FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 5, 1995

SAM COLLETTE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 95-37-DM
	:	WE MD 94-11
BOART LONGYEAR COMPANY,	:	
Respondent	:	Lone Tree Mine

DECISION

Appearances: Sam Collette, Hominy, Oklahoma, pro se; Matthew McNulty, Esq., VanCott, Bagley, Cornwall and McCarthy, Salt Lake City, Utah for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Sam Collette pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the "Act" alleging violations by the Boart Longyear Company (Longyear) of Section 105(c)(1) of the Act.[1] In his unedited complaint of discrimination Mr. Collette states as follows:

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

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

"I have worked for Longyear since 2-27-89, on 12-10-92 I injured back trying to move rig with a piece of timber and a water truck. I had [illegible] on my chest and around my heart and low back pain; I spent one night in hospital. I seen Dr. P. Herz, I went threw physical therapy until 1-16-93; I wanted to back to work. I talked Dr. into giving my a 50 lb limited, went to work driving water truck rom 1-19-93 to 2-24-93. The lower back pain encrease il. I went back to Dr. Herz. I continue physical therapy it made me worse. Dr. Herz take me off therpy and had a MRI scan of the lumbar spine showed generative disease L4-5 & L5-S1. Right posterolateral herniation at L4-5. Lumbar epidural steroids were administered but these did not help. SIIS had me see Dr. Ready July, 1993. He seen me for 15 min. He said I could return to work at light duty. SIIS sent me to C.E. Quazaleri, M.D. A repeat MRI scan showed a small right [illegible] at L3-4 with associated marginal osteophyte formation plus small right central disc protrusion. There was right [illegible] disc protrusion at L4-5.

On 2-22-94 Longyear offered a job driving a worker truck, based on Dr. Ready release light duty 39 lb. driving water truck on <u>trial basis</u>. I refused the job because I felt like it would in danger my health. The juring, getting up and down out of truck. I tried this job and the pain was to much. In drilling there is a lot of off the road driving. Longyear said I volanary quit, by refusing a job. My doctor Dr. Herz & Dr. Quaglier said driving a truck is not good for me. I tried this job on 1-19-93 to 2-2-93 the pain got were if like I need pain pill to continue driving. I am in more pain now, then before. I don't take pain pill except as a last resort. When Longyear learn of reason for refusing job, they said they bought two new truck with air ride, seats which was not meanson at the time of job offer. But in my opinion it still not suitable because of the off road driving & set up and down out of truck with a back disorder. Longyear has stop all medical rehabilitation, & "SIIS" comp. checks. Longyear said I didn't try to work because I didn't get a hold of them about job offer. I received job offer threw SIIS, they said to get hold of there office not Longyear. I contact OSHA in Oklahoma City around 3-4-94, they revered my to DELISH of NV. I filled out a discrimination report with them. I asked if I need to threw your offices, Calvin Murry said he didn't think so. After 55 days I called them and they said had to go threw MSAHA your office. The only release I have is Dr. Ready, I have tried to get job & can't. Contacted OK employment office on 3-6-94. They said with that release for work they couldn't help me. I have also contact OLD Employers, with no help.

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right afforded by this Act.

My OSHA rights are reieved. I was up for rehabilitation "consided quit 3-2-94" ".

In his complaint before this Commission Mr. Collette added that: "I am requesting a lagetemate [sic] job orfer [sic], a job that won't endanger my health, back pay, proper medical treatment and retrained . . . P.S. Is driving a water truck safe for me?" In his post hearing "final argument" Collette summarizes his complaint as follows:

> Boart Longyear Company discriminated against Sam Collette in failing to offer a true "light-duty" job that Sam Collette was capable of performing because he had reported an alleged danger to Board Longyear Company, i.e. the potential danger to health and safety presented by his back problem and associated pain. Further Boart Longyear Company failed to address the health and safety concerns of Sam Collette after Sam Collette's refusal to perform work that he reasonably believed was not within his functionable [sic] capacities and would therefore endanger his health and safety.

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub. nom. *Consolidation Coal Co. v. Marshall,* 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by any protected activity.

If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.,* 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Dir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB Transportation Management Corp.,*462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

For a work refusal to come within the protection of the Act, the miner must have a good faith, reasonable belief that the work in question is hazardous. See generally, *Robinette*, 3 FMSHRC at 807-12. In determining whether the miner's belief in a hazard is reasonable, the judge must look to the miner's account of the conditions precipitating the work refusal and also to the operator's response. An operator has an obligation to address the danger perceived by the miner. Secretary on behalf of *Pratt v. River Hurricane Coal Company, Inc.,* 5 FMSHRC 1529, 1534 (September 1983); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (February 1984), *aff'd sub nom. Brook v. Metric Constructors, Inc.* 766 F.2d 469 (11th Cir. 1985). As stated in *Gilbert v. FMSHRC,* 866 F.2d 1433 (D.C. Cir. 1989), once it is determined that a miner has expressed a good faith reasonable concern, the analysis shifts to an evaluation of whether the operator has addressed the miner's concern in a way that his fears reasonably should have been quelled. In other words, did management explain to the miner that the problems of concern had been corrected? 866 F.2d at 1441. See also *Secretary on behalf of Bush v. Union Carbide Corp.,* 5 FMSHRC 993, 997-99 (June 1983); *Thurman v. Queen Anne Coal Co.,* 10 FMSHRC 131, 135 (February 1988), aff'd 866 F.2d 431 (6th Cir. 1989) (table).

Within this framework of law it is clear that Mr. Collette cannot prevail under either of his theories of discrimination. Under his first theory he claims that Longyear failed to offer him a true "light duty" job on February 28, 1994, in retaliation for his complaint on February 25, 1993, to Tom Joiner, Longyear's Manager of Safety, that his work driving a water truck caused him constant pain in his back. Even assuming, arguendo, that his complaint about back pain while driving a water truck constituted a protected safety complaint and even assuming that Longyear's job offer, through the Nevada State Industrial Insurance System (SIIS) on February 28, 1994, was motivated at least in part by this activity I find that Longyear has nevertheless affirmatively proven that it had no other light duty jobs at the mine which Collette could have performed within his limited physical capacities and for which he was qualified. The credible evidence shows that the only other light duty jobs then existent were that of secretary and zone manager -- positions for which Collette was not qualified. Moreover, these positions were then filled. Collette's termination for his failure to accept Longyear's job offer was therefore in any event not in violation of the Act.[2]

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[2] It is noted that Mr. Collette disagrees with the findings of the Nevada State Industrial Insurance System determination

that he was not sufficiently disabled to qualify for workers' compensation. He appears to agree with the determination of the Social Security Administration that he was apparently disabled with respect to his former work activity as a water truck driver.

Collette also appears to suggest that Longyear's filing with the Nevada SIIS of an incorrect job description for the position of water truck driver was also a retaliatory response to his health and safety complaint. It was acknowledged by Longyear at hearing that the report, indeed, erroneously indicated that only four to five pounds of pressure was required to depress the water truck clutch pedal whereas it actually required 50-74 pounds of pressure. This erroneous information could very well have misled examining physicians into concluding that Collette had the residual capacities to perform the job offered by Longyear and therefore could have resulted in the erroneous denial to him of worker's compensation. However, Collette has failed to show that this error was in retaliation for his claimed protected activity. The credible evidence suggests the error was inadvertent and while it may very well have been a material fact to the determination by the Nevada SIIS in denying worker's compensation benefits, that issue is not before me in this proceeding.[3]

I further find that the Complainant cannot prevail under his second theory of discrimination, i.e. that he suffered discrimination because he refused to perform the work as a water truck driver under the reasonable belief that, because of his back pain and injury, such work was not within his functional capacities and would therefore endanger his health and safety. It appears that Collette rejected the Longyear job offer made through Cheryl Price, a representative of the Nevada SIIS, around February 28, 1994 (Tr. 184). However, because of Collette's physical inability to perform any work for which he was then qualified at the subject mine I do not find that his resulting termination was in retaliation for his refusal to accept the job of water truck driver. It was a natural consequence dictated by Collette's election and his own physical condition and job skills.

There is a legitimate question, moreover, whether such idiosyncratic problems as Collette's back injury, over which the mine operator has no control, were intended by Congress, in any event, to support a miner's right under the Act to refuse work.

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[3] At hearing the parties were advised to bring this error to the attention of the Nevada State Industrial Insurance System for appropriate corrective action by that agency. It appears that Longyear has, in fact, now notified that agency of the error.

See *Price v. Monterey Coal Co.*, 12 FMSHRC 1505 (August 1990) (Commissioner Doyle,concurring) The genesis for the recognition of certain work refusals as protected activity is the Senate Report on the 1977 Act, which endorsed a miner's right to refuse "to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 81, 95th Cong., 1st Sess 35 (1977). In order to be protected, work refusals must be based upon the miner's's "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC 812; *Gilbert v. FMSHRC,* 866 F.2d 1933 at 1439 (D.C. Cir. 1989).

The case at bar would also be illustrative of what the Commission in the *Price* decision was describing as beyond the Congressional intent in endorsing a limited right to refuse "to work in conditions which are believed to be unsafe or unhealthful". By that very language it is clear that the intent was to protect against "conditions" inherent in the work process and not to provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries would find working most jobs in the mining industry impossible. While it is truly unfortunate that persons such as Mr. Collette may not, because of such injuries, be able to perform work in the industry it is not the purpose of the Act to remedy such problems. To hold a mine operator responsible under such circumstances would effectively make him a guarantor of compensation. It is clearly not the purpose of the Act, but rather worker's compensation, social security disability and other similar laws to provide loss of income protection under these circumstances.

ORDER

Discrimination Proceedings Docket No. WEST 95-37-DM are hereby dismissed.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

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