CCASE:
BRYAN WIMSATT V. GREEN COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

BRYAN WIMSATT, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. KENT 93-735-D
GREEN COAL COMPANY, INC., Respondent	:	MADI CD 93-08
	:	Henderson County Mine No. 1

ORDER DENYING RESPONDENT'S
MOTION FOR SUMMARY DECISION

This proceeding concerns a complaint of alleged discrimination filed with the Commission 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)

Essentially, the complainant asserts that he was constructively discharged or justifiably refused to work under unsafe working conditions, due to his safety complaints being ignored by the respondent.

Respondent has now moved for summary decision on the grounds that the pleadings, taken together with the complainant's deposition, show that there is no genuine issue as to any material fact and that, therefore, respondent is entitled to summary decision as a matter of law.

Commission Rule 64(b) states that, "A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R 2700.64(b). As the Commission has pointed out, summar decision is an extraordinary procedure and must be entered with care, for it has the potential, if erroneously invoked, of denying a litigant the right to be heard. Thus, it may only be entered when there is no genuine dispute as to material facts and when the party in whose favor it is entered is entitled to summary decision as a matter of law. Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981). Here, the burden is on the respondent, as the moving party, to establish its right to summary decision, and I conclude that respondent has not met that burden.

In this case, while it would appear that the respondent has repeatedly offered to reinstate the complainant to his former position as an oiler on the 1650 shovel, the complainant has just as steadfastly refused to return to work on that job. Respondent argues that complainant did not and does not refuse to return to this job for safety reasons, but rather, because of his "fear of the highwall." However, the great unanswered question so far is: Was it, in fact, unsafe to work in the pit at the time or times complainant has refused to? This is still a genuine issue of material fact at this point in time. In order to carry his burden of proof on that issue, complainant will have to establish, by a preponderance of the evidence, a reasonable, good faith belief that an unsafe condition existed in the pit that forced him to refuse to perform. I have no idea whether or not he can do that, but he is at least entitled to try.

ORDER

Based on the foregoing findings and conclusions, the respondent's motion for summary decision is DENIED. Therefore, this matter will need to be set down for a hearing on the merits in the near future. The parties are invited to submit proposed trial dates.

Roy J. Maurer
Administrative Law Judge

Distribution:

Frank P. Campisano, Esq., First Trust Centre, Suite 10 North, 200 South Fifth Street, Louisville, KY 40202 (Certified Mail)

Mary Lee Franke, Esq., Kahn, Dees, Donovan & Kahn, 305 Union Federal Building, P. O. Box 3646, Evansville, IN 47738-3646 (Certified Mail)

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