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MARTHA PERANDO V. METTIKI COAL
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FMSHRC-WDC
April 15, 1988

MARTHA PERANDO

v. Docket No. YORK 85-12-D

METTIKI COAL CORPORATION

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

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by Martha Perando pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)(the "Mine Act" or "Act"). The issue presented is whether Mettiki Coal Corporation ("Mettiki") discriminated against Perando in violation of section 105(c)(1) of the Mine Act when, in response to Perando's development of industrial bronchitis and her request for a transfer from an underground position to a surface position, it reassigned her to a less dusty surface position in the mine's laboratory at a rate of pay less than what she earned in her prior underground position. 1/ Commission Administrative

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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

Law Judge Gary Melick concluded that Perando had a "medically substantiated inability to work underground," which in his opinion was "the functional equivalent of a work refusal," that this "refusal" was protected activity, and that the reduction in Perando's pay as a result of her transfer constituted unlawful discrimination under the Act. 8 FMSHRC 1220, 1222 (August 1986) (ALJ). The judge awarded Perando back pay, interest and costs. 8 FMSHRC 1341 (September 1986)(ALJ). We granted Mettiki's petition for discretionary review and permitted the Secretary of Labor to participate on review as amicus curiae. 2/ We hold that under the circumstances of this case no protected work refusal occurred and that Perando's transfer to a lower paying surface position did not violate the Mine Act. Accordingly, we reverse.

From 1980 to 1985 Perando worked as a miner at Mettiki's underground coal mines in western Maryland. In 1983 she began to experience breathing problems. Perando's respiratory problems persisted, and in February 1984, Perando was examined by her personal physician, Dr. Karl Schwalm, who concluded that Perando had a bronchial illness and referred her to Dr. James Raver, a specialist in pulmonary medicine. Dr. Raver examined Perando and diagnosed her illness as industrial bronchitis. Both Dr. Schwalm and Dr. Raver advised Perando that working in an underground mining environment was not conducive to her recovery. Perando was given medication and told that if her condition did not improve she should consider employment in a different working environment. Perando reported her condition to Tom Gearhart, Mettiki's personnel director, who suggested that Perando take six months sick leave in the hope that her health would improve and also suggested that she see Dr. Steven Schonfeld, another pulmonary specialist. Dr. Schonfeld examined Perando on May 2, 1984, and confirmed that she had industrial bronchitis. In his report of that date concerning Perando's condition, Dr. Schonfeld stated that if the symptoms "persist unabated [Perando] may indeed have to change her actual job function." Mettiki Motion to Dismiss, Exh. C. (February 16, 1986). He further recommended that Perando increase therapy, have further tests and return to work. Id. Both Gearhart and Dr. Schwalm received a copy of Dr. Schonfeld's report.

Perando followed Gearhart's suggestion that she take extended sick

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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).

2/ The Secretary's position in this case supports the mine operator. The Secretary submits that the Mine Act does not provide the right to a job transfer with pay protection to a miner suffering from a disease for which the Secretary has not promulgated specific standards pursuant to section 101(a)(7) of the Act. 30 U.S.C. $ 811(a)(7).

leave. During this time her underground position was held open. While Perando was on sick leave, Gearhart received a letter dated May 14, 1984, from Perando's personal physician, Dr. Schwalm, expressing his opinion that Perando "cannot continue in her current job" and "recommend[ing]" that she be placed in "a different position without exposure to coal dust." Mettiki Motion to Dismiss, supra, Exh. C. Gearhart also received from Dr. Raver two letters dated June 25, 1984, and August 30, 1984, the former stating that Perando "seem[ed] to be suffering from industrial bronchitis," which was "disabling in terms of her normal ability to work," and asserting that "[a]lthough she may respond to additional forms of therapy, [a] less dusty environment may be the only workable solution." M. Exh. R-3; Tr. 78 (May 1, 1986).

While on sick leave, Perando telephoned Gearhart several times and asked whether Mettiki could place her in a surface mining position. On September 26, 1984, Gearhart asked Perando if she would be willing to work in the mine's surface laboratory. Perando agreed and reported for work at the laboratory the next day. Perando's weekly rate of pay while working underground had been $520.20. In the laboratory position, Perando earned $383.20 per week. (While on sick leave Perando had received $165.00 per week. Tr. 27 (March 6, 1986)). During the period that she was assigned to the laboratory, Perando was absent frequently. On March 27, 1985, six months after she had accepted the position in the laboratory, Mettiki discharged Perando because she had not reported to work for a substantial period of time.

Subsequently, Perando filed a complaint with the Department of Labor's Mine Safety and Health Administration alleging that Mettiki had discriminated against her in violation of the Mine Act. The Secretary of Labor investigated her complaint, found no violation of the Act, and declined to file a discrimination complaint on her behalf. 30 U.S.C. $ 815(c)(2). Pursuant to section 105(c)(3) of the Act, 30 U.S.C. $ 815(c)(3), Perando then filed a complaint of discrimination on her own behalf with this independent Commission. 3/

In his decision, Judge Melick first found that Perando had contracted industrial bronchitis "from her exposure to coal dust while working at the Mettiki underground mine...." 8 FMSHRC at 1221.

3/ Perando's complaint with the Commission originally alleged five acts of discrimination by Mettiki. Mettiki filed a motion to dismiss all the charges. At a hearing on the motion, Perando withdrew two of her claims, and the judge denied Mettiki's dismissal motion with

respect to the other three. 8 FMSHRC 364 (March 1986)(ALJ). The remaining three allegations dealt with Mettiki's reduction of Perando's pay in connection with her transfer to the laboratory; its handling of her work absences while she was assigned to the laboratory; and her discharge. 8 FMSHRC at 1222-24. In his decision on the merits, the judge denied Perando's complaint with regard to Mettiki's treatment of her work absences and her discharge. 8 FMSHRC at 1222-24. Perando did not seek review of those determinations by the judge. Thus, only the judge's determination that Perando was discriminated against when her pay was reduced at the time of her transfer is at issue on review.

Although indicating that "Perando had never 'refused' to work underground in the traditional sense," the judge determined that her "medically substantiated inability to work underground was the functional equivalent of a work refusal." 8 FMSHRC at 1222. He also found that Perando's "work refusal" was based on her reasonable and good faith belief that further work underground would be hazardous to her health, and that this "refusal" was communicated to Mettiki by the doctors' reports to Gearhart. Id. He concluded that Perando's "work refusal" was protected activity. The judge stated that "in recognition of the health hazard presented to Ms. Perando by underground work ..., Mettiki offered her the outside job in the laboratory." Id. He then concluded that because the new position in the laboratory paid less than her prior underground position, "Mettiki did in fact discriminate against her because of her work refusal." Id. We conclude that the judge erred as a matter of law.

The general principles governing analysis of discrimination cases under the Mine Act are settled. 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 or she 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 (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, supra, 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 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 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). Cf. NLRB v. Transportation Mgt. Corp., 462 U.S. 393, 397-413 (1983)(approving nearly identical test under National Labor Relations Act).

A miner's refusal to perform work is protected under section 105(c) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula, 2 FMSHRC at

2789-2796; 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 (llth Cir. 1985). "The case law addressing work refusals contemplates some form of conduct or communication manifesting an actual refusal to work." Secretary on behalf of Sedgmer, et al. v. Consolidation Coal Co., 8 FMSHRC 303, 307 (March 1986).

The claim of protected activity asserted on review is that Perando's request to work in a less dusty environment, in conjunction

with her doctors' letters that stated the medical inadvisability of her continued employment underground, constituted a work refusal. We find no evidence that Perando, in fact, engaged in a work refusal. Perando testified that after she was informed by the doctors who examined her that she had developed industrial bronchitis, she wanted to work and did not refuse to work underground. Tr. 44-45 (May 1, 1986). Neither Perando's acceptance of Mettiki's offer of extended sick leave nor her request while on sick leave for a transfer to a surface position constitutes a work refusal. While acknowledging that Perando "never 'refused' to work underground in the traditional sense," the judge nevertheless concluded that Perando's "medically substantiated inability to work underground was the functional equivalent of a work refusal," which was communicated to Mettiki by the doctors' reports to personnel director Gearhart. 8 FMSHRC at 1222. We disagree.

None of the doctors' reports received by Mettiki (summarized above) stated directly or indirectly that Perando was refusing to work underground. The May and June 1984 letters from Drs. Schwalm and Raver expressed only their own medical recommendations that Perando should be working in a different environment without exposure to coal dust. These medical recommendations constitute, at most, communications from others concerning possible personnel actions that the operator might consider with respect to Perando's job assignments. Even viewing Perando's actions and the doctors' reports together, we find no work refusal. Because no work refusal in fact took place and no other claim of protected activity is involved in this proceeding, Perando's discrimination complaint must be dismissed.

Even if we were to assume, for the sake of argument, that a work refusal occurred, Perando's complaint would still fail because, in the circumstances of this case, her "refusal" would not have been protected under the Mine Act. Such an action by Terando would have to be interpreted as a refusal by a miner (not suffering from pneumoconiosis) to report to work unless and until assigned to a dust-free area. Such a right is not granted by the Mine Act.

Section 101(a)(7) of the Act, 30 U.S.C. $ 811(a)(7). authorizes the Secretary to develop improved mandatory health or safety standards providing that miners whose health has been impaired by exposure to a designated hazard "shall be removed from such exposure and reassigned" and that such transfer shall be without loss of pay. To date, the Secretary has implemented this statutory mandate by providing under 30 C.F.R. Part 90 that a miner who has been determined by the Secretary of Health and Human Services to have

evidence of the development of pneumoconiosis shall be afforded the option to transfer without loss of pay to a mine area where the average concentration of respirable dust is at or below 1.0 mg/m3. 30 C.F.R. $$ 90.3, 90.100, & 90.103. See generally Jimmy R. Mullins v. Beth-Elkhorn Coal Corp., et al., 9 FMSHRC 891, 896-98 (May 1987).

As the Secretary emphasizes in her amicus brief on review, the Department of Labor has not promulgated any similar transfer-pay retention standards applicable to miners with industrial bronchitis, the illness suffered by Perando. Also even a miner who falls within the protections of Part 90 does not have the right to refuse to work pending transfer to a job in a mine atmosphere totally free of respirable dust. Gary Goff v. Youghiogheny & Ohio Coal Co., 8 FMSHRC 1860, 1865 (December 1986). Exposure to some amount of respirable dust is inherent in virtually all underground coal mining. Thus, even if the Secretary had included miners suffering from industrial bronchitis within the scheme of the present Part 90 transfer-pay retention regulations, Perando would not have had a right under those provisions to transfer with pay retention to a less dusty position since her underground work areas at Mettiki were consistently below the required Part 90 respirable dust level of 1.0 mg/m3. M. Exh. R-2, Tr. 74-77, 100-102 (May 1, 1986). To accord Perando the right asserted in this case would confer upon her greater transfer-pay retention protection than that enjoyed by Part 90 miners, an anomalous result.

Accordingly, we conclude that Perando failed to establish prohibited discrimination under the Mine Act. We reverse the judge's decision, vacate his award of back pay, interest and costs, and dismiss Perando's discrimination complaint.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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