FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 22, 2003

THOMAS P. DYE II, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2002-408-DM
	:	RM MD 02-11
v.	:	
	:	Mine I.D. 05-01732
	:	Cotter Mill
MINERAL RECOVERY SPECIALISTS, INC., Respondent	:	

DECISION

Appearances: Thomas P. Dye II, Cañon City, Colorado, pro se;
David Tierney, Mineral Recovery Specialists, Inc., Johnson City, Tennessee, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Thomas P. Dye II against Mineral Recovery Specialists, Inc., ("MRSI") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Dye alleges that he was fired by MRSI because he refused to perform a task that he considered to be unsafe. An evidentiary hearing was held in the Commission's courtroom in Denver, Colorado. For the reasons set forth below, I find that Mr. Dye did not establish that MRSI discriminated against him in violation of section 105(c) of the Mine Act.

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

Cotter Corporation ("Cotter") operates a uranium mill in Fremont County, Colorado. Daniel Dilday, who had no affiliation with Cotter, helped design a new process to extract pure zirconium from radioactive ore. He discovered an ore body that could be run through this process to determine whether zirconium and uranium could be economically produced. He approached CMS Enterprises Development, LLC ("CMS") with this idea. CMS agreed to finance the construction of the necessary facilities and to underwrite the initial production costs. CMS entered into an agreement with Cotter so that the facilities necessary to produce zirconium using this new experimental process could be constructed at the Cotter mill. This zirconium recovery project (the "project") was constructed at the Cotter Mill in several buildings in an area that was set apart from the existing uranium mill. CMS contracted with MRSI to provide the

technology for the project and to guide the operation of the process. CMS had a project manager and a project engineer on the site and MRSI employed people to run the project. As the project progressed, Cotter's hourly employees were trained and began taking over the production work. Several other contractors were involved in the project as discussed in more detail below. If the project was successful, Cotter planned to purchase the patent and run the project on its own with some technical guidance from MRSI.

Dye was hired by MRSI as a temporary, full-time employee in October 2000. He was terminated by MRSI on February 26, 2002. He held several positions at the project and at the time of his termination he was the lead man over several elements of the project. He did not directly supervise Cotter hourly employees working in his areas, but he had some control over their work. At about 6:00 a.m. on February 26, 2002, Dye attended the turnover meeting. At that meeting, plans were made for the oncoming day shift. Mr. Dilday, who was MRSI's project manager, asked Dye what his plans were for the day. Dye responded that he "was going to get the candle filter lid back on candle filter 2A, get it hydro-tested, pressure tested, so we could run product." (Tr. 116). Dilday responded "sounds like a good idea." *Id.*

The zirconium recovery project involved a rather complex process. The raw ore went through several stages of milling and preparation in different buildings. At or near the final stage of production, prepared material was processed in candle filters to further purify the product. The candle filters were large, pressurized vessels. The project was designed so that material could be processed through two sets of candle filters, each set consisting of a large and small candle filter. All of the candle filters were in operation except candle filter 2A. It had been purchased used and needed to be repaired before it could be placed in service. The lid for this candle filter had been sent to an outside contractor for repairs and had been returned to the project a few days prior to February 26.

At about 7:00 a.m. on February 26, there was another meeting known as the contractors' meeting. This was a meeting among MRSI management, CMS management, Cotter representatives, and the other contractors working at the project. Dye did not attend this meeting. William Ganyard, who was the foreman for the mechanical contractor at the site, attended the meeting. He worked for a contractor known as Vision Air. At this meeting, Dilday announced that he wanted candle filter 2A up and running by noon that day. Ganyard told Dilday that this request "was just a completely impossible directive." (Tr. 133). It was Ganyard's understanding that, after he told Dilday it would be impossible to install the lid on the candle filter that day, "that was the end of the directive." (Tr. 134). When Ganyard left the meeting, he knew that he would not be trying to put the candle filter together that day. (Tr. 138). He also testified that Dilday understood that "it was not going to happen." (Tr. 147-48).

Ganyard testified that, as the mechanical contractor at the site, it would have been the responsibility of Vision Air to reassemble the candle filter, not Mr. Dye. (Tr. 137). Getting the candle filter into operation was essentially a three step process. First, the lid would need to be put on the vessel and bolted down. Ganyard estimated that the lid weighed about 10,000 pounds.

(Tr. 136). Ganyard testified that, because the lid was so heavy, he would need to rent a large forklift and get it to the project before work could even begin. (Tr. 138-39). Getting a forklift to the project would take at least a day. (Tr. 139). Ganyard estimated that it would take a crew of people several days to get the lid assembled on the vessel. The second step in getting the candle filter into production would be to pressure test it to see if it was functioning properly. Michael Jeffris, an engineering technician with MRSI, would have been the individual to pressure test the vessel. (Tr. 183-85, 222). If the vessel passed the in-house testing, then an appointment would be made to have it certified by the State of Colorado. (Tr. 141). Because it is a pressurized vessel, it could not be used in production until it was state-certified. This certification would be the third necessary step.

Later in the day on February 26, Ganyard ran into Dye and told him about the "ridiculous nature of [Dilday's] directive." (Tr. 136). Ganyard told Dye about this directive because it was "the most ridiculous request we could possibly imagine," rather than to advise Dye that Vision Air was going to proceed with the work. (Tr. 139). Ganyard thought that the "point was moot" and stated that he did not tell Dye to get working on it. (Tr. 138).

Dye interpreted this conversation differently. He testified that Ganyard approached him when he was on a cigarette break and told him that "Dilday said get the candle filter up and running by noon." (Tr. 117). Dye testified that he estimated that the entire process of getting the candle filter into production would take about six days. *Id.* Dye further stated that he called Dilday on the radio to tell him that he could not get the candle filter up and running by noon. Dye stated that Dilday responded, "I don't care, just get it up and running." (Tr. 118). Dye said that he told Dilday that "it is not going to happen." (Tr. 119). Dye testified at the hearing that it was impossible to get the candle filter up and running that day. (Tr. 126). He interpreted Dilday's instruction to mean that he had to get it into operation "at all costs." (Tr. 127).

Dye believed that he was being required by Dilday to get the candle filter into production without having it tested and certified. Dye believes that his refusal to comply with Dilday's direct order to have the candle filter in operation by noon was protected under section 105(c) of the Mine Act. As Dye states in his discrimination complaint, "the unit HAD to be hydro-tested, pressure-tested, and certified first as this was the only way to confirm that the unit was repaired properly and wouldn't erupt. . . . " He goes on to state, "[i]f not repaired properly, the unit could cause serious harm &/or injury to several people." Dye testified that after lunch that day, Dilday told him that his attitude had deteriorated to such an extent that he did not want him working for MRSI any more. (Tr. 121).

Mr. Dilday testified that Dye was not the individual with MRSI who would oversee the installation of the subject candle filter. (Tr. 223). James Miller, Dye's supervisor and Dilday's assistant, was the individual who had assumed that responsibility when the other candle filters were installed and certified. Dilday had no recollection of the discussion during the contractors' meeting on the morning of February 26, but he remembers that getting all of the candle filters into operation was frequently discussed at these meetings. (Tr. 223, 234). Dilday denied that he

ever told Dye or Ganyard to put the candle filter into production without having it tested and certified. (Tr. 224). Dilday stated that getting a candle filter "up and running would include all of those prerequisites." (Tr. 245). Dilday did not recall discussing the candle filters with Dye on the radio that day. (Tr. 230).

Dilday testified that it is possible that he could have asked to have the candle filter running by noon at the contractors' meeting on February 26. (Tr. 234). If he did, he stated that it is quite likely that Ganyard would have objected because "Billy [Ganyard] and the guys would not hesitate to tell me [that] we have [an] issue." (Tr. 235).

In the late morning or early afternoon of February 26, Dilday was asked to meet with Davis Tilton, Cotter's general mill foreman. Tilton told Dilday that Cotter's hourly employees were starting to file written complaints about Dye's conduct at the project. (Tr. 235-36). Tilton testified that he had been receiving oral complaints about Dye from Cotter employees and that he had now received several written complaints. (Tr. 156; Exs. R-1, R-2). These complaints were filed by Genelle Duran and Tom Salas, who worked in a different area of the project from the candle filters. Ms. Duran, who was an operator in the product building, complained that Dye demanded that she place her hand between two screws of a running auger to get a grab sample. (Tr. 157; Ex. R-1). When she refused, Dye became angry with her. Tilton testified that Duran came to him "in tears" because of the way Dye treated her. (Tr. 170). Mr. Salas apparently became frustrated with Dye's hostile attitude toward Cotter employees. (Tr. 158; Ex. R-2). Salas believed that the product line in that area should be shut down until a plugged chute was cleared, but Dye would not let him shut it down. When Tilton heard of these complaints, he discussed them with James Miller. Miller testified that several Cotter hourly employees complained that Dye was "bossy, belligerent, forceful at times." (Tr. 191). Tilton told Miller that "we were not going to work this way" and he ordered production shut down in that area until the matter was corrected. (Tr. 159). Tilton told Dilday that the problem needed to be "fixed" to "adjust attitudes" at the project. (Tr. 160). Dye did not work for Cotter but did have the authority to indirectly control the work of hourly Cotter employees. Because Dye did not work for Cotter, Tilton left it to Dilday to take the appropriate action. *Id.*

After this discussion with Tilton, Dilday and Miller looked for Dye, who was taking a cigarette break near the gate at the fence line. (Tr. 236). When Dilday told Dye about these complaints, Dye responded that Cotter's employees were lazy. (Tr. 237). When Dilday said, "I am not sure who really has the attitude here, it seems to me you may," Dye responded by saying something to the effect of "damn right, I have a bad attitude." (Tr. 237). Dilday told him that his attitude had to change, but Dye said he would not change. According to Dilday, Dye started "ranting" that nobody at the project knew what they are doing and that he was the only person who knew how to make zirconium. *Id.* When he continued "ranting," Dilday decided that he had to immediately terminate Dye's employment with MRSI. (Tr. 238). Mr. Dye believes that this final meeting took place in the MRSI trailer. Dye testified that Dilday complained about his attitude at this meeting and told Dye that he did not want him working at the project any more. (Tr. 120). Miller testified that the meeting occurred at the gate and that Dye angrily told them

that he knew what was going on with the project but people would not listen to him. (Tr. 195). Dye did not mention the candle filter at this meeting and it was not discussed.

In the summer of 2002, CMS decided to extricate itself from the zirconium recovery project. (Tr. 252-54). CMS is primarily involved in electricity generation and had little knowledge of chemical processing. Cotter took over the project and unspecified changes were made. Dilday and Miller were laid off in August 2002. MRSI, which was created for this project, represents that it is no longer in business, it has filed articles of dissolution with the State of Tennessee, and it is in the process of winding down its affairs.

II. DISCUSSION WITH FINDINGS OF FACT 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). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary 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); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine 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. *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. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission and the courts have recognized the right of a miner to refuse to work in the face of perceived hazards. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 810-12. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous

condition." *Id*. at 812; *accord 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. *See Robinette*, 3 FMSHRC at 809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.

A. Protected Work Refusal

Mr. Dye contends that he was terminated because he refused to perform a task that he believed to be hazardous to himself and others. He maintains that he was ordered to have the 2A candle filter up and running by noon of the day he was terminated without having it tested and certified. He believes that complying with this order would have exposed himself and others to a serious hazard because the untested and uncertified pressurized vessel could erupt or explode if it was not properly repaired. I find that although his concern appears to have been made in good faith, it was not reasonable. I credit the testimony of Ganyard and Miller that it would have taken several days just to install and bolt down the lid. A large forklift or crane would need to be rented and brought to the property to lift the 10,000 pound lid into place. It was not within the realm of possibility that the candle filter would be operated that day. Consequently, Dye would not have been required to operate an untested, uncertified candle filter. I credit Ganyard's testimony that it was completely "ridiculous" to believe that the candle filter could be put back together and put into operation that day. It was unreasonable for Dye to believe that he was being asked to put himself or others in danger because he testified that he knew that it was an impossible task. At the most, all Dye would have been able to do that day was to coordinate with Ganyard to start organizing the work.

I also credit the testimony of Ganyard, Miller, Tilton, and Dilday that Vision Air, the mechanical construction contractor at the project, would be the entity to install the lid. Miller and Dilday testified that Mr. Jeffris, an engineering technician with MRSI, would have been the individual to supervise the testing and certification of the candle filter. He tested and arranged for the certification of the other candle filters at the project that were already in operation. Although Dye may have had some involvement in reassembling the candle filter, it is clear that he would not have been a major participant. He would have started working with the candle filter only after it had been assembled, tested, and certified. When the lid was actually installed in May 2002, a crew of six people completed this task in about two days under Ganyard's supervision. (Tr. 135). The candle filter was never put into production because it did not pass MRSI's in-house pressure testing. The vessel leaked badly whenever the test was performed.

I also credit the testimony of Dilday, Miller, and Tilton that the candle filter would not have been operated until it had been tested and certified. The other candle filters had been tested and certified. Tilton, as the mill manager for Cotter, testified that he would not have allowed his employees or MRSI to operate the candle filter without first getting it certified. He stated that he kept all vessel certificates in his office. (Tr. 151). It was not reasonable for Dye to believe that

he would be required to run product through the candle filter "at all cost" without having it tested and certified.

Dye testified that he had a conversation with Dilday on the radio that morning, after he spoke with Ganyard, in which Dilday directly ordered him to get the candle filter up and running by noon that day. (Tr. 118). Ray Houston, a former Cotter employee, testified that he overheard Dilday order Dye to get the candle filter operating by noon, "no matter what." (Tr. 57). No other witnesses could recall overhearing such a conversation. Dye admitted that it was physically impossible to get the lid installed on the candle filter by noon. (Tr. 126). Dye's safety concern was that he would be required to operate the candle filter before it was tested and certified. It is clear that this could not have occurred that day. I find that Dye did not engage in a protected work refusal because his belief that MRSI was requiring him to place himself in danger was entirely unreasonable.

B. <u>Adverse Action</u>

If I credit the testimony of Dye and Houston that Dilday directly ordered Dye by radio to have the candle filter in operation by noon "no matter what," it can be argued that MRSI failed to address Dye's fears. MRSI was under the obligation to address his initial safety concerns "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441. Neither Dilday nor Miller told Dye that, given the work involved in getting the lid back on the vessel, he did not have to get the candle filter into operation that day. In addition, no one from MRSI specifically told Dye that he would not be directed to operate the candle filter until it had been tested and certified. Given the conflict in the testimony concerning this radio conversation, I will assume for this part of my analysis that Dye established that he engaged in a protected work refusal and that MRSI did not adequately address his concern that he would be required to operate the candle filter before it was tested and certified.

I find that MRSI's decision to terminate him from his temporary position was not motivated in any part by his work refusal. I credit the testimony of Ganyard that he had convinced Dilday at the contractors' meeting that the candle filter could not be put back together that day. Dilday understood that the candle filter would not be reassembled. (Tr. 147-48). I find that the evidence establishes that Dye was terminated because, in the days prior to February 26, Cotter management received a number of complaints from its union employees about Dye's manner of directing the work at the project. When Dilday and Miller asked Dye to try to "lighten up" when dealing with Cotter employees, Dye refused. Miller testified that he had discussed this issue with Dye several times in the past, without success. (Tr. 210). I credit the testimony of Dilday that Dye told him that Cotter employees were lazy and that he would not change his attitude about them or the project. Tilton, the mill foreman for Cotter, felt compelled to shut down part of the project until certain complaints that had been raised by his employees concerning Dye's actions were addressed. Given these circumstances, Dilday felt that he had no choice but to terminate Dye's employment with MRSI. I find that MRSI terminated Dye's

employment for this reason alone. Dye's refusal to undertake to bring the candle filter into production on February 26 played no part in MRSI's decision to terminate Dye.

Dye introduced evidence to show that he was a safe and knowledgeable employee who had a competent practical understanding of the zirconium recovery project. I credit this evidence. Dye believed that Dilday, on the other hand, was not safe and Dilday did not understand the project has well as he did. Dye pointed to instances in which Dilday gave orders that were unsafe. For example, in one instance Dilday ordered that a rotating kiln be heated to 500 degrees before starting to rotate it. Dye believes that this was very unsafe. Dilday stated that he took this action on the recommendation of a consultant who stated that "we would get some benefit" if we "cook [the ore] before we start rotation." (Tr. 231-32). The tube inside the kiln bent when heated in this fashion, but MRSI was able to straighten it out again. *Id.* The kiln was not used in the process after that date. Dye offered this evidence to show that Dilday was not a safe or competent manager. As a consequence, Dye believes that Dilday's direction that he get the candle filter into operation by noon was entirely in character and Dye took his order seriously with good reason. I accept Dilday's explanation for this incident.

Dye also offered into evidence the decision of the hearing officer of the Colorado Department of Labor and Employment in which Dye was awarded unemployment benefits. (Ex. P-2). The hearing officer determined that Dye was provoked by Dilday when he was accused of violating safety rules. The hearing officer held that Dye's attitude was poor because he was criticized for doing something he did not do. *Id.* Although Dilday was present at the unemployment compensation hearing, MRSI did not present any evidence. The decision of the hearing officer is not binding on me; the proof needed to obtain unemployment benefits differs from the proof necessary to prevail in this discrimination proceeding; and hearing officer did not have any evidence before him except that presented by Dye. Consequently, I do not give the unemployment compensation determination much weight.

Dye attempted to present evidence that Dilday ordered him to take actions that were unsafe in order to damage equipment so that Dilday or MRSI could recover the insurance proceeds. Several witnesses mentioned that there were rumors that the project was being sabotaged. (*See* Tr. 25, 97-98). He offered the testimony of Christina Smith, owner of a bar in Cañon City, to the effect that it was MRSI's intention all along to sabotage the project and destroy equipment so that MRSI could file the patent for the zirconium recovery process and collect the insurance money. (*See* Tr. 215-18; Attachment 7 to Dye's Motion to Amend Complaint dated 01/09/03; Order Denying Motion, 25 FMSHRC 83, 84 (Feb. 2003)). Ms. Smith would have testified that she overheard Dilday, Miller, and others talking about this plan in her bar. I did not permit Dye to present this evidence at the hearing because it is highly unreliable hearsay and only marginally relevant to the issues in the case. Dye did not question Dilday or Miller about these alleged conversations during cross-examination.

In determining whether a mine operator's adverse action is 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 toward 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).

It is not clear whether MRSI management knew that Dye had engaged in protected activity. Dilday and Miller knew that the candle filter was not being reassembled, but Dilday believes that he made that decision on his own after the contractors' meeting. He may not have understood that Dye believed that he was "refusing" to perform that task out of concern for his safety. There is no evidence of hostility or animus toward the protected activity. All of the other candle filters were tested and certified before they were placed into production. After candle filter 2A was reassembled in May 2002, MRSI began pressure testing it. When it failed the tests, it was never placed into production. Thus, refusing to operate a pressurized vessel prior to having it tested and certified would not provoke a hostile reaction from MRSI. There was a coincidence in time between the protected activity and the adverse action.

With respect to disparate treatment, Dye alleges that Dilday did not follow the MRSI employee handbook which includes a provision for verbal and written warnings. Dilday testified that the manual gave him the discretion to skip these steps "depending on the severity of the situation." (Tr. 238). Dilday considered Dye's behavior toward Cotter employees to be serious enough to warrant immediate dismissal after Dye stated that he would not change his attitude at their meeting on February 26. I conclude that Dye was not treated in a disparate fashion given his conduct.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Thomas P. Dye II against Mineral Recovery Specialists, Inc., under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

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