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DONALD DENU V. AMAX COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 26, 1990

DONALD F. DENU

v. Docket No. LAKE 88-123-D

AMAX COAL COMPANY

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"), Complainant, Donald Denu, alleges that Amax Coal Company ("Amax") violated section 105(c)(1) of the Mine Act. 1/ Commission

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

Discrimination or interference prohibited; complaint;
investigation; determination; hearing

(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
(Footnote continued)

Administrative Law Judge Gary Melick held that Amax violated section 105(c) of the Mine Act by threatening Denu with disciplinary action and discharge for refusing to unplug a 6,900-volt power cable. 11 FMSHRC 317 (March 1989)(ALJ). We granted Amax's Petition for discretionary review. For the reasons set forth below, we reverse the judge's decision.

Fn. 1/ continued

a complaint with the Secretary alleging such discrimination. Upon 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....

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....

At the time of the events giving rise to this proceeding, Denu was an electrician and local union president at Amax's Ayrshire Mine in Indiana. The Ayrshire Mine is a surface coal mine at which a dragline is used to remove the overburden and electrically powered shovels are used to remove coal. The 6,900-volt power cable ("power cable" or "cable") supplying electricity to the shovels in the pit crosses the bench where the dragline operates. The bench is cut about six to eight feet below the undisturbed ground and the pit is 85 feet below the bench. When it is necessary for the dragline to travel past the cable, the cable is unplugged at both ends, moved around the dragline and then plugged back in. As an aid to our discussion, a copy of Respondent's Exhibit 2, reduced in size, is attached to this decision and incorporated herein.

When the dragline approaches the power cable as it travels along the bench, the procedure for moving the cable around the dragline is commenced. First, the shovel operators are directed via radio to shut off their equipment. Next, the circuit breaker at the 6,900-volt substation (the "substation") located on undisturbed ground is switched off and the plug to the power cable is pulled from the substation. These steps de-energize the cable. The plug at the other end of the power cable is removed from the 6,900-volt circuit breaker box (the "switch box") located on the bench near the highwall above the pit. The switch box end of the cable is then moved around the dragline and reconnected at the switch box. Next the other end of the cable is plugged back in at the substation and the circuit breaker at the substation is switched on, which energizes the cable. Finally the shovels are switched on.

Usually, a pair of electricians travels by truck to the substation to switch off the power to the cable and to disconnect the plug. Then they travel by truck to the bench to unplug the other end of the power cable, move it around the dragline and plug it back in at the switch box. Finally they travel by truck to the substation to plug that end of the cable back in and turn on the circuit breaker. Sometimes, however, if the shovels are operating, and other electricians are available, a pair of electricians is dispatched to the substation to perform the tasks required at that location and a second pair of electricians is sent to the bench to perform the tasks required there. If this procedure is used, the two pairs of electricians communicate via radio to ensure that the switch is off and the cable is unplugged at the substation before the other end of the cable is unplugged at the switch box on the bench. Once the cable is moved and reattached at the switch box, the electricians on the bench immediately radio the electricians at the substation to re-energize the power cable.

Donald F. Denu is an experienced electrician with over nine years experience in the mining industry. On February 27, 1988, Denu was working

the 4:00 p.m. to midnight shift. At 6:00 p.m. he was preparing with another electrician, Harrison Key, to disconnect and move the power cable to allow the dragline to pass. According to Denu, he and Key drove to the substation to de-energize the cable. Tr. 23. While there, Denu observed that there was only one cable connected at the substation. Tr. 33; Exh. C-1. While he and Key waited at the substation for a call to disconnect the cable, Vernon Knight, the second shift electrical

supervisor and Denu's immediate supervisor, radioed Denu and told them to proceed to the bench because he was bringing Don Kozar and Don Gehlhausen, two electricians, to disconnect the cable at the substation. Denu asked to remain at the substation but Knight told them to proceed to the bench. Tr. 23-33, 219, 223-224; Exh. C-1.

After Denu and Key returned to the bench, Denu called Knight and asked if he was going to be allowed to disconnect the power cable at the substation. Tr. 26-33; Exh. C-1. Knight replied that the other pair of electricians would perform the disconnect at the substation. A discussion followed wherein Denu told Knight that the procedure was improper and unsafe and that he would withdraw himself by refusing to unplug the head of the cable at the switch box. Knight radioed Brent Weber, second shift general supervisor, and told Weber to meet him at the bench. Knight drove to the bench with Kozar and Gehlhauser, got out of the truck and instructed Kozar and Gehlhauser to drive to the substation to standby for the disconnect. Tr. 23-33, 219, 223-224; Exh. C-1.

A discussion between Denu, Knight and Weber took place at the bench. According to Denu, Knight told him that he would be disciplined for insubordination and Weber asked him if he knew what the consequences of his actions were. Denu stated that he replied that there should be no consequences to a person who withdraws himself from a situation that he feels is unsafe or is in violation of Federal law. According to Weber, he overheard Denu tell Knight over the radio that he would withdraw if he was required to unplug the cable at the switch box for the reasons he had expressed previously. Weber testified that when he arrived, he told Denu that he did not appreciate him talking about such matters over the radio. Weber testified that he did not mention disciplinary action until after Denu refused to unplug the cable. Tr. 33-37, 224-230, Exh. C-1.

Electrician Kozar called Denu via the radio and said that the cable at the substation was unplugged and the cable head was on the ground. Weber then ordered Denu to unplug the cable at the switch box. Denu replied that he was going to withdraw and again said it was not a safe practice. Weber testified that he replied that if Denu did not exercise in good faith his right to withdraw he would be subject to discipline. Weber went on to testify that Denu then got out of his truck and said that Weber was not threatening him with discipline or anyone else with this issue ever again. A short, heated discussion followed in which Weber told Denu that he was bordering on insubordination because he had come right up against Weber. Tr. 33-38, 103, 224-230; Exh. C-1.

Weber asked Key if he would unplug the cable at the switch box. Key, who testified that he did not find the procedure to be unsafe,

complied. Denu then put on hot gloves and assisted Key in moving the disconnected cable around the dragline. Key then plugged the cable back into the switch box and Denu turned the circuit breaker off on the switch box. Kozar was called on the radio and told to plug the other end of the cable back into the substation and switch the circuit breaker on. After that was completed, Denu closed the switch on the switch box, which reapplied power to the shovels in the pit. Tr. 39-41; Exh. C-1.

Kozar testified that he did not walk along the cable or otherwise trace the cable from the switch box to the substation. He also testified that neither the cable head nor its receptacle was labeled. After he switched off the circuit breaker, unplugged the cable and put the cable head on the ground, he did not lock out or tag out the cable. Rather, he remained at the substation until it was time to plug the cable back in and switch on the circuit breaker. He stated that there was only one cable plugged in at the substation, that this cable went in the direction of the pit and that he did not see any other substations or switch boxes in the area that could have supplied power to the cable plugged in at the switch box on the bench. Although he could not state that he was 100% certain that he unplugged the correct cable, he believed that he did. He stated that he remembers seeing the power indicator light go out at the switch box or lights go off at the shovels when he threw the switch at the substation. He testified that at the time he felt sure that he had de-energized the correct cable. Tr. 101-104.

Near the end of the shift, there was a brief meeting with the union safety committeeman about Denu's work refusal. Weber, Knight, Denu and Robert Lee, the safety committeeman, were present. Lee stated that the labor contract requires that an MSHA inspector be notified if there is a disagreement on withdrawal actions. Weber responded that a federal electrical inspector was expected back the next working day (Monday, February 29, 1988). He also told Denu to report to the office of Larry Landes, human relations manager, before the start of his shift the next working day to determine if disciplinary action would be taken. Lee and Denu complained to Weber that the labor agreement was not being followed. The discussion centered around the labor agreement and was heated at times. Denu states that Weber's attitude was threatening. Tr. 42-44, 149-51, 229-31; Exh. C-1.

On Monday, February 29, 1988, the next work day after Denu's work refusal, William Deuel, an MSHA electrical inspector, was scheduled to terminate an electrical citation that had been abated. When the inspector arrived, Larry Ashby, AMAX's electrical maintenance manager, told him what had happened on February 27. Ashby asked if the company's radio disconnect procedure was still permitted by MSHA. As discussed below, Inspector Deuel had previously told him and Denu that radio communications may be used when disconnecting cables. Inspector Deuel called MSHA's Arlington headquarters in Ashby's presence and confirmed that radio communications are a proper procedure when disconnecting power cables. Inspector Deuel went to a safety committee meeting attended by management and union officials and explained that radio disconnect procedures are permitted by MSHA. Tr. 185-188. Jay Perry, the union safety committee chairman, told Denu about MSHA's interpretation prior to his meeting with Landes that

afternoon.

At the afternoon meeting, Landes told Denu that the company was not going to take disciplinary action, that the matter was resolved and that the company did not anticipate this sort of problem occurring in the future. Lee testified that Landes said that if this problem happened again, disciplinary action would be taken. No disciplinary action was ever taken and nothing was put into Denu's personnel file as a result of this incident.

About a year before Denu's work refusal, on March 2, 1987, Denu had asked Inspector Deuel if it was improper for the company to ask him to unplug a shovel cable when other electricians were assigned to unplug the cable at the power source. Larry Ashby also participated in these discussions. Denu testified that Inspector Deuel replied: "I agree with you, Don, but I don't think the books [regulations] do." Tr. 93; Exh. C-28. Ashby recalls Inspector Deuel stating that MSHA did not consider the unplugging of cables to be electrical work and that the proper use of radio communications was acceptable. Ashby also testified that Inspector Deuel talked about an MSHA policy memo authorizing this procedure and that the inspector subsequently gave him a copy. 2/ Ashby did not discuss the matter further with Denu. Tr. 174-179; Exh R-8.

Denu brought this present action under section 105(c)(3) of the Mine Act, 30 U.S.C. 815(c)(3), 3/ after the Secretary of Labor determined that Amax did not violate section 105(c). Exh. R-3. At the hearing, Denu did not state directly what the hazard was in allowing one set of electricians to disconnect the plug at the substation and another set to move the cable. He did state his belief that such a procedure would violate 30 C.F.R. 77.501. 4/ This regulation requires that disconnecting devices be locked out and tagged out before electrical work is performed on electric distribution circuits. Denu maintained that the cable is an electric distribution circuit and that disconnecting the cable head from the bench box is electrical work. Tr. 49-50. He testified that the radio disconnect procedure used violates the standard because he is not personally allowed to lock out and tag out the disconnecting device, the plug, at the substation. 5/ Tr. 52. Denu also generally relied on the

2/ This MSHA memorandum, dated November 20, 1974, instructs MSHA inspectors not to issue citations when they observe an electrician at one location performing repair work on a high-voltage electrical system after another qualified electrician de-energized the circuit at a different location so long as the two electricians are in direct telephone or radio communication. Exh. R-8.

3/ See n. 1, supra.

4/ 30 C.F.R. 77.501, provides in pertinent part:

Electric distribution circuits and equipment; repair.

No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person Disconnecting devices shall be locked out and suitably tagged by the persons who

perform such work....

5/ Amax and apparently MSHA consider 30 C.F.R. 77.501 inapplicable when unplugging high voltage lines. The term "high voltage" is defined in 30 C.F.R. 77.2(s) as "more than 1000 volts." The provisions of 30 C.F.R. 77.704-1 govern high-voltage lines and provides in part:

(Footnote continued)

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fact that there have been a number of fatalities and injuries at other mines caused by violations of section 77.501. Tr. 54, 59, 67. He stated that since he did not believe that Kozar and Gehlhauser traced the cable from the switch box back to the substation, and the cable and receptacle were not marked at the substation, there was no guarantee that Kozar deenergized the correct cable. Tr. 62. He stated that even if Kozar had locked the cable out, there would have been a violation and he would have refused to work because he would not have been "afforded the opportunity to perform that disconnect and lock out procedure myself." Tr. 69-70. Although Denu did not specifically articulate the hazard of unplugging a cable that is energized, Kozar testified that there could be a big flash or explosion and the person involved could receive burns or be electrocuted. Tr. 115-116.

Following an evidentiary hearing, Administrative Law Judge Gary Melick held that Amax violated section 105(c) of the Mine Act and awarded damages of \$1,000 as had been stipulated by the parties. 11 FMSHRC 563. 6/ The judge found that Denu entertained a reasonable, good faith belief that a hazardous condition existed at the time he was directed to disconnect the cable at the bench box. He found that there is "no dispute that it would have been extremely hazardous and likely to result in severe burns and/or electrocution to have disconnected the cable at the switch box if the cable had remained connected and energized at the substation or had been reconnected and re-energized." 11 FMSHRC at 321. He found that the cable could have been "intentionally or unintentionally" reconnected at the substation. Id. He then stated that while under the circumstances of this case, the chances may not have been great that the cable had not been "deenergized, disconnected and not

Fn. 5/ continued

Work on high-voltage lines.

(a) No high-voltage line shall be regarded as deenergized for the purpose of performing work on it, until it has been determined by a qualified person ... that such high voltage line has been deenergized and grounded. Such qualified person shall by visual observation (1) determine that the disconnecting devices on the high-voltage circuit are in open position, and (2) insure that each ungrounded conductor of the high-voltage circuit upon which work is to be done is properly connected to the system grounding medium....

The MSHA memorandum referenced in note 3 above, is based on this safety standard.

6/ Because Denu was not suspended or discharged by Amax the stipulated damages cover the costs associated with Denu's prosecution of his discrimination complaint. Of the \$1,000 in stipulated damages, approximately \$700 is wages lost to Denu because he missed six days of work while preparing and presenting his case.

reconnected, the danger of serious injury or electrocution was a near certainty if the cable at the substation had been inadvertently reconnected and reenergized." *Id.* The judge considered "these extreme consequences" to be a key component in his determination that Denu entertained a reasonable, good faith belief in a hazard. Finally, the judge concluded that threats of disciplinary action directed to a miner exercising a protected right constitute unlawful interference under section 105(c)(1), whether or not those threats are later carried out.

Under established Commission precedent, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that 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*, 3 FMSHRC at 818 n. 20. If an operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activity alone. See also *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).

A miner has the right under section 105(c) of the Mine Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition. *Pasula*, 663 F.2d at 1216 n. 6, 1219; *Miller v. Consolidation Coal Co.*, 687 F.2d 194, 195 (7th Cir. 1982). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; Secretary on behalf of *Bush v. Union Carbide Corp.*, 5 FMSHRC 993. A good faith belief "simply means honest belief that a hazard exists." *Robinette* at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Id.* The Commission has rejected a requirement that miners who refuse to work must objectively prove that hazards existed. The miner must simply show that his perception was a reasonable one under the circumstances. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (November 1982); *Robinette*, supra. In determining whether the miner's belief was reasonable under the circumstances, the judge is to look to the miner's account of the conditions precipitating the work refusal, and to the operator's response in order to evaluate the relevant

testimony as to "detail, inherent logic and overall credibility."
Robinette, 3 FMSHRC at 812. The perception of a hazard must be viewed
from the miner's perspective at the time of the work refusal. Secretary
on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (September
1983); Haro, supra.

The pivotal issue in this case is whether Denu was engaged in a
protected work refusal. On the facts presented, the issue is not

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whether Denu generally believed that it was hazardous to unplug an energized 6,900-volt power cable, but whether he entertained a reasonable, good faith belief at the time of his work refusal that he faced a hazard if he unplugged the power cable at the switch box as he had been instructed to do.

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. §823(d)(2)(A)(ii)(I). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Nevertheless, "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951). For the reasons discussed below, we conclude that substantial evidence does not support the judge's conclusion that "Denu did in fact entertain a reasonable, good faith belief that a hazardous condition existed at the time he was directed to disconnect the power cable at the 6,900 volt switch box." 11 FMSHRC 320-21.

Although Denu did not testify as to the hazards presented by unplugging an energized power cable, Kozar testified that a "big flash" can result and the miner could receive burns on his arms or could be electrocuted. Tr. 114-16. Since no evidence of record contradicts this testimony, the judge's conclusion that unplugging an energized 6,900-volt power cable presents a significant safety hazard is supported by substantial evidence.

It is clear, however, that at the time of Knight's order to unplug the power cable, Denu knew that Kozar was at the very same substation at which Denu had been when Knight ordered Denu to proceed to the bench. 7/ Denu also knew from his own personal observation that only one power cable was present at this substation. In fact, Denu had just proceeded to the substation to unplug the very same cable. Thus, when Kozar called Denu on the radio and told him that the plug was disconnected and on the ground, Denu could not have entertained a reasonable belief that Kozar had unplugged a different cable. Finally, Denu also knew that Kozar was a qualified electrician and that he and another electrician were going to remain at the substation for the short duration of the cable move and that they were to plug the cable back in at the substation only after Denu had notified them via radio that the cable move had been completed. Whatever uncertainties Denu may have had regarding whether all steps had been taken to de-energize the cable could have been resolved through use of the two-way radio system.

The record also makes clear that the issue of the safety of using

two pairs of electricians in radio communication with each other when

7/ Indeed, if Denu entertained any doubts as to Kozar's location, he could have simply asked Kozar where he was when the two were in communication on the radio.

disconnecting power cables had arisen before. Denu had raised safety concerns with respect to this issue about a year before and was told by MSHA electrical Inspector Deuel that it was allowed under MSHA's safety standards. He also knew from previous discussions that AMAX believed it to be a safe and legal procedure.

Given the above facts as set forth in the record, we believe that Denu failed to prove that his belief that@ at the time of the events at issue, if he had pulled the plug at the switch box as instructed by Knight he would have been exposed to an electrical hazard was reasonable. Instead, the record reveals that Denu refused to work because of generalized fears that if a mistake is made when working with 6,900-volt power lines, a serious accident can happen. 8/ The record does not show that he had a reasonable belief that such a mistake would be made or that an accident would happen if he unplugged this particular cable at the time of his work refusal.

Denu testified that he would not have unplugged the cable at the switch box unless AMAX allowed him to personally disconnect the power cable at the substation and put his own personal lock on the cable head. Tr. 74. He stated that even if Kozar had locked out the cable head at the substation, he would have refused to unplug the cable at the switch box. Thus, Denu was reserving to himself exclusively the right to unplug the cable at the substation. Nothing in the Mine Act or MSHA's safety standards grants a miner the right to insist that only he can de-energize a power cable if he is required to unplug the other end of the cable. Kozar was a qualified electrician in direct communication with Denu and nothing in the record suggests that he was regarded by Denu as being unreliable or incapable of safely performing the disconnect at the substation. Thus, in the absence of a reasonable fear that the cable was energized, Denu had no statutory right to insist that he be granted the exclusive right to personally perform all aspects of the assigned task.

Because we are bound to affirm an administrative law judge's findings of fact if supported by substantial evidence, we have carefully reviewed the judge's decision and have determined that several additional critical findings lack a substantial basis in the record. One significant

8/ In order to prove that his work refusal was reasonable and made in good faith, Denu introduced a number of exhibits to illustrate the hazards presented when an electrician works on an electrical circuit that has not been locked out. Exhs. C-4 through C-8. None of these exhibits concern the hazards present in unplugging or moving high voltage cables. The judge held that Denu was concerned about the hazards presented because he was "aware through MSHA 'Fatalgrams' of the potentially fatal consequences in

similar if not identical situations." 11 FMSHRC 321. Denu attempted to introduce these "Fatalgrams" (MSHA notices of fatal mine accidents) at the hearing, but withdrew them when the judge and counsel for Amax questioned their relevance. Tr. 57-59. In addition, none of the other exhibits that were introduced shed light on the hazards presented in this case.

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finding lacking record support is the judge's determination that the serious hazard presented by unplugging an energized 6900-volt power cable was "not significantly diminished" by the fact that Denu knew that the cable plug at the substation was out and lying on the ground. 11 FMSHRC at 322. The judge recognized that the record evidence establishes that Denu knew that (1) only one cable exited the substation, (2) this cable was likely the same cable that was plugged in at the switch box, (3) two qualified electricians were at the substation to disconnect this cable, and (4) one of the electricians told Denu via radio that the cable head was out and lying on the ground. *Id.*

In spite of this evidence, the judge found that "the serious hazards, previously discussed, are not significantly diminished by these considerations." *Id.* We find no basis whatsoever in the record to support this finding. Denu knew that during the short period of time required to move the cable around the dragline, two qualified electricians would be present at the substation to make certain that the only cable connected to the substation was unplugged and remained unplugged at the substation. There is no evidence in the record to suggest that these electricians were unaware of the procedure to be followed, that they were otherwise unqualified or that Denu had a reasonable fear that they would plug the cable back in at the substation prematurely. Thus, the record evidence demonstrates that the hazards of electric shock were not only "significantly diminished" but were in fact eliminated when Kozar told Denu that the cable head was disconnected and lying on the ground.

The judge also concluded that Denu had reason to believe that if the circuit breaker malfunctioned at the substation the cable could remain energized even though the switch was off and the indicator light on the switch box was off. Assuming this to be true, it is totally irrelevant because the undisputed testimony is that Kozar not only turned off the circuit breaker at the substation but also pulled the plug. The testimony concerning the hazards of a switch malfunction assume that the cable remains plugged in at the substation. The testimony makes clear that once the cable is unplugged at the substation it is impossible for the cable to remain energized. Therefore, a malfunction of the circuit breaker would create a potential hazard to the electrician unplugging the cable at the substation rather than to the electrician unplugging the cable at the switch box. Thus, substantial evidence does not support the judge's conclusion.

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We stress that our conclusion is based on Denu's knowledge of certain facts at the time of his work refusal, particularly his knowledge that only one cable exited the substation and that Kozar, a qualified electrician, was dispatched to the substation to unplug the same cable that Denu prepared to unplug previously. Substantial evidence does not support the judge's determination that Denu reasonably believed that he faced a hazard if he followed the radio disconnect procedure in this particular instance.

Accordingly, the judge's decision is reversed.

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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