beyond 13 to 14 feet in the areas in question, were protected under Section 105(c) of the Act. Accordingly, I conclude that his discharge did not violate Section 105(c) of the Act supra, and thus his complaint of discrimination must be dismissed.

ORDER

It is hereby ORDERED that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

Distribution:

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