# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

June 28, 1999

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| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 98-130-D |
| ON BEHALF OF | : | MSHA Case No. MORG CD 97-07 |
| JOHN E. PALMER AND, | : | |
| JAMES W. TAYLOR, | : | Docket No. WEVA 98-131-D |
| Complainants | : | MSHA Case No. MORG CD 97-07 |
| v. | : | |
| | : | Federal No. 2 Mine |
| EASTERN ASSOCIATED COAL CORP., | : | Mine ID 46-01456 |
| Respondent | : | |

## DECISION

Appearances: Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
David R. Joest, Esq., Eastern Associated Coal Corporation, Henderson, Kentucky, for Respondent.

Before:Judge Hodgdon

These consolidated cases are before me on Complaints of Discrimination filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of John E. Palmer and James W. Taylor, against Eastern Associated Coal Corporation, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Fairmont, West Virginia. For the reasons set forth below, I find that Eastern Associated did discriminate against Palmer and Taylor.

## Background

The Respondent's Federal No. 2 Mine is an underground, coal mine near Fairview, West Virginia. Access to the underground workings is provided by a man cage (elevator) which is lowered down a 740 foot shaft. Under normal conditions it is the only way to get in, or out of, the mine. The cage holds approximately 40 men and can also be used to load equipment into and out of the mine.

A steel cable runs from the top of the cage, up a tower (head frame) built over the shaft, and goes over a "bull wheel" located at the top of the tower and comes back down to where it is connected to a counter-weight. As the cage goes down, the counter-weight goes up. The process

reverses when the cage comes up. The raising or lowering of the cage is accomplished by a motor. The elevator operates in two modes, automatic and manual. In the automatic mode, a button is pushed and the cage goes up or down at a constant, full speed. In manual mode, the elevator is operated by a hoist operator in the hoist house and the speed of the cage is controlled by the operator. Automatic mode is normally used when men are going in or out of the mine. Manual mode is normally used when work is being done on the hoisting equipment or the shaft and cage are being inspected.

The cage is equipped with safety catches, called "safety dogs," which are steel wedges designed to deploy if the cage should begin to free-fall by digging into the wooden guides between which the cage operates. The "dogs" and guides are visually checked daily and the "dogs" are deployed bi-monthly, although they have never been tested in a free-fall because then they and the guides would have to be replaced.

<u>September 17, 1997</u>

In the early morning hours of September 17, 1997, an electrician was called out of the mine to check a noise being made by the elevator. When the day shift electricians performed their preshift examinations that morning, the noise was louder. After completing their preshifts, Dan Hart, the electrical supervisor, and two other electricians spent most of the day trying to determine and correct the cause of the noise, which appeared to be coming from the "bull wheel."

Sometime between 3:30 and 3:40 p.m., John Horn, an afternoon shift mechanic was waiting to be lowered into the mine and heard the noise from the wheel. He notified mine committeeman, Joe Reynolds, who in turn contacted safety committeeman, Bob Kurczak.[1] Horn said that the noise was "a loud, screeching noise and something like grinding at the time." (Tr. 61.) He also noticed "the side structures of the light metal on the cage vibrating rapidly more than it usually does at any time like something was off balance or something could have maybe come loose on the bull wheel." (*Id.*)

Reynolds and Kurczak went to Complainant Palmer, president of the local union, who was completing his shower after finishing his shift and explained the situation to him. Sometime later, Complainant Taylor, chairman of the union safety committee, was notified at home and he returned to the mine. After several meetings between various members of management and the union and with the electricians in an attempt to determine what was causing the noise, it was evident that no one knew its source. The best assurances that anyone could give was from the electricians who thought that the elevator would be safe to operate in the *manual* mode.

There were several aborted attempts to take the afternoon shift miners down into the mine. At least five miners exercised their individual rights to withdraw from unsafe conditions

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[1] The miners at Federal No. 2 are represented by the United Mine Workers of America.

by getting off of the elevator or refusing to get on it.  Finally, Palmer told the shift foreman, James Wilmoth, that "the cage is down until we kn[o]w where the noise is coming from." (Tr. 159, 284, 362, 427.)  Taylor arrived at the mine some time after this, and after making his own investigation, told management that he could not in good conscience allow the men to ride the elevator until the cause of the noise was identified and it was determined that it was safe.

At about 8:00 p.m. Darrell Harper, a representative of 3-H Mining, the manufacturer of the bull wheel, arrived at the mine.  He examined the wheel and concluded that the noise was being caused by the liners in the wheel.[2]  He declared that the cage was safe to operate and everyone accepted his opinion.

By this time, the afternoon shift had been sent home.  Palmer and Taylor remained at the mine until the midnight shift came on to advise them that the cage was safe.

*Discriminatory Action*

At a meeting with mine management on September 23, 1997, Palmer and Taylor were informed that they were being disciplined for their activities on September 17.  Palmer was suspended without pay for five days "for your actions on the Afternoon Shift of Wednesday, September 17, 1997, when you interfered with management of the mine when you refused to let our employees enter the elevator on this [*sic*] date."  (Jt. Ex. 8.)  Taylor was removed from the Mine Health & Safety Committee "as a result of the incident that occurred on the Afternoon Shift of Wednesday, September 17, 1997, in which you were involved."  (Jt. Ex. 11.)

Palmer and Taylor filed discrimination complaints with MSHA on September 23 as a result of the disciplinary action taken against them.  They also pursued their grievance rights under the union contract.  As of the date of the hearing, the grievances had been settled with Taylor having been restored to his position on the safety committee, he was in fact never removed, and the disciplinary letter having been removed from Palmer's personnel file, although he did serve the five day suspension without pay.

## Findings of Fact and Conclusions of Law

[2] The liners protect the bull wheel itself from wear by the cable.

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity.[3] *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively 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.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

It is the Complainants' position that they engaged in protected activity when they refused to allow the cage to be used without knowing whether it was safe to do so. The company argues that the Complainants did not engage in protected activity because neither of them refused to go into the mine in the cage and they cannot refuse to allow other miners to work in unsafe conditions. Finding that individual miners can exercise statutory rights on behalf of others, I conclude that Palmer and Taylor did engage in protected activity.

<u>*Good Faith and Reasonable Work Refusal*</u>

The Commission has long held that a miner's refusal to perform work is protected activity under the Act if it is based on a reasonable, good faith belief that the work involves a hazard. *Secretary on behalf of Hannah, Payne & Mezo v. Consolidation Coal Co.*, 18 FMSHRC 2085, 2090 (December 1996); *Secretary on behalf of Dunmire & Estle v. Northern Coal Co.*,

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[3] Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

4 FMSHRC 126, 133-38 (February 1982); *Robinette*, 3 FMSHRC at 807-12; *Pasula*, 2 FMSHRC at 2789-96. While accepting this proposition, the Respondent asserts that Palmer and Taylor did not have the right to refuse to allow other miners to work. The company makes this assertion based on the following language from the Third Circuit Court of Appeals:

> In upholding the ALJ's decision the Commission relied on what it asserted to be the right of miners to walk off the job when confronted with unsafe and unhealthful work conditions. Assuming the existence of such a right, it is still clear that the Mine Act does *not* provide for the right to shut down equipment so that *other* miners may not work. There is no right in the Act to shut down an entire shift's work. An individual is protected by the Act from retaliation for asserting and acting on his real fear that conditions are unsafe or hazardous to his health; but no one has the right to stop others from proceeding to work if they so wish.

*Consolidation Coal Co. v. Marshall*, 663 F.2d 1211, 1219 (3rd Cir. 1981).

While this language could be interpreted to support the company's position, it is a strained interpretation. The court is plainly saying that no one has the right to prevent someone who wants to go to work from doing so; not that no miner can assert the protection of the Act on behalf of another miner. In this case, there is no evidence that Palmer and Taylor prevented anyone from going to work who wanted to.[4] In addition, the operators reading of the decision flies directly in the face of the plain language of section 105(c)(1) of the Act that a miner cannot be discriminated against "because of the exercise of such miner, [or] representative of miners . . . *on behalf of himself or others* of any statutory right afforded by this chapter" (emphasis added).

Furthermore, if the Respondent's rendition of *Marshall* is correct, it is curious that the Commission held in a decision subsequent to *Marshall* "that the test of section 105(c)(1) supports the extension of protection, in appropriate circumstances, to individual miners exercising statutory rights on behalf of others" and did not even mention *Marshall*. *Cameron v.*

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[4] The Respondent cites the following as an indication that miners were prevented from going to work:

> Q. Your understanding was that the miners wanted to go underground?
>
> A. Yes. That's what we all go up there for to go underground to make a living.

(Tr. 491.) This clearly is a general statement of why everyone was there and not evidence that miners were precluded from going to work against their will.

*Consolidation Coal Co.*, 7 FMSHRC 319, 322 (March 1985). Finally, even if the company has correctly read *Marshall*, it is a Third Circuit case and thus binding only in the Third Circuit. The instant case occurred in the Fourth Circuit, as did *Cameron*, which was affirmed by the Court of Appeals. *Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 367-67 (4th Cir. 1986).

Thus, the principle that individual miners can invoke the protections of the Act on behalf of other miners is applicable in this case.[5] Significantly, the Commission has applied the principle in a case with facts very similar to the ones here. In holding that a surface electrician had properly exercised safety rights under the Act when he refused to restore power to the mine because two mine examiners, who could be killed or maimed by an explosion if there was an electrical fault with methane present, were still underground, the Commission stated:

> While Hannah did not work underground, and thus would not himself have been exposed directly to the risk of death or injury from explosion that could have resulted from restoring power when accumulations of methane gas were present, this does not in itself render his work refusal unprotected. The Commission has held that, in appropriate circumstances, the Mine Act extends protection to a miner who refuses to perform an assigned task due to the danger posed to the health or safety of another miner.

*Hannah*, 18 FMSHRC at 2092 n.6 (citations omitted). Consequently, I conclude that Palmer and Taylor were entitled to exercise safety rights on behalf of the other miners in this case.

Even though Palmer and Taylor could properly exercise safety rights on behalf of the other miners, they do not come within the protection of the Act if their belief that operation of the elevator could be hazardous was not in good faith and reasonable. The company contends that the complainants did not act in good faith and reasonably because no hazard in fact existed, neither complainant noticed the noise during the day shift, they could not explain exactly what they thought would happen as a result of the noise, Taylor did not object to management using the elevator, the electricians working on the elevator stated that they thought it was safe to operate in the manual mode, and the elevator has safety features. None of these arguments has merit.

Initially, it should be noted that the fact that it was finally determined that the elevator was safe to operate does not mean that the Complainants did not act in good faith or were

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[5] I find that Palmer and Taylor were representatives of miners, although the outcome would not change even if they were acting in their individual capacities. *Cameron*, 7 FMSHRC at 322.

unreasonable. They need only show that at the time they acted they were acting in good faith and reasonably, not that a hazard actually existed. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989); *Robinette*, 3 FMSHRC at 812. In the same vein, it is not significant that the miners could not describe exactly what they believed would happen to the elevator because of whatever was causing the noise. There is no requirement that they describe the exact hazard they fear, only that they reasonably and in good faith believe that there is a hazard. Furthermore, it is clear from the testimony of all of the miners that they were afraid that, in the worst case, the elevator would free fall down the 740 foot shaft.

Whether or not the Complainants heard the noise during their shift at the mine is irrelevant. No one disputes that the bull wheel began making the noise in the early morning hours of September 17, that it got louder during the day and that the electricians spent all day trying to locate its source. Moreover, it is clear that Palmer and Taylor did hear the noise before they acted; they were not relying on second hand information.

Taylor's statement to management that management could use the elevator if they wanted to because they believed that it was safe does not indicate that he did not have a good faith belief that the elevator was not safe. He was merely stating the obvious, the miners thought the elevator was unsafe, management did not, therefore, if management wanted to use the elevator, it was up to them. As he testified: "I thought that they would probably take disciplinary action against me for interfering with mine management, that they deemed it was safe and who was I to tell them that they couldn't ride their own cage anytime they wanted to." (Tr. 636.)

When concerned about the possibility of the elevator falling down a 740 foot shaft, a statement by the electricians that they did not know what the problem was, but thought that it would be safe to operate in the manual mode was hardly reassuring. The statement itself indicates that even the electricians did not think it was safe to operate the elevator in the normal mode. In addition, they did not give any reason why they believed the manual mode would be safe, if the normal mode was not. Therefore, the statements of the electricians do not provide a basis for concluding that the Complainants' actions were not taken in good faith and were unreasonable.

Finally, the fact that there were emergency safety devices on the elevator does not mean that the elevator was safe. The fact that the safety devices would only deploy in the event of a free fall undermines the company's reliance of them to rebut the reasonableness of the complainant's belief.

In short, the Complainants were faced with a situation where the elevator was making a loud, screeching, grinding noise and no one knew what was causing it or what effect the cause of the noise might have on the operation of the elevator. To ride the elevator, the miners had to believe that it would safely deliver them down a 740 foot shaft into the mine. The most reassuring statement anyone could make was that they thought the elevator could be safely operated in the manual, or non-normal mode. Several miners had already exercised their individual rights to remove themselves from the elevator. In these circumstances, I conclude that

Palmer and Taylor were acting in good faith and reasonably when they refused to allow miners to ride the elevator until it could be determined what was causing the noise and whether the elevator was safe to operate.

*Concerns Communicated to Management*

In order for a work refusal to be protected, the safety concerns must be communicated to the operator. *Hannah*, 19 FMSHRC at 2090-91; *Dunmire*, 4 FMSHRC at 133. In this case there is no doubt that the Complainants' safety concerns were communicated to mine management.

*Failure to Allay Fears*

Once a miner has expressed a good faith, reasonable concern about safety, the operator has a duty to address the perceived danger in a manner that should reasonably resolve the miner's fears. *Gilbert*, 866 F.2d at 1441; *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985); *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983). The operator argues that miners' fears were addressed by the electricians.

As noted above, the electricians did not adequately dispel the concerns. In a similar case, the Commission found that the company had not conveyed sufficient information to complainants who were refusing to ride an elevator to allay their reasonable fears. The Commission pointed out that "[t]hey were told by Hager and Smith that the elevator was safe, *but they were not told what caused the malfunctions or why it was now considered safe*." *Hogan and Ventura and UMWA v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1074 (July 1986) (emphasis added). Likewise, in this case, the electricians could not say what was causing the noise, nor could they say why the elevator was safe to operate in the manual mode, but not the normal mode.

It was not until Harper arrived, determined the cause of the noise, and concluded that the elevator was safe to operate that the Complainants' concerns were adequately addressed. If matters had ended there, everything would have been fine. Instead, management took disciplinary action against Palmer and Taylor. As is made clear in the disciplinary letters, this action was taken because of the protected activity in which the Complainants engaged.

*Conclusion*

In sum, I find that the Complainants had a reasonable, good faith basis for refusing to let the elevator be used to take miners into the mine, that they were entitled to make this refusal on behalf of the other miners both in their individual capacities and as representatives of miners, that they communicated their fears to management and that management did not adequately address those fears until a representative of the manufacturer of the bull wheel came to the mine. I further find that the company took adverse action against Palmer and Taylor for having engaged

in protected activity. Thus, I conclude that the Complainants have made out a *prima facie* case of discrimination.

The operator does not claim that the adverse action was not motivated by the protected activity, nor does it claim that there was some other unprotected activity which motivated the disciplinary action. Accordingly, I conclude that Palmer and Taylor were disciplined in violation of section 105(c) of the Act and are, therefore, entitled to the remedies prescribed by that section.

*Entitlement to Relief*

The Respondent asserts that "Complainant's settlement of their labor grievances, which grieved the same actions which are the subject of their 105(c) complaints, without any reservation of the right to pursue those complaints, should bar Complainants from receiving any relief in these proceedings." (Resp. Br. at 31.) The Commission has held that: "Generally, when a discriminatee is unconditionally and in a bona fide fashion offered reinstatement, the running of back pay is tolled." *Bryant v. Dingess Mine Service et al*, 10 FMSHRC 1173, 1180 (September 1988). This is true even if the offer arises out of contractual grievance negotiations, when the grievance and the discrimination complaint arise out of the same circumstances. *Id.* at 1181. Thus, the settlement of a grievance may serve to terminate, prospectively, any relief to which the complainant may be otherwise entitled.

In this case, however, the Respondent did not make an unconditional offer of reinstatement. Palmer was not made whole, he has served the five day suspension and lost five days pay. Consequently, unless the settlement of the grievance specifically provided that it also settled the discrimination complaint, which it apparently did not, I find that the Complainants are not precluded from seeking relief under the Act.

**Civil Penalty Assessment**

The Secretary has proposed penalties of $7,500.00 for each complainant. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, I find that Federal No. 2 is a very large mine, that its controlling entity, Peabody, Inc., is a very large mining conglomerate and that the mine has a low history of previous violations. (Jt. Ex. 1.) I further find that the proposed penalties will not adversely affect the operator's ability to remain in business.

With regard to the Respondent's demonstrated good faith "in attempting to achieve rapid compliance after notification of a violation," it would seem that the Respondent will not receive notification of a violation until it receives this decision. There is no evidence, however, that on being notified of the complaints the company has penalized, harassed, discriminated against or

otherwise treated the Complainants in any way different than any other miner. Therefore, I find to that extent the company has demonstrated good faith.[6]

I find that the company has been only moderately negligent with regard to these complaints. The line between raising legitimate safety concerns and "interfering with the management of the mine" can be a thin one. While the Complainants did not cross it in this case, it cannot be said that the company over-reacted to the loss of an entire production shift. If the Complainants *had* interfered with mine management, the disciplinary action taken by the company would be relatively lenient.

Likewise, the Secretary has not shown that this was a grave violation of the rights of miners. While Palmer speculated that some miners may be reluctant to raise safety concerns as a result of the discipline meted out to Taylor and him, no direct evidence was presented of such reluctance. Palmer testified that miners were still bringing complaints to him. Further, there is no evidence that the company discourages safety complaints. Indeed, while the union contract calls for bi-monthly paid safety inspections by the union safety committee and management, management proposed and carries out paid safety inspections for the months when the contract does not provide for them.

Accordingly, taking all of these factors into consideration, I conclude that a penalty of $7,500.00, $3,750.00 for each complainant, is appropriate.

## Order

Accordingly, it is **ORDERED** that:

1. The Respondent **PAY** Mr. Palmer full back pay, with interest and benefits, for the five days that he was suspended;

2. The Respondent **REIMBURSE** Mr. Palmer and Mr. Taylor for any reasonable and related economic losses or litigation expenses incurred as a result of the adverse action taken against them;

3. The Respondent **EXPUNGE** any and all references to the disciplinary action taken against Mr. Palmer and Mr. Taylor, and the circumstances surrounding it, from any and all records kept by Respondent, including but not limited to the Complainants' personnel files;

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[6] Management's attempts to settle the grievances do not demonstrate any lack of good faith, as argued by the Secretary.

4. The Respondent, and its agents and employees, **REFRAIN** from informing any prospective employer of the section 105(c) complaints filed by Mr. Palmer and Mr. Taylor, the circumstances and events underlying and/or related to the complaints, or any other instance in which either complainant may have made safety complaints or exercised his rights under the Mine Act;

5. The Respondent **POST** a copy of this decision on the mine bulletin board for a period of **30 days**.

6. The Respondent **PAY** civil penalties of **$7,500.00** within 30 days of the date of this decision.[7]

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203 (Certified Mail)

David R. Joest, Esq., Eastern Associated Coal Corporation, 1951 Barrett Court, Henderson, KY 42420 (Certified Mail)

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[7] In addition to the remedies ordered, the Secretary also requested that the Respondent be ordered to cease and desist discriminating against the Complainants in violation of section 105(c) and to post a notice stating that it will not violate section 105(c) with respect to any miner. There is no evidence that the Respondent is currently discriminating against the Complainants. In addition, no purpose will be served by ordering the Respondent to comply with a law with which it is already required to comply.