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HARRY RAMSEY V. INDUSTRIAL CONTSRUCTORS
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
August 29, 1990

HARRY RAMSEY

v. Docket No. WEST 88-246-DM

INDUSTRIAL CONSTRUCTORS
CORPORATION

BEFORE: Ford, Chairman; Backley, Doyle, 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. (1988)("Mine Act" or Act"), Industrial Constructors Corporation ("ICC"), seeks review of a decision by Commission Administrative Law Judge John J. Morris sustaining a complaint of discrimination brought by Harry Ramsey pursuant to section 105(c)(1) of the Mine Act. 1/ In an Interim Order the judge found that two acts of discrimination by ICC had occurred: the first, when Ramsey was constructively discharged on August 13, 1987, as the result of a safety related complaint, and the second, when ICC subsequently refused to rehire him. 11 FMSHRC 1585 (August 1989)(ALJ). In a final decision ICC was ordered to pay Ramsey back pay, interest, attorney's fees and costs. 11 FMSHRC 1988 (October 1989)(ALJ). The Commission granted ICC's petition for discretionary review. For the reasons that follow, we reverse the judge's decision.

Complainant Ramsey was employed at ICC's Colosseum gold mine, located near San Bernadino, California, from May 1987 until August 1987. With both his prior employer and his own company, Ramsey operated and hired operators of heavy equipment. At ICC, Ramsey initially operated

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1/ Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act].

30 U.S.C. 815(c)(1).

various types of equipment at the mine site and briefly worked as a laborer. Tr. 24-36. In June or early July 1987, Ramsey was assigned as a loader operator to ICC's newly established rock crusher operation, but actually worked as the crusher operator because the individual hired as the crusher operator failed to appear for work. On July 18, 1987, he was reclassified by the foreman, Clifford Morrison, from loader operator to crusher operator with a pay increase. Exh. C-2, Tr. 37-38, 155.

As a crusher operator Ramsey was located in the control tower, an 8'x8' building, 20 feet in height with windows on all sides, affording the operator a view of the working area. Tr. 40-42, Exh. C-3. The duties of the crusher operator were to monitor and insure the continuous flow of material (rock) into and out of the hopper and to shut down the crusher whenever the hopper became blocked up or when a problem with the conveyor belt arose. Tr. 38-40, 44.

Ramsey testified that under normal procedures, when the mechanic or the foreman noticed a buildup of material, they would inform him by hand signal of the problem. Ramsey, under the foreman's or mechanic's instructions, would then alert the three or four workers in the area, first by a horn signal, as a general alert, and then by hand signals, directing them to the specific problem area. When all workers were in view, the machinery was then shut down, and the blockage or spillage could then be safely removed. Tr. 38-40, 44-45. From a designated area the mechanic or foreman would also inform him by hand signals when they wished him to shut off the water spray system, which primarily controlled dust during production and at times was used to increase the moisture content of the material being processed. Tr. 47. It is undisputed that standard operating procedure, shortly before the end of each production shift, was to clean the buildup of mud from the screens by turning off the water sprays while keeping the crusher running, thus allowing the dry material to hit the screens, chipping away the mud. Tr. 55, 160.

On August 12, 1987, Ramsey worked the swing shift, which began about 4:00 p.m. and ended about 2:00 a.m. the next morning. Ramsey testified that about 45 minutes before the end of the shift while in production crushing rock, foreman Morrison gave him a hand signal from the work area to shut off the water sprays. Ramsey initially failed to comply, explaining that this was the first shift since the operation had started that they had "run full production all night"; that production "had been running smooth all night"; that "we had a heck of a stockpile of material out there"; and that he was not anticipating any shut down with 30 to 45 minutes production time still remaining before their normal shut down time. Tr. 45-46.

When Morrison, after a minute or two, "gave me a real strong signal again to shut it off," Ramsey then did as directed. Tr. 44-47, 123-24. According to Ramsey, within a few minutes the dust was such that he "couldn't see the window of the control tower in front of me" and was unable to see any of the employees. He testified that normal procedure was to shut down the machinery automatically if the dust was so thick that you couldn't see at all. Tr. 47-50. After two or three minutes, he shut down the crusher and he stated that about 5 minutes

later the dust had cleared sufficiently so that he could see "a little bit," making out "more or less shadows or whatever the equipment is." Tr. 52. At that point Morrison climbed into the tower and asked why Ramsey had "shut the plant down." Ramsey responded that if he could not see after the water was cut off, he could not operate. According to Ramsey, Morrison replied "I'll tell you when to shut the water on and when to shut it off." Tr. 54, 59, 124-26.

Morrison left the tower and Ramsey restarted the belt for about five minutes, the normal procedure used to clean off the screens before the next shift. Tr. 54.56. Ramsey then met Morrison outside the tower where he again asked if he (Ramsey) had the "latitude" to turn the water on and off when he could not "see the people under me", and received the same reply. Tr. 59-61, 120. The conversation continued and Ramsey repeated a number of times that if he did not have the "latitude" to turn the water off, "I wouldn't work for him under those conditions," because "it is not safe." Tr. 60-61, 120. Ramsey testified he meant not working for Morrison, and that it was not his intention to stop working for ICC. Tr. 61, 116. The judge found, however, that turning in his hard hat and flashlight and saying he "quit" established that he did quit. 11 FMSHRC 1589. At about 10:00 a.m. that same day, Ramsey telephoned mine superintendent Orville Hildebrandt to inform him of the events and was told by Hildebrandt that he would check into it and get back to him. About one week later, during which Ramsey did not work, he was told by Hildebrandt's secretary that there was no work available for him. Tr. 65-69. Ramsey testified that he has continuously but unsuccessfully sought employment based on his work experience, sending out 60-70 resumes or applications. Tr. 81-84. He has worked at other jobs, operating an unsuccessful novelty sales company, managing a mobile home park, and working as a "ranger" at a golf course. Tr. 87-89. On cross-examination Ramsey stated that his understanding with respect to being hired by ICC was that his employment was to be continuous during a three-year project, but that there was no specific agreement on that issue. Tr. 112.

ICC Supervisor Morrison testified that ten or fifteen minutes before the end of the shift on August 13, he signaled Ramsey to turn off the water sprays in order to clean the screens. He had personally insured the safety of all employees by gathering them together with him or in the parts van, and that all could be seen by Ramsey. Tr. 160-61, 178-79. After turning off the water, Ramsey also turned the crusher off. Tr. 160. Morrison also testified that Ramsey had authority to shut down if the employees could not be seen by him. Tr. 160-61. Morrison believed the disagreement with Ramsey was over the authority to shut off the water, not to shut down the crusher. Tr. 162. He stated that outside the tower Ramsey handed him his hard hat and flashlight and said he quit, and that Morrison then said

nothing, but walked away. Tr. 162. He stated there was never any dispute that Ramsey had authority to shut down the crusher for safety reasons. Tr. 163. In his opinion, visibility that night never reached a dangerous extent, and he could always see Ramsey in the tower. Tr. 165-66.

Dick Nash, ICC personnel manager, testified that the crusher operations were completed in September 1987, and that Morrison, together

with everyone on the crusher night shift, was terminated on September 25, 1987, and everyone on the day shift, one day later. Tr. 200-03. Mine Superintendent Hildebrandt testified that he decided not to rehire Ramsey because of the August 12 incident and because of an earlier incident in which Ramsey had complained to him and threatened to quit in a disagreement with another supervisor about the correct method of using the bucket on a loader so as to not damage the equipment. Tr. 246-48.

On August 30, 1987, Ramsey filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"), and on June 14, 1988, the Secretary of Labor filed a discrimination complaint on behalf of Ramsey pursuant to 30 U.S.C. 815(c)(2). On October 20, 1988, counsel for the Secretary moved to dismiss that complaint and to permit Ramsey to file a complaint on his own behalf, pursuant to 30 U.S.C. 815(c)(3), on the grounds that Ramsey had refused to accept a settlement offer considered reasonable by the Secretary. Following retention of counsel by Ramsey, the judge, on January 23, 1989, granted the Secretary's motion and the matter proceeded to hearing. 2/

In upholding Ramsey's complaint of discrimination, the judge found that Ramsey was engaged in a protected activity when he complained to Morrison about the dusty conditions, which precluded him from seeing the workers in proximity to the crusher, and concluded that "the facts here involve a mix of what would occur when the crusher operator turned off the crusher and/or the water. The critical point is that Ramsey's complaint was clearly safety related." 11 FMSHRC at 1595. Quoting extensively from Ramsey's September 15, 1987 statement to MSHA investigators, the judge found a good faith concern for the safety of other miners and a nexus between his complaint and possible injury to others. 11 FMSHRC at 1595-98. As to whether Ramsey communicated his complaint to management, the judge concluded:

> It is apparent from the record here that the words spoken encompassed and communicated the safety hazard. Further, by their very nature safety complaints often revolve in a heated and argumentative manner. Compare, Secretary on behalf of John Gabossi v. Western Fuels-Utah, Inc., 9 FMSHRC 1481 (1987).

Id. at 1598.

Next, the judge found that Ramsey was constructively discharged in that "ICC created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign," which is the standard of law applied to constructive discharge under Simpson v. FMSHRC, 842 F.2d 453

(D.C. Cir. 1988). Further, the judge rejected

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2/ The judge's granting of the Secretary's motion effectively converted the complaint to an action brought pursuant to 30 U.S.C. 815(c)(3).

ICC's reasons for not rehiring Ramsey and held that he was discriminated against a second time when ICC refused to rehire him. 11 FMSHRC at 1599-1600. Lastly, rejecting ICC's contention that Ramsey along with all other crusher employees would have been terminated on September 27, 1987, the judge awarded back pay with interest from August 13, 1987, to August 31, 1989, when Ramsey declined reinstatement under an agreement between the parties. 11 FMSHRC at 1603.

A miner alleging discrimination under the Act establishes a prima facie case of prohibited discrimination under the Mine Act 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 at 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 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 unprotected activity. Pasula. supra; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Robinette, supra; 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).

At issue before us here is a work refusal based on an asserted safety hazard to miners other than the complainant himself. In Secretary on behalf of Philip Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (March 1985), aff'd sub nom Consolidation Coal v. FMSHRC, 795 F.2d 364 (4th Cir. 1986), the Commission held that "in certain limited circumstances," the protection of section 105(c) of the Mine Act does attach to a work refusal premised on hazards to others:

> Therefore, we hold that a miner who refuses to perform an assigned task because he believes that to do so will endanger another miner is protected under section 105(c) of the Mine Act, if, under all the circumstances, his belief concerning the danger posed to the other miner is reasonable and held in good faith. Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1418 (June 1984), citing Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC at 807-12. We emphasize, however, the need for a direct nexus

between performance of the refusing miner's work assignment and the feared resulting injury to another miner. In other words, a miner has the right to refuse to perform his work if such refusal is necessary to prevent his personal participation in the creation of a danger to others. Of course, as with other work refusals, it is necessary that the miner, if possible, "communicate,

> or at least attempt to communicate, to some representative of the operator his belief in the ... hazard at issue," Sammons v. Mine Services Co., 6 FMSHRC 1391, 1397-98 (June 1984)(emphasis added), quoting Secretary on behalf of Dunmire and Estle v. Northern Coal Co., supra, 4 FMSHRC at 133, and that the refusal not be based on "a difference of opinion --not pertaining to safety considerations--over the proper way to perform the task at hand." Sammons, 6 FMSHRC at 1398.

7 FMSHRC at 324.

Our review of the testimony convinces us that the substantial evidence of record does not support the judge's conclusion that Ramsey was engaged in protected activity on August 13, 1987. As this Commission has consistently recognized, the term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, e.g., Secretary v. Michael Brunson, 10 FMSHRC 594, 598 (May 1988), Secretary v. Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1984) quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). We are guided by the settled principle that in reviewing the whole record, an appellate tribunal must also consider anything that "fairly detracts" from the weight of the evidence that may be considered as supporting a challenged finding and must not sustain a finding "merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn ..." Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

Ramsey, himself, on direct examination twice testified unequivocally that he initially refused and then reluctantly complied with Morrison's signals to turn off the water sprays solely because he thought production was going so well, that a large amount of material awaited crushing, and that he considered it too early in the shift to cut off the water sprays, which was routinely done shortly before the end of each shift in order to clean the screens. Ramsey also testified that under Morrison's instructions whenever a potential problem or safety hazard arose, Ramsey would alert the employees first by a horn signal, then by hand signals, directing them to an area where they could be observed by him. Tr. 38-40 44-45. If, despite his testimony, Ramsey's reactions to Morrison s signals were safety related, we find it inconsistent that he did not use the established audio and visual signals to alert the employees and ensure their safety before any dust visibility problem arose.

The testimony of both Ramsey and Morrison at hearing consistently identified the basis of Ramsey's complaint as his "latitude to turn the water on or off." The testimony further establishes that Ramsey's authority to turn off the crusher for safety related concerns was not challenged. Unlike the judge, we place little reliance on Ramsey's September 15, 1987 statement to MSHA investigators quoted extensively in the decision at 1195-97. We view Ramsey's statement as unproved

allegations made in support of his discrimination complaint, and we consequently cannot accord it sufficient weight to overcome his contrary testimony adduced under oath at the hearing subject to the rigors of cross-examination.

In Sammons, supra, this Commission emphasized that in discrimination complaints involving work refusal, the alleged protected activity must not be based on a "difference of opinion--not pertaining to safety considerations--over the proper way to perform the task at hand." 6 FMSHRC at 1398. Ramsey's own testimony makes clear that his initial refusal and later reluctance to shut off the water sprays were entirely production oriented. He simply believed it too early in the shift, with production going well and a large stockpile of raw materials yet to be processed, to stop production in order to clean the screens for the oncoming shift. In light of his own testimony, we view Ramsey's subsequent attempts to link his work refusal with safety related concerns to be too little, too late, and inconsistent with the facts. Accordingly, under Cameron. supra, we find that Ramsey s work refusal was not a protected activity under section 105(c) of the Mine Act.

For these same reasons we find that Ramsey failed to communicate to Morrison any true concern with a safety hazard underlying his work refusal. In so concluding, we recognize that as the judge noted, safety complaints are often couched in a heated or argumentative manner, and that a brief, simple communication rather than a detailed statement is sufficient, so long as it describes the nature of the safety hazard to the operator. See e.g., Secretary/UMWA v. Emerald Mines Corp., 8 FMSHRC 1066, 1074, (July 1986), aff'd sub nom. Emerald Mines Co. v. FMSHRC, 829 F.2d 31, (3rd Cir. 1987). In this instance however, there was no communication descriptive of a safety complaint but only a heated disagreement with a supervisor over Ramsey's "latitude" to shut the water on and off and who would make the decision to stop production. See also Conatser v. Red Flame Coal Co., Inc., 11 FMSHRC 12, 17, (January 1989).

We next address the judge's conclusion that Ramsey was constructively discharged. In Simpson, supra, the court adopted the "objective" standard for establishing constructive discharge, holding that constructive discharge occurs whenever "a miner engaged in a protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign." 842 F.2d at 461. That standard, the court explained, is the one employed in cases arising under the Civil Rights Act of 1964 and is the same test employed in adjudicating constructive discharge cases under other statutes protecting employees against adverse job actions. 842 F.2d. at 461-62. The cases cited by the court in Simpson agree that a finding of constructive

discharge must demonstrate "aggravating factors such as a continuous pattern of discriminatory treatment." Watson v. Nationwide Insurance Co., 823 F.2d 360, 361 (9th Cir. 1987); Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981). The cases also have consistently emphasized that "a single isolated instance of employment discrimination is insufficient as a matter of law to support a finding of constructive discharge." Watson, supra, 823 F.2d at 361; see also Satterwhite v. Smith, 744 F.2d 1380,

1381, (9th Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 813; (9th Cir. 1982).

In Simpson, the complainant quit his job after the operator had failed repeatedly over a period of several weeks to perform the required pre-shift or on-shift examinations or to test for the presence of black damp, gas, or water in the underground coal mine. The Commission referred to the operator's repeated failures as "blatant violations of the Mine Act," (8 FMSHRC at 1038) a description noted by the court in its finding that Simpson had been constructively discharged. 842 F.2d at 463.

Although the judge stated in his decision that he felt constrained under the Court's holding in Simpson to reach a finding of constructive discharge, we find no parallel between the working conditions involved in Simpson and the conditions of August 13 described by Ramsey in this case. Nor do we see any similarity between the continuous pattern of misconduct on the part of the operator in Simpson and the single incident on which this case rests. In sum, we are persuaded by the testimony of record that Ramsey voluntarily quit his job at the end of the shift and find no evidence to support a finding that a reasonable miner would have felt compelled in this instance to resign because of intolerable conditions created or maintained by operator misconduct as required under Simpson for a finding of constructive discharge.

On review, ICC also challenges the judge's finding that a second act of discrimination occurred when ICC refused to rehire Ramsey after August 13, 1987. If Ramsey's work refusal constituted protected activity under the Mine Act, ICC's refusal to rehire him would be a second unlawful act of discrimination if the evidence demonstrated that the refusal was based on that protected activity. Simpson, 842 F.2d at 454, 464. If Ramsey's work refusal did not constitute protected activity, ICC's refusal to rehire him would be discriminatory only if the evidence established "some nexus to protected activity." 842 F.2d at 464. Rejecting ICC's arguments that Ramsey was not rehired because of two non-safety related disagreements with supervisors, the judge found that the incident of August 13, 1987 involved protected activity and that ICC's refusal to rehire Ramsey was therefore a second act of discrimination.

Because we have found that Ramsey's work refusal of August 13 was not a protected activity, a finding of discriminatory conduct in ICC's refusal to rehire him must rest on evidence establishing "some nexus" with other protected activity. Other than the August 13 incident, however, no other protected activity is alleged. As the judge noted at 11 FMSHRC 1593, n. 3, Ramsey's earlier complaint to Hildebrandt alleged that supervisor Brown's instructions as to how the loader should be operated would result in damage

to the equipment and was not safety related. Absent any nexus with other protected activity, we find no evidence to support the judge's finding that ICC discriminated against Ramsey for a second time when it refused to rehire him.

Accordingly, we reverse the judge's findings that Ramsey engaged in protected activity and was constructively discharged. We also reverse his finding that ICC's refusal to rehire Ramsey constituted a second act of discrimination. 3/

L. Clair Nelson, Commissioner

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3/ Commissioner Lastowka elected not to participate in this decision.

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