FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 22, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RICHARD M. BUNDY Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 2001-608-DM Bingham Canyon Mine
v.	:	Mine I.D. 42-00149
KENNECOTT UTAH COPPER CORP., Respondent	:	

DECISION

Appearances: Gregory W. Tronson, Esq., and Jennifer A. Casey, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Complainant;
James M. Elegante, Esq., Kennecott Utah Copper Corp., Bingham Canyon, Utah, and Melissa H. Bailey, Esq., Ray, Quinney & Nebeker, Salt Lake City, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Richard M. Bundy against Kennecott Utah Copper Corporation ("Kennecott") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c) (the "Mine Act"). The complaint alleges that Kennecott terminated Mr. Bundy from his employment in violation of section 105(c). An evidentiary hearing in this case was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

I. FINDINGS OF FACT

Kennecott is the operator of the Bingham Canyon Mine, a large open-pit copper mine in Salt Lake County, Utah. Mr. Bundy worked at the mine as a repair gang machinist from March 21, 2000, until he was terminated on March 21, 2001, after he refused to work overtime on the evening of March 15, 2001. He told his supervisor that he was too tired to work safely during the overtime shift and left the mine at 11:30 p.m. at the end of his regular shift.

At the time of Mr. Bundy's termination, the mine worked three shifts. Bundy worked the B shift, which started at 3 p.m. and ended at 11:30 p.m. His supervisor was Michael

Ragsdale. As a repair gang machinist, Bundy helped repair and maintain electric shovels and drills at the mine. Mr. Bundy was suspended without pay on March 16, 2001. Following an investigation and a disciplinary hearing conducted by Kennecott on March 19, Bundy was terminated from his employment on March 21, 2001. (Ex. R-26).

The circumstances giving rise to his suspension and termination stem from events on March 15, 2001. Bundy arrived for work at the beginning of his shift and was directed by Ragsdale to help repair the No. 56 shovel (the "shovel"). The transmission for the shovel had been removed on the previous shift, but the crew on that shift could not remove the swing shaft. The transmission is connected to this swing shaft, which functions as a pinion to rotate the very large metal-toothed wheel under the superstructure of the shovel. As this wheel is turned, the deck of the shovel, the house containing the machinery and controls, as well as the crane for the shovel, rotate. The swing shaft is quite large and heavy. In theory, the swing shaft should simply fall out when the transmission is removed but, more often than not, the swing shaft has been deformed from use. A number of techniques are used to remove the swing shaft so that it can be replaced with a new one.

About five members of the B crew, including Bundy, were assigned to remove the swing shaft, which is in a small compartment under the deck of the shovel. The crew determined that the best way to remove this swing shaft was to weld blocks in this compartment and then maneuver the swing shaft free using hydraulic jacks. One end of the jack was placed against the block and then pressure was exerted against the swing shaft to loosen it. The compartment containing the swing shaft measures about 44 inches wide, 66 inches deep, and 34 inches high. The jack weighs about 30 pounds and is capable of exerting 30 tons of pressure.

Bundy testified that he spent more that three hours of his shift in this compartment with the hydraulic jack attempting to dislodge the swing shaft. He testified that he was the only member of his crew who worked in the swing shaft compartment for a substantial period of time. He had to sit in the cramped compartment as he worked. Although Bundy believes that he made some progress in loosening the swing shaft, the swing shaft was still in place at the end of the shift.

Bundy testified that by 11 p.m., he was very tired and was ready to go home. Ragsdale believed that he needed three B shift employees to work overtime on the C shift to remove the swing shaft and to perform other jobs that he wanted to complete before the start of the A shift the next morning. These overtime employees would work with the four members of the C shift.

The employees at the mine are represented by several unions. The repair gang machinists are represented by Local 568 of the International Association of Machinists and Aerospace Workers (the "union"). There is a single collective bargaining agreement ("CBA") at the mine that applies to seven unions including this union. The CBA has specific procedures

that Kennecott must follow when it seeks to have employees work overtime. As applied here, Kennecott must first seek volunteers for overtime, starting with those on the crew with the most seniority. If Kennecott cannot recruit a sufficient number of volunteers, it can force employees to work overtime. In such an instance, the company must start with the employee on the crew with the least seniority and work up the seniority list until it secures the number of overtime employees that it is seeking.

On the night of March 15, Ragsdale began informally soliciting volunteers to work overtime as the crew was beginning to wrap up its work at the shovel and at the other locations where crew members were working. After the crew had driven to the changing room at about 11 p.m., Ragsdale again sought volunteers. When no employees volunteered for overtime, he announced that he would have to force three employees to work overtime. The person at the bottom of the seniority list, Danny Turquoise, volunteered. The next eligible employee up from the bottom of the seniority list, Duane Barton, "volunteered" to work overtime after Ragsdale told him that he was going to force him to. The next employee up on the seniority list was Bundy. Ragsdale asked Bundy to work overtime. Bundy declined. Bundy testified that he believed that he was too tired to work safely and he believed that he would be placing himself and others at risk if he worked with heavy equipment and machinery during the C shift.

Ragsdale continued to press Bundy to work overtime. Bundy refused, saying on several occasions that he was "too tired and unsafe" to work overtime. Ragsdale continued to press Bundy to work overtime and Bundy continued to refuse. This dispute continued over a 15- to 20-minute period. Ragsdale had a number of other responsibilities that he had to tend to before 11:30 p.m. so the exchange between Ragsdale and Bundy was not continuous. During the shift, Ragsdale did not observe Bundy working in the compartment under the deck but saw him joking around with other employees and Bundy did not appear to be particularly tired to him.

Ragsdale advised Bundy that the company would have to make a determination as to whether Bundy should be excused from working overtime. Bundy then advised Ragsdale that he could not stay because he was having carpet installed in his home at 7 a.m. the next morning. Ragsdale told Bundy that he would be home in plenty of time for the carpet installers. When Ragsdale believed that they had reached an impasse, he went to his office and looked at the CBA to make sure that he was following the required procedures for forcing overtime on an employee and to review the procedure for resolving disputes. After reviewing the CBA, Ragsdale discussed the procedures for forcing overtime with the union representative on the shift, J. T. Timothy, to see if he was proceeding correctly. Mr. Timothy advised Ragsdale that he had the right to force Bundy to work overtime that night. Bundy did not seek union representation and he did not talk to Timothy about his rights.

Ragsdale approached Bundy one more time and told him that he could be forced to work overtime and that they would have to resolve their dispute and talk to a union representative. Bundy went to the time clock, punched out, and said "I punched out . . . I [am] on my own time now . . . I [am] going home . . . quit talking to me." (Tr. 38). As Bundy left,

Ragsdale said that their dispute could not wait until the next day and, if he left, he would face disciplinary action. Mr. Bundy left the mine. After Bundy left, Ragsdale wrote up what is called a "Notice of Investigation and Hearing" under the CBA, which is commonly referred to as a "disciplinary ticket." He wrote the ticket because Bundy left the mine without permission. The next day, when Ragsdale advised Jerry Kinyon, the Field Maintenance Superintendent, what had happened on the B shift, Kinyon agreed that Ragsdale had followed the terms of the CBA.

Ragsdale, Danny Turquoise, and Duane Barton worked the C shift that night. Ragsdale does not ordinarily work on the C shift but he did so that night to make sure that the shovel was repaired. The C shift crew removed the swing shaft using a different method which did not require anyone to enter the frame of the shovel or to work in a tight space. Several individuals on the crew performed that task while others worked in the warehouse and obtained supplies from the shop.

On March 16, 2001, after Bundy arrived at the start of the B shift, Kinyon gave Bundy the disciplinary ticket. A representative from the union was present at this meeting in Kinyon's office to represent Bundy, but Bundy refused representation and he signed a waiver releasing the union from its obligations to represent him.[1] Bundy was suspended until a disciplinary hearing was held on March 19, 2001. Bundy, Ragsdale, Kinyon, two union representatives, and a Kennecott human resources department representative were present. Although Bundy refused union representation, the union officials wanted to attend because the outcome of the hearing could have an impact on future cases involving union members. At this hearing, Ragsdale explained what happened and Bundy responded by defending his actions. After reviewing Kennecott's Code of Conduct and the CBA, Kinyon recommended that Bundy be dismissed from his employment at Kennecott. Kinyon's decision was based, in part, on Bundy's violation of the second paragraph of the Code of Conduct, which covers the "[f]ailure or refusal to comply with instructions, perform work assignments, or complete responsibility of the job." (Ex. R-20).

II. MOTION TO EXCLUDE TESTIMONY OF TERRY HURST AND DAVID PARSONS

At the hearing, the Secretary called Terry Hurst and David Parsons as witnesses. Kennecott objected to their testimony because the Secretary did not list them as witnesses on her witness list provided in response to my Amended Notice of Hearing issued on January 7, 2002. The Secretary also did not list these individuals as potential witnesses in her response to Kennecott's interrogatories. In response, the Secretary maintains that these witnesses were

[1] Utah is a "right-to-work" state. Bundy is not a member of the union. At all times pertinent in this case, whenever Bundy was asked by Kennecott officials if he wanted a union representative, Bundy declined and, when requested by the union, he signed a release relieving the union of its obligation to represent him.

informants protected under 29 C.F.R. § 2700.61 ("Commission Rule 61") and that she was not required to disclose their names until two days before the hearing under Commission Rule 62. At the hearing, I allowed the Secretary to present these witnesses and asked the parties to brief this issue. I stated that if I granted Kennecott's motion, the testimony of these witnesses would be stricken.

Terry Hurst was employed by Kennecott on several occasions. His most recent employment by Kennecott was between January 1998 and June 22, 2001. He worked as a repair gang machinist. He voluntarily left Kennecott in June 2001 to take a job in the aircraft industry at Hill Field Air Force Base. David Parsons worked at Kennecott from January 25, 2000, until February 3, 2002, as a repair gang mechanist. At the time of the hearing, he was living in Garland, Texas, and was looking for work with Ingersoll-Rand and other mining-related companies. Both of these men were working on the same shift as Bundy on March 15, 2001.

The Secretary maintains that, although Hurst and Parsons were no longer employed by Kennecott at the time of the hearing, "they both worked at the Bingham Canyon Mine in March 2001 when Bundy was terminated from his position and [they] provided confidential information to MSHA regarding Bundy's protected activity and subsequent termination." (S. Br. 7). She further argues that "the possibility for retaliation for communicating with MSHA lingers for Hurst and Parsons in the same manner as it would for current employees working for Kennecott." *Id.* The Secretary contends that these witnesses should be afforded the same protection from disclosure as current Kennecott employees. In making this argument, the Secretary relies on case law on the informant's privilege, including *Bright Coal Co.* , 6 FMSHRC 2520 (Nov. 1984).

Kennecott contends that the Secretary was obligated to provide it with the names of Hurst and Parsons because neither of these individuals are miners. It argues that Commission Rules 61 and 61 only apply to individuals "currently employed in mining operations." (K. Br. 19). The term "miner" is defined in section 3 of the Mine Act as "any individual working in a coal or other mine." 30 U.S.C. § 802. Kennecott argues that there was no potential for intimidation or retaliation against Hurst and Parsons and that Rules 61 and 62 do not apply to them. The Secretary violated the Commission's rules when it failed to identify Hurst and Parsons as witnesses and, consequently, their testimony should be stricken. In addition, Kennecott maintains that the Secretary failed to provide the names of these witnesses two days prior to the start of the hearing as required by Rule 62.

The Commission has two related procedural rules that govern the disclosure of the identity of informants and witnesses who are miners. Rule 61 provides that a judge shall not, except in extraordinary circumstances, order a person to disclose to an operator or his agent the name of an informant who is a miner. In broadly interpreting the informant's privilege, the Commission noted that the language of the Mine Act and its legislative history "reflect

congressional concern about the possibility of retaliation against miners who participate in enforcement of the Act." *Bright* , 6 FMSHRC at 2524. The Commission went on to state:

> We believe that these expressions of congressional concern for protecting the identity of miners who contact the Secretary regarding violations of the Act, and otherwise protecting miners who participate in enforcement of the Act, underscore the need for the recognition and proper application of the informer's privilege in Mine Act proceedings. Therefore, in order to maximize the lines of communication with the Secretary concerning violations of the Mine Act, we hold that a person's status as an informer is not dependent on whether that person is an employee of a mine operator.

Id. The Commission discussed this issue because the operator in that case had ceased all operations and it was not clear whether the informants were still employed in the mining industry. Consequently, an individual who was an eyewitness to events that may be in violation of section 105(c) of the Mine Act may be an informant notwithstanding the fact that he is no longer employed by a mine operator. In such an instance, that individual's identity would be protected from discovery by the informant's privilege. *See also Asarco, Inc.*, 12 FMSHRC 2548, 2552-57 (Dec. 1990); 14 FMSHRC 1323, 1327-28 (Aug. 1992). The Secretary maintains that Hurst and Parsons were informants protected by this privilege.

Although the language of Rule 61 can be interpreted to protect the identity "of an informant who is a miner" and not informants who are no longer employed by a mine operator, the Commission has not adopted this interpretation. It has consistently interpreted the informant's privilege broadly. The Commission has not implied that Rule 61[2] is to be construed more narrowly than or inconsistently with its broad interpretation of the informant's privilege. In any event, I am prohibited by Commission case law from revealing the identity of informants who are not miners.[3]

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[2] When the Commission's cases on the informant's privilege were issued, the provisions of Rules 61 and 62 were contained in Rule 59. *See Bright*, 6 FMSHRC at 2523 n 2. When the Commission revised its rules, it split Rule 59 into two rules. In the preamble, the Commission noted that a "miner informant may also be a witness in Commission proceedings" and stated that a judge shall not disclose under Rule 62 whether any miner witnesses "were also informants." 58 *Fed. Reg.* 12158, 12163 (March 3, 1993).

[3] Because the informant's privilege is a qualified one, if the judge determines that the privilege applies, he must perform a "balancing test to determine whether the respondent's need for the information is greater that the Secretary's need to maintain the privilege to protect the public interest." *Bright*, 6 FMSHRC at 2526. Because of the manner in which the issue arose, the balancing test does not apply.

Rule 62 provides that a judge shall not, "until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner . . . whom a party expects to summon or call as a witness." This rule applies to all miners who are called as witnesses, including miners who are not informants. How this two-day rule should be applied to witnesses who are not informants and who are no longer employed in the mining industry is not before me. What is before me is how this rule should be interpreted for witnesses who are informants but who are no longer employees of a mine operator. As discussed above, a judge is prohibited from ordering the Secretary to disclose the identify of an informant. I hold that Rule 62 is an exception to this prohibition with respect to informants who are to be called as witnesses. If the Secretary intends to call an informant as a witness, she must identify him two days prior to the hearing. If she does not intend to call an informer as a witness, his identity need not ever be revealed. Given the Commission's interpretation of the informant's privilege, discussed above, Rule 62 must also apply to individuals who are not employed in the mining industry at the time of the hearing.[4]

I find that Hurst and Parsons were informants as that term has been interpreted by the Commission and that the Secretary was within her rights to protect their identity. As a consequence, for the reasons set forth above, the Secretary was not required to reveal their identity until two days before the hearing under Rule 62. My holding in this case is consistent with my holdings in two previous cases. *Mobile Premix Sand & Gravel Co.* 19 FMSHRC 220 (Jan. 1997); *Basin Resources, Inc.*, 18 FMSHRC 1125 (June 1996).[5]

Kennecott argues that the Secretary did not comply with Rule 62, in any event, because she provided it with the names of these witnesses less than two days prior to the start of the hearing. It is undisputed that the Secretary advised Kennecott that she was calling Hurst and Parsons as witnesses on Saturday, March 16, 2002, at about 11 a.m. (S. Br. Ex. C). The hearing commenced at 9 a.m. on Tuesday, March 19, 2002. Kennecott points to Commission Rule 8, which states that when a prescribed time period is less that seven days, "intermediate Saturdays, Sundays, and federal holidays shall be excluded in the computation." As a consequence, Kennecott maintains that the Secretary was obligated to provide the names of these witnesses at 9 a.m. on Friday, March 15, 2002.

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[4] If I interpret the word "miner" in Rule 62 to include only individuals who are employed by operators at the time of the hearing, then the Secretary would not be required to reveal the identity of "non-miner" witnesses who are informants. An informant's identity would be protected by the informant's privilege and Rule 62 would not apply because the informant is not a "miner." I reject this interpretation.

[5] In making its arguments, Kennecott relies on orders of Commission Judge Feldman. *Laurel Run Mining Co.*, 19 FMSHRC 1229 (June 1997), 19 FMSHRC 1607 (Sept. 1997). That case arose out of a different set of facts but, to the extent that Judge Feldman's holding is inconsistent with the holding in this case, I respectfully disagree with his reasoning.

The Secretary does not dispute Kennecott's argument that she was required to provide the names of Hurst and Parsons on the morning of Friday, March 15. She argues that counsel for the Secretary misinterpreted the Commission's rules. She contends, however, that the sanction of striking the testimony of these two witnesses is too extreme. She maintains that I should take into consideration the reason for the delay and whether the delay prejudiced Kennecott. The Secretary argues that Kennecott failed to establish actual prejudice caused by the delay. She points to the fact that Kennecott engaged in active discovery but did not take any depositions in this case, Kennecott had knowledge that Hurst and Parsons were on Bundy's crew and had informally interviewed them about the facts in this case. The Secretary contends that Kennecott "obtained detailed, factual information concerning Bundy's allegations . . . ." before this case was initiated. (S. Br. 11). The Secretary maintains that if Kennecott believes that it was prejudiced by the delay, it could have requested a one-day continuance of the hearing. Finally, the Secretary believes that Bundy's interests should not be compromised by the failure of the government to meet its time obligations.

I hold that the Secretary was obligated to disclose the names of these informant witnesses at or about 9 a.m. on March 15. Under the facts of this case, however, I find that Kennecott did not suffer any prejudice by the Secretary's short delay. The testimony of Hurst and Parsons was consistent with the testimony of the other witnesses and consistent with what they told Kinyon when he interviewed them on March 26, 2001. (Ex. R-27). Consequently, the motion to strike the testimony of Hurst and Parsons is **DENIED**.

III. SUMMARY OF THE PARTIES' ARGUMENT

A. Secretary of Labor

The Secretary contends that Bundy had a reasonable, good faith belief that he was so tired that if he continued working on the shovel he could injure himself or others. A miner who refuses to work is not required to establish that an actual hazard exists, but he must show that he had an "honest belief that a hazard exists." *Robinette,* 3 FMSHRC at 810. Nevertheless, the miner must attempt to communicate his safety concerns to the operator. *Sec'y of Labor on behalf of Dunmier v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).

The Secretary maintains that when Bundy told Ragsdale that he was too tired to work safely, he had a reasonable good faith belief that he would put himself and others in danger if he continued working on the shovel. The Secretary argues that his refusal to work beyond his normal work shift was protected activity under section 105(c) of the Act. Because Kennecott discharged Mr. Bundy as a direct result of this work refusal, it violated section 105(c). The Secretary relies, in part, on a decision of former Commission Judge Koutras in which he held that a refusal of a miner to work overtime because he was too tired is protected activity. *James Eldridge v. Sunfire Coal Co.*, 5 FMSHRC 408 (March 1983). The Secretary also relies on the Commission's decision in *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking*

Co., 21 FMSHRC 265 (March 1999) in which the Commission held that a work refusal based on fatigue as a result of excessive work hours was protected under the Mine Act.

The Secretary rests on the fact that Bundy "conducted uniquely difficult work" on the B shift on March 15. (S. Br. 15). He was working in a small compartment in the frame of the shovel using hydraulic jacks weighing about 30 pounds to exert pressure on the swing shaft. Because the compartment was dark and dusty, he used a flashlight to see. Bundy testified that he worked in this compartment for about 3½ hours and that it was "back-breaking" work. (Tr. 20). Bundy testified that he was mentally and physically exhausted at the end of his regular shift.

The Secretary also states that Kennecott did not tell Bundy what overtime work he would be performing during the C shift. Consequently, he assumed that he would be "conducting the same back-breaking work" that he performed on the B shift. Ragsdale told the crew that he was seeking miners to work overtime because the swing shaft had not been removed on the B shift. Bundy honestly believed that he could not safely continue to remove the swing shaft on the next shift. The Secretary maintains that Bundy communicated his safety concerns to Ragsdale on several occasions. Despite Bundy's repeated attempts to communicate his safety concerns, Ragsdale did nothing to address these issues or to ease his fears. The Secretary also believes that Ragsdale expressed animus towards Bundy's safety concems. Finally, the Secretary contends that Bundy was terminated as a direct result of his work refusal.

B. <u>Kennecott</u>

Kennecott maintains that the record in this case does not support the Secretary's position that Bundy entertained a reasonable, good faith belief that a hazard existed at the time he refused to work overtime. Kennecott believes that Bundy raised the safety issue to mask his real reason for his work refusal. He simply did not want to work another four hours but wanted to go home. Bundy offered a string of excuses to get out of his obligation under CBA to work overtime. Thus, Kennecott contends that the safety concern was a pretextual excuse rather than one made in good faith. Kennecott points to the fact that, in a conversation with Kinyon, Bundy stated that Kennecott "was missing the boat" by not having 12-hour shifts. (Tr. 375-76).

Kennecott contends that Bundy's refusal to work overtime and his subsequent decision to walk off the job was also unreasonable. Kennecott maintains that Ragsdale tried to keep Bundy from leaving the mine so that Bundy and the company could follow the dispute resolution process in Article 18J of the CBA. Because Bundy is not a member of the union, he refused to comply with the requirements of the CBA. Kennecott states that if Bundy had stayed at the mine, he would not have been required to work around the shovel or perform any other heavy work while the parties attempted to resolve the issue under Article 18J and he would have been compensated for this time. Thus, even if Bundy's safety concern was initially reasonable, it became unreasonable, and therefore unprotected, when he refused to allow the

company to follow the procedures set forth in the CBA to resolve the issue. If Bundy was concerned about safety, he would have stayed at the mine because he would not have been required to place himself in a position where he could be injured. As a consequence, Bundy's testimony was not credible as further evidenced by the fact that he told Ragsdale that he was having carpet laid at his home at 7 a.m., which Bundy now admits was not true.

Even if Bundy's work refusal was protected, the Secretary failed to establish that his dismissal was motivated in any part by his protected activity. Although Kennecott had knowledge of Bundy's safety concerns, the company never had a chance to address them because Bundy abruptly left the mine. As a consequence, Kennecott was never given the opportunity to make a determination whether Bundy was too tired to work safely. There is no evidence in the record that Kennecott has any animus towards work refusals due to safety concerns. Bundy was terminated from his employment, after a hearing on the merits, because he refused to stay at the mine to have the matter resolved under the procedures set forth in the CBA.

IV. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d. Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The mine operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In a discrimination case involving an alleged work refusal, the complainant is not required to establish that a hazard actually existed. The complainant must show that his work refusal was based on his reasonable, good faith belief that a hazard exists. To meet this burden

of proof, the Secretary must establish that Mr. Bundy's belief that he could not continue to work safely was reasonable, that it was made in good faith, and that he at least attempted to communicate his belief that he could not continue to work safely to a representative of Kennecott. *Sec'y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982). The "perception of the hazard must be viewed from the miner's perspective at the time of the work refusal." *Gilbert v. FMSHRC*, 866 F. 2d 1433, 1439 (D.C. Cir 1989).

I find that Bundy acted in good faith when he told Ragsdale that he was too tired to work safely. "Good faith belief simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. I find that the preponderance of the evidence establishes that Bundy honestly believed that he was too tired to continue working safely with heavy equipment. At first he did not give Ragsdale any reason why he did not want to work overtime. He raised the safety issue once they reached the change room. When that failed, he told Ragsdale that people were coming to install new carpets in his house at 7 a.m. the next morning. As a consequence, Kennecott maintains that the Secretary did not establish that Bundy was acting in good faith when he raised safety issues. Kennecott states that his lack of good faith is underscored by the fact that he told Kinyon the next day that Kennecott should institute 12-hour shifts. Kennecott also argues that I should not credit Bundy's testimony because, in order to obtain unemployment benefits, he told the hearing officer at the benefits hearing, while under oath, that he did not have carpeting installed the next day. (Tr. 51-52, 83-84). Kennecott also points to the fact that Bundy's statements about having carpet installed has changed several times and that his testimony at the hearing in this case was also inconsistent on this issue. (K. Br. 29-30; Tr. 49, 82).

Although Bundy's lack of candor is troubling, I find that his testimony at the hearing as to why he raised the carpet issue with Ragsdale to be credible. He testified that he did not need to be home when the carpet was installed and that he told Ragsdale about the carpet installers in the hope that Ragsdale "would let me go home." (Tr. 50). Bundy testified that he did not want to work overtime because he felt that he was too tired to work safely, but he raised the carpet issue thinking that perhaps Ragsdale would accept that excuse, since he did not believe that he was getting anywhere with the safety issue. I give Bundy the benefit of the doubt on this issue.

The closer question is whether Bundy's safety concerns were reasonable. The Secretary contends that Bundy's safety concerns were reasonable because he had been working with heavy equipment for at least three hours in a very small, dark compartment under the deck of the shovel. Bundy assumed that he would be doing the same "back-breaking" work during overtime because the swing shaft had not been removed from the shovel. (Tr. 93). Ragsdale told the crew that he needed three individuals to work overtime so that the repair work on the shovel could be completed. At the hearing in this case, Bundy stated that he was concerned that "if you are not mentally and physically able to work, in a split second you can get crushed, maimed, or even kill yourself or a fellow coworker." (Tr. 40). The Secretary contends that the reasonableness of Bundy's concerns is emphasized by that fact he had worked about 300

overtime hours during the previous year thereby demonstrating that he was not someone who evaded work responsibilities. Finally, the Secretary argues that Bundy's safety concerns were clearly communicated to his supervisor, Ragsdale.

Kennecott argues that Bundy was not being reasonable on the evening of March 15. It maintains that it terminated Bundy for walking off the job, not for raising safety issues. He did not know what work he would be required to perform during the C shift and the Mine Act does not regulate working hours or allow miners to refuse to perform work that does not present any particular hazards. Moreover, even assuming that Bundy had legitimate safety concerns, he refused to stay at the mine so that the matter could be handled under the dispute resolution provision in the CBA. Kennecott contends that Ragsdale "worked to convince Bundy to follow the dispute resolution procedure of Article 18J of the CBA to make a determination as to whether a safety hazard existed." (K. Br. 27; Tr. 254). Bundy's refusal to submit to this procedure because he was not a member of the union was unreasonable. Kennecott contends that Bundy would not have had to perform any work while the matter was being resolved. As a consequence, if Bundy had stayed at the mine, as instructed by Ragsdale, he would not have been exposed to any safety hazards.

Under the appropriate circumstances, I hold that a miner has the right to refuse to perform a job assignment if he is too tired to safely conduct the work. Former Commission Judge Koutras held that a miner is engaged in protected activity when he refused to work overtime because he was "too tired and exhausted" to continue extracting pillars in a coal mine. *Eldridge*, at 464. Commission Judge Feldman held that miners, who drive large multi-ton haul trucks, had the right to refuse to continue driving their vehicles because of fatigue in the face of the long hours that they had worked during the preceding weeks driving these trucks over mountainous terrain on narrow and winding roads. *Sec'y on behalf of Bowling v. Mountain Top Trucking Co.*, 19 FMSHRC 166 (Jan 1997); *aff'd on this issue* 21 FMSHRC 265, 274 (March 1999).

I find, however, that Complainant did not establish that Bundy's refusal to work overtime on the night of March 15, 2001, was protected activity under section 105(c) of the Mine Act because his refusal was not reasonable at the time he left the mine. Bundy's initial concern that he was too tired to continue trying to remove the swing shaft was reasonable, but his refusal to stay at the mine until the matter was resolved or until he was assigned work that he considered to be hazardous considering his fatigued state was not reasonable. In reaching this conclusion, I have considered the facts from the perspective of Mr. Bundy at the time of his work refusal.

First, it was not reasonable for Bundy to assume that he would be required to continue the "back-breaking" job of attempting to remove the swing shaft from inside the compartment under the deck for the shovel. Bundy was never assigned to perform that task by management. Bundy undertook to be the employee on the B shift to work in the compartment on his own. He could have asked another employee to take over that work during overtime, or asked

Ragsdale to assign him a different, less demanding task. Several of the employees who worked overtime performed tasks that did not involve working with heavy equipment or working in areas that presented a hazard. Indeed, Mr. Herbert, who worked the C shift that night, testified that he told Ragsdale that overtime employees would not be needed that night. (Tr. 181-83). Bundy had no reasonable basis to conclude that he would be forced to continue working in the compartment under the deck of the shovel. His refusal to work was too anticipatory to be afforded protection. In contrast, the miners who refused to work in the *Eldridge* and *Bowling* cases had been assigned to complete specific jobs. Mr. Eldridge was told that he would be pulling pillars until the job was completed. The miners in *Bowling* were truck drivers who would be required to continue driving their haul-trucks over narrow maintain roads. If Bundy had stayed at the mine and Ragsdale required him to work in or around heavy equipment or put him in a dangerous position, taking into consideration his fatigued state, Bundy would have had a statutory right to refuse to perform those tasks. Instead, Bundy left the mine at the end of his shift despite requests from Ragsdale to stay so that the matter could be discussed and resolved.

Complainant emphasizes the fact that Bundy raised the safety issue in the context of whether he could be required by Kennecott to work overtime. The Mine Act does not regulate the working hours of miners. Thus, the issue is whether Bundy had a reasonable belief that he could not safely perform an assigned task because of his fatigued state, irrespective of the time in which he raised the issue. A miner who is mentally and physically exhausted may reasonably believe that he cannot safely perform a specific task in the middle of his shift, particularly if the shift is longer than eight hours. In such an instance, his refusal may constitute protected activity. On the other hand, a miner who does not know what task he will be required to perform cannot refuse to perform any work because he is fatigued.[6] It is important to understand that there has been no showing that Bundy was so tired that he could not do any productive work. Complainant's case was premised on the assumption that Bundy would be required to perform a task that was too demanding for him to safely perform. Bundy assumed, without justification, that he would be forced to work in the compartment of the shovel doing the same work he did during the B shift. Although Bundy stated that he was also mentally tired, which could have clouded his thinking, he did not wait to see what job he was assigned. He also did not attempt to negotiate with Ragsdale to get an easier job assignment. Bundy only told Ragsdale that he could not be forced to work overtime because he was too tired.

Mr. Timothy was the union representative on the B shift that evening. Any hourly worker, including a worker who is not a member of the union, has the right to talk to the representative about his rights and to request representation. Ragsdale asked Bundy if he wanted to talk to Timothy. Bundy refused by saying that he had no use for unions and that the

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[6] Situations may arise where a miner is so exhausted that he cannot perform any productive work. There has been no showing that Bundy was in such a condition. Some of the miners who worked on the C shift that night performed work that was not arduous and did not involve the use of heavy equipment.

union could not help him. Ragsdale talked to Timothy, but only in the context of making sure the union did not dispute his right to force Bundy to work overtime. It is not clear whether Timothy understood the nature of Bundy's refusal but he advised Ragsdale that he could force Bundy to work overtime under the CBA.

Complainant argues that Kennecott failed to notify Bundy of his rights under section 18J of the CBA. It is clear that Bundy was advised of his safety rights and his rights under the CBA at the time of his orientation when he was hired by Kennecott. As a general matter, an employer is not required to offer its interpretation of a union contract to its employees and in some instances an employer would violate the National Labor Relations Act if it does so. More importantly, it is clear that Bundy was well aware of his right to request union representation. It was not necessary for Bundy to understand all of the nuances of the CBA because he could ask a union representative. Union representative Timothy was available to Bundy but he waived his right to seek his representation or his advice. (Tr. 284).

Section 18J of the CBA, "Disputes Resolution," establishes a step-by-step procedure that the company and union will follow when an employee "believes an unsafe condition exists which is beyond the normal hazards inherent in the operation which involves an immediate danger of injury to his person . . . ." (Ex. R-6). Under this procedure, the employee notifies his immediate supervisor when he believes that such a condition exists. If the supervisor determines that an immediate danger of injury does not exist, the employee may request union representation. If the union representative and the supervisor cannot reach an agreement, the matter proceeds to subsequent steps which involves calling in higher levels of management, calling in company and union safety officials and, in certain instances, calling in medical personnel. This procedure has been used in similar situations such as when miners ask to leave their shift early because they feel tired or sick.

I credit the testimony of Kennecott witnesses that the company would have called in those people necessary to resolve the dispute between Ragsdale and Bundy on the night of March 15. If Bundy had remained at the mine, he would not have been required to work until the matter was resolved, but he would have been paid for his time. Because Bundy refused to discuss the matter with Timothy and he left without Ragsdale's permission, the dispute resolution procedures were never implemented. Complainant faults Ragsdale because he did not lay out this procedure in detail for Bundy before he left. As stated above, Mr. Timothy was available to assist Bundy. Ragsdale testified that Bundy told him that he did not need the union's help and that he could handle the matter on his own. (Tr. 254). It must also be understood that Ragsdale had to tend to many other matters between 11:10 and 11:30 that night, including lining up the oncoming crew to give them their assignments and advising that crew's leadman of the status of the work to be completed. It was unreasonable for Bundy to insist that Ragsdale determine whether he should be excused from working overtime during this 20-minute period. When Ragsdale kept talking about it, Bundy told him to "quit talking to me." (Tr. 38).

Throughout this proceeding Bundy maintains the he was in the best position to know whether he was too tired to work safely. The implication is that once Bundy told Ragsdale that he was too tired to work safely, he should have been excused from working overtime. Given the subjective nature of such a claim, it is reasonable for an employer to want to evaluate such a claim. When an employee asks to be excused from working at the Bingham Canyon Mine because he is sick or exhausted, Kennecott sends him to its on-site medical clinic for an examination. (Tr. 118-19, 155). In at least one instance, an employee who asked to be excused from working overtime because he was not feeling well was sent home after he was examined by clinic personnel. If the clinic is closed, an EMT is available to examine the employee. It is impossible to know how Mr. Bundy's situation would have been resolved had he remained at the mine. I find that because Bundy left the mine before he was given a work assignment and before Kennecott was given the opportunity to review his claim that he was too tired to work safely, his refusal to remain at the mine for overtime was not reasonable and was not protected by section 105(c) of the Mine Act.

When "a miner expresses a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to address the perceived danger." *Gilbert*, 866 F.2d at 1440. In *Gilbert*, a miner raised concerns about the condition of a roof in a mine. Although the miner had not been told that he was going to be working in the same area, he left the mine after he came to work the next morning because of his continued concerns about the condition of the roof. When he inquired about the roof that morning, he was told that it was "none of his concern". *Id.* After reviewing the events leading up to his work refusal, the court held that the Commission's conclusion that he could not have "entertained a reasonable or good faith belief that he would be required to work in a hazardous [area]" was not supported by the record. The court remanded the case to determine "whether management addressed [the miner's safety] concerns in a way that his fears reasonably should have been quelled." *Id. at* 1441.

The facts in this case differ significantly from the facts in *Gilbert*. In *Gilbert*, the miner had a reasonable, good faith belief that he would be required to work under a hazardous roof. In the present case, none of the conditions at the mine presented a hazard that concerned Bundy. His safety concern was that, because he was tired from working under the deck of the shovel for three hours during his regular shift, he could not continue to safely perform that task or another arduous task without jeopardizing his safety and the safety of others. In *Gilbert*, the miner was concerned that management had not done enough to determine the extent of the roof control problem and had not taken sufficient steps to secure the roof. In this case, by leaving the mine, Bundy prevented management from making a determination whether he was indeed too tired to work safely. Thus, the only option for Kennecott was to take Bundy at his word, allow him to go home, and force the next person up the seniority list to work overtime.

I credit the testimony of Ragsdale that he told Bundy that they would have to resolve their dispute that night and that he would be disciplined if he left at the end of his shift. (Tr. 253-55). Although these statements did not address Bundy's concerns about his fatigued state, it is clear that Bundy was not going to be asked to work under the deck of the shovel until his

concerns were discussed further. It appears that Bundy did not particularly like Ragsdale and did not completely trust him. But given the nature of Bundy's safety concern, it was incumbent on him to remain at the mine until Kennecott could evaluate his fitness to work. Thus, Bundy's initial concern that Ragsdale would make him get right back into the compartment under the shovel or perform other arduous work "reasonably should have been quelled," at least enough for him to stay at the mine to see if Ragsdale was acting in good faith. It was not reasonable for Bundy to leave before the dispute was resolved or before he was assigned a task that he believed he could not safely perform. It is important to remember that Ragsdale had not required Bundy to work under the deck of the shovel during the B shift, so Bundy's continuing concern that he would be forced to perform such work during overtime was illogical and unreasonable.

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent:
(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

In applying this test to the present case, it is clear that Kennecott had knowledge of the protected activity and that there was a coincidence in time between the protected activity and the adverse action. Any hostility exhibited by Ragsdale concerned Bundy's refusal to work overtime and to stay at the mine to resolve the matter. There has been no credible showing that Ragsdale and Kennecott were hostile to miners' safety concerns or that Ragsdale issued the disciplinary ticket because Bundy raised safety issues. Bundy was disciplined because he left the mine. In the termination letter, Kinyon stated "[s]ince you chose not to have further discussions with your supervisor, refused to stay, used foul and abusive language towards him, then left the property, the Company has decided to terminate your employment effective the date of this letter for your insubordinate behavior as described above." (Exs. R-26, G-6). Finally, Complainant did not establish disparate treatment. There is little evidence on this issue. A union officer was given a disciplinary ticket for refusing overtime, but the ticket was vacated when the company discovered that he refused overtime because he had to tend to union business. On February 22, 2001, Bundy refused to work overtime after Ragsdale told him he was going to force him to work but, before the matter came to a head, another employee voluntarily agreed to work overtime. (Tr. 214; Ex. R-3). Bundy had not been previously disciplined and he received favorable performance evaluations. No employee had been terminated at the mine under similar circumstances because there is no evidence that anyone

had refused to work overtime and then left the mine in a similar manner. I find that there is insufficient evidence to hold that Bundy was treated differently than other employees because he raised a safety issue.

In conclusion, I find that although Bundy's initial concern about his fatigued condition was reasonable, his refusal to remain at the mine after the end of his shift to resolve the matter under the CBA was not reasonable and was not protected by section 105(c). I find that the adverse action was not motivated by Bundy's protected activity but was prompted by his unprotected activity alone, as discussed above.

V. ORDER

For the reasons set forth above, the complaint filed by the Secretary of Labor on behalf of Richard M. Bundy against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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