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MICHAEL DAMRON V. REYNOLDS METAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 16, 1991

MICHAEL P. DAMRON

v. Docket No. CENT 89-31-M

REYNOLDS METAL COMPANY

BEFORE: Backley, Acting Chairman; Doyle, Holen and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act"). The issue presented is whether substantial evidence of record supports a decision by Commission Administrative Law Judge James A. Broderick, dismissing a complaint of discrimination brought by Michael P. Damron pursuant to section 105(c)(3) of the Mine Act. In his decision, the judge concluded that Damron's work refusal on September 7, 1988, was not based on a reasonable, good faith belief that a hazard existed, and that therefore his discharge was not in violation of section 105(c)(1) of the Mine Act. 12 FMSHRC 414 (March 1990)(ALJ). 1/ Damron petitioned for review asserting that the judge (1) misconstrued the testimony of a witness, (2) failed to state the basis for a credibility determination, and (3) failed to consider the testimony of another witness. The Commission granted Damron's petition for discretionary review. For the reasons that follow, we vacate the judge's decision and remand for further consideration.

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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).

I.

Background

For more than nine years prior to September 1988, Michael P. Damron had been employed as a laborer at the Reynolds Metal Company ("Reynolds") Sherwin Plant, at which bauxite is processed into a derivative of aluminum called alumina. Scale, a by-product of the chemical process, is scraped from the alumina tanks and fed onto a conveyor belt to the ball mill, which crushes it into powder. The belt shuts down automatically, thus preventing damage to the mill, when a metallic object passes under a magnet affixed to the midpoint of the belt. The ball mill and belt are located outside and directly below the operating floor where the kilns are located. The operating floor is open and is approximately 30 feet above the belt and mill.

In September 1988, Damron was working as a hydrate helper. His primary duties included removing metal and other foreign objects from the scale at the location of the magnet. He was also responsible for cleaning the head and tail pulleys that drive the conveyor belt, maintaining the general area, emptying wheelbarrows filled with scale, making adjustments on the variable speed feeder, operating the portable pump in the pit area where scale is fed onto the belt, and keeping the equipment in operating order. Tr. 292-94.

In 1984, a shelter had been erected near the magnet. It was replaced by a new one about two years later. The shelters consisted of scaffolding 6 feet high and 6 feet square, covered with 2' x 12' boards with an additional piece of plywood over the boards. Although Reynolds denied that the shelters had been constructed for safety purposes, to guard against materials falling from the operating floor, the judge found:

> During the period from 1984 until September 1988, on numerous occasions large cloth filters weighing in excess of 100 pounds were dropped from the operations floor to the ground below by operations employees. Metal rods, pieces of scaffold boards, bolts, tools, and pieces of corrugated metal siding also fell or were dropped; liquid hydrate spilled from the upper floor to the ball mill area.

12 FMSHRC at 415.

On September 1, 1988, following an inspection by the Department of Labor's Mine Safety and Health Administration ("MSHA"), Reynolds removed the shelter. The MSHA inspector had pointed out that an electrical extension cord running to the shelter was not properly grounded, that

the shelter area was dirty, and that the chair on which Damron sat was broken, but no citations were issued for conditions in the shelter. 12 FMSHRC at 416. Reynolds contends that the shed was removed because of numerous health and safety problems and to avoid future citations. Br 3. Following a protest by Damron, a safety meeting between company and union representatives was

held on Friday, September 2, 1988, to discuss new protections at the work site. Reynolds agreed to erect a barrier against the handrail of the upper floor and to erect a metal shed in the area where the magnet was located in order to protect the ball mill operator. Reynolds also agreed not to operate the mill until the guardrail barrier was in place.

On Monday and Tuesday, September 5 and 6, Damron, after expressing his concern about the lack of a shelter, was assigned to other duties and was not required to run the ball mill. During that time, he discussed his concerns about operating the belt without temporary overhead protection with General Supervisor Thomas Reynolds and Foreman Arlon Boatman. Supervisor Reynolds testified that, on Monday night, September 5, he instructed Damron as follows:

> And I told him that, if he had any real safety concerns regarding the operation of the belt line, without that temporary shed, that he should go outside the building, down the tunnel, and operate the belt standing in that position. And that as metal came up the belt, he could shut the belt down and remove it. And without any further comment he left the office.

Tr. 318-19.

Boatman testified that he was unaware of the safety meeting on Friday, September 2, but that on Monday and Tuesday, he and Damron discussed his safety concerns:

> I also told Mike that ... in what he stated yesterday, that if he felt uneasy in standing at the metal detector area, that he could move to any position that he felt safe or would feel safer. And one thing that he did not say that I also told him, that should anything go through the detector, if for any reason it failed and we did get metal in the mill, that it would be my responsibility.

Tr. 351-52.

When asked if he had heard Reynolds' testimony giving him the option of working the mill from a safe distance. Damron stated:

> A. Yes, I heard what he said. It's not true, he never given [sic] me any options, just to do it or else.

Q. You'd disagree with his testimony?

A. Yes, I do.

Tr. 460.

When asked if anyone, other than Boatman, had ever suggested any way of operating the mill other than standing by the magnet, Damron replied:

A. No, they didn't. Nobody but Mr. Boatman.

Tr. 460.

Damron further testified that, when he reported for the afternoon shift on Wednesday, September 7, he was ordered by foreman Boatman to run the ball mill. Damron refused, stating that "there's still no overhead protection over there, it's unsafe, I don't want to do it." Tr. 231. Boatman thereafter suspended Damron with intent to discharge. Tr. 358.

When Boatman was asked whether he would have allowed Damron to work the mill from outside the building on Wednesday, September 7, when he suspended Damron, Boatman testified:

THE WITNESS: I would have allowed him to operate the mill as I had directed him to, which would have been under normal conditions, as we had been operating. And this would have been his direction.

MS. CUNNINGHAM: (To the witness) And had he objected to working or standing at the magnet, what about that?

A. No. Because the situation, as far as me as a representative of the company, and as a supervisor, that if I gave him the direct order to operate the facility under normal conditions, standing where he needed to, if he needed to stand at the metal detector, if he needed to clean conveyor belts, tail pulleys or whatever, it would be the general operation, the regular general operation of the facility.

Tr. 353.

Damron, when asked if Boatman suggested to him on Wednesday, September 7, that he run the mill from a distance, testified:

A. He made that suggestion on that Monday when I talked to him and we walked out into the area, not on a Wednesday.

Q. Okay. Do you think that... .

A. On Wednesday, there was no room for discussion.

Q. Okay. But do you think if you'd told him that you'd run the Mill from outside the area that he

was unwilling to go along with that?

A. Well, I can't speak for Mr. Boatman, I don't know what he would say at that point in time.

Q. He was simply asking you to run the Mill, though, wasn't he?

A. He was directing me to run the Mill, yes.

Q. Okay.

A. He didn't direct me to run the Mill this way; he didn't direct me to run the Mill that way; he directed me to run the Mill.

Tr. 251.

Two days later, the metal shed was erected at the magnet site. On September 12, 1988, Damron's discharge became effective. In October 1988, Damron filed a discrimination complaint with MSHA. On June 1, 1989, MSHA determined that no violation of section 105(c) of the Mine Act had occurred. On June 28, 1989, Damron filed his complaint with the Commission pursuant to section 105(c)(3) of the Mine Act. Following arbitration under the union contract, Damron was reinstated, without back pay, on November 21, 1989. Tr. 182.

II.

Disposition of Issues

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of proof to establish that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (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, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone.

Pasula, supra: Robinette, supra: see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983)(approving nearly identical test under National Labor Relations Act).

The Commission has held that a miner's refusal to perform work is protected activity under section 105(c)(1) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-38 (February 1982). See also Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319, 321-24 (March 1985), aff'd sub nom. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 366-68 (4th Cir. 1986); Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). If an operator takes an adverse action against a miner in any part because of a protected work refusal, a prima facie case of discrimination is established. E.g,. Dunmire & Estle, supra, 4 FMSHRC at 132-33; Metric Constructors, supra 6 FMSHRC at 229-30, aff'd, 766 F.2d at 472-73.

The disposition of this case turns on the issue of whether Damron's refusal to operate the ball mill on September 7 was based on a reasonable, good faith belief that doing so involved a hazard. In his decision, the judge found that the Respondent was aware that on numerous occasions large, filters, rods, tracks, tools and other heavy objects had fallen or were dropped from the operating floor to the ground below. Accordingly, he concluded: "From the perspective of the ball mill operators, including Complainant the hazard was real, and their perception of the hazard was reasonable. 12 FMSHRC at 420. The judge also found that Damron had communicated his safety concerns in the formal safety meeting held on September 2, 1988, and that "Respondent addressed the concerns by agreeing to put up a permanent barrier along the handrail of the operating floor above the ball mill and to erect a metal shed for the mill operator at or near the magnet." 12 FMSHRC at 420. As to Damron's concerns regarding the lack of overhead protection pending completion of the metal structure, the judge stated, "I find as a fact that Reynolds did tell Complainant that he could run the mill away from the building "'down the tunnel.'" 12 FMSHRC at 418. Although finding Boatman's testimony "ambiguous" on the issue of whether, on September 7, he would have permitted Damron to run the belt from a safe distance, the judge concluded:

> However, he [Boatman] did not withdraw his authorization given two days before that Complainant could have operated the ball mill away from the belt. Nor did Complainant testify that he [Damron] understood that it had been withdrawn.

Id.

Having found that Respondent, through supervisors Reynolds and Boatman, had addressed Damron's reasonable fear of a safety hazard by permitting him to work outside the area of danger until the shed was erected, the judge concluded that "Damron's refusal to operate the ball mill on September 7, 1988, was not based on a reasonable, good faith belief that the work was hazardous. Respondent's action in discharging him was not in violation of section 105(c) of the Act." 12 FMSHRC at 421

On review, Damron contends that there is not substantial evidence in the record to support the judge's finding that foreman Boatman authorized him on September 7, 1988, to operate the mill at a safe distance from the belt, in that Boatman's testimony, rather than being "ambiguous," is unequivocal to the effect that Damron was given no option but to operate the mill from the usual area. Damron further argues that the judge erred by failing to provide any basis for his credibility determination concerning the contradictory testimony of Reynolds and Damron and by failing to consider the testimony of another witness, Dalma Rogers.

This Commission has frequently addressed the standard of review to be applied in determining whether the record contains substantial evidence to support a judge's findings. In Secretary v. Michael Brunson, 10 FMSHRC 594, 598-99 (May 1988), the Commission stated:

> As we have 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., Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1137 (May 1984) quoting Consolidated Edison Co. v. NLRB 305 U.S., 197, 229 (1938). While we do not lightly overturn a judge's factual findings and credibility resolutions (e.g., Hall v. Clinchfield Coal Co., 8 FMSHRC 1624, 1629-30 (November 1986)), neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., Krispy Kreme Doughnut Corp. v. NLRB, 732 F.2d 1288, 1293 (6th Cir. 1984); Midwest Stock Exchange, Inc. v. NLRB. 635 F.2d 1255, 1263 (7th Cir. 1980).

Commission Procedural Rule 65(a) 29 C.F.R. 2700.65(a), states in pertinent part that a Commission judge's decision "shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order." (Emphasis added.) This is necessary, as the Commission explained in Secretary v Anaconda Company, 3 FMSHRC 299 (February 1981) "in order to prevent arbitrary decisions and to permit meaningful review." Further, in Anaconda, the Commission stated:

> Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively. See Duane Smelser Roofing Co. v. Marshall, 617 F.2d 448, 449, 450 (6th Cir. 1980); UAW v. NLRB 455, F.2d 1357, 13691370 (D.C. Cir. 1971); Anglo-Canadian

Shipping Co. Ltd. v. FMC, 310 F.2d 606, 615.617
(9th Cir. 1962); R.W. Service Systems. Inc.,
235 N.L.R.B. No. 144, 99 L.R.R.M. 1281, 1282 (1978).

Id. at 300.

In this case, the judge characterized as ambiguous the testimony of foreman Boatman on the critical issue of whether he would have permitted Damron to work at a safe distance from the belt on September 7, 1988. 12 FMSHRC at 418. Notwithstanding this ambiguous testimony, the judge found that Boatman "... did not withdraw his authorization given two days before that Complainant could have operated the ball mill away from the belt." Id. If Boatman's testimony is ambiguous, we find no record support for this crucial conclusion. Moreover, the decision does not contain an explanation for the judge's apparent rejection of Damron's conflicting testimony on the substance of the same conversation on September 7, 1988, wherein Damron sets forth his understanding of Boatman's work order. Damron testified that in that conversation he received no indication that he had permission to work at a safe distance from the belt. Therefore, in accordance with Commission Procedural Rule 65(a), supra, and to ensure that effective appellate review can be performed, we remand this matter to the judge with directions that he further analyze the relevant testimony and set forth the bases for his findings.

We next address Damron's contention that the judge erred by failing to provide a basis for his credibility determination concerning the contradictory testimony of Reynolds and Damron. In his decision, after setting out supervisor Reynolds testimony that he had specifically authorized Damron to run the mill from a safe distance and Damron's denial that Reynolds had ever given such permission, the judge found, without explanation, that Reynolds had given such authorization. 12 FMSHRC at 418. If the judge's finding on this issue is based upon a credibility determination, it should be so stated.

As to Damron's third assignment of error, our review of the record convinces us that the judge did not abuse his discretion in choosing not to rely on the testimony of Dalma Rogers in reaching his decision. Fourteen witnesses testified at the hearing. It is within a judge's discretion to sift through the testimony presented and to base his decision on that which he deems to be credible, relevant and dispositive of the issues before him.

III.

Conclusion

On the foregoing bases, this case is remanded to the judge for further proceedings consistent with this opinion.

Richard V. Backley, Acting Chairman

Joyce A. Doyle. Commissioner

Arlene Holen, Commission

L. Clair Nelson, Commissioner

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