

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 11, 2001

BRYCE DOLAN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. CENT 97-24-DM
: MSHA Case No. SC MD 96-05
F& E ERECTION COMPANY, :
Respondent : Mine ID No. 41-00230-B96
: Bayer Alumina Plant

DECISION ON REMAND

Before: Judge Feldman

This matter has been remanded for re-analysis of whether the working conditions faced by Bryce Dolan at F&E Erection Company (F&E) at the time of his April 16, 1996, resignation constituted a constructive discharge. 23 FMSHRC 235 (March 2001) (“*Dolan II*”). In resolving this issue the Commission has directed me to apply a two-step inquiry concerning whether “Dolan had engaged in a protected work refusal *and* whether [Dolan] faced ‘intolerable working conditions.’” *Id.* at 240-41 (emphasis in original). In its prior remand decision the Commission concluded that substantial evidence supported the conclusion that Dolan’s work refusal was protected. 22 FMSHRC 171, 177-78, 180 (February 2000) (“*Dolan I*”). Consequently, the remaining issue is “whether intolerable conditions existed such that a reasonable miner would have felt compelled to resign.” *Id.* at 176. For the reasons set forth below, I conclude that, although Dolan’s work refusal was protected, his discrimination complaint must be denied because his working conditions were not objectively intolerable at the time of his resignation.

My initial remand decision determined that Dolan’s working conditions were intolerable because Dolan was forced to choose between continuing to work in the face of a reasonably held perceived hazard, *i.e.*, lead exposure, or to quit his job. 22 FMSHRC 554, 558-59, (April 2000) (ALJ). The linchpin of my constructive discharge finding was Dolan’s reasonably held fears cultivated by F&E’s failure to provide personal protective equipment from late 1994 until March 1996. As the Commission noted, “Dolan’s initial fears in March 1996, at a time when F&E had provided no personal protective gear to Dolan’s crew, were reasonable . . . [and] F&E conceded as much at the hearing.” 22 FMSHRC at 177.

F&E knew Dolan and his crew were removing lead based paint from November 1994 through March 1996 without protective equipment or periodic air sampling. 20 FMSHRC 591, 595 (June 1998) (ALJ). F&E's failure to provide personal protective equipment created an atmosphere of cynicism and mistrust.¹ It was this atmosphere of suspicion that provided a reasonable basis for Dolan's belief that the protective equipment belatedly provided by F&E, as well as its offer of reassignment to non-lead abatement work, were inadequate and insincere. Under such circumstances, my initial remand decision determined that Dolan's working conditions were so intolerable that a reasonable person, similarly exposed to Dolan's history of unsafe working conditions, would have felt compelled to resign.² 22 FMSHRC at 177-78 ("Dolan I") (applying the "reasonable miner in Dolan's position" test). Consequently, the initial remand decision reinstated the grant of Dolan's discrimination complaint. 22 FMSHRC at 560.

In its current remand, the Commission rejected my findings of a constructive discharge based on Dolan's reasonably held fears. The Commission concluded my response to its initial remand was a restatement of the doctrine of a protected work refusal that ignored the constructive discharge question. 23 FMSHRC at 241. Consequently, the Commission again vacated my finding of discrimination and specifically directed me to determine whether "Dolan faced intolerable working conditions as of the date of his [April 16, 1996] resignation." *Id.* at 242 *citing* 22 FMSHRC at 177. In so doing, the Commission also directed that I "consider anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead jobs." 23 FMSHRC at 241. In resolving the constructive discharge issue, consistent with the Commission's instructions, I have applied a "purely objective standard" to view the allegedly objectionable working conditions from the perspective of a reasonable employee familiar with lead abatement procedures who had not experienced Dolan's history of hazardous working conditions. 22 FMSHRC at 177, n.7.

¹ F&E's failure to provide personal protective equipment is disturbing particularly in view of the lead abatement training that it had provided for its employees that emphasized the hazards of lead poisoning and the need for personal protection. (*See* Comp. Ex. 1).

² Having previously ignored Dolan's potential lead exposure, it was incumbent on F&E to regain Dolan's confidence. For example, F&E could have provided Dolan with the opportunity to speak to Health and Safety Management, Inc. (HSM), F&E's environmental consulting firm, to assure Dolan that the personal protection equipment provided was adequate. In addition, F&E could have provided Dolan with an air supplied full-face respirator and/or heavy woven fire resistant overalls, even though the filtered full-face respirator and Tyvek suits may have been adequate. It was F&E's "take it or leave it" attitude in the face of its past failures that provides the basis for concluding that F&E failed to alleviate Dolan's reasonable fears. Had F&E taken the reasonable steps necessary to dissipate Dolan's fears, Dolan's continuing refusal to work would have become unreasonable and unprotected. *Secretary of Labor o/b/o Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 998-99 (June 1983).

The Commission explained its concern regarding collapsing the protective work refusal question and the intolerable working conditions question into a single inquiry. The Commission stated:

[O]nce a miner engages in a protected work refusal based on his or her good faith, reasonable belief in the existence of a hazard, the operator must take steps to reasonably quell the miner's concerns. A situation could arise, however, where an operator has taken such measures, but the miner clings to his or her belief in the existence of a hazard and quits. In this situation, resorting to the largely subjective standard applied to work refusals would almost certainly turn the miner's quitting into a constructive discharge --- and this is essentially what our dissenting colleagues do in this case. In other words, a miner's continuing belief in a hazard would establish a constructive discharge even where the operator took reasonable steps to address the miner's concern.³ At its worst under this approach, a miner could prove a constructive discharge even **where the hazard in which he or she believed was illusory** and where the operator could not address his or her concerns because the hazard did not exist.

22 FMSHRC at 180 ("*Dolan I*") (emphasis added).

Thus, the Commission has directed me to determine whether Dolan's fears were illusory, or, whether his fears were based on objectively intolerable working conditions. In essence, the Commission has directed that I determine if an actual hazard in fact existed at the time of Dolan's April 16, 1996, resignation.

As discussed below, the evidence fails to establish that Dolan suffers from an identifiable physical impairment that is related to his lead abatement employment at F&E. The evidence also fails to demonstrate that the personal protection measures taken by F&E when Dolan resigned on April 16, 1996, were inadequate, or, that the working conditions faced by Dolan otherwise were objectively intolerable.

³ Unlike the Commission's hypothetical, the Commission has concluded that F&E failed to address Dolan's concerns in a way that should have alleviated Dolan's fears. 22 FMSHRC at 177-78 ("*Dolan I*"); 23 FMSHRC at 238 ("*Dolan II*"); *Gilbert v. FMSHRC*, 866 F.2d 1433, 1441 (D.C. Cir. 1989).

Discussion

I. Dolan's Medical Condition

As a threshold matter, while Dolan's failure to develop lead poisoning would not be dispositive of whether his working conditions were intolerable, a confirmed diagnosis of lead poisoning, supported by blood chemistry or other objective clinical findings, would render Dolan's working conditions intolerable *per se*. As the Commission noted, "the judge did not enter any findings concerning the nature or cause of Dolan's disability." 23 FMSHRC at 244 ("*Dolan II*"). To ensure that the record is complete, on April 20, 2001, following a telephone conference with the parties, I issued an Order requesting Dolan to provide all pertinent medical records from April 16, 1996, to the present, including physical examination findings, diagnoses, and any objective clinical studies and laboratory results, including but not limited to blood chemistry findings, to support such diagnoses. The Order also requested Dolan to provide copies of pertinent Texas Workers' Compensation Commission decisions concerning his claim for workers' compensation benefits. The Order established a filing schedule for Dolan's submission and F&E's reply.⁴

In a decision dated June 11, 1999, a Hearing Officer of the Texas Workers' Compensation Commission determined that Dolan's work history included exposure to toxic chemicals. After considering the relevant medical evidence, the hearing officer concluded Dolan's chemical exposure resulted in a "compensable injury in the form of an occupational disease on March 27, 1996." (*Dolan's Resp.* at 143).⁵ The workers' compensation decision determined Dolan was disabled from August 14, 1996, and continuing through July 24, 1997. (*Id.* at 143-44). Significantly, the workers' compensation decision does not identify any specific occupational disease.

Dolan's Workers' Compensation decision was affirmed by a Texas Workers' Compensation Commission Appeals Panel on August 18, 1999. (*Id.* at 145). In affirming the decision, the appeals panel, noting conflicting medical opinions, concluded the hearing officer has broad discretion with respect to the weight and credibility to be accorded to evidence.

⁴ Although the medical records and Texas Workers' Compensation Commission decisions submitted by the parties have not been formally admitted into evidence inasmuch as they have been provided during this remand process, there have been no objections to their authenticity and they otherwise have not been objected to. Therefore, I have considered these documents in the disposition of this matter.

⁵ References to information provided by Dolan an F&E in response to the April 20, 2001, Order requesting additional information and documentation will be shown as "*Dolan's Resp.*" or "*F&E's Resp.*" followed by the page number or exhibit.

(*Id.* at 147). The appeals panel, citing previous Texas Workers' Compensation Commission cases, determined the hearing officer "could determine that an injury occurred whether or not there was objective evidence of injury." (*Id.* at 148).

The Texas Workers' Compensation Commission decision is relevant evidence. However, considerations concerning the weight to be given to the hearing officer's decision and credibility findings therein are analogous to the evidentiary considerations given to arbitration decisions. The Commission has long ago held that:

The Hearing before the administrative law judge is still *de novo* and it is the responsibility of the judge to render a decision in accordance with his own view of the facts, not the arbitrator. Arbitral findings, even those addressing issues perfectly congruent with those before the judge, are not controlling on the judge.

Secretary of Labor o/b/o David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2795 (October 1980).

In weighing the evidentiary significance of external adjudicative decisions it is important to weigh the adequacy of the record upon which the decision is based. *Id.* While the medical documentation contains subjective complaints of muscle weakness and nausea, it is noteworthy that Dolan's medical records lack any significant objective laboratory or clinical findings that would support a diagnosis of lead poisoning or other chronic illness related to toxicity. In this regard, there is no evidence of muscle atrophy, significant impairment of sensation, significant cognitive loss,⁶ or, abnormal blood chemistry findings.

The diagnostic work-up performed by Dolan's personal physician Dr. Arch I. Carson shortly after Dolan resigned in April 1996 is particularly instructive. Dolan was initially seen by Carson on May 17, 1996, for a variety of subjective complaints including joint pains, tremor and severe headache. (*Dolan's Resp.* at 4). At that time Dolan related a history of toxic fume exposure. (*Id.* at 5). Physical examination revealed no obvious distress, neurological testing was unremarkable, and there were no clinical findings of muscle wasting or weakness. (*Id.* at 6). All blood and urine tests were within normal limits and showed no detectible presence of abnormal levels of heavy metals, including lead, cadmium, arsenic, mercury, and chromium with the exception of a very mildly elevated plasma chromium level of unclear significance. *Id.* Dr. Carson noted that the mildly elevated chromium level was unlikely attributable to workplace exposure in light of normal values of heavy metals. (*Id.* at 6-7).

Dolan was again seen by Dr. Carson on July 9, 1996, with continuing complaints of joint pains, numbness, goose bumps and chills. (*Id.* at 7). Dolan reported that co-workers had similar

⁶ Dolan currently works as a substitute teacher for the Cuero, Texas Independent School District. (*Dolan's Resp.* at 152).

symptoms.⁷ (*Id.*) On July 27, 1996, Dr. Carson discussed Dolan's lab results with him assuring him that heavy metal toxicity was essentially ruled out as a cause of his symptoms. (*Id.*)

Dolan was again seen on October 15, 1996. Dr. Carson noted:

Mr. Dolan's symptoms of joint pains and migrating myalgias have improved significantly since his last visit. I believe it is possible for him to return to work without significant workplace restrictions at this time. I believe it will be beneficial for him to get back into a workplace environment where he can engage in gainful employment while continuing his recovery. His response to therapy with nonsteroidal and anti-inflammatory agents suggests an inflammatory nature of his symptoms.

(*Id.* at 7-8). Dr. Carson's "presumptive diagnoses" were: 1. noxious vapor inhalation injury; 2. metal polymer fume fever; 3. chronic arthritis/arthralgia NOS; 4. reactive anxiety; 5. reactive depression; and 6. bilateral carpal tunnel syndrome. (*Id.* at 33).

Dolan's blood levels were periodically monitored for lead by F&E on several occasions. Dolan's micrograms of lead per deciliter of blood were: 10 on August 11, 1995; 6 on November 17, 1995; 17 on February 8, 1996; and 8 on April 16, 1996. These levels were below the 40/30 micrograms per deciliter of blood considered to be the threshold levels for concern by the Occupational Safety and Health Administration (OSHA), and below the 50 microgram per deciliter of blood level that requires a worker's removal from lead abatement work.⁸ Given the OSHA standards concerning blood lead level action thresholds, these readings are not evidence of toxicity. Moreover, these blood level readings have not been relied on by any physician to support a specific diagnosis of lead toxicity.

Finally, the Texas Workers' Compensation Commission assigned Dr. Stephen Brooks, a consulting physician, to determine the nature and extent of Dolan's impairment. (*F&E's Resp.* at 10-11). Dr. Brooks examined Dolan on February 12, 1999, for the purpose of establishing an

⁷ There is no evidence of any relevant identifiable medical condition or diagnosis concerning Dolan's co-workers.

⁸ OSHA standards reflect that harmful effects from exposure to lead do not usually occur unless an employee's blood level exceeds 40 micrograms per deciliter (40 µg/dl) of blood. The standards do not require temporary removal from lead work until a worker's blood level reaches 50 µg/dl. (29 C.F.R. 1926.62, App. A; Resp. Ex. 1). Such an employee may resume lead work when two consecutive blood tests indicate the employee's blood level is at or below 40 µg/dl. *Id.* However, the standard provides that the blood level of employees intending to have children should be maintained below 30 µg/dl. *Id.*

impairment rating and the date of Dolan's maximum medical improvement. Dr. Brooks summarized his examination findings as follows:

Mr. Dolan complains of numerous symptoms, and he states that he feels that he is worsening, despite having been removed from the workplace environment for a period of 34 months. However, after interviewing and examining Mr. Dolan and reviewing the records available to me in this matter, I am unable to find objective evidence of a ratable disorder other than carpal tunnel syndrome.

(*Id.* Ex.4). Dr. Brooks determined Dolan had a 5% impairment rating and that Dolan reached his maximum medical improvement on June 18, 1998. (*Id.*)

In the final analysis, Dolan asserts he suffers from job related toxicity although there is no material evidence of toxic substances in his body. While Dolan may sincerely believe that his physical complaints are the result of his employment, as the proponent in this matter, Dolan has failed to satisfy his burden of proof. Consequently, in the absence of a diagnosis of an identifiable occupational disease supported by objective clinical findings, the evidence fails to establish that Dolan's work conditions on April 16, 1996, were intolerable *per se* because his employment was the cause of his disability.

II. Dolan's Working Conditions

Having concluded that Dolan's working conditions were not *per se* intolerable, the analysis shifts to application of the objective standard to determine whether Dolan's working conditions as they existed on April 16, 1996, were intolerable. The objective standard is a legal standard that is based on conduct and perceptions external to a particular person. *Black's Law Dictionary* 1413 (7th ed. 1999). For example, the reasonable person standard is considered an objective standard because it does not require a determination of what a party to a law suit was thinking. *Id.* Thus, applying the objective standard requires considering whether a reasonably prudent person familiar with welding and lead abatement work precautions and practices would have considered Dolan's April 16, 1996, working conditions intolerable. *See Ideal Cement Company*, 12 FMSHRC 2409, 2415 (November 1990) (application of "reasonable person test" to evaluate particular factual settings).

In applying the reasonable person test to resolve the constructive discharge question, it is important to focus on the term "intolerable working conditions." Working conditions are "intolerable" if they are "unbearable" or if they are "not capable of being borne or endured." *Webster's Third New International Dictionary* 1185 (1993 edition). As the court stated in *Simpson v. FMSHRC*, 842 F.2d 453, 463 (D.C. Cir. 1988), "the requirement that conditions be 'intolerable' to support a constructive discharge will not easily be met."

Turning to Dolan's working conditions, as previously noted F&E does not deny that Dolan's employment conditions were potentially hazardous prior to March 1996, when Dolan

was burning lead paint with a torch without any respiratory or other personal protection equipment. However, the issue for resolution is whether Dolan's use of a full-face respirator, Tyvek suits and HEPPA vacuums on April 16, 1996, were inadequate measures to protect Dolan from lead exposure.

As a general proposition, OSHA's permissible exposure limit (PEL) standard prohibits employee exposure to lead concentrations in excess of 50 micrograms per cubic meter ($50 \mu\text{g}/\text{m}^3$) of air averaged over an 8-hour period. (29 C.F.R. § 1926.62; Comp. Ex.1). Employees exposed to lead levels in excess of the PEL must wear respiratory protection. Under the OSHA standard, a half-mask air purifying respirator with high efficiency filters protects an employee from exposure levels up to $500 \mu\text{g}/\text{m}^3$. (29 C.F.R. § 1926.62, Table 1). Similarly, a full-face purifying respirator with high efficiency filters, or a full-face supplied air respirator operated in demand mode, provides employee protection up to $2,500 \mu\text{g}/\text{m}^3$. *Id.*

Thus, evaluation of the effectiveness of the full-face respirator used by Dolan requires a determination of the degree of exposure. In response to Dolan's initial safety complaints, Dolan was provided with a half-face respirator that, as noted, provides protection to $500 \mu\text{g}/\text{m}^3$. Air sample monitoring taken from March 20 through March 22, 1996, in the vicinity of Dolan and his crew by HSM, reflected that Dolan, while using the cutting torch, was exposed to averages of $467 \mu\text{g}/\text{m}^3$ on March 20, and $136 \mu\text{g}/\text{m}^3$ on March 21, in excess of OSHA's PEL of $50 \mu\text{g}/\text{m}^3$ averaged over an 8 hour period. Other crew members not using the cutting torch during this period were exposed to impermissible levels of average lead concentration ranging from $60 \mu\text{g}/\text{m}^3$ to $136 \mu\text{g}/\text{m}^3$. (Exs. C-3, C-28).

As a result of its monitoring results, HSM recommended that the employee using the cutting torch be furnished with a full-face respirator with high efficiency filters while the other crew members used half-face respirators. Thus, the full-face respirator provided to Dolan, and the half-face respirators furnished to Dolan's crew members not using a cutting torch, provided protection by a factor of approximately five times the amount of actual exposure.

In support of his assertion that the full-face respirator was inadequate to protect him from the hazards of toxic metal exposure, Dolan relies on the testimony of Robert Miller, an industrial hygienist. While the evidence supports Miller's testimony that half-face respirators did not provide adequate protection to personnel, such as Dolan, using a cutting torch, F&E ultimately provided Dolan with a full-face respirator prior to his April 16, 1996, resignation. Miller's testimony that respirators may leak due to poor fit, or perspiration, was credited at the hearing to support Dolan's asserted good faith belief that a hazard continued to exist. However, Miller's general concern about the effectiveness of respirators, a means of protection commonly used in industry, does not overcome the fact that, according to OSHA standards, the full-face respirator was adequate protection given Dolan's level of exposure. Accordingly, the evidence, when viewed objectively, does not reflect that Dolan's use of a full-face respirator was an intolerable working condition.

Tyvek suits are flame retardant, thin, disposable coveralls made of spun olefin. Miller opined that the Tyvek suits furnished to Dolan were inadequate protective clothing. In this regard, Miller testified that Tyvek suits were not an "optimal solution" because of a propensity of

spun olefin materials to develop holes from tears or burns posing a contamination risk to clothing underneath. 22 FMSHRC 178. Miller recommended fire resistant overalls as a better solution. Once again, Miller's testimony supports the good faith nature of Dolan's safety fears, not the inappropriateness of Tyvek use. Fire resistant overalls woven with heavy material, as recommended by Miller, undoubtedly would provide a greater level of protection despite their obvious non-disposable disadvantage. However, the issue before me on this remand is whether Dolan's use of Tyvek suits constituted objectively "unbearable" working conditions, not whether there was a more suitable alternative. In this regard, Dolan's training instructions concerning safe lead abatement procedures included the utilization of Tyvek suits. (Comp. Ex.1) .

More importantly, ALCOA's *Handbook for Lead Activities*, proffered by Dolan, specifically addresses the propriety of disposable Tyvek protective clothing. ALCOA's *Handbook for Lead Activities* applies to all outside contractors as well as ALCOA employees.⁹ ALCOA's handbook states:

PROTECTIVE CLOTHING

When you are required to work with lead containing material, protective work clothing will be provided. Facilities to change into and out of the protective clothing will be provided. Shower facilities for decontamination shall also be provided. **The typical protective clothing will be disposable coveralls such as Tyvecs** (sic).

(Comp. Ex. 12) (emphasis added). Consequently, the evidence fails to establish that F&E's reliance on Tyvek overalls as a means of personal protection is contrary to industry standards. Accordingly, Tyvek use cannot be deemed to be intolerable.

In summary, the evidence fails to support the conclusion that a reasonable person familiar with welding and lead abatement work would consider the use of a full-face respirator, Tyvek overalls and HEPPA vacuums as a means of personal protection against lead exposure to be intolerable working conditions that fail to satisfy OSHA, or general industrial safety standards. Accordingly, on balance, Dolan has failed to demonstrate, by a preponderance of the evidence, that he faced intolerable working conditions at the time of his April 16, 1996, resignation.

III. F&E's Reassignment Offer

⁹ Dolan was employed by F&E as a contract employee at ALCOA's Point Comfort Plant.

Finally, the Commission has directed that I reconsider Dolan's rejection of F&E's offer of reassignment to non-lead abatement activities in light of the objective constructive discharge issue. As previously discussed, my initial remand decision credited Dolan's skepticism concerning the sincerity of F&E's offer of reassignment in view of Dolan's reasonably held belief that he had been exposed to unsafe working conditions, and F&E's failure to quell Dolan's fears. From Dolan's perspective, it is not difficult to understand his feelings that a reassignment to non-lead work would be temporary and only postpone his inevitable return to conditions he believed to be unsafe.

However, the Commission has directed that I revisit the reassignment issue using an objective standard to consider the overall conditions Dolan faced at the time of Dolan's resignation. 23 FMSHRC 242 ("*Dolan II*"). Given F&E's responses to Dolan's safety complaints consisting of performing air sampling, as well as providing respirators and protective clothing that have not been shown to violate industry standards, applying the reasonable person test, Dolan's refusal to accept F&E's offer of reassignment was objectively unreasonable.

ORDER

Consistent with the above discussion, Bryce Dolan's April 16, 1996, work refusal was protected activity under section 105(c) of the Mine Act. However, the working conditions faced by Dolan at the time of his April 16, 1996, resignation were not intolerable. Consequently, Dolan's protected work refusal did not constitute a constructive discharge. **ACCORDINGLY**, Bryce Dolan's discrimination complaint **IS DENIED**.

Jerold Feldman
Administrative Law Judge

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