

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 17, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-248-D
on behalf of GRANT NOE, Jr.	:	BARB CD 99-07
Complainant	:	
v.	:	
	:	
J & C MINING, L.L.C. AND	:	
MANALAPAN MINING CO., INC.,	:	No. 1 Mine
Respondents	:	Mine ID No. 15-17707

## DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Complainant;  
Susan Lawson, Esq., Lawson & Lawson, Harlan, Kentucky, and  
Richard D. Cohelia, Evarts, Kentucky, on behalf of the Respondents.

Before: Judge Melick

This case is before me upon the Complaint by the Secretary of Labor, on behalf of Grant Noe, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act." These proceedings have been bifurcated and therefore have been limited at this stage to the issue of liability. The Secretary alleges in her complaint that J & C Mining Company, LLC (J & C) violated Section 105(c)(1) of the Act on March 2, 1999, when Noe was purportedly the subject of a constructive discharge after he had engaged in protected activities on December 16, 1998 and on January 19, 1999, and engaged in a protected work refusal on March 2, 1999. (Secretary's Reply Brief page 5)<sup>1</sup>. She seeks as restitution only

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<sup>1</sup> 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

damages for the alleged constructive discharge on March 2, 1999. Manalapan Mining Company Inc., (Manalapan) has been joined as a successor-in-interest to J & C.

### Background

J & C operated the No. 1 Mine from 1997 to May 1, 1999, when it was acquired by Manalapan. During relevant times, J & C operated two production shifts and one maintenance shift each day for five days a week. It employed 13 to 14 miners on each of the first and second production shifts and six miners on the third shift. J & C also frequently operated overtime shifts on Saturdays for coal production or dead work. Four to six miners were typically assigned for such deadwork and the full crew was typically assigned for overtime production.

J & C operated a bridge hauling system which dumped onto a belt. The mine had as many as four underground beltheads and four bridges operating at one time. The production shifts had four bridge operators and two beltmen. There was a constant problem with rocks clogging and stopping the belt. It was therefore important to have a beltman assigned at the beltheads to prevent rocks from causing belt shutdowns.

In early 1999, J & C was retreat mining in the main section. As it progressed toward the surface, three of the beltheads were eliminated. Early in March 1999, they were ready to move to the new panel. It took three shifts to move the belthead. Once the mining equipment was moved to the new panel after March 8, 1999, two of the four bridges were temporarily removed until the advance mining moved deep enough to return them to production. With the removal of the two bridges, two additional qualified men (the two bridge operators) were then available to operate several different types of equipment, perform dead work and watch the belts until their bridges were placed back into production.

Noe had been working as a beltman on the first shift from September 1997 to March 2, 1999. His main duties were to remain at the beltheads and remove rock from the belt. On March 1, 1999, Mine Foreman Jesse Saylor met with Noe in the mine office and stated that he needed someone to work the third shift for two or three weeks because third shift miner, Roger Ramey had been injured. There is no dispute that Ramey had in fact been injured and was unable to work. Noe responded that he did not want to work on the third shift. In this regard he explained at hearing that he did not want to leave his family alone and that third shift foreman Jerry Polly was hard to work for, was an unsafe foreman and that he did not want to work for him.

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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.

Saylor ended the conversation by instructing Noe to report the next day at his regular first shift assignment.

Noe reported for work on the first shift the next day as directed. At the end of the shift Saylor again called Noe into the mine office. Also present in the office at that time was second shift foreman George Saylor and section foreman Carl Runyon. Jesse Saylor again asked Noe to transfer to the third shift. Noe refused, and Jesse Saylor then offered him a \$.50-cent per-hour raise to work the third shift. According to Noe he refused, explaining that if he went to the third shift and “got hurt again they would not pay me [compensation].” Jesse Saylor then informed Noe that the third shift assignment was all that J & C Mining had to offer him and gave Noe the option of working the third shift or quitting. Noe informed Saylor that he could not quit but that he would not work the third shift. Saylor stated that “it was either third shift or go home.” Noe asked Saylor whether that meant he was fired. Saylor confirmed that Noe was fired. Noe then turned in his equipment and uniforms as requested by Saylor.

According to George Saylor, Jesse Saylor asked Noe at this meeting to help him out for a couple of weeks. Noe responded “I’m not going on no God damn third shift” and when Jesse Saylor told Noe “that’s all I got, it’s either that or go home,” Noe “exploded.”

The Secretary argues that when Noe was fired by Jesse Saylor at the March 2, 1999, meeting, he was constructively discharged. She maintains that his refusal to transfer to the third shift was based on a reasonable and good faith belief that to do so would have been hazardous.<sup>2</sup> See *Miller v. FMSHRC*, 687 F.2d 194, 195-96 (7<sup>th</sup> Cir. 1982). It is now the well established law that a constructive discharge is protected if conditions faced by the miner (in this case by Noe’s transfer to the third shift) are so intolerable that a reasonable person would feel compelled to resign. *Simpson v. FMSHRC*, 842 F.2d 453, 463 (D.C. Cir. 1988).

Constructive discharge cases have been analyzed by the Commission by first determining whether the miner engaged in a protected work refusal, and then determining whether the conditions faced by the miner constituted intolerable conditions. *Secretary on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 268 at 272-81 (March 1999); *Secretary on behalf of Nantz v. Nally & Hamilton Entreprises Inc.*, 16 FMSHRC 2208 at 2210-13 (November 1994). 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 such perceived danger. In order to be protected, work refusals must be based upon the

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<sup>2</sup> While the Secretary argues in her post hearing briefs that Noe quit on March 2, 1998, also because of prior adverse actions based on earlier protected activities, the record does not support her argument. At hearings, Noe clearly articulated the reasons he quit and did not mention in this regard any of these alleged prior adverse actions as having any part in this decision. Under these circumstances the Secretary cannot properly assert that any of the prior alleged adverse actions played any role in Noe’s decision to quit. Accordingly the Secretary’s argument in this regard is rejected.

miner's "good faith, reasonable belief in a hazardous condition." *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *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 FMSHRC 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 Co.*, 4 FMSHRC 126, 133 (February 1982).

The issue then is whether Noe, in refusing to transfer to the third shift, held a good faith and reasonable belief that it would have been hazardous and then whether conditions on the third shift were so intolerable that a reasonable person would have felt compelled to resign. Noe testified that he explained to Jesse Saylor at their meeting on March 1, 1999, his reasons for refusing the transfer. This testimony is set forth in the following colloquy at hearing:

- Q. What did you tell Jessie Saylor at that time with regard to the third shift transfer?
- A. I told him I didn't want to go on third shift because I didn't want to leave my family alone.<sup>3</sup> You know, I was scared of where I lived at. And Jerry Polly is hard to work with. Because to me, I thought he was an unsafe worker and I didn't want to work with him.
- Q. And why did you consider him to be unsafe to work for?
- A. Well, the time I was there I know of at least six people that had been in hurt and one died. They saved him two or three time before they got him out of the mine. That scared me.
- Q. Who do you know that was hurt on third shift? What are their names?
- A. Glen Brock was.
- Q. And he's the one who died three times?
- A. That's why they say, sir.
- Q. And who else do you know that was hurt?

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<sup>3</sup> It was proffered at hearing that Noe suffers from a condition known as "obsessive compulsive disorder" and that this condition was related to his concerns about leaving his family at night. (Tr. 189).

A. Roger Ramey was hurt twice.

Q. Okay. Who else?

A. Cole Colinger (phonetic) was hurt. And I think there's another one, but I can't remember his name. I'm pretty sure.

(Tr. 111-112)

When asked to explain these injuries and foreman Polly's involvement if any, Noe testified as follows:

JUDGE MELICK: And what kind of injuries did each receive?

BY ATTORNEY DOUGHERTY: Let's start with the first one. Who was the first one. Who was the first one?

A. Glen Brock, he was electrocuted.

JUDGE MELICK: He was electrocuted?

A. Yes, sir.

JUDGE MELICK: And what did Mr. Polly have to do with that electrocution?

A. Well, he was the foreman, you know, so he was there.

JUDGE MELICK: Well, do you know if he had anything to do with the injuries?

A. No, sir I don't.

JUDGE MELICK: Who was the second one?

A. Roger Ramey.

JUDGE MELICK: Ramey?

A. Yes, sir.

JUDGE MELICK: What kind of injuries did Mr. Ramey receive?

A. First time, I believe, he cut his little finger off.

JUDGE MELICK: And what did Mr. Polly have to do with that injury, if anything?

A. He was just there, also.

JUDGE MELICK: He happened to be there?

A. Yes sir.

JUDGE MELICK: And what was the third injury?

A. Cole Colinger. He was cut - - - his arm with a piece of rock, and they thought he was going to lose his arm for a while, but he didn't.

JUDGE MELICK: All right. And what did Mr. Polly have to do with him being cut by a rock, if anything?

A. He as roof bolter man. He should have made it safer. He should have had a jack there for him to see it.

JUDGE MELICK: Mr. Polly was a roof bolter?

A. No, he was a box cutter. The other fellow was a roof bolter man.

JUDGE MELICK: All right. Are there any other injuries working for Mr. Polly?

A. No, just those three, but two of them were hurt twice.

JUDGE MELICK: Two of them were hurt twice?

A. Yes, sir. Roger Ramey and Glen Brock.

JUDGE MELICK: Do you know if any other injuries were the result of working for Mr. Polly?

A. No.

(Tr. 113-116).

At the second meeting with Foreman Jesse Saylor on March 2, 1999, Noe provided a third reason for not wanting to transfer to the third shift. This was explained in the following colloquy:

Q. And what did you [mean] by that with regard to your compensation and going to third shift?

A. Well, [if] I went on third shift and got hurt again, they would not pay me. They didn't pay me that first time.

Q. So you were concerned that there was a likelihood you may be injured on third shift and that if you were, that compensation would be denied again?

A. Yes, sir.

(Tr. 120).

Noe testified that after stating his reasons for not wanting to go to the third shift the following conversation transpired:

A. He said, you have no choice but to quit. And I told him, Jessie, I can't quit. I said, I can't quit. He said that's all I got for you. I said, well I'm not going to. He said, that's all I got. I looked at him, I said, I'm fired now? He said, yes. I asked him, I said do you want my rescuer? He said, I'll take your rescuer and uniforms. I set my rescuer - - - laid them both beside him. I said, you f'ed me, Jessie? He said no.

(Tr. 120-121).

Within this framework of evidence I find that Noe had neither a good faith nor reasonable belief that it would have been hazardous to transfer to the third shift. The first and apparently most important reason he cited for not wanting to transfer, i.e., that he did not want to leave his family alone because he lived in an unsafe area, is unrelated to any mining hazard. His desire not to work with Foreman Polly because Polly was "hard to work with," is likewise not a reason related to any mining hazard.

Finally, Noe's vague claim that third shift Foreman Polly was an unsafe worker (and that Noe would therefore more likely be injured on the third shift) has no credible record support. While Noe speculates that Polly was unsafe because three miners had been injured while working on his shift he concedes that Polly had not caused any of the injuries (Tr. 165-166). Indeed, the Complainant has failed to provide any specific evidence that Polly had anything to do with any of those injuries or that in fact there were more injuries on his shift than on other shifts. The very fact that Noe has asserted these facially unsupported claims in itself demonstrates the lack of a good faith reasonable belief.

Under the circumstances I do not find that the Secretary has sustained her burden of proving that Noe entertained either a reasonable or a good faith belief that a transfer to the third shift would have been hazardous or that the conditions on the third shift were so intolerable that a reasonable person would have felt compelled to resign. The facts do not support a constructive discharge.

**ORDER**

Discrimination Proceeding Docket No. KENT 99-248-D is hereby dismissed.

Gary Melick  
Administrative Law Judge

Distribution: (By Facsimile and Certified Mail)

Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd.,  
Suite B-201, Nashville, TN 37215

Susan C. Lawson, Esq., Lawson & Lawson, P.S.C., Post Office Box 837, Harlan, KY 40831

Richard D. Cohelia, Representative of J & C Mining, Safety Director for J & C Mining, and  
Manalapan Mining Co., Inc., Route 1, Box 374, Evarts, KY 40828

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