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MSHA V. CONSOLIDATION COAL
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FMSHRC-WDC

March 26, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of PAUL SEDGMER, JR.,
EDWARD BIEGA, AND DENNIS GORLOCK

v. Docket No. LAKE 82-105-D

CONSOLIDATION COAL COMPANY

BEFORE: Backley, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by the Secretary of Labor under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 815(c)(2)(1982). The complaint alleges that Consolidation Coal Company ("Consol") unlawfully suspended the complainants for refusing to operate heavy mobile equipment at speeds which they considered to be unsafe. Consol maintains that the complainants were disciplined lawfully for operating their equipment too slowly. Following a hearing on the merits, a Commission administrative law judge dismissed the Secretary's complaint. 6 FMSHRC 1740 (July 1984)(ALJ). For the reasons stated below, we affirm the judge's decision in result.

On April 12, 1982, the complainants returned to Consol's Reclamation Services No. 60 Mine in Ohio to work as pan operators following a three-month layoff occasioned by a lack of reclamation work. 1/ Several days later. on April 15, 1982, complainants Sedgmer and Gorlock were part of a pan crew operating their equipment

in a loading and dumping cycle.

1/ A pan, also called a scraper, is a 95,000-pound vehicle used to scrape earth and haul it to another location.

Robert Busby, the crew's foreman, believed that certain crew members deliberately were working slowly. He asked Mine Superintendent James Taylor to visit the site. Taylor did so and agreed that certain members of the crew were engaged in a production slowdown. Taylor asked several of the pan operators why they were operating their equipment so slowly and whether they could increase their speed. Sedgmer and Gorlock both told him that they were going as fast as prevailing conditions would permit. Following his exchange with Taylor, Gorlock asked an inspector of the Department of Labor's Mine Safety and Health Administration ('MSHA"), who was at the site, how fast he should operate his pan. The inspector responded that each equipment operator must judge proper operating speed based upon the conditions he encounters and the capabilities of his equipment. Complainant Biega was not at work that day.

Not satisfied with the equipment operators' pace of production, Taylor asked Thomas Cyrus, a company reclamation supervisor, to structure a time-motion study. The time-motion study devised was to involve a "deadhead" operation, that is. driving empty pans from one reclamation area to another. Neither the pan operators nor their foreman was to know that the study was being conducted. The deadhead operation was scheduled for Friday, April 23, 1982. The regular pan crew was augmented that morning by bulldozer operators and mechanics. Foreman Busby used a list prepared by Superintendent Taylor to assign operators to the 13 pans. The first four pans were assigned to bulldozer operators and mechanics. The next five pans were assigned to regular pan operators. The last four pans were assigned to the complainants and John Hornyak, a mechanic.

The time-motion study covered almost the entire route of the equipment relocation. No times were recorded for approximately the first mile of the run in order to permit the operators to bring their pans up to operating speed. The total distance considered in the time-motion study amounted to approximately 9.7 miles. The results of the time-motion study showed that the fastest operator completed the run in 28 minutes. The slowest operator in the first nine pans completed the run in 40 minutes. Complainant Biega took 55 minutes to finish, while complainants Gorlock and Sedgmer took 74 minutes and 76 minutes, respectively, to complete the run. 2/

Upon completion of the deadhead operation, the complainants were flagged over to the side of the road. Taylor asked each of the miners two questions: whether there was anything mechanically wrong with his pan and whether there was anything unsafe about his pan. All three of the complainants responded in the negative. Taylor then told the

complainants to remain in their pans. They did so until the end of their shift, a period of about six hours. At that time, they were told to report to Taylor's office at 7:00 a.m. on Monday, April 26, 1982.

2/ The first nine pans completed the run without mishap. Mechanic Hornyak was taken out of the deadhead by Robert Laine, a maintenance supervisor, because he saw the brakes on Hornyak's pan smoking. Not having completed the deadhead, Hornyak's results were not evaluated in the time-motion study.

On April 26, the complainants reported to Taylor's office accompanied by an agent of the United Mine Workers of America ("UMWA"), which represented Consol's employees at the mine. Taylor spoke with each man individually and handed each a notice of suspension with intent to discharge. The letter concluded that each complainant had engaged in a slowdown and had violated a number of employee conduct rules governing insubordination and participation in a work stoppage or slowdown. The complainants, following the grievance procedures contained in the collective bargaining agreement between Consol and the UMWA, appealed the disciplinary action taken against them. The arbitrator who heard the case concluded that the complainants had engaged in a slowdown, but that their actions did not warrant dismissal. Instead, the complainants each received a 30-day suspension without pay or benefits.

Following the arbitrator's decision, the Secretary filed a complaint under the Mine Act on behalf of Sedgmer, Biega, and Gorlock. In his decision, after a hearing on the complaint, the Commission administrative law judge found that during the deadhead run the complainants had taken a "leisurely trip" relying on the belief that only equipment operators rightfully can determine the speed at which they will operate their equipment. 6 FMSHRC at 1744. As a matter of law under the relevant mandatory safety standard, the judge held that the speed at which a pan may be operated properly and safely is not within the sole discretion of the pan operator. 6 FMSHRC at 1745. 3/ The judge indicated that the question of the complainants' good faith belief in a safety hazard was not a controlling factor in this discrimination proceeding. Id. According to the judge, the crucial question was whether Consol, in taking disciplinary action against the complainants, held a good faith belief that the complainants were engaged in a slowdown. Id. The judge found that the results of the time-motion study justified Consol's belief in this regard. Id. Notwithstanding his statements regarding the relevancy of the complainants' belief in a safety hazard, the judge examined the testimony regarding the dust and traffic conditions which the complainants alleged created a hazard. He found that the road conditions encountered by all the operators were approximately the same and not so severe as to justify abnormally slow speeds. 6 FMSHRC at 1743-46. The judge decided the case in Consol's favor and dismissed the Secretary's complaint. 6 FMSHRC at 1746.

On review, the Secretary of Labor challenges the judge's decision on the grounds that it fails to comply with Commission Procedural Rule

3/ 30 C.F.R. $ 77.1607(c) provides

> Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and type of equipment used.

65(a) and that it is inconsistent with the Commission's settled discrimination precedent. 4/ The Secretary argues that the judge's decision provides no clear findings or legal foundation that can be challenged or subjected to meaningful review. Accordingly, the Secretary suggests that the Commission either remand the case to the judge for reconsideration and entry of a decision that meets applicable standards. or that the Commission enter the necessary factual findings based on the record and analyze them in accordance with governing precedent.

We agree that the judge's decision is not a model of clarity. Nevertheless, we have examined carefully the judge's findings and the record as a whole. Based on this review, we are satisfied that the judge entered the minimum necessary findings. We conclude further that, with certain clarifications, his determination on the merits is supported by substantial evidence and is consistent with applicable principles of discrimination law. Compare Gravely v. Ranger Fuel Corp., 6 FMSHRC 799 (April 1984), aff'd sub nom. Gravel v. Ranger Fuel Corp. and FMSHRC, No. 84-1511 (4th Cir. May 24, 1985), with The Anaconda Co., 3 FMSHRC 299 (February 1981).

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786! 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant.

4/ Rule 65(a) provides in pertinent part:

> Form and content of judge's decision. The

> judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order. ...

29 C.F.R. $ 2700.65(a).

Robinette, supra, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the (Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

With respect to the first element of the prima facie case in this proceeding, the Secretary contends that the complainants were engaged in a form of protected work refusal. The Commission has held that a miner's work refusal is protected under section 105(c) of the Mine Act if the refusal is based on the miner's good faith, reasonable belief in a hazardous condition. Pasula supra, 2 FMSHRC at 2789-96; Robinette, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985). See also Miller v. FMSHRC 687 F.2d 194, 195-96 (7th Cir. 1982). The case law addressing work refusals contemplates some form of conduct or communication manifesting an actual refusal to work. See, e.g., Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397 (June 1984). However, the facts of the present case do not reveal an unambiguous refusal to work. Rather, the claim is advanced that the miners chose to perform work in what they believed to be a safe manner, although it was contrary to the manner of operation envisioned by the operator. In Sammons, supra, the Commission indicated that, in appropriate cases, such activity could enjoy the protection of the Act, but that the involved miner must still hold a reasonable, good faith belief in the existence of a hazard, and ordinarily should communicate, or at least attempt to communicate, to the operator his belief in that hazard's existence. Sammons, 6 FMSHRC at 1397-98. We also made clear that "a difference of opinion -- not pertaining to safety considerations --over the proper way to perform [a] task" would lie outside the ambit of statutory protection. Sammons, 6 FMSHRC at 1398.

Thus, the initial issue is whether the complainants' conduct in driving the pans at a speed determined by the mine operator to be unacceptably slow, was predicated on a reasonable, good faith belief that to operate their equipment at a faster speed would have been unsafe. Central to this inquiry are the perceptions of the complainants that prevailing road conditions on April 23, 1982, justified, on safety grounds, their comparatively slow speed of operation. 5/

5/ The judge stated that the complainants' belief in the existence of a hazard is not a "controlling factor" and that it is "the motivation of the employer that is crucial." 6 FMSHRC at 1745. If the judge intended to suggest that the miners' belief in a hazardous condition was legally irrelevant, he erred. Pasula, 2 FMSHRC at 2789-96; Robinette, 3 FMSHRC at 807-12.

In essence, as the judge noted (6 FMSHRC at 1744-45), all three complainants testified to the effect that the pan operator commands an absolute discretion in determining how fast the equipment should be operated. They stated that the deadhead route was dusty and that other haulage traffic was present. All three alleged that these factors necessitated a slow speed, and also that they maintained slow speeds in order to reduce the generation of more dust along the route. All three disclaimed any intent to work slowly in order to preserve work for themselves.

In evaluating the complainants' testimony, the judge found that they had not engaged in a deliberate slowdown designed to hamper Consol's operation and to avoid layoff. 6 FMSHRC at 1744. This language may be read as suggesting that the complainants acted in good faith. Assuming that they held a good faith belief, it is still necessary to establish the separate and conjunctive element that the belief was reasonable. See Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC at 993, 997 (June 1983). Concerning the miners' reasonable belief -- the issue on which we conclude that this case turns -- the judge analyzed and weighed the pertinent evidence and found that the miners' "leisurely trip" lacked a reasonable basis in safety-related concerns. As discussed below, we agree with the judge's disposition of this issue and find it supported by substantial evidence and grounded in credibility resolutions that the judge was best positioned to make.

The judge noted the existence of conflicting testimony regarding the road conditions encountered by the pan operators during the deadhead operation. 6 FMSHRC at 1743-44. Contrary to the testimony of the complainants, four of the operators in the main group of pans testified that dust was not a problem for them. Superintendent Taylor and the other management personnel, who traversed the deadhead route several times observing the pan operators' progress, testified that dust, traffic, and road surface conditions were not significantly different for any of the pan operators. 6 FMSHRC at 1744. The judge found expressly that the road conditions encountered during the deadhead were no more dusty for the complainants than they were for the other members of the pan crew, and that the complainants were not held up by other traffic. 6 FMSHRC at 1744, 1746. In this regard, the judge stated that "there [was] no evidence of a traumatic change in the road conditions" between the beginning and the end of the test. 6 FMSHRC at 1744. He concluded, "I do not find that such extremely dusty conditions existed, and I cannot find that the time and motion study was unfair." 6 FMSHRC at 1746. In reaching these factual findings, it is apparent that the judge credited the relevant

testimony of the operator's witnesses and discounted the complainants' claims of unsafe road conditions. The judge's factual findings, which in part turn on credibility, are supported by substantial evidence and must be upheld. In reaching this conclusion we also rely on the testimony by the MSHA inspector that the overall safety consciousness of the operator was very good, that the haulage road was well-maintained, that management never set a speed as far as he knew, and that he had never issued a citation to one of Consol's operators for

operating at an unsafe speed. Tr. 665-71. All of these facts support the judge's holding that the complainants' belief in the existence of a safety hazard was unreasonable. 6/

Finally, we note also that while the judge observed that the complainants had made safety complaints from time to time, he found that there was no evidence that such complaints had any connection with the disciplinary action taken against them. 6 FMSHRC at 1745. With the exception of Sedgmer, whose testimony that he raised safety concerns prior to the deadhead run was disputed and not credited by the judge, none of the complainants raised any safety concerns with Consol management before, during, or after the deadhead operation. While such communications are not only expected, in ordinary course, in work refusal situations, their absence also lends weight to the conclusion that the disagreement here as to operating speed did not have a sound basis in safety concerns. Sammons, 6 FMSHRC at 1397-98.

We conclude that substantial evidence supports the judge's conclusion, whether express or implied, that the complainants failed to prove that their conduct was premised on a reasonable belief in the existence of a hazard. Thus, they failed to establish protected activity and a prima facie case. The Secretary's complaint was properly dismissed.

6/ We note that while 30 C.F.R. $ 77.1607(c) necessarily delegates to the equipment operator a certain degree of latitude in determining safe operating speeds, this determination is not within his absolute discretion. Compliance with section 77.1607(c) must be judged on an objective, "reasonable person" basis, rather than on the basis of the subjective perceptions of each and every equipment operator. Cf. Great Western Electric Co., 5 FMSHRC 840, 841-43 (May 1983). Just as an MSHA inspector may determine that equipment is being operated at too fast a speed, a determination can also be made by persons other than the equipment operator that the equipment is being driven slower than conditions warrant.

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Accordingly, on the foregoing bases, we affirm the judge's decision in result. 7/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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

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