FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 15, 2002

GUY ADAMS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 2002-37-D
v.	:	WILK CD 2001-03
	:	
CALVIN V. LENIG COAL	:	
PREPARATION AND SALES, INC.,	:	Calvin Lenig Coal Preparation
Respondent	:	Mine ID 36-07440

DECISION

Appearances: John B. Dougherty, Esq., Ira H. Weinstock, P.C., Harrisburg, Pennsylvania, for the Complainant;
Joseph C. Michetti, Esq., Dluge & Michetti, Trevorton, Pennsylvania, for the Respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(3). The complaint was filed by Guy Adams against the respondent, Calvin V. Lenig Coal Preparation and Sales, Inc. (Lenig).[1] This discrimination matter presents the issue of whether Adams' December 5, 2000, work refusal was protected activity under the Act, and if so, whether his decision to voluntarily quit his job constituted a constructive discharge. *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 175-80 (Feb. 2000). This case was heard on July 9, 2002, in Harrisburg, Pennsylvania. The parties' post-hearing briefs are of record.

Despite his employment and on-the-job training since July 1994, Adams' discrimination complaint primarily is based on his failure to receive formal classroom new miner's training and annual refresher training with respect to his job as a laborer/weighmaster at Lenig's coal preparation facility. As result of his lack of formal training, Adams asserts his working conditions were intolerable and constituted a constructive discharge because he feared for his safety. Adams also vaguely asserts that he was concerned about a variety of other hazardous

[1] Adams' complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on April 18, 2001, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Adams' complaint was investigated by the Mine Safety and Health Administration (MSHA). On October 19, 2001, MSHA advised Adams that its investigation did not disclose any section 105(c) violations. On October 30, 2001, Adams filed his discrimination complaint with this Commission which is the subject of this proceeding.

conditions associated with his employment. However, there is no credible evidence that these concerns were reasonable, good faith concerns, or, that any such safety concerns were communicated by Adams to the respondent. For the reasons discussed below, Adams' discrimination complaint is dismissed.

I. Findings Of Fact

Calvin V. Lenig Coal Preparation and Sales, Inc., operates a coal preparation facility at a rural location at R.D. 1 in Shamokin, Pennsylvania. The facility, which is located adjacent to the Lenig home, has been operated as a "mom and pop" operation by the Lenig family since 1971. The business was operated as a sole proprietorship prior to the death of Calvin Lenig in October 1997. The business was incorporated in January 1998 following Lenig's death. Diann Lenig-Ferry, Calvin Lenig's widow, is the President of the corporation.[2] Vernon Zerby, Diann Lenig-Ferry's son-in-law, is the corporate Vice-President.

Mr. And Mrs. Lenig started their coal preparation and sales business by purchasing coal from Anthracite Industries, a local coal mine. Coal was delivered to the Lenig facility by truck. At the Lenig preparation plant, the raw coal was loaded onto a car carrier and transported to a shaker screen where it was sized and stockpiled. The Lenigs sold and delivered the finished product to local residents for household coal consumption. To improve the quality of the processed coal, the Lenigs built a hopper, a picking table and a conveyor belt. In the early years, the unprocessed coal would be dumped into the hopper for distribution onto the picking table where rock was removed by the Lenigs and their children. The conveyor then transported the coal to the crusher for final processing. Thereafter, a building was constructed next to the family residence to house a diester table on the lower level that separated finer coal into six different sized shakers. (Tr. 371).

In December 1989, MSHA approved a training plan for the Lenig preparation plant for the facility's two employees. The training plan required eight hours new miner training on site and 16 hours at the South Schuykill County Area Vocational-Technical School. (Comp. Ex. 1; 30 C.F.R. § 46.5). The training plan was approved by MSHA training specialist Joseph W. Fisher. The training plan also identified Diann Lenig as the individual qualified to teach first aid as well as on-site new miner and annual refresher training. (Comp. Ex 1).

In 1994, Lenig purchased and installed a heavy media system on the second floor of the processing building that improved the coal processing at the diester table by mechanically separating pea coal from nut coal and rock. The heavy media system processed coal from a slurry mixture by using conveyors, draglines and magnets to separate the coal. The system included two large vibrators that were installed on the side of the processing building.

When the heavy media system was installed, Calvin Lenig wanted to protect the supporting structure with Rustoleum paint. Lenig's health had been deteriorating since 1988

[2] For ease of reference, Mrs. Lenig-Ferry will also be referred to in this decision as Mrs. Lenig. (Tr. 36).

when he suffered the first of a series of heart attacks. As a consequence of Lenig's impaired health, in July 1994 Lenig hired Guy Adams to paint the heavy media system. Adams was a neighborhood youth who lived in the area. After the heavy media became operational, Lenig continued to employ Adams as a general laborer and weighmaster and trained him to operate the heavy media system.

Operation of the media system included monitoring the slurry and overseeing the operating controls. In addition to working inside operating the heavy media, Adams occasionally worked outside where he operated the front-end loader to dump coal into the hopper or load trucks. Adams also operated the scale to weigh truckloads of coal. Operating the scale required puling a handle to load the coal into the truck before reading a digital scale to determine the size of the load.

Lenig, his wife and Adams were the only individuals working at the coal preparation plant from 1994 until Lenig's death in October 1997. Mrs. Lenig's son-in-law Vernon Zerby began working at the facility shortly after Calvin Lenig's death.

Mrs. Lenig testified that although she was familiar with the training plan that required formal new miner and refresher training, the only training provided to Adams was on-the-job training by her and her husband. In this regard, the respondent's counsel stipulated that no formal classroom new miner or refresher training was provided to Adams as required by the approved training plan and Part 46 of the Secretary's regulations governing surface facility training. (Tr. 136-38). Mrs. Lenig explained that Adams was familiar with the operation of the heavy media because he was present when the system was installed. She stated her husband taught Adams how to operate the heavy media system. Mrs. Lenig testified that she discussed first aid training with Adams during lunches that she provided to Adams in her house.

Mrs. Lenig admitted that she repeatedly asked Adams to sign MSHA training certificates that reflected that he had completed new miner training, refresher training and first aid training, when, in fact, no formal training had ever been provided. (Tr. 54-66; Comp. Ex. 2). The first time formal training was provided was after Mrs. Lenig was cited by MSHA for failing to provide formal miner training to her son-in-law and another employee in May 2001, approximately six months after Adams had quit his job. The citation was terminated after the employees received training at a local vocational school. It is not clear whether the citation was issued as a result of MSHA's investigation into Adams' April 2001 discrimination complaint.

Mrs. Lenig testified that Adams never complained to her about inadequate training, and to the best of her knowledge, he never complained to MSHA inspectors who periodically visited the facility. Adams does not contend that he ever complained to MSHA about a lack of training.

Adams continued to operate the heavy media equipment and the front end-loader during his tenure at the preparation plant from July 1994 until he quit in December 2000. During this period Adams did not sustain any job related injuries. Adams began operating the truck scale in March 1997. Adams was never injured while performing his weighmaster duties. As noted below, the only injury Adams alleges to have sustained at work was a swollen thumb in 1995.

In addition to Adams' purported concern about his lack of formal training, Adams testified about a variety of other alleged safety related concerns. Adams reported incidents of ball bearings and pipes "flying apart" in the summer of 1999. (Tr. 176-77). Adams also reported incidents of slurry spills that had to be cleaned up. In addition, Adams complained about an accident in 1995 when he allegedly fell off the conveyor and his "thumb swelled up" and he had "coal dirt in [his] elbow." (Tr. 190-91). Finally Adams complained about a reported silt dam overflow into a local creek that occurred in November 2000. This alleged incident posed no danger to Adams who was working on the second floor at the heavy media in the processing house. In short, it has neither been contended nor shown that Adams communicated any safety related concerns to the respondent in the weeks preceding his December 5, 2000, voluntary quit.

Adams testified that he quit his job after going to Mrs. Lenig's residence on the morning of December 5, 2000. Adams testified that he told Lenig that he "wasn't happy there no more." (Tr.204). He stated he told her was "trapped like a puppet." (Tr. 205). He explained he was unhappy because people came to his house when they needed coal and he was "on call all the time." (Tr. 205). He reportedly complained that there were no rules and that he didn't know "what was a hazard and what wasn't." (Tr. 205-06). Significantly, Adams admitted he did not explain to Mrs. Lenig what "problems" he reportedly was experiencing at work when he quit on December 5, 2000. (Tr. 246-47).

Mrs. Lenig and Zerby testified that Adams never complained about maintenance problems or inadequate training. (Tr. 377, 381, 400). Zerby testified ball bearings at the heavy media are in housings and are incapable of becoming hazardous projectiles. Zerby stated malfunctions of equipment were repaired quickly and spills were promptly cleaned to avoid disruptions in production.

The respondent asserts Adams quit his job because December is deer hunting season. Adams testified that, although he wanted to go hunting, he "wasn't going to quit his job because he couldn't go." ((Tr. 246). Despite his alleged safety concerns, Adams admitted he asked Mrs. Lenig to rehire him approximately two weeks after he had quit. (Tr. 261). Adams denied that he filed his April 2001 discrimination complaint because he was disappointed that his unemployment claim had been denied in January 2001. (Tr. 261).

II. Further Findings and Conclusions

a. Timeliness of Complaint

As a preliminary matter, section 105(c)(2) of the Mine Act requires a miner to file a discrimination complaint within 60 days of the alleged discrimination. In this case, Adams is alleging a protected work refusal on December 5, 2000. Consequently, the April 18, 2001, discrimination complaint Adams initially filed with MSHA is untimely. Accordingly, at the hearing the respondent moved to dismiss the complaint. (Tr. 254-58). Although I reserved judgement on this issue, at the hearing I noted the statutory 60 day filing period is not jurisdictional. (Tr. 256-57).

The Commission has consistently held that the time limits for filing discrimination complaints under section 105(c) of the Act may be extended in justifiable circumstances. The Commission has concluded that a miner's ignorance of the applicable time limits may excuse a late-filed discrimination complaint provided the respondent is not prejudiced by the delay. *Secy. o/b/o Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986). Here, the delay was approximately 60 days. Such a minimal delay does not materially prejudice the respondent by requiring it to defend a "stale" claim. Accordingly, the respondent's motion to dismiss on the grounds of untimeliness **IS DENIED**.

b. Adams' Work Refusal

The purpose of the Mine Act is to encourage mine operators and miners to work together to ensure a safe workplace. 30 U.S.C. § 801. In furtherance of this goal, section 105(c) of the Act provides, in pertinent part:

> 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 . . . subject to this Act because such miner . . . has filed or made a complaint under or related to this Act . . . . including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

Although section 105(c) of the Act grants miners the right to express safety and health related concerns, it does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the Courts have recognized the right to refuse to work in the face of perceived dangers. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). Thus, the issues in this matter are whether Adams' December 5, 2000, work refusal was protected by the Act, and if so, whether the working conditions that motivated his refusal to work were intolerable leaving Adams no alternative other than to quit his job.

In order to be protected, work refusals must be based on the miner's "good faith, reasonable belief in a hazardous condition." *Secretary of Labor on behalf of Robinette* v. *United Castle Coal* Co., 3 FMSHRC 803 (April 1981); *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). 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 (April 1981); *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). The purpose of the "good faith" belief requirement is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Robinette*, 3 FMSHRC at 810. Significantly, neither the Commission nor the Courts have extended the right of work refusal to encompass refusals based on violations of standards that do not involve hazardous conditions. *National Cement Company*, 16 FMSHRC 1595, 1599 (August 1994).

For a work refusal to be protected under the Mine Act, a miner should first communicate his safety concerns to some representative of the operator. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982). If the miner expresses a

reasonable, good faith fear concerning safety, the operator has a duty to address the perceived danger. *Metric Constructors, Inc.,* 6 FMSHRC at 230; *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983).

Communication of the safety related concern is an essential prerequisite for a protected work refusal because it provides the mine operator with an opportunity to address the miner's concerns in a way that should alleviate the miner's fears. *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 997-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99.

Thus, to establish a protective work refusal a miner must demonstrate: (1) a reasonably held good faith belief that he was exposed to a hazard; and, (2) that his concerns were not addressed despite having communicated them to the mine operator. In this case, Adams has demonstrated neither.

It is undisputed that Lenig's failure to provide new miner and annual refresher training was a violation of Part 46 of the Secretary's training regulations. However, as noted, work refusals based on violations of standards that do not involve hazardous conditions are not protected by the Act. *National Cement,* 16 FMSHRC at 1599. In this regard, it cannot seriously be argued that Adams' failure to receive formal training as a new-hire in July 1994 posed a hazard to Adams during the performance of his laborer and weighmaster duties in December 2000. Surely Adams was competent to perform his job duties given his more than six years of on-the-job work experience. Similarly, Adams' failure to receive formal annual refresher training, given the continuing performance of his duties, has not been shown to have posed a hazard to Adams. In fact, Adams has not asserted that his job training and experience did not provide him with the skills necessary to perform his job. Consequently, there is no basis for concluding that Adams' reported safety related concerns regarding his lack of formal training were reasonable.

While Adams' purported concerns about his lack of formal training do not provide a basis for his discrimination complaint, Adams was not without recourse if he truly feared for his safety. Under such circumstances, Adams could have brought his training concerns to the attention of MSHA officials. In such an event, his expressed concerns would be protected activity under section 105(c) of the Act. Moreover, MSHA would have ensured, as it has already done in this case, that the required Part 46 training was provided.

Adams remaining safety related complaints, such as flying pipes and ball bearings, are notably lacking in credibility. Moreover, they are too remote in time to have been a motivating factor in Adams' decision to terminate his employment. While the motivation for Adams' December 5, 2000, work refusal and voluntary quit is unclear and best known to Adams, what is clear is that his decision to leave was not related to any of the alleged safety concerns described by him in this proceeding. Moreover, assuming *arguendo*, Adams' had legitimate safety related concerns, there is no credible evidence that such concerns were communicated to the respondent.

Accordingly, Adams' December 5, 2000, work refusal and voluntary quit are not entitled to the statutory protection afforded to miners under section 105(c) of the Act.

Although I need not address the question of whether Adams' working conditions were intolerable given the unprotected nature of his work refusal, I note that a protected work refusal and intolerable working conditions are inexorably intertwined. If a miner has a reasonable, good faith belief that the continued performance of his job jeopardizes his health or safety, and his concerns are communicated to, and ignored by, his employer, the complaining miner's job conditions are intolerable. Under such circumstances the working conditions are intolerable because the mine operator failed to exercise reasonable attempts to alleviate the miner's fears regardless of the actual existence of the dreaded perceived hazard. On the other hand, if a miner genuinely is not worried about his health or safety, a constructive discharge normally will not lie.

ORDER

In view of the above, the discrimination complaint filed in Docket No. PENN 2002-37-D by Guy Adams against Calvin V. Lenig Coal Preparation and Sales, Inc., **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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