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R. SIMPSON V. KENTA ENERGY AND ROY JACKSON
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 11, 1989

ROBERT SIMPSON

v. Docket No. KENT 83-155-D

KENTA ENERGY, INC.

and

ROY DAN JACKSON

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) (the "Mine Act" or "Act"), is on remand to us from an opinion of the United States Court of Appeals for the District of Columbia Circuit reversing our prior decision in this matter. Robert Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988), rev'd, Robert Simpson v. Kenta Energy, Inc. & Roy Dan Jackson, 8 FMSHRC 1034 (July 1986). This case involves a discrimination complaint filed by Robert Simpson alleging that he engaged in a protected work refusal and that Kenta Energy, Inc. ("Kenta") and Roy Dan Jackson constructively discharged him and refused to reinstate him in violation of section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1). In a decision on the merits and a supplemental decision as to Jackson's personal liability, Commission Administrative Law Judge James A. Broderick upheld Simpson's complaint against Kenta and Jackson, and ordered Simpson reinstated with back pay, interest, attorney's fees, and litigation expenses. 6 FMSHRC 1454 (June 1984)(ALJ); 7 FMSHRC 272 (February 1985)(ALJ).

Jackson petitioned the Commission for review, and we reversed the judge's decisions, concluding that Simpson did not engage in a protected work refusal because of a failure to communicate his safety concerns and that, in any event, he was not constructively discharged in violation of the Act. 8 FMSHRC 1034 (July 1986). Simpson appealed to the Court, which reversed and remanded with instructions to the Commission to consider certain issues. In light of the Court's decision, we now resolve the remanded issues, decide remaining questions not reached in

our prior decision given our original disposition, and, on the following grounds, affirm the judge's decisions.

I.

The facts relating to Simpson's work refusal and the adverse actions are set forth in our earlier decision and need not be repeated in detail here. See 8 FMSHRC at 1035-37. Briefly, Simpson, a scoop operator at Kenta's No. 1 Mine, quit his job in September 1982 because of safety concerns based on conditions at the mine. Prior to leaving work, Simpson failed to communicate those concerns to any supervisory representative of Kenta. In December 1982, approximately three months after he quit, Simpson met Roy Dan Jackson, Kenta's President, by chance, explained the safety concerns that had prompted his action, and asked for his job back. Jackson refused to rehire him. Shortly before his encounter with Jackson, Simpson had filed a discrimination complaint with the Secretary of Labor alleging that his severance of employment had amounted to a violation of section 105(c)(1) of the Mine Act. Following investigation of this complaint, the Secretary determined that no violation of the Act had occurred and Simpson then filed with this independent Commission his individual discrimination complaint against both Kenta and Jackson. See 30 U.S.C. §§ 815(c)(2) & (3).

In his decision on the merits upholding Simpson's complaint, Judge Broderick found that Simpson's decision to leave his job represented a protected work refusal based on Simpson's reasonable, good faith concerns for his safety. The judge found that there was no qualified supervisor to perform required preshift and onshift examinations and that Simpson believed that they were cutting in the direction of abandoned works with no test holes being drilled. 6 FMSHRC at 1455-57, 1460. Concerning the requirement in work refusal situations that a miner communicate his safety concerns to the mine operator prior to or reasonably soon after his work refusal (see, e.g., *Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982)), the judge found that Simpson had not communicated his safety concerns to Jackson. The judge excused the failure, however, on the grounds that Jackson had actual knowledge of the absence of a foreman and the failure to perform the preshift and onshift examinations and that communication would have been futile. 6 FMSHRC at 1462. The judge concluded that Simpson suffered an adverse action, a constructive discharge, because Simpson was subjected to working conditions so intolerable that he was forced to quit. 6 FMSHRC at 1460-61. The judge found that although Kenta and Jackson were not motivated to maintain the

intolerable working conditions because of Simpson's protected activity, their motivation was not determinative as to whether discrimination had occurred. 6 FMSHRC at 1461. The judge further determined that Jackson's failure to rehire Simpson also violated section 105(c) of the Act. 6 FMSHRC at 1457, 1462-63, 1464. With regard to the latter finding, the judge rejected the operator's defense that Simpson would have been laid off in any event for economic reasons in January or February of 1983. 6 FMSHRC at 1462, 1463.

At the conclusion of his decision on the merits, the judge directed further proceedings to resolve the question of whether

respondent Jackson was personally liable for the discriminatory acts in issue. 6 FMSHRC at 1464. The judge ordered Simpson to "file a statement explaining with particularity the legal basis of his claim against Respondent Jackson, and the evidence it expects to produce to establish that claim." *Id.* On June 27, 1984, Simpson submitted a Statement of Claim, essentially basing his assertion of Jackson's personal liability on doctrines of piercing the corporate veil and alter ego. On July 30, 1984, the judge issued an Order Permitting Further Discovery and Notice of Hearing. In part, the order dealt with Simpson's contention that Jackson should be held personally liable for the discrimination in question:

Jackson's liability in this case depends upon whether he was the "person" who discharged Complainant in violation of section 105(c)(1) of the Act. This question may be related to the further question whether Jackson was the "operator" (defined in section 3(d) of the Act) of the subject mine. The questions whether Jackson was the alter ego of Kenta and whether Kenta's corporate veil may be pierced are important insofar as they may bear on the first question set out above.

Order 2. In his February 1985 remedial decision, the judge concluded that Jackson was, in reality, the "operator" of the mine at all relevant times and found Jackson personally liable for the unlawful discrimination at issue. 7 FMSHRC at 273-78. The judge directed Simpson's reinstatement, the award of some \$36,000 in back pay and interest, and payment of some \$57,000 in attorney's fees and expenses. 7 FMSHRC at 286.

Jackson filed a Petition for Discretionary Review; Kenta did not. In his petition, Jackson challenged the judge's central conclusions with respect to Simpson's work refusal, the communication issue, and the two instances of discrimination. Jackson also assigned as error the judge's finding that Simpson would not have been laid off for economic reasons and further claimed that the judge committed a prejudicial error of procedure "by first establishing a procedure for trying the issue of Jackson's personal liability wherein Simpson framed the specific legal basis for his claims against Jackson and then issuing his [remedial] order on matters not specified by Simpson." PDR 15-17. Jackson raised no issues concerning the back pay or attorney's fees determinations.

In our decision reversing the judge, we held that the

judge erred in concluding that Simpson had engaged in a protected work refusal and that Simpson had been subjected to a discriminatory constructive discharge and failure to rehire. 8 FMSHRC at 1038-41 & n.4. With respect to the work refusal issue, we agreed with the judge that Simpson had a good faith, reasonable belief in hazardous conditions. 8 FMSHRC at 1038. However, focusing on the requirement that a miner communicate to the operator his health or safety concerns, we concluded that Simpson, without any showing of good reason, had failed to communicate such concerns "to anyone in authority prior to quitting his job on September 20, or even reasonably soon thereafter." 8 FMSHRC at 1039.

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We rejected the judge's finding (6 FMSHRC at 1462) that any such communication by Simpson would have been futile: "Even assuming, as the judge did, that Jackson was aware of the absence of a foreman and the failure to conduct the required pre-shift and on-shift examinations, we cannot presume that Jackson would have taken no action had Simpson communicated his concerns to Jackson." 8 FMSHRC at 1039-40.

In addressing the constructive discharge issue, and assuming *arguendo* that Simpson had engaged in protected activity, we stated that "in order to establish a successful claim of constructive discharge, the miner must show that in retaliation for protected activity by the miner the operator created or maintained intolerable working conditions in order to force the miner to quit." 8 FMSHRC at 1040, citing *Rosalie Edwards v. Aaron Mining, Inc.*, 5 FMSHRC 2035, 2037 (December 1983). We found "no evidence in this record that Kenta or Jackson were motivated to create or to maintain the conditions about which Simpson was concerned because of the exercise by Simpson of any rights protected by the Mine Act." 8 FMSHRC at 1040-41. Accordingly, we concluded that Simpson had not been constructively discharged in violation of the Act.

In addition, we found insufficient record support for, and therefore reversed, the judge's additional conclusion that the failure to rehire Simpson constituted a further violation of section 105(c) of the Act. 8 FMSHRC at 1041 n.4. We also denied a motion filed on review by Simpson to reopen the proceedings to determine whether the Black Joe Coal Company was a legal successor to Kenta and, hence, liable for Kenta's alleged discrimination. 8 FMSHRC at 1041. Simpson had asserted that the judge's finding as to Kenta's liability was final and not subject to review insofar as Kenta was concerned because Kenta had not petitioned the Commission for review of the judge's decision. We stated:

In his petition for review Jackson raised the central issue of whether Simpson was discriminated against in violation of the Act. We have concluded that no discrimination occurred in conjunction with Simpson's leaving the job. Because there is no violation of the Act, there is no liability on behalf of any respondent. In these circumstances, Simpson's argument that he had a binding judgment against Kenta because Kenta did not separately seek review is rejected. See, e.g., *Arnold Hofbrau, Inc. v. George Hyman Construction Co., Inc.*, 480 F.2d 1145,

1150 (D.C. Cir. 1973).

Id.

Given our disposition of the case, we did not address the issues of whether Simpson would have been laid off in any event and whether the judge committed a prejudicial procedural error in the supplemental remedial proceedings.

In its opinion reversing our decision, the Court approved in general terms the Commission's Pasula/Robinette work refusal doctrine

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(2 FMSHRC 2786 (October 1980); 3 FMSHRC 803 (April 1981), respectively). 842 F.2d at 458. The Court also specifically endorsed the Commission's Dunmire & Estle communication requirement in work refusal situations (4 FMSHRC 126 (February 1982)). 842 F.2d at 459.

With regard to the subject of communication in a work refusal context, the Court noted that Simpson argued that the futility of communication issue was one of fact and that the Commission had impermissibly substituted its own view of the facts for that of the judge, while Jackson argued that the futility issue was one of law. 842 F.2d at 459-60. The Court opined that the "Commission's decision sheds little light on this [factual v. legal] aspect of the dispute." 842 F.2d at 460. The Court quoted the Commission's discussion of futility (8 FMSHRC at 1039-40), and stated that it could not determine "whether the Commission meant to reject the legal standard applied by the ALJ, or, alternatively, whether the Commission simply regarded the ALJ's finding of futility as a fact determination that lacked adequate record support." *Id.* The Court suggested that the Commission's decision "could be read to maintain that there was substantial evidence only for a finding of 'possible operator awareness of a hazard,': [8 FMSHRC at 1040], and not for the conclusion that notice would have been futile." *Id.*

The Court then engaged in its own evidentiary analysis, in which it concluded that substantial evidence supported the judge's findings "not only that Jackson was aware of conditions at the mine but also that he would have been unresponsive to any worker complaints about them." 842 F.2d at 460-61. However, the Court stopped short of totally disposing of this issue because it felt that the Commission's decision may have been based on "an unarticulated conclusion that, as a matter of law, futility in this context requires some showing beyond what the term means in common parlance, a showing Simpson may not have made." 842 F.2d at 461 (emphasis added). The Court accordingly remanded the issue to us in the following terms: "We therefore remand the communication issue to the Commission for reconsideration, and for a clear explanation of why the futility exception should or should not apply to the facts of this case." 842 F.2d at 461.

The Court next examined the constructive discharge issue, noting that "[a]ll parties apparently agree that if the work refusal was protected, a constructive discharge would have amounted to unlawful discrimination...." 842 F.2d at 461. Relying on *Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981), a Title VII discrimination case, the Court distinguished between its own, preferred "objective"

standard governing constructive discharges, and what it described as the Commission's "subjective," motivation-based standard. 842 F.2d at 461- 63. The Court approved the "objective" constructive discharge standard for Mine Act purposes. *Id.* The Court viewed the objective standard as requiring a showing that "an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." 842 F.2d at 461. The Court attached weight to the fact that the Commission had recognized that respondents' "blatant violations of the Mine Act" had led to Simpson's leaving his job. 842 F.2d at 463. The Court concluded its examination by asserting in effect that there

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was no question that conditions were intolerable at the Kenta No. 1 Mine and justified Simpson's work refusal. The Court then stated that resolution of the case therefore turned on whether Simpson's work refusal was protected -- the primary subject of remand. 842 F.2d at 463.

Finally, the Court addressed the operator's failure to rehire and the motion to reopen. Regarding failure to rehire, the Court observed that if "Simpson's September work refusal was unprotected, the Commission's ruling [on rehire] would be sound, because the discrimination prohibited by the Mine Act requires some nexus to protected activity." 842 F.2d at 464. On the other hand, if "Simpson's work refusal was protected by the Mine Act, the evidence ... would have supported the ALJ's finding that the refusal to rehire was based on protected activity, in violation of section 105(c)(1)." *Id.*

The Court's treatment of the Commission's disposition of Simpson's motion to reopen turned on the fact that Kenta had not separately sought review of the judge's decision. The Court regarded the Commission's disposition of that issue as amounting to a "vacation" of the judgment against Kenta, apparently not subscribing to the Commission's view, based on the Court's decision in *Arnold Hofbrau*, *supra*, that a finding of no liability at all in this matter would operate to relieve Kenta (and its successors) of liability under the judge's decision. The Court stated:

The Commission's return to the merits of Simpson's case obviously may compel a return to this last holding, so we note at this point only the questionable consistency of the Commission's action vacating the judgment against Kenta Energy with its review authority. See ... 30 U.S.C. § 823(d) (limiting the grounds for discretionary review by the Commission, and denying authority to "raise or consider additional issues" not presented by the petition for review).

842 F.2d at 464.

II.

We first address the specific issues that the Court remanded to the Commission, and then resolve the two questions remaining from the original proceeding on review.

A. Issues on remand

1. Futility of communication

The Court stated that our determination regarding futility of communication may have been based on our "conclusion that, as a matter of law, futility in this context requires some showing beyond what the term means in common parlance." 842 F.2d at 461. Such is not the case.

The Court specifically approved our statement of the communication requirement associated with the right to refuse work as set forth in *Dunmire and Estle*, supra. In that decision, we held:

Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances -- such as futility -- may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.

4 FMSHRC at 133 (emphasis added).

As the Court recognized (842 F.2d at 460), *Dunmire and Estle* stands for the general proposition that communication issues should be resolved "in a common sense, not legalistic manner." 4 FMSHRC at 134. Accordingly, we do not view the futility exception to the communication requirement as a technical or restrictive concept. Rather, futility in this context is based on the common meaning of the term and covers situations in which a miner's communication of a health or safety concern would be ineffective or useless. See generally Webster's Third New Int'l Dictionary (Unabridged) 925 (1986 ed.)(definitions of "futile" and "futility"). If genuine futility is present, a miner's failure to communicate may be excused. Such a situation may occur, for example, where a mine operator has made clear that it will not address complained of hazards or where the operator has manifested "evident disdain for worker complaints" (842 F.2d at 460).

Our earlier resolution of the futility issue was based on factual, not legal, grounds and meant only that we discerned a lack of substantial evidentiary support for what we viewed as the judge's "presumption" that communication with Jackson would have been futile. See 8 FMSHRC at 1039-40. The court, however, has concluded that there is adequate record support for the judge's findings that Jackson was aware of the conditions at the mine and

would have been unresponsive to worker safety complaints about those conditions. 842 F.2d at 460-61. Within the proper meaning of the Dunmire and Estle futility exception as explained above, the Court has effectively held that Simpson's failure to communicate is excused. In light of the Court's factual determinations, we so hold as well. Given our prior finding that Simpson's work refusal was based on a reasonable, good faith belief in a hazard (8 FMSHRC at 1038), we conclude that Simpson engaged in a protected work refusal under the Mine Act.

2. Constructive discharge

The Court, agreeing with the judge, held that to establish a successful claim of constructive discharge under the Mine Act, a miner must show that the operator maintained conditions so intolerable that a reasonable miner would have felt compelled to quit. 842 F.2d at 461-63. Noting our statement that "blatant violations of the Mine Act" existed at the mine prior to Simpson's work refusal (8 FMSHRC at 1038), the Court observed that such conditions "see[m] to preclude [the Commission's] rejection of the ALJ's finding [that the operator maintained conditions so intolerable that a reasonable miner would have felt compelled to quit]." 842 F.2d at 463. Given the Court's disposition of this issue, we are constrained to conclude in this case that Simpson established that he was subjected to constructive discharge in violation of section 105(c)(1) of the Act.

3. Refusal to rehire

Given our disposition of the work refusal and constructive discharge issues, we additionally conclude that the refusal to rehire Simpson after he quit also constituted an act of unlawful discrimination. We had reversed the judge on this issue, finding insufficient record support for his conclusion to the contrary. The Court stated, however, that "[i]f Simpson's work refusal was protected by the Mine Act, the evidence ... would have supported the ALJ's finding that the refusal to rehire was based on protected activity in violation of section 105(c)(1)." 842 F.2d at 464. In view of the Court's analysis of the relevant evidence, we accordingly adopt the Court's view and conclude that the refusal to rehire also violated the Act.

4. Simpson's motion to reopen

On review before the Commission, Simpson had moved to reopen the proceedings to determine whether Black Joe Coal Company was the legal successor to Kenta and should assume Kenta's liability to Simpson. We originally denied this motion in view of our conclusion that no violation of the Act had occurred. As noted, Kenta did not seek Commission review of the judge's decision. In the Court's apparent view, Kenta's failure to petition for review meant that, pursuant to operation of the statute, the judge's decision with regard to Kenta became a final decision of the Commission on April 7, 1985, 40 days after its issuance. 30 U.S.C. § 823(d)(1). No party sought review of that "portion" of the judge's decision in a United States Court of Appeals. 30 U.S.C. § 816(a). Under these circumstances,

the Court appears to have treated the judge's decision as to Kenta as a final judgment that we lacked authority to review or "vacate." See 842 F.2d at 464. We adopt in this case the Court's view in that regard. Therefore, Simpson must be regarded as having received a final judgment holding Kenta liable to Simpson for the discriminatory acts at issue and for the relief ordered by the judge.

Simpson's motion to reopen alleges generally that Kenta went out

of business and did not reinstate Simpson or pay him back pay, and that Black Joe Coal Company is Kenta's successor for purposes of Mine Act liability and should be held liable to remedy the respondents' discrimination. In *Ronald Tolbert v. Chaney Creek Coal Corp.*, 9 FMSHRC 1847 (November 1987), we denied a similar motion to reopen a final judgment" on the grounds that the relief sought was in the nature of enforcement of judgment and collection of a judgment debt and that such an enforcement request is properly directed to the Secretary of Labor, who is authorized pursuant to sections 106(b) and 108 of the Mine Act, 30 U.S.C. §§ 816(b) & 818, to seek compliance with Commission orders in the federal courts. 9 FMSHRC at 1848. We subsequently made clear that if the Secretary declines to act in enforcement, all other remedies (including any remedies available in state courts) may be pursued. *Danny Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 508-09 (April 1988).

Accordingly, we deny Simpson's motion to reopen. Simpson may pursue his appropriate enforcement remedies elsewhere. We have today confirmed that his judgment against Kenta is final. There is no serious legal question that a Commission judgment may be enforced against a genuine successor. See generally *Secretary on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (March 1987), *aff'd sub nom. Terco v. FMSHRC*, 839 F.2d 236 (6th Cir. 1987), *pet. for cert. den.*, U.S. , 102 L.Ed 2d 36 (1988). We note that questions of successorship frequently arise in the context of enforcing judgments. See, e.g., *Christiansen v. Mechanical Contractors Bid Depository*, 404 F.2d 324, 325 (10th Cir. 1968) (proceedings for execution upon a judgment pursuant to Fed. R. Civ. P. 69). Thus, the Secretary on Simpson's behalf or Simpson, as the case may be, may seek enforcement of his claims in any proper enforcement forum.

B. Additional Issues

As noted, two issues were not decided in our original opinion given the other results that we reached. We now resolve those questions, both of which were previously briefed to us on review by the parties.

1. The layoff issue

Before the judge, Kenta had argued as a defense to the allegations of discriminatory discharge and refusal to rehire that "because of a recession in the coal business, [Simpson] would have been laid off in any event and that he was not rehired in December [1982] because there was no job for him." 6 FMSHRC at 1462. The

judge rejected this defense, stating that "[t]he evidence does not show that [Simpson] would have been laid off for economic reasons." 6 FMSHRC at 1463. On review, Jackson argues that the judge erred in finding that Simpson would not have been laid off for economic reasons. The evidence in the record establishes that certain layoffs did occur at the mine in January or February 1983, after the December 1982 refusal to rehire Simpson. Therefore, given our conclusion above that the refusal to rehire was in violation of the Act, we view Jackson's and Kenta's assertions that Simpson would have been laid off in any event as a defense to the judge's order of reinstatement and award of back pay and interest.

In general, once discrimination has been found and a gross amount of back pay alleged, "the burden is on the employer to establish facts which would negative the existence of [backpay] liability to a given employee or which would mitigate that liability." *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972), quoting *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). Specifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an affirmative defense to reinstatement and backpay. See, e.g., *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175-77 (2d Cir. 1965), cert. den., 384 U.S. 170 (1966). Cf. *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 232-33 (February 1984), aff'd, 776 F.2d 469 (11th Cir. 1985) (operator bears burden of proof with respect to willful loss of earnings by back pay claimant). Thus, at trial the burden was on respondents to establish by a preponderance of the evidence Simpson's probable layoff as an affirmative defense to his claims for reinstatement and back pay.

Judge Broderick concluded that respondents had not carried their burden of proof. The evidence on the subject was provided by the testimony of Jackson himself. Initially, Jackson testified that he had laid off two miners after Simpson left; that the mine was not "running much coal" and that he had been required to "cut the crew down real small;" that other miners in his crew were more experienced than Simpson; and that he would "lay the youngest men off first." Tr. 609, 611-12, 614-16. In response to subsequent questioning by Judge Broderick, Jackson further stated that he "guess[ed]" that the two miners he had laid off were let go in January or February 1983; that they were "the youngest people [he] had"; that he "guess[ed]" that they had more seniority than Simpson; that he "guess[ed]" that "most" of the miners had more seniority than Simpson; that layoffs were also based on "job qualification"; and that one of the two laid off miners "might have" qualified for Simpson's scoop operator's job while the other would not have. Tr. 654-55. Significantly, Jackson testified that he did not always base layoff decisions on seniority, at times basing such decisions on the size of a miner's family and upon job qualifications. Tr. 315-16, 655.

The judge weighed the respondents' evidence and found it lacking. Jackson's testimony lacks specificity as to how seniority was calculated. It also lacks certainty as to the seniority of the two laid-off miners or the retained miners in relation to Simpson, and as to how "job qualification" and family considerations figured into Jackson's decisions regarding layoffs. Further, the respondents

did not introduce seniority lists or business records explaining the layoff decisions or the effects of the alleged recession on the mine's operation.

The record evidence also shows that another miner, Roy Gentry, a former bolting machine operator, replaced Simpson as scoop operator after Simpson left. Gentry Dep. 3. This fact lessens the weight to be accorded Jackson's assertion that he had not hired any scoop operators to replace Simpson; apparently, he did not have to. There is no evidence of record as to how Simpson's incumbency in the scoop position would have been affected had he not left work. The respondents bore the

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burden of proving that Simpson would have been laid off and we conclude that they failed to carry that burden.

2. The procedural objection

At the outset, it is important to clarify that Jackson is not claiming that there was a lack of notice or a procedural error in trying the question of his personal liability nor is he attacking on the merits any of the judge's substantive findings with regard to his personal liability. Jackson contends only that in concluding Jackson was an "operator" and personally responsible for the discrimination in question, the judge went beyond Simpson's supplemental statement of claim, which framed the issue of Jackson's liability in terms of piercing the corporate veil and alter ego. We find this objection semantic and without merit.

The discrimination complaint and trial (see Tr. 344-45) made clear that Simpson was pursuing Jackson as a co-respondent on theories of personal liability. Simpson's argument that the corporate veil should be pierced to show that Jackson was the alter ego of Kenta was simply another way of stating that Jackson was the real "operator," the real "person" in control of the personnel actions at the mine. The point of this approach was to show that Jackson should not be permitted to "hide" behind the corporate veil. We find Simpson's statement of claim reasonably clear in this regard. For example, at pp. 9-10 of the claim, Simpson asserts that "[f]rom this evidence it is clear that Jackson was the operator of the [mine] ... [and] that corporate formalities were not observed. ... Jackson was the alter ego of Kenta." In other words, any evidence as to corporate control was relevant only to the extent that it clarified Jackson's status as an "operator" and his personal responsibility for the events at issue.

The judge's order of July 30, 1984, also made the nature of this issue reasonably clear. If the respondents were aggrieved by the judge's characterization of the question, they should have objected in a timely fashion to the judge himself -- a course they did not follow. In view of this, Jackson cannot be heard on appeal to complain that he was deprived of notice or prejudicially misled by Simpson's pleadings. Accordingly, we reject this procedural objection.

III.

In sum, on the bases articulated above, we affirm the judge's conclusions that Simpson engaged in a protected work refusal and that Kenta and Jackson violated the Act when Simpson was discharged and refused rehire. We confirm the viability of Simpson's final judgment against Kenta. We deny Simpson's motion to reopen. Simpson may pursue all appropriate remedies for enforcement of the final judgment against Kenta. We affirm the judge's finding that respondents failed to prove that Simpson would have been laid off, and we reject the procedural challenge to the judge's actions below. Accordingly, Judge Broderick's decisions are affirmed. 1/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

1/ Chairman Ford did not participate in the consideration or disposition of this matter.

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