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SOL (MSHA) V. NATIONAL CEMENT
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
August 17, 1994

SECRETARY OF LABOR :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
on behalf of RONNY BOSWELL :

v. : Docket No. SE 93-48-DM

NATIONAL CEMENT COMPANY

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

DECISION

BY: Backley, Doyle and Holen, Commissioners

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"), presents the issue of whether National Cement Company ("National Cement") unlawfully suspended Ronny Boswell for three days in violation of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1).1 Administrative Law Judge Gary Melick dismissed the discrimination complaint filed on Boswell's behalf by the Secretary of Labor. 15 FMSHRC 1250 (June 1993)(ALJ). The judge concluded that, although the Secretary had established a prima facie case of discrimination, National Cement

1 Section (105)(c)(1) of the Mine Act provides:

> 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 or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine ....

had defended affirmatively by proving that it would have suspended Boswell in any event for his unprotected activity alone. The Commission granted the Secretary's petition for discretionary review. For the reasons stated below, we affirm the judge's decision.

I.

Factual and Procedural Background

Ronny Boswell operated a front-end loader at National Cement's plant in Ragland, Alabama. On December 27, 1991, Boswell, working the night shift, carried out the required examination of a 950 payloader before operating it. 15 FMSHRC at 1252-53. There were two sets of lights on the front of the loader, one factory-installed set seven feet above the ground and an additional set installed by National Cement on the cab, 12 feet above the ground. Id. at 1253. Boswell noticed that the bracket holding one of the lower lights was bent, causing the beam to be misdirected, and that the other lower light was burnt out; the upper lights were in working order. Id.; Tr. I 38-39, 48-50. He indicated in his inspection report that the lower lights were faulty and also noted that "[t]otal disregard" by the operator of defects in mobile equipment could lead to damage or injury. 15 FMSHRC at 1252-53; Tr. I 38-39; G. Ex. I. During the preceding 12 days, he had reported problems with the loader's lights on nine different occasions but had operated the equipment. 15 FMSHRC at 1252-53; G.Ex.2.

That night, Boswell operated the 950 loader in the clay house, where overhead lighting eliminated the need for equipment lights. Around 12:30 a.m., Rudy Hall, a temporary foreman, talked with Boswell about his inspection report and Boswell stated that he meant what he wrote. Hall ordered Boswell to shut down the loader and operate the only other loader at the plant, a 540 payloader. 15 FMSHRC at 1253; Tr. I 59, 61; Tr. II 8, 48. Boswell parked the 950 loader in front of the break shack.

After operating the 540 loader for about 25 minutes, Boswell smelled antifreeze fumes emanating from a leak. He reported this condition to Hall, complaining that he "couldn't breathe." 15 FMSHRC at 1253; Tr. I 62-63, 66, Hall then instructed Boswell to return to the 950 loader, which was still parked in the break shack area; it had been tagged out or removed from service. 15 FMSHRC at 1256; Tr. I 66, 143-44.

Boswell refused to restart the 950 loader, telling Hall that "it's in the company safety book that you can't start it up until the problem is fixed." 15 FMSHRC at 1253; Tr. I 66-68. Boswell referred to National Cement's repair requirements, which were contained in

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2 The judge stated that Boswell noted defects in the loader's upper lights (15 FMSHRC at 1253), but it is evident from the record and the judge's other findings that the defects were in the lower pair.

a document entitled "National Cement Company Safety Procedures and Requirements."3 15 FMSHRC at 1253; Tr. I 66-68; G. Ex.3. Boswell also testified at hearing that he was prohibited by the Secretary's regulations, including 30 C.F.R. 57.14100(c), from resuming operation of the 950 loader until it was repaired.4 Tr. I 70-73, 76, 123; Tr. II 169.

Boswell and Hall argued over the work assignment, and Boswell requested a safety review by his union representative. Hall declined to contact the representative but did call Cedric Phillips, the company safety director, who came to the plant and examined the loader. At Phillips' direction, the bent light bracket was straightened and Boswell replaced the burnt-out light. Boswell then resumed operating the 950 loader and continued for the remainder of the shift. 15 FMSHRC at 1254.

On January 13, 1992, National Cement disciplined Boswell, suspending him from work for three days because of the events of December 27. 15 FMSHRC at 1254; G. Ex. 6. Boswell filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") and, on October 28, 1992, the Secretary filed the present complaint on Boswell's behalf, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. 815(c)(2)

The judge found that Boswell had engaged in protected activities When he reported the 950 loader's defective lights in his December 27 inspection report, when he complained about the lights on prior occasions, and when he refused to operate the 540 loader because of the antifreeze fumes in the cab. 15 FMSHRC at 1254-55. The judge further found that the disciplinary action against Boswell was motivated, at least in part, by these protected activities and, accordingly, determined that the Secretary had established a prima facia case of discrimination. Id. at 1255.

3 Paragraph (g) on page 4 of that document states:

> Report and, if possible, repair any defects found. Do not use machine with uncorrected safety defects which present a hazard. If the loader is unsafe and removed from service, tag it to prohibit further use until repairs are completed.

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G. Ex. 3.

4 30 C.F.R. 57.14100(c) provides:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

The judge concluded, however, that National Cement affirmatively defended against the prima facie case by proving that it would have taken the adverse action against Boswell solely on the basis of his unprotected activity, i.e., his insubordination in refusing to operate the 950 loader for reasons unrelated to safety. 15 FMSHRC at 1255-56. The judge noted that a miner's right to refuse work under the Act must be premised on a belief that the work involves a hazard, and he emphasized that Boswell insisted that he had no such belief or concern. Id. at 1256. The judge rejected the Secretary's contention that a miner should be permitted to refuse work on the basis of a good faith, reasonable belief that the work violates a mandatory standard. Also, assuming arguendo that the Secretary's "legal theory [was] correct," the judge determined that the evidence did not demonstrate, within the meaning of section 57.14100(c), that the 950 loader had been removed from service. Id. The judge concluded that Boswell had failed to meet his burden of proving a good faith, reasonable belief that operating the loader would have violated a standard and, accordingly, he dismissed the discrimination complaint. Id.

II.

Disposition

The principles guiding the Commission's analysis of discrimination under the Mine Act are 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, he nevertheless may defend affirmatively by proving that he also was motivated by the miner's unprotected activity and would have taken the adverse action in question for the unprotected activity alone. 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

The Secretary urges the Commission to recognize a miner's right under the Act to refuse work that the miner believes would violate a mandatory standard, even when he does not believe that the work poses a hazard. He seeks remand for analysis of the evidence under that test. Alternatively, the Secretary argues that Boswell's refusal to restart the 950 loader was a continuation of his prior protected activities and that the judge erred in treating the latter conduct as unprotected. In response, National Cement contends that Boswell's refusal to restart the 950 loader was unprotected and was separate from his protected activities. It further asserts that, in order for Boswell's work refusal to be protected, it must have been based on a threat to health and safety, and that a perceived violation of a mandatory standard, by itself, is not sufficient to justify a work refusal.

The primary issue on review is whether the judge erred in finding that National Cement affirmatively defended against the prima facie case by showing that Boswell's conduct in refusing to restart the loader was unprotected and that he would have been suspended for that unprotected activity along. We conclude that the judge did not err.

The fundamental purpose of the Mine Act is to provide miners with more effective production against hazardous conditions and practices. 30 U.S.C. 801. Section 2(a) of the Act emphasizes that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource - the miner." 30 U.S.C. 801(a)

The Act grants miners the right to complain of a safety and health danger or violation, but does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have inferred a right to refuse work in the face of a perceived hazard. See Secretary on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516, 519-21 (March 1984), aff'd 780 F.2d 1022 (6th Cir. 1985); Paula Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514 (August 1990)(citations omitted). In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Robinette, 3 FMSHRC at 812; Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir 1989). 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 vs. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." Robinette, 3 FMSHRC at 810. iners may, under existing case law, justify a work refusal based on violation of a standard if that violation also involves a hazard.

To date, neither the Commission nor the Courts of Appeals have extended the right of work refusal to encompass refusals based on violations of standards that do not involve hazardous conditions. The Secretary's theory that the Act protects a work refusal premised on a belief in a nonhazardous violation of a standard proposes a substantial and unwarranted departure from the Commission's case law.

Boswell maintained throughout the hearing that he did not regard the 950 loader as hazardous or unsafe to operate. 15 FMSHRC at 1256; Tr. I 59-60, 76-78, 91, 177-78. To accord protection to a work refusal premised on a nonhazardous condition would go beyond the language of section 105(c) and the basic purpose of the Act. We reject the Secretary's suggestion that the Commission substantially extend miner's rights to refuse work under the Act.

Even if we were to assume, arguendo, as the judge did, that a miner has a right to refuse nonhazardous work on the basis that such work would violate a safety standard, we agree with the judge that the Secretary failed to prove that Boswell entertained a good faith, reasonable belief that operation of the 950 loader would have violated section 57.14100(c). 15 FMSHRC at 1256. Indeed, Boswell's belief, as it is presented in the record, would weigh

against any conclusion that section 57.14100(c) was violated; that section expressly addresses the operation of hazardous equipment and Boswell, by his own testimony, maintained that a hazard did not exist. Further, the evidence demonstrates that the loader had no hazardous defect and it had not been removed from service and placed in a designated area or otherwise tagged out. We note that the Secretary did not cite the operator for a violation of section 57.14100(c). Finally, as the judge found, it was not clear that Boswell even raised the safety standard to Foreman Hall at the time of his work refusal. 15 FMSHRC at 1253. The Commission has held that a miner's failure to communicate his safety concern to the operator may strip a work refusal of its protection under the Act. Braithwaite v. Tri-Star Mining, 15 FMSHRC 2460; 2464-65 (December 1993).

We reject the Secretary's alternative argument that Boswell's refusal to restart the loader was inextricably connected to his previous complaints and should share their protected status. Although Boswell had made various complaints about the defective lights on the 950 loader, his refusal to restart the loader, according to his own statements at trial, was not based on safety concerns. Thus, we conclude that Boswell's earlier protected activities did not render his work refusal protected. See, generally, Cooley, 6 FMSHRC at 520-22.

Accordingly, we affirm the judge's determination that Boswell's refusal to restart the loader was not protected and that National Cement affirmatively defended against the Secretary's
prima facie case.

III.

Conclusion

For the foregoing reasons, the judge's decision is affirmed.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Jordan, Chairman, concurring in the result:

I agree with my colleagues that the judge's decision dismissing Boswell's discrimination complaint should be affirmed. I reach that result on the basis that substantial evidence supports the judge's determination that Boswell did not entertain a reasonable belief that operating the 950 loader would have violated a mandatory safety standard. Given that fact, I find it unnecessary to address the issue of whether a work refusal can ever be protected under section 105(c), when the miner has a reasonable belief that performing such work would violate a mandatory safety standard, but does not believe the job would pose a hazard.

By its terms, the standard which Boswell purportedly thought operation of the 950 loader would violate, 30 C.F.R. 57.14100(c), applies "[w]hen defects make continued operation hazardous to persons . . ." (emphasis supplied). Boswell repeatedly testified, however, that he did not believe that the 950 loader presented a safety hazard. Tr. I 58-60, 76-77, 79, 85, 91, 997; 15 FMSHRC at 1256. Moreover, Boswell admitted that he had read section 57.14100 on several occasions prior to the work refusal at issue here, and that he was familiar with the regulation. Tr. I 71-73. In light of this testimony, there is no reason not to charge Boswell with actual knowledge that section 57.14100 applies only when defects cause a hazard. Therefore, like my colleagues, I agree with the judge's conclusion that Boswell did not have a reasonable, good faith belief that operating the 950 loader would violate section 57.14100(c). Unlike the majority, however, I would stop there, and refrain from reaching the broader question posed by the Secretary: whether a miner has a right under the Act to refuse work that he or she reasonably and in good faith believes would violate a mandatory standard, irrespective of the existence of a hazard.

I also do not reach the Secretary's alternative theory that Boswell's work refusal, though unprotected, falls under the penumbra of earlier protected activities engaged in by Boswell in connection with his assertion of safety complaints pertaining to the 950 loader. In my view this contention is not properly before us because it was not first addressed to the judge.

Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. 823(d)(2)(A)(iii), provides in pertinent part: "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." See also Commission Procedural Rule 70(d), 29 C.F.R. 2700.70(d). In his post-hearing brief to the judge, the Secretary argued only that Boswell's refusal to restart the 950 loader was in and of itself protected activity due to Boswell's reasonable belief that to restart

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1 The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's decision. 30 U.S.C. 823 (d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., ll FMSHRC 2159,2163 (November 1989), quoting Consolidated Edison Co,. v. NLRB, 305 U.S. 197, 229 (1938).

that equipment would violate a mandatory safety standard. Sec. Post Trial Br. at 9. The Secretary did not argue below, as he does on appeal, that "Boswell's refusal to restart the 950 loader was inextricably linked to . . . two prior protected activities and therefore could not stand as independent ground for adverse action." PDR at 7. In light of his failure to squarely raise this theory before the judge, it is not surprising that the judge did not rule on the question whether an unprotected work refusal could nevertheless fall within the ambit of earlier protected activities because of the nexus between the protected and unprotected activities.

The Secretary's failure to raise this theory below is fatal to his request for Commission review on this point. The Commission has previously held that the provisions of section 113 bar Commission review of theories newly articulated on appeal. See, e.g., Beech Fork Processing, Inc., 14 FMSHRC 1316 (August 1992).

Accordingly, I would affirm the judge's decision based on his conclusion that "Boswell has [not] met his burden of proving that he entertained a good faith and reasonable belief that to operate the 950 loader would have . . . violated the cited mandatory standard."

Mary Lu Jordan