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VINCENT BRAITHWAITE V. TRI-STAR MINING
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December 22, 1993

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| VINCENT BRAITHWAITE | : | |
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| v. | : | Docket No. WEVA 91-2050-D |
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| TRI-STAR MINING | : | |

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

DECISION

BY THE COMMISSION:

This is a 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"), brought by Vincent Braithwaite against Tri-Star Mining ("Tri-Star"), pursuant to section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3).(Footnote 1) Administrative Law Judge William Fauver awarded damages to Braithwaite after concluding that Tri-Star had unlawfully discharged him because he refused to operate a piece of equipment that Braithwaite believed he was unqualified to operate. 14 FMSHRC 1460 (August 1992)(ALJ); 14 FMSHRC 2001 (December 1992)

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

> (1) No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation in a coal or other mine ....
>
> ...
>
> (3) Within 90 days of the receipt of a complaint ... 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).

(ALJ). The Commission granted Tri-Star's petition for discretionary review, which challenged the legal and factual basis for the judge's determination of liability and damages. For the reasons stated below, we reverse the judge's decision and dismiss the complaint.

## I.
## Factual and Procedural Background

### A. Factual Background

Tri-Star operates a surface mine employing 27 miners, approximately six of whom are designated as heavy equipment operators. On July 24, 1989, Tri-Star hired Braithwaite as a heavy equipment operator. At that time, Braithwaite initialed Form 5000-23 of the Department of Labor's Mine Safety and Health Administration ("MSHA"), indicating that he was either qualified to operate, or had been trained to operate, eight specified pieces of equipment. Braithwaite's foreman, Ray Tighe, placed his initials beside Braithwaite's, and Mine Superintendent George Beneer signed the form. At the time he initialed the form, Braithwaite had limited experience in operating only two pieces of equipment. One was a Cline coal haulage truck, which he subsequently drove on a regular basis for Tri-Star, and the other was an FB 35 loader. 14 FMSHRC at 1460-61.

On September 25, 1990, Foreman Tighe asked Braithwaite to operate the Euclid R-120 (the "R-120" or the "Uke"), a large 50-ton dump truck used for hauling overburden. 14 FMSHRC at 1461. The R-120, larger than the Cline truck Braithwaite regularly drove, was frequently operated on uneven ground and rocked from side to side. Tri-Star had provided training on the R-120 to Braithwaite, which consisted of his riding beside an experienced driver and then driving the R-120 with the experienced driver beside him. 14 FMSHRC at 1462. Following that training, Braithwaite had driven the R-120 in active mining operations for three or four days. Id.; Tr. 27.

Braithwaite refused Tighe's September 25 order to drive the R-120, stating that he was "uncomfortable" driving it. Tighe sent Braithwaite to the mine office to talk to Mine Superintendent Beener. Braithwaite told Beener that he was "uncomfortable" operating the R-120. While Braithwaite was in Beener's office, Foreman Tighe requested a driver for the Cline truck and one for the R-120. Beener sent Braithwaite back to the mine site to run the Cline or, if it was not running, to assist the mechanic in working on it. 14 FMSHRC at 1461, 1464.(Footnote 2)

When Braithwaite returned to the mine site, Tighe inquired as to what had happened at the meeting with Beener. Braithwaite reported to Tighe that Beener had told him, "[Y]ou do not have to run a Euclid, ... we will keep you

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2 The judge referred to Braithwaite's meeting with Mine Superintendent Beener and Braithwaite's subsequent conversation with Tighe as occurring on September 24, 1990. 14 FMSHRC at 1464. However, both events occurred after Braithwaite's work refusal on September 25, apparently on the same day. See Tr. 17-18, 122.

on a Cline." Tr. 126. Tighe checked with Beener, who said he had told Braithwaite, "[W]e would try and keep him on the Cline if he felt uncomfortable with the Uke but there would be times that he would have to run the Euclid." Tr. 124-25. Tighe did not tell Braithwaite about his conversation with Beener. 14 FMSHRC at 1464. On two occasions after September 25, Braithwaite was asked to operate the R-120 and he did so for a total of two hours. Id. at 1462.

On September 27, 1990, two days after his conversation with Beener, Braithwaite again initialed MSHA Form 5000-23, indicating that he was qualified to operate or had been trained to operate eleven pieces of equipment, including the Euclid R-120. Jt. Ex. 2. On April 2, 1991, Foreman Tighe told Braithwaite to park the Cline and "to run the Uke because there was no more coal to haul with the Cline." Tr. 69. Braithwaite responded that he felt "uncomfortable" operating the R-120 and that he "had already talked to Mr. Beener about it." Tr. 30. Braithwaite did not mention safety or request additional training on the R-120. Tighe told Braithwaite to turn over the maintenance records for the Cline and "hit the road." Tr. 29. Braithwaite understood Tighe to mean that he was fired and left the mine without speaking further to Tighe or Beener. 14 FMSHRC at 1463.

B. Procedural Background

Following his discharge, Braithwaite obtained copies of his MSHA 5000-23 forms and complained to MSHA that the forms had been falsified. MSHA conducted an investigation into these allegations, pursuant to section 103(g) of the Mine Act, 30 U.S.C. 814(g), but found no basis for them. Subsequently, Braithwaite filed a discrimination complaint with MSHA, under section 105(c)(2) of the Mine Act, 30 U.S.C. 815(c)(2). Following its investigation, MSHA notified Braithwaite that it found no violation. Braithwaite filed a complaint against Tri-Star on his own behalf, pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), and a hearing was held on April 29, 1992.

In his August 24, 1992, decision on liability, the judge concluded that Tri-Star discharged Braithwaite for refusing to operate the R-120, which he believed he was not qualified to operate. The judge found that Braithwaite's experience on the R-120 was limited. In his view, Braithwaite properly communicated a safety concern when he told the foreman, on September 25, 1990, that he did not feel comfortable operating the R-120 and when he told the mine superintendent how he felt about operating the R-120. 14 FMSHRC at 1462, 1464.

The judge further found that, after speaking with Beener, Foreman Tighe had an obligation to tell Braithwaite that Beener had said that Braithwaite would be required to operate the R-120 or lose his job. 14 FMSHRC at 1464. The judge concluded that, if the foreman had received such instructions, he had a duty to address Braithwaite's safety concern and offer further training on the R-120. According to the judge, Tighe, by remaining silent, left Braithwaite in the position of believing he had been relieved by Beener of the duty to operate the R-120. Id. at 1464-1465.

The judge found that, when Braithwaite again refused to operate the R-120 on April 2, 1991, Tighe did not properly address Braithwaite's safety concern by correcting Braithwaite's belief that he had been relieved of responsibility to drive the R-120. The judge found that, if Tighe had done so, Braithwaite could have requested more training on the R-120 in order to keep his job, and that such a request would itself have been a protected work refusal in light of the limited training he had received. 14 FMSHRC at 1463, 1466.

On December 1, 1992, the judge issued his second decision, awarding damages and also denying Tri-Star's motion for reconsideration, which was based on the decision and evidence in Braithwaite's state unemployment compensation proceeding. 14 FMSHRC 2001.

## II.
## Disposition of Issues

Tri-Star argues that certain of the judge's findings are contrary to findings in the MSHA investigations of Braithwaite's section 103(g) and discrimination complaints, including MSHA's conclusion that training had been conducted properly. Tri-Star further argues that Braithwaite walked off the job on April 2, did not communicate a valid safety complaint to Tighe, and could not have communicated one, given his training and experience on the R-120. Tri-Star also raises a number of issues concerning the judge's award of damages. In response to Tri-Star's petition for review, Braithwaite submitted a statement with attachments addressing several of Tri-Star's factual contentions.

The principles governing analysis of a discrimination case under the Mine Act are well settled. A 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, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d 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. Pasula, 2 FMSHRC at 2799-800. 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 and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

A miner's refusal to perform work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. Robinette, 3 FMSHRC at 808-12; Conatser v. Red Flame Coal Co., 11 FMSHRC 12, 17 (Jan. 1989); see also Simpson v. FMSHRC, 842 F.2d 453, 458 (D.C. Cir. 1988). The Commission has held: "Proper communication of a perceived hazard is an integral component of a protected work refusal, and responsibility for

the communication of a belief in a hazard underlying a work refusal lies with the miner." Conatser, 11 FMSHRC at 17, citing Dillard Smith v. Reco, Inc., 9 FMSHRC 992, 995-96 (June 1987). "[T]he communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work." Smith, 9 FMSHRC at 995. The miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner's concern. Id. Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act. Finally, the Commission has held that the "communication of a safety concern 'must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used ....'" Conatser, 11 FMSHRC at 17, quoting Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (July 1986), aff'd mem., 829 F.2d 31 (3d Cir. 1987).

The key issue here is whether Braithwaite made an adequate safety communication. The judge found that, on September 25, 1990, Braithwaite communicated to Tri-Star a safety concern that was adequate, "indicating that he did not feel properly trained or qualified to operate the R-120 truck safely." 14 FMSHRC at 1464. However, the record reflects only that Braithwaite was "uncomfortable" driving the R-120 and that he told Beener how he "felt." Tr. 18, 121-23. Braithwaite's testimony as to what he actually told Tighe and Beener on September 25 does not go beyond these statements. Although Braithwaite explained at the hearing that he felt "uncomfortable" running the R-120 because of its large size, that he "wasn't trained much on it," and that he was concerned about the safety of other workers (Tr. 18, 122-23), we discern nothing in the record to indicate that Tighe had reason to know that Braithwaite's discomfort was more than a personal preference not to operate the R-120 (see Tr. 18, 25, 33). Further, Braithwaite testified that he never requested additional training on the R-120. Tr. 121. Thus, Braithwaite's communication was inadequate to establish a protected work refusal.

Further, after Braithwaite's refusal to drive the R-120 on September 25, 1990, Braithwaite drove it on two occasions. On September 27, he initialed MSHA Form 5000-23, indicating that he was qualified to operate the R-120.(Footnote 3) 14 FMSHRC at 1462. Six months later, on April 2, 1991, when Foreman Tighe asked Braithwaite to run the R-120 because there was no work for the Cline truck, Braithwaite again responded that he was "uncomfortable" operating it and refused to do so. Again, there is no evidence to indicate that Tighe had

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3 The judge relied on an MSHA interview statement from the MSHA investigator who assisted in investigating Braithwaite's discrimination complaint to establish that Braithwaite could not have been properly trained on the equipment listed on the form. 14 FMSHRC at 1462. The investigator's statement, however, does not address Braithwaite's training on specific equipment. MSHA's investigation concluded, moreover, that "training was done properly" at Tri-Star and that Braithwaite was "properly trained in the operation of the Euclid dump truck." Resp. Ex. 1, pp. 9, 10.

reason to know that Braithwaite had a safety concern or that his discomfort was anything more than a personal preference.

In Conatser, the Commission reviewed communication of a work refusal factually similar to Braithwaite's. There, the Commission determined that a miner's statement was, in context, ambiguous. 11 FMSHRC at 17. The fact that the miner had driven the truck on seven prior occasions vitiated the adequacy and clarity of the communication. Id. Here, the record is similarly lacking in an unambiguous safety communication from Braithwaite on April 2. Accordingly, we conclude that, as a matter of law, Braithwaite's statements were insufficient communication of a safety concern to protect his refusal to work.

In his decision, the judge shifted the communication burden from Braithwaite to Tri-Star. The judge concluded that Foreman Tighe was obliged to tell Braithwaite, who alleged Beener had relieved him of any duty to operate the R-120,(Footnote 4) that he would be required to operate the R-120 or lose his job. 14 FMSHRC at 1464. As noted in Conatser, "responsibility for the communication ... lies with the miner." 11 FMSHRC at 17. Nothing in the record suggests that communicating safety concerns to Tighe would have been futile. Compare Simpson v. FMSHRC, 842 F.2d 453, 459-61 (D.C. Cir. 1988).

We conclude that Braithwaite's work refusal did not include the required safety communication and therefore, as a matter of law on this record, was unprotected.(Footnote 5) See Smith, 9 FMSHRC at 995-96.

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4 Braithwaite's stated belief that he had been relieved of his responsibility to operate the R-120 was not based on anything Beener said. See Tr. 18, 121-24, 129, 139. Braithwaite testified that, after he told Beener how he felt, Beener "walked around, scratched his head ... shut the door, a couple of minutes later he come [sic] out and said go to job six, run [the] Cline." Tr. 123. Furthermore, as Braithwaite testified, no other heavy equipment operator was excused from operating a particular piece of equipment. Tr. 138-39.

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5 Given our disposition of this case based on the inadequacy of Braithwaite's safety communication, we need not reach the reasonableness or good faith of his belief that he was not adequately trained or qualified to operate the R-120. See Dillard Smith v. Reco, Inc., 9 FMSHRC at 996 n.*. We also need not reach Tri-Star's additional arguments, including issues relating to the judge's award of damages.

## III.
## Conclusion

For the foregoing reasons, the judge's decision is reversed, and his orders are vacated.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner