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SOL (MASH) V. METRIC CONSTRUCTORS
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 29, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. SE 80-31-DM

METRIC CONSTRUCTORS, INC.

DECISION

This case involves a complaint of discrimination filed by the Secretary of Labor with this independent Commission pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. V 1981). The complaint alleged that Metric Constructors, Inc. ("Metric"), violated section 105(c)(1) of the Mine Act, 30 U.S.C. $ 815(c)(1)(Supp. V 1981), when it terminated the employment of seven of its workers following their refusal to perform certain work that they believed was hazardous. A Commission administrative law judge concluded that the terminations were discriminatory, awarded back pay with interest to six of the seven complainants, awarded hearing expenses to five of the seven, and assessed a civil penalty of $1,000 for the violation of section 105(c)(1). 4 FMSHRC 791 (April 1982)(ALJ). We subsequently granted petitions for review filed by Metric and the Secretary, and we heard oral argument. For the reasons set forth below, we affirm the judge's finding of a violation of the Mine Act and his assessment of a civil penalty. However, we remand certain aspects of his remedial awards.

I.

Metric, a subcontractor, was engaged to do repair work at a cement plant owned by Florida Mining and Materials Corporation near Brooksville, Florida. Beginning on February 27, 1979, the kiln and the preheater at the plant were taken out of se vice so that repair work could be done. Much of the repair work involved welding. The seven complainants, all welders, were hired on a temporary basis to do the work. 1/ It was agreed they would work 12 hours per day, seven days per week, for approximately four weeks beginning February 27, 1979. It was also agreed that they would work a night shift, from 7:00 p.m. to 7:00 a.m.

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1/ The complainants are: Joe Brown, Johnny Denmark, David Mixon (deceased), the McGuire brothers (Jerry and Terry) and the Parker brothers (John and Wes).

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On the nights of February 27, 28, and March 1, 1979, the complainants worked on and around the kiln. On the night of March 2, they were assigned to weld vortex ducts, i.e., air intakes, on the pre-heater, a tall, smokestack-like structure. Their work area was approximately 180 feet above the ground. The judge has accurately described the crucial events.

The seven Complainants proceeded with Night Foreman Davis to inspect their working area by climbing a set of stairs to it. Their working area was pointed out by Bob Davis from a platform. The Complainants could not reach it, however, because there was a gap of at least 6 to 8 feet between the platform where they were standing and the actual working area.

It was then determined that four of the Complainants (Joe Brown, Terry McGuire, Jerry McGuire and John Parker) would weld on the duct work, while the other three would pull leads (power supply for the welding machines) and act as relief when the welders got tired. Since there was no direct access to the duct work, the four welders were lifted to the work site in a basket by a crane. The other three Complainants pulled leads to within 6 to 8 feet of the duct work and stood on a platform handing supplies to the welders as needed. The platform had no fence or handrail around it.

Once the four Complainants reached the duct work in the basket, they found there were no scaffolding or handrails around the work site nor were there any padeyes on which to hook their safety belts. [.2/] They were thus required to weld padeyes before they could attach their safety belts.

Terry McGuire and Joe Brown went inside the [duct] ... that was being welded onto the pre-heater, while Jerry McGuire went on top of the duct, and John Parker worked from an unsecured one-board scaffold below the duct.

The four Complainants ... worked for approximately 2 hours under conditions which they considered unsafe. Jerry McGuire, who was on top of the duct, was being blown about by heavy winds. John Parker, who was below the duct on the one-board scaffold, was being "burned" by the welding fire from above as were Terry McGuire and Joe Brown inside the duct. The lighting at the work site was insufficient and by 7:30-8:00 p.m. on March 2, 1979, it was dark outside.

The four welders working on the duct were able to reach the platform where the other three were standing only by walking around on a ring which encircled the pre-heater.

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2/ A padeye (or pad eye) is a plate with a round opening, usually welded or fixed to a structure, to which safety belts or lines may be attached.

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Shortly after 9:00 p.m., all seven Complainants went on break. They decided that because of what they believed to be unsafe and hazardous working conditions Terry McGuire and Joe Brown would talk to Bob Davis about improving the conditions by getting additional lights, fire blankets, scaffolding, cables for handrails and jacks for scaffolding board at the work site.

Once on the ground, and after their break, Joe Brown, Terry McGuire and Jerry McGuire, on behalf of all seven men sought out Night Foreman Bob Davis and registered their complaints about the unsafe and hazardous working conditions, i.e., no handrails, no scaffolding, and no lights and to request angle irons, scaffold jacks, scaffold boards, fire blankets, cable for handrail and lighting. While they were so engaged, the other four Complainants returned to the platform located 6 to 8 feet from the duct.

4 FMSHRC at 793-795 (transcript citations and footnotes deleted).

Following the complaints, Foreman Davis went to the office trailer where he told Thelbert Simpson, the night superintendent, that the complainants wanted a scaffold and handrails before they resumed welding. Davis and Simpson agreed to call Russ Jones, the project superintendent, who was not on the job site. Simpson called Jones, and told him that the complainants refused to continue working on the pre-heater. Jones asked if Simpson had any other work for them. Simpson said that he did not, and Jones responded that the complainants should go home and come back in the morning for their pay. Simpson apparently did not tell Jones why the complainants refused to work.

Simpson then told Brown and the McGuire brothers that Jones had said to go home and to come back in the morning for their pay. The employees asked if there was other work for them to do on the ground and Simpson said there was not. They asked if they were being fired, and Simpson said they were not. Davis told the employees that Jones had said they would have to continue welding as before. He also told them that if they refused they would have to go home, and that they could come back in the morning and get their money.

Following this conversation, the employees went home. They

returned the next morning to collect their pay. Each was asked to sign a slip which indicated that they had voluntarily quit, and each refused. That same morning other welders, who had been hired along with the complainants, were assigned to do the welding on the pre-heater. That work was completed three or four days before the end of the four-week work period of employment at the cement plant.

In his decision below, the Commission's administrative law judge found that the conditions under which the employees were asked to work were in fact unsafe. He also concluded that they engaged in a work refusal that was "reasonable and fully justified by the circumstances." 4 FMSHRC at 802. Metric asserted, in defense of its termination of the complainants, that it too had a reasonable belief--that the conditions of employment were safe. Metric argued that because it had no duty to change the conditions to the employees' satisfaction and because no other work was available for the employees to do, it had no obligation to continue to employ them. The judge found, however, that

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Metric's argument that it reasonably believed the conditions were safe was undermined by its failure to investigate the conditions and by Simpson's failure to advise Jones of the reason why the men refused to work. 4 FMSHRC at 802. 3/ Consequently, the judge concluded that Metric's decision that the men could either work under the unsafe conditions or have their employment terminated was equivalent to discharging them for engaging in protected activity. 4 FMSHRC at 803-04. The judge awarded back pay and hearing expenses, and assessed a civil penalty for Metric's violation of the Mine Act.

II.

The Violation of Section 105(c)(1)

Metric argues that the judge's finding of a violation is at odds with the scheme and policies of the Mine Act. According to Metric, the result of the judge's decision is that an operator must continue to employ and pay miners who exercise a protected right to refuse work, even though there is no alternative work for them to do, unless the operator reasonably believes that working conditions are safe. Metric asserts that this transforms the right to refuse work into a mechanism for coercing compliance with safety standards. Metric argues, as it did before the judge, that it owed no duty to its employees to ensure that the conditions were safe or to believe that they were safe. Thus, Metric submits that in the absence of alternative work, it had no obligation to keep the complainants on the payroll.

We have held that a miner's work refusal is protected under the Mine Act if the miner has a reasonable, good faith belief in a hazardous condition. 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). See also Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982). In this case, the judge found that conditions on the night of March 2, 1979, resulted in an unsafe working environment and that the complainants had a reasonable belief this was the case. Substantial

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3/ Foreman Davis died before the hearing. In a statement taken before his death, Davis asserted that he, rather than Simpson, called Jones and told him of the safety complaints. The statement was made to the Department of Labor's Mine Safety and Health Administration and was offered into evidence by the Secretary. Metric asserts that the judge erred, to its prejudice, by treating the statement of Davis as testimony introduced on Metric's behalf that created a conflict between Metric's witnesses.

Although the judge referred to Davis' statement several times and noted that it conflicted with Simpson's and Jones' testimony in respect to what Jones was told, he ultimately discounted the statement and credited the testimony of Simpson and Jones. 4 FMSHRC at 800-01 n.5. Thus, although the judge may have been imprecise or mistaken in referring to a conflict in the testimony of Metric's witnesses (4 FMSHRC at 795 n.4, 801 n.5)) we do not believe Metric was thereby prejudiced. Moreover, and more important, the judge's conclusions as to the fundamentals of the violation are supported by the record without reference to Davis' statement.

evidence supports these findings, and Metric does not contest them on review. There is no hint in the record that the employees fraudulently expressed a fear of the working conditions. Because they shared a reasonable, good faith belief that their working environment was unsafe, their work refusal was protected under the Act. See Robinette, supra.

A complainant establishes a prima facie case of discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by the protected activity. See, for example, Hollis v. Consolidation Coal Co., 6 FMSHRC_____, Docket No. WEVA 81-480-D, slip op. at 5-6 (January 9, 1984), and cases cited. In cases involving a miner's work refusal, one of the factors which may be considered in determining the intent behind the adverse action is the reasonableness of the operator's reaction to the work refusal. We have held that a miner refusing to work on the basis of a good faith, reasonable belief in a hazard "should ordinarily

communicate, or at least attempt to communicate, to some representative of the operator his belief in the ... hazard at issue." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982). A corresponding rule of reason applies to the operator's response as well. Thus, as we recently stated, "Once a reasonable good faith fear in a hazard is expressed by the miner, the operator has an obligation to address the perceived danger." Secretary on behalf of Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 1529, 1534 (September 1983). See also Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-99 (June 1983). If an operator precipitately disciplines a miner, without attempting in any manner "to address the perceived danger," it does so at its own legal risk if it is later determined in litigation under the Act that the work refusal was protected.

The judge's decision accords with these general principles. The judge found that Metric did not reasonably believe that the working conditions complained of were safe. The evidence in this record as to the hazardous nature of the conditions is strong. Metric presented no evidence from which it could be concluded that it reasonably believed the hazards did not exist. Nor did Metric's supervisory personnel take any action which implied that they reasonably believed the conditions were not hazardous. As the judge noted, none of Metric's personnel investigated the complaints to determine their validity, and Simpson did not even advise the project superintendent that the safety complaints had been made. 4/

4/ Metric argues that its termination of the employees' could not have been motivated by their protected safety complaints because Project Superintendent Jones, who made the decision to terminate, was not told of their protected activity. It is clear, however, that Night Superintendent Simpson knew why the men were refusing to work. An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions. See, for example, Allegheny Pepsi Cola Bottling Co. v. NLRB, 312 F.2d 529, 531 (3rd Cir. 1962). Accordingly, the fact that Night Superintendent Simpson did not communicate the miners' safety concerns to Project Superintendent Jones cannot serve to insulate Metric from liability for this unlawful discharge.

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We conclude that substantial evidence supports the judge's finding that Metric did not have a reasonable belief that the conditions were safe when it offered the complainants the option of either working under those conditions or of not working at all. Moreover, even if Metric's belief in the safety of the working conditions were a reasonable one, we find compelling the lack of an affirmative response

by Metric to the complainants' concerns under these circumstances. Miners have been accorded the right to refuse work under the Act in order to help achieve the goal of a safe workplace. Pasula, 2 FMSHRC at 2790-93. If an operator may take action which adversely affects miners when it does not have a basis for a reasonable belief that the complained-of conditions are safe, and without addressing the miners' fears, the exercise of the right to register safety complaints and to refuse work will be chilled. Here we endorse the judge's view that "where the mine operator's belief that the working conditions are safe is unreasonable and the miners' belief that such conditions are unsafe is reasonable, the discharge of complaining miners for such work refusal is discriminatory and a violation of the Act." 4 FMSHRC at 804. Accordingly, we affirm the judge's conclusion that the termination of the employees violated section 105(c)(1) of the Act. 5/

III.

The Remedies

Back pay--mitigation

At the hearing, Metric attempted to establish that several of the discharged employees had failed to mitigate their loss of pay by refusing to search for other employment. The judge held that when an employer raises such a defense, the discriminatees are required to establish that they at least engaged in "reasonable exertions" to find employment. 4 FMSHRC at 805. Counsel for the Secretary of Labor argues that to establish a mitigation defense, an operator must prove not only that the employee did not make the required reasonable efforts, but also that an employee could have obtained suitable employment. We do not agree.

Because the Mine Act's provisions for remedying discrimination are modeled largely upon the National Labor Relations Act, we have sought guidance from settled cases implementing that Act in fashioning the contours within which a judge may exercise his discretion in awarding back pay. Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982); Dunmire and Estle, supra, 4 FMSHRC at 142. Back pay may be reduced where a miner

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5/ Metric contends that the record supports a finding that the complainants were terminated because there was no alternative work for them when they refused to do the work assigned them. Given our disposition of the case, we need not and do not at this time decide questions pertaining to the relationship between the availability of alternative work and the validity of discipline over a work refusal. Metric also complains of the judge's assessment of a civil penalty. In affirming the judge's finding of a violation, however, we affirm his penalty assessment as well. The Act requires a penalty where there has been a violation. We conclude that the judge's findings

with respect to the statutory penalty criteria are supported.
30 U.S.C. $ 820(i)(Supp. V 1981).
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fails to mitigate damages, for example, by failing to remain in the labor market or to search diligently for alternative work. Dunmire and Estle, 4 FMSHRC at 144. However, we conclude that when such diligence is lacking, the operator should not also be compelled to shoulder the additional burden of establishing that suitable interim employment could have been found. The employee must reasonably search for a suitable alternative job; where he does not, the existence of the alternative work is irrelevant. See, for example, NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1317-19 (J.C. Cir. 1972).

With respect to James Parker, the judge denied back pay on the basis that Parker's testimony established a failure to make reasonable efforts to obtain other employment. Parker's testimony shifted. He initially stated that after he was terminated by Metric on March 2, 1979, he first applied for other work in July 1979. I Tr. at 200. He then stated that the period in which he did not look for a job was only a month, or three to four weeks. I Tr. at 204. Finally, he stated that he sought another welding job on March 5, 1979. I Tr. at 211-213. The judge accepted Parker's initial statement and found the other testimony "not sufficiently trustworthy." 4 FMSHRC at 807 n. 12. Where a judge's finding rests upon a credibility determination, we will not substitute our judgment for his absent a clear indication of error. The shifting nature of Parker's testimony leads us to agree with the judge that Parker failed to make reasonable efforts to find other employment after being discharged. The denial of back pay with regard to Parker is affirmed.

The judge also denied one week of back .nay to Joe Brown. He concluded that Brown did not make reasonable efforts to seek suitable alternative employment during the week following the termination of his employment with Metric. 4 FMSHRC at 806. A discriminatee must make "reasonable efforts" to find other employment. OCAW v. NLRB, 547 F.2d 598, 603 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977). The determination as to what constitutes a reasonable effort is made on the basis of the factual background peculiar to each case. See NLRB v. Madison Courier, Inc., 472 F.2d at 1318. Here John Parker, James McGuire, and Terry McGuire all sought employment within one to three days of the loss of their jobs. 4 FMSHRC at 806, 809 and 810. This factor is helpful in determining what could reasonably be expected of Brown. Brown's failure to make comparable efforts or to offer any explanation as to why he was unable to do so supports the judge's conclusion that he made no responsible effort to find alternative employment following the loss of his job. We are not

prepared to say that the judge erred in denying Brown one week of back pay. Our decision is restricted to the facts of this case. We are not intimating that a failure to seek alternative employment for one week after an unlawful termination is per se unreasonable. 6/

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6/ Counsel for the Secretary argues that Brown's failure for one week to seek other employment does not establish that his efforts were unreasonable. Counsel notes that in Dunmire and Estle, supra, we found that complainant Estle made reasonable efforts to mitigate his loss of income. 4 FMSHRC at 130. 144. However, unlike Brown, Estle sought to he reinstated the first working day after he was discharged. 4 FMSHRC at 130. Moreover, in this case. unlike Dunmire and Estle, detailed evidence concerning mitigation and what others did to try to find suitable alternative employment was introduced. Also, of course, complainants' jobs with Metric were only scheduled to last for four weeks.

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The judge awarded full back pay to David Mixon and Johnny Denmark, although neither appeared at the hearing. 4 FMSHRC at 808-09. Mixon died one month before the hearing, and Denmark was overseas serving in the Navy. Metric, which elicited its evidence with respect to mitigation through the cross-examination of the complainants who testified, consequently had no evidence to present with regard to whether Mixon or Denmark failed to mitigate their losses. The judge found that Metric did not establish a lack of reasonable effort by Mixon and Denmark to find suitable alternative employment and awarded both full back pay. 4 FMSHRC at 808-09.

The judge did not err. The operator bears the burden of proof with respect to willful loss. OCAW v. NLRB, 547 F.2d at 602-03. We recognize that there are circumstances, such as those at hand, under which a complainant may not appear to testify. However, an operator may prepare for that possibility by initiating pre-trial discovery relating to the issue of mitigation. Significantly, although Metric submitted two sets of interrogatories to the Secretary of Labor and one request for production of documents, none of the questions asked or the items sought related to the issue of mitigation. Nor did Metric seek to depose either Mixon or Denmark prior to the hearing. We therefore affirm the judge's conclusion that Metric failed to establish a willful loss of earnings with respect to Mixon and Denmark and his conclusion that both were entitled to full back pay.

Overtime compensation

In his post-hearing brief, the Secretary of Labor requested overtime pay in the amount of time and a half for each hour over 40 hours per week that would have been worked absent the discriminatory discharges. The judge concluded that the record lacked

an evidentiary basis for such an award. 4 FMSHRC at 806. Our duty is to restore the discriminatees to the enjoyment of the wages they lost as a result of the illegal terminations. We are mindful of the fact that the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. $ 201 et seq. (1976 & Supp. V 1981)("FLSA"), requires compensation for each hour worked over 40 hours per week at one and one half times the regular rate of pay for certain classes of employees and employers. 29 U.S.C. $ 207 (1976 and Supp. V 1981). As counsel for the Secretary has noted, this statutory obligation is a part of every employment contract between an employee and an employer subject to the terms of the FLSA. See for example, Roland Electric Co. v. Black, 163 F.2d 417, 426 (4th Cir. 1947), cert. denied, 333 U.S. 854 (1948). While we understand the judge's concern over the lack of specific evidence on this point, we cannot ignore the possibly applicable mandates of the FLSA.

We remand in order to permit the parties, on an expedited basis, to address this issue more fully. If the judge on remand determines that the FLSA applied to Metric, the back pay award in this case should reflect inclusion of the necessary overtime pay. 7/

7/ We leave undisturbed the judge's assessment of interest on the back pay awards at the rate of 12% per annum compounded annually from March 3, 1979, until paid. Barring an abuse of discretion in the assessment of interest by a judge, we will not in this case retroactively implement our recently announced prospective policy for the computation of interest based upon use of the IRS "adjusted prime rate." Secretary on behalf of Bailey v. Arkansas-Carbona Co., 6 FMSHRC 2042, 2049-54 (December 1983).

Expenses

The judge awarded the complainants, on an individual basis, $125.00 in expenses for each day they attended the hearing. 4 FMSHRC at 810-11. The judge concluded the daily amount of $125.00 was "fair [and] reasonable." 4 FMSHRC at 811.

Recovery of expenses incurred in bringing a successful claim may be part of the relief necessary to make a discriminatee whole. Northern Coal, 4 FMSHRC at 143-44. The burden of establishing a claim for expenses is upon the Secretary. It is he who must introduce sufficiently detailed evidence so that a determination may be made whether the complainants' claims are justified. When he does not do so and when, as here, the judge's award is without record support, we have no basis for meaningful review. We therefore vacate the award of expenses. However, in view of the statutory duty to make these miners whole, we remand in order to afford the parties the opportunity to submit evidence concerning the appropriate amount, if any, of the

expenses to be awarded the complainants.

IV

For the foregoing reasons, the judge's finding of a violation and assessment of a civil penalty are affirmed. The award of expenses is vacated, and the matter is remanded for expeditious reconsideration of that issue. The back pay awards are also remanded for expeditious determination of whether overtime pay, pursuant to the FLSA, should be included in the award. The judge who decided the case below is ill, so the proceeding is remanded to the Chief Administrative Law Judge for reassignment to another judge.

Richard V. Backley, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

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