FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

February 29, 2000

BRYCE DOLAN	:	
	:	
v.	:	Docket No. CENT 97-24-DM
	:	
F & E ERECTION COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Jerold Feldman concluded that complainant Bryce Dolan engaged in a work refusal protected by section 105(c) of the Act, 30 U.S.C. § 815(c), and granted the complaint of discrimination brought by Dolan against his employer, F & E Erection Company ("F&E"). 20 FMSHRC 591 (June 1998) (ALJ). In a subsequent decision on relief awarding back pay, attorney's fees, and litigation expenses, the judge determined that Dolan's unavailability for work due to his claimed physical disability constituted a willful loss of earnings inconsistent with Dolan's duty to mitigate damages, and he consequently excluded the period of unavailability from the calculation of back pay. 20 FMSHRC 847 (Aug. 1998) (ALJ). The Commission granted the petition for discretionary review filed by F&E challenging the judge's conclusion that F&E discriminated against Dolan, and directed for review sua sponte the issue of whether Dolan failed to mitigate his damages. For the reasons that follow, we vacate the finding of discrimination, the determination that Dolan failed to mitigate damages, and the award of relief, and remand for further proceedings.

I.

Factual and Procedural Background

The complainant, Bryce Dolan, was an iron worker employed by F&E, a construction contractor that performed work at an alumina smelter in Point Comfort, Texas operated by the Aluminum Company of America ("Alcoa"). 20 FMSHRC at 594-95. In September or October

1994, Dolan began working in an area of the facility referred to as the R35 tank farm. *Id.*; Tr. I 19, 76. Dolan's work involved welding "stiffeners"[1] on trusses that support large storage tanks. 20 FMSHRC at 595. In order to ensure a good weld on the stiffeners, Dolan and the five to six other members of his crew would remove paint from the angle iron of the trusses before affixing the stiffeners. *Id.*; Tr. II 141-42. The crew removed the paint by burning it off using a cutting torch. 20 FMSHRC at 591. From late 1994 until March 1996, Dolan's crew was not furnished with any personal protective equipment or clothing. *Id.* at 595.

In March 1996, Dolan learned that Alcoa employees performing similar work in the R35 tank farm were furnished with protective clothing and respirators and that the entire R35 tank farm was to be treated as a lead abatement area. 20 FMSHRC at 596; Tr. I 45-46. Dolan complained to safety man Dennis Spears, crew foreman Howard Talbert, and general foreman Steve Whitehead about the health hazards of removing lead-based paint without wearing personal protective gear, and about symptoms of lead poisoning that he and members of his crew were experiencing.[2] 20 FMSHRC at 596; Tr. I 24, 47-48, 54-56, 78-80, 95-96, 153-54, 347, 397; Tr. II 146-47. From March 18 to March 22, 1996, F&E contracted with Health and Safety Management Inc. ("HSM") to perform air sample monitoring on crew members who, in the meantime, had been provided with Tyvek suits[3] and half-face respirators.[4] 20 FMSHRC at 596. Based on lead exposure levels measured,[5] HSM recommended that the crew member using the

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[1] "Stiffeners" are 4-inch-wide pieces of channel iron welded onto the trusses to "stiffen" or strengthen them to prevent bending. Tr. II 141-43.

[2] Lead can be absorbed into the body by inhalation and ingestion of dust and fumes. 20 FMSHRC at 593; RX-1 (29 C.F.R. § 1926.62 App. A., part II.A). Symptoms of lead over-exposure include loss of appetite, constipation, nausea, excessive tiredness, weakness, insomnia, headache, muscle and joint pain or soreness, fine tremors, numbness, and dizziness. 20 FMSHRC at 593; RX-1 (29 C.F.R. § 1926.62 App. A., part II.B). Overexposure to lead can result in severe damage to blood-forming, and nervous, urinary, and reproductive systems. *Id.*

[3] Tyvek suits are thin, disposable coveralls made of spun olefin. 20 FMSHRC at 597; CX-6.

[4] Half-face respirators are air purifying respirators with high efficiency filters that provide protection up to 500 micrograms per cubic meter of air ("$\mu g/m^3$"). 20 FMSHRC at 593; Tr. II 44; RX-1 (Table 1).

[5] The March 1996 air sample monitoring measured lead levels ranging up to 467 $\mu g/m^3$. 20 FMSHRC at 596; CX-3. The standard regulating exposure to airborne contaminants issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") limits lead exposure to an average of 150 $\mu g/m^3$. 30 C.F.R. § 56.5001(a); RX-3; Tr. I 518-21. The construction industry lead standard issued by the Department of Labor's Occupational Safety and Health Administration ("OSHA"), a copy of which was provided to F&E employees (Tr. I 521-22), requires that employers provide respiratory protection, protective clothing,

cutting torch wear a full-face respirator,[6] while the remaining crew members could continue to wear half-face respirators. 20 FMSHRC at 596. F&E implemented this recommendation. *Id.* at 597; Tr. I 405-08.

On or about March 25, 1996, Dolan complained that the entire crew should wear full-face respirators due to their close proximity to each other, and that the Tyvek suits were inadequate to prevent lead contamination because they were easily torn and sparks from the cutting torch readily burned holes in the suits. 20 FMSHRC at 597; Tr. II 155-56. In response, F&E provided a large quantity of Tyvek suits so that the crew could replace them as needed. 20 FMSHRC at 597. In addition, F&E required the crew to vacuum their clothing with high efficiency vacuums before leaving the work area. *Id.*; Tr. I 513.

Dolan continued to complain about the inadequacy of the half-face respirators and Tyvek suits. 20 FMSHRC at 597. On April 16, 1996, F&E held a meeting to address Dolan's concerns. *Id.* At this meeting, Whitehead stated that F&E was going to continue using the half-face respirators and Tyvek suits and he offered to transfer any employee who wanted to perform non-lead work. *Id.* at 598. No employees accepted Whitehead's offer of reassignment. Tr. I 417-19. At the conclusion of this meeting, Dolan quit his job due to his belief that the personal protective gear was inadequate to prevent lead exposure to himself and his family. 20 FMSHRC at 598.

After quitting on April 16, 1996, Dolan looked for work and received unemployment compensation. *Id.* at 598; Tr. I 113-14; CX-7. He began seeing Dr. Arch Carson on May 17, 1996. CX-8. According to Dr. Carson, Dolan's symptoms included "muscle and joint pains, tremor, severe headache, and additional neurologic symptoms which are disabling in nature." *Id.* Dr. Carson stated in a memorandum dated June 5, 1996, that Dolan was "currently unable to engage in employment in his usual trade, or in any other usual form of employment." *Id.* On or about August 11 and 12, 1996, Dolan worked for United Kensington Group as a construction worker. 20 FMSHRC at 598, 849; Tr. I 114-15, Tr. II 166, 280. He quit on or about August 12 due to severe pains in his legs. 20 FMSHRC at 598, 849; Tr. I 115. He testified that he has been disabled from working since that date. 20 FMSHRC at 598, 849; Tr. I 115-16. Dolan did not look for work thereafter. 20 FMSHRC 598, 849.

Dolan filed a discrimination complaint with MSHA on May 20, 1996. MSHA subsequently informed Dolan that, because F&E had taken appropriate remedial actions, his complaint did not merit litigation. On December 27, 1996, Dolan filed a complaint of discrimination on his

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housekeeping, and hygiene facilities to employees who are exposed to lead above the permissible exposure limit of 50 $\mu g/m^3$ averaged over an 8-hour period. 20 FMSHRC at 596; 29 C.F.R. § 1926.62(c), (f) - (i).

[6] Full-face respirators provide lead protection up to either 2,500 or 100,000 $\mu g/m^3$, depending on the type of full-face respirator used. 20 FMSHRC at 593; Tr. II 42-43; 29 C.F.R. § 1926.62(f)(3) (Table I).

own behalf pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). Evidentiary hearings were held in San Antonio, Texas on April 15 and 16, 1997, and April 14 and 15, 1998.

Analyzing the case as a work refusal, the judge concluded that Dolan's work refusal was protected (20 FMSHRC at 606) and that, accordingly, Dolan should be awarded back pay, attorney's fees, and litigation expenses. *Id.* at 847. First, the judge found that Dolan's complaints were made in good faith and that his concerns were reasonable in light of F&E's admission that "it should have taken protective measures prior to the time of the complaints." *Id.* at 599. He further found that Dolan adequately communicated his complaints to F&E personnel. *Id.* at 600. The judge found that F&E's continued use of the half-face respirators and Tyvek suits failed to provide "a meaningful response" so as to quell Dolan's fears. *Id.* at 604. He also noted that F&E's offer to transfer employees "did not address the hazardous conditions complained of by Dolan" and "thwart[ed] the Mine Act's purpose of encouraging a safe workplace" by continuing to expose any employees who remained at the R35 tank farm to lead poisoning. *Id.* at 604-05.

Concerning back pay eligibility, the judge noted that "whether Dolan is disabled is beyond the scope of this proceeding," and that he did not claim back pay from July 25, 1997, the date Dolan began receiving temporary lost wage payments under the Texas workers' compensation program. *Id.* at 849. The judge rejected Dolan's claim of back pay for the period August 12, 1996 to July 25, 1997, on the basis that Dolan "removed himself from the labor market as of [August 12, 1996]." *Id.* at 849-50. Noting that it is appropriate to reduce back pay where an employee incurs a "willful" loss of earnings, the judge determined that, in the absence of a medical finding of disability for the relevant time period, "Dolan's loss of earnings due to his decision not to look for work must be characterized as voluntary." *Id.* Excluding the period from August 12, 1996 to July 25, 1997, the judge ordered F&E to pay Dolan $12,094.60 in back pay, less applicable deductions. *Id.* at 850.

II.

Disposition of Issues

F&E argues that Dolan "voluntarily quit his job" and that substantial evidence does not support the judge's finding of a protected work refusal. PDR at 1, 8-10, 18; F&E Br. at 2, 13-20. It contends that Dolan's work refusal was not reasonable because (1) Dolan knew that his blood lead level was well below that recognized as safe by the OSHA standard; (2) there was no evidence that Dolan's family was exposed to lead and, in any event, the protection of family members is beyond the scope of the Mine Act; (3) the protective measures implemented by F&E following Dolan's complaint were adequate; and (4) F&E offered to transfer Dolan to a non-lead job. *Id.* F&E also argues that the judge erred in applying the wrong legal standard by focusing on Dolan's subjective concerns and not whether a reasonable person standing in Dolan's place would be justified in refusing to work. PDR at 10; F&E Br. at 21-22.

Dolan responds that substantial evidence supports the judge's finding that his work refusal was protected. D. Br. at 9-19. He points to evidence of faulty monitoring, inadequate personal protective gear, and health hazards to himself and his crew, as well as his fears about "bringing lead home to his family." *Id.* Dolan asserts that, prior to giving blood samples, workers were usually assigned to non-lead jobs for 2 weeks or longer, which casts doubt on the significance of his blood lead level test results. *Id.* at 9. In addition, Dolan argues that the judge applied the correct legal standard by considering whether, viewed from Dolan's perspective, he had a good faith, reasonable belief of a hazardous condition. *Id.* at 19-22.

We conclude that the judge erred by failing to analyze this case as a constructive discharge. There is no dispute that Dolan was not disciplined, but rather quit his job. Under our precedent, a finding that an operator took adverse action against a miner engaged in protected activity is a necessary element of the complainant's case. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Thus, unless Dolan was forced to resign, i.e., constructively discharged, there was no adverse action here, and hence no finding of discrimination could be made.

By contrast, a work refusal is a form of protected activity. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). Not all work refusals lead to a termination of the employment relationship, even where they are not protected. *See, e.g.*, *National Cement Co. v. FMSHRC*, 27 F.3d 526 (11th Cir. 1994). In the work refusal context as well, a finding of adverse action is a prerequisite to a determination that the operator violated section 105(c). *See id.* at 534. Thus, in proceeding directly from his finding of protected work refusal to his conclusion that F&E discriminated against Dolan, the judge erred.

In declining to consider the constructive discharge claim, at trial the judge purported to distinguish the concepts of constructive discharge and work refusal, stating:

> I don't see any issue of constructive discharge in this case. *I don't view the circumstances of Mr. Dolan's employment as being created for the specific purpose of creating intolerable conditions to encourage him to quit his employment.*
>
> So really what we have to do is focus in on the issue of work refusal. Mr. Dolan refused to work under the conditions that F&E was requesting him to work under and the issue is whether or not that work refusal is covered under the Mine Act.

Tr. II 8 (emphasis supplied). The judge further stated:

> A work refusal is where an employee refuses to continue working under the conditions that he's been working under because of a perceived hazard.
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> . . . .
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> A constructive discharge is where when the employee complains about a perceived hazard, *the employer then creates working conditions that are so intolerable, unrelated to the perceived hazard, that he wants the employee to quit.*

Tr. II 9 (emphasis supplied).

It thus appears that the judge's failure to analyze the constructive discharge question was based on his view that the complainant must show that, in retaliation for the miner's protected activity, the operator intended to create the conditions prompting the resignation. The judge's statements regarding constructive discharge reflect a misunderstanding of our constructive discharge jurisprudence. In light of this error, we find it necessary to review our analytical framework for constructive discharge cases.

A constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. *See*, *e.g.*, *Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C. Cir. 1988). Contrary to the judge's statement at trial, in determining whether a constructive discharge has occurred, the focus is not on whether the operator has retaliated against a miner's engaging in protected activities by deliberately causing hazardous conditions in an explicit effort to get the employee to resign. In *Simpson*, the D.C. Circuit specifically rejected any requirement that a miner establish retaliatory motivation to establish a constructive discharge. *Id.* at 462-63. Rather, the key inquiry in a constructive discharge case is whether intolerable conditions existed such that a reasonable miner would have felt compelled to resign. It is the operator's failure to reasonably remedy such conditions that converts the resignation into an adverse action. *See Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208, 2210-13 (Nov. 1994) (affirming conclusion of constructive discharge in the absence of finding that operator deliberately created intolerable conditions to provoke miner's resignation). The question whether conditions are intolerable is "viewed from the perspective of a reasonable employee alleging such conditions." *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 276 (Mar. 1999), *pet. for review docketed*, No. 99-4278 (6th Cir. Oct. 22, 1999). The *Simpson* court also explained that "[w]hether conditions are so intolerable that a reasonable person would feel compelled to resign is a question for the trier of fact." 842 F.2d at 463.

In cases involving claims of constructive discharge, the Commission has first examined whether the miner engaged in a protected work refusal, and then whether the conditions faced by

the miner constituted intolerable conditions. *See Bowling*, 21 FMSHRC at 272-81; *Nantz*, 16 FMSHRC at 2210-13. The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. *See Price*, 12 FMSHRC at 1514; *Cooley*, 6 FMSHRC at 520. 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; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, "a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).

Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Secretary of Labor on behalf of Bush v. Union Carbide Co.*, 5 FMSHRC 993, 998-99 (June 1983); *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (Feb. 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *See Bush*, 5 FMSHRC at 998-99.

There is no doubt that Dolan's initial fears in March 1996, at a time when F&E had provided no personal protective gear to Dolan's crew, were reasonable. As the judge noted, F&E conceded as much at the hearing. 20 FMSHRC at 599-600. Nor is it disputed that Dolan made protected safety complaints to F&E based on his fears. The question is whether a reasonable miner in Dolan's position would have had his fears quelled by the measures taken by F&E in response to Dolan's initial complaint.[7] We find that substantial evidence supports the judge's

[7] We reject F&E's suggestion that the judge erroneously adopted a subjective test to determine the work refusal issue. In fact, the standard under which work refusals are analyzed includes the *subjective* element of a miner's "honest *belief* that a hazard exists," as well as the objective requirement that the miner's belief be reasonable. *Robinette*, 3 FMSHRC at 810 (emphasis added). In contrast, a constructive discharge analysis requires a determination of whether the conditions faced by the miner were so intolerable that a *reasonable miner* would have felt compelled to quit. On this question, the sine qua non of a constructive discharge, we employ a purely *objective* standard and view the conditions faced by the miner from the perspective of a reasonable employee alleging such conditions. *Bowling*, 21 FMSHRC at 276.

Here, as the judge correctly noted, the issue is whether F&E addressed Dolan's concerns "in a way that should have alleviated" his fears. 20 FMSHRC at 592. Whether Dolan's fears were in fact quelled is relevant to the determination of this question. *See Secretary of Labor on*

conclusion that F&E failed to address Dolan's concerns in a way that should have alleviated his fears.[8]

Concerning the half-face respirators provided to the crew, Dolan testified that, due to the close proximity of the crew members (all working within a 10-foot square area) and exposure to what Dolan believed was the same air, the entire crew should wear full-face respirators. Tr. II 154-56. Dolan's concerns about the half-face respirators were shared by Robert Miller, an industrial hygienist called to testify as an expert witness on Dolan's behalf. Miller testified that welders, as well as those using the cutting torch, should be issued full-face respirators with supplied air, in part based on air monitoring readings showing a high lead content in the air sampled by a welder. Tr. II 245-48, 251-52; CX-9, 28. The judge credited Miller's testimony that respirators may leak due to a poor fit or perspiration. 20 FMSHRC at 601.

With regard to the Tyvek suits, Dolan testified that sparks from the cutting torch readily burned holes in the suits and they were easily torn, thus exposing the crew to lead contamination. Tr. I 32, 44, 69, 88, 111. Crew members Kenneth Tam and Troy Stewart also testified that the Tyvek suits were inadequate. Tr. I 203-08, 217, 225, 292-93. Although F&E further made available a quantity of Tyvek suits for replacement and provided a high efficiency vacuum following Dolan's subsequent complaints, the record indicates that the availability of replacement Tyvek suits was inadequate to protect workers because rips and holes exposed underlying clothing to lead contamination. 20 FMSHRC at 600. Moreover, the vacuuming of body parts that were not covered by the Tyvek suits before departing the work area did not prevent lead contamination to the underlying clothing. *Id.* at 597.

Miller also testified that the Tyvek suits were inadequate. He stated that "[t]he use of Tyvek suits when welding or cutting or any use of flame producing situation . . . is not an optimal solution because of the propensity for spun olefin materials to develop holes . . . from the heat of particulate hot particles hitting the suits . . . . [T]he concern . . . would be with potential contamination of clothing underneath the coverall . . . ." Tr. II 233-34. Miller further testified:

> [t]he particles are so small in a fume [created by burning lead-based paint] that they readily penetrate most mechanical barriers.

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behalf of James Johnson v. Jim Walter Resources, Inc., 18 FMSHRC 841, 848-49 (June 1996) (discussing operator's failure to quell discriminatee's fears).

[8] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 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 [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

> For example, the spun olefin Tyvek suits are designed to block large particulate material. However, a fume would find very little problem in finding its way through the suit, even if they . . . didn't have holes as a result of the burning activity, which would certainly raise concerns for potential contamination of clothing underneath the Tyvek suit itself, because you're dealing with such small particulates.

Tr. II 239. Noting that Dolan was required to take home the clothing he wore underneath the Tyvek suit, Miller further testified that, because of "both the holes as well as the size of the fume particles, [the Tyvek suit] doesn't necessarily represent an appropriate particulate protection system for the clothing he wore underneath." Tr. II 263. Finally, Miller added that, unlike the Tyvek suits, "there are several [fire resistant] materials that are job appropriate" as a protective coverall for torch burning and welding. Tr. II 276. Miller's testimony about the inadequacy of the Tyvek suits was uncontradicted.[9]

A major shortcoming in our dissenting colleague's opinion is that it fails to recognize the importance in the distinction between the largely *subjective* legal standard applied in the protected work refusal context, and the *objective* standard used in determining if intolerable conditions existed in the workplace. The dissenters collapse these separate and distinct legal standards into a single inquiry by asserting that there is no basis for drawing "a distinction between a miner who is engaged in a protected work refusal with no end in sight and a miner who quits under the same conditions." Slip op. at 13. In our view the merging of these two legal constructs into a single analytical framework creates a legal hodgepodge that is inconsistent with Commission case law. More importantly, however, the collapsing of these standards is also a venturous legal maneuver that may lead to unintended and inconsistent results.

As we stated above, the issue of whether a miner has engaged in a protected work refusal is determined by whether the miner has a "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812. From a practical standpoint, this means that miners are able to make decisions removing themselves from potentially hazardous conditions without the concern of having to prove that the condition actually existed. *Id*. This is an extremely important legal construct, particularly in the mining industry, where hazards often appear

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[9] The judge discussed, at length, the propriety of burning paint with a cutting torch, rather than chipping it with a needle gun and grinder, as a method of lead abatement, concluding that burning "was contrary to industry standards and maximized worker exposure to lead fumes." 20 FMSHRC at 600-04. However, Dolan complained about the lack of personal protective gear, not about the method of lead abatement. Tr. II 69-70. Moreover, the burning method is not prohibited by OSHA or MSHA regulations. Tr. II 96-97; 29 C.F.R. § 1926.62(d)(2)(iv)(D); *see* 30 C.F.R. §§ 56.5001 - 56.5006. Thus, while the method of lead abatement is relevant for purposes of evaluating the adequacy of F&E's protective measures in response to Dolan's complaint, we agree with F&E that it is not in and of itself an issue in this case.

instantaneously and a miner's decision to remove him or herself from a dangerous situation could be the difference between life and death.

We see a further problem with our colleagues' approach collapsing these two different standards into a single inquiry. As we have stated, once a miner engages in a protected work refusal based on his or her good faith, reasonable belief in the existence of a hazard, the operator must take steps to reasonably quell the miner's concerns. A situation could arise, however, where an operator has taken such measures, but the miner clings to his or her belief in the existence of a hazard and quits. In this situation, resorting to the largely subjective standard applied to work refusals would almost certainly turn the miner's quitting into a constructive discharge — and this is essentially what our dissenting colleagues do in this case. In other words, a miner's continuing belief in a hazard would establish a constructive discharge even where the operator took reasonable steps to address the miner's concern. At its worst under this approach, a miner could prove a constructive discharge even where the hazard in which he or she believed was illusory and where the operator could not address his or her concerns because the hazard did not exist.

As illustrated above, the distinction between these separate legal constructs is more than semantic. Under our colleagues' line of reasoning, it is unclear which legal standard would apply to a miner's protected work refusal, and which would apply to a determination of intolerable conditions. We are extremely reluctant to adopt a mode of legal analysis that serves to confuse a clear area of Commission case law, particularly one that has the potential to have such important ramifications on a miner's safety rights.

In sum, substantial evidence supports the judge's conclusion that Dolan's refusal to perform lead abatement work was protected. However, because the judge erred in failing to analyze the constructive discharge issue, we remand for the judge to determine whether Dolan faced intolerable conditions as of the date of his resignation.[10] In so doing, the judge must consider anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead jobs. On this issue, we have held that a short-term reassignment, which the miner reasonably believes would soon be followed by his return to duties subjecting him to intolerable conditions, is not an adequate response to a miner's complaint involving such conditions. *Nantz*, 16

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[10] While we are sympathetic to our dissenting colleagues' desire to avoid a remand of this case, we believe that such a result is necessitated by the judge's fundamental error in not analyzing this case as a constructive discharge. We are troubled by our colleagues' attempt to derive the necessary elements of a constructive discharge from factual findings made by the judge in his opinion below, since those findings were made in the context of applying an admittedly incorrect legal standard. Given our perspective that a judge's factual findings are often colored by the legal standard applied, we believe that the more appropriate course here is to remand so that the judge can base his factual findings upon application of the correct (i.e., constructive discharge) standard.

FMSHRC at 2214. Because the record contains evidence on both sides of this question,[11] it is the judge in the first instance who must resolve the parties' dispute over whether Dolan reasonably believed that the transfer offered by Whitehead would only last for a short period of time before he would again be returned to intolerable conditions. Unlike our dissenting colleagues, we are unwilling to usurp the province of the judge, as the initial finder of fact, on this and the other significant factual issues he must resolve on remand.

III.

Conclusion

For the foregoing reasons, we vacate the judge's finding of discrimination and remand the case for further proceedings consistent with this opinion.[12]

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

[11] Dolan, Tam and Whitehead testified that at times, F&E moved crew members to non-lead work for short periods of time. Tr. I 72-73, 221-23, 478-83. Dolan testified that he understood F&E's reassignment offer to be a short-term reassignment similar to past transfers. Tr. I 72-73. Whitehead, Talbert and F&E foreman Gary Smith testified that in the April 16 meeting, Whitehead did not state any limitations on the reassignment offer. Tr. I 348-49, 368, 382-83, 417-19. Whitehead also testified that, at the time he made the offer, there were about 300 F&E employees at Point Comfort, and that Dolan's crew was the only one doing lead abatement work. Tr. II 44, 64-67.

[12] Given our decision remanding the discrimination issue to the judge, we do not believe it is appropriate at this time to decide the mitigation of damages issue the Commission directed for review sua sponte.

Chairman Jordan and Commissioner Marks, concurring in part and dissenting in part:

We agree with the majority that the judge erred when he ruled that in a constructive discharge case a complainant must show that the operator acted in retaliation against his or her protected activity. The majority is correct that the D.C. Circuit resolved this question in *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988), holding that a complainant need not prove retaliatory motivation. However, because the evidence demonstrates that Dolan was subjected to intolerable conditions and constructively discharged, we believe that a remand is unnecessary, and would instead affirm the judge's finding of discrimination.

The majority remands this case because the judge failed to apply a constructive discharge analysis. But the very evidence relied on by our colleagues to support the judge's finding of a protected work refusal — coupled with additional evidence already in the record — shows that Dolan met his burden of showing that he faced intolerable conditions and thus was forced to quit.

The analyses of a work refusal and a constructive discharge often overlap, as they do in this case. This is because, at the heart of a work refusal case is the existence of a "hazardous condition" (*Robinette*, 3 FMSHRC at 812), while a successful constructive discharge claim requires "that conditions be 'intolerable'" (*Simpson*, 842 F.2d at 463). It is not surprising that the intersection between these two concepts and the evidence needed to prove each is sometimes blurred. This is especially true when, as is the case here, the intolerable condition is the continued exposure to the hazardous condition prompting the work refusal.

The case of *Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208 (Nov. 1994) is instructive in this regard. In *Nantz*, the complainant was routinely exposed to dust after the window of his enclosed-cab bulldozer was broken. He complained about the dust exposure, and when the situation was not remedied, he quit. The Commission upheld his discrimination claim, finding that he had engaged in protected activity when he refused to operate the bulldozer based on his good faith, reasonable belief that the dust conditions were hazardous. *Id*. at 2211-13. In upholding this finding, the Commission relied on Nantz's testimony and the testimony of his co-workers. *Id*.

After an extensive analysis of this work refusal, the Commission disposed of the question of whether conditions reached an intolerable level in one brief paragraph, in which it upheld the judge's findings that the dust conditions were in fact severe, and thus intolerable. The judge based his determination on Nantz's testimony and the corroborating testimony of his co-workers — undoubtedly, the same evidence the Commission used to find a protected work refusal. With a general reference to that testimony, the Commission simply held that substantial evidence supported the judge's finding that the dust reached an intolerable level. *Id.* at 2213. Thus, the Commission relied on identical evidence for both findings.

An even more explicit illustration of the overlap between the evidence of a work refusal and a constructive discharge was provided in the decision of the administrative law judge in

Simpson v. Kenta Energy, Inc., 6 FMSHRC 1454 (June 1984) (ALJ).[1] In *Simpson*, the complainant refused to work because of dangerous conditions. The judge stated that "[t]he intolerable conditions which caused him to quit his employment are the same conditions justifying his work refusal." *Id.* at 1461.

Although the judge here did not analyze the evidence in terms of a constructive discharge, he found that the operator failed to adequately respond to Dolan's concerns, and that Dolan's work refusal therefore retained its protected status. 20 FMSHRC at 604-05. If a judge finds a miner justified in refusing to work under certain conditions and there is no dispute that those conditions are not going to improve, then the judge has conferred protected status on an indefinite work refusal. We fail to see why we would make a distinction between a miner who is engaged in a protected work refusal with no end in sight and a miner who quits under the same conditions. In determining that a work refusal remains protected even though the operator had ample opportunity to address the concerns motivating the refusal, a judge necessarily concludes that the miner does not have to tolerate the conditions under which the employer is requiring him or her to work. The conditions have, therefore, been deemed intolerable.

In this case, although the judge never used the word "intolerable," he found that the working conditions facing Dolan were objectively intolerable, and that Dolan was therefore justified in quitting his job. The judge found that F&E completely ignored Dolan's legitimate complaints about lead exposure and continued to employ inadequate protective measures. *Id.* The judge's implicit finding of intolerable conditions is amply supported by the record. For instance, the judge concluded that the frequent replacement of Tyvek suits (relied on heavily by the operator to prove that its response to Dolan's complaints was adequate) "does not prevent contamination." *Id.* at 600. This finding is supported by Dolan's testimony that he was constantly forced to keep changing the Tyvek suits and taking off his clothes in a contaminated area. Tr. I 69. He stated that sometimes he had to use 15 Tyvek suits in one day. Tr. I 146. He also testified that when he complained that there were no full-face respirators Whitehead simply told him "just keep your face out of the smoke and everything will be okay." Tr. I 53.

In addition, the dangers of lead contamination were unequivocally described in a pamphlet from the Texas Department of Health admitted into evidence as Complainant's Exhibit 2. This handout, which Dolan testified he had received from other employees who took a lead abatement course in 1996 (Tr. I 38), outlined in detail the potential hazards of lead, characterizing it as a "strong poison," with detrimental effects ranging from fatigue and numbness to reproductive problems and brain disorders. CX-2; *see also* RX- 9 at 5.

The judge's finding that the Tyvek suits did not prevent lead contamination, coupled with the dire warning in the pamphlet that lead poisoning could lead to a "decreased life span," and

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[1] Although unreviewed decisions of administrative law judges are not binding Commission precedent (29 C.F.R. § 2700.72), we nonetheless find it helpful to examine how constructive discharge was analyzed in the *Simpson* case.

that extreme cases "can result in convulsions, coma, or death," (CX-2 at 5), supports the judge's conclusion that Dolan's continued work refusal was reasonable. As we explained above, this is, in fact, an implicit finding that Dolan faced intolerable conditions and thus was constructively discharged. *See Liggett Indus., Inc. v. FMSHRC*, 923 F.2d 150 (10th Cir. 1991) (walking off job because of exposure to inadequate ventilation of welding fumes and noxious gases constituted constructive discharge). Consequently, remanding the case to the judge to address this issue is not warranted.[2]

Nor is it necessary to remand the case to the judge to determine whether the employer's offer to transfer Dolan to a non-lead job defeats Dolan's claim that he faced intolerable conditions. Although Whitehead did not place a restriction on his offer, prior transfers had invariably resulted in only a short-term reassignment. Tr. I 72, 221-22, 478-83. The judge found that "the sincerity of F&E's offer of reassignment as a permanent solution to Dolan's complaints is suspect." 20 FMSHRC at 604-605. The judge also acknowledged that the offer of reassignment "was not a permanent solution." *Id*. at 605. We believe, therefore, that the judge has already made a finding that the transfer would be temporary, and that consequently there is no need to remand this issue back to him. *See Nantz*, 16 FMSHRC at 2214 (miner's refusal to accept temporary job was inextricably connected to his initial work refusal and also qualified as protected activity).

Because we would affirm the judge's ruling that F&E discriminated against Dolan, we next turn to the question of how Dolan's damages should be computed. Specifically at issue is whether he should be compensated for the period August 12, 1996 (when he left a construction job due to pain in his legs) to July 25, 1997 (when he began to receive temporary lost wage payments under the Texas workers' compensation program).

As the judge noted, he was not required to decide in the Mine Act proceeding whether Dolan was actually disabled during this period. That determination had yet to be made by the appropriate Texas agency at the time the parties submitted their evidence on back pay to the judge. 20 FMSHRC at 849; Tr. I 184-86. If in fact Dolan was disabled, then his failure to look

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[2] The majority hypothesizes that the foregoing analysis would permit a finding of constructive discharge where, even though the operator has taken reasonable steps to address the complaining miner's concern, the miner continues to believe in the existence of a hazard and quits. Slip op. at 10. As the majority recognizes, however, it is unlikely that a miner who continues to refuse to work after an operator has taken reasonable steps to dissipate his fears or ensure the safety of the challenged task or condition will be considered to be engaging in a work refusal protected by the Mine Act. *See* slip op. at 7 (citing *Bush*, 5 FMSHRC at 998-99). The miner's reasonable belief in the hazard remains a central component of the work refusal test. Thus, the majority's fears that we would somehow dilute the constructive discharge standard because we are adopting the findings the judge made in concluding that this work refusal was protected are unfounded.

for work could hardly be called "voluntary." Therefore the judge erred in concluding that Dolan's failure to look for work after August 12 was "willful."

F&E is correct in asserting the general proposition that when a miner is disabled, he or she is not entitled to back pay for the period the disability renders the miner unavailable for work. Although this appears to be a question of first impression under the Mine Act, it is well settled under the National Labor Relations Act, a statute to which the Commission has referred in other cases involving mitigation of damages,[3] that back pay is generally not awarded for periods when an employee is unavailable due to a disability. *NLRB v. Louton, Inc.*, 822 F.2d 412, 415 (3d Cir. 1987); *American Mfg. Co.*, 167 NLRB 520, 522 (1967). However, this does not settle the question of Dolan's mitigation of damage, because under the NLRA an exception to this general rule is recognized "[w]here an interim disability is closely related to the nature of the interim employment or arises from the unlawful discharge and is not a usual incident of the hazards of living generally." *Id.*; *see also Graves Trucking, Inc. v. NLRB*, 692 F.2d 470, 476-77 (7th Cir. 1982) (upholding award of back pay to union steward disabled by his supervisor, but shortening time period of award) (citing cases). In *Becton-Dickinson Co.,* 189 NLRB 787 (1971), the NLRB awarded back pay to an employee for a period during which she was disabled due to an acute anxiety reaction which the Board concluded the employer had induced or to which it had substantially contributed. Concluding that "[t]o withhold a backpay order in these circumstances would permit [the employer] to escape all liability for the loss of wages which [the employee] may have suffered because of factors [the employer] unlawfully set in motion, contrary to the remedial purposes of the Act." *Id.* at 789.

Under Title VII as well, a causation analysis has been applied to determine whether periods of disability are to be included in a back pay calculation. *Martin v. Department of Air Force*, 184 F.3d 1366 (Fed. Cir. 1999). In *Martin*, a Back Pay Act case, the Federal Circuit awarded back pay to an employee for a period of time when he was disabled as a result of an interim job he was forced to take after his unlawful termination from his government job. The Court ruled that, taking into account the Congressional intent in passing the Back Pay Act and the requirement of a causation analysis in connection with the back pay provisions of similar federal laws, denying an employee back pay for a period of disablity without reviewing the cause of the disability would be unreasonable. *Id.* at 1371. The court explained that "equity and reason require that if such an employee is unable to work because of an accident or illness closely related or due to interim employment or arises because of the unlawful discharge, the period of disability should be included in a back pay period." *Id.* at 1372.

We agree with the NLRB that "the practice of disallowing back pay without inquiry as to the nature of the physical disability, [and] the cause thereof, . . . may be convenient but is not always equitable." *American Mfg. Co.*, 167 NLRB at 522. Therefore, we would adopt the exception discussed above to ensure that miners disabled due to the conditions which gave rise to their employer's discriminatory conduct can still receive redress. Thus, if his exposure to lead

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[3] *See, e.g.*, *Metric Constructors, Inc.*, 6 FMSHRC 226, 231-32 (Feb. 1984).

caused Dolan's disability, Dolan should be entitled to back pay for the period of time at issue. Because the Commission had not explicitly adopted this principle prior to the trial in this case, we would remand and reopen the record for the submission of evidence relevant to this issue.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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