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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

February 16, 1990

JOHN A. GILBERT

v. Docket No. KENT 86-49-D

SANDY FORK MINING COMPANY, INC.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JOHN A. GILBERT

v. Docket No. KENT 86-76-D

SANDY FORK MINING COMPANY, INC.

BEFORE: Ford, Chairman; 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 pursuant to an opinion of the United States Court of Appeals for the District of Columbia Circuit reversing our prior decision in this matter. *John A. Gilbert v. FMSHRC*, 866 F.2d 1433 (1989), rev'@. *John A. Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327 (August 1987). This case involves discrimination complaints filed against Sandy Fork Mining Co., Inc. ("Sandy Fork") by complainant John A. Gilbert on his own behalf (Docket No. KENT 86-49-D) and by the Secretary of Labor on Mr. Gilbert's behalf (Docket No. KENT 86-76-D). Both complaints are based on the same set of circumstances and allege that

Sandy Fork discharged Gilbert in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), because of his refusal to perform work that he believed to be hazardous. In his decision below, Commission Administrative Law Judge Gary Melick denied the Secretary's motion to dismiss Gilbert's own discrimination complaint on

jurisdictional grounds and concluded that Sandy Fork had not discriminated against Gilbert in violation of the Act. 8 FMSHRC 1084 (July 1986)(ALJ).

The Commission subsequently granted petitions for discretionary review filed by both Gilbert and the Secretary. In our prior decision, we affirmed on substantial evidence grounds the judge's conclusion that Sandy Fork had not discriminated against Gilbert in violation of the Act, but we reversed the judge's denial of the Secretary's motion to dismiss Gilbert's own complaint. 9 FMSHRC 1327 (August 1987). Gilbert 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 decide those issues, sustain Gilbert's complaints, and remand this proceeding to the judge for resolution of remedial matters.

I.

In upholding the judge's conclusion that Gilbert had not been illegally discharged, we determined that, even assuming that Gilbert had engaged in a protected work refusal on August 6, 1985, Sandy Fork did not take any adverse action against him because of that work refusal. 9 FMSHRC at 1334-35. We further found that substantial evidence supported the judge's determination that at the time of his August 7 work refusal, Gilbert did not entertain a reasonable, good faith belief that he would be required to work under hazardous conditions. 9 FMSHRC at 1335. In reaching that conclusion, we noted that "Sandy Fork's supervisors and managers did not react to Gilbert precipitately or manifest retaliatory intent." 9 FMSHRC at 1335. Accordingly, we unanimously affirmed on substantive grounds the judge's dismissal of Gilbert's complaints.

In addition, a majority of the Commission held that the judge had erred in denying the Secretary's motion to dismiss Gilbert's individual complaint on jurisdictional grounds. The majority concluded that the express language of section 105(c)(3) of the Mine Act provides that a complainant may file a private action only after the Secretary informs the complainant of her determination that a violation has not occurred. 30 U.S.C. § 815(c)(3); 9 FMSHRC at 1337. The majority declared invalid the clause in former Commission Procedural Rule 40(b) permitting the filing of individual actions when the Secretary has not made a determination of violation within 90 days. 1/ The Commission therefore

1/ Former Commission Procedural Rule 40(b) provided:

A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complaining miner, representative

of miners, or applicant for employment if the Secretary determines that no violation has occurred, or if the Secretary fails to make a determination within 90 days after the miner complained to the Secretary.

29 C.F.R. § 2700.40(b)(1986). This rule was amended on November 23, 1987, to delete the underlined phrase.

reversed the judge's denial of the Secretary's motion and dismissed Gilbert's private discrimination complaint. 9 FMSHRC at 1338-39. Commissioners Doyle and Nelson dissented from this aspect of the decision. They found the Mine Act to be silent as to the consequences of the Secretary's failure to make a determination of discrimination within the 90-day statutory period, that former Rule 40(b) was a reasonable construction of the Mine Act, and that it should not be invalidated. 9 FMSHRC at 1340-44.

The Court reversed the Commission's decision with respect to the merits of Gilbert's discrimination complaints and also with respect to the retroactive application to Gilbert of the Commission majority's holding that individual complaints may be brought under section 105(c)(3) only after the Secretary rejects a miner's initial complaint. The Court remanded to the Commission questions in both areas for further consideration. 866 F.2d at 1434-35.

II.

A. The merits of Gilbert's discrimination complaint

We note initially that the Court endorsed several important principles of Commission discrimination law. Citing Secretary on behalf of *Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983) and Secretary on behalf of *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981), the Court agreed with the Commission that section 105(c) of the Act "protects a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous." 866 F.2d at 1439. The Court subscribed as well to the Commission's view that in analyzing whether a miner's fear is reasonable, the perception of a hazard must be viewed from the miner's perspective at the time of the work refusal. 866 F.2d at 1439, citing Secretary on behalf of *Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1533-34 (September 1983) and *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1944 (November 1982). The Court also approved Commission holdings that to be accorded the protection of the Act in engaging in a work refusal, a miner need not objectively prove that an actual hazard existed and, further, that a good faith belief simply means an honest belief that a hazard exists. *Id.*, citing Secretary on behalf of *Hogan & Ventura v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1072-73 (July 1986); *Pratt*, *supra*, 5 FMSHRC at 1533-39; *Haro*, *supra*, 4 FMSHRC at 1943-44; and *Robinette*, *supra*, 3 FMSHRC at 810.

To determine whether substantial evidence supported the Commission's conclusion that Gilbert's August 7 work refusal lacked the required basis of a good faith, reasonable belief in a hazard, the Court adopted

Commission guidelines for assessing a miner's "good faith." 866 F.2d at 1440. First, the Court indicated that, where reasonably possible, a miner refusing work should ordinarily communicate or attempt to communicate to some representative of the operator his belief in the safety or health hazard at issue and, second, when a miner has expressed a reasonable, good faith fear in a hazard, the operator has a corresponding obligation to address the perceived danger. 866 F.2d at 1440, citing Secretary on behalf of *Dunmire & Estle v. Northern Coal*

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Co., 4 FMSHRC 126, 133 (February 1982); Bush, supra, 5 FMSHRC at 997-98; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226 (February 1984), aff'd sub nom. Brock ex rel. Parker v. Metric Constructors Inc., 776 F.2d 469 (11th Cir. 1985); Hogan & Ventura, supra, 8 FMSHRC at 1074. Applying these principles, the Court found that the record did not support the Commission's determination that on August 7 Gilbert did not entertain a good faith, reasonable belief that he would be required to work in a hazardous area. 866 F.2d at 1140-41.

The Court presented its view of the evidence. Among other things, the Court noted that Gilbert was working in an area of the mine in which it appeared to him that the prevailing roof conditions placed his safety in jeopardy; that he left work on August 6 with management's permission; that when he returned to work on the morning of August 7 he learned from other miners of a roof fall that had occurred overnight in the area where he had been working; and that when he inquired of management representatives what had been done to address the unsafe conditions, they "refused to address his concerns." 866 F.2d at 1440-41. The Court found that Gilbert's "initial fears" on August 6 were reasonable and that on August 7 "he made a good faith attempt to communicate his reasonable fears to management." 866 F.2d at 1441.

The Court, however, stopped short of outright reversal of the "Commission's decision, stating that it was not "clear" whether "management addressed Gilbert's concerns [on the morning of August 7] in a way that his fears reasonably should have been quelled." 866 F.2d at 1441. See also 866 F.2d at 1441 n.11. The Court explained:

In other words, did management explain to Gilbert that the problems in his work area had been corrected? Or did management indicate to Gilbert that he would be assigned to another area in the mine that was free of safety problems? Or did management indicate to Gilbert that the situation was unsettled, and that he should wait five hours (until the start of his assigned shift) before inquiring further about safety conditions in his area? These questions must be answered by the Commission in order for it to determine whether the management at Sandy Fork reasonably addressed Gilbert's fears on the morning of August 7. If management effectively "stone-walled" Gilbert in responding to his inquiries on the 7th, then his continued fears regarding work hazards were reasonable, and his refusal to return to work cannot be viewed as either unreasonable or in bad faith.

866 F.2d at 1441.

There is no question on this record that mine management was aware of the roof problems in the area where Gilbert was working and was taking steps to address the problems. As the judge found, and as we noted, when Gilbert brought the conditions that he perceived to be hazardous to the attention of his section foreman on August 6, the

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foreman responded that he would add more cribs to support the roof and that he would stand by and watch while coal was cut. 8 FMSHRC at 1089; 9 FMSHRC at 1330. Gilbert then went outside the mine and repeated his concerns to the general mine foreman, who told Gilbert that he would not insist that he resume work and that Gilbert should go home and return the next day to meet with Phipps, the general manager, and Begley, the mine superintendent.

When Gilbert returned on August 7, Phipps and Begley were underground conducting an examination of the roof, and Gilbert was told by another miner that a roof fall had occurred in the mine during the night. After Phipps and Begley emerged from the mine, Gilbert talked separately with each of them.

Gilbert talked first with Phipps. Both Gilbert and Phipps testified that Gilbert told Phipps that he was afraid of the roof. Tr. I 39.40; III 89-92. Gilbert asked Phipps what management was going to do about the roof and how the roof would be supported. Tr. II 39-40. Gilbert testified that Phipps responded that "they [were] supporting what they could." Tr. 139-40. Similarly, Phipps stated that "primarily" he told Gilbert that the mine roof was all the top that the mine had. Tr. II 127. Both Phipps and Gilbert testified that Phipps asked Gilbert if he had any ideas for dealing with the roof (Tr. I 40; III 91), and Gilbert testified that he offered a few suggestions (Tr. I 40). Phipps further stated that he did not try to "convince" Gilbert that the roof was safe and that, although management was pursuing several approaches for alleviating the roof problems, he did not discuss those initiatives with Gilbert at that time. Tr. III 127-28.

Gilbert then engaged Begley in a similar brief conversation. Gilbert and Begley also agreed that Gilbert told Begley that he was afraid of the roof. Tr. I 40-41; II 109. Gilbert testified that Begley replied that "that's all they can do ... that's all the top they [had]." Tr. I 41. Begley stated that he did not recall telling Gilbert anything about the top on the morning of August 7. Tr. II 111-12. Begley's recollection was that he and Gilbert discussed Gilbert's possible job transfer rather than roof problems. *Id.* After these two conversations, Gilbert left the mine.

The Court rejected the judge's and Commission's determinations that in leaving the mine at this point, some five hours before his shift was scheduled to begin and before he had been told the specific area of the mine to which he would be assigned, Gilbert acted precipitately and unreasonably. 866 F.2d at 1140. Instead, the Court has directed us to determine whether management explained to Gilbert that the problems in his general work area had been corrected, or had indicated that he would be assigned to another area of the mine free of safety problems, or had

suggested that the situation was unsettled and that he should wait until the start of his assigned shift before inquiring further about safety conditions in his area. 866 F.2d at 1441.

Based on the testimony summarized above, we conclude that Gilbert's safety concerns were not addressed in a manner sufficient to reasonably quell his fears. Given the Court's belief that Gilbert did

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not act precipitately and its finding that he entertained a good faith, reasonable belief in a hazard, we are constrained to conclude that Gilbert's departure from the mine on August 7 constituted a discriminatory discharge in violation of section 105(c)(1) of the Act. Accordingly, the judge's conclusion to the contrary is reversed.

B. Retroactive application of changed Commission policy

As noted, the Commission majority concluded that the judge erred in denying the Secretary's motion to dismiss Gilbert's private complaint. In essence, the majority held that the provision of former Commission Rule 40(b) permitting a miner to file a discrimination complaint prior to the Secretary's determination that no discrimination had occurred conflicted with what the majority viewed as the express enforcement schemes set forth in section 105(c) of the Act and, accordingly, was invalid. The Court took issue with the majority's retroactive application to Gilbert of this new Commission policy. The Court did not consider the prospective validity of the new policy but, rather, held that the majority had not explained the basis for retroactively applying the new policy to Gilbert. 866 F.2d at 1441-42.

Citing *Loc. 900, Int'l U. of Elec. Wkrs. v. NLRB*, 727 F.2d 1184, 1194-95 (D.C. Cir. 1985) and *Retail, Wholesale & Dept. Store U. v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), the Court identified five factors that are to be applied in determining whether a new rule developed in an adjudication should be given retroactive effect. Those factors are:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

866. F.2d at 1442.

The Court discerned nothing in the record or the Commission's decision to overcome the first four factors, all of which, in the Court's opinion, militated strongly against application of the Commission's new policy to Gilbert. 866 F.2d at 1442-43. The Court indicated that the Commission had not examined whether the "statutory interest" in the

application of the new policy to Gilbert, notwithstanding his reliance on the old policy, was of sufficient magnitude to overcome the other four factors, and it remanded the matter to the Commission for the purpose of carrying out such a statutory interest analysis. 866 F.2d at 1443.

In discussing retroactive application of new agency policy in *SEC v. Chenery*, 332 U.S. 194, 203 (1974), the Supreme Court, in relevant part, stated:

[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design.... If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

The "statutory interest" criterion referred to by the Court herein is drawn from *Chenery*, supra, and is a flexible concept. In applying it in retroactivity contexts, courts have explained it in terms of statutory "purpose" and "design" (e.g., *Retail, Wholesale & Dept. Store U.*, supra, 466 F.2d at 392), "overriding Congressional interest" (*Clark-Cowlitz Jt. Operating Agency v. FERC*, 826 F.2d 1074, 1085 (D.C. Cir. 1987)), "significant policy concern of ... legislation" (*NLRB v. Wayne Transp.*, etc., 776 F.2d 745, 751 (7th Cir. 1985)), and "statutory intent" (*Stewart Capital Corp. v. Andrus*, 701 F.2d 846, 849-50 (10th Cir. 1983)).

With respect to prospective application of the Commission's new policy, all Commissioners adhere to their respective views as expressed in the prior Commission decision in this matter. With respect to retroactive application of that policy, all Commissioners conclude that under all the circumstances presented, any practical or legal "mischief in allowing Gilbert's private action to go forward would not be sufficient to overcome the Court's determinations with regard to the first four retroactivity criteria. We note that the Secretary first moved to dismiss Gilbert's action and it is the Secretary who, as the primary prosecutor under the section 105(c) enforcement schemes would be the primary victim of the "mischief" that she originally asserted resulted from a "two-tracked" proceeding such as this. Yet, as the Court noted, the Secretary "appeared to concede [during oral argument in this and a related case before the Court] that the government had no case that it wished to pursue in defense of the Commission's retroactive application of the new rule." 866 F.2d at 1443.

Thus, in light of the Court's opinion, Gilbert's private complaint must be reinstated.

IV.

On the foregoing bases, we reverse the judge's conclusion that Sandy Fork did not discriminate against Gilbert in violation of section 105(c)(1) of the Act and we reinstate Gilbert's discrimination complaints. We remand the matter to the judge for determination of all outstanding remedial issues.

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