CCASE:
MSHA & UMWA V. EMERALD MINES
DDATE:
19860731
TTEXT:

FMSHRC-WDC
July 31, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of MICHAEL HOGAN
and ROBERT VENTURA

and Docket No. PENN 83-141-D

UNITED MINE WORKERS OF AMERICA

v.

EMERALD MINES CORPORATION

BEFORE: Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case involves a discrimination complaint brought by the Secretary of Labor on behalf of miners Michael Hogan and Robert Ventura, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)(the "Mine Act"). The complaint alleges that Emerald Mines Corporation ("Emerald") unlawfully suspended the complainants in violation of section 105(c)(1) of the Mine Act for refusing to ride the mine's main hoist elevator. 1/ The complainants alleged that the main hoist elevator was in an unsafe condition. Following a hearing on the merits, Commission

---

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

(footnote 1 continued)

Administrative Law Judge George Koutras dismissed the complaint. 5 FMSHRC 2174 (December 1983)(ALJ). The Commission granted the petitions for discretionary review filed by the Secretary and the United Mine Workers of America ("UMWA") and heard oral argument. For the reasons that follow, we reverse the judge's dismissal of the discrimination complaint, conclude that Emerald unlawfully suspended the complainants, and remand to the judge for consideration of appropriate relief.

The events at issue involve the main elevator at Emerald's No. 1 Mine, a large underground coal mine located in southwestern Pennsylvania. At the time of these events, the mine was operating three shifts daily. Hogan and Ventura were working underground on the 4:00 p.m. to midnight shift. Neither miner had any prior disciplinary history. Both were considered good and conscientious employees by their shift foreman, Denny Smith.

The usual route underground and into the mine is via an enclosed elevator that carries a maximum of 24 persons. The elevator shaft is 600 feet deep. The elevator normally runs on automatic mode at a speed of 900 feet per minute.

On December 27, 1982, there were mechanical problems with the elevator. At about 5:30 p.m., Denny Smith rode the elevator underground. After he exited, the elevator did not return automatically to the surface. The elevator constituted one of two required fresh air escapeways. If the elevator could not be repaired within 30 minutes the miners had to be given the option of leaving the mine by the remaining fresh air escapeway--up the slope. Therefore, all of the miners underground, including Hogan and Ventura, were notified of the elevator malfunction. Denny Smith called the underground maintenance foreman who repaired the elevator.

Ventura testified that he was told by Mark Sunyak, a miner who also worked on the 4:00 p.m. to midnight shift and who used the elevator to leave the mine following its repair, that the elevator had not leveled properly at the bottom of the shaft. On the midnight shift of December 28, 1982, the elevator malfunctioned again. Maintenance representatives from Houghton Elevator Company were called to make repairs, which took some t'.= and delayed the entrance of the day shift employees until approximately 9:45 a.m.

---

Footnote 1 end.

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).

The elevator malfunctioned again on December 28 when at 3:00 p.m. the doors did not open. Jackie Smith, a maintenance foreman, was called to repair the elevator. He corrected the problem by recycling the power and running the elevator up and down several times.

Later that day, at about 3:50 p.m., Hogan, Ventura, and other afternoon shift miners were standing on the elevator platform when the doors opened and a group of day shift miners exited. Hogan and Ventura testified that the miners exiting the elevator appeared highly agitated, excited, and shaken and were talking about an elevator malfunction that occurred on their ride up. Miners testified that the elevator cage was proceeding up the shaft at the normal speed (900 feet per minute) when, at about 100 feet from the top, it stopped suddenly. The cage appeared to some to fall, stop, start back up, and stop a third time. Those inside the elevator telephoned the elevator control room and Jackie Smith brought the elevator up manually at inspection speed (180 feet per minute). Miners who experienced the elevator incident testified that the stopping and dropping of the elevator jarred them and caused their knees to buckle. Some feared that the cage might fall to the bottom of the shaft, seriously injuring them.

One of the miners on the elevator, Jerry Kessler, testified that immediately upon leaving the cage he advised Denny Smith, the shift foreman, that "there [was] something wrong with the cage, it dropped." Tr. 207, 213. Kessler stated that Smith did not appear to hear him although they were only one and one half feet apart. Kessler proceeded to tell every man he saw on his way to the bathhouse about the incident including Martin Willis, the UMWA's safety committeeman. Kessler told Ventura, "If anybody rides that damn elevator, they are a fool because somebody is going to get killed." Tr. 113.

Willis proceeded to the mine foreman's office to see what management intended to do about the incident. Meanwhile, Jackie Smith ran the empty elevator up and down without a recurrence of the incident and the afternoon crew was ordered to enter the mine via the elevator.

As the afternoon shift began caging down, Hogan and Ventura separately approached management representatives and told them that they believed that the elevator was unsafe and that they would not cage down. Ventura testified that he asked Alan Hager, the mine foreman, who had arrived at the elevator platform, whether he was aware of the problems with the elevator. Hager responded that there was nothing wrong. Hogan testified that he told Hager he did not

believe the elevator was safe and that he was invoking his individual safety rights. Both Hogan and Ventura also asked Jackie Smith about the malfunction of the elevator and testified that Smith told them he did not know what was wrong with the elevator and could not guarantee that it was safe. However, Smith testified that he told Hogan and Ventura that he had not found anything wrong with the elevator and that it was "the safest piece of equipment at the mine." Tr. 386.

Hogan and Ventura were called to mine foreman Hager's office where they met with Hager and other management officials. Hager offered to take the two miners into the mine by either the slope car or by running the elevator manually. When safety questions were raised about these options, Hager withdrew the offer to transport the miners in by the slope car. The miners were then assigned alternate work at surface areas of the mine, which they performed.

Hager then called the state and federal inspectors, who arrived at about the same time as John Lusky, a mechanic from the Houghton Elevator Company who had been called by management to examine the elevator. Hager had previously told Hogan and Ventura that, depending on the result of the investigation of the elevator by the inspectors, they might be disciplined. A+ about 8:00 p.m., after testing the elevator and replacing several parts, Lusky advised the inspectors, Hager and other management personnel that he considered the elevator to be safe and that none of the elevator safety features were defective. The inspectors, who also examined the elevator, did not issue any citations for safety violations.

Hager then summoned Hogan and Ventura to his office. He told them that in management's view nothing was unsafe about the elevator at the time of their refusal to cage down and that, therefore, they would receive a five-day suspension. Hager's stated reason for the suspensions was that the miners had interfered with management's right to direct the workforce and that the complainants had acted "arbitrarily and capriciously and not in good faith" in refusing to ride the elevator. Tr. 55, 125. 2/

Hogan and Ventura subsequently filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging discrimination under $ 105(c)(1) of the Mine Act. Following an investigation by MSHA, the Secretary filed with the Commission a discrimination complaint on behalf of Hogan and Ventura.

After a hearing on the merits, the Commission judge concluded that the complainants' work refusals were not protected by the Mine Act and that the five-day work suspensions did not constitute unlawful retaliation under section 105(c). In reaching this conclusion, the judge focused solely upon the so-called "drop incident" of December 28. He concluded that the earlier mechanical problems with the elevator could not serve as a basis for a good faith, reasonable belief that the elevator was hazardous. 5 FMSHRC at 2211. The judge found that at the time of their work refusal on December 28, the complainants did not possess a good

_____

2/ Hager testified that under the Bituminous Coal Wage Agreement of 1981 (the "Contract") a dispute between miners and management may be resolved by calling in state and federal mine inspectors. According to Hager, if the inspectors find that the conditions complained of do not constitute a violation of any safety standards, management is free under the Contract to discipline the miners.

faith, reasonable belief that riding the elevator was hazardous. The judge was influenced by what he termed the complainants' lack of "credible first-hand information indicating that the elevator would more than likely fall to the bottom of the shaft if they were to ride it." 5 FMSHRC at 2212. The judge further found that the miners had failed to communicate the "drop incident" to management as the reason why they refused to ride the elevator. 5 FMSHRC at 2210, 2213. Additionally, the judge was impressed with what he viewed as Emerald's positive and affirmative steps to address the elevator problems. 5 FMSHRC at 2206.

On review, the Secretary and the UMWA argue that in evaluating the complainants' good faith, reasonable belief that the elevator was hazardous, the judge incorrectly applied an "objective" test rather than the applicable test -- whether the miners had a reasonable basis for believing that riding the elevator was hazardous. They also argue that the judge erred in focusing solely upon the "drop incident." They assert that the prior malfunctions of the elevator were known to Hogan and Ventura and influenced their decision on December 28 to refuse to ride the elevator. They further contend that Hogan and Ventura adequately communicated their safety concerns to management.

Conversely, Emerald accepts the judge's emphasis of the "drop incident" as the focal point for analysis of the complainants' good faith, reasonable belief that the elevator was hazardous, and argues that the judge correctly found that Hogan and Ventura did not adequately communicate that incident as the basis for their work refusals. Alternatively, Emerald contends that the complainants' work refusals should be viewed as continuing ones during which Emerald provided assurances and took remedial action so as to remove the refusal from the Act's protection.

We conclude that the judge erred in finding that Hogan and Ventura were not discriminated against in violation of section 105(c) of the Mine Act. First, we find that the judge erred in concluding that the complainants did not possess a good faith, reasonable belief that the elevator was hazardous. Second, we find that the judge erred in concluding that the miners did not communicate sufficiently their safety concerns to Emerald. We begin with the issue of the miners' good faith, reasonable belief.

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 activity, and (2) it would have taken the adverse action in any event for the unprotected activity 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 a 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 work, if the miner has a good faith, reasonable belief in a hazardous condition. Pasula, 663 F.2d at 1217 n. 6, 1219; Miller v. Consolidation Coal Co., 687 F.2d 194, 195 (7th Cir. 1982); Secretary of Labor on behalf of Phillip Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (March 1985), on remand 7 FMSHRC 1682 (October 1985), aff'd sub. nom. Consolidation Coal Co. v. FMSHRC and Secretary of Labor on behalf of Phillip Cameron, No. 85-2369, slip op. at 8-9 (4th Cir. July 8, 1986); Robinette, 3 FMSHRC at 807-12. However, this right to refuse to work is not unconditional. Where reasonably possible, a miner refusing work should ordinarily communicate or attempt to communicate to some representative of the operator his belief that a safety or health hazard exists. Simpson v. Kenta Energy Inc., KENT 85-155-D, slip op. at 5-7, 8 FMSHRC (July 8, 1986); Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982); See also Miller 687 F.2d at 195-96.

Initially, we conclude that the judge's view regarding the scope of the complainants' safety concerns is overly narrow and unsupported by the record. The record clearly reveals that from December 27 up to the complainants' refusal to ride the elevator on December 28, the elevator malfunctioned several times. The "drop incident" which preceded the complainants' refusal to ride was but the latest in a series of malfunctions. Hogan and Ventura were aware of these incidents. In concluding that the elevator problems on December 27 could not serve as a basis for a good faith, reasonable belief that the elevator was hazardous at the time of the work refusal on December 28, the judge emphasized the fact that the complainants knew that the earlier problems had been corrected. 5 FMSHRC at 2210-11. Regardless of whether the complainants knew that the prior problems had been corrected, the problems provided a valid basis for the complainants' safety concerns in light of the subsequent occurrence of further problems. The elevator malfunctions created an atmosphere in which the complainants understandably distrusted the elevator's reliability, and we conclude that the prior problems logically cannot be severed

from the overall mood of distrust which, for the complainants, culminated in the "drop incident."

With this in mind, we find that it is clear from the overwhelming weight of the evidence that the complainants possessed a good faith belief that riding the elevator would be hazardous. A good faith belief simply means an honest belief that a hazard exists. The purpose of this

requirement is to remove from the Mine Act's protection work refusals involving fraud or other forms of deception. Robinette, 3 FMSHRC at 808-10. Hogan and Ventura knew that the elevator had malfunctioned on their December 27 shift. They were told of subsequent malfunctions. They observed and talked to miners who were involved in the so-called "drop incident" immediately after it happened. Thus, they had sufficient reason to have a good faith belief that the elevator was defective at the time they refused to ride it. There is nothing in the context of events to suggest an ulterior motive. Nor does the record indicate any evidence in either employees' personnel history suggesting a likelihood of pretext or ulterior motive for their actions. Equally important, each complainant initially acted individually, without knowledge of the intentions of the other. We therefore hold that Hogan and Ventura had a good faith belief that it would be hazardous to ride the elevator and that the judge's contrary conclusion is not supported by substantial evidence.

In addition to being held in good faith, the miner's belief in a hazard must be reasonable. Unreasonable, irrational, or completely unfounded work refusals do not warrant statutory protection. Robinette, 3 FMSHRC at 811. This requirement necessitates a showing that the miner's honest perception of a hazard be a reasonable one under the circumstances. Cameron, No. 85-2369, slip op. at 8-9 (4th Cir. July 8, 1986); Robinette, 3 FMSHRC at 812; Haro v. Magma Copper Co., 4 FMSHRC 1935, 1944 (November 1982). Thus, reasonableness is to be evaluated from the viewpoint of the refusing miner at the time of refusal. Objective proof that an actual hazard existed is not required. Robinette, 3 FMSHRC at 810; Haro, 4 FMSHRC at 1943-44; Pratt v. River Hurricane Coal Co., Inc., FMSHRC 1529, 1533-34 (September 1983). 3/

In finding that the complainants did not possess a reasonable belief that the elevator was hazardous to ride, the judge made errors of law and of fact and applied an objective standard. The judge held that Hogan and Ventura knew, prior to their refusal, of the efforts of Hager to locate and correct the problem with the elevator, including test runs of the elevator with the union president on board. The judge also held that the complainants knew that Hager had summoned state and federal inspectors and that, prior to their refusal, Hogan and Ventura had received Hager's offer to take them into the mine by operating the elevator on manual mode. 5 FMSHRC at 2209. The record contains uncontroverted evidence that the complainants had, at best, only limited knowledge of inconclusive testing that had been performed before the afternoon shift began to cage down in the elevator. At the

time of his

_____

3/ In interpreting the Contract to permit the discipline of a miner when the complained of conditions are found not to be violations of mandatory safety standards, Emerald runs the risk of imposing discipline in violation of section 105(c) of the Mine Act. See Oral Arg. Tr. 47-48. The fact that the perceived hazard does not violate a mandatory health or safety standard does not mean the miner lacked a good faith, reasonable belief in the hazard at the time of his refusal. Robinette, 3 FMSHRC at 411-12.

refusal to board the elevator, Hogan was not aware of any steps taken by management to locate the reason for the elevator drop, or of any repairs or maintenance done on the elevator after the incident. Hogan knew only that the empty cage had been run up and down a few times. Further, Hogan was not aware that the union president had ridden in the cage or that the Houghton mechanic had been summoned. Similarly, at the time of his refusal, Ventura was unaware of any testing of the elevator. He knew only that management was unaware of the source of the elevator's problems and had summoned the Houghton mechanic. Moreover, there is no question but that Hager's offer to manually cage down the complainants and Hager's call to state and federal inspectors came after Hogan and Ventura refused to ride the elevator. Hager's testimony alone makes this clear. 4/

In evaluating the reasonableness of the complainants' belief that the elevator was hazardous, the judge concluded that the malfunctions of the elevator prior to the "drop incident could not serve as a basis for a reasonable belief that the elevator was hazardous. The judge noted that repairs had been made. 5 FMSHRC at 2211. While it is true that the complainants were aware that the problem of December 27 had been corrected, they did not know whether any subsequent repairs had been made. More importantly, given the fact that the complainants heard from the other miners that the elevator continued to malfunction, it was reasonable, regardless of the repairs to the elevator, for the complainants to assume that the elevator was experiencing continuing and repeated safety problems, the underlying causes of which were unknown.

On December 28, Hogan actually saw the miners as they got off the elevator or immediately after they got off the elevator. His first hand impression was that they were agitated and that a few of them were so upset that they were "really scared" and "actually white." Tr. 34. Both Hogan and Ventura heard a number of miners report that something serious had just happened on the elevator. These observations corroborated and heightened their already existing concerns regarding the safety of the elevator. Given the complainants' knowledge of the elevator's prior malfunctions and the complainants' observation of and discussions with miners immediately after the "drop incident," we conclude that the great weight of the evidence establishes that the complainants did possess a reasonable belief that riding the elevator would be hazardous. The complainants were not required to be presented with "first-hand information indicating that the elevator ... would more than likely fall to the bottom of the shaft if they were to ride on it." 5 FMSHRC at 2212.

We recognize that management attempted to address complainants' fears. Hager talked to the complainants in his office. Hager initially

_____

4/ The judge was impressed that the inspectors did not issue any citations and that no cause for the elevator stopping was discovered. 5 FMSHRC at 2209. The fact that a subsequent investigation fails to confirm an actual violative condition does not vitiate the reasonableness of a miner's work refusal. Robinette, 3 FMSHRC at 411-12.

told the complainants that they could enter the mine via the slope, which offer was later retracted. He also offered to have the elevator operated manually. The Houghton mechanic was called. Jackie Smith, the maintenance foreman, also talked to Hogan and Ventura after their initial refusal. The judge found that Smith told the complainants that he did not find anything wrong with the elevator and that it was safe.

A continuing work refusal in the face of corrective measures taken by management at some point loses the protection of the Mine Act. Bush v. Union Carbide Corp., 5 FMSHRC 993, (June 1983). However, we conclude that Hager and Smith did not convey sufficient information to the complainants to allay their reasonable fears. They were told by Hager and Smith that the elevator was safe, but they were not told what caused the malfunctions or why it was now considered safe. They were told that the mechanic from the elevator company was coming to inspect the elevator, but when they were told the results of his inspection they were also simultaneously informed that they were being suspended. They were told that they could enter the mine by going down the slope, but this offer was withdrawn. They were told that they could enter the mine while the elevator was operated manually, but manual operation of the elevator would not assure its safety if something other than the elevator's electric controls was defective. Finally, although Hogan learned, following his refusal to ride the elevator, that test runs of the elevator had been made with an empty cage, he reasonably discounted these tests because of the lack of weight on the elevator.

Not only must a miner have a good faith, reasonable belief in the hazard that is the basis for his work refusal, "where reasonably possible, a miner refusing work should ordinarily communicate ... to some representative of the operator his belief in the safety or health hazard at issue." Dunmire and Estle, 4 FMSHRC at 133. See also Simpson, KENT 85-155-D, slip op. at 5-7, 8 FMSHRC (July 8, 1986). The judge found that the only basis for the complainant's work refusal was the "drop incident" and that Hogan and Ventura "did not communicate the asserted elevator 'dropping' to anyone at anytime prior to their work refusal." 5 FMSHRC 2213. Like the judge's analysis of the reasonableness of the complainants' refusal, we find his analysis of the communication requirement too restrictive.

In Dunmire and Estle, 4 FMSHRC at 134, the Commission stated, "[0]ur purpose is promoting safety, and we will evaluate communication issues in a common sense, not legislative manner. Simple, brief communication will suffice...." In articulating a safety complaint, a

miner need not make a detailed statement as to the nature of the hazard, as long as the operator has notice of the hazard that the miner believes exists. The goal is to adequately apprise the operator so that it may address the perceived hazard. Simpson, KENT 85-155-D, slip op. at 6, 8 FMSHRC (July 8, 1986). Thus, the communication must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used and the results, if any, that flow from the communication.

The record indicates that Hogan and Ventura individually advised Denny Smith and Alan Hager that they did not believe the elevator was safe. Smith and Hager confirmed that the complainants expressed concern to them about the safety of the elevator. It is clear that the complainants' questions and statements stimulated Emerald to act. Emerald understood the substance of the complainants' concerns and moved to address the hazard the complainants perceived. Hager summoned a mechanic from Houghton to inspect the elevator. He also called the state and federal mine inspectors who reviewed the elevator's operation. Consequently, in these circumstances, we conclude that the complainants' statements and questions regarding the safety of the elevator were sufficient to satisfy the obligation of a miner who refuses work to articulate the reason for his work refusal.

Thus, we hold that the complainants had a good faith, reasonable belief that riding the elevator was unsafe, and that they adequately communicated their safety concerns to mine management. We further conclude that the complainants' initial refusal to ride the elevator was protected by section 105(c) of the Mine Act, and that before their fears could be sufficiently allayed by management they were suspended for their protected activity. The judge's contrary conclusions are not supported by substantial evidence and are contrary to law.

There is no dispute that the five-day suspension of Hogan and Ventura was motivated by the complainants' protected activity. Accordingly, we reverse the judge's finding that no violation of section 105(c) occurred and we remand for determination of appropriate remedies. 5/

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

---

5/ Chairman Ford and Commissioner Backley did not participate in the consideration or decision of the merits of this case.

~1076
Distribution

Linda Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

R. Henry Moore, Esq.
Rose, Schmidt, Chapman, Duff & Hasley
900 Oliver Bldg.
Pittsburgh, Pennsylvania 15222

Mary Lu Jordan, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge George Koutras
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041