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MSHA (JOHN BUSHNELL) V. CANNELTON INDUSTRIES
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FMSHRC-WDC
February 26, 1988

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, on behalf
of JOHN W. BUSHNELL

v Docket No. WEVA 85-273-D

CANNELTON INDUSTRIES, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint filed by the Secretary of Labor on behalf of John W. Bushnell pursuant to the Federal Mine Safety and Health Act of 1977. 30 U.S.C. $801 et seq. (1982) ("Mine Act" or "Act"). The complaint alleges that Cannelton Industries, Inc. ("Cannelton"), discriminated against Bushnell in violation of section 105(c)(1) of the Mine Act when, after a job transfer that occurred as part of a company-wide work force reduction and realignment, he was paid at a rate lower than the rate he was receiving immediately prior to his transfer. 1/ This job transfer occurred several years after his initial

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1/ Section 105(c)(1) provides in relevant part:

> 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 ... in any coal or other mine... because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant

> to section [101] of this [Act] ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this [Act].

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

30 C.F.R. Part 90 contains mandatory health standards published pursuant to section 101 of the Mine Act. 30 U.S.C. $ 811. Under

transfer without loss of pay to a low dust job pursuant to 30 C.F.R. Part 90. Commission Administrative Law Judge William Fauver determined that Cannelton unlawfully discriminated against Bushnell when it failed to compensate him at the same rate of pay after his transfer as he had received before the transfer. Judge Fauver awarded Bushnell back pay of $161.14 plus interest on that sum and assessed Cannelton a civil penalty of $25 for the violation of section 105(c)(1) the Act. 8 FMSHRC 1607 (October 1986) (ALJ). We conclude that Cannelton's failure to retain Bushnell's previous rate of pay when Bushnell was transferred to a lower paid position for reasons unrelated to dust exposure, as part of a legitimate work force realignment, did not violate rights granted by the Mine Act or Part 90. Accordingly, we reverse.

I.

The parties waived an evidentiary hearing and stipulated to the facts. 8 FMSHRC at 1607-1608. When this case arose in 1984, Bushnell had been employed by Cannelton for approximately 17 years as a miner at its Pocahontas No. 3 and No. 4 underground coal mines in West Virginia. In 1972 Cannelton was informed that Bushnell had evidence of pneumoconiosis and was eligible for transfer to a low-dust job pursuant to section 203(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $ 801 et seq. (1976) (amended 1977) ("Coal Act"), and 30 C.F.R. Part 90 (1972). 2/ However, Bushnell deferred the exercise of his transfer rights until 1980 when he was placed as a Part 90 miner in the low-dust surface position of dispatcher. From September 1980 through September 16, 1984, Bushnell earned $113.28 for an eight-hour shift as a dispatcher.

The parties stipulated:

> On September 17, 1984 the work force of the Pocahontas Nos. 3 and 4 mines was reduced due to economic conditions. The remaining employees were realigned in accordance with [Cannelton's] labor agreement. On September 17, 1984 [Bushnell]

Part 90, a miner who, in the judgment of the Secretary of Health and Human Services, has evidence of the development of pneumoconiosis (Black Lung disease) is given the option to transfer, without loss of pay for such work, to another position in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m3"). 30 C.F.R. $$ 90.3 & 90.103. See generally Gary Goff v.

Youghiogheny & Ohio Coal Co., 7 FMSHRC 1776, 1778-82 (November 1985) ("Goff I").

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2/ Section 203(b) of the Coal Act, 30 U.S.C. $ 843(b) (1976), providing for the transfer of miners evidencing pneumoconiosis, was carried over in 1977 as section 203(b) of the Mine Act. 30 U.S.C. $ 843(b) (1982). The original Part 90 regulations implementing the Coal Act's statutory transfer right were replaced by the current Part 90 regulations in 1980. The present Part 90 regulations also supersede section 203(b) of the Mine Act. 30 U.S.C. $811(a); 30 C.F.R. $90.1.

> was realigned from his dispatcher position to general inside laborer as part of the general realignment noted above.

Stipulations No. 6 & 11 (p.2)(July 15, 1986). It is undisputed that the transfer was not exposure-related, was the result of a bona fide work force reduction and realignment, and was not motivated by Bushnell's Part 90 status. There is no evidence in the record that the new position subjected Bushnell to dust levels in excess of those permitted under Part 90. When Bushnell was transferred, his company occupation code was changed and his pay was reduced to that of the laborer's position, $104.78 for an eight-hour shift. On October 1, 1984, the Pocahontas mines were closed and the remaining employees, including Bushnell, were laid off. Bushnell incurred lost wages totaling $161.14 as a result of his transfer to the laborer's position.

Bushnell filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he had been illegally discriminated against in contravention of his Part 90 pay protection rights. Following MSHA's investigation of the complaint, the Secretary of Labor filed a discrimination complaint with this independent Commission on Bushnell's behalf pursuant to section 105(c)(2) of the Mine Act. 30 U.S.C. $ 815(c)(2).

In his decision, Judge Fauver focused upon a portion of the Part 90 regulations providing that "[w]henever a Part 90 miner is transferred, the operator shall compensate the miner at no less than the regular rate of pay received by that miner immediately before the transfer." 30 C.F.R. $ 90.103(b). The judge noted that the Part 90 regulations define "transfer" as "any change in the occupation code of a Part 90 miner." 30 C.F.R. $90.2. The judge construed the "whenever" in section 90.103(b) to include all transfers of Part 90 miners, including transfers not resulting from dust exposure considerations. He stated: "[W]henever a Part 90 miner has a change in his occupation code, the regulation require[s] that he be paid at no less than the regular rate of pay received prior to that change." 8 FMSHRC at 1608. Reasoning that Bushnell was a Part 90 miner whose occupation code had been changed without retention of the rate of pay received previously, the judge held that Cannelton's failure to maintain Bushnell's rate of pay after transfer was "contrary to the plain language of the regulation" and "constitute[d] interference with a protected right." 8 FMSHRC at 1609.

II.

The question presented is whether Bushnell's transfer to a lesser paying position during Cannelton's reduction in force and realignment violated section 105(c)(1) of the Mine Act by infringing upon any right conferred by the Part 90 regulations. It is clear that a Part 90 miner, upon exercising his option to work in a low dust area of a mine, enjoys the right to be paid in the new position at a rate not less than the regular rate of pay received immediately before his exercise of that option. We conclude, however, that the pay protection provisions of the Mine Act and the Part 90 regulations do not grant Part 90 miners a vested pay entitlement that insulates them against all negative business

and economic contingencies affecting their employers. We hold that the reduction in Bushnell's pay after his transfer to the laborer's position under the circumstances presented in this case did not violate the Act.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of prohibited discrimination under section 105(c) of the Act, a complaining miner bears the burden of proving (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of David 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 Thomas 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 it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra; See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); 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 Commission's Pasula.Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

We have held that section 105(c)(1) of the Act bars discrimination against or interference with miners who are "the subject of medical evaluations and potential transfer" under the Part 90 regulations. Goff I, supra, 7 FMSHRC at 1780-81. We have emphasized repeatedly the importance of the rights and protections conferred by Part 90 and related provisions of the Act (Jimmy R. Mullins v. Beth-Elkhorn Coal Corporation, et al., 9 FMSHRC 891 (May 1987); Gary Goff v. Youghiogheny and Ohio Coal Co., 8 FMSHRC 1860 (December 1986) ("Goff II"); Goff I, supra), but we have also recognized that their extent is not unlimited and that "[c]laims of protected activity and discrimination in this context must be resolved upon the basis of a careful review of the structure of miners' rights and operators' obligations contained in the pertinent statutory and regulatory texts." Mullins. supra, 9 FMSHRC at 896. Accordingly, we

look first to the language of the statute and the implementing regulations.

Section 101(a)(7) of the Mine Act states that mandatory standards promulgated by the Secretary may provide that "where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to [a] hazard covered by such mandatory standard, that miner shall be removed from such exposure and

reassigned." 3/ Section 101(a)(7) further provides: "Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to this transfer." Finally, that section states: "In the event of [such] transfer of a miner..., increases in the wages of the transferred miner shall be based upon the new work classification."

As we stated in Goff I, "Part 90 implements this statutory mandate by providing for the transfer of miners who, as a result of exposure to the health hazard of respirable dust, have developed pneumoconiosis." 7 FMSHRC at 1778 n.3. In most instances, the Part 90 program allows eligible miners the option of transferring to an area of a mine where the average concentration of respirable dust is continuously maintained at or below 1.0 mg/m3, a concentration below the maximum level specified in the general respirable dust standards. 30 C.F.R. $$90.3 & 90.100. The Part 90 regulation protecting miners from pay loss upon such transfer, 30 C.F.R. $90.103, provides in relevant part as follows:

> (a) The operator shall compensate each Part 90 miner at not less than the regular rate of pay received by that miner immediately before exercising the [transfer] option under $90.3 ....
>
> (b) Whenever a Part 90 miner is transferred, the operator shall compensate the miner at not less than the regular rate of pay received by that miner immediately before the transfer.
>
> (d) In addition to the compensation required to be paid under paragraphs (a) [and] (b) ... of this

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3/ In relevant part, section 101(a)(7) provides:

> Where appropriate, [any mandatory health or safety standard promulgated under this subsection] shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to [a] hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in

> the classification such miner held immediately prior to this transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based on the new work classification.

30 U.S.C. $811(a)(7).

> section, the operator shall pay each Part 90 miner the actual wage increases that accrue to the classification to which the miner is assigned. [4/]

On review, the Secretary emphasizes the language of section 90.103(b) of the Part 90 regulations and argues that the pay protection provision of the Act and the regulations apply "whenever a Part 90 miner is transferred." S. Br. 11-12 (emphasis added). The Secretary asserts that "[a]11 transfers, including those resulting from economic factors, entitle Part 90 miners to the pay protection provisions of that section." S. Br. 12 (emphasis added). The Secretary interprets the pay protection provision of section 101(a)(7) and Part 90 as vesting permanently when a miner exercises the Part 90 transfer option. Thus, in the Secretary's view, when Bushnell exercised his Part 90 rights by transferring to a less dusty job, he gained protection from any future reduction in his pay resulting from a subsequent job transfer irrespective of the reason for the subsequent transfer.

This argument reaches beyond the language and the intent of the Mine Act and of the Secretary's own regulations. First, the words of section 101(a)(7) of the Act condition pay protection upon an exposure-related transfer. Section 101(a)(7) states: "Any miner transferred as a result of [respirable dust] exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer." (Emphasis added.) Thus, the express language of the Act limits compensation protection to transfers resulting from the removal of miners from dusty work environments. Section 101 provides no basis for the Secretary's position that all subsequent, nonexposure-related transfers are subject automatically to statutory pay protection. The word "whenever" in 30 C.F.R. $90.103(b), supra, upon which the Secretary's argument turns, must be read in its proper context. Section 90.103(a) refers to exposure-related transfer upon exercise of the Part 90 transfer option. Hence, the "whenever" in subsection (b) of section 90.103 refers back to Part 90 dust exposure-related transfers only. The judge's and Secretary's ascription of a more global meaning to the "whenever" in section 90.103(b) is not supported by a plain reading of

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4/ As mentioned earlier (n.2, supra), the present Part 90 standards supersede section 203(b) of the Mine Act, which, carried over from the Coal Act, specifically afforded miners evidencing pneumoconiosis the option of transferring to a low-dust area and further provided that "[a]ny miner so transferred shall receive compensation for such work

at not less than the regular rate of pay received by him immediately prior to his transfer." 30 U.S.C. $843(b)(3).

30 C.F.R. $90.103 also requires that "section 203(b) miners" as of January 31, 1981, were to be compensated at no less than the regular rate of pay that they were entitled to receive under section 203(b) of the Act immediately before the effective date of the present Part 90 regulations (section 90.103(c)), and that section 203(b) miners are also entitled to receive the wage increases accruing to the positions to which they are transferred (section 90.103(d)).

the underlying statutory and regulatory texts.

The pertinent legislative and regulatory histories also demonstrate that the basic purpose of the wage saving provisions is to provide immediate financial protection to the wages of miners transferred for health reasons. In enacting section 203(b) of the Coal Act, the predecessor provision to section 101(a)(7) and Part 90, Congress emphasized the health-related nature of the provision. A key House report states: "The committee considers this section ... equal in importance to the dust section for decreasing the incidence and development of pneumoconiosis." H. Rep. No. 563, 91st Cong., 1st Sess. 20 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1050 (1975); See also Id. at 1071-72 & 1199. The legislative history of the Mine Act also reveals Congress' intent to link the wage saving provision to health-based transfers. The Conference Committee made clear that a miner is immediately protected against reduction in compensation if it is determined that reassignment is necessary to avoid material impairment of health or function:

> [A] miner who is reassigned to a different job classification will suffer no reduction in compensation if such reassignment is the result of a medical examination indicating that such miner may suffer material impairment of health or functional capacity by further exposure to a toxic substance or harmful physical agent. After reassignment, however, such miner will be entitled only to the same dollar rate increase applicable to his new job classification. The conferees intend this provision to encourage miner participation in medical examination programs by insuring that miners who do participate in such programs shall suffer no immediate financial disadvantage if a medical examination results in a job reassignment.

Conf. Rep. No. 461, 95th. Cong., 1st. Sess. 42 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd. Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1320 (1978) (emphasis added). Not only does this history militate in general against the Secretary's interpretation of permanently vested pay protection but it also indicates that, in tying wage increases to the new job classification,

the Mine Act imposed a limitation on Part 90 miners' pay rights.

Despite the Secretary's arguments on review that the wage saving provisions of Part 90 apply to all subsequent, nonexposure-related transfers of Part 90 miners, his official comments in promulgating the Part 90 regulations lend support to our contrary conclusion. In those comments, the Secretary noted the causal connection between a miner's removal from exposure to a hazardous substance and the pay protection provision of section 101(a)(7). The Secretary stated: "By adopting section 101(a)(7) Congress recognized that miners may be forced to

choose between continued exposure to hazardous substances or significant wage reduction if work in cleaner environments is sought. To correct this situation, section 101(a)(7) explicitly states that a reassigned miner retain at least the previous rate of pay received, and specifically addresses the issue of subsequent wage increases." 45 Fed. Reg. 80,760, 80,767 (December 5 1980). Of equal significance, the Secretary acknowledged Congress intent that the wage saving provision provide immediate protection against financial disadvantage.

> [R]ather than extending the full protection of wage increases to the miner's preassignment job classification, Congress purposefully placed a special limit on wage increases received by the miners: "... increases in wages of the transferred miner shall be based upon the new work classification." The Conference Committee Report reflects Congressional concern that miners who participated in programs authorized under section 101(a)(7) and are reassigned jobs should not suffer "an immediate financial disadvantage."

Id.

Thus, we find nothing in the language, purpose, or history of the Mine Act or Part 90 supporting the pay protection right claimed by Bushnell. Here, there is no dispute that Bushnell's September 17, 1984 transfer to the laborer's position (1) occurred several years after his initial Part 90 transfer to the dispatcher's position, (2) was not exposure-related, (3) represented an otherwise legitimate job realignment pursuant to Cannelton's collective bargaining agreement and was carried out in the context of layoff and mine closure affecting all of Cannelton's miners at the Pocahontas mines, and (4) did not result in exposure to respirable dust in excess of the level specified in Part 90. For the reasons articulated above, we cannot conclude that the immediate pay protection right enjoyed by Bushnell when he was initially transferred to the dispatcher's position obtained when he was transferred subsequently to the laborer's position.

We further note that the stipulated record is devoid of any evidence that Cannelton's business actions were tainted by any intent to discriminate, retaliate, or interfere with any legitimate statutory or Part 90 rights available to Bushnell. Cf. Mullins, 9 FMSHRC at 899. Thus, the sole and undisputed reason for Bushnell's reassignment to the laborer's position was the reduction in force

and realignment of Cannelton's employees due to adverse economic conditions. Accordingly, we hold that Bushnell's transfer did not violate section 105(c)(1) of the Act.

III.

In sum, we conclude that Cannelton did not violate section

105(c)(1) of the Mine Act by failing to compensate Bushnell at a pay rate equal to his previous pay rate when it transferred him from the position of dispatcher to the position of general inside laborer during the realignment of employees. Therefore, we reverse the decision of the judge, vacate the back pay award and the civil penalty assessed, and dismiss the complaint of discrimination.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

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