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JOHN COOLEY (MSHA) V. OTTAWA SILICA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of John Cooley

v. Docket No. LAKE 81-163-DM

OTTAWA SILICA COMPANY

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 perform an allegedly dangerous task. The Commission's administrative law judge held that the miner's work refusal was protected and that his discharge by Ottawa Silica Company ("Ottawa") violated the Mine Act. The judge ordered reinstatement with back pay and benefits, without interest. The judge also denied, without prejudice, the Secretary of Labor's request for assessment of a civil penalty in this proceeding. 4 FMSHRC 1013 (June 1982)(ALJ). For the reasons that follow, we affirm the judge's finding of a violation and his severance of the civil penalty proceeding. However, we vacate the judge's back pay and benefits award and remand for a recomputation of the amount due the complainant.

Ottawa mines and processes silica sand at its Michigan Division Quarry, where the events at issue occurred. The operation involves the drying of wet sand in a large natural gas-fired dryer. The dryer has an electric spark plug that ignites the pilot light. The pilot ignites the flame of the main burner. These operations are usually performed from a control panel located approximately ten feet from the ignition area. At times, during 1979 and 1980, difficulties in lighting the dryer occurred when the electric spark plug failed to ignite the pilot light. On these occasions, the pilot was ignited manually.

Manual lighting required two people, one at the control panel and another who would hold a piece of burning paper to the pilot. To light the pilot a worker would climb eight feet above the floor to a metal walkway which surrounded the dryer. The pilot was 54 inches

away from
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the closest vantage point on the walkway. There was an opening between the pilot and this point on the walkway called a floor-hole, which was two feet wide. In order to reach the pilot a worker had to lean or climb over the guardrail on the walkway. Then, while reaching over the floor-hole, the worker would touch the burning paper to the pilot.

John Cooley, the complainant, had been employed by Ottawa as a laborer for eighteen months prior to his discharge in May 1980. During his employment with Ottawa, Cooley had a history of absenteeism, work refusals, and insubordination, and was nearing the conclusion of a one-year disciplinary probation when he was discharged. As noted above, at the time in question, the pilot light on the dryer did not always ignite automatically. When this occurred, a second worker, usually a laborer, was called to assist the dryer operator by igniting the pilot with burning paper. Cooley testified that he had been instructed in this method by two supervisors, including David Chalmers, his foreman at the time of his discharge. Cooley had been directed to ignite the pilot manually on over 30 occasions. Cooley testified that he complained throughout this period to his foreman, as well as to the dryer operators, that this was an unsafe procedure.

Cooley eventually bid on the job of dryer operator. When Cooley won the bid on the dryer, he was assigned a five-day training period in April 1980, with an experienced operator, Marvin Phelps. During his training the pilot had to be ignited manually on several occasions. Cooley was again assigned to light the pilot with burning paper, while Phelps worked the control panel. On every occasion Cooley complained to Phelps that the manual lighting procedure was unsafe.

On Friday, May 2, 1980, the last day of Cooley's five-day training period, the dryer was down when the shift started. Shortly before lunch, Cooley had to manually light the pilot. He testified that in doing so, he singed the hair on the knuckles of his right hand. He was very angry and wanted to confront management. He testified that he calmed himself down, realizing that he was on probation. He decided, however, that he would not manually light the pilot again. Under Ottawa's collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Cooley was permitted to withdraw his bid during the training period. Because of his general dissatisfaction with the dryer operator's job, Cooley voluntarily withdrew his bid. Cooley so informed Chalmers, who agreed. Cooley told Chalmers he would return to working as a laborer after lunch.

Later that day, after having returned to his work as a laborer, Cooley was in the lunchroom when he received a telephone call from Chalmers, who told him to manually light the pilot on the dryer. Cooley testified that he immediately cursed. Cooley told Chalmers, however, that he was not cursing at him but that he would not light the pilot. He also said that if that were the proper way to light the pilot, the dryer would have been supplied with "a carton of matches and a bale of paper." Cooley reiterated this position in the face of renewed demands by Chalmers, who reminded him that he was still on probation. Chalmers then told Cooley to meet him at his office but Cooley replied that he would be in the lunchroom.
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Chalmers met Cooley in the lunchroom and again ordered him to light the dryer manually. After a brief exchange, Chalmers stated that he did not want to hear Cooley's explanation and ordered Cooley off company property. Before leaving, Cooley met with his union steward, Kenneth Stumpmier, a former dryer operator. Cooley told Stumpmier that he was being sent home because of his refusal to light the pilot for safety reasons. Stumpmier attempted to talk to Chalmers about Cooley's work refusal after Cooley left but Chalmers refused to discuss the matter.
On Monday, May 5, 1980, Hilliard Bentgen, Ottawa's Industrial Relations Supervisor, discussed Cooley's behavior with Chalmers. Under Ottawa's personnel policies only Bentgen had authority to discharge an employee. Bentgen also met with Cooley and Stumpmier and discussed Cooley's safety concerns. In response to an inquiry by Bentgen, Stumpmier stated that he also would not light the pilot manually because it was unsafe to do so.
Bentgen discharged Cooley by letter dated May 6, 1980. The letter explained that Cooley was discharged because of his previous disciplinary problems, his refusal to follow the instructions of Chalmers, and his use of foul and abusive language in speaking with Chalmers.
In his decision, the Commission's administrative law judge concluded that Cooley engaged in a protected work refusal. The judge determined that Cooley had a good faith, reasonable belief that manually lighting the dryer was unsafe and exposed him to possible injury. The judge also found that the practice of lighting the pilot with a burning piece of paper was, in fact, unsafe. He rejected Ottawa's contention that Cooley communicated his safety concerns only after his refusal to work and concluded that Cooley had consistently complained that the procedure was unsafe. The judge noted that it was uncontested that Cooley's concerns were clearly expressed to Bentgen before Bentgen's decision to discharge. He held that the communication made by Cooley regarding his safety concerns fell within

the test enunciated in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982).

Finally, the judge rejected Ottawa's contention that Cooley was discharged because of his profanity toward his supervisor. First, he held that Cooley's use of profanity was part of the protected work refusal. Second, he held that the "[t]estimony and evidence adduced ... [did] not support a conclusion that the respondent would have fired Mr. Cooley for the manner in which he communicated his work refusal to his supervisor." 4 FMSHRC at 1048. The judge noted the absence of evidence that Cooley or any other employee had ever been disciplined for using profanity. He also noted testimony that Cooley's "cursing" was directed at the method of lighting the dryer, not at Chalmers, and that Ottawa's assertions that Cooley used "vile," "foul," and "abusive" language were based on Chalmers' report to Bentgen. Chalmers, who had been discharged for poor work performance, did not testify at the trial below. The judge, therefore, held that Cooley's discharge violated the Mine Act.

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Under the analytical guidelines established in Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Corp. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence that (1) he engaged in protected activity and (2) the adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. See NLRB v. Transportation Management Corp.,_____U.S. ____, 76 L.Ed.2d 667 (1983).

As explained in Robinette, a work refusal is protected under section 105(c) only when the miner has a good faith, reasonable belief in a hazardous condition. Good faith in this context simply means an honest belief that the hazard exists. Accompanying the good faith requirement is the additional requirement that the belief in a hazard be a reasonable one under the circumstances. Good faith and reasonableness may be determined by evaluating all the evidence for detail, inherent logic and overall credibility. Robinette, 3 FMSHRC at 807-12.

Ottawa challenges the judge's finding that Cooley had a reasonable belief that lighting the dryer manually was hazardous. Substantial evidence supports the judge's conclusion that Cooley's belief in this hazard was reasonable. The judge concluded that Cooley singed his hand and that this incident verified for Cooley his concerns over

the manual lighting. The other dryer operators, while personally unconcerned with the danger, nonetheless respected Cooley's belief concerning the danger of the lighting procedure and did not find his reluctance unreasonable. Further, while there is no requirement that the reasonableness of Cooley's belief be verified objectively (Robinette, 3 FMSHRC at 811-12), the judge concluded that the practice was in fact unsafe, and substantial evidence supports that determination. We conclude that nothing in the record warrants reversal of the judge's conclusion that Cooley's belief in the hazard was reasonable.

Ottawa also challenges the judge's finding on good faith. Substantial evidence supports the judge's finding that Cooley acted in good faith. The judge acknowledged Cooley's troubled work history, short temper and lack of self-restraint, but found him to be a credible witness. 4 FMSHRC at 1045. The record is replete with references to Cooley's concerns over lighting the pilot manually, including complaints to Chalmers. It was the singing of Cooley's hand that prompted him to vow not to perform the task again. In the final analysis, the judge's finding that Cooley possessed a good faith belief in the hazard is based essentially on credibility resolutions, and we discern nothing in the record warranting reversal of that resolution.

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Ottawa also asserts that Cooley did not communicate the safety related basis for his work refusal to his employer on a timely basis, as required by Dunmire and Estle. While Dunmire and Estle states a preference for contemporaneous communication, it also contemplates a reasonable attempt to communicate even after the work refusal, if the circumstances so warrant. 4 FMSHRC at 133. Ottawa's position ignores the effect of Chalmers' actions. The testimony is uncontroverted that when Chalmers and Cooley met in the lunchroom, moments after Cooley's initial refusal over the telephone, Cooley attempted to raise the safety of the procedure as a concern. Chalmers refused to listen, saying "I don't care. I don't care. I don't care. I want you off the property." Tr. 31. Chalmers' refusal to consider the reason for Cooley's actions was compounded by Chalmers' subsequent refusal to discuss Cooley's safety concerns with Stumpmier, the union steward. With the contemporaneous attempts to communicate made futile, the discussion with Bentgen on Monday, May 5, was the first opportunity for Cooley to present his concerns clearly.

Ottawa has continually argued that Cooley concocted his safety concern over the weekend to save his job. However, the judge found that Cooley's history of complaints about the manual lighting procedure to his foreman and other dryer operators, including complaints during his training period, indicated a genuine and

reasonable concern. The only evidence in the record to support a fabrication theory is the lapse of time over the weekend. We are persuaded that Cooley's previous statements, along with his inarticulate expressions of the basis for his refusal at that time, overcome the allegations of fabrication.

On the basis of the above, Cooley showed that he engaged in protected activity, the first element necessary to prove a prima facie case. As to the second element of a prima facie case, Ottawa does not contest that Cooley's discharge was motivated in part by Cooley's refusal to work. The discharge letter from Bentgen stated that Cooley was being discharged in part because he had refused to follow the instructions of his foreman. Therefore, the element of motivation was proved and Cooley established a prima facie case of discrimination.

Ottawa defended below and argues before us that Cooley's use of profanity toward his supervisor was a separable, unprotected action which would have resulted in Cooley's termination in any event, regardless of the work refusal. The Secretary of Labor argues that because the profanity was part of the communication of the refusal to work, it was part of the protected activity itself. The judge agreed with the Secretary's position, and found that the use of profanity during the telephone conversation in such a context was part of the protected work refusal. 4 FMSHRC 1047. We do not agree that the profanity was protected but we hold that Ottawa did not establish that it would have discharged Cooley for that reason alone.

The right to refuse to work is not explicit in the Mine Act. In Pasula, we found that right to exist on the basis of the entire statute, statements of legislative intent and legislative history. We did not discern then, and we do not now, any foundation for protection of profanity or other opprobrious conduct, whether occurring contemporaneously

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with or subsequent to a refusal to work. See Robinette, 3 FMSHRC at 817, and Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). Thus, because opprobrious conduct is not protected, the operator may show that such conduct motivated the adverse action, and that it would have taken such action against the miner in any event for that unprotected conduct alone.

The close nexus between Cooley's swearing and his work refusal complicates this case. Therefore, the "in any event" test may be best applied by envisioning Ottawa's response to the situation without a work refusal, i.e., did Ottawa prove that it would have discharged Cooley if the events had occurred exactly as they did, except that Cooley had proceeded to light the pilot?

Ottawa's discharge letter to Cooley clearly identified his use of profanity as one motivating factor in his discharge. Ottawa therefore

showed that it was, in part, also concerned by Cooley's use of profanity. However, in order to prevail Ottawa must also prove the second element of its affirmative defense--that it would have taken adverse action against Cooley in any event for this unprotected activity alone. The judge concluded that Ottawa did not carry its burden. We agree and find that substantial evidence supports the judge's conclusion.

The record is clear that Cooley was less than an ideal employee. He had been discharged, reinstated on probationary status and suspended during that probationary period for insubordination. Bentgen testified that, given Cooley's record, Cooley would have been discharged for the use of profane language alone. However, there are countervailing factors on which the judge relied. Despite Cooley's disciplinary history, there is no evidence that Ottawa considered his difficulties to involve profanity. Further, there is no evidence that anyone had ever been disciplined by Ottawa for swearing or that the operator had a policy prohibiting swearing, either generally or at a supervisor.

In addition, by Cooley's own admission the swearing came first, yet Chalmers did not threaten discipline then. Only when Cooley refused to light the pilot did Chalmers threaten to discipline him. Three times Chalmers attempted to get compliance by reminding Cooley that he was on probation. If the swearing had been of significant concern, it is unlikely that Chalmers would have repeatedly requested that Cooley light the dryer. Immediately after the incident, Chalmers told Stumpmier that he had sent Cooley home because of his refusal to light the dryer and that this was the reason he would recommend Cooley's discharge. He never mentioned Cooley's profanity in this discussion. ~522

We recognize that Cooley's previous discipline involved incidents of possible insubordination involving work refusals. At the time of the dryer pilot incident, Cooley had not yet completed his one-year probation and was clearly at risk for any future acts of insubordination. The judge could have concluded that Ottawa proved that Cooley's language was a separate and serious basis for discharge. However, the judge concluded:

> After careful review of the record, I conclude and find that the testimony and evidence adduced in this case does not support a conclusion that the respondent would have fired Mr. Cooley for the manner in which he communicated his work refusal to his supervisor.

4 FMSHRC at 1048. We conclude that substantial evidence supports the judge's interpretation of the evidence and his rejection of Ottawa's position.

In conclusion, we find substantial evidence in the record to

support the judge s conclusion that Cooley engaged in a protected work refusal and that his termination, based in part on that protected activity, violated section 105(c) of the Mine Act. Ottawa did not prove that it would have discharged Cooley in any event for his unprotected use of profanity and is therefore liable for its unlawful action. 1/

Issues remain concerning the judge's remedial order. The judge ordered Cooley reinstated with back pay but failed to award interest. The back pay award was based on data submitted by the Secretary, which utilized the dryer operator's rate of pay. Ottawa alleges that such calculations are in error because Cooley was a laborer at the time the discharge occurred. The Secretary argues that the award should have included interest.

The record reflects, and the judge held, that Ottawa discriminated against Cooley by discharging him. The Secretary's case did not involve allegations that Cooley's withdrawal of his bid for the operator's job resulted from discrimination. Cooley's testimony shows that he withdrew his bid for numerous reasons which did not involve the lighting procedure. Tr. 44-45, 64-65, Cooley Deposition 3-7. Cooley had voluntarily withdrawn his bid, without retaliation or conflict, before the incident that resulted in his illegal discharge. The record does not support a conclusion that the withdrawal of his bid in any way affected the events

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1/ We note that Ottawa prohibited manual lighting of the dryer after the events in this case. It would thus appear that this dispute will not arise again.

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leading up to or surrounding his discharge. Thus, Cooley had returned to his laborer's job when on May 2, as had happened in the past, he was again directed to manually light the dryer's pilot. Therefore, he should be reinstated to the position and pay rate he would have held but for the discrimination: that of laborer. Despite Ottawa's failure to respond to the judge's direction that the parties address remedy, 2/ it was error for the judge to fashion a remedy so clearly at odds with his findings and the evidence. Accordingly, we vacate the judge's award based on the dryer operator's pay rate and remand to the judge for the limited purpose of calculating a back pay award consistent with Cooley's status as a laborer at the time the unlawful discrimination occurred.

Further, we hold that, under the circumstances of this case, the judge erred in awarding to Cooley an increment of 52% of the back pay award to cover unspecified benefits. It is unlikely that Cooley would be made whole by receipt of a cash payment for loss of pension contributions. Retroactive payment to the appropriate fund, to insure

that there is no break in service or related abrogation of pension rights that would have accrued but for the illegal discharge, would appear to be the appropriate remedy. See NLRB v. Strong, 393 U.S. 357, 358-60 & n. 4 (1968). Different treatment of health care benefits may also be required in order to make Cooley whole. Thus, on remand, the judge is to afford the parties an opportunity to present any argument and additional relevant evidence to insure that the remedy assumes a make-whole character.

The Secretary challenges the failure of the judge to award interest on the back pay. As we held recently, "Unless compelling reasons point to the contrary, the full measure of relief should be granted to a [discriminatee]. ... Included in that 'full measure of relief' is interest on an award of back pay." Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2049 (December 1983)(citations omitted). In Arkansas-Carbona, we established a formula for the computation of interest. In general, we contemplated only a prospective application of the Arkansas-Carbona interest formula. 5 FMSHRC at 2054. However, in this case, the judge failed to award any interest. This is inconsistent with the Mine Act because it penalizes Cooley without cause. Accordingly the case is remanded for computation of interest pursuant to the Commission's interest formula set forth in Arkansas-Carbona.

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2/ Ottawa was ordered by the judge to address the appropriate back pay remedy in its post-trial brief. It failed to do so. A party is precluded by the terms of the Mine Act from raising issues on review that it did not raise below. 30 U.S.C. $ 823(d)(2)(A)(iii)(Supp. V 1981). Were it not for the fact that, as discussed above, the utilization of the dryer operator's rate is totally without support in the record, Ottawa would be bound by the judge's award.

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The final issue in this case is the Secretary's challenge to the judge's severance, without prejudice, of the civil penalty proceeding from the discrimination case. In Arkansas-Carbona we approved the judge's severing of the Secretary's proposal for civil penalty from the underlying discrimination proceeding because the proposal was vague and unsupported by information on the section 110(i) criteria for assessing a penalty. 30 U.S.C. $ 820(i). We held in that case that the Secretary should henceforth include a penalty request in the discrimination complaint, supported by allegations concerning the appropriate factors sufficient to give the operator notice of the basis for the proposed penalty. 5 FMSRHC at 2044-48. We have since promulgated an interim procedural rule requiring this approach. Commission Interim Procedural Rule 42(b).

49 Fed. Reg. 5750 (1984)(to be codified at 29 C.F.R. 2700.42).

The present case was filed before the decision in Arkansas-Carbona and in many respects is similar to that case. The Secretary's complaint made only a naked request "for an order assessing an appropriate civil penalty against the respondent for violating section 105(c) of the Act." The only evidence specifically introduced by the Secretary on the penalty question was a computer printout of Ottawa's citation history and the size of Ottawa's Michigan division. Only in the Secretary's post-hearing brief was a dollar figure for the penalty proposed. These facts reveal even less notice to the operator concerning the penalty issue than was the case in Arkansas-Carbona. As we stated in affirming the judge's actions in that case:

> Because the Secretary did not provide in his complaint sufficient notice to the operator of the amount of the penalty sought and the basis therefor, we cannot say that the judge erred in severing the penalty proposal in order to provide such notice to the operator. Nor do we see the utility of a remand to allow the Secretary to amend his complaint. The judge's approach to the Secretary's inadequate proposal is consistent with the Act's notice requirement....

5 FMSHRC at 2048. There is no reason to take a different approach in this case and we therefore affirm the judge's severance of the civil penalty proceeding.

For the foregoing reasons, we affirm the judge's conclusion that Ottawa violated section 105(c)(1) of the Mine Act by discharging Cooley. Having so found, we order Cooley's immediate reinstatement to his position of laborer if such action has not been previously taken. We vacate the judge's award of back pay at the dryer operator's

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rate and remand for recomputation of back pay at the laborer's rate with reconsideration of the treatment of fringe benefits. The judge shall award interest under the principles and methodology of Arkansas-Carbona. Lastly, we affirm the judge's severance of the request for a civil penalty from the merits of the discrimination case. 3/

Rosemary M. Collyer, Chairman
Richard V. Backley, Commissioner
A.E. Lawson, Commissioner
L. Clair Nelson, Commissioner

3/ Ottawa has challenged the Commission's jurisdiction in this case, citing as its basis for this argument the enactment of H.R.J. Res. 370, Pub. L. No. 91-92, $ 131, 95 Stat. 1183, 1199 (1981), during

the hearing in this case. This enactment was a Continuing Resolution on appropriations, which included a prohibition against expenditures by the Department of Labor's Mine Safety and Health Administration ('MSHA') to enforce the Mine Act in sand, gravel, and crushed stone mining operations. That prohibition only affected MSHA's funding. The Commission is a separate and independent federal agency, not connected to or part of the Department of Labor. At the time of the Resolution's passage, this case had already been filed with the Commission and the Commission had independent authority to resolve the issues. See generally Climax Molybdenum Co. v. MSHA and OCAW, 2 FMSHRC 2748, 2750 (October 1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447 (lOth Cir. 1983). (In July 1982, subsequent to the hearing in this case, H.R.J. Res. 370 was superseded, and MSHA's previous enforcement authority over sand, gravel, and crushed stone operations was re-established.)
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