

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
March 28, 1997

JAMES C. TYSAR, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 96-146-DM
: NC MD 96-04
AKZO NOBEL SALT, INC., :
Respondent : Cleveland Mine
: Mine ID No. 33-01994

DECISION

Appearances: James C. Tysar, Parma, Ohio, pro se, Complainant;
Mark N. Savit, Esq., and Ruth L. Ramsey, Esq.,
Patton Boggs, L.L.P., Washington, D.C., for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant filed an initial complaint with the U.S. Department of Labor, Mine Safety and Health (MSHA), and after investigating the complaint, MSHA informed the complainant of its decision not to pursue the matter further. The complainant then filed his complaint pro se with the Commission.

The complainant has been employed by the respondent for over nine years, and at the time his complaint was filed he was employed as a laborer. The complainant alleges that he was discriminated against and suspended from work for three days on October 6, 1995, because of his refusal to perform a job assignment in a mine area that he believed was unsafe. The complainant seeks to recover back pay for the three-day suspension, two days of missed overtime, and expungement of the suspension action from his personnel records.

The respondent filed a timely answer to the complaint denying any discrimination and taking the position that the complainant was suspended for insubordination for refusing to carry out a work assignment and order by his supervisory foreman. A hearing was held in Cleveland, Ohio, and the parties appeared and participated fully therein. The parties filed post hearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

Issue

The issue presented in this case is whether or not the respondent discriminated against the complainant by suspending him for three days after he refused to carry out a work assignment and order by his supervisor to perform a job task that the complainant believed was unsafe.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c)(1), and (2) and (3).
3. Commission Rules, 29 C.F.R. ' 2700.1, et seq.

Background

The record reflects that on October 6, 1995, Mr. Tysar and co-worker Christopher Brown were working as laborers on the midnight shift on the second floor of the mine warehouse under the supervision of Surface Shipping Production Foreman James Mook. Mr. Mook assigned them the task of cleaning (shoveling) salt off the CFC scalping screen feed conveyor belt located on the second floor. There is a dispute as to whether they were assigned to clean the entire belt line or whether their work assignment was confined to only the belt tailpiece area.

The belt in question is an elevated inclined belt approximately 20 feet long and 3 to 4 feet wide, that passes over and in front of an elevator that opens directly beneath a portion of the belt. The belt section to the left of the elevator as one is directly facing the elevator is approximately 13 feet above the floor, and the tail piece section to the right of the elevator is approximately 10 feet above the floor, and 6 to 10 feet from the elevator.

The assigned cleaning task called for Mr. Brown, the junior laborer, to shovel the belt from an elevated man basket@ secured to the end of a forklift, with Mr. Tysar operating the forklift. The belt was de-energized and locked out, and Mr. Brown would have performed the cleaning from the man basket which was equipped with hand rails and a locked gate. He was also provided with a safety belt and lanyard.

After securing the man basket to the forklift, and while preparing to move the forklift into position to begin cleaning the belt, a maintenance vehicle with two mechanics in it exited the elevator under the overhead belt line and passed by Mr. Tysar and Mr. Brown. Mr. Tysar contacted Mr. Mook and expressed his concern that he and Mr. Brown might be at risk if they were cleaning the belt area in front of the elevator doors and a vehicle exited and struck the forklift while Mr. Brown was in the raised man basket.

Mr. Mook responded to Mr. Tysar's concern, and in the course of their discussion at the job scene, Mr. Tysar informed Mr. Mook that he wanted the elevator shut down and taped off while he and Mr. Brown cleaned the belt in order to insure against another vehicle driving out of the elevator and possibly striking the forklift while Mr. Brown was suspended in the air cleaning the belt in front of the elevator doors.

Mr. Mook maintained that his belt cleaning assignment was confined to the belt tailpiece area in order to facilitate the repair and replacement of a belt wiper, and that Mr. Tysar and Mr. Brown would have no reason to be in front of the elevator doors while cleaning the tailpiece. Mr. Tysar and Mr. Brown maintained that they were assigned to clean the entire belt line, and that at some point while doing this job, the forklift would be parked in front of the elevator doors.

Mr. Tysar estimated that the belt cleaning job would take less than an hour, and Mr. Mook rejected his request that the belt be shut down and taped off while he and Mr. Brown cleaned the belt. Mr. Mook indicated that the elevator was needed to bring in parts and supplies, and he maintained that he offered Mr. Tysar two alternatives to shutting down and taping the elevator, namely, an offer to inform the other employees of the work being done by Mr. Tysar and Mr. Brown, and a suggestion that Mr. Tysar position himself next to the forklift, with the brake set, so that he could observe the elevator and warn anyone exiting that he and Mr. Brown were working in the area. Mr. Tysar denies that these offers were made, and even if they were, he indicated that he would reject them because he believed that disabling the elevator and taping off the area was the only acceptable means of insuring his safety. Mr. Mook then gave Mr. Tysar and Mr. Brown a direct order to proceed with their job assignment, and when they refused, Mr. Mook suspended them. They subsequently filed their complaints, and Mr. Brown withdrew his complaint shortly before the scheduled hearing. His case was dismissed.

Complainant's Testimony and Evidence

James C. Tysar, the complainant in this matter, testified that he is employed by the respondent as a laborer, has been employed by the company for over nine years, and serves as a safety committeeman. He stated that although he and Mr. Brown refused an order by Mr. Mook to do the assigned job, his refusal was based on a safety concern and Mr. Mook's refusal to grant his request to make his work area safe by taking the elevator out of service.

Mr. Tysar stated that he suggested to Mr. Mook that he call the plant safety director, but instead, Mr. Brian Bonjack, a maintenance foreman, appeared on the scene, and Mr. Tysar believed that Mr. Bonjack was called as a witness because Mr. Mook intended to suspend us (Tr. 23). Mr. Tysar stated that Mr. Bonjack had no knowledge of the events leading to his suspension, and was there to witness his confrontation with Mr. Mook. Mr. Tysar explained his work assignment and safety concerns as follows at (Tr. 49-51):

THE WITNESS: All right. My foreman, Jim Mook, gave myself and Mr. Chris Brown a job to do on the second floor of the warehouse. Our job was to - - my job was to operate a forklift with Mr. Brown in a caged-in platform which was attached to the forks of the fork lift. I was supposed to raise him up into the air to the level of the conveyor belt, which we were told to clean the decking on; Mr. Brown was told to clean the decking.

This particular conveyor belt runs on an angle, about a 45-degree angle directly above - - well, three feet out and directly above the doors of a freight elevator.

As we were getting into position to do this job, the doors of the elevator opened up and a maintenance vehicle pulled out of the elevator doors at a pretty good rate of speed.

So, I contacted Mr. Mook, and I explained to him the situation as far as our concern for our safety, being getting bumped into or knocked over while Mr. Brown was up in the air. And I requested that he tape off the elevator doors - - caution tape the elevator doors on the first floor - - so that nobody gets on the elevator and gets off on the second floor. I also suggested that he might put a **Do Not Operate** tag on

the button of the elevator so that nobody pushes the buttons to operate the elevator.

Mr. Mook decided that it would be better that I put Mr. Brown up in the air on a platform, set the emergency brake and go stand by the little window in the door and look to see if the elevator is coming up.

JUDGE KOUTRAS: The door of the elevator?

THE WITNESS: Yes.

JUDGE KOUTRAS: The window in the door of the elevator is what he expected you to do?

THE WITNESS: Yes. But that scenario there would have put me directly under where Mr. Brown was working. If Mr. Brown dropped a shovel, I could get hit with a shovel.

I just thought that the best course of action to make our work area safe was to disable the elevator or to prevent people from using the elevator while we were doing this job.

Mr. Tysar further explained his safety concerns as follows at (Tr. 25):

JUDGE KOUTRAS: How would the forklift get bumped?

THE WITNESS: Because our job was to clean belt decking, which the belt decking ran over the top of the elevator doors.

JUDGE KOUTRAS: You felt that that would be bumped by a piece of equipment coming out of the elevator?

THE WITNESS: I felt that it could be. I'm not saying that it would be. I'm saying that there was a very good probability. The maintenance people were using the elevator at the time. The elevator is always in use. Electricians use it, mechanics use it, people come and go.

Mr. Tysar believed it would have taken Mr. Mook 10 to 15 minutes to tape off the elevator, and the belt cleaning job would not have taken more than an hour (Tr. 26). He confirmed that he told Mr. Mook that he refused to do the work out of concern for

his personal safety (Tr. 34). He and Mr. Brown were then escorted off company property, and he was suspended for three days, and Mr. Brown was suspended for only one day because he had a better work record (Tr. 35). Mr. Tysar confirmed that he filed a grievance with his union regarding his suspension, but did not prevail (Tr. 42-44; 303-304).

Mr. Tysar believed that the best course of action to make his work area safe was to disable the elevator or prevent people from using it while he and Mr. Brown were working (Tr. 51). He explained that Mr. Brown was expected to clean hardened salt buildup on the belt decking in between the rollers and on the belt bottom, and they would be positioned in front of the conveyor that was ten feet off the floor on a 45-degree angle directly above the elevator door (Tr. 53).

Mr. Tysar stated that in response to his complaint, Mr. Mook suggested that he lift Mr. Brown up in the air, set the forklift park brake, and then get off the forklift and look through the window of the elevator door (Tr. 54). Mr. Tysar believed he would be at risk if the forklift tipped over, depending on the size and weight of the vehicle leaving the elevator, and Mr. Brown could have dropped a shovel or shoveled salt down on him if he were standing under the belt looking through the elevator window. He further believed that Mr. Brown would be at risk if he were knocked out of the forklift basket if the forklift tipped over (Tr. 54).

Mr. Tysar confirmed that his confrontation with Mr. Mook took place while he and Mr. Brown were preparing to clean the belt. Mr. Brown would have been on the forklift cleaning the belt decking with a shovel. The platform had rails around it, with a locked gate, and the salt would be shoveled into a dumpster below the belt (Tr. 55-56).

Mr. Tysar confirmed that that he disagreed with Mr. Mook's suggestion that he look through the elevator window and leave the forklift in a locked position while Mr. Brown was cleaning, and there was no overhead protection between the bottom of the belt and the floor level (Tr. 57). He stated that he had no idea what Mr. Mook expected of him once he looked through the elevator window (Tr. 58). He believed that Mr. Mook should have responded to his complaint in a diplomatic manner rather than punishing him for his complaint, and he stated as follows at (Tr. 59, 61-62):

JUDGE KOUTRAS: So, that was the dispute?

THE WITNESS: Yes, that was the dispute.

JUDGE KOUTRAS: The foreman said, ANo, we're going to do it this way,@ and you said, ANo, we're going to do it my way.@ And that was the end of it.

THE WITNESS: Yes, I saw it as a power struggle.

* * * *

THE WITNESS: In some cases when some people that are given a position with power or authority, they handle it well and some people - -

JUDGE KOUTRAS: How do you think someone else would have handled that situation?

THE WITNESS: Well, everybody has their own personalities and dispositions. What I'm saying is that he may have had a personal problem with me. I don't know. But I was doing my job as a union safety committeeman, and I was also taking responsibility for my own personal safety and Mr. Brown's safety, even if I wasn't a union safety committeeman.

Mr. Tysar stated that he and Mr. Brown would have been no more than four feet from the elevator doors. The doors were 10 feet wide, and the belt line was approximately 15 or 20 feet long. He stated that he and Mr. Brown were to clean the belt, starting at one end and cleaning the entire decking. At one point in time they would be directly in front of the elevator doors, and at other times Aa little to the right or to the left@ (Tr. 64).

Mr. Tysar believed that other pieces of equipment would have been on the elevator on the midnight shift, and maintenance personnel were working during that time. He described the area as the second floor of a warehouse with bins and mixers on that floor, and confirmed that the elevator was the only means for vehicles to reach the second floor (Tr. 67-68). He believed that Mr. Mook did not want to inconvenience the maintenance department by shutting down the elevator (Tr. 69).

On cross-examination, Mr. Tysar stated that the elevator window is near the left edge of the door at eye level of a person of average height, and that he had difficulty seeing through the window because it is always dirty and there is an inner screen door in addition to the main door (Tr. 77-78). He further explained the operation of the doors, and stated that the

maintenance vehicle that exited the elevator was backed in so that the front of the vehicle came out first when the elevator doors opened (Tr. 79-82).

Mr. Tysar stated that the belt was not running and it was locked out as required when idlers and rollers are to be cleaned (Tr. 82). He confirmed that the two individuals in the maintenance vehicle that came out of the elevator observed him as he was positioning the forklift, and they would pass him on their way back to the elevator (Tr. 85). He stated that there were **A**quite a few@ vehicles in use on the midshift shift, as well as two mechanics and two electricians (Tr. 86). The incident in question occurred at 3:50 a.m., and the shift started at midnight (Tr. 88).

Mr. Tysar could not recall that Mr. Mook offered him any other alternative ways to make the belt cleaning job safe other than looking through the elevator window (Tr. 93). He could not remember whether Mr. Mook ever offered to notify all of the other personnel using vehicles that he was working in the area and stated, **A**even if he did, that's a moot point because that's still not good enough,@ and that **A**people forget@ (Tr. 95-96). He believed that **A**the safest way to do this would have been to disable and not use the elevator or tape it off@ (Tr. 96). He further stated as follows at (Tr. 96-97):

Q. So, it's your testimony that there was no other alternative that would have been acceptable to you in any case; is that right?

A. I'm willing to talk with people and compromise. That's what this whole thing is about, especially when my own safety is concerned, that particular - - even if he did or even if he did bring that possible solution up, that would have been unacceptable, yes.

And, at (Tr. 101-102):

Q. Did you suggest anything other than taping off the elevator or de-energizing it, Mr. Tysar?

A. Those are the two things that came to mind and that's normally what would be the best solution to a problem like that.

Q. The question was did you suggest. I take it your answer is **A**no?@

A. No, because Mr. Mook was fighting me that whole time. He was arguing with me about it.

Mr. Tysar confirmed that the conveyor belt was three and a half to four feet away from the elevator, and if he were standing next to the window looking into the elevator he would have possibly been three to four feet in front of the belt area that Mr. Brown was shoveling (Tr. 105). Mr. Tysar further stated that the belt was three and a half to four feet wide and Mr. Brown was shoveling on the far side of the belt away from the elevator and Mr. Brown would have been six to eight feet behind him (Tr. 106). Mr. Brown would have been anywhere from eight to fifteen feet up in the air, depending on the part of the belt he was working on, and 15 to 20 feet where the window was located.

In response to a question as to whether or not he told Mr. Mook about his concern that Mr. Brown might drop a shovel on his head, or shoveling material down on him, while he was looking through the window, Mr. Tysar responded as follows at (Tr. 108-109):

THE WITNESS: About overhead? Yes, that was brought up; something like that, I guess.

JUDGE KOUTRAS: Specifically, did you tell Mr. Mook - -

THE WITNESS: Not about a shovel, no.

JUDGE KOUTRAS: Or material?

THE WITNESS: Material; things falling from above, yes.

JUDGE KOUTRAS: Could fall on your head?

THE WITNESS: Things falling from above, yes.

JUDGE KOUTRAS: You told Mr. Mook that?

THE WITNESS: I believe - -

JUDGE KOUTRAS: That you were concerned that material would fall on your head while you were standing at the elevator looking through the window?

THE WITNESS: I told Mr. Mook I didn't feel safe doing that; that's what I told him.

JUDGE KOUTRAS: But you didn't give him any specifics. You just used the generic word **A**safe.@ You didn't feel you were safe, right?

THE WITNESS: Basically, yes.

JUDGE KOUTRAS: But you didn't tell him why?

THE WITNESS: I don't believe I did.

Mr. Tysar stated that there is less salt buildup higher up the belt line and the **A**worst of it@ was in front of and to the right of the elevator (as one faced it) closer to the belt tail piece which was six to ten feet away (Tr. 113-114). The forklift was four and a half to five feet wide and he did not believe he could have positioned the forklift in such a way as to clean the belt at the tail pulley area without putting it in front of the elevator. He believed that part of the forklift would still be in front of part of the door (Tr. 119).

Mr. Tysar denied that Mr. Mook worked with him to position the forklift so that it was out of the way of the elevator. He confirmed that Mr. Mook showed him how to set the parking brake, and the forklift was 15 or 20 feet away from the elevator at that time and off to the side for a distance of four feet (Tr. 120). He confirmed that the tailpiece was on the left as one exited the elevator, and that the first place a left turn can be made while exiting the elevator was 20 feet from the elevator door (Tr. 122).

Mr. Tysar confirmed that he has never heard Mr. Mook say **A**to hell with safety@ (Tr. 122). He stated that he did not know whether Mr. Mook called Mr. Ryon, and he confirmed that in his deposition he stated that Mr. Mook did in fact call Mr. Ryon but explained that he **A**was confused to an extent@ (Tr. 128). He then confirmed that his notes reflect that **A**after consulting with Tim Ryon, Mook came back and ordered us to work in this unsafe environment, and we refused on the grounds of our safety@ (Tr. 129).

Mr. Tysar stated that Mr. Mook showed him where the job was to be done, and he explained as follows at (Tr. 131):

Q. And he pointed out exactly where he wanted you to shovel and where he wanted you to put the forklift?

A. You use the work **A**exactly.@ He basically went up to the second floor with us, showed us the job to be done, told us how he wanted us to do it, what to use.

As far as exactly goes, those are specifics. We had a good understanding of what needed to be done and how it had to be done and what we had to use to get it done. That was clear.

Mr. Tysar stated that he raised a safety concern with Mr. Mook about securing the work basket to the forklift, and that Mr. Mook responded to his satisfaction by securing the basket to the forklift, and providing a safety belt and lanyard for Mr. Brown. Mr. Tysar commented that Aif I was going to be in the basket, I wouldn't have any problem with it@ and AI would have felt safe@ (Tr. 133).

Mr. Tysar stated that Mr. Mook responded to his call to come to the work area in a reasonable amount of time, andAwhen he got up there, then we had an argument and could not agree on a compromise@ (Tr. 137). Mr. Mook then assigned him and Mr. Brown to do some shoveling while he spoke on the telephoneAprobably with Mr. Ryon@ (Tr. 139). After finishing that call, Mr. Mook then stated AI'm giving you a direct order. I want you to do such and such a job,@ and then Awhen we refused on the grounds of safety, that's when we were suspended@ (Tr. 140).

Mr. Tysar confirmed that he has been warned or written up three times for safety violations, and he explained the circumstances. He filed grievances for two of the violations, and the grievances were denied (Tr. 140-143). Mr. Tysar denied that Mr. Mook had ever previously spoken to him about safety violations or written him up for any violations (Tr. 144).

Mr. Tysar confirmed that when he and Mr. Brown were preparing to do the work and the maintenance vehicle came out of the elevator it was not Aa near miss@ and they were far enough away. His concern was that a vehicle exiting the elevator in the course of his assigned work would come close to where the forklift would be parked (Tr. 145). The forklift would be positioned away from the elevator, and the conveyor belt would have been between the elevator and the forklift. Assuming that he and Mr. Brown had proceeded to work on the belt, and the vehicle came out of the elevator, Mr. Tysar believed that it would have hit the forklift. He further stated at (Tr. 147-148):

THE WITNESS: Your honor, we're really only talking about that area there, that general area where we were working is only like roughly 20 to 25 feet and directly in front of the elevator doors. There's some

space off to the right and off to the left that you're not directly in front of the doors, but most of it is.

JUDGE KOUTRAS: Okay.

THE WITNESS: Just about anywhere you park that thing, if we were positioned directly in front of the elevator door, it would have been a direct hit. If we were off to the right a little bit, we would still have gotten hit.

JUDGE KOUTRAS: Well, my question is in the course of your cleaning the belt, would you have been positioned directly in front of the elevator at any time while you were doing the work?

THE WITNESS: Yes.

Christopher Brown, employed by the respondent as a laborer, confirmed that he and Mr. Tysar were assigned to do the belt cleaning job by Mr. Mook. He believed that Mr. Tysar had a legitimate safety reason for asking Mr. Mook to tape off the elevator, and he would have felt better if the elevator was tagged out (Tr. 154). Mr. Brown could not recall any alternative safety suggestions by Mr. Mook (Tr. 155).

Mr. Brown believed that his one day suspension was unfair, but confirmed that the withdrawal of his complaint ~~was~~ my own idea, ~~and~~ that mine management never discussed the matter with him or influenced his decision. He also confirmed that respondent's counsel never harassed him, and he simply ~~couldn't~~ handle ~~the~~ legal proceeding (Tr. 160-161).

On cross-examination, Mr. Brown confirmed that he felt unsafe with the job assignment by Mr. Mook, and told Mr. Mook that ~~I~~ feel unsafe, ~~but~~ said nothing specific as to why he felt unsafe. Mr. Brown stated that he offered no suggestions or ideas to Mr. Mook to correct the situation, and he could not recall any alternatives offered by Mr. Mook other than taping off or de-energizing the elevator (Tr. 163).

Mr. Brown stated that ~~I~~ hardly said a word ~~during~~ the conversation that took place with Mr. Mook, and he could not recall if both he and Mr. Tysar tried to reason with Mr. Mook. He further confirmed that he did not participate in the conversation between Mr. Mook and Mr. Tysar and that ~~all~~ I said was I thought it was unsafe ~~at~~ (Tr. 166). To the best of his recollection, the vehicle in question backed out of the elevator

(Tr. 167), and when asked if he could be wrong, he replied AI could be wrong, but I'm pretty sure it came out backward@ (Tr. 169).

Respondent's Testimony and Evidence

James S. Mook, respondent's Surface Shipping Production Foreman, testified that he has worked for the respondent for 19 years, and he described the second floor area around the freight elevator, and explained the diagrams (Exhibit R-2, Tr. 180-185).

Mr. Mook stated that he was informed by the maintenance department that the conveyor belt tailpiece wipers could not be changed out until all of the salt buildup at the tailpiece was cleared out. He determined that the belt tailpiece needed to be cleaned, and he assigned that job task to Mr. Tysar and Mr. Brown on the evening of October 6, 1995. The work was to begin after their lunch hour when he had time to personally take them to the area and show them what needed to be done (Tr. 186). He confirmed that he personally took them to the job area because it was a new job assignment and not a repetitious one (Tr. 187).

Mr. Mook explained what occurred at the time he assigned the job task to Mr. Tysar and Mr. Brown. He stated that he told them that Awe had some belt decking to clean out and we needed a lock.@ The belt electrical breaker was locked out, and Mr. Brown was assigned to do the manual cleaning work from the forklift basket, and Mr. Tysar was assigned to operate the forklift. He then told them, Awe're here, set up and away you go,@ and since they had no questions, he left the area (Tr. 187-188).

Mr. Mook confirmed that Mr. Tysar raised a question concerning how the basket would be attached to the forklift, and he and Mr. Tysar secured it with a heavy rope and Mr. Tysar Awas quite pleased with that arrangement@ (Tr. 189). Mr. Mook further explained his work assignment as follows at (Tr. 189-190):

Q. So, you locked out the belt and tied the basket there. Did you show them where you expected them to put the forklift?

A. Yes, I did. It was obvious because I pointed out the tail piece area where all the salt buildup was.

Q. Could you describe - - can you point on the diagram to the best of your recollection where the salt buildup was that they had to knock down?

A. The forklift in the picture is positioned right where the man had to be to be able to reach right and left of that tail pulley because on a tail piece you have strip boards that contain the salt as it enters the belt; that's where the wipers were blown out and that's where the salt was packed up.

As you went uphill, the salt tapered down to nothing. So, the wipers being blown out caused all this spillage right there at the tail piece area. Once we set this man up in this location, he could reach in this tail piece area and uphill and be able to accomplish all the clean up there was.

Q. Did you explain that to Mr. Tysar and Mr. Brown?

A. Not in detail. I told him we were going to clean the tail piece area up, and this is where I told him to set the machine and there were no questions.

Q. So, you told him the tail piece area. Did you tell him the entire belt had to be cleaned?

A. No, I didn't.

Mr. Mook stated that he instructed Mr. Tysar to use a scrap-salt dumpster that was nearby so that most of the salt could be shoveled from the belt decking directly into the dumpster. Mr. Tysar moved the dumpster into place with the forklift and it was placed to the right of the elevator in an inset by a walled partition (Tr. 191).

Mr. Mook stated that he returned to his office, and five to ten minutes later Mr. Tysar called on the intercom and informed him that there was **A**a near miss accident@ and that two men on a maintenance vehicle **A**came screaming off the elevator@ and could have hit him and caused an accident. Mr. Tysar informed him that no one was hurt **A**because we weren't set up yet@ (Tr. 192).

Mr. Mook identified and offered a copy of a letter addressed to Mr. Tysar, dated October 6, 1995, that he was in the process of writing as a disciplinary action because of Mr. Tysar's unsatisfactory work performance (Exhibit R-7). Mr. Mook stated that the letter was never given to Mr. Tysar, or discussed with him because his work suspension that same evening occurred before he could do so. The letter was rejected (Tr. 199-202).

Mr. Mook stated that Mr. Tysar had worked for him for seven weeks prior to the suspension in question, and that he had many discussions and confrontations with him concerning his lack of work, personal safety, and unsafe work (Tr. 203-205).

Mr. Mook stated that after speaking with Mr. Tysar over the intercom, Mr. Tysar and Mr. Brown came to his office within minutes screaming that they could not do this job at the freight elevator because it was an unsafe act and they started demanding that safety men from the company be brought in (Tr. 208). Mr. Mook stated that he instructed Mr. Tysar and Mr. Brown to return to the second floor area and not to resume work on the belt, but to shovel salt from the floor into two dumpsters in the corner of the warehouse until I can get this sorted out (Tr. 208).

Mr. Mook stated that he then went to the warehouse after requesting the presence of maintenance foreman Brian Bonjack for a second opinion as to whether there were any other safety facets involved with the work assignment that he had made. Mr. Mook then called Mr. Chris Gill, the mine surface superintendent, to make him aware of his problems with Mr. Tysar, and he and Mr. Gill had an ongoing conversation about Mr. Tysar (Tr. 209-211).

Mr. Mook stated that the forklift was parked off to the side when he arrived at the job scene, and it was all set up but not at the job site yet (Tr. 211). He and Mr. Bonjack discussed the situation, confirmed with Mr. Tysar that the forklift brake had been tested and was working fine, and made sure the basket was secured and that the safety belt and lanyard were in place. The belt line was locked out, and he then ordered Mr. Tysar to move the forklift and park it to the right of the elevator as shown in the large diagram exhibit R-4.

Mr. Mook was of the opinion that the area where all of the belt work was needed to be done could have been reached with a shovel by the person in the basket where the forklift would have been parked to the right of the elevator (Tr. 213). However, this opinion was not acceptable to Mr. Tysar and he was extremely angry because he believed that other people could still exit the elevator and was afraid that he could get hit even with the forklift in that location (Tr. 216). Mr. Mook stated that because of the presence of other equipment on the left side of the elevator as one exits the doors, anyone exiting the elevator on a piece of equipment would have to proceed straight ahead for a distance of 20 feet, and past the parked forklift, before he could make a left turn to reach the other warehouse areas (Tr. 215-216).

Mr. Mook stated that he offered Mr. Tysar the following alternatives other than taping off or locking out the elevator in order to assure him that the job would be safe (Tr. 218-219):

THE WITNESS: I told him to park the machine, set the park brake, take it out of gear, get off, stand three feet, an arm's length away from the machine so he would be at the controls near enough in case Brown needed him, which would put him in a frontal view of that elevator to see anyone getting off of it.

Mr. Mook further stated that he offered to contact everyone that may have been working with vehicles that might come into the work area in question, and he denied telling Mr. Tysar to look through the elevator window (Tr. 217, 225). Mr. Mook pointed out that the dumpster was placed at the intended work location so that the salt could be shoveled in from the belt (Tr. 219). He further explained his suggested safety alternatives at (Tr. 223-224):

A. Two fold. He would be there as the safety man for Mr. Brown, if needed. And he would be needed to move the machine, if nothing else. He was within hand's reach of the control.

And, secondly, to be able to view the elevator because I stated to these gentlemen during the course of these discussions that there was a problem in the block press pump room and I needed to keep the freight elevator running if possible, so that everyone could safely use the elevator and us still get our job done at the same time. So, with Jim Tysar standing in that position, this was the alternative safety suggestion by me, he could be there for Brown as the safety man and also be able to see anyone coming off the elevator.

At that point, I timed the opening on the freight elevator doors - - Brian Bonjack was present during this period, during all of these proceedings - - and it took a full six seconds for the doors to open once the open door button was pushed. So, I explained that to Mr. Tysar that he would have plenty of time to warn off anybody getting off the elevator.

Mr. Mook stated that there were three potential vehicles that could have used the elevator and he offered to warn those operators of the work taking place, but this was unacceptable to

Mr. Tysar and there was only one thought in his mind, and that was the shutting down of the elevator or nothing at all (229-230).

Mr. Mook denied that there was any near miss with respect to the vehicle that drove off of the elevator, and Mr. Tysar and Mr. Brown had not yet arrived at their work area when the machine drove past them. He stated that he spoke to the vehicle operator who informed him that there was no near miss and that the forklift was in the middle of the warehouse and had not moved to the corner by the elevator, and no one was in it (Tr. 235-236).

Mr. Mook stated that he and maintenance foreman Bonjack discussed the job from beginning to end and made sure that there were no unsafe items left, and concluded that we were well off to the side and no one could get hurt exiting the elevator (Tr. 237). He then called superintendent Gill who informed him that since there are no more safety items to be addressed, that this is now an act of insubordination and Mr. Brown and Mr. Tysar were suspended and escorted off the property (Tr. 237-238). Mr. Mook stated that during his discussions with Mr. Brown and Mr. Tysar, Mr. Brown was very quiet, and simply accompanied Mr. Tysar (Tr. 240).

During cross-examination, and in response to a bench question, Mr. Mook agreed that assuming the forklift moved along the beltline, if it was in front of the elevator doors when they opened, this would be an unsafe location (Tr. 248). However, Mr. Mook believed that the forklift would never be positioned in front of the elevator doors because the salt buildup was only at the tail piece, and the main reason for the work was to clean that area so that the wipers could be repaired (Tr. 248).

Brian T. Bonjack, respondent's Surface Maintenance General Foreman, testified that he was summoned by Mr. Mook to the scene of the incident on October 6, 1995, involving Mr. Tysar and Mr. Brown. Mr. Mook requested his presence because he wanted a second opinion about a safety matter on the second floor of the warehouse. He stated that there were discussions going on about the relevant safety of the job assignment made by Mr. Mook, and Mr. Mook wanted his opinion regarding the conditions that Mr. Tysar and Mr. Brown had been asked to work in (Tr. 256-258).

Mr. Bonjack stated that Mr. Tysar and Mr. Brown were assigned to clean the belt tailpiece, and he explained further as follows at (Tr. 258-259):

Q. Okay, if I may, if you can look at Exhibit R-4, and if you would, Mr. Bonjack, show me on Exhibit R-4 what area of the belt Mr. Tysar and Mr. Brown had been assigned to, please?

A. The tail piece is this area at the end of the conveyor, this being the tail roller which is shown at this point right here. And the chalking on this is generally directly going upstream from that, which would be in this particular area.

Q. If we're facing the elevator, is it your testimony that most of the area Mr. Tysar and Mr. Brown had been assigned to clean was to the right of the elevator?

A. That's correct.

Q. Did they have to clean any of the area over here by the elevator?

A. I didn't observe any significant salt buildup in that area. There was a large accumulation in the tail piece area because there was a leaky tail piece wiper, which is what perpetrated this whole cleanup operation.

Based on his understanding that the work that Mr. Tysar and Mr. Brown were assigned to do was confined to the tailpiece area, Mr. Bonjack was of the opinion that they would not be in the pathway of any vehicles coming out of the elevator, (Tr. 259-261). He believed the forklift would not have been located directly in front of the elevator door in order to complete the cleanup job because the cleanup area was significantly offset from the elevator (Tr. 259-262).

Mr. Bonjack stated that although the cleaning of the belt was not part of his department, and he does not assign workers to do the cleaning, he believed that it is a routine assignment and the tail pieces are routinely the worst areas to clean up. He did not know if the belt in question had previously been taped off while it was cleaned (Tr. 262-263).

Mr. Bonjack stated that Mr. Mook suggested to Mr. Tysar that he position the forklift a safe distance from the elevator opening and stand next to it to assist Mr. Brown if necessary and to verbally warn anyone coming off the elevator that they were working in the area. He stated that the area was quiet and that the elevator doors can be heard when they are opening. He further stated that Mr. Mook offered to apprise or warn other

plant personnel about the cleanup activity taking place and to use caution if they were in the area. However, Mr. Tysar would only be satisfied if the elevator was rendered inoperable (Tr. 263-266).

Mr. Bonjack was of the opinion that Mr. Tysar and Mr. Brown were not exposed to any imminent danger from vehicles passing by the area where they were working (Tr. 266). He stated that the mechanical work that was to be done required the elevator to be serviceable in order to bring in parts. He believed the options given to Mr. Tysar and Mr. Brown were clearly explained to them and that the response by Mr. Tysar and Mr. Brown was an overreaction to a situation that didn't merit that type of reaction (Tr. 268).

On cross-examination, Mr. Bonjack stated that he was not specifically summoned to the scene by Mr. Mook to be a witness but to verify what his findings were and to see if I could see anything additional that maybe he had not seen (Tr. 269). He confirmed that for the most part, he simply observed the verbal exchange between Mr. Mook and Mr. Tysar, and that his conversation about the safety issues was with Mr. Mook and not with Mr. Tysar and Mr. Brown (Tr. 271-273).

Mr. Bonjack stated that he was not aware that Mr. Mook's work assignment included the entire belt. He believed that the opening of the elevator doors could be heard above the noise of the forklift motor (Tr. 277-278, 280). He agreed that someone up on a forklift cleaning the belt directly in front of the elevator would be at risk if a piece of equipment came off the elevator (Tr. 283).

In response to further questions, Mr. Bonjack stated that he was not present when Mr. Mook gave Mr. Brown and Mr. Tysar their work assignment. However, in the course of his conversation with Mr. Mook after arriving at the scene, it was his understanding that Mr. Brown and Mr. Tysar were to clean the belt tail piece (Tr. 285). He stated that the salt buildup at the belt area closer to the top tapers off dramatically once you get away from the tail piece. In his opinion, it was not necessary to clean the belt area away from the tail piece because the entire purpose of the cleanup assignment was to ready the area for the mechanics to change the worn tail piece wipers. He stated whether he wanted the rest of the belt cleaned or not, I wasn't a party to that and I certainly didn't see large accumulations of salt elsewhere. The tail piece was the area of concern (Tr. 286). He conceded that assuming Mr. Brown and Mr. Tysar understood that they were to clean the entire belt, the forklift would at one

point during the cleaning process be directly in front of the elevator (Tr. 288).

Russell T. Ryon, respondent's Human Resources Manager, explained how company overtime is calculated, and stated that Mr. Tysar would not have been eligible for overtime because he was suspended, and the suspension was over a weekend. He stated that he would have to review the personnel records to determine whether Mr. Tysar would have qualified for overtime had he not been suspended (Tr. 289-293).

Mr. Tysar testified in rebuttal that he and Mr. Brown were ordered to clean the entire belt line and not just the tail piece, and he stated as follows at (Tr. 306-307):

We were told to shovel the decking on that particular belt, not the tail piece, the whole belt. We weren't even told where to start. We were just told to do the decking. That's what we were told.

With respect to any safety alternative offered by Mr. Mook, Mr. Tysar stated as follows at (Tr. 307):

* * * * he told me to go look in the window of the elevator after I hoisted Chris Brown up in the air and set the parking brake. That's it.

I don't remember anything about him telling me to put my arm out and stand an arm's length away from a forklift. He stated to me to go up to the door, and look through the window, and when the elevator comes up, to tell whoever comes out of the elevator to be careful or to stop or whatever.

Mr. Tysar denied that Mr. Mook told him he was prepared to ask the other employees and mechanics to be aware when they got off the elevator (Tr. 308).

Christopher Brown was recalled by the Court and stated that Mr. Mook instructed him and Mr. Tysar to clean off the decking, and when asked if he mentioned anything about the tail piece, Mr. Brown responded **A**well, that's part of it@ and **A**he didn't tell us where to start@ (Tr. 310). He could not recall that Mr. Mook indicated which part of the belt was **A**worse@ or **A**best,@ and he believed that he and Mr. Tysar were expected to shovel off the decking of the entire belt.

In response to a question as to where he would have started the belt cleaning, Mr. Brown responded **A**I have no idea.@ When

asked where he would have started if the elevator opening incident had not occurred, he responded "I don't know" (Tr. 311).

When asked if he would have started at the far end or at the worst end, he responded "wherever, we really weren't in position" (Tr. 311). He explained that the belt decking is the area between the rollers and the belt frame, and it was his understanding that he and Mr. Tysar were to clean the entire length of the belt and the tail piece (Tr. 313-314).

Findings and Conclusions

Fact of Violation

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidated Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1994); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, 732 F.2d 954 (6th Cir. 1983) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

Mr. Tysar's Protected Activity

I conclude and find that Mr. Tysar had a right to complain to Mr. Mook about his concern that proceeding with the belt cleaning job assignment might place him at risk and expose him to a possible hazard if he and Mr. Brown were working with the forklift in front of the elevator doors and another vehicle exited the elevator. His complaint is a protected activity which may not be the motivation by mine management for any adverse personnel action against him. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), Rev'd on other grounds, sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaint must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estlev. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7th Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

I further conclude and find that Mr. Tysar timely communicated his safety concern to Mr. Mook about the possibility that another vehicle might exit the elevator and place him at risk when he contacted him over the intercom and then went to his office with Mr. Brown to further express their safety concerns about their belt cleaning assignment. The timeliness of the complaint met the requirements enunciated by the Commission in Secretary on behalf of Dunmire and Estlev. Northern Coal Co., 4 FMSHRC 126 (February 1982); Secretary ex rel. John Cooley v. Ottowas Silica Company, 6 FMSHRC 516 (March 1984); Gilbert v. Sandy Fork Mining Company, supra; Sammons v. Mine Services Co. 6 FMSHRC 1391 (June 1984).

In the course of the hearing, Mr. Tysar, for the first time, alleged that Mr. Brown could have dropped a shovel on him if he were standing under the belt looking through the elevator window.

I take note of the fact that Mr. Tysar never mentioned such a concern in his complaint statement to MSHA's special investigator on December 11, 1995. When asked in the course of the hearing whether he ever informed Mr. Mook about any safety concern that Mr. Brown might drop a shovel on him while cleaning the belt, Mr. Tysar Agessed that something like that was brought up@ However, when pressed for more specifics, Mr. Tysar admitted that he did not mention any shovel to Mr. Mook. During his testimony,

Mr. Mook made no mention of any shovel complaint by Mr. Tysar. Further, I find nothing in Mr. Brown's deposition and hearing testimony reflecting any safety concern that he could drop a shovel on Mr. Tysar while cleaning the belt.

I find no credible evidence that Mr. Tysar ever communicated a safety concern to Mr. Mook concerning the possibility that Mr. Brown might drop a shovel on him if he and Mr. Brown were positioned in front of the elevator cleaning the belt.

In the course of the hearing, Mr. Tysar expressed a further concern about the possibility of Mr. Brown shoveling salt materials on him if he were to stand in front of the elevator looking through the window. Although Mr. Tysar suggested the possibility of such an event in his prior statement to the MSHA investigator, his October 6, 1995, company grievance does not include safety concerns for falling shovels or materials. Further, when asked in the course of the hearing if he informed Mr. Mook about any concern for falling materials, Mr. Tysar responded "Yes," but then explained that he simply told Mr. Mook that he "didn't feel safe" looking in the elevator window and did not believe that he gave Mr. Mook any reasons for his concern (Tr. 108-109).

I find Mr. Tysar's testimony regarding his concern for falling materials to be contradictory. However, in the course of the hearing Mr. Mook testified that Mr. Tysar and Mr. Brown "blew this out of proportion" in referring to "shoveling salt down directly in front of this elevator where people coming or they themselves would be in danger" (Tr. 227). He then confirmed that falling salt "was their concern, so I was trying to address it" (Tr. 228). Under the circumstances, and notwithstanding Mr. Tysar's contradictory testimony, I conclude and find that Mr. Mook must have been aware of Mr. Tysar's concern since he acknowledged as much. Accordingly, I find that Mr. Tysar timely communicated his falling materials concern to Mr. Mook.

Mr. Tysar's Work Refusal

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and has communicated this to mine management, such as a foreman, management has a duty and obligation to address the perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard. Secretary v. River Hurrigan Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v.

FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'g Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

The focus in work refusal cases is the complaining miner's belief that a hazard exists, and the critical issue is whether or not that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983); Miller v. FMSHRC, 687 F.2d 1984 (7th Cir. 1982). In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (September 1983); Haro v. Magma Cooper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (July 1986). The Commission has also explained that A good faith belief simply means honest belief that a hazard exists @ Robinette, supra at 810,

As recently reiterated by the Commission in Billy R. McClanahan v. Wellmore Coal Corporation, 19 FMSHRC 55, 67 (January 1997), once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern A in a way that his fears should have been reasonably quelled @ Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989); Thurman v. Queen Anne Coal Co., 10 FMSHRC 131-135 (February 1988), Aff'd, 866 F.2d 431 (6th Cir. 1989); Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate his fears or ensure the safety of the challenged task or condition, Bush, at 5 FMSHRC 998-99.

The respondent concedes that Mr. Tysar engaged in a protected activity by raising the issue of a potential danger to him and Mr. Brown if they were to proceed with their assigned job task. Indeed, foremen Mook and Bonjack both agreed that assuming the forklift moved along the beltline, if it was positioned in front of the elevator doors when they opened, it would be in an unsafe location. However, the respondent believes that the disputed issue is whether, in light of the circumstances, Mr. Tysar's belief that a hazard existed was reasonable, whether the hazard was beyond one inherent in the mining industry, and whether it was adequately addressed by Mr. Mook.

The critical disputed issue with respect to whether or not Mr. Tysar's work refusal was made in good faith and based on an honest and reasonable concern that he would be exposed to a potential hazard if he were to commence cleaning the belt while the elevator was still in operation is whether his assigned work task by foreman Mook included the cleaning of the entire beltline or was limited to the cleaning of the tailpiece.

The respondent does not dispute the fact that Mr. Tysar would have a legitimate safety concern if he and Mr. Brown were assigned to clean the entire beltline and needed to position the forklift in front of the elevator to do the job (Tr. 317-318). Mr. Mook and Mr. Bonjack agreed that if the forklift were to move along the beltline and was positioned in front of the elevator doors when the doors opened, Mr. Brown and Mr. Tysar would be in an unsafe location (Tr. 248-283).

I conclude and find that if in fact Mr. Tysar and Mr. Brown were assigned and expected to clean the entire beltline while the elevator remained in operation, they would at some point in time be positioned with the forklift in front of the elevator doors, and would be at risk if a vehicle unexpectedly exited the elevator while they were in front of it. Under this scenario, I would conclude that Mr. Tysar's concern for his safety would not be unreasonable. However, if Mr. Tysar's work assignment was confined to the belt tail piece area, I would find it reasonable to conclude that the cleaning of the belt in that location would not present a hazard to Mr. Tysar and Mr. Brown if the elevator were to continue in operation, and that Mr. Tysar's concern would not be reasonable.

Mr. Brown testified at his October 22, 1996, deposition that Mr. Mook assigned him to clean the belt decking ^Aright above the elevator [@] for a distance of ^Aabout 30 feet [@] (Tr. 5-6). He confirmed that the elevator was 10 feet wide, and when asked about the remaining 20 feet of the beltline, he stated that ^Awe would doing this one section [@] directly above the elevator (Tr. 6). He could not remember how Mr. Tysar described the area where they were supposed to be working in to Mr. Mook during their discussion (Tr. 19). When asked to describe his understanding of their exact work area on the evening in question, Mr. Brown stated as follows at (Tr. 20-22).

17. Again, can you describe for me exactly the work area? Was it only the area immediately over the elevator?

1. Um-hum, yes.
17. So you didn't have to clean any of the decking to the right of the elevator?
1. Yes. We had to do a section.
17. I'm still a little confused about the section that you all had to clean off. Was it actually 30 feet of the belt that you had to clean off?
1. No. It was right where the tail piece was.
17. And you're saying that that is directly over the elevator?
1. No. That is to the right, but it goes up, that we had to shovel.
17. It's to the right and it goes up, so it's to the right of the elevator and it goes up?
1. Right.
17. So in addition to the area directly over the elevator, you had to clean to the right and up?
1. Right.
- * * * *
17. But if it was to the right of the elevator, how was cleaning that section unsafe?
1. Well, we had to move up. We'd have to - - he'd have to move his forklift and then get in position to shovel the - - keep on moving up shoveling.

I find Mr. Brown's deposition testimony to be rather confusing and contradictory. On the one hand he states that the work assignment was limited to the belt area over the elevator, and on the other hand he identified and limited the work area to **Aa** section right where the tail piece was^o and not directly over the elevator, rather than the entire 30 feet of belt line. At the hearing, Mr. Brown testified that it was his understanding that he and Mr. Tysar were to clean the entire length of the belt, including the tail piece, but he had no idea where he would

have started the job if the work refusal had not occurred (Tr. 311, 313-314).

Mr. Tysar testified that he and Mr. Brown were told to clean the belt decking between the belt rollers and the belt bottom, and that the belt traveled at a 45 degree angle above the elevator doors (Tr. 25, 49-53). He believed the belt was approximately 15 to 20 feet long, and stated that he and Mr. Brown were to clean the entire belt, starting at one end and cleaning the entire decking (Tr. 64). In response to a question as to whether Mr. Mook pointed out the exact area that he wanted cleaned, Mr. Tysar stated that he and Mr. Brown had a good understanding of what needed to be done and how it had to be done (Tr. 131). He later described the area where he and Mr. Brown would have been working as roughly 20 to 25 feet and directly in front of the elevator doors (Tr. 147-148). Still later, he testified that they were told to shovel the whole belt and they weren't even told where to start (Tr. 306-307).

Mr. Mook testified that he personally escorted Mr. Tysar and Mr. Brown to the belt area to explain their job task and that he told them they had some belt decking to clean out and pointed out the obvious tail piece area where the salt buildup was located.

Mr. Mook believed that all of the salt spillage at the tail piece area and uphill could be reached and cleaned up at the tail piece location. He stated that he told Mr. Tysar to clean up the tail piece area and to position the forklift at that location, and Mr. Tysar and Mr. Brown had no questions. Mr. Mook denied that he told them to clean the entire beltline.

General Foreman Bonjack testified credibly that the large salt accumulation at the tail piece was the result of a leaky tail piece wiper and that the clean up operation was intended to address that problem. Mr. Bonjack observed no significant salt accumulations in the elevator area, and he was of the opinion that that there was no need to position the forklift in front of the elevator doors in order to complete the clean up job because the area that needed cleaning was away from the elevator.

Mr. Bonjack confirmed that he was not present when Mr. Mook gave Mr. Tysar and Mr. Brown their initial work assignment and he was not aware that the work assignment included the entire belt.

However, after arriving at the scene of the dispute, and speaking with Mr. Mook, Mr. Bonjack learned that the work assignment was confined to the tail piece area which he believed was the area of Mr. Tysar's concern.

Mr. Tysar did not dispute or rebut Mr. Mook's credible testimony that the defective belt tail piece wipers needed to be changed out by the maintenance department and that this could not be done until the salt accumulations at the tail piece were cleaned up. Indeed, Mr. Tysar confirmed that the worst salt buildup was at the tail piece, and that had the work begun, Mr. Brown would have cleaned up the salt accumulations and shoveled them into the dumpster that was placed at the tail piece for this purpose (Tr. 56). Mr. Mook testified credibly that Mr. Tysar used the forklift to move the dumpster into place in an inset next to a wall partition so that the salt materials shoveled by Mr. Brown could fall directly into the dumpster (Tr. 191). All of this credible and unrebutted testimony by Mr. Mook lends credence to his contention that the belt cleaning assignment was limited to only the tail piece area and not the entire belt line.

In the course of his deposition, Mr. Brown stated that a foreman whose name he could not recall told him a long time ago that there was a rule that required a forklift operator to remain in the driver's seat if there was someone in the man basket (Tr. 25-27). He suggested that this rule would not allow Mr. Tysar to stand next to the forklift while he was in the basket. Upon review of the respondent's April 1, 1995, mine safety rules and policies, Mr. Brown could not find any such rule related to forklifts (Tr. 34-36). Mr. Brown did not pursue this rule further at the hearing, and there is no credible evidence that he or Mr. Tysar ever raised it with Mr. Mook. The only safety issue Mr. Tysar raised with respect to the forklift was the securing of the man basket, and Mr. Tysar conceded that Mr. Mook addressed his concern to his satisfaction (Tr. 133-134).

Mr. Tysar stated that even if the assigned work area was confined to the belt tail piece, there was a very good probability that the forklift could have been bumped by a vehicle exiting the elevator because part of the forklift would still be in front of part of the elevator doors (Tr. 119). I find this difficult to believe, particularly since Mr. Tysar himself described the width of the forklift at 4 2 to 5 feet, and stated that the belt tail piece was 6 to 10 feet away from the elevator door (Tr. 113-114). He further stated that had he proceeded with the assigned work, the forklift would have been positioned away from the elevator. The conveyor belt would have been in between the elevator and the forklift (Tr. 145). Under these circumstances, and given the fact that the dumpster was located directly under the belt so that Mr. Brown could shovel in the salt materials, I find it highly unlikely that any of the materials would fall on Mr. Tysar.

Mr. Tysar further confirmed that any vehicle exiting the elevator would have to travel straight out of the elevator for at least 20 feet before it could turn left because of the presence of other equipment in the tail piece area. Under the circumstances, I find it highly unlikely that a vehicle exiting the elevator would abruptly turn sharply to the left immediately upon exiting the elevator rather than proceeding straight ahead for 20 feet where it could freely turn left without encountering any equipment obstacles, including the forklift that I find was positioned in front of the tail piece and clear of the elevator doors. Further, if the vehicle was backing out of the elevator, as Mr. Brown testified it did on the day in question, I find it unlikely that it would back out at a high rate of speed and then turn around and proceed toward the tail piece area.

After careful review and consideration of all of the testimony and evidence in this case, I credit the testimony of Mr. Mook and Mr. Bonjack and find that Mr. Mook assigned Mr. Tysar and Mr. Brown to clean the belt tail piece area and not the entire belt. I find the testimony of Mr. Tysar and Mr. Brown regarding their work assignment to be contradictory and less than credible.

In view of my finding that Mr. Tysar's work assignment was confined to the tail piece area, and based on my foregoing findings and conclusions, I conclude and find that Mr. Tysar would not have been exposed to a hazard had he proceeded to clean the tail piece area, and that even viewed from his own perspective, I cannot conclude that his work refusal was reasonable and made in good faith. Further, even if I were to find that Mr. Tysar's work refusal was reasonable, in view of my findings and conclusions which follow below, I have concluded that Mr. Mook timely addressed Mr. Tysar's safety concerns with reasonable offers of safety alternatives, and that Mr. Tysar's rejections of these offers was unreasonable.

Foreman Mook's Response to Mr. Tysar's Safety Concerns

The evidence establishes that Mr. Tysar's confrontation with Mr. Mook took place while Mr. Tysar and Mr. Brown were preparing to position the forklift in order to commence the belt cleaning, and before any cleaning had actually been done. Mr. Tysar candidly admitted that he viewed his encounter with Mr. Mook as a power struggle and he believed that Mr. Mook acted less than diplomatically in responding to his concern. Having viewed Mr. Tysar in the course of the hearing, he impressed me as an articulate, but rather argumentative and strong willed individual, who at times

displayed his anger and frustration in a less than diplomatic manner. Indeed, at one point in the course of the hearing I observed that Mr. Mook was so provoked by Mr. Tysar's suggestions that he had little or no concern for safety that he needed to be restrained by his counsel, and the Court ordered a brief **A**break@ to **A**cool off@ the parties and admonish them to maintain the proper decorum.

I find Mr. Tysar's unsupported assertion that Mr. Mook had little regard for safety to be less than credible. Mr. Tysar himself confirmed that Mr. Mook responded to his call to come to the work area in a reasonable amount of time, and assigned him and Mr. Brown to do other work while he considered the matter further (Tr. 137-138). Mr. Tysar further confirmed that Mr. Mook locked out the belt, and immediately responded to his safety concern regarding the securing of the **A**man basket@ to the front of the forklift, and provided a safety belt and lanyard for Mr. Brown's use while cleaning the belt from inside the basket that was equipped with protective railings and a locked gate (Tr. 133).

Mr. Mook testified credibly that he thoroughly considered all of the safety aspects of his belt cleaning assignment in consultation with foreman Bonjack, and rejected as unreasonable Mr. Tysar's request to take the elevator out of service before he was expected to proceed with the belt cleaning job. Mr. Mook further testified credibly that he offered two alternative safety suggestions to Mr. Tysar namely, an offer that he (Mook) inform and alert other employees who might use the elevator that Mr. Tysar and Mr. Brown were working in the area, or that Mr. Tysar station himself next to the forklift and near the controls, with the brake engaged, so that he could have a clear view of the elevator in order to readily alert anyone exiting the elevator that he and Mr. Brown were working in the area.

Mr. Brown testified at his deposition that Mr. Mook did not suggest any safety alternatives and never suggested that Mr. Tysar serve as **A**a lookout@ or put the forklift in gear or in park (Tr. 9, 11, 12). However, in the course of the hearing that followed a little over a month later, Mr. Brown was less than certain that Mr. Mook never offered any alternatives to shutting down the elevator and stated that he had no recollection of any alternatives offered by Mr. Mook (Tr. 163). Mr. Brown's conflicting testimony was contradicted by Mr. Tysar who testified that Mr. Mook told him to set the forklift brake and stand by the elevator door where he could observe the arrival of the elevator by looking through the window.

Mr. Tysar initially claimed that he had no idea what Mr. Mook expected of him by looking through the elevator window (Tr. 58). However, he later testified that Mr. Mook suggested that he look through the elevator window in order to warn anyone on the elevator to be careful or to stop (Tr. 307). I find Mr. Tysar's testimony concerning Mr. Mook's alternative safety suggestion to be less than credible. Mr. Tysar claimed that he had no idea what Mr. Mook had in mind when he told him to look through the elevator window, yet he confirmed that Mr. Mook expected him to warn anyone on the elevator that he and Mr. Brown were working in the area.

I further find Mr. Tysar's testimony that he could not remember Mr. Mook offering to inform other employees that he and Mr. Brown were cleaning the belt (Tr. 95), to be contrary to his later denials that any such offer was ever made (Tr. 308).

I have considered the question of why Mr. Mook would find it necessary to offer alternative safety precautions if in fact his work assignment was limited to the tail piece area, and I find his explanation that he did so to assure Mr. Tysar that the cleaning job would be safe to be credible.

Foreman Bonjack corroborated Mr. Mook's testimony that he offered the two safety alternatives to Mr. Tysar in response to Mr. Tysar's concern that he and Mr. Brown might be at risk if a vehicle exited the elevator with the forklift positioned in front of it, but that Mr. Tysar rejected Mr. Mook's offer and insisted that the elevator be shut down. Having viewed Mr. Bonjack's demeanor in the course of the hearing, I find his testimony to be credible.

Although Mr. Tysar indicated that he was unwilling to talk with people and compromise, he confirmed that he made no suggestions to Mr. Mook short of insisting that the elevator be taken out of service, and he remained steadfast in his insistence that the only safe method of cleaning the belt that he would accept was to shut down the elevator and tape it off so that it could not be used while the belt was being cleaned. Indeed, Mr. Tysar admitted that any alternatives suggested by Mr. Mook, short of taking the elevator out of service, would have been unacceptable to him and rejected out of hand.

I find Mr. Tysar's summary refusal to seriously consider Mr. Mook's alternative safety suggestions to be unreasonable and a less than good faith effort to at least attempt to resolve the dispute to their mutual satisfaction. I further discredit Mr.

Tysar's assertion that Mr. Monk simply told him to go look through the elevator window, and credit Mr. Mook's testimony that he did more than that in suggesting alternative ways to address Mr. Tysar's safety concerns.

I conclude and find that foreman Mook addressed Mr. Tysar's safety concern in a reasonable way by offering the two alternatives previously discussed, and that Mr. Tysar's rejection of those suggestions and insistence that the elevator be shut down was unreasonable. Under the circumstances, I conclude and find that Mr. Tysar's work refusal was unprotected and that his suspension was not discriminatory and did not amount to a violation of section 105(c) of the Act.

ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

George A. Koutras
Administrative Law Judge

Distribution:

James C. Tysar, 4823 Russell Avenue, Parma, OH 44134 (Certified Mail)

Mark N. Savit, Esq., Ruth L. Ramsey, Esq., Patton Boggs, L.L.P.,
2550 M Street, N.W., Washington, D.C. 20037 (Certified Mail)

\mca