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SOL (MSHA) V. L.H. SOWLES
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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 (MSHA), ON BEHALF OF THOMAS K. ALLEN, and ALAN D. BOE,	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. WEST 94-71-D
	:	Docket No. WEST 94-47-DM
Complainants	:	Rosebud No. 6 Mine
v.	:	
L. H. SOWLES COMPANY, Respondent	:	

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Complainants;
Gerald Roth, Colstrip, Montana for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases, consolidated for hearing, are before me based upon Petitions filed by the Secretary of Labor on behalf of Alan D. Boe and Thomas K. Allen alleging that they were discharged by L. H. Sowles Company ("Sowles") in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Pursuant to notice, a hearing was held in Billings, Montana on February 1, 1993. Subsequent to the hearing, the Secretary filed a brief on March 24, 1994. On April 4, 1994, a brief was filed by Sowles.

Findings of Fact and Discussion

I. Factual Background

During the period in issue, i.e., May 24, 1993 through June 9, 1993, Western Energy Company ("Western") operated an advanced coal preparation plant ("prep plant") located on the site of its Rosebud No. 6 Mine. Western contracted with Sowles for the latter to modify the prep plant. On May 24, 1993, Alan Boe and Thomas K. Allen started to work for Sowles. Initially, Boe and Allen, who are millwrights, were assigned to a

task putting buckets on a chain. From the time Boe was hired until June 9, 1993, Sowles did not complain to him about his work habits, or punctuality. There is no evidence that in this time period Sowles disciplined or expressed any dissatisfaction with Allen, or with his work.

On June 9, 1993, at approximately 9:30 a.m., Gerald Roth, Sowles's superintendent, who was the supervisor of Boe and Allen, asked Boe to install explosion doors on a chute. According to Boe, he told Roth that the man-lift ("JLG") was "working" (Tr. 87) above them and ". . . this is unsafe; we should'nt be doing it." (Tr. 94) Boe stated that Roth responded as follows: "Get the damn explosion doors on, we have got to get the chute stood." (sic) (Tr. 94). Roth then walked away, and Boe went up a hill where Allen was working, and told him of Roth's directive to install the explosion doors. According to Boe, Allen responded by indicating that he would not work under a suspended load. According to Boe, Roth then came up on the hill and said to him and Allen as follows: "You guys either get that explosion door put on or go to the house." (Tr. 107) (Emphasis added)(Footnote 1). This letter term terminology is commonly used to tell a miner that he is being fired. According to Boe, his and Allen's response to Roth was as follows: "We said we weren't going to work on it." (Tr. 108). Boe and Allen then went to see Patrick Rummerfield, Western's Safety Coordinator. According to Rummerfield, Boe and Allen informed him that they had refused to work under a suspended load. Boe and Allen then gathered their tools and left the site.

II. Applicable Law

The Commission, in Braithwaite v. Tri-Star Mining, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Tri-Star, at 2463-2464, stated as follows:

> The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by

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1 In essence, Roth also testified that he made this statement.

protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

A miner's refusal to perform work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. Robinette, 3 FMSHRC at 808-12; Conatser v. Red Flame Coal Co., 11 FMSHRC 12, 17 (Jan. 1989); see also, Simpson v. FMSHRC, 842 F.2d 453, 458 (D.C. Cir. 1988). The Commission has held: "Proper communication of a perceived hazard is an integral component of a protected work refusal, and responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner." Conatser, 11 FMSHRC at 17, citing Dillard Smith v. Reco, Inc., 9 FMSHRC 992, 995-96 (June 1987). "[T]he communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work." Smith, 9 FMSHRC at 995. The miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner's concern. Id. Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act. Finally, the Commission has held that the "communication of a safety concern 'must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used . . . .'" Conatser, 11 FMSHRC at 17, quoting Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (July 1986), aff'd mem., 829 F.2d 31 (3d Cir. 1987).

III. Discussion

I find that the record establishes that Boe and Allen were told by Roth, in essence, to either install the explosion doors or they would be fired. They chose not to install the doors, and were fired. Hence, they were discharged by Roth solely for their work refusal to install explosion doors. Under applicable case law cited above, it must be decided (A) whether the work refusal was protected, i.e., whether it was based on a reasonable belief that the work involves a hazard, and (B) whether Boe and Allen communicated this belief to Roth.

(A) Reasonable Belief in a Hazard

In order to install the explosion doors on the chute, Boe and Allen would have had to climb a ladder that had been set against the chute. According to Boe's testimony that I find credible, when he had his initial conversation with Roth, he was standing approximately 1 foot from the base of the ladder which was approximately 1/2 - 2 feet from the base of the chute. Boe looked up and observed that the cage of a mobile man-lift (JLG) was directly overhead. Boe indicated that the cage was approximately 20 feet above the ground. The cage, which contained 2 iron workers, Roger Meyer, and David Little Whiteman, Jr., was connected to an arm that was attached to the base of the man-lift. In addition to the iron workers, the cage also contained following items: 3/4 inch bolts, an electric wrench, an acetylene cutting torch, and hand tools. The openings in the floor of the cage were not large enough to allow these items to fall through. However, Meyer explained that in performing his duties in the case, he reaches up over the basket of cage with his tools. It thus is possible that a tool could accidentally drop, and hit someone below. Both Meyer and Little Whiteman, Jr., in essence, stated that in the normal performance of their duties, the cage would have been over the ladder in question.

At approximately 10:00 a.m., Patrick D. Rummerfield Western Safety Coordinator, observed the area in question and noted the man-lift. He opined, that it would be a hazard to have person stand on the ladder and install explosion doors at the chute "If everything was exactly as these photographs show" (Tr. 52) (Govt Ex C-1-4).

Boe expressed his concern about the hazards of working under the cage of the man-lift. He indicated that the hydraulic system supporting the cage could fail, or tools and equipment used by the iron workers could fall causing injuries.

Roth testified that he intended to have had the man-lift cage swing away from the area in question, so that Boe and Allen would not have been exposed to any hazard when working on the ladder. However, he did not tell either Boe or Allen that he had intended to move the man-lift.

Within the framework of the above evidence, I find that Boe and Allen had a good faith belief that performing the work requested by Roth would have exposed them to the hazards of working under the man-lift cage i.e., a risk of being injured by an item dropped from the cage.

(B) Communication of a Perceived Hazard

According to Roth, when he had asked Boe to install the explosion doors, the latter did not say anything about working

under a suspended load, or about working in unsafe conditions. Roth indicated that Boe stated merely that "the area was too congested could it wait until later" (sic) (Tr. 276). On cross-examination, Roth stated that he interpreted Boe's refusal as follows: "He wanted to wait until the iron workers were plumb done, and then they go over and work on the area." (sic) (Tr. 286). Boe, on the other hand, stated that he told Roth that it was unsafe to install the explosion doors. He said that he did not recall saying that he not want to do the work because the area was "congested" (Tr. 156). Within the framework of this evidence, and based upon the demeanor of Boe whom I found to be a credible witness on this point, I conclude that Boe did communicate to Roth his safety concerns regarding the performance of work installing the explosion doors as ordered by Roth.

According to Allen, at approximately 9:30 a.m. on June 9, when Boe informed him that Roth wanted them to install explosion doors which required them to stand on a ladder under the man-lift, Allen said he would not do it as working under the JLG was unsafe. Allen said that he did not say anything to Roth prior to the time Roth approached him on the hill and told him and Boe that if they did not want to do the work they should go home. Allen indicated that after Roth spoke to him he did not say anything to Roth.(Footnote 2) Allen explained as follows: ". . . I wasn't going to do it, so there was nothing to say" (Tr. 200).

Since Boe and Allen were ordered by Roth to perform the same task, i.e., to install explosion doors, a communicated refusal by Boe to Roth, served to alert Roth of the perceived danger of performing this of task. Thus, Roth was afforded the opportunity to address the perceived danger to Boe and Allen. (See, Smith v. Reco, supra, at 995). There was accordingly no need for Allen to separately communicate his concerns to Roth. I thus conclude that the communicated refusal by Boe allows Allen's refusal to be afforded the protection of the Act.

Conclusion

Based on the all the above, I conclude that Respondent did violate Section 105(c) in discharging Boe and Allen. There is no evidence regarding Respondent's history, if any, of previous Section 105(c) violations. Further, regarding Respondent's negligence, I find Roth's testimony credible that he had intended to have had the manlift removed so that Boe and Allen would not

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2 Boe testified that after Roth spoke to him and Allen, "we said we weren't going to work on it." (Tr. 108).

have had to work under it installing the explosion doors. I conclude that a penalty of $1000.00 is appropriate for each violation. The parties have agreed that the back pay to which Boe and Allen are entitled is to be based upon 145 hours, and a rate of pay of $21.97 an hour.

Order

It is Ordered as follows:

1. Docket No. WEST 94-71-D is dismissed;

2. Respondent shall pay a total civil penalty of $2,000.00,(Footnote 3) within 30 days of this decision, for discharging Alan Boe, and Thomas K. Allen, in violation of Section 105(c) of the Act;

3. Respondent shall, within 30 days of this decision, pay Alan Boe, and Thomas K. Allen, back wages based on 145 hours and a rate pay of $21.97 an hour, plus interest at a rate to be calculated in accordance with LOC. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1443 (November 1988), pet. for review filed, No. 88-1873 (DC Cir. December 16, 1988), and based on the formula set forth in Secretary on behalf of Bailey v. Arkansas - Carbona Co., 5 FMSHRC 2042, 2051-53 (December 1983); and

4. The employment records of Alan Boe, and Thomas K. Allen, be completely expunged of all comments and references to the circumstances involved in their discharges, and the discharges be removed from their files.

Avram Weisberger
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, Room 1585, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Gerald Roth, P.O. Box 718, Colstrip, MT 59323 (Certified Mail)

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3 The penalty for the violation found in Docket No. WEST 94-71-D is $1,000.00. The penalty for the violation found in Docket No. WEST 94-47-DM is $1,000.00.