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MSHA V. UNION CARBIDE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20006
June 8, 1983

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

ex rel. Kenneth E. Bush

v. Docket No. WEST 81-115-DM

UNION CARBIDE CORPORATION

DECISION

This discrimination case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1976 & Supp. V 1981), and involves a miner's discharge for refusing to work under allegedly unsafe conditions. The administrative la judge concluded that the miner's work refusal was not protected, and that his discharge did not violate the Mine Act. 1/ For the reasons that follow, we affirm the judge in result.

I.

The miner, Kenneth Bush, was employed at Union Carbide Corporation's Rifle Plant from 1965 until his discharge on July 25, 1980, except for a year's layoff in 1972. From 1977 or 1978 until his discharge, he was a member of the union safety committee. The Rifle Plant is a facility for preparing vanadium. 2/ Vanadium, originally contained in ore mined and purchased by Union Carbide, arrives at the Rifle Plant in a concentrated liquid solution after intermediate preparation at another Union Carbide facility. At Rifle, further preparation is required to produce vanadium compounds sold by Union Carbide for use in the chemical and steel industries.

The operations at Rifle Plant require large quantities of sulfuric acid, which is shipped to the plant in railroad tank cars. Originally this acid was unloaded from the tank cars into storage tanks when it reached the plant. On July 21, 1980, Union Carbide changed the procedure, so that acid was unloaded from the tank cars into trucks. Under the new procedure, compressed air was piped into a tank car and the acid was forced through a pipeline running from the tank car to a manhole on the top of a truck.

1/ The judge's decision is reported at 4 FMSHRC 365 (February 1982)(ALJ).

2/ Vanadium is a "gray or white, malleable, ductile, polyvalent metallic element ... resistant to air, sea water, alkalies and reducing acids except hydrofluoric acid." Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms 1195 (1968).

On July 9, 1980, Gerald Speaker, the master mechanic and one of Bush's supervisors, demonstrated the new acid unloading procedure to Bush and other miners, and asked if they had any suggestions for changes. Bush and others complained about the safety of the new procedure because of possible acid leaks caused by acid build-up in the pipeline, and requested valves to bleed the line and prevent such build-up. (None of Bush's co-workers appears to have made safety complaints to management after July 9.) On July 22, when Speaker and Bill Snyder, the maintenance foreman who also supervised Bush, assigned him to "break in," or learn, the acid unloading procedure, Bush refused, stating that it was unsafe and it was not his job. 3/ Union Carbide permitted Bush merely to watch the procedure. Snyder testified that the acid leak and blow back problems were corrected that same day.

On the morning of July 23, another miner, Jim Hardin, received minor burns while unloading acid. Bush was not there when the accident occurred but subsequently learned of it. Also that morning, when Speaker asked Bush the exact nature of his safety complaints about the new acid unloading procedure, Bush merely repeated his earlier comment: "It never has been safe and it isn't safe now and it never will be safe and besides it is not my job." Tr. II 112. That afternoon, Snyder and Bush met at Snyder's request, and discussed Bush's safety complaints and Union Carbide's corrective measures item-by-item. 4/ In particular, Snyder told Bush that the July 22 changes in the procedure had eliminated acid leaks and blow backs. Snyder described the conclusion of their meeting: "I asked Ken after all these things had already been taken care of, and we went through them all, I said now, would you please unload acid." Tr. II 76. Bush refused a third time, stating it was "unsafe now and down the road," and that it was not his job; he did not tell Snyder why he thought the procedure still was unsafe. Tr. I 94; Tr. II 76.

3/ At the hearing Bush testified that his major safety concerns on July 22 were acid leaks, and "blow backs" occurring when acid feeding into a truck mixed with compressed air and the air pressure caused acid to spray out of the manhole in a mist about 6-8 feet in area. Snyder and Speaker testified, however, that although Bush told them the procedures were unsafe, he did not specify his complaints that day.

4/ Although the judge at one point erroneously refers to this meeting as having occurred on July 24 (4 FMSHRC at 371), the record

is clear that it occurred on July 23. The judge's error is probably typographical for he recognized in his Findings of Fact (Finding 12, 4 FMSHRC at 367) that the meeting occurred on July 23. The Secretary asserts that the judge's description of what took place at the meeting bears no relationship to what actually transpired. To the contrary, the judge's description of the meeting is fully supported by the record.

At about 7:00 a.m. on July 24 -- in response to Plant Manager Harold Piper's request the previous day that he interrupt his inspections elsewhere and come to Rifle as soon as possible -- Charles Myers, Union Carbide's Safety Coordinator, began an inspection of the acid unloading procedure. 5/ Myers carried out a 2-3 hour inspection and subsequently discussed with Snyder, Speaker and Piper the procedure, the complaints, and the corrective measures taken by management. Myers concluded there was nothing unsafe about the procedure, but rather that it was "very adequate," and a "very complete procedure." Tr. II 3-8, 30-31.

The events precipitating the discharge occurred on the afternoon of July 24 in the presence of numerous management personnel and miners. When Speaker instructed Bush to continue breaking in on the acid unloading procedure, Bush again refused. Speaker asked Bush if he was refusing to do his assigned work, to which Bush once more replied that he was refusing because the procedure would "always be unsafe" and it was not his job. Tr. I 98-99; Tr. II 10-11 34, 78. Piper repeated the question and Bush replied, "[T]hey aren't my duties. They are unsafe besides. Tr. I 99, 147-149; Tr. II 11, 34, 78. Piper testified that when Bush "started to go through the reasons" why the procedure was unsafe, he cut Bush off, saying, "Ken, we have repeatedly tried to discuss this with you, with no rational discussion, we are not going to go through it now." Tr. I 150; Tr. II 34.

Piper then suspended Bush for refusing to do his assigned work. Bush, angry over the suspension, responded in part, "You mousey little b------, I ought to break your f------ nose." Tr. I 99-100, 148-151; Tr II 11, 34-35, 78-79. Bush was very agitated and advanced to within 6 to 8 inches of Piper, clenching and unclenching his fists, but no blows were exchanged. After a few more angry words, Bush walked away. The next day Piper sent Bush a certified letter, which stated that Bush was terminated effective immediately "for the totality of your conduct on thursday, July 24, 1980, including insubordination, refusal to carry out work assignments, and for making threatening and derogatory remarks and gestures toward me."

5/ While the operator did not expressly inform Bush of Myers' inspection, Bush knew that Myers was at the plant, because he testified that he saw Myers in the unloading area that morning. Bush testified that he was in the unloading area at the time to "see what changes had been made." He stated that he also saw "a

man on the valve right under the truck," and "observed valves in the position where the truck overflowed, if it overflowed like before, [the miner] was immediately under it...." However, Bush did not complain at that time, either to Myers to to other management personnel. Tr. I 142-145.

The Secretary of Labor filed a discrimination complaint on Bush's behalf alleging that Union Carbide "unlawfully discriminated against and discharged [Bush] for engaging in activity protected under section 105(c) of the Act." In its answer, Union Carbide denied that it had violated the Mine Act, asserting that Bush was discharged "for good and sufficient cause, to wit, insubordination, refusal to carry out work assignment and making threatening and derogatory remarks and gestures toward the Plant Superintendent." The judge concluded that Bush's discharge did not violate the Mine Act.

In essence, the judge held that at the time of Bush's July 24 work refusal and subsequent outburst, he did not have a reasonable belief that unloading acid was hazardous. The evidence led the judge to conclude that Bush would not unload acid under any circumstances. 4 FMSHRC at 371. The judge based this conclusion on his findings that by the time of Bush's final work refusal Union Carbide had "rectified" the acid leaks and blow backs of which he had complained; that at the July 23 meeting, Union Carbide had discussed each of Bush's complaints and the corrective action taken and Bush failed to identify any further safety problems at the meeting's close; and that his July 24 work refusal immediately followed this meeting and was accompanied by his unvarying and unenlightening refrain that acid unloading would "never" be safe and was not his job anyway. 4 FMSHRC at 370-71.

While the judge recognized the hazards of acid unloading, he held that "when all precautions have been taken, it does not mean that an employee may ... refuse to do the work under the protection of the Act." 4 FMSHRC at 371. Because he found that a work refusal under those circumstances "cannot be considered reasonable," he concluded that Bush's refusal on July 24 was unprotected. The judge found that Bush was discharged in part because of his July 24 work refusal and in remaining part because of his other unprotected conduct on that date. 4 FMSHRC at 368, 370-71. The judge dismissed the discrimination complaint on the grounds that firing Bush for his unprotected July 24 work refusal and for other unprotected activity could not amount to a violation of the Mine Act. 6/

6/ Certain aspects of the judge's legal analysis require clarification, although they do not affect the correctness of his dismissal of the discrimination complaint. In addition to finding that Bush's July 24 work refusal was unprotected, the judge also found that Bush's earlier safety complaints were protected, that he made a protected safety complaint at the time of his July 24 work refusal, that Union Carbide discharged Bush in part for the latter complaint, and that it would not have fired him in any event for his unprotected

activity alone. 4 FMSHRC at 370.

At first glance, these findings would suggest a conclusion of discrimination. However, Union Carbide expressly discharged Bush solely for the events of July 24 (the Secretary does not argue otherwise), so that Bush's safety complaints prior to that date, protected or not, are not directly relevant. Further, Bush's statement on July 24 that the job was unsafe was not a separate complaint, but instead was merely the

II.

In order to establish a prima facie case of discrimination, a complaining miner must prove that he engaged in protected activity and that the adverse action was motivated in any part by the protected activity. Secretary ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary ex rel. Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). It is undisputed that Union Carbide fired Bush for the "totality of [his] conduct" on July 24, including his work refusal, insubordination, and threatening and derogatory remarks and gestures. Bush's insubordination and opprobrious conduct are not protected by the Mine Act. 7/ Consequently, the narrow question before us in this case is whether Bush's work refusal was protected. If it was not, then firing him for it does not give rise to a violation of the Mine Act.

For a work refusal to come within the protection of the Mine Act, the miner must have a good faith, reasonable belief that the work he refuses to do is hazardous. The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed; the burden of showing good faith does not, of course, amount to a burden of demonstrating the absence of bad faith. Robinette. 3 FMSHRC at 807-12. 8/ In determining if the miner's belief is a reasonable one

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footnote 6 continued

expression of his final work refusal. The expression of this work refusal cannot be divorced from the refusal itself. If the work refusal lacked the protection of the Mine Act, so did the words communicating it. We disavow any suggestion to the contrary in the judge's reasoning. In sum, the judge's decision must be read in light of his ultimate conclusion. We are satisfied that, with the clarifications discussed in this note, he properly based his dismissal of the complaint on his conclusion that Bush's July 24 work refusal was not protected. Similarly, we interpret the judge's discussion of the operator's motivation in firing Bush as meaning merely that Bush was fired in part for his work refusal and in part for his other unprotected conduct on July 24.

7/ Bush's angry words and threats occurred after he refused to work and are separate from that refusal. Therefore, this is not a case requiring us to decide whether objectionable conduct occurring directly in the course of the alleged protected activity operates to

strip that activity of its claim to protection. See Robinette, 3 FMSHRC at 817. See generally Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729-31 (5th Cir. 1970), and authorities cited.

8/ To the extent that note 14 in Robinette (3 FMSHRC at 811) may suggest that the burden of proof on any issue shifts to the operator, it has been misread. The burden of proof remains with the complainant at all times on all issues of his or her case, including good faith and reasonableness. As Robinette correctly holds, "the 'ultimate' burden of persuasion never shifts from the complainant." 3 FMSHRC at 818 n. 20.

under the circumstances, the judge looks to the miner's account of the conditions precipitating the work refusal, and to the operator's response. The judge then evaluates the relevant testimony as to "detail, inherent logic, and overall credibility." Robinette, 3 FMSHRC at 812.

As indicated above, the judge's conclusion that Bush's July 24 work refusal was unreasonable is based on his findings that Union Carbide had corrected the hazardous conditions about which Bush had previously complained, and had so informed Bush on July 23. After being informed, Bush failed to articulate any further safety problems. When he continued to refuse to unload the acid on July 24, he merely invoked his ritualistic litany that acid unloading would never be safe, and besides was not his job. We are persuaded that substantial evidence supports the judge's findings and conclusions.

The record establishes Union Carbide's continuing concern about miners' complaints and its willingness to address them. As requested by Bush and other miners on July 9 and by Bush on July 22, Union Carbide corrected the acid leaks and blow backs. In addition, the operator initiated the July 23 meeting with Bush, where Snyder informed Bush of these corrections and tried without success to discover Bush's remaining safety complaints. Union Carbide's good faith and desire to cooperate were further demonstrated by Piper's July 23 request that Myers inspect the unloading procedure as soon as possible. Where, as here, the necessary communication between the miner and operator has occurred and management has taken corrective measures at some point repetition of the same complaint and work refusal loses the protection of the Mine Act.

In this context, the evidence does not support the reasonableness of Bush's continuing belief in a hazard. Indeed, the judge virtually discredited Bush's testimony. It is significant that after July 9, no one aside from Bush seems to have complained to management regarding the acid unloading procedures. At no time did Bush file a grievance under the union contract or raise his concerns with the union safety committee of which he was a member. Moreover, at the July 23 meeting, Bush was unresponsive to Union Carbide's repeated attempts to discover why he was still concerned about the unloading procedure. On July 24, after both Speaker and Piper asked Bush if he were refusing to do his assigned work, he merely repeated that. the procedure was unsafe, would never be safe, and was not his job. While it is true that Piper interrupted Bush at that point, we do not believe the interruption was legally significant. The record fails to show that Bush would have said anything more illuminating than he had said four times already. Rather, the record reveals that Bush's testimony overall as to what he told his supervisors with

regard to his safety concerns was vague, unspecific, and subject to memory lapses. 9/

9/ Even testimony that at first glance seems to support Bush's position, ... fails to do so on closer examination. Thus, although Bush knew on July 23 that Hardin was burned, there is no testimony that Bush thought the burn was caused by a safety defect. The judge made no findings on the cause of the burn and Bush did not testify as to what he believed. Similarly, as discussed in footnote 5, although on the morning of July 24 Bush observed the unloading procedure he did not then complain of any hazards. His testimony as to what he observed that morning is ambiguous as to whether he believed a hazard actually existed at that time. Further. the judge found that Union Carbide had corrected the acid leaks.

In sum, the judge inferred from the evidence that Bush would not unload acid under any circumstances. In so doing, the judge credited the operator's testimony that it had remedied the acid leaks and had conveyed this information to Bush, and discredited Bush's testimony pertaining to reasonable belief in a hazard. We emphasize that a "judge's credibility findings and resolution of disputed testimony should not be overturned lightly." Robinette, 3 FMSHRC at 813. Here, in the presence of substantial evidence to support his findings, we see no reason to take the exceptional step of overturning this basis for the judge's decision. We are persuaded, as was the judge, that Bush's belief in the hazard was not "a reasonable one under the circumstances" in that Bush's account of the conditions responded to was not persuasive in "detail, inherent logic and overall credibility." Robinette, 3 FMSHRC at 812. We reach this result also because acid unloading is a necessary and integral part of Union Carbide's operations and, like working on high steel or, indeed, in a mine, always poses some element of risk. Bush's work refusal was therefore unprotected and the operator's firing him in part for that refusal did not amount to a violation of the Mine Act. 10/ Like the judge, we will not penalize Union Carbide for refusing to tolerate indefinitely Bush's unchanging refrain and work refusals.

III.

One last point remains to be discussed. Union Carbide asserted at oral argument--as it had before the judge--that the Rifle Plant is not a "mine" within the meaning of the Mine Act. We disagree. Substantial evidence supports the judge's findings that vanadium is a mineral and that facilities at the plant are used in the work of "preparing" vanadium. 4 FMSHRC at 369.

The Mine Act specifically includes within its coverage "lands ... structures, facilities, equipment ... used in ... the work of preparing ... minerals. 30 U.S.C. 802(h)(1). It is clear Congress intended this expansive definition of "mine" to be broadly construed. 11/ While we have recognized that the "inclusive nature of the Act's coverage ... is not without bounds" (Carolina Stalite Co., 4 FMSHRC 423, 424 (March 1982), appeal filed sub nom. Donovan v. Carolina Stalite, Nos. 82-1467, 82-1830, D.C. Cir.), the situation here is readily distinguishable from cases where we declined to apply the Mine Act. See Stalite, 4 FMSHRC at 424-425; and Elam, 4 FMSHRC at 5, n. 3. Rifle is an integral part of Union Carbide's corporate structure, and some of the vanadium-bearing

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10/ Because we have determined that Bush's work refusal was not

based on reasonable belief that a hazard existed, we need not reach the question of his good faith.

11/ Oliver Elam Co., 4 FMSHRC 5, 6 (January 1982), citing S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor and Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

ore prepared at Rifle is mined by Union Carbide. Moreover, the distillation of the vanadium concentrate at the plant is a necessary preliminary step to commercial use. Such mineral preparation falls within the scope of the Mine Act. 12/

Accordingly, on the bases discussed above, we affirm the judge's dismissal of Bush's complaint of discrimination.

12/ We also believe it is desirable as a matter of policy that a single federal agency inspect all of Union Carbide's facilities engaged in related operations, that is, its mines and its primary and secondary preparation facilities. 30 U.S.C. 802(h)(1). As pointed out at oral argument by counsel for the Secretary, without rebuttal by Union Carbide, until this proceeding Union Carbide had not disputed the Mine Safety and Health Administration's jurisdiction, and had permitted inspection without protest for a number of years.

Commissioner Lawson dissenting;

I am in agreement with the majority that this is a mine, but the record does not support its conclusion that the complainant, a miner with fifteen years employment at Union Carbide, and at the time of his termination a safety committee representative for his union, was discharged for unprotected activity. It is undisputed that miner Bush had never been disciplined before, for any reason. Tr. I 78.

The proposition that substantial evidence furnishes strong support for the decision of a trial court is not in dispute. What is at issue are the numerous evidentiary gaps, misinterpretations, and inconsistencies in the decision of the judge below, which presents to the Commission a decision unsupported by the record in this case. Substantial evidence is either wholly absent from this record--indeed any evidence in a most critical area--or so misstated as to be of little or no value for purposes of review.

For example, although the judge found complainant had engaged in protected activity (4 FMSHRC 370), and the operator has not challenged this finding on review, the majority here has determined that Bush's activity was not protected (slip op. at 4, 5, and n. 6), thus ignoring the presumably substantial evidence on which the judge relied in reaching that conclusion.

As the majority concedes, the judge erred in recounting and relying upon a nonexistent conversation of July 24th, in the clearly determinative underpinning for his decision:

> The complainant did engage in protected activity in that he complained that the new procedure for unloading acid was unsafe. The complaint was made to complainant's supervisor on several occasions, and including July 24, 1980, the day complainant was suspended. A safety complaint involving a condition adjudged by the miner to be unsafe constitutes conduct protected by the Act.
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> * * *
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> After the solution of all the complaints had been explained to complainant in his supervisor's office on July 24, 1980, complainant was again asked to break in on the work of unloading the acid. Complainant again refused, stating that it was unsafe, but when he was asked in what way it was unsafe, complainant offered no

explanation. Complainant also stated, as he had before
that 'besides, its not my job.' The only conclusion I
can come to is that complainant would not unload acid
under any circumstances. [Emphasis added]. 4 FMSHRC 370,
371.

Indeed, the July 24th refusal to discuss complainant's safety concerns is revealed by the record as that of Union Carbide's Superintendent, Harold Piper, not miner Bush. It is undisputed that Bush attempted to explain the reasons for his belief that the acid handling procedure was unsafe. However, as Piper stated Bush "started to go through the reasons", but "I cut off his discussion." Tr. II 34 36, Tr. I 150. 1/

I am therefore unwilling to confirm these undisputed decisional contradictions of the judge, by speculating as to what he might have intended to say--but didn't -in particular on the central point critical to the resolution of this dispute. The timing and the content of the verbal exchanges between the parties should not be determined by inference, when Kenneth Bush's job, his fifteen years of employment and service for this operator, depends upon the accuracy of the facts upon which we must base our decision.

It is undisputed that Bush had some years previously witnessed employee Victor Sullivan "severely burned by acid" (Tr. I 90); had himself received acid burns (Tr. I 103); had learned of Hardin's acid burns while working on the acid line on July 23rd and had observed, on the day of his discharge, that valves were still dangerously positioned and likely to cause overflow. Tr. I 144. Yet, in examining Bush's belief to find it unreasonable, neither the judge below nor the majority herein has made any determination nor addressed the issue of whether the complainant's refusal to work was made in good faith. It is established law that the operator has the burden of proving the absence of good faith. Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 810-12 & n. 14 (April 1981). 2/

1/ Nor is there any record support for or explanation by the majority of its assertion that this miner's July 24 statement that the job was unsafe was not a separate complaint, nor that Bush's safety complaints prior to July 24 are "not...relevant." Slip op. at 4, n. 6. Certainly the judge found the complaint to be separate (4 FMSHRC 367), and the majority found Bush's angry outburst, which occurred in that same discussion, to be separate. Slip op. at 5, n. 7.

2/ Contrary to the majority's assertion, n. 14 of Robinette has not been "misread":

> 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. Emphasis supplied.

Robinette at 811 n. 14.

The essential holding below, adopted by the majority herein, is that Bush's work refusal was not based on a "reasonable belief", and is therefore unprotected. Slip op. at 7. That conclusion is founded on, and can only be supported by, as has been noted, the judge's mistaken reliance on a nonexistent conversation. 3/ The basis for the holding below being thus lacking, the decision cannot stand. Bell Lines, Inc. v. United States (1967, SD W Va) 263 F.Supp 40, 46; 5 U.S.C.A. 557 (c).

Certainly complainant on July 22nd had testified in detail as to his safety concerns (Tr. I 43-45). Union Carbide apparently gave these complaints credence, although the record is unrevealing as to whether or not the changes made in the sulfuric acid handling procedure between the July 22nd complaint of Bush and his discharge on July 24th represented improvements. A valve in the acid line had been replaced, but it is significant that miner Bush was not advised of this change in the acid handling procedure, nor permitted to express himself as to the safety implications thereof.

On July 23rd, miner Hardin had been burned while unloading this sulfuric acid. Thereafter, on July 24th, Union Carbide's Safety Coordinator, Myers, had inspected this procedure, and the method of handling this acid was then modified. Complainant was not informed of nor aware of this modification, nor at the time of his work refusal on the 24th, of the reason for the injury to Hardin. Tr. II 52. Indeed, the record reflects that on the morning of the 24th, Bush observed valves in a position to cause overflowing, as before. Tr. I 143-145.

In any event, whatever opportunity Bush might have had to express his concern as to these procedures was foreclosed, as well as any views he may have had concerning whether the later changes ordered by Myers had corrected the problems of safety involving the acid handling procedure. The majority would, however, confirm complainant's discharge because of Union Carbide's "good faith and desire to cooperate", albeit this operator had withheld critical information from Bush, a safety representative of his fellow miners. Slip op. at 6.

Even more disturbing, and perhaps most pernicious of all, is the majority's clear approval of this operator's refusal to listen, much less respond, to complainant's reasons for his refusal to work. I cannot agree to the promulgation of a rule that condones an operator's refusal to hear an employee's safety complaint, a fortiori one that approves the discharge of a miner who has the temerity to raise such complaint. The law does not require that a miner work under

conditions perceived to bc hazardous, nor to blindly accept the mine operator's assessment of the safety of the workplace. Patience is to be preferred over peril when the miners' health and safety weighs in the balance. Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 780 (1974) cert. denied 420 U.S. 938.

3/ See United States v. United States Gypsum Co., 333 U. S. 364 (1948) "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 395.

Under the majority's rationale, a hear-no-evil rule has been established, which will henceforth provide an operator with a ready avenue for avoiding responsibility for discrimination. It need only refuse to listen to safety complaints. This certainly is not supported by the Act; indeed it is directly contrary to the language of section 105(c)(1) and Commission precedent, which strongly encourages, if not requires, a miner to inform his employer of the dangers of the mine. Northern Coal Company, 4 FMSHRC 126, 133-135 (1982).

Whether miner Bush would have unloaded acid on the 24th was not therefore meaningfully offered as an option to Bush, given Union Carbide's refusal to listen to the reason or reasons he then believed that the work he refused was unsafe, the unexplained accident to Hardin, and the also unexplained change in the acid unloading procedure, subsequent to that accident, together with Bush's observation on the day he was discharged that valves were still dangerously positioned and likely to cause overflow. The Act and our precedent do not require miners to perform unsafe work, nor that which a miner has a good faith, "reasonable belief" to perceive as unsafe.

To the extent that the majority bases its finding that Bush's belief was not "reasonable" "...because acid unloading is a necessary and integral part of Union Carbide's operation and, like working on high steel, or indeed, in a mine, always poses some element of risk", it decides a question not presented to the judge below, nor raised on review to the Commission. The Act limits Commission review "to questions raised by the petition" and provides that the "Commission shall not raise or consider additional issues...." Sections 113(d)(2)(A) & 113 (d)(2)(B). Here, the majority's finding was neither presented to the judge below nor raised by any party on review. Previously, this Commission has refused to address an argument not raised before the judge. Cowin and Company, Inc., 1 FMSHRC 20, 22, n. 6.

In any event, the suggestion that working with acid poses an element of risk is not at issue in this case, nor is working on high steel. What is at issue are the procedures utilized in handling the acid, and whether these were reasonably perceived by this miner as unsafe.

The majority has viewed this miner's belief not only narrowly, but solely from the perspective of the operator. The belief to be tested, however, is that of the miner. The reasonableness of this miner's belief, on which he based his work refusal, cannot be divined only from the operator's subjective, and not disinterested, assessment thereof. Phillips v. Interior Board of Mine Operations Appeals, supra. When viewed from Bush's perspective, the evidence leads to an opposite conclusion, and I submit clearly supports the reasonableness

of his belief that this work was unsafe.

To recapitulate, Bush, on the morning of July 24, went to the acid unloading site to see "[w]hat changes had been made." Tr. 1 142. A truck was being unloaded, and it is unrefuted that he observed valves in the position they had been in when acid had previously leaked. Tr. I 144. Nor was Bush told that Safety Coordinator Myers had reviewed the unloading procedures that morning at Plant Manager Piper's request, (Tr. II 52-3)nor was he advised that the faulty connection, which caused acid to splash in Hardin's face, had been replaced. 4/ Tr. II 6-7.

4/ Rather, Supervisor Snyder had told him "human error" was "partly responsible." Tr. II 72-3. Indeed, the record reflects a dispute between Union Carbide's own witnesses as to the cause of this accident. Tr. 11 6-7, 51, 52.

The record reveals that there had never been any discharges of other employees at this mine because of their safety complaints (oral arg. 53, 54), only Bush. Union Carbide presented no evidence that it was company policy to discharge for refusal to perform work because "it isn't my job" (oral arg. 53) or insubordination; indeed, Superintendent Piper testified that "we will not do anything in the heat of an incident other than to suspend". Tr. II 36. The judge, of course, found that Union Carbide would not have fired this miner for the unprotected activity alone (4 FMSHRC 370), and this finding is buttressed by the operator's letter of July 25th, in which it noted that Bush was being discharged "for the totality of your conduct..., including the refusal to carry out work assignments." Exh. C-2. (Emphasis added.)

In summary, we have an undisputedly woefully deficient and unsupported judge's decision, a miner who had made protected safety complaints and had observed still existing unsafe conditions at his workplace just prior to his discharge, a mine operator who refuses to listen to this experienced miner's safety complaints concerning a three-day old, but already modified, procedure for handling sulfuric acid--which had already caused burns to one of complainant's fellow miners--and an employer who admittedly suspended this miner for his refusal to do this work which he, in good faith, reasonably believed to be unsafe.

For the reasons stated, I therefore dissent, would find a violation of section 105(c), and would reverse and remand for appropriate relief.

A. E. Lawson, Commissioner

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