FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 18, 2001

FRANKIE UNDERWOOD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2001-192-DM
v.	:	SC MD 01-05
	:	
HUNT MIDWEST MINING, INC.,	:	Stamper Quarry
Respondent	:	Mine ID No. 23-01926

DECISION

Appearances: Marlin Johanning, Esq., Atchison, Kansas, on behalf of Complainant; Rachel H. Baker, Esq., Seigfreid, Bingham, Levy, Selzer & Gee, P.C., Kansas City, Missouri, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Complaint of Discrimination filed by Frankie Underwood, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*., (1994), the "Act." Mr. Underwood alleges in his complaint that Hunt Midwest Mining Inc. (Hunt Midwest) violated Section 105(c)(1) of the Act when he was discharged for not reporting to work for three consecutive days.[1] Underwood maintains that he refused to report to work because it would have been hazardous to do so.

In his initial complaint filed December 7, 2000, with the Department of Labor's Mine

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[1] Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

Safety and Health Administration (MSHA), Mr. Underwood alleged as follows:

> On 11/8/00 Gary Wright told me I was relieved of duty as stripping foreman. At that point he offered me any job I wanted at the Stamper plant. I would report to work on 11/13/00, when I got there they offered me a mechanics job. I refused to do this job. I had a talk with Gary Wright and Jim Murray explained to them that I was not a mechanic & it wasn't safe for the guys running the equipment if I was to take the job. Gary then said that the only job we have take it or leave it. I was discharged for not reporting to work, because I refused to perform an unsafe act. I would like to be reinstated plus back pay for wages lost.

At hearings Underwood testified that he began working for Hunt Midwest in April of 1990 as an equipment operator. Except for a one-year period when he worked elsewhere he continued working as an equipment operator until January 2000. He was then promoted to stripping foreman, responsible for 8 to 15 employees who were removing top soil. He continued to receive the same hourly rate of pay. According to Underwood, on November 8, 2000, he was told by Gary Wright, then manager of Hunt Midwest's Western Operations, that he was being relieved of his duties as a foreman because of his lack of communication.

According to Underwood, when he reported to his new job site at the Stamper Quarry the following Monday, November 13, mine foreman Willis Pretzer, allowed him to take off and report the following day, November 14th. When Underwood reported back the next day Pretzer furnished him with a hard hat and showed him around the mine site. Pretzer wanted Underwood to start the equipment in the morning, do some welding and to help him keep the equipment running until he hired a mechanic. He purportedly also told Underwood that he would be cutting his pay to $12.00 an hour. Dissatisfied with this rate of pay, Underwood told Pretzer that he would have to talk to Jim Murray, Hunt Midwest's Vice President and General Manager, about increasing his pay.

Underwood did not begin working but went to see Murray who was then at the corporate offices at the Randolph Mine about one-half mile away. Although he was uncertain of the date, sometime later that week Underwood received a conference call from Murray and Wright during which they agreed to raise his pay to $14.00 an hour. During the course of this conversation, Underwood apparently expressed some concern about performing mechanical work and Murray or Wright reassured him that he would not be expected to overhaul or replace engines. In specific response to one of his questions, Underwood was also told that he would not be asked to repair brakes. Underwood acknowledges that at no time was he asked to perform any specific duty for which he felt he was not qualified. Based on his allegations herein it may therefore also be inferred that he was likewise not asked to perform any duty which he felt would have been unsafe. At the conclusion of his conversation with Wright (which Underwood believed occurred subsequent to the conference call) he was again offered a job at the Stamper Quarry. Wright wanted him to report to work Friday, November 17. In response, Underwood admits that he said

"okay." Underwood further admits that he thereafter never did show up for work and never returned to the quarry.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion 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. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, *sub nom. Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (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 the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra*. See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

The Complainant herein asserts that he is entitled to relief under a "work refusal" theory. The Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of a perceived danger. In order to be protected however work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Robinette,* 3 FMSHRC at 810; *Gilbert v. FMSHRC,* 866 F.2d 1433, 1439 (D.C. Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette,* 3 FMSRC at 810. Consistent with the requirement that the Complainant establish a good faith, reasonable belief in a hazard "a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator, his belief in the safety or health hazard at issue." *Secretary of Labor, on behalf of Dunmire v. Northern Coal Company,* 4 FMSHRC 126, 133 (February 1982).

The first issue to be addressed in this case is whether the Complainant ever actually refused to work. In his last communication with mine management (in either a conference call with Murray and Wright or a subsequent call with Wright alone) the Complainant concedes that when he was offered work at $14.00 an hour at the Stamper Quarry and was told to report there for work, he responded "okay." There were no subsequent communications and Underwood acknowledges that he never did show up for work. He subsequently received a letter notifying him of his discharge for failing to "show up for work for three or more consecutive days without notification to [his] supervisor." (Exh. C-3). Considering Underwood's testimony alone, I find that his expression "okay" in response to management's offer of employment was indeed an acceptance of work and not a refusal to work. Under the circumstances his failure to subsequently show up for work, without any further communication, can in no way be construed as a "work refusal."

Even assuming, *arguendo*, that his failure to appear for work may be construed as a "work refusal" such a "refusal" to work cannot in any way be construed as having been the result of any hazardous condition. Underwood admittedly was never told to perform any specific job function

that he deemed to be hazardous. Indeed, when Underwood apparently expressed some concerns about performing job duties as a mechanic for which he was not qualified, Murray and Wright allayed any such concerns in the conference call when they specifically stated that he would not be performing such duties as overhauling engines, replacing engines and, in response to a specific question from Underwood, not repairing brakes. If Underwood had any other concerns about hazardous conditions, he admittedly did not communicate those concerns to management. For these additional reasons I cannot find that the Complainant has met his burden to establish a protected "work refusal."

In reaching these conclusions, I have not disregarded the decision by Deputy S. Stacey, of the Missouri Division of Employment Security, holding that Mr. Underwood, was "disqualified from 11/19/00 because the Complainant failed without good cause on 11/16/00 to apply for or accept available suitable work." (Exh. No. C-2).[2]

The "reason" given by Deputy Stacey for the holding was as follows:

> The Claimant refused an offer of work because he believed he could not perform the work without training. The employer was willing to "train him on that job."

The Complainant argues that this "reason" was inconsistent with the Respondent's claims herein. It is not at all clear however that the stated "reason" was based upon any defense or claim by this Respondent or upon any evidence of record since neither the pleadings nor the complete record of such proceedings was introduced at these proceedings.[3] Under the circumstances I can give but little weight to the Complainant's argument herein.

Under all the circumstances I find that the Complainant has failed to sustain his burden of proving a violation of Section 105(c)(1) of the Act and his Complaint must accordingly be dismissed.

ORDER

Discrimination Proceeding Docket No. CENT 2001-192-DM is hereby dismissed.

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[2] The parties agree that this decision is now before the Missouri Court of Appeals upon a request for reconsideration. Accordingly the deputy's decision is not yet final.

[3] The Complainant was granted additional time following hearings to produce such a record but failed to do so.

Gary Melick
Administrative Law Judge

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