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ROBERT SIMPSON V. KENTA ENERGY & ROY DAN JACKSON
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FMSHRC-WDC
JULY 8, 1986

ROBERT SIMPSON

v. Docket No. KENT 83-155-D

KENTA ENERGY, INC.

and

ROY DAN JACKSON

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

I

This case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq (1982). 1/ In his decision below, Commission Administrative Law Judge James Broderick concluded

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1/ 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 applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent,

> or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or 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].

30 U.S.C. $ 815(c)(1).

that Robert Simpson was constructively discharged in violation of the Mine Act. 6 FMSHRC 1454 1463-64 (June 1984)(ALJ). The judge found both Kenta Energy, Inc. ("Kenta"),and Roy Dan Jackson liable, and the judge ordered Simpson reinstated with back pay, interest, attorney's fees, and litigation expenses. 7 FMSHRC at 272, 286 (February 1985) (ALJ).

We granted Jackson's petition for discretionary review of the judge's decision. (Kenta did not seek review). The central issue raised on review is whether the judge properly found that Simpson was discriminated against in violation of the Act. The Secretary of Labor participated as amicus curiae on review, and the Commission heard oral argument. For the reasons that follow, we reverse the judge's decision and we vacate his orders requiring Simpson's reinstatement and affording Simpson monetary relief.

II

Robert Simpson was employed as a scoop operator at Kenta's No. 1 Mine (known as the Black Joe Mine) from January 1981 until September 20, 1982. The Black Joe Mine, an underground coal mine, located in Harlan, Kentucky, operated one shift per day and employed eight to ten miners. Jackson was the president of Kenta Energy and was responsible for mining operations and for the "hiring and firing" of miners at the Black Joe Mine. 7 FMSHRC at 277.

For almost two years prior to September 3, 1982, Danny Noe was the foreman and shift boss at the mine. As foreman, Noe was certified to conduct the required preshift and on-shift examinations. See 30 C.F.R. $ 75.303-.304. Noe injured his back on September 3, 1982, and thereafter did not return to work. The judge found that after September 3, and for the remaining time that Simpson worked at the mine, no supervisor was present at the mine and that the required preshift and on-shift examinations were not conducted. 6 FMSHRC at 1456. These findings are supported by substantial evidence.

Sometime after Noe was injured and before Simpson quit work, the mining operations drove right, off the main heading and in the direction of an abandoned mine, commonly referred to as the "old works." Substantial evidence of record indicates that Simpson and other members of the crew became concerned about cutting into the old works and of being exposed to the dangers of "black damp" (oxygen-deficient air), methane gas, or accumulated water. According to Simpson and others, the miners believed that the old works were 300-400 feet from where they had turned right. However, miners Tony

Gentry and Charlie Patterson testified that the mine map indicated that the old works were 850 feet from where the miners had turned right. Tr. 225, 360. Gentry Dep. 13.

Simpson and Robert Nelson, the cutting machine operator, asked Charlie Patterson, who was responsible for ordering supplies and equipment at the mine, to obtain a test auger so that exploratory bore holes could

be drilled in advance of the working face in order to check for black damp, gas, or water. 2/ An auger was ordered but did not arrive until sometime after September 20, 1982.

Simpson testified that after completing his shift on September 20, 1982, he decided not to return to the job because of his concerns about the lack of a foreman and a test auger.

On September 22, Simpson returned to the mine at mid-shift to pick up his personal equipment. Simpson encountered Patterson and told Patterson that he had quit his job because of the lack of a foreman and a test auger. Patterson suggested to Simpson that he return to work, and he would be paid for the whole day. Simpson asked whether there was a foreman or an auger at the mine. When Patterson responded in the negative, Simpson said that "it still wouldn't help me none." Tr. 48, 6 FMSHRC at 1457. Simpson made no attempt to contact Jackson to explain why he had quit. 3/

Approximately one month later, Simpson learned that a mine foreman had been hired and a test auger acquired. Simpson testified that he then attempted to telephone Jackson to ask for his job back but that he was unable to reach Jackson. Tr. 50, 6 FMSHRC at 1457.

Sometime in December 1982, Simpson and Jackson met by chance at an auto parts store. Simpson then told Jackson that he had quit because of concerns about the lack of a foreman and a test auger at the mine. Simpson requested his job back. Jackson replied that there was no present opening at the Black Joe Mine but that Simpson might be able to get a job at another mine. According to Simpson, he also stated, "next time you'll learn not to get a wild hair." Tr. 51, 6 FMSHRC at 1457.

On November 23, 1982, prior to the above encounter with Jackson, Simpson had filed a discrimination complaint under section 105(c) of the Act with the Department of Labor's Mine Safety and Health Administration ("MSHA"). On February 23, 1983, prior to MSHA's determination of the merits of Simpson's claim, Simpson, through private counsel, filed a discrimination complaint directly with the Commission. Following an investigation to determine whether a violation of the Mine Act had occurred, MSHA decided not to prosecute a complaint on Simpson's behalf.

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2/ 30 C.F.R. $ 75.1701 requires the drilling of boreholes to a distance of at least 20 feet in advance of the working face when a working place in a mine approaches within 200 feet of any workings

of an adjacent mine. At the t'.= Simpson quit, the miners had advanced 250 feet in the direction of the old works. Tr. 84, 132, 363. It appears, according to the mine map (Complainant's Exhibit 1), that the drilling of boreholes was not required as of the time Simpson left the job if the miners were mining in any section other than the No. 5 entry.

3/ As noted above, and as the judge found, Patterson was not a supervisor. 6 FMSHRC at 1462.

The administrative law judge first found that Simpson's decision to leave his job represented a protected work refusal. The judge stated:

> [T]here was no qualified supervisor at the mine to perform the required preshift and onshift examinations. [Simpson] and at least some of the other members of the crew believed that they were cutting in the direction of an abandoned mine. The failure to drill test holes in such a situation is hazardous.... [Simpson's] work refusal resulted from a reasonable good faith belief that continuing to work would be hazardous.

6 FMSHRC at 1460. Concerning the requirement that in work refusal situations a miner communicate his safety concerns to the operator prior to or reasonably soon after his work refusal, see, e.g., Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982), the judge found that Simpson had not communicated his safety concerns to Jackson. 6 FMSHRC at 1462. The judge concluded, however, that communication regarding the absence of a foreman and the failure to perform preshift and on-shift examinations at the mine was not necessary because Jackson was deemed to have known about these conditions. The judge stated, "I do not consider that it is necessary in order to invoke the protection of section 105(c), that it be shown that the operator was specifically aware of the reason for a miner's work refusal, if the operator was aware of the hazardous conditions which prompted the refusal...." 6 FMSHRC at 1462.

The judge further determined that Simpson suffered an adverse action, in this case a constructive discharge, because Simpson was subjected to working conditions that were so intolerable that he was forced to quit his job. 6 FMSHRC at 1460-61. The judge found that although Kenta and Jackson were not motivated to maintain the intolerable working conditions because of Simpson's protected activity, their motivation was not determinative as to whether discrimination had occurred. 6 FMSHRC at 1461.

III

On review, Jackson argues that the judge erred in finding that Simpson was not required to communicate his safety concerns to management. Jackson contends,citing Dunmire and Estle, that a miner is required to report a safety hazard prior to a work refusal when possible, but in any event must report the hazard within a

reasonable time after the refusal. Jackson argues that it was reasonably possible for Simpson to communicate his concerns and that the judge erred in finding it would have been futile for Simpson to communicate his concerns to Jackson. Conversely, Simpson and the Secretary assert that there are exceptions to the general communication requirement, futility being one, and that the judge correctly held it would have been futile for Simpson to communicate his safety complaints.

Regarding the issue of constructive discharge, Jackson contends that the judge's holding that Simpson was not required to show that Jackson's conduct was motivated at least in part by Simpson's protected activity was erroneous and contrary to Commission precedent. In response, Simpson and the Secretary argue that it is sufficient for Simpson to demonstrate that Jackson intended him to work under intolerable conditions and that the judge correctly held that Simpson need not prove that Jackson specifically intended that the conditions would cause Simpson to quit. We now turn to a resolution of these issues.

IV

We conclude that the judge erred in finding that Simpson was discriminated against in violation of section 105(c) of the Mine Act. First, we find that the judge erred in concluding that Simpson engaged in a work refusal protected under the Mine Act. Second, we further find that the judge erred in holding that Simpson was the subject of a discriminatory constructive discharge. We begin with the work refusal issue.

Under the Mine Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that 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 (3rd. 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. Robinette, 3 FMSHRC at 818 n.20. 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. See also Donovan v. Stafford Construction 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).

A miner has the right under section 105(c) of the Mine Act to refuse to work, if the miner has a good faith, reasonable belief in

a hazardous condition. Pasula, 2 FMSHRC at 2793, 2796; Robinette, 3 FMSHRC at 807-12. We agree that Simpson had valid safety concerns. It was reasonable for him to fear for his safety in these circumstances. There was no foreman at the mine and no pre-shift or on-shift inspections were performed. These are blatant violations of the Mine Act. However, where reasonably possible, a miner refusing work must ordinarily communicate or attempt to communicate to some representative of the operator his belief that a safety or health hazard exists. Dunmire and Estle, 4 FMSHRC at 133. See.also Miller v. Consolidation Coal Co., 687 F.2d 194, 195-96 (7th Cir. 1982).

The requirement of communication of the safety concerns motivating a miner's work refusal is important. Such communication is a vital aid to both miners and operators in the performance of their duty to prevent and eliminate unsafe and unhealthy conditions and practices in the country's mines. 30 U.S.C. $ 801(e). As such, it is a requirement "well suited to promoting the Act's fundamental objective of promoting mine safety and health." Miller, supra, 687 F.2d at 196. See also Dunmire and Estle, 4 FMSHRC at 133.

Exceptions to the communication requirement exist but are limited. It may not be reasonably possible for a miner to communicate his safety concerns in all instances; exigent circumstances may prevent such communication. However, absent such exceptional circumstances, a miner must notify an operator of the hazards he perceives before his work refusal or reasonably soon thereafter. Dunmire and Estle, 4 FMSHRC at 134.

Simpson did not communicate his safety concerns to anyone in authority prior to quitting his job on September 20, or even reasonably soon thereafter. Although his ability to do so concededly was complicated by the absence of any supervisor at the mine site on a regular basis, the judge found, and the parties do not dispute, that Simpson lived approximately four miles from Jackson, that Simpson had known Jackson for about 15 years, and that Simpson previously had gone to Jackson's home on three or four occasions to borrow money from Jackson. 6 FMSHRC at 1457. While the judge found that on the day of the work refusal Jackson and other management personnel were not at the mine site, the record does not reveal any reason preventing Simpson from thereafter otherwise communicating his safety concerns to Jackson. Only after Simpson met Jackson by chance more than two months after Simpson had quit work, and after Simpson knew that the conditions about which he was concerned had been corrected, did Simpson tell Jackson that he had quit because of the absence of a foreman or a test auger at the mine.

The judge excused Simpson's failure to communicate his safety concerns regarding the absence of a foreman and the failure to perform the required examinations because "communication ... would have been futile." 6 FMSHRC at 1462. We disagree. The record clearly indicates that Simpson made no reasonable attempt to communicate his concerns to Jackson. We cannot simply presume that such communication would have been futile. The case law construing the right to make safety complaints and to refuse work under the Mine Act is premised on the belief that communication of hazards and responses to such hazards are the means by which the Act's purposes

will be attained. Dunmire and Estle, 4 FMSHRC at 133-135; Secretary of Labor ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993 (June 1983); Secretary on behalf of Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 126 (February 1982). Once a reasonable, good faith fear of a hazard is expressed by a miner, an operator has an obligation to address the perceived danger. Pratt, 5 FMSHRC at 133. See also Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472=73 (llth Cir. 1985). Simpson's failure to communicate his fears concerning

the lack of a test auger negated the opportunity for Jackson to address those fears by explaining the exact location of the old works. Even assuming, as the judge did, that Jackson was aware of the absence of a foreman and the failure to conduct the required pre-shift and on-shift examinations, we cannot presume that Jackson would have taken no action had Simpson communicated his concerns to Jackson.

Possible operator awareness of a hazardous condition does not mean that upon complaint by a miner an operator will continue to ignore its duty to correct the hazard. In fact, communication from a miner often provides the impetus for an operator to act and for this reason miners were given such rights in the Mine Act. Here, Simpson had a reasonable basis for believing his working conditions were hazardous. Instead of following any of the statutory mechanisms available for addressing his fears, e.g., requesting an MSHA inspection under section 103(g)(1) of the Act, 30 U.S.C. $ 813(g)(1), or communicating his fears to the operator, he simply chose to quit his job. His right to quit in such circumstances is clear, but in so doing he did not trigger any protection under the Mine Act.

V

Assuming arguendo that Simpson engaged in protected activity, we further conclude that the judge erred in finding that Simpson was constructively discharged in violation of the Mine Act. The Commission first addressed the doctrine of constructive discharge in Rosalie Edwards v. Aaron Mining, Inc., 5 FMSHRC 2035 (December 1983). There the Commission held that in order to establish a successful claim of constructive discharge, the miner must show that in retaliation for protected activity by the miner the operator created or maintained intolerable working conditions in order to force the miner to quit. Id. at 2037. Simpson and the Secretary argue here that establishing discriminatory motive is not always required, that it may be presumed. They cite decisions construing Title VII of the Civil Rights Act, 42 U.S.C. $ 2000e et seq., and urge us to apply this rationale to the Mine Act. See e.g., Goss v. Exxon Office Systems Co., 747 F.2d 885, 887-88 (3rd Cir. 1984); Calcote v. Texas Educational Foundation, 578 F.2d 95 (5th Cir. 1978); Muller v. U.S. Steel Corp., 509 F.2d 923, 929 (lOth Cir. 1975), cert.denied, 423 U.S. 825 (1975). This same argument was urged by the Secretary and rejected by the Commission in Edwards. We recognize the existence of case law under Title VII not requiring proof of retaliatory motive. We believe, however, that section 105(c) of the Mine Act essentially is an anti=retaliation provision and that the theory of constructive

discharge adopted in Edwards is the appropriate approach to be followed under the Mine Act. The Secretary appears to have acknowledged that this determination falls within the Commission's discretion. Or. Arg. Tr. 64-65. See Metric Constructors, supra, 766 F.2d at 472-73; Donovan v. Stafford Construction Co., supra, 732 F.2d at 959.

We find no evidence in this record that Kenta or Jackson were motivated to create or to maintain the conditions about which Simpson was concerned because of the exercise by Simpson of any rights protected

by the Mine Act. Cf. Sure-Tan, Inc. v. NLRB 467 U.S. 883, 894-96 (1984); NLRB v. Haberman Construction Co., 618 F.2d 288, 296 (5th Cir. 1980) modified, 641 F.2d 351, 358 (5th Cir. 1981)(en banc); J.P. Stevens and Co. v. NLRB 461 F.2d 490, 494 (4th Cir. 1972). Therefore, we conclude that Simpson was not the victim of a constructive discharge, and the judge's contrary finding is reversed. 4/

Accordingly, we reverse the judge's finding of discrimination and vacate his award of back pay, interest, attorney's fees, and incidental expenses.

VI

On review, Simpson has moved to reopen the proceedings to determine whether Black Joe Coal Company ("Black Joe") is a legal successor to Kenta, and thus, whether Black Joe should be held liable for Kenta's liability. Simpson relies on the fact that only Jackson petitioned the Commission for review of the judge's decision imposing liability on Kenta and Jackson. Simpson claims that the judge's order therefore is final insofar as Kenta is concerned. The motion is denied. In his petition for review Jackson raised the central issue of whether Simpson was discriminated against in violation of the Act. We have concluded that no discrimination occurred in conjunction with Simpson's leaving the job. Because there is no violation of the Act, there is no liability on behalf of any respondent. In these circumstances, Simpson's argument that he has a binding judgment against Kenta because Kenta did not separately seek review is rejected. See e.g., Arnold Hofbrau, Inc. v. George Hyman Construction Co., Inc., 480 F.2d 1145, 1150 (D.C. Cir. 1973). 5/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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4/ The administrative law judge also concluded that respondents' refusal to rehire Simpson constituted "a further violation of $ 105(c)

of the Act." 6 FMSHRC at 1464. We find insufficient record support for this conclusion and therefore reverse.

5/ Chairman Ford did not participate in the consideration or decision of the merits of this case or the subsequent Motion to Reopen.

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