FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 25, 2000

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

The captioned matter is before me based on a discrimination complaint filed on December 27, 1996, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3), by the complainant, Bryce Dolan, against the respondent, F&E Erection Company (F&E). The initial decision granted Dolan's discrimination complaint based on a finding that Dolan engaged in a work refusal protected by section 105(c) of the Mine Act. 20 FMSHRC 591 (June 1998) (ALJ).

On February 29, 2000, the Commission, although finding that "substantial evidence supports the judge's conclusion that F&E failed to address Dolan's concerns in a way that should have alleviated his fears," vacated the initial finding of discrimination and remanded this matter for further consideration concerning whether Dolan's protected work refusal constituted a constructive discharge. 22 FMSHRC 171, 177-78. Relying on *Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C. Cir. 1988), the Commission concluded "the key inquiry in a constructive discharge case is whether intolerable conditions existed such that a reasonable miner would have felt compelled to resign." *Id.* at 176. Thus, the Commission remanded this matter for me to determine whether Dolan's work refusal constituted a constructive discharge. For the reasons discussed below, I find that F&E's inadequate response to Dolan's reasonable, good faith safety complaints constituted a discriminatory constructive discharge.

In remanding this matter, the Commission noted that I stated at the hearing that I considered this a work refusal case, rather than a constructive discharge case, because F&E's actions were not calculated to induce Dolan's resignation. 22 FMSHRC at 177-78. I was referring to a retaliatory constructive discharge. A retaliatory constructive discharge occurs when an operator, who is prohibited by section 105(c) of the Act from directly firing a miner

who has engaged in protected activity, seeks to effectuate the miner's termination indirectly by creating intolerable working conditions.[1]

Since termination of the miner must be accomplished indirectly, invariably a retaliatory constructive discharge involves working conditions that are unrelated to safety hazards because exposing the miner to hazardous conditions would give rise directly to section 105(c) protection. *Secretary of Labor o/b/o Bowling v. Mountain Top Trucking Company*, 21 FMSHRC 265, 275-81 (March 1999) *pet. for review docketed*, No. 99-4278 (6th Cir. Oct. 22, 1999) (truck drivers who quit after they had been called back to work after a discriminatory discharge were the victims of a retaliatory constructive discharge because they were subjected to forced idleness as well as to other forms of harassment). However, the anti-discrimination provisions of the Mine Act have been interpreted to prevent employers from accomplishing indirectly what is directly prohibited by law. *Id.* at 272, *citing Simpson* 842 F.2d at 461; *Secretary of Labor o/b/o Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208, 2210-13 (November 1994). The evidence does not reflect, and Dolan does not contend, that Dolan's working conditions were created by F&E in retaliation for Dolan's protected activity in order to encourage him to resign.

The facts in this case are set forth in the initial decision as well as in the Commission's remand decision. Briefly stated, Dolan was an iron worker employed by F&E, a construction company that performed work at an alumina smelter in Point Comfort, Texas operated by the Aluminum Company of America (Alcoa). From late 1994 until March 1996, to ensure a good weld on stiffeners, Dolan and five to six other crew members were removing paint from the angle irons of trusses in the R35 tank farm before affixing the stiffeners. Despite the fact that Jones & Neuse, Inc. (J&N), F&E's environmental and engineering consultant, had recommended "[r]emoval and containment of abated lead will be accomplished by using needle guns, roto penes and grinders attached to high efficiency vacuums," Dolan's crew removed the paint by burning it off with a cutting torch. 20 FMSHRC at 594. During this period Dolan's crew was not provided with any personal respiratory equipment or protective clothing.

In March 1996, Dolan learned that Alcoa employees performing similar work in the R35 tank farm were furnished with protective clothing and respirators, and, that the entire R35 tank farm was supposed to be treated as a lead abatement area. Dolan complained to several F&E officials, including general foreman Steve Whitehead, about the hazards of removing lead based paint without personal protective gear.

[1] A "retaliatory discharge" is "a discharge that is made in retaliation for the employee's conduct (such as reporting unlawful activity by the employer to the government) . . . ." *Black's Law Dictionary* 476 (7th ed. 1999).

In response to Dolan's complaint, F&E contracted with Health and Safety Management, Inc. (HSM) to perform air sample monitoring on crew members who, in the meantime, had been given Tyvek suits[2] and half-face respirators. Based on HSM's air sampling results, HSM recommended that the crew member using the cutting torch wear a full-face respirator, while the remaining crew could continue to wear half-face respirators. F&E implemented HSM's recommendation.

On or about March 25, 1996, Dolan complained that the entire crew should wear full-face respirators due to their proximity to the person using the cutting torch. Dolan also complained that the Tyvek suits were inadequate to prevent lead contamination because they were easily torn and because sparks from the cutting torch burned holes in the suits. In response, F&E provided a large quantity of Tyvek suits so that the crew could wear double layers and replace them when needed. In addition, F&E required the crew to vacuum their clothing with high efficiency vacuums before leaving the work area.

Dolan continued to complain about the inadequacy of the half-face respirators and Tyvek suits. On April 16, 1996, F&E held a meeting to address Dolan's concerns. At the meeting, Whitehead stated F&E would continue to use half-face respirators and Tyvek suits, and he offered to transfer any employee who wanted to perform non-lead based work. No employees accepted Whitehead's offer of reassignment. At the conclusion of the April 16, 1996, meeting, Dolan quit his job because he believed that the personal protective equipment provided by F&E was inadequate to prevent lead exposure to himself and his family.

As noted above, the Commission, in its remand decision, has determined that:

> There is no doubt that 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. As the judge noted, F&E conceded as much at the hearing. 20 FMSHRC at 599-600. Nor is it disputed that Dolan made protected safety complaints to F&E based on his fears. The question is whether a reasonable miner in Dolan's position would have had his fears quelled by the measures taken by F&E in response to Dolan's initial complaint. We find that substantial evidence supports the judge's conclusion that F&E failed to address Dolan's concerns in a way that should have alleviated his fears.

22 FMSHRC at 179. The Commission, having concluded that Dolan's work refusal was protected, has directed that I determine, using an objective standard, whether the working conditions at the time of Dolan's April 16, 1996, resignation constituted a constructive discharge. On April 16, 1996, F&E already had responded to Dolan's complaints by (1) performing air sampling; (2) providing a full-face respirator to the cutting torch operator; (3) providing a half-face respirator to the remaining crew; (4) initially providing Tyvek suits; (5)

[2] Tyvek suits are thin, disposable coveralls made of spun olefin. 20 FMSHRC at 597.

subsequently providing greater quantities of Tyvek suits; (6) providing high efficiency vacuums; and (7) offering Dolan a temporary reassignment to non-lead abatement duties.

Despite F&E's responses to Dolan, as determined by the Commission, the evidence supports the conclusion that the protective measures taken were inadequate to alleviate Dolan's fears. *Id.* Robert Miller, an industrial hygienist who testified on behalf of Dolan, opined that respirators leak due to poor fit or perspiration. Miller also questioned whether half-face respirators provided adequate protection for non-torch cutting crew members. Dolan's testimony that Tyvek suits were ineffective because of they were not burn resistant, and because they tore, was supported by the testimony of crew members Kenneth Tam and Troy Stewart. In addition, vacuuming personnel before they left the work area did not prevent contamination to underlying clothing.

Burning lead paint is the fastest, cheapest, and, from a safety standpoint, the least desirable method of lead removal. 20 FMSHRC 602. Although OSHA does not strictly prohibit burning lead paint in inaccessible areas, OSHA has determined that burning as a principal method of removing lead-based paint is not acceptable. *Id.* Burning as a method of lead abatement is generally prohibited by Alcoa. *Id.* Finally, F&E's burning method was contrary to the advice of J&N, its environmental and engineering consultant, that lead paint should be removed by chipping and grinding. *Id.* at 594.

Although Dolan did not specifically complain about the burning method of lead abatement, Dolan's concerns were caused by F&E's practice of burning lead paint with a cutting torch rather chipping it with a needle gun and grinder. It was F&E's decision to burn, rather than chip, that provides the basis for Dolan's concerns regarding exposure to respirable fumes, as well as exposure to lead as a consequence of burn holes in Tyvek suits. F&E must bear the burden of departing from generally accepted methods of lead abatement.

In determining whether a constructive discharge has been shown despite remedial measures taken by an operator in response to a miner's complaints, it is helpful to examine the D.C. Circuit Court's decision and its progeny in *Gilbert v. FMSHRC* 866 F.2d 1433, 1439 (D.C. Cir. 1989); *John A. Gilbert v. Sandy Fork Mining Company, Inc.*, 12 FMSHRC 177 (February 1990) (*Gilbert I*); *John A. Gilbert v. Sandy Fork Mining Company, Inc.*, 12 FMSHRC 1203 (June 1990) (*Gilbert II*). Gilbert refused to perform work because of his concern regarding hazardous roof conditions. In *Gilbert*, the Commission concluded there "was no question . . . that mine management was aware of the roof problems . . . and was taking steps to address the problems." *Gilbert I*, 12 FMSHRC at 180. However, the Commission determined that Gilbert's safety concerns were not addressed in a manner sufficient to reasonably quell his fears. *Id.* at 181. In view of the fact that Gilbert "did not act precipitately and . . . he entertained a good faith, reasonable belief in a hazard, his departure from the mine constituted a discriminatory constructive discharge in violation of section 105(c)(1) of the Mine Act." *Gilbert II*, 12 FMSHRC at 1205. (emphasis added); *Gilbert I*, 12 FMSHRC 181-82.

Turning to the facts of this case, the Commission has determined Dolan had a good faith, reasonable belief that a hazard existed, and it is evident that Dolan did not act precipitately. Dolan initially raised safety related complaints in March 1996 and he waited a reasonable period

for F&E to respond. Dolan did not resign until April 16, 1996, when it became clear that F&E would not alleviate his continuing concerns about his safety. Thus, consistent with *Gilbert*, the evidence reflects that Dolan's resignation on April 16, 1996, constituted a discriminatory constructive discharge.

In reaching the conclusion that Dolan was constructively discharged, I note that whether or not full and half-face respirators and Tyvek suits were ineffective goes beyond the scope of this proceeding. The determining factors in concluding Dolan was compelled to resign are the reasonableness of Dolan's continuing fears, and F&E's failure to adequately quell Dolan's fears, not the actual degree of hazard presented by F&E's lead abatement procedures. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982); *Metric Constructors, Inc.* 6 FMSHRC 226, 230 (February 1984); *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983); *Gilbert v. FMSHRC, supra; Secretary of Labor o/b/o Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983); *Thurman v. Queen Anne Coal Co.,* 10 FMSHRC 131, 135 (February 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). In fact, a miner refusing work under a good faith belief that a hazard exists is not required to prove that the working conditions were, in fact, hazardous. *See Secretary of Labor o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810-12 (April 1981).[3] It is F&E's failure to remedy Dolan's reasonable, good faith safety concerns that provides the "aggravating circumstances" necessary to support a finding of a constructive discharge. *Clark v. Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981). Thus, as the Court concluded in *Simpson*, "[t]he resolution of [a discrimination] case . . . will turn on whether [the underlying] work refusal was protected . . . . 842 F.2d at 463.

In the final analysis, the Mine Act "is a remedial and safety statute, with its primary concern being the preservation of human life . . ." *Freeman Coal Mining Co. V. Interior Bd. Of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974) (citations omitted); *Peabody Coal Co.*, 7 FMSHRC 1357 (September 1985); *Jim Walter Resources*, 7 FMSHRC 1348 (September 1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987). Under the Mine Act, a miner who reasonably believes he is exposed to a continuing hazard is not required to continue working under such circumstances. If the operator fails to address the miner's good faith, reasonable safety concerns, the miner is left with an "intolerable" choice - - to continue to work indefinitely in the face of a perceived hazard, or to quit his job.[4] It is the operator's failure

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[3] The Commission has "rejected a requirement that miners who have refused to work must objectively prove that the hazard complained of existed . . . [and has] adopted a 'simple requirement that the miner's honest perception be a reasonable one under the circumstances.'" *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1532 (September 1983) *quoting Haro v. Magma Copper Co.,4 FMSHRC 1935, 1943-44* (November 1982), and *Robinette*, 3 FMSHRC at 812.

[4] Unlike the Mine Act, most other anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, do not exclusively concern safety and health. Consequently, there is a general reluctance to predicate a constructive discharge on the fact of discrimination, absent aggravating circumstances, because public policy requires discrimination victims to mitigate damages by remaining on the job while attacking unlawful discrimination within the context of existing employment relationships. *Clark v. Marsh*, 665 F.2d at 1173.

to respond adequately to the perceived hazard that is the prohibited adverse action that compels the miner's resignation and provides the basis for a "discriminatory constructive discharge."[5] *Gilbert II*, 12 FMSHRC at 1205; *Simpson*, 842 F.2d at 463.

Finally, the Commission also directed me to examine anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead abatement jobs on the issue of constructive discharge. Whitehead testified that during the April 16, 1996, meeting he offered to transfer any employee who was not satisfied doing lead abatement work to another part of the plant. Whitehead could not explain why no one accepted his offer given the inherent dangers associated with excessive lead exposure. Dolan and Tam testified that it was not uncommon for F&E to transfer employees to non-lead work, particulary during periods immediately preceding blood test monitoring. However, employees were always returned to lead abatement tasks since most of the tanks, with the exception of newer units, contained lead based paint.

As noted in the initial decision, the intent of the Mine Act is to minimize the exposure of all miners to hazards not just those miners that speak out about hazards. 20 FMSHRC at 605. Thus, offering to reassign a complaining miner while others continue to be exposed to the subject hazard is not an appropriate mitigating factor. Moreover, given the nature of F&E's contract activities concerning maintenance of steel tanks containing lead paint, I credit the testimony of Dolan and Tam that any reassignment would have been temporary in nature. As the Commission noted in its remand, a miner's refusal of a temporary reassignment as a solution to his complaints concerning the continuing existence of hazardous conditions is inextricably connected to the underlying complaints and constitutes protected activity. 22 FMSHRC at 180 *citing Nantz*, 16 FMSHRC at 2214. Accordingly, F&E's offer of reassignment does not alter the fact that its inadequate response to Dolan's legitimate concerns provided the aggravating factors necessary to support a constructive discharge.

ORDER

In view of the above, Bryce Dolan's April 16, 1996, work refusal and resignation were protected by the provisions of section 105(c) of the Mine Act and constituted a

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Thus, under most anti-discrimination statutes, absent aggravating circumstances, discrimination alone is "an insufficient predicate for a finding of a constructive discharge." *Id.* For example, a failure to receive equal pay for equal work, and a denial of a promotion because of an employee's ethnicity, do not provide a basis for a constructive discharge under Title VII. *Id.* (citations omitted). However, section 105(c) does not require a miner, whose work refusal is entitled to statutory protection because he reasonably believes that he is exposed to hazardous conditions, to remain on the job for the purpose of mitigating damages.

[5] Obviously, minor or technical violations of the Mine Act, or conditions that are not potentially dangerous to health and safety, ordinarily will not support a finding of a constructive discharge. *Simpson*, 842 F.2d at 463.

constructive discharge. Consequently, the grant of Dolan's discrimination complaint and the August 5, 1998, *Supplemental Decision on Relief*, 20 FMSHRC 847 (August 1998) (ALJ) **ARE REINSTATED**.[6]

Jerold Feldman
Administrative Law Judge

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[6] The Commission previously has directed for review *sua sponte* the mitigation of damages issue that is relevant for determining the proper period for relief.