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MSHA V. UNITED CASTLE COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 3, 1981

SECRETARY OF LABOR,)
MINE SAFETY AND HEALTH)
ADMINISTRATION (MSHA), ex rel.)
)
THOMAS ROBINETTE,)
Applicant)
)
v.) Docket No. VA 79-141-D
)
UNITED CASTLE COAL COMPANY)
Respondent)

DECISION

This case raises significant questions under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979) concerning the right to refuse work which we announced in our recent decision in Consolidation Coal Company (David Pasula), 2 FMSHRC 2786 (1980), petition for review filed, No. 80-2600 (3d Cir. November 12, 1980). For the reasons set forth below, we affirm the judge's protected activity findings but remand for re-analysis of a narrow, but crucial, aspect of the discrimination issue in light of Pasula.

I.

The Secretary of Labor filed this discrimination complaint alleging, in relevant part, that United Castle Coal Company violated section 105(c)(1) of the Mine Act by discharging Tommy Robinette for engaging in the allegedly protected activity of "complain[ing] about working the belt feeder without an operative cap light." Following an evidentiary hearing, the administrative law judge issued a decision in Robinette's favor and ordered his reinstatement. 1/ We granted United Castle's petition for discretionary review. The judge's decision and

the briefs filed with us pre-dated our Pasula decision.

In the following section, we summarize the key evidence and factual findings and set forth additional uncontradicted testimony not discussed in the judge's decision. Tommy Robinette was employed by United Castle as a "miner's helper" on the continuous mining machine. In February 1979, Robinette received his first warnings for unsatisfactory job performance--one for "substandard work" and the other for "substandard work and insubordination." At the start of work on Wednesday, May 30, 1979,

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1/ The judge's decision is reported at 2 FMSHRC 700 (1980).

Robinette was informed by Percy Sturgill, his section foreman, that Isaac Fields, another miner, was being given Robinette's job as miner's helper, and that Robinette was being assigned Fields' job as conveyor belt feeder operator, a lower paying position. 2/ Sturgill testified that Robinette told him he would take the feeder work "under protest" and "[a]nytime" Robinette had "to do something [he did not] like," he "usually mess[ed] it up." Tr. 130-131, 145. After leaving work on May 30, Robinette filed a complaint with MSHA under section 105(c) of the Act alleging that his job transfer was discriminatory.

When Robinette reported for work on Thursday, May 31, Sturgill informed him that, beginning Monday, June 4, Robinette would be assigned to driving a shuttle car at his previous rate of pay. Robinette told Sturgill that he had filed the discrimination complaint. Sturgill responded that if Robinette "want[ed] to play it that way," Sturgill "could play it that way too." Tr. 11. 3/ That day, Robinette worked for about two hours on the miner and spent the rest of the shift on the belt feeder. While operating the miner, Robinette "let a shuttle car get on a miner cable and ... also let the miner ... [destroy] the line curtains." Tr. 132-133. Sturgill reprimanded Robinette for these incidents, but did not issue any formal warnings or complaints. Sturgill testified that Robinette stated that "[e]verybody else [ran] over [the cable]" and that they "[did not] need the damn [curtains] [any]way." Tr. 133. Sturgill ended the section shift early because the belt feeder's tail shaft broke. Sturgill and United Castle vice president Jack Tiltson inspected the tail shaft and concluded that failure to grease the shaft had caused a "gobbing out" of the piece by coal and rock. 4/ The belt feeder, which ran about 16 hours per day, required daily greasing by the feeder operator. Robinette admitted to Sturgill that he had not greased the tail shaft, and Tiltson reprimanded Robinette.

2/ Fields had recently filed a complaint with MSHA against United Castle alleging that in January 1979, United Castle had demoted him from miner's helper to feeder operator when he had refused to operate the miner when he claimed there was a lack of air and water. After May 30, Fields and United Castle signed a settlement in which he agreed to withdraw his complaint and United Castle promised not to interfere with miners' rights under the Act. The judge found (2 FMSHRC at 703), and we agree, that Robinette was switched as part of United Castle's effort to resolve Fields' MSHA complaint.

3/ The judge credited Robinette's, rather than Sturgill's version of this conversation. 2 FMSHRC at 703.

4/ A gobbing out is a filling or choking up with coal, rock, or other debris. The gobbed out conveyor equipment consisted of the feeder,

the conveyor belt's tail piece, and the continuously moving belt itself, or beltline. Coal from the face is discharged from shuttle cars onto the receiving end of the 30 foot long feeder. The feeder's dumping end dumps coal onto the tail piece, the 14 foot long receiving end of the beltline. The coal is moved out along the three foot wide beltline. The beltline is suspended from the roof by chains and ropes and is guided and moved by an idler system of regularly spaced sets of rollers. There are top rollers for the "top" belt and bottom rollers for the "return" belt. Each top set consists of three aligned rollers: two side rollers positioned at 27 degree angles on opposite sides of the top belt, troughing the belt, and a middle or bottom roller underneath.

Sturgill testified that on Friday morning, June 1, Robinette told him that he "did [not] like being put on the feeder" and that the "[miner's helper] job ... was all [he] cared about." Tr. 135.

Robinette testified that while he was working on the feeder the afternoon of June 1, the conveyor belt went out of line along the beltline and the belt's tail piece and caused a gap on the tail piece through which coal and rock could fall. Tr. 13-15, 18. That day both coal and rock were running through the feeder. Tr. 15, 41-44, 150. Ordinarily, the feeder operator is required to remove or break up rocks moving on the belt to permit coal to pass and to avoid gobbing out. Occasionally, the feeder and belt must be shut down to remove larger rocks.

Robinette testified that while the beltline was running, he attempted to "train" (realign) it by tapping the top beltline rollers with a small hammer. Tr. 13, 28-29. He was wearing a standard cap lamp with an insulated electrical conducting cord running over his shoulder and down the front of his body to his belt battery. Robinette testified that while he was bending over the beltline trying to realign it, his cap lamp cord became caught in a roller, his cap was yanked off his head, and the cord was completely severed, cutting off his light. Tr. 13-14, 26-29. There was no other illumination in the area.

Robinette felt his way down the rib towards the tail piece. He called to the shuttle car operator "to tell Sturgill that [he] needed a light [because] his cord had [been] cut in two." Tr. 14. 5/ At the time, Sturgill was working about a break away on repair of a shuttle car. Robinette waited about 5 or 10 minutes, but there was no response. When the shuttle car operator returned, Robinette repeated his request that Sturgill be informed of his need for light. Robinette saw the operator stop by Sturgill and heard Sturgill yell to the operator to tell Robinette to sit down and that Sturgill would come over when he could. 6/

At that point, Robinette shut off the feeder and belt. Robinette testified that while waiting for assistance, he heard coal and rock falling off the belt and gobbing out near the gap caused by the belt misalignment on the tail piece. He testified he was concerned that he could not see what was happening and that the gobbing out could cause a break in the belt or a friction fire. Tr. 14 15, 17-18.

Within a few minutes, Sturgill arrived. He testified that he saw Robinette disconnect the mine phone--the only one in the immediate

area. Tr. 138. At the hearing, Robinette denied disconnecting the phone. Tr. 172. Sturgill repaired Robinette's cap lamp and also, as he testified,

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5/ The judge found that Robinette also told the shuttle car operator to inform Sturgill that Robinette "would have to shut down the feeder." 2 FMSHRC at 704. However, there is no evidence to that effect in the record.

6/ Robinette testified that Sturgill holler[ed] [to the shuttle car operator] to tell [Robinette] [to] just sit up there; there [isn't anything] going to get him and [Sturgill would] bc up there when he] could." Tr. 14. Sturgill testified that he told the operator to "[t]ell [Robinette] to sit down at the [mine] phone and I'll be there in just a few minutes." Tr. 137 138.

the mine phone. The two men engaged in heated conversation about Robinette's actions. Sturgill testified that Robinette told him that his lamp cord had been cut when he "fell down at the beltline getting a rock off" (Tr. 139); that he disconnected the phone because he "did [not] want to hear ... Tiltson['s] and [mine administrator Denver Cook's] bull shit" (Tr. 141); in response to Sturgill's criticism that disconnecting the phone could be hazardous if there were a fire, that "[t]his mine could [not] burn; it [was] too wet and muddy" (Tr. 141-142); and that foremen "[have] come and gone; ... [we will] get you too" (Tr. 142). 7/ Robinette testified that when they turned on the conveyor machinery again, they had to shut it down because it was gobbed out (Tr. 16); Sturgill testified that there was "some spillage" which he instructed Robinette to shovel up (Tr. 140). Sturgill instructed Robinette to report to the mine office at the end of the shift.

After the shift, Robinette left when Tiltson was unable to meet with him. After Robinette's departure, Sturgill discussed the day's incidents with Tiltson and mine administrator Denver Cook. Tiltson and Cook reviewed Robinette's file containing the two February warnings. 8/

On Monday morning, June 4, based on Sturgill's information, Cook prepared and signed another "employee warning record" for Robinette, and, after reviewing it, Tiltson decided to discharge him. The form states:

> Employee became disobedient with section foreman. [Employee] [w]as not maintaining the belt feeder in a clean and safe condition[;] the job requires the feeder to be greased and shoveled at all times. [Employee] [d]isconnected the mine phone interrupting mine communications.
>
> Dismissed from the Company after thorough examination of his past ... record of warnings and and present attitude and workmanship [on] his job.

When Robinette arrived at work, Cook told him to come with him to Tiltson's office. Robinette took along another miner, Teddie Joe Fields. At the office, Tiltson informed Robinette that he was fired. Tiltson stated that the discharge was "for what happened that Friday and what had happened in the past." Cook raised a question about his operating equipment without a cap lamp. Tr. 40 41. Tiltson stated that it had been "unnecessary for [Robinette] to stop production" because of the incident and that "[he] could have got[ten] out of the

way and the tail piece would have [taken] care of itself." Tr. 41. 9/

7/ Sturgill's testimony is not discussed in the judge's decision. The judge merely found that the two men "exchanged harsh words" and that Robinette was "belligerent and uncooperative." 2 FMSHRC at 704, 706. Robinette's initial testimony regarding the exchange was summary (Tr. 15-16, 36-37); on rebuttal, he was not asked about, and did not contradict Sturgill's version.

8/ Sturgill suffered a heart attack on June 2, and did not participate further in the Robinette matter.

9/ Cook's and Tiltson's comments about the lamp cord were testified to only by Teddie Fields. Robinette did not mention these statements; Tiltson did not testify at the hearing; and Cook, who did testify, was not asked about the June 4 meeting.

On June 4 Robinette filed another discrimination complaint with MSHA, based on his discharge. MSHA filed an application for temporary reinstatement, which was issued on September 24. On October 11, 1979, the Secretary filed the instant complaint under section 105(c), alleging that Robinette had been discharged for "complain[ing] about working the belt feeder without an operative cap light."

The judge credited Robinette's testimony concerning the belt misalignment and the accidental severing of his lamp cord; he discredited evidence introduced by United Castle to show that the cutting of the cord was deliberate, not accidental. 2 FMSHRC at 704. The judge found that Robinette's ceasing to operate, as well as his shutting off the conveyor equipment when he lost his cap lamp, constituted a "bona fide" refusal to work under conditions which Robinette believed, and the judge agreed, were hazardous. Id. at 704, 705, 706. The judge held that Robinette's work refusal was protected activity under the Mine Act. Id. at 706.

The judge treated the case as involving a "mixed motivation"--not pretextual--discharge. He credited Sturgill's testimony that Robinette disconnected the mine phone shortly after he shut off the conveyor equipment. 2 FMSHRC at 704. The judge also found that Robinette's work was "less than satisfactory" and that he was "obviously belligerent and uncooperative with ... Sturgill as a result of his change in job classification." Id. at 706. The judge concluded, however, that the "effective" cause of Robinette's discharge was his protected work refusal. Id. at 705, 706. Omitting reference to the phone disconnection, the judge stated that "[t]he other reasons given for the discharge--insubordination and inferior work--were not the primary motives for discharge." Id. at 705. On the basis of these findings, the judge concluded that Robinette's discharge violated section 105(c) of the Mine Act, and he ordered reinstatement and payment of back pay.

II.

In Pasula, we established in general terms the right to refuse to work under the Mine Act, but did not attempt at that time to define the specific contours of the right. 2 FMSHRC at 2789-2796. This case requires us to set some of the contours and to determine whether Robinette's conduct falls within the zone of protected activity.

United Castle's concessions narrow the issues before us. Anticipating Pasula, United Castle "agrees" that the Mine Act grants miners a right to refuse work in the face of conditions which they

believe "in good faith" place their "health or safety in immediate danger." Petition for Discretionary Review (PDR) 7. United Castle further "concedes" that the right may in some cases extend to "self help by taking some affirmative actions other than merely refusing to work." Id. Assuming for the sake of argument that the severing of Robinette's cap lamp cord was a genuine accident, United Castle "readily concedes" that once Robinette lost his light, "it would have been hazardous for [him] to ... perform his duties without [it]." PDR 23. Thus, assuming a genuine accident, United Castle admits that Robinette's mere ceasing to operate the feeder was a protected work refusal and that he could not have been lawfully discharged for that

conduct alone. Rather, United Castle focuses on Robinette's additional behavior in shutting down the conveyor equipment--an action characterized by the judge as an integral part of Robinette's protected work refusal and by United Castle as an unprotected form of "affirmative self-help."

As a threshold matter, we consider whether the right to refuse work includes such "affirmative" forms of self-help as shutting off or adjusting equipment in order to eliminate or protect against hazards, for it is precisely such conduct which is in issue here. By treating Robinette's shutting down of the conveyor as an integral part of his protected work refusal (2 FMSHRC at 704, 705, 706), the judge answered this question in the affirmative. 10/ We agree with that view. Occasions will arise where mere ceasing of work will not eliminate or protect against hazards, while adjusting or shutting off equipment will. In these cases, such affirmative action may represent the safest and most responsible means of dealing with the hazard. Affirmative self-help may also reduce possible loss of time and of productivity. Taking this case as an example, if we accept Robinette's good faith and his claim that there was a danger of friction fire on the gobbed-out conveyor and feeder, his shutting down the equipment seems both responsible and praiseworthy. Such prophylactic action may have saved United Castle from a worse threat to health and safety--and to productivity. Approving this affirmative dimension to the right is consistent with Pasula. Effective and timely protection of miners is the essence of the Pasula work refusal doctrine:

> The successful enforcement of the ... Act is ... particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction. The right to do so would be hollow indeed, however, if before the regular statutory enforcement mechanisms could at least be brought to bear, the condition complained of caused the very injury that the Act was intended to prevent. [2 FMSHRC at 2790.]

Since, as discussed above, affirmative self help may often represent the most effective and responsible means of protecting miners from hazards, the right to refuse work "would be hollow indeed" if it did not embrace such means. Accordingly, we hold that the right to refuse work may extend to shutting off or adjusting equipment in order to eliminate or protect against a perceived hazard.

United Castle contends, however, that Robinette's work refusal was

void from its inception because he caused the unsafe condition in question by deliberately severing his own cap lamp cord. Thus, United Castle charges him with a general failure of good faith and reasonableness. Unlike the Pasula case (see 2 FMSHRC at 2790-2793), the evidence regarding these issues is sharply disputed and cannot be resolved unless the underlying questions of whether good faith and reasonableness are

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10/ As noted above, United Castle has also conceded that, in proper circumstances, the right to refuse work may include affirmative self help.

required for the activity to be protected are also answered. By emphasizing that Robinette's work refusal was "bona fide" (2 FMSHRC at 705), the judge implicitly found that good faith was a prerequisite to a valid work refusal, and we agree.

A good faith requirement is supported by Pasula, the Act's legislative history, analogous sources of occupational safety and health law, and sound policy. Pasula approvingly refers in several passages to the good faith of the miner involved in that case. 2 FMSHRC at 2793, 2796. In the legislative history set forth in Pasula, and quoted below, 11/ Senators Williams and Javits pointedly described the meaning of the right to refuse work in terms of the miner's "good faith" belief and action. Both the Secretary of Labor's work refusal regulation under the Occupational Safety and Health Act of 1970, 29 U.S.C. $651 et seq.s (the OSH Act), 12/ and section 502 of the Labor Management Relations Act (LMRA),

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11/ MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.

The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.

MR. JAVITS. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.

[2 FMSHRC at 2792, quoting from Senate floor debate on S. 717, June 21, 1977, reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977. at 1089 (1978)("Leg. Hist.").]

12/ 29 CFR $1977.12(b)(2), the Secretary of Labor's OSH Act work refusal regulation, provides:

[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort

to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

As noted in Pasula (2 FMSHRC at 2793 n. 7), the Supreme Court approved these OSH Act criteria in Whirlpool Corp. v. Marshall, 445 U.S. 1 (1979). United Castle urges us to define the scope of the right to refuse work by wholesale adoption of these criteria. Such a step would be inconsistent with our Pasula approach favoring gradual, case-by-case development of the law in this area. See 2 FMSHRC at 2793. Moreover, we agree with the Secretary that such incorporation would be ill advised

(footnote 12 continued)

29 U.S.C. $143, 13/ also require good faith for a valid work refusal. A policy of not requiring good faith would appear anomalous, seemingly condoning irresponsible or deceptive work refusals. We note that the Secretary makes no argument here that good faith is not required.

Good faith belief simply means honest belief that a hazard exists. The basic purpose of this requirement is to remove from the Act's protection work refusals involving frauds or other forms of deception. Lying about the existence of an alleged hazard, deliberately causing one, or otherwise acting in bad faith could endanger other miners and disrupt production--and, not least, squander scarce administrative

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fn. 12/ cont'd.
as a substantive matter. The Secretary observes (Br. 9-12 & nn. 1 & 3) that he has not promulgated an identical regulation under the Mine Act because of the differences in the two statute's legislative histories and regulatory purposes. As the Whirlpool decision noted (445 U.S. at 13 n. 18), the Mine Act's relevant legislative history--set forth in Pasula at 2791-2793 shows that Congress expressly intended the Mine Act to guarantee a broad right to refuse work. In contrast, the OSH Act's legislative history is silent on any similar right. See 445 U.S. at 13-21. More significantly, the OSH Act regulation must apply nationally to a wide range of typical jobs and work settings, while the Mine Act applies more narrowly to one of the nation's most hazardous occupations and working environments. While these considerations may be thought to justify the relatively restrictive definition of the right in the OHS Act regulation, they support a broader and simpler definition of the right under the Mine Act. This is not to say that we will develop the right without concern for the operators' legitimate interests in productivity, economy, and discipline. The concerns of miners and operators will be best served by a straightforward approach which steers clear of subtle refinements and complicated exceptions. Proper administration of the Mine Act requires a simple, yet supple, right which miners and operators can understand and practically apply without confusion and torrents of litigation.

We also find unpersuasive United Castle's suggestion that Whirlpool viewed the OSH Act regulation as "a correct statement" of what should be considered protected activity under the Mine Act. In the passage upon which United Castle relies (445 U.S. at 13 n. 18), the Court merely indicated that the Secretary's interpretation of the OSH Act to support a right to refuse work conforms to the same interpretation which Congress wished to be placed on the Mine Act's anti retaliation provisions. The Court did not state that the details of the OSH Act regulation necessarily defined the scope of that right under the Mine

Act.

13/ Section 502 provides in part:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

and judicial resources in resolution of any resultant complaint under the Act. Such behavior has no place under the Act. 14/

Good faith also implies an accompanying rule requiring validation of reasonable belief. Such a validation rule is implicit in the judge's findings. See 2 FMSHRC at 704, 705, 706. Unreasonable, irrational or completely unfounded work refusals do not commend themselves as candidates for statutory protection in light of Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 385-387 (1973). In interpreting section 502 of the LMRA (n. 13 above) in that case, the Court squarely rejected the contention that "an honest belief, no matter how unjustified, in the existence of 'abnormally dangerous conditions for work' necessarily invokes the protection of $502." Reasoning that "[i]f the courts require no objective evidence that such conditions actually obtain, they face a wholly speculative inquiry into the motives of the workers" (414 U.S. at 386), the court held that "a union seeking to justify a contractually prohibited work stoppage under $502 must present ... ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists...." Id. at 386 387. Pasula also referred approvingly to the miner's "reasonable [belief] ... unsupported by objective, ascertainable evidence." 2 FMSHRC at 2793.

Although Gateway arose in a section 502 and contractually-prohibited work stoppage context and is explicable in terms of the national policy favoring arbitration (see 414 U.S. at 386), the reluctance to rely on the "slender ... thread [of] subjective judgment" weighs against resolving work refusal cases under the Mine Act on the basis of the miner's good faith alone. Several possible reasonableness rules suggest themselves, but only one convincingly accords with the purposes of the Mine Act.

The relatively stringent "objective, ascertainable evidence" test mentioned in Gateway is usually satisfied only by the introduction of physical evidence, "disinterested" corroborative testimony, and not infrequently--expert testimony. Cf. NLRB v. Fruin Conlon Construction Co., 330 F.2d 885, 890-892 (8th Cir. 1964), cited approvingly in Gateway, 414 U.S. at 387 (construing section 502). We think that such a test may be better suited to the broad scope of section 502, particularly where, as in Gateway, a union's contractually prohibited strike is involved. For while "objective, ascertainable" evidence is always welcome, it may not be readily obtainable in mining cases. Unsafe conditions can occur

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14/ We are not suggesting that in work refusal litigation the

Secretary or miner must demonstrate an absence of bad faith. Ordinarily, the miner's own testimony will expose the credibility of his good faith. Operators may use cross examination or introduction of other evidence to show that, in reality, good faith was lacking. Thus, in a practical sense, the real evidentiary burden occasioned by the rule will be on operators to prove the absence of good faith.

suddenly and in remote sections of mines; the miner in question may be the only immediate witness; and physical evidence may be elusive. Situations are also bound to arise where outward appearances suggest a dangerous condition which closer subsequent investigation does not confirm. Furthermore, we believe that such a test would chill the miner's exercise of the right to refuse work, an outcome inconsistent with the Act's legislative history favoring a broad right in a uniquely hazardous working environment. Miners should be able to respond quickly to reasonably perceived threats, and mining conditions may not permit painstaking validation of what appears to be a danger. For all these reasons, a "reasonable belief" rule is preferable to an "objective proof" approach under this Act.

More consistent with the Mine Act's purposes and legislative history is a simple requirement that the miner's honest perception be a reasonable one under the circumstances. 15/ Reasonableness can be established at the minimum through the miner's own testimony as to the conditions responded to. That testimony can be evaluated for its detail, inherent logic, and overall credibility. Nothing in this approach precludes the Secretary or miner from introducing corroborative physical, testimonial, or expert evidence. The operator may respond in kind. The judge's decision will be made on the basis of all the evidence. This standard does not require complicated rules of evidence in its application. We are confident that such an approach will encourage miners to act reasonably without unnecessarily inhibiting exercise of the right itself.

Finally, reasonableness has a similar role to play with respect to any affirmative self-help undertaken by the miner. The same reasons which justify a good faith standard also support a reasonableness rule in this context. Irresponsible reaction to a good faith, reasonable belief in a hazard has no more place under the Act than bad faith belief itself. For example, if Robinette had deliberately set about wrecking the feeder in response to his problems with it, extended analysis would not be necessary to show that his "affirmative action" was beyond the Act's pale. As with reasonable belief, a miner need only demonstrate that his affirmative action was a reasonable approach under the circumstances to eliminating or protecting against the perceived hazard.

In sum, we adopt a good faith and reasonableness rule that can be simply stated and applied: the miner must have a good faith, reasonable belief in a hazardous condition, and if the work refusal extends to affirmative self-help, the miner's reaction must be reasonable as well. We next apply these criteria to the evidence

in this case.

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15/ As noted above, the OSHAct regulation approved in Whirlpool (n. 12 above) meets the validation problem by requiring that an employee's apprehension of a hazardous condition must be one that the mythical "reasonable person" would have shared under the circumstances. While the "reasonable person" standard avoids the problems associated with "objective proof," it lends itself to the interpretation that there is only one reasonable perception of any given hazard--that of the "reasonable person." But the reasonable person is never there. Clearly, reasonable minds can differ, particularly in a mine setting where conditions for observation and reaction will not be clinically aseptic.

Robinette's good faith in general presents a close issue. Robinette was the only eyewitness to the severing of his lamp cord. The judge, who observed Robinette's demeanor, credited his testimony that the cord was accidentally cut when it became snared on a belt roller, and rejected United Castle's claim that Robinette deliberately cut the cord. Under the good faith principles discussed above, if Robinette did deliberately cut his cord, he set in motion the hazardous condition complained of and his "work refusal" should not be protected by the Act. United Castle points to several aspects of this case, analyzed below, which we acknowledge cast some doubt on Robinette veracity. Nevertheless, a judge's credibility findings and resolutions of disputed testimony should not be overturned lightly. For the following reasons, we are not persuaded that the evidence requires us to take the exceptional step of reversing the judge's crediting of Robinette's testimony on the accident.

As United Castle correctly points out, Robinette flatly denied disconnecting the mine phone. Tr. 172. The judge's finding, in whichwe concur, that he did disconnect it can mean only that Robinette testified untruthfully regarding that incident. United Castle argues that "if [Robinette] was willing to lie under oath about the phone incident, he would be quite willing to lie under oath about how his lamp cord was cut." PDR 17-18. We do not subscribe to a "false in one, false in everything" rule of testimonial evidence, and such rules are not applied inflexibly in any event. Cf. U.S. v. Spain, 536 F.2d 170, 173 (7th Cir. 1976), cert. denied, 429 U.S. 833; Lozano Enterprises v. NLRB, 327 F.2d 814, 816 & n. 2 (9th Cir. 1964). Where it is apparent that a witness has testified untruthfully in part, the judge should ordinarily explain how that fact affects the credibility of the witness with respect to his remaining testimony. While we would have preferred the judge to supply such an explanation, particularly on so sensitive a subject as good faith, failure to do so is not necessarily reversible error. If the remainder of a questionable witness' testimony is corroborated by other credible evidence (see, for example, Larmay v. Hobby, 132 F. Supp. 738, 740 (E.D. Wis. 1955)), or is otherwise inherently believable, the judge is not foreclosed from accepting it. We therefore reject the contention that Robinette's untruthful phone testimony by itself compels disbelief of the accident testimony. Our resolution of this credibility issue in no way lessens our serious concern, discussed below, over proper evaluation of the role played in Robinette's discharge by his reprehensible disconnection of the phone.

Robinette's testimony about the accident is believable. United Castle introduced demonstrative and testimonial evidence (Tr. 78-87)

to show that Robinette's cord could not have been severed in the way it was by getting caught in a roller. United Castle "concedes that [its] testimony did not establish conclusively that it was impossible for [Robinette's] lamp cord to have been severed in the manner in which he claimed," but maintains that "[the] testimony clearly did establish that such an accident is highly unlikely." PDR 15-16. United Castle's witness had held a lamp cord similar to the one worn by Robinette against a moving belt roller, but was able to produce only a "nick" in the cord. Among other things, however, the experiment was conducted outside the mine on equipment other than that involved in the incident, and the witness used a piece of cord lacking the kind of opposing tension caused by a cap and belt at either end. See Tr. 87 96.

Obviously, the experiment did not replicate the conditions present at the time of the alleged accident. While the judge did not explain in detail his conclusion that United Castle's evidence "failed to establish [its] contentions" (2 FMSHRC at 704), we conclude that the foregoing considerations adequately support that conclusion. United Castle's evidence merely raises suspicion about, but does not demolish, Robinette's credibility. 16/ We find, therefore, that substantial evidence supports the judge's finding that there was a genuine accident.

Next, United Castle claims that the judge made no findings, and that the evidence does not show, that Robinette had a reasonable good faith belief in a hazard which would have justified his additional step of shutting off the equipment. 17/ The judge did make findings on these matters. In paragraphs 13, 14, and 15 (2 FMSHRC at 704), he describes in general terms the hazardous conditions Robinette faced and makes clear that Robinette's work refusal included both the ceasing of work and shutting down of equipment. Findings 13 and 14 cover only the conceded hazard in Robinette's continuing to operate the machinery without light. Finding 15, however, deals with the additional problem of whether the belt should have been left on:

> The belt feeder operator is required to remove or break up rocks moving on the belt to permit the coal to pass. It is necessary on occasion to shut down the feeder to remove larger rocks. To permit the belt to continue running when the operator has inadequate illumination would create a hazardous situation for the operator and other miners.

16/ United Castle also argues that the rest of Robinette's pre- and post-accident conduct--his poor performance on May 31, his disconnecting the phone, and his insubordination towards Sturgill--shows that he probably lied about the accident. We cannot agree. These are separate incidents and the fact that he may have acted badly otherwise does not prove that he did so in the incident in question. United Castle also points out what we regard as only a minor discrepancy in the testimony of Robinette and Sturgill. As opposed to Robinette's testimonial version of the accident, Sturgill testified (Tr. 139) that when he arrived on the scene, Robinette told him that the cord was cut when he "fell down at the beltline ... getting a rock off." Assuming Robinette did say that, the explanation seems close enough to his trial version of "training" rollers while a gobbing out problem was going on. Both men were also under stress when these words were exchanged. United Castle's additional claim that Sturgill testified that the belt was running in line when he got

there is not borne out by the transcript. Sturgill somewhat confusingly stated that "I've seen the belt running in line[;][a] new set, it ought to run in line." Tr. 159. This is not an unequivocal statement that it was then running in line, and, in any event, Robinette's "training" may have substantially realigned the belt. 17/ As stressed above, United Castle concedes that if there was a genuine accident, Robinette was justified in ceasing to operate the equipment. It does not concede, though, that he was justified in shutting the equipment down.

Although the judge did not specify what "hazardous situation" would have obtained had the belt continued to run, he clearly found that shutting it off was justified. The evidence supporting that conclusion is strong.

United Castle emphasizes Robinette's lack of light. PDR 22-23. However, Robinette testified that he stopped working for two reasons: he was concerned that he could not see what was happening (Tr. 17-18) and the belt misalignment on the tail piece caused a gobbing out which could have broken the belt or led to a friction fire. Tr. 15, 18. He shut off the conveyor equipment mainly because of his concern over the second condition. While lack of light alone may not have justified the shutdown, the other perceived hazard, worsened by the darkness, did.

Robinette's testimony concerning misalignment was not convincingly rebutted. His testimony (Tr. 16) that both coal and rock were running through the feeder on June 7 was corroborated by Teddie Joe Fields (Tr. 41-44) and Sturgill (Tr. 150). Robinette also testified that once the equipment was turned back on, it had to be shut down because of the gobbing out. In partial corroboration, Fields testified that he observed Robinette that day cleaning up gob outs on the tail piece (Tr. 44), and Sturgill admitted that after he reprimanded Robinette for shutting off the equipment, he had to instruct him to shovel up "some spillage" from the beltline (Tr. 140). Furthermore, it was undisputed that United Castle did not want gobbing out to occur; that the feeder operator was required to remove rock because it can cause gobbing out; and that occasionally the feeder and belt were shut down to remove rock. United Castle's standard procedures in this regard conform to the basic principle of mine safety that feeders and belts must be kept clear of debris precisely to avoid the hazards of friction fire or spillage which Robinette testified he feared. In a larger sense, it is probably unsafe to leave an unattended, unlighted conveyor belt running because hazardous rock accumulation can come through at any time. We therefore conclude that there is substantial evidence to show that Robinette's affirmative self-help was founded on a good faith reasonable belief in a gobbing out hazard which was exacerbated by lack of light. 18/

This result also dictates the similar conclusion that Robinette's affirmative self-help was itself reasonable. Merely stopping work would not have completely removed or protected against the gobbing out dangers. Turning off the equipment was entirely consistent with United Castle's standard procedure when there is an accumulation of rock. In short, it would appear that Robinette's action was more than

merely reasonable.

United Castle's remaining protected activity contentions--that any perceived hazard was not so severe as to subject Robinette to a risk of serious bodily harm or death; that he had less drastic alternatives

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18/ United Castle also argues (PDR 21-22) that Robinette's comment during his subsequent heated exchange with Sturgill that the mine was too muddy to burn undermines any claimed good faith belief in a gobbing out related fire hazard. While the comment is deplorable, it is not the same as asserting that the conveyor equipment was fireproof in the event of a gobbing out.

for eliminating the perceived hazard; and that he first failed to seek operator assistance to correct the condition--can be disposed of through evidentiary analysis. This case does not require definitive answer as to whether any criteria like these should be adopted.

Regarding "severity of hazard," the hazard here, as in Pasula, was "sufficiently severe whether or not the right to refuse to work is limited to hazards of some severity." See 2 FMSHRC at 2793. As discussed above, the evidence showed a reasonably-based fear of gobbing out on the belt which could have led to friction fire or dangerous spillage of rock and coal. These are hazards of substantial severity and, accordingly, Robinette's reasonable good faith belief was directed to a sufficiently serious danger.

Concerning a "less drastic alternative," our preceding conclusion on good faith rejects any implicit argument that it would have been more reasonable not to shut off the conveyor equipment. United Castle proposes only one positive alternative course of action: that Robinette should have sought immediate assistance from the shuttle car operator in repairing his light. This individual did not testify, and there was no showing that he was competent to fix the broken cord. Moreover, this argument goes to Robinette's ceasing work due to lack of light. Repairing the light would have taken time and, in any event, would not have completely dealt with the danger of gobbing out. We find no evidence that Robinette had a less drastic, reasonable alternative.

Regarding "seeking operator assistance," the evidence is undisputed that, before shutting down the equipment, Robinette repeatedly sought Sturgill's general assistance, waited 10-15 minutes for help, and was finally told either that Sturgill would be there when he could or in a "few minutes." This evidence makes out a reasonable attempt to seek operator assistance whether or not such action is always required where possible. True, Robinette did not inform Sturgill of the specific gobbing out hazard or of any intention to shut off the equipment (see n. 5 above). However, we think that under the exigencies of actual mining conditions and the stress of a possible emergency, a summons for general help would be sufficient. Even if contact is required, we also believe that the obligation would terminate if the situation worsened or, as here, the operator failed to respond with reasonable promptness. 19/.

United Castle's final protected activity argument is that even if the work refusal was protected, Robinette "lost the Act's protection" by his subsequent conduct in disconnecting the phone and threatening

Sturgill. This position is loosely based on two rules developed under

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19/ United Castle appears to argue that in shutting off the equipment, Robinette disobeyed Sturgill's "off-the scene" instruction to sit by the phone until he could come to help. Such "off-the-scene" instructions should not be binding where, as here, the operator's agent has not observed the conditions facing the miner. A contrary rule would exalt obedience to uninformed orders to the detriment of health or safety.

the National Labor Relations Act, 29 U.S.C. $151 et seq.: that protected activity loses its otherwise protected character if pursued in an opprobrious manner, and that bona fide discriminatees who engage in post-discrimination misconduct can forfeit their entitlement to being made whole. See, for example, Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729-731 (5th Cir. 1970)(opprobrious conduct); Alumbaugh Coal Corp. v. NLRB, 635 F.2d 1380, 1385-1386 (8th Cir. 1980) (post-discrimination misconduct). Neither doctrine applies to Robinette's misconduct, which occurred after the work refusal and prior to the alleged discrimination. Rather, this misconduct formed part of the basis for Robinette's discharge and should simply be analyzed along with the other discharge issues.

More importantly, Pasula has already resolved the question of the effect of "subsequent misconduct." There, we had occasion to review an underlying arbitral decision that Pasula had not engaged in a protected work refusal because of several incidents of apparent misconduct after his ceasing of work. We concluded that a "miner's good faith is not 'lost' by his subsequent misconduct...." 2 FMSHRC at 2796. This result is not unfair to operators. The requirements of good faith and reasonableness will guard against work refusals carried out in an opprobrious fashion, and "subsequent misconduct" of the kind involved here will be weighed along with all other relevant discrimination issues.

In sum, we affirm the judge's findings that Robinette engaged in a protected work refusal. We now discuss the question of whether Robinette was discharged because of his protected activity.

III.

In Pasula, we announced the following test for resolving discrimination cases:

> We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in.a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On

these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected

~818 conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.
[2 FMSHRC at 2799-2800 (emphasis in original).] 20/

There can be no serious question that the Secretary effectively established a prima facie case that Robinette was discharged in part because of his protected activity in shutting off equipment. Sturgill reprimanded Robinette for the shutdown and was obviously upset by it. While the shutdown is not mentioned in the final employee warning record prepared by Cook, Tiltson informed Robinette during the June 4 discharge interview that he was being terminated for the events of June 1 and for past incidents. During the interview, Cook mentioned the cord incident and shutdown, and Tiltson stated that it had been "unnecessary for [Robinette] to stop production" because of the cap light incident and that Robinette "could have got[ten] out of the way and the tail piece would have [taken] care of itself." Moreover, in its brief to the administrative law judge, United Castle argued that the discharge was justified in part by Robinette's "shutting down production after he had been instructed to remove himself from the area of any danger." Br. to Administrative Law Judge 30. On the basis of all this, the judge found that the work stoppage was the primary cause of discharge; we certainly agree it was a cause.

20/ The "ultimate burden of persuasion" on the question of discrimination rests with the complainant and never "shifts." As we indicated in Pasula, above, there are intermediate burdens which do shift. The complainant bears the burden of producing evidence and the burden of persuasion in establishing a prima facie case. The operator may attempt to rebut a prima facie case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut, he may still affirmatively defend in the manner indicated in the quotation from Pasula above. The twin burdens of producing evidence and of persuasion then shift to him with regard to those elements of affirmative defense. If the operator cannot rebut or affirmately defend against a prima facie case, the complainant prevails. Of course, the complainant may attempt to refute an affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have been taken in any event for such unprotected activities alone. If a complainant who has established a prima facie case cannot refute an operator's meritorious affirmative defense, the

operator prevails. This latter consequence stems from the fact that the "ultimate" burden of persuasion never shifts from the complainant. Cf. Wright Line, 251 NLRB No. 150, 105 LRRM 1169, 1173 1175 (1980) (adopting a discrimination test substantially the same as the one announced in Pasula). In footnote 11 of that decision, the NLRB explained its similar position on the relationship of the intermediate burdens of proof to the ultimate burden:

> It should be noted that this shifting of burdens does not undermine the established concept that the [Board's] General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense ... to overcome the prima facia case of wrongful motive. Such a requirement does not shift the ultimate burden.

The more difficult question is whether United Castle, in effect, carried its defensive burden of showing that it was also motivated by Robinette's unprotected activities and would have discharged him for those activities alone. The judge found that Robinette's "insubordination and inferior work" were other reasons for the discharge, but not the "primary motives," and that the work refusal was the "effective cause" of discharge. In view of the evidence of Robinette's wide-ranging misconduct or "inferior" work set forth above in our summary of the facts, we agree that United Castle was also motivated by his "unprotected activities." The Secretary does not seriously argue otherwise. Thus, the only real question is whether Robinette would have been fired for those activities alone, regardless of whether he had shut down the conveyor.

The final warning notice does mention the phone disconnection, Robinette's disobedience, his failure on May 31 to grease the feeder, and his past record of warning. 21/ These are not minor matters. Both the Mine Act and a mandatory safety standard require mine phones 22/ and disconnecting one to avoid "listening to supervisors' bull shit" reveals a flagrant disregard of mine safety.

The judge did not specifically explain what he meant in finding number 23 (2 FMSHRC at 705) that the work refusal was the "effective" cause of discharge. However, in finding number 23 he also employs the term "primary." If "effective" means primary, as seem the most reason able interpretation of the judge's language, such a finding does not logically rule out the possibility that the other reasons, by themselves, would also have led United Castle to discharge Robinette. All the reasons-listed may have been sufficient grounds for termination even if the work refusal was the leading one. If that is the case, United Castle effectively met its Pasula burden. In this regard, we are particularly troubled by the fact that the judge did not specifically analyze the role played by the phone incident in the discharge.

Accordingly, although the judge's findings are consonant with three of the four Pasula evidentiary standards, we remand on the narrow question of whether Robinette would have been fired for his unprotected

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21/ We recognize that the notice was prepared by Cook, who had not witnessed the events in question. Nevertheless, Cook prepared the form based on Sturgill's firsthand information, and Sturgill supplied direct testimony on the May 30 - June 1 incidents.

22/ Section 316 of the Act and 30 CFR $75.1600 require installation of

phones in designated mine working areas. The phone in question was a required "working section" phone and, indeed, was "the last phone [inby] the face. Tr. 115. See also 30 CFR $75.1600 2(e) ("repairs [on broken phones] shall be started immediately, and the system restored to operating condition as soon as possible").

activity alone. In this regard, the judge should discuss and analyze all of Sturgill's testimony concerning Robinette's relevant comments and deeds between May 30 and June 1, and in particular, Robinette's disconnection of the phone and his specific insubordinate words to Sturgill on the latter date. The judge may permit the parties to file supplemental briefs directed to the issue on remand and, if he determines the need exists, open the record for further testimony and evidences.

For the foregoing the reasons, we affirm the judge's findings in part and remand in part.

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