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PHILLIP CAMERON (MSHA) V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 28, 1985
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of PHILLIP CAMERON
v. Docket No. WEVA82-190-D
CONSOLIDATION COAL COMPANY

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. (1982) ("Mine Act"). The complaint alleged that Consolidation Coal Company ("Consol") violated section 105(c) of the Mine Act when it disciplined Phillip Cameron following his refusal to perform his work assignment. Cameron believed that to carry out the assignment would endanger a miner working with him, although he foresaw no danger to himself. A Commission administrative law judge dismissed the discrimination complaint, concluding that the Mine Act does not extend a protected right to a miner to refuse to perform work when the danger perceived is to the safety of another miner. 4 FMSHRC 2205 (December 1982) (ALJ).

We granted petitions for discretionary review filed by the Secretary of Labor and the United Mine Workers of America ("UMWA"), and heard oral argument. For the reasons that follow, we reverse and remand for further proceedings.

At the time of the events at issue, Phillip Cameron was a haulage motorman at Consol's underground Ireland coal mine. Cameron operated a 27-ton locomotive or "motor" that pulled a train or "trip" of loaded coal cars. Cameron transported the loaded trip from a belt head on a siding in his section, onto and along the main haulageway, to the main dumping point for the mine. Until the time of the events at issue, it had been the procedure in Cameron's section to use a safety switch to prevent loaded cars from rolling back into the mine in the event of an uncoupling. The safety switch would derail uncoupled cars, sending them into the rib or wall of the mine, thereby avoiding a more dangerous "runaway" situation. Cameron was working with another miner, Elmer Aston, who was temporarily assigned to haulage. Aston's

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included helping to gather the empty cars at the dump and composing a new trip of full cars at the siding. He rode with Cameron on the locomotive and was receiving on-the-job training as a motorman.
On Saturday, October 31, 1981, Cameron and Aston were informed by Edward Gibson, their section foreman, that the haulage procedure had been changed. The new procedure involved adding a "trailing motor" to the trips. In the event of an uncoupling from the lead motor, instead of relying on the safety switch to prevent runaways, the trailing motor was to apply its brakes to stop the cars. Gibson explained that a 10-ton trailing motor was to be used. Cameron and Aston told Gibson that they thought a 10-ton motor was too small to control a detached trip. They requested permission to use a larger trailing motor until they had a chance to discuss the matter with the UMWA safety committee at the mine. The mine was not at full production that day and a 50-ton motor was available. Foreman Gibson permitted the 50-ton motor to be used as the trailing motor, but informed Cameron and Aston that the larger motor would not be available on the following Monday, and that a 10-ton trailing motor would be used thereafter.
That night Cameron called David Shreves, a UMWA International safety representative, to inquire about the directed use of a 10-ton trailing motor. According to Cameron, Shreves agreed that a 10-ton motor was inadequate to control disconnected coal cars and indicated that if a problem arose on the job, Cameron should contact the local UMWA safety committee.
At the start of their shift on the following Monday, Cameron and Aston were told by Gibson to use the 10-ton trailing motor. Both men expressed concern for the safety of the procedure, requested that the UMWA safety committee be consulted and refused to perform their assignments.1/ Although as lead motorman Cameron's safety was not threatened by the new procedure, he expressed fear for Aston's safety in the event of an uncoupling.2/ Foreman Gibson sent the men to the shift foreman, Richard Fleming. Attempts by Fleming to persuade the men to use the 10-ton motor were unsuccessful. Mine Superintendent Robert Omear was contacted and he instructed Fleming to prepare a test to demonstrate the safety of the procedure. In the interim, Cameron and Aston performed alternate work.
Tests of the 10-ton motor's braking ability were then conducted in Cameron's section. Cameron, Aston, the UMWA safety committee, and various management officials were present. Cameron and Aston designated the track location they believed to have the steepest grade. The first test was intended to determine if the 10-ton motor could hold a loaded trip on this incline. The trip was stopped on the

incline, the brake was set on the trailing 10-ton motor, and the brake on the lead motor was released. The 10-ton trailing motor held. The second test involved

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1/ While there is some inconsistency in the testimony concerning whether Cameron refused to work or merely requested consultation with the safety committee, the judge found that Cameron refused to perform his assigned work. This finding is not challenged on review and the record supports this conclusion.

2/ Cameron also expressed concern that when a more senior motorman returned from sick leave, he (Cameron) would be riding the trailing locomotive. In this regard, the judge found that Cameron's fears for his own safety were "too remote and speculative" to support the work refusal at issue. Neither the Secretary nor the UMWA take issue with the judge's finding concerning Cameron's personal safety.

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letting the loaded trip drift backwards 10 feet before the trailing motor's brakes were applied. The 10-ton motor stopped the trip. Cameron, Aston, and the safety committee were concerned that the tests were inadequate and they remained dissatisfied with the safety of the procedure. Nevertheless, they thereafter used the 10-ton trailing motor without subsequent work refusals.

Because of their continued concerns, however, on Thursday, November 5th, a further test was performed for state and federal mine inspectors. In this test the loaded trip, with the lead locomotive attached was allowed to coast backwards 100 feet before the 10-ton trailing motor's brakes were applied. The trip stopped within 150 to 200 feet of the point at which braking had commenced. The inspectors were satisfied with the ability of the 10-ton trailing motor to act as a brake. Although Cameron, Aston, and the UMWA safety committee remained unconvinced, Cameron and Aston continued to perform their assigned duties.

On Friday, November 6, Cameron was given a five-day suspension as a result of his refusal on the preceding Monday to perform his assigned duties. (Through a contractual arbitration process, Cameron's suspension was later reduced by one day). Aston was not disciplined.3/

The administrative law judge found that Cameron had engaged in a work refusal and that he was disciplined by Consol because of this refusal. The judge further found that Cameron's belief about the safety hazard posed to Aston was held in good faith and was reasonable. The judge concluded, however, that the Mine Act does not extend protection for a work refusal to situations where a miner himself is not threatened by continued performance of work, but there is a perceived risk to another miner. Finding that Cameron therefore

did not engage in activity protected by the Mine Act, the judge dismissed Cameron's discrimination complaint.

We disagree with the judge's holding concerning the scope of the right to refuse work under the Mine Act. As discussed below, we hold that, in certain limited circumstances, the Mine Act extends protection to a miner who refuses to perform an assigned task because such performance would endanger the safety or health of another miner.

Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicants for employment in any coal or other mine subject to this Act ... because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

3/ The operator's reason for not disciplining Aston was because at the time of the work refusal he was inexperienced and "visibly frightened." Cameron had worked at the mine since 1969.

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30 U.S.C. • 815(c)(1)(emphasis added). The Secretary and the UMWA point to this statutory language as support for their view that the Mine Act protects a miner's refusal to perform work that endangers another miner. Consol asserts that the emphasized text is not even applicable to this case:

> The pronoun "himself" refers to the miner or applicant for employment. The pronoun "other" relates to the representative of miners. Obviously, an individual exercises his own rights, and a representative exercises the rights of those he represents -- in other words, the rights of others.

Reply Brief at 10.

Although we agree with Consol that a "representative" exercises the rights of others, there is nothing inherent in the construction of • 105(c)(1) that limits the ability to exercise statutory rights "on behalf of others" exclusively to representatives of miners. Rather, the phrase logically can be read to have grammatical and substantive application to all three categories of protected persons referred to in section 105(c). Furthermore, in common usage the phrase "on behalf of" is not limited in meaning to actions taken in a representative capacity. Actions on behalf of others also are actions "in the interest of" or "for the benefit of" others. Webster's Third New International Dictionary (Unabridged) 198 (1971). We conclude,

therefore, that the text of • 105(c)(1) supports the extension of protection, in appropriate circumstances, to individual miners exercising statutory rights on behalf of others. Accord, Sec. on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 134 (Feb. 1982).

An individual miner's right to refuse to perform work in conditions posing a danger to himself is itself not found in the text of the Mine Act. It has come to be recognized and accepted, however, in view of clear legislative history, the overall statutory scheme and the underlying purpose of the Act. See, e.g., Sec. 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 (3d Cir. 1981); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982). Accord, Sec. v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), pet. for review filed, No. 84-3427, llth Cir., July 19, 1984; Sec. on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981).

In the present case, the parties cite the same legislative history relied on and discussed in the above-cited work refusal cases, but arrive at different conclusions as to its bearing on the existence of a miner's right to refuse work that threatens the well-being of another miner. See Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-24; 1088-89; 1356 (1978). Consol argues, and the judge agreed, that this legislative history indicates that the right to refuse work is personal to the miner who is endangered. The Secretary and the UMWA argue that the legislative history indicates that a broad reading must be given to the Act's discrimination provisions, and that the right at issue is supported thereby.

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Our review of the cited passages discloses no clear answer to the question before us. The legislative history does not specifically focus on or otherwise address the question of whether a miner may refuse an assignment that jeopardizes a co-worker's safety or health. Because of this lack of focus, we draw no relevant lesson from the use in the legislative history of the singular or plural form of words such as "his", "their", "miner", or "miners" in the discussion of the rights of miners. Id.

This Commission previously has stressed that, due to our adjudicatory function, we must give "cautious review" to any argument that the Commission recognize statutory rights claimed to exist despite "legislative silence" as to the asserted right. Council of Southern Mountains v. Martin County Coal Corp., 6 FMSHRC 206, 209 (February 1984), aff'd sub nom. Council of Southern Mountains v.

FMSHRC, 751 F.2d 1418 (D.C. Cir. 1985). Accord, UMWA v. Secretary of Labor, 5 FMSHRC 807, 810-15 (May 1983), aff'd mem., 725 F.2d 126 (D.C. Cir. 1983). We have further stated that although "[w]e do not quarrel with the general proposition that statutory rights and duties may be judicially inferred ... due respect for the limits of judicial power requires that any such inference be founded on a persuasive textual or legislative indication of the intended presence of the claimed right or duty. ... [T]here must be a persuasive nexus between that which is stated in a statute and that which is inferred from it." Council of Southern Mountains, supra, 6 FMSHRC at 209. We continue our adherence to these sound principles.

Unlike the asserted statutory rights that we rejected in Council of Southern Mountains and UMWA v. Secretary, in the present case we find the persuasive indication of the intended presence under the Mine Act of a miner's right to refuse to perform work that threatens the safety or health of another miner. This indication in part is derived from the "on behalf of others" language in section 105(c), but it is drawn primarily from the presence of the previously recognized statutory right of a miner to refuse to perform work that threatens his personal safety. We have reexamined the same legislative history and statements of Congressional concern requiring recognition of the latter right, and we can find no persuasive rationale for foreclosing the logical corollary at issue here. Certainly, given the force of Congressional concern for protecting the safety of miners expressed in the Mine Act, which concern led to the granting of a right to refuse unsafe work in the first place, it would be anomalous to hold that in exercising that right a miner could consider only a threat to his well-being without regard to whether that threat or another threat jeopardizes the safety or health of other miners.

We recognize the legitimate concerns of Consol regarding the need to maintain its ability to control its workforce effectively, particularly the need to avoid protecting under section 105(c) so-called "sympathy" work stoppages. To this end, we are in agreement with the statement by the Seventh Circuit in Miller v. FMSHRC, supra, that "we are unwilling to impress on a statute that does not explicitly entitle miners to stop work, a construction that would make it impossible to maintain discipline in the mines." 687 F.2d at 196. For this reason, a careful and reasoned examination of the circumstances proffered as justifying the exercise of this right is required whenever it is asserted.

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We believe that the general analytical framework that has been established for evaluating the legitimacy of an individual miner's refusal to work under circumstances claimed to pose a danger to himself, when carefully applied, effectively can be used in

examining a work refusal based on an asserted hazard to another miner. Therefore, we hold that a miner who refuses to perform an assigned task because he believes that to do so will endanger another miner is protected under section 105(c) of the Mine Act, if, under all the circumstances, his belief concerning the danger posed to the other miner is reasonable and held in good faith. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984), citing Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC at 807-12. We emphasize, however, the need for a direct nexus between performance of the refusing miner's work assignment and the feared resulting injury to another miner. In other words, a miner has the right to refuse to perform his work if such refusal is necessary to prevent his personal participation in the creation of a danger to others. Of course, as with other work refusals, it is necessary that the miner, if possible, "communicate, or at least attempt to communicate, to some representative of the operator his belief in the ... hazard at issue," Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397-98 (June 1984) (emphasis added), quoting Secretary on behalf of Dunmire and Estle v. Northern Coal Co., supra, 4 FMSHRC at 133, and that the refusal not be based on "a difference of opinion -- not pertaining to safety considerations -- over the proper way to perform the task at hand." Sammons, 6 FMSHRC at 1398.

It is in this latter regard that the judge's decision causes us some uncertainty. Although the judge did conclude that Cameron's "belief about the safety hazard was in good faith and was reasonable" (4 FMSHRC at 2211), he also found that some part of Cameron's fear was based on the experience level of the trailing motorman, rather than use of the trailing motor itself. 4 FMSHRC at 2216. The judge also stated that "it was clear to me ... that [Cameron] intended to reserve to himself the right to decide whether he would accept any other individual assigned by the operator to be his trailing motorman." Id. These statements conflict with the judge's previous finding concerning Cameron's reasonable, good faith belief that the procedure itself posed a hazard. Also, we are unsure as to what extent the judge's primary conclusion that the Act did not provide the right that we have recognized may have influenced his further findings and ultimate disposition. For these reasons, we deem it appropriate to remand this case for further consideration and findings in light of our decision.

Accordingly the judge's decision is reversed and this case is remanded for further proceedings consistent with this decision.4/

Richard V. Backley, Acting Chairman
James A. Lastowka, Commissioner
L. Clair Nelson, Commissioner

4/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. • 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.
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