

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 28, 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 94-704-D
ON BEHALF OF KENNETH H. :
HANNAH, PHILIP J. PAYNE :
AND FLOYD MEZO, : MSHA Case No. VINC CD 94-07
Complainant : Rend Lake Mine
v. : I.D. No. 11-00601
: :
CONSOLIDATION COAL COMPANY, :
Respondent :

DECISION

Appearances: Lisa A. Gray, Esq., Office of the Solicitor, U.S.
Department of Labor, Chicago, Illinois for the
David J. Hardy, Esq., Jackson & Kelly, 1600

Before: Judge Melick

These cases are before me upon the Complaint by the Secretary of Labor on behalf of Kenneth H. Hannah, Philip J. Payne, and Floyd Mezo, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801, *et. seq.*, the "Mine Act", alleging that the Consolidation Coal Company (Consol) suspended these miners in violation of Section 105(c)(1) of the Act.¹ In particular, in the Secretary's Complaint before this Commission, as in their initial Complaint filed with the Mine Safety and Health Administration (MSHA), it is alleged that "[o]n April 13, 1994, we were suspended with the intent to discharge by Consolidation Coal Company, Rend Lake Mine, after [sic] exercised our statutory protected right to refuse to work under conditions that we in good faith felt to be unsafe regarding energizing power underground following an unplanned mine fan stoppage on April 9, 1994."²

¹ The Complainants were initially suspended with intent to discharge, however, by decision of an arbitrator on April 25, 1994, they were reinstated without backpay. The Complainants here seek back pay for the 12 days they were suspended (Joint Exhibit No. 1).

² In his post-hearing brief, the Secretary for the first

While the Mine Act grants miners the right to complain of a safety or health danger or violation, it does not expressly grant the right to refuse to work under such circumstances. However, the Commission and the courts have inferred a right to refuse to work in the face of a perceived danger and this right is now well established. See *Secretary on behalf of Cooley v. Ottawa Silica Co.* 6 FMSHRC 516, 510-21 (1984) *aff'd*, 780 F.2d (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (1990). Moreover, a miner exercising such a work refusal is not required to prove that a hazard actually existed. *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC at 812. In order to be protected, work refusals need only be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id*; see also *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). However, the complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (1983). A good faith belief "simply means an honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving fraud or other forms of deception." *Id*.

The critical issue in these cases is whether the individual Complainants, at the time they refused the direct work orders of

time presents the additional complaint that Hannah's protected rights were also interfered with when he was purportedly threatened with removal from the Mine Safety Committee. While this new theory of discrimination could perhaps have been joined by a timely amended complaint pursuant to Rule 15, FED.R.CIV P., no such amendment has been filed. In any event, amending the complaint at this late stage would be prejudicial to Respondent, denying it the opportunity to present evidence on this new issue and to argue and brief the issue. See 3 *Moore's Federal Practice & 15.08[4]*.

Mine Superintendent Joseph Wetzell, Maintenance Supervisor John Moore (and in the case of Hannah the additional work order of Foreman Gary Phelps) on April 10, 1994, (after being advised that State Mine Inspector Bill Sanders had, in effect, addressed their safety concerns) entertained a good faith, reasonable belief in a hazardous condition justifying their continued work refusal. The Complainants case in this regard was articulately stated at hearing by Kenneth Hannah. Hannah continues to work for Consol at the Rend Lake Mine as a surface electrician. He was also working in that capacity on April 10, 1994. He has no underground mining experience. Hannah was called at home in the early morning hours of April 10 to restore power to the mine. He had previously worked on the 4:00 p.m. to 12:00 midnight shift on April 9 when power was lost and the ventilating fans shut down.

Hannah was aware that the third of three fans came back on at 12:20 a.m. on the 10th. On the latter date at around 11:00 a.m., as he was entering the wash house, Complainants Payne and Mezo asked Hannah, as a member of the mine safety committee, to represent them in a meeting with mine management about the fan stoppage. They were concerned because pre-shift examiners told them that an inspection of the secondary escapeways had not been properly performed after the stoppage. They also told Hannah about a prior meeting concerning this matter with Maintenance Supervisor John Moore.

Hannah testified that, in preparation for meeting with Moore, he first talked with several of the mine examiners, namely Gary Cook, Wesley Dickey and Gary Richardson. According to Hannah, they reported that the mine should have been checked in its entirety, including the secondary escapeways, before re-energizing the mine.³ The Complainants then met again with Moore. Hannah explained what he had been told by the examiners

³ It is not disputed that several of the mine examiners, including Dickey, had been informed after a fan stoppage several weeks before this incident that state mine inspector Sanders had ruled that an inspection of the secondary escapeways was not required as a result of a fan stoppage. This determination was apparently never challenged although there were procedures

and asked Moore if he knew whether the examination was proper. Moore responded that he did not know since he was not experienced in production. Hannah admitted that he too did not know the answer since he was a "surface" man.

Moore then indicated that he would call someone with the necessary experience, naming Assistant Mine Superintendent Rick Harris. Moore also called for the mine examiners to come into his office. Three of the examiners then entered the office and mine examiner Dickey opined that the mine had not been properly examined following the fan stoppage since the secondary escapeways had not yet been examined. Moore completed his phone call with Harris and reported to the Complainants that, according to Harris, the mine examination had been "done right". Hannah reportedly then told Moore that the mine examiners disagreed and that they needed to get the "proper people" out to the mine to make sure that it was safe. According to Hannah, he then read from provisions of the Labor-Management Contract (The National Bituminous Coal Wage Agreement of 1993) to the effect that, if there was disagreement between the miners and management and that if it involved state or federal law, that the appropriate officials were to be contacted. Hannah maintains that he then told Moore that the "state man", presumably a state mine inspector, should be called immediately and that Moore refused to call him. Hannah further maintains that he then told Moore to get the "state man" on the phone and that he could talk to him himself but that Moore refused and told the Complainants to go back to the wash house.

According to Hannah, Moore later appeared at the wash house and reported that the "state man" said it was okay to return to work. Hannah maintains that he then told Moore that the Complainants themselves had to call the "state man" and that Moore refused the request. The Complainants then invoked their "safety rights". Hannah maintains that he, in fact, asked Moore if he could call and talk to state mine inspector Sanders and Moore refused and refused to call Sanders himself. Hannah testified that he did not thereafter call Inspector Sanders himself because he believed that he was forbidden to use the telephones without permission.

available to do so. There is no evidence, however, that any of the Complainants were aware of this ruling at the time they exercised their work refusal.

Hannah testified that Phelps, his foreman, thereafter directed him to put power in the mine and Hannah refused, noting that there were mine examiners underground at the time. Phelps then gave Hannah a direct order to turn on the power and Hannah refused, stating that with two mine examiners underground he would not take the chance of an explosion. Hannah maintains that he then said he was again exercising his individual rights because, if there were an electrical fault with methane present, he could trigger an explosion that would kill or maim the examiners underground.

According to Hannah, Moore then also gave him a direct order to turn on the power and Hannah again refused with the same explanation. Hannah maintains that he had other work to do and Moore then told him to return to that other work. Hannah was later called to Superintendent Wetzel's office where Wetzel was attempting to ascertain from Payne and Mezo the law they were claiming was broken. Hannah intervened, advising Wetzel that they were in fear of creating an explosion and killing themselves and others.

Hannah then returned to his regular duties but was called later to a meeting. State Inspector Sanders was present. Hannah asked Sanders whether the mine in its entirety was required to be examined following a power outage and fan stoppage. Sanders explained that escapeways need be examined only once every 24 hours and did not need to be re-examined after a power outage for that reason alone. Sanders further stated that it would be safe to turn on the power. Apparently satisfied by Sanders that it was neither a violation nor a hazard Hannah then told the Complainants to turn on the power and return to work. According to Hannah, Superintendent Wetzel then told the Complainants the matter was not over and that they were subject to discipline and the removal of Hannah as safety committeeman.

Complainant Floyd Mezo also volunteered to work on the morning of April 10, 1994, because of the fan outage. His orders from foreman Johnny Moore were to turn the power back on. He and Complainant Payne were waiting in the wash room when some of the pre-shift examiners returned from underground. He overheard their conversation that they had not inspected the escapeways. Mezo testified that he and Payne then went to Moore's office reporting this apparent problem. Moore indicated that he was not a mine examiner and did not know whether the exam was adequate. He agreed, however, to find out. Moore then telephoned someone and Mezo and Payne returned to the wash house. Mezo then asked safety committeeman Hannah to represent them in further meetings. Mezo maintains that Hannah thereafter did all of the talking for the Complainants and that he never said another word. Mezo

maintains that, during the meeting with Moore, Hannah had asked for Moore to call the state mine inspector and that Moore refused several times to allow Hannah to use the phone himself.

Mezo recalled, however, that Moore, at the second meeting, said that they had, in fact, called the "state" and the "state" said their procedures were "okay". Significantly, Mezo acknowledged that there were telephones available outside of Moore's office and in the communications room. Moreover, Mezo admitted that he made no effort to use those phones. Furthermore, he was unaware of any rule that would prevent him from using the phones. Mezo also observed that Hannah did, in fact, later use a telephone at the mine to contact another safety man. Following the meeting with state inspector Sanders, Hannah told Mezo and Payne to go back to work.

Complainant Philip Payne, an underground mechanic with 15 years experience, testified that he too was called back to the mine on April 10 to help restore the power. He confirms Mezo's testimony in significant respects. Payne also recalls that Hannah, in fact, used a mine telephone to call a UMWA representative. Payne maintained that neither he nor Mezo had access to a telephone but, as a matter of fact, did not even think of using it. He believed that the telephones were not to be used without permission. He further maintains that, since he did not believe he had the authority to use the phone, he did not call the state inspector himself.

From the credible testimony of Foreman Moore, however, it is apparent that the Complainants were mistaken as to when Moore declined to call State Mine Inspector Sanders. Moore testified that he did not, at either of the two meetings in his office, refuse to call State Inspector Sanders nor did he refuse to allow any of the Complainants to use the telephone to call Sanders. Indeed, Moore testified that he was never asked at these meetings to call any inspector nor was he ever asked permission to use the telephone. Furthermore, he was not aware of any rule barring the use of the telephone. According to Moore, it was only after the second meeting in his office, when Hannah had already insisted that the state inspector be present at the mine, after the Complainants had already refused to work and after Moore had called Mine Superintendent Wetzel to come to the mine, that the Complainants asked him to call the state inspector apparently to have him come to the mine. Moore declined to do so at this point in time since Wetzel was then on his way to the mine site. Moore testified that such a decision would then have been up to Wetzel.

Donald Niblet, Communications Coordinator at the Rend Lake Mine, testified that around 12:30 in the afternoon on April 10

Hannah asked to use the telephone. Niblet testified that he furnished Hannah the telephone number of UMWA official Oxnard and that Hannah thereafter used the telephone himself. According to Niblet, Hannah never stated that he had permission to use the phone. Niblet also testified that miners do not, as a practice, ask permission before using the mine telephone and so far as Niblet knew it was not necessary to have permission to use the phone. Niblet observed that Hannah dialed the telephone himself and that he, Niblet, stepped outside while Hannah made his call.

Tom Samples, a maintenance supervisor, overheard the conversation in Moore's office and heard Moore later advise the Complainants that Mr. Phares had contacted State Inspector Sanders. He recalled that the Complainants nevertheless insisted that the state inspector appear at the mine in person and inform them personally. Samples did not hear any of the Complainants ask Moore to call the state inspector nor did they ask to use the telephone. Samples observed that, as Hannah came out of Moore's office, he said he needed to use a telephone and Samples advised him that there was a phone in the corner. Samples testified that he then stepped aside to give Hannah privacy but that he did not see him actually use the phone.

Within the framework of the credible evidence, I indeed must conclude that when the Complainants were advised by Moore, in particular, and later by Wetzel that State Inspector Sanders had, in fact, been contacted regarding their concerns (about re-energizing the mine following a fan stoppage without a specific examination of the secondary escapeways) and had concluded that there was no safety hazard and that the procedures were legally permissible, their work refusal could no longer be considered reasonable or in good faith. Clearly, if the Complainants did not believe in the statements of mine officials regarding their conversations with State Inspector Sanders, it was incumbent on them to call Sanders themselves.⁴ I find Consol's witnesses to be the more credible on this issue and conclude that any of the Complainant's could have used the available telephones at any time, that there was no policy prohibiting the use of the phones for this purpose and that Hannah himself used the telephone in calling another union official without any specific permission to do so, thus directly discrediting his own testimony. The

⁴ By obtaining this information from the state mine inspector Consol had thereby fulfilled its obligation to address the perceived danger that had been communicated by the Complainants. See *Braithwaite v. Tri-Star mining*, 15 FMSHRC 2460 (1993).

Complainants' failure to either accept the reported statements of Sanders or verify those statements by calling Sanders themselves and their continued refusal to work without Sanders' physical presence was unreasonable. Their continued refusal to return to work could not thereafter be considered to be based upon a good faith, reasonable belief in a hazard. This conclusion is reinforced by the fact that when State Inspector Sanders later arrived at the mine his opinion was the same as reported by mine officials and that the Complainants then accepted Sanders conclusions and returned to work. Accordingly, their continued work refusal was not protected and their suspension by Consol for that continued work refusal must stand.

ORDER

This discrimination proceeding is hereby dismissed.

Gary Melick
Administrative Law Judge

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