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CHARLES CONATSER V. RED FLAME COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 12, 1989

CHARLES CONATSER

v. Docket No. KENT 87-168-D

RED FLAME COAL COMPANY, INC.

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) ("Mine Act" or "Act"), Charles Conatser alleges that Red Flame Coal Company, Inc. ("Red Flame") violated section 105(c)(1) of the Mine Act when it discharged him for refusing to drive a rock truck.1/ Commission

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1/ Section 105(c), 30 U.S.C. $ 815(c), provides in relevant part:

> Discrimination or interference prohibited; complaint; investigation; determination; hearing
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> (1) 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 ... because such miner ... has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because of

the exercise by such miner ... of any statutory right afforded by this [Act].

(2) Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon

Administrative Law Judge George A. Koutras dismissed Conatser's discrimination complaint on the grounds that Conatser failed to communicate his belief in the existence of a safety hazard to Red Flame's foreman at the time of his work refusal. 10 FMSHRC 416 (March 1988)(ALJ). For the reasons that follow, we affirm the judge's decision.

Conatser was employed by Red Flame at its strip coal mine on Whitco Mountain in Letcher County, Kentucky, as a general loader operator from July 14, 1986, through the date of his discharge on January 26, 1987. In that capacity, Conatser operated an end loader, a heavy vehicle resembling a tractor and equipped with a loading bucket. Conatser had been transferred to the Red Flame mine by No. 8 Limited of

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> receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint.... If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance....
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> (3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner ... of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing

... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance....

Virginia ("No. 8 Limited"), a parent corporation of Red Flame for whom he had worked in the same capacity for a period of some seven years. While employed at the No. 8 Limited mine, Conatser had driven rock trucks on several occasions. (Rock trucks are heavy haulage vehicles with empty weights ranging from 50 to 85 tons.)

At approximately 7:00 a.m. on January 26, 1987, Conatser reported for work at Red Flame and was advised that his end loader was inoperable. There were 10 to 12 inches of snow on the ground and Red Flame's foreman, Zachary Mullins, was having the haulroads scraped to remove the snow. Mullins directed Conatser to assist Red Flame's mechanic in starting up some heavy equipment. While Conatser was so occupied, Mullins radioed the mechanic and directed him to start up an 85-ton WABCO rock truck.

Mullins drove up to the WABCO rock truck and motioned Conatser over. Mullins then instructed Conatser to drive the rock truck that day. Conatser responded, "I can't drive a rock truck." 10 FMSHRC at 466-67; Tr. 75, 116, 497-98. Mullins then told Conatser that "Roy Clifford, Robert and Larry"--other miners at Red Flame--had all learned to drive a rock truck and that Conatser could drive. Tr. 75, 423; Mullins Dep. 27 28; Exhibit R-2. When Conatser again told Mullins that he could not drive the truck, Mullins told Conatser either to drive it or "go to the house." 2/ Conatser responded that Mullins was forcing him to go to the house. Conatser then asked Mullins to get his steel-toed safety shoes for him, which were in Conatser's loader, and Mullins told Conatser to pick them up on his way out. Conatser left the mine site. Later that same day, Conatser filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he had been discharged by Red Flame in violation of section 105(c) of the Mine Act.

On the advice of MSHA, Conatser subsequently contacted Wesley Burke, No. 8 Limited's president, and on February 27, 1987, met with Burke and Cruce Davis, Red Flame's mine superintendent, to ask for his end loader job back. At that time, Conatser advised management that he had refused to drive the rock truck because he feared for his safety as he did not know how to "gear down' a rock truck on a slope and because he had never driven a rock truck under wet weather conditions. When Conatser called Burke a week later to find out whether Red Flame would rehire him, Burke informed Conatser that he would not be rehired.

After investigating Conatser's complaint, which alleged in

essence that he was discharged after refusing to operate a rock truck that he lacked experience to drive. MSHA advised Conatser on May 22, 1.87. that the information received during its investigation did not establish a

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2/ Both the Commission and the Sixth Circuit Court of Appeals agree that this language is synonymous with a discharge in the mining industry. See, e.g., Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (August 1982), aff'd sub nom. Whitley Development Corp. v. FMSHRC, No. 84-3375, slip op. at 2 (6th Cir. July 31, 1985); Secretary on behalf of Keene v. S&M Coal Co., 10 FMSHRC 1145, 1147 n.5 (September 1988).

violation of section 105(.c) of the Mine Act. On June 8, 1987, Conatser, proceeding without counsel, filed his own discrimination complaint with the Commission pursuant to section 105(c)(3) of the Act (n. 1 supra). He subsequently retained counsel to represent him before this Commission.

Following an evidentiary hearing, Judge Koutras issued a decision dismissing Conatser's complaint. The judge first determined that Conatser's refusal to drive the rock truck on January 26, 1987, was based on a reasonable, good faith belief in a safety hazard. 10 MSHC at 457-62. In this regard, he found that the condition of the haulroads at the Red Flame mine on January 26, 1987, "presented ... possible sliding and slipping hazards for the [rock] trucks" scheduled to operate on the haulroads that day. 10 FMSHRC at 457-59. The Judge found that although Conatser operated rock trucks on some seven occasions at the No. 8 Limited strip site, he had driven them only on level terrain during dry weather conditions. 10 FMSHRC at 459-60; Tr. 61-62, 65-66, 70, 94-97, 515-516, 520. The judge concluded that Conatser's refusal to drive the rock truck on January 26, 1987, was reasonable in light of his relative inexperience in operating rock trucks, the fact that he had never driven a rock truck on a wet hill or roadway, and the potentially hazardous nature of the roadway over which he was expected to drive on that date. 10 FMSHRC at 459-61.

Considering next whether Conatser had communicated his safety concerns to Mullins, the judge found that Conatser simply responded to Mullins' instruction to drive the rock truck with the statement "I can't drive a rock truck." 10 FMSHRC at 466-67. Based upon Conatser's prior experience, however, the judge found that this statement was not true. 10 FMSHRC at 467. The judge further found that Conatser in no way communicated his safety concerns to Mullins at the time of his work refusal. 10 FMSHRC at 467-68. The judge expressly rejected Conatser's argument that his brief statement was sufficient by itself to raise a safety issued declining to read into that statement the various reasons subsequently asserted by Conatser in his written statement to MSHA and in his testimony at the hearing for refusing to operate the rock truck that day. Id.

The Judge also found credible testimony by Mullins that if Conatser had told Mullins that he feared for his life or safety, or even given Mullins a reason for not driving the rock truck, he would not have required Conatser to drive the truck. 10 FMSHRC at 468; Tr. 400-01, 403-06. Davis' testimony that Mullins would have assigned the job to someone else if Conatser had informed Mullins of

his safety concerns was also credited by the judge in concluding that Conatser's belief in the existence of a safety hazard was "in no way" communicated to Mullins at the time of his work refusal. 10 FMSHRC at 468; Tr. 484-86, 488. The judge determined from the testimony of Mullins, Davis and Red Flame miners that management at Red Flame took appropriate action to address communicated safety concerns and that because Conatser did not communicate his safety concerns to Mullins at the time of his work refusal, Mullins had no opportunity to understand the basis of Conatser's work refusal, to address Conatser's safety concerns, or to take any corrective action. 10 FMSHRC at 468.

he was in shock due to Mullins' direction that he either drive the rock truck or go to the house, he had no opportunity to communicate to Mullins his reasons for refusing to drive the rock truck. The judge found that Conatser's claim of being in shock was difficult to believe. 10 FMSHRC at 468. Noting that Conatser conceded at the hearing that Mullins had not prevented him from speaking, the judge further found that Conatser had an ample opportunity to communicate his safety concerns to Mullins and that Conatser's failure to do so at the time of his work refusal was not excused by mitigating reasons or extenuating circumstances. 10 FMSHRC at 469. Accordingly, the judge concluded that because Conatser failed to communicate his safety concerns to Mullins, his work refusal was not protected under the Mine Act and his subsequent discharge by Red Flame for that work refusal was not in violation of the Act. Id.

Finally, the judge considered an allegation by Conatser that Red Flame's refusal to rehire him constituted a separate act of discrimination under the Mine Act. Finding no probative credible evidence to sustain this allegation, the judge summarily rejected this argument. 10 FMSHRC at 469-70. 3/

On review, Conatser essentially asserts that the judge erred as a matter of law in finding that Conatser's statement to Mullins at the time of his work refusal was insufficient to raise a safety issue. Arguing that the judge's finding was too restrictive, Conatser contends that his statement to Mullins, if evaluated in light of the evidence and the appropriate legal standard, clearly raised a valid safety issue at the time of the work refusal--that Conatser was incapable of operating the rock truck under the conditions present at that time. Conatser also complains that certain findings of fact made by the judge are not supported by substantial evidence and should be reversed. We disagree.

The principles governing analysis of a discrimination case under the Mine Act are well settled. In order to establish a prima facie case of discrimination under section 105(c) of the 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 in no part motivated by protected activity. If the 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 alone and would have taken the adverse action in any event for the

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3/ No issue concerning Red Flame's refusal to rehire Conatser was raised by Conatser on review and, accordingly, that issue is not before us.

unprotected activity. Pasula, supra; Robinette, supra; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1984); 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983)(approving a nearly identical test under the National Labor Relations Act).

A miner's refusal to perform work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 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, 472-73 (11th Cir. 1985); see also Simpson v. FMSHRC, 842 F.2d 453, 458 (D..C. Cir. 1988); Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 366 (4th Cir. 1986). It is further required that "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." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126, 133 (February 1982); see also Simpson v. FMSHRC, supra, 842 F.2d at 459; Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (July 1986), aff'd mem., 829 F.2d 31 (3rd Cir. 1987)(table cite).

Proper communication of a perceived hazard is an integral component of a protected work refusal, and the responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner. Dillard Smith v. Reco, Inc., 9 FMSHRC at 992, 995-96 (June 1987). Among other salutary purposes, the communication requirement is intended to avoid situations in which an operator at the time of a work refusal is forced to divine the miner's motivations for refusing work. Dillard Smith, supra, 9 FMSHRC at 995. We have also stated that the communication of a safety concern "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." Hogan and Ventura, supra, 9 FMSHRC at 1074.

In a well-reasoned analysis, the judge properly considered and applied relevant Commission and judicial precedent concerning work refusals. The primary issue presented on review is whether substantial evidence supports the judge's ultimate conclusion that Conatser failed to adequately communicate to Mullins his belief in

the existence of a safety hazard. We find that it does.

In the context of the facts in this case, Conatser's statement to Mullins that he "can't drive a rock truck" was, at best, ambiguous. Conatser himself testified that he knew how to operate trucks and had driven rock trucks on some seven previous occasions. Tr. 68-69, 125-26. Based in large part on this testimony, the judge found that Conatser's "can't" statement to Mullins simply was not true. 10 FMSHRC at 467-68. We concur, and find that this fact vitiates the asserted adequacy and clarity of Conatser's communication.

Conatser has maintained in this proceeding that his statement to Mullins really meant that he lacked the ability to operate a rock truck under the weather and road conditions present that day. However, Conatser conceded that he said nothing to Mullins at the time of his work refusal about his specific fears concerning the weather conditions, his inexperience driving a rock truck down a sloped haulroad, or his lack of training in operating a rock truck; rather, Conatser merely "figured" that Mullins would know these fears. Tr. 75-76, 117-19, 126, 142, 412, 524-25. To the contrary, Mullins testified that because Conatser had the general reputation of being capable of operating a rock truck among Red Flame miners who had seen him operate such vehicles when they were employed at the No. 8 Limited site, he believed Conatser could operate a rock truck on the morning of the work refusal. Tr. 173, 175-76, 246-47, 271, 273, 279, 377-79, 403, 406-09, 410-12. In any event, Mullins' unrebutted testimony reflects that in responding to Conatser's work refusal, he replied that "Larry and all them [other miners] ... drove them and there is no reason you can't." Tr. 415 (emphasis supplied). In our view, Mullins' response should have demonstrated to Conatser that Mullins did not comprehend the nature of Conatser's safety concerns. Yet, as the judge found, Conatser "did not elaborate further or explain to Mr. Mullins the reasons for his purported inability to drive the rock truck," and simply repeated his "can't" statement. 10 FMSHRC at 467.

In analyzing whether Conatser was prevented from communicating his safety concerns to Mullins, the judge found that Conatser had an ample opportunity to communicate with Mullins at the time of his work refusal. 10 FMSHRC at 468-69. It is undisputed that Conatser engaged Mullins in further conversation relating to his safety shoes before leaving the mine site. The judge also determined that Conatser's assertion that he could not communicate further with Mullins because he was "in shock" was difficult to believe. Id. The judge observed that Conatser did not strike him as a timid individual, but rather impressed him as a rather combative person. Id. These observations are in the nature of credibility resolutions and we reject Conatser's challenges to them. See, e.g., Robinette, supra, 3 FMSHRC at 813.

While he have made clear that in work refusal contexts a "[s]imple, brief" communication by the miner of a safety or health concern will suffice (Dunmire & Estle, supra, 4 FMSHRC at 134), we conclude that in the context presented by this case Conatser's communication fell short of the required sufficiency and clarity. Indeed, we believe that this case well illustrates many of the

reasons for the communication requirement. From all that appears on this record, had Conatser articulated his safety concerns, they would have been addressed by the operator.

In this regard, we find the following observation of the judge, well-founded in the testimony, to be particularly salient:

> Foreman Mullins testified that had Mr. Conatser told him that he feared for his life or safety, or given him a reason for not driving the rock truck, he would not have required him to do so.

> Superintendent Davis testified that Mr. Mullins would not endanger anyone's life, and if he did, he would fire him. The miners who testified in this case corroborated the fact that Mr. Davis and Mr. Mullins were concerned for their safety and always addressed their concerns over the road conditions. Mr. Davis further confirmed that had Mr. Conatser informed Mr. Mullins that he was afraid to drive the truck, Mr. Mullins would have assigned someone to go with him, or assigned another driver. Former foreman Meade also confirmed that if anyone expressed fear or reluctance in operating a piece of equipment, he would either assign them to other work, or not require them to operate the equipment. In view of this testimony, which I find credible, it would appear to me that management at Red Flame and No. 8 Ltd. took appropriate action to address communicated safety concerns. However, in Mr. Conatser's case, since he did not communicate his safety concerns to his foreman at the time of his work refusal, the foreman had no opportunity to address them and take corrective action.

10 FMSHRC at 468 (.emphasis in original).

We have considered Conatser's evidentiary challenges to the credibility of Mullins and to the judge's various resolutions of conflicting testimony and his credibility determinations and find no error of fact or law in the decision below. Conatser has not provided compelling reasons that would justify our taking the extraordinary step of overturning the judge's credibility findings and resolutions of disputed testimony and we decline to do so.

Accordingly, we conclude that the judge's finding that Conatser failed to adequately communicate a safety concern is supported by substantial evidence and is correct as a matter of law as applied to that evidence. Thus, we affirm the judge's conclusion that Conatser's work refusal was not protected by the Mine Act and that his discharge for that refusal did not violate the Act. 4/

4/ Upon consideration of Conatser's Motion For Leave to File Reply Brief, and the opposition thereto, the motion is hereby granted. We have considered the brief in our decision.

For the foregoing reasons, the judge's decision is affirmed.

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