FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 17, 2000

BRIAN T. CHRISTIE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 2000-23-D
	:	PITT CD 99-05
v.	:	
	:	
MOUNTAIN SPRING COAL COMPANY,	:	No. 1 Mine
Respondent	:	Mine ID 36-08725

DECISION

Appearances: Brian T. Christie, Worthington, Pennsylvania, *pro se;*
Julia K. Shreve, Esq., Jackson & Kelly, P.L.L.C., Charleston, West Virginia, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Brian T. Christie, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," alleging that he was discharged by the Mountain Spring Coal Company (Mountain Spring) on August 2, 1999, presumably in violation of Section 105(c)(1) of the Act.[1] More particularly Mr.

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

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

Christie alleges in his initial complaint filed August 3, 1999, with the Department of Labor's Mine Safety and Health Administration (MSHA) as follows:[2]

> 1) Superintendent trying to force me to take vacation for injury instead of compensation.[3]
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> 2) Superintendent asked me if I wanted to fireboss again on 7-30-99 and wanted an answer on 7-31-99. On 7-31-99 I told the face boss Walter Delt I did not wish to fireboss. On 8-2-99 at approximately 6:30 a.m. Mr. Saddler told me I was suspended with intent to Discharge, because you are no good to me if you wont fireboss. I don't need you.

In a statement to MSHA special investigator John Savine, on August 12, 1999, Mr. Christie stated that "I believe I would not have been fired if I would have agreed to fireboss" and at hearings testified that he was discharged because he refused to fireboss on July 30, 1999. These proceedings are limited to consideration of those allegations.

Mr. Christie seeks reinstatement and damages, including back pay and reimbursement of medical expenses. However, since he claims that because of his limited functional capacities from a pre-existing medical condition he must be exempted, in any reinstatement order, from working as a fire boss and from operating any equipment such as a roof bolter or power scoop which could aggravate the pain in his neck. Indeed, it appears that the only job for which Mr. Christie would accept reinstatement would be that of bridge operator.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of production and proof that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, *sub nom. Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.*

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[2] In a letter dated October 6, 1999, MSHA concluded that a violation of Section 105(c) of the Act had not occurred. Mr. Christie thereafter requested relief from this Commission.

[3] In his subsequent statement to MSHA investigator John Savine on August 12, 1999, Christie acknowledged that he had by that time received all the Workers' Compensation to which he was entitled (Exh. C-3, p.3).

See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

A miner's refusal to perform work is protected under the Act, if it is based upon a reasonable, good faith belief that the work involves a hazard. *Pasula, supra*, 2 FMSHRC at 2789-96; *Robinette, supra*, 3 FMSHRC at 807-12; *Secretary v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-31 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469, 472-73 (11th Cir. 1985); *see also Simpson v. FMSHRC*, 842 F.2d 453, 458 (D.C. Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 366 (4th Cir. 1986). It is further required that "where reasonably possible, a miner refusing work should ordinarily communicate . . . to some representative of the operator his belief in the safety or health hazard at issue." *Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982); *see also Simpson v. FMSHRC*, supra, 842 F.2d at 459; *Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1074 (July 1986), *aff'd mem.*, 829 F.2d 31 (3rd Cir. 1987) (table cite).

Christie had been off from work and receiving workers' compensation from April 21 through May 10, 1999, because of a knee injury and again from June 25 through July 29, 1999, because he reinjured that knee. According to Christie he reported back to work on July 30, 1999, to "full duty" upon the doctor's release without any restrictions (Exh. C-3, pp.2-3). Christie testified that mine superintendent Seibert Saddler had asked him on July 30th to perform fireboss duties and that he told him that he did not want to do it. He explained at hearing that performing the duties of a fire boss, traveling in a jeep in 36 to 41 inch-height coal and necessitating the twisting and wrenching of his neck, was painful. According to Christie, Saddler knew the history of his neck injury and pain based on his pre-employment physical exam and should have accepted him with his work limitations.[4] Christie also admitted however that even if he was reinstated he would not be able to perform the duties of a fireboss nor could he operate a power scoop or roof bolter because of his neck pain. Indeed, he testified that the only work he could perform at the mine was that of bridge operator. He maintains that he is unable to ride into the mine in a sitting-up position and even riding in a jeep "would be a problem."

The narrow issue presented herein is whether Mr. Christie's refusal to perform duties as a fire boss was a protected work refusal.[5] Even assuming, *arguendo*, that Christie entertained a

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[4] The pre-employment exam report shows however that Christie had "no physical or mental limitations related to work as an underground miner. (Exh. C-1).

[5] At hearings Christie also appeared to allege for the first time that after he told Saddler that he did not want to fireboss, Saddler offered to have him perform only partial fireboss inspections but then sign the fireboss books as if he had completed the inspections - - an unlawful procedure. This allegation had never previously been made either in his complaint

good faith and reasonable belief that to perform the duties of fire bossing would have been unsafe because of his pre-existing neck condition, for a work refusal to be protected, the miner must first communicate his safety concerns to some representative of the operator. *Secretary on behalf of Dunmire*, 4 FMSHRC at 133. In this regard, the Commission has held that "proper communication of a perceived hazard is an integral component of a protected work refusal and responsibility for the communication of a belief in a hazard underlying the work refusal lies with the miner." *Conatser*, 11 FMSHRC at 17, citing *Dillard Smith v. Reco Inc.*, 9 FMSHRC 992 at 995 - 96 (June 1987). The miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner's concern. Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act.

In this case, Mr. Christie, in his statement to investigator Savine and at hearings, acknowledged that he did not communicate that his refusal to perform the duties of a fire boss was because of his pre-existing neck injury. Christie testified only that he thought Saddler knew of the history of his neck injury and the pain associated with that injury based on his pre-employment physical exam and presumably should therefore have known the reason for his refusal to fire boss. However, as previously noted neither his preemployment physical nor the doctor's release on July 29, 1999, placed any restrictions on Christie's return to work as an underground miner. Indeed, it is uncontradicted that Christie was released by a physician to "unrestricted duty" upon his return to work only a few days earlier (Respondent's Exh. No. 2) and that Christie himself admitted in his August 12, 1999, statement that he had been released by the doctor on July 29, 1999, to full duty without restrictions (Exh. C-3). In addition, Saddler testified credibly that when he asked Christie to do the firebossing Christie never mentioned any neck injury or pain or anything about putting his papers in jeopardy.

Under the circumstances and even assuming, *arguendo*, that Christie retained a good faith and reasonable belief that to work with his neck pain was a safety hazard, he cannot prevail under a "work refusal" theory because of his failure to communicate that as a reason for his refusing to perform the duties of a fire boss. In any event, I do not find that the work refusal in this case based on the impairment claimed in this case is protected by the Act. Here, Christie's alleged neck pain, caused by a non-work related vehicular accident several years before he even began employment with Respondent, is an idiosyncratic physical impairment not involving inherently unsafe working conditions and practices of the mine operator. See, e.q., *Paula Price v. Monterey Coal Company,* 12 FMSHRC 1505 at 1519-1520 (August 1990), (concurring opinion); *Sam Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ) and *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 643 (April 1996) (ALJ). This case does not present

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filed herein or in the lengthy and thorough interview by the MSHA investigator. Saddler also denied the allegation in his testimony at hearings. Under the circumstances, I do not find this new allegation to be credible.

the "appropriate circumstances" mentioned in *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984), in which a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition.

Christie also claimed that he refused to perform fire boss duties because "Saddler would not run the mine the way it was supposed to be run" (Tr. 126). He admits however that he did not communicate this reason to Saddler. In light of this admission Christie likewise could not prevail under a "work refusal" theory. *Conatser*, 17 FMSHRC at 17, *Dillard Smith*, 9 FMSHRC at 995-96. Since Christie admits moreover that he could not in any event perform the duties of a fire boss because of his neck pain, this claim could not provide a good faith and reasonable belief basis for a work refusal.

Under the circumstances, Mr. Christie has failed to sustain his burden of proving that he was discharged in violation of Section 105(c) of the Act and accordingly his complaint must be dismissed.

ORDER

Discrimination Complaint Docket No. PENN 2000-23-D, is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

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