FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 31, 1997

BILLY R. McCLANAHAN	:	
	:	
v.	:	Docket No. VA 95-9-D
	:	
WELLMORE COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

[1] Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), Billy R. McClanahan seeks review of a decision by Administrative Law Judge David Barbour dismissing a complaint that he filed pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. ' 815(c)(3).[2] 17 FMSHRC 1773 (October 1995) (ALJ). The judge determined that McClanahan=s safety complaints regarding the weight haulage limitation required by his employer, Wellmore Coal Corporation (AWellmore@), were not based on a good faith belief that hauling the required weight was hazardous. For the reasons that follow, we reverse and remand.

I.

[2] Section 105 provides in part:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of 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, or because of the exercise by such miner . . . of any statutory right afforded by this Act.
>
> (c)(2) Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint with the Secretary alleging such discrimination. . . .
>
> (c)(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify . . . 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 . . . to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). . . . Whenever an order is issued sustaining the complainant=s charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney=s fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

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

Factual and Procedural Background

In 1978, McClanahan began working for Wellmore as a haulage truck driver.[3] 17 FMSHRC at 1774. On August 20, 1992, McClanahan was advised that Wellmore was terminating its trucking business but that its former truckers could purchase trucks and haul as independent contractors at Knox Creek=s No. 3 Preparation Plant, or Wellmore=s No. 7 or No. 8 plants. *Id.*; Tr. 316-18. McClanahan entered into an agreement, dated August 21, 1992, to purchase Truck No. 42, the truck he usually drove. 17 FMSHRC at 1775. As an independent contractor, McClanahan hauled refuse regularly at the No. 3 Preparation Plant and continued to be paid by the hour for hauling at that location. *Id.* at 1775; Tr. 61, 319.

In December 1993 or January 1994, a new refuse fill area was opened at Knox Creek No. 3. *Id*. The haulage route to the new area was approximately two miles longer than the route previously traveled by the truckers, and included a one-lane road over a hill. *Id.* As a result, trucks took longer to travel the distance to dump refuse. *Id.* At approximately this time, in an effort to increase refuse removal, the company instituted a policy requiring trucks to haul at least 25 tons per load. *Id.*; Tr. 300, 362, 366, 438. The policy was later modified to allow trucks to haul no less than 24 tons. 17 FMSHRC at 1775. A trucker with a load weighing less than 24 tons was prohibited from hauling for the remainder of the shift and the next day. Tr. 77-78.

[3] Wellmore and Knox Creek Coal Corporation (AKnox Creek@) were affiliated with United Coal Company (AUnited@). 17 FMSHRC at 1774; W. Br. at 1-2.

McClanahan testified that he repeatedly made safety complaints about the weight requirement from its inception.[4] 17 FMSHRC at 1788. He maintained that, on January 27, he told Danny Estep, the trucking foreman, that he was afraid to haul 25 tons up the one-lane road, that 25 tons was too much weight for the truck, and that if the truck=s drive line broke, the truck could travel over the highwall. *Id.*; Tr. 74. McClanahan stated that, on January 31, he told Estep that it was unsafe and unfair to make the truckers choose between being injured or going home, and that on February 1, he informed Estep that he could not haul that much weight safely or efficiently. 17 FMSHRC at 1788; Tr. 78-79. He testified that, on February 4, he complained on the CB radio about Aoverloading being so hazardous,@ and that, on February 27, he told Charles Carter, the president of Wellmore, that he was Ascared of trying to haul that much weight because of the hazards.@ 17 FMSHRC at 1788; Tr. 79, 87.

[4] Wellmore witnesses denied that McClanahan had made safety complaints, testifying that McClanahan=s only stated concern was for the wear-and-tear that the weight requirement would inflict on his truck. 17 FMSHRC at 1788. The judge found that, at least by September 22, 1994, management understood that McClanahan=s complaints about the weight requirement were related to safety. *Id.* at 1788-89. Wellmore challenged that finding for the first time at oral argument. Oral Arg. Tr. 38-40. Although we need not address arguments raised for the first time at oral argument (*Tarpley v. Greene*, 684 F.2d 1, 7 n.17 (D.C. Cir. 1982)), we conclude that the judge=s finding is supported by substantial evidence. As noted by the judge, McClanahan meticulously documented the dates and substance of his complaints. 17 FMSHRC at 1788; C. Ex. 4. At least nine of those complaints were related to safety. 17 FMSHRC at 1788.

On March 2, McClanahan=s truck was weighed. 17 FMSHRC at 1778. The load was 100 pounds under 24 tons. *Id.* Estep told McClanahan that he could not return to work the next day. *Id.* McClanahan testified that it was snowing and that he told Estep that he already was Ascared to death@ but that the snow made it worse. *Id.*; Tr. 93. He stated that Estep told him that he did not want to hear any excuses. Tr. 93. After McClanahan hauled that load, Estep ordered him to have his next load weighed. Tr. 93-94. McClanahan=s next load weighed 21 tons. Tr. 94. McClanahan stated that Estep informed him that Dave Fortner, the company=s vice president of preparation, would fire him if he refused to haul 24 tons. Tr. 94, 294-95. McClanahan replied that he was refusing to haul because he was scared, not because he Adidn=t want to work.@ Tr. 94. McClanahan testified that he also informed Estep about the manufacturer=s recommended maximum gross vehicle weight (AGVW@) for his truck,[5] and tried to show him the portion of the manufacturer=s manual stating that it was hazardous to haul loads exceeding the recommended GVW, but that Estep had responded, ABull.@ 17 FMSHRC at 1778. Estep denied that McClanahan ever mentioned the GVW sticker or any other safety concerns at any time. *Id.*; Tr. 450, 473, 477, 479.

On March 3, McClanahan went to the mine office and spoke with David Wampler, the president of Knox Creek. 17 FMSHRC at 1778-79. McClanahan stated that as soon as he walked in the office, Wampler told him that he had to haul the 24-ton limit. *Id.* at 1779. McClanahan told him that hauling that much weight scared him. *Id.* He stated that Wampler said that the company would buy back the truck for McClanahan=s ownership interest in it. *Id.* McClanahan testified that he then offered to sell the truck for the book or appraised value, but Wampler replied that he would just terminate McClanahan. Tr. 97. McClanahan testified that he tried to get Wampler to look at the GVW information and the truck owner=s manual, but that Wampler refused. 17 FMSHRC at 1779. Wampler testified that McClanahan had informed him that he could not haul the 24-ton limit because of the wear-and-tear to his truck. *Id.*; Tr. 323.

McClanahan testified that, on March 4, he called MSHA but was informed that MSHA could not help. 17 FMSHRC at 1779. He stated that he also called Virginia=s Department of Mine Land Reclamation (ADMLR@) and eventually spoke with Inspector Lawrence Odum. *Id.* On March 7, Odum met McClanahan at the plant. *Id.*

During the March 7 meeting, McClanahan expressed concern over dumping refuse into the slurry basins. *Id.* at 1780. He was afraid that his truck would get too near the edge of a basin

[5] The manufacturer=s recommended maximum GVW is the weight of the empty truck plus the amount that the manufacturer recommends that the truck haul. McClanahan=s truck had a manufacturer=s recommended GVW of 56,800 pounds and weighed 26,900 pounds empty. Tr. 230-31. The maximum amount that the truck could haul in accordance with the manufacturer=s GVW is calculated by subtracting the weight of the empty truck (26,900 pounds) from the GVW of the truck (56,800 pounds) to arrive at the difference of 29,900 pounds. Tr. 230-31. To convert the amount of 29,900 pounds to tons, the figure of 29,900 is divided by 2,000 to arrive at the amount of 14.95 tons, or approximately 15 tons. Tr. 231.

and fall in, and that the weight that he was hauling would make it more likely that the edge would give way. *Id.* Odum informed McClanahan that the conditions at the mine did not look like something his agency would be involved in, rendered no opinions about safety, and referred McClanahan to the Occupational Safety and Health Administration (AOSHA@), MSHA, or the Virginia Division of Mines. *Id.*; Tr. 26, 43.

On September 12, McClanahan=s load was weighed at 23.65 tons. 17 FMSHRC at 1781. According to McClanahan, Estep told McClanahan to Astraighten up [his] attitude.@ *Id.* According to Estep, after McClanahan=s load was found to be underweight, Estep told him that he needed to haul the required weight and to stop being stubborn about it. Tr. 450. When Estep pressed McClanahan about whether he was going to comply with the haulage requirements, Estep testified that McClanahan had replied, AI might be light again and I might not.@ 17 FMSHRC at 1781. McClanahan was told to go home and to not come to work the next day. *Id.*

On September 14, when McClanahan returned, his load was again weighed. *Id.* His load weighed 22.74 tons. *Id.* McClanahan was laid off for the rest of the shift and the next day. *Id.* When he returned to work on September 19, his load was weighed again. *Id.* His load weighed 23.50 tons. *Id.* McClanahan was again sent home for the remainder of the shift and the next day. *Id.* When he returned on September 21, McClanahan=s load was again weighed. *Id.* McClanahan=s load weighed 24.96 tons. *Id.* McClanahan explained that he had been loaded with mud, which is heavy, along with slate. Tr. 122.

On the morning of September 22, Estep called McClanahan via the CB radio and asked him to go the mine office. 17 FMSHRC at 1781. Estep, Fortner and Gross were waiting for him when he arrived. *Id.* According to McClanahan, Fortner told McClanahan that he would be fired if he hauled under the weight limit again. *Id.* at 1782. McClanahan testified that when he tried to explain that he was scared of hauling that excessive weight and that he did not want to risk his health or life, Fortner replied that he had a solution for him and offered him a job at Wellmore No. 8. Tr. 123. McClanahan rejected the offer because truckers at Wellmore No. 8 were paid by the ton hauled, and he believed that he would have to haul twice his truck=s recommended GVW Ajust to make a living.@ Tr. 123.

Later that day, McClanahan=s truck was weighed. Tr. 124. McClanahan=s load weighed 22.96 tons. 17 FMSHRC at 1783. Gross told McClanahan, AThat=s all for you.@ Tr. 124. When McClanahan asked him if that was all for the day or for good, Gross replied, AYou=re fired.@ Tr. 124.

On November 7, 1994, McClanahan filed with MSHA a complaint alleging discrimination in violation of section 105(c) of the Mine Act. *Id.* at 1773. After an investigation, MSHA advised McClanahan of its conclusion that no violation of section 105(c) had occurred. *Id.* On January 6, 1995, McClanahan filed with the Commission a complaint on his own behalf pursuant to section 105(c)(3) of the Act. *Id.*

The judge denied McClanahan=s discrimination complaint. 17 FMSHRC at 1793. He found that McClanahan had made safety complaints to management regarding dumping refuse into slurry basins, but that those complaints lost their protected status under the Mine Act because management had adequately addressed them. *Id.* at 1787. He also found that McClanahan had expressed safety concerns to management about hauling 24 or more tons. *Id.* at 1788-89. The judge concluded, however, that McClanahan=s concerns were those of a truck owner for cost and repair, and were not based on a good-faith belief that the haulage requirement was hazardous to his safety. *Id.* at 1789. The judge based his conclusion on evidence that, as an employee of Wellmore=s, prior to McClanahan=s purchase of the truck, McClanahan repeatedly hauled more than 24 tons without making known his complaints to management or MSHA. *Id.* at 1789-91. In addition, the judge relied on evidence that, after purchasing his truck, McClanahan failed to complain to MSHA about the purported hazards of the weight limit. *Id.* at 1791-92. The judge also found unsupported by the record McClanahan=s assertion that hauling loads in excess of the manufacturer=s recommended GVW was inherently dangerous. *Id.* at 1792. Accordingly, the judge dismissed the proceedings.

On November 29, McClanahan filed a petition for discretionary review, challenging the judge=s decision, which the Commission granted.[6] The Commission subsequently heard oral argument.

II.

Disposition

McClanahan argues that the judge erred in dismissing his discrimination complaint. He submits that substantial evidence does not support the judge=s findings that he consistently hauled loads of 24 or more tons as an employee, that he failed to contact MSHA, and that it is not inherently dangerous to haul loads exceeding the manufacturer=s recommended GVW. M. Br. at 7-15. McClanahan also asserts that substantial evidence does not support the judge=s finding that his concerns about dumping refuse into the slurry basins were adequately addressed by management. *Id.* at 15-17. He requests that the Commission sustain his discrimination complaint, reverse the judge=s decision, and grant him Areinstatement with full back pay and benefits,

[6] Prior to filing his petition for discretionary review, McClanahan mailed a letter to Judge Barbour, which was forwarded to and received by the Commission on November 20, 1995. The existence of the letter was disclosed to counsel of both parties and copies were provided upon counsels= requests. The Commission determined that the letter is outside of the record on review and, accordingly, did not consider it in its disposition of the case. *See* 30 U.S.C. ' 823(d)(2)(C).

including any and all costs related to his unlawful discharge, and including attorney=s fees.@ *Id.* at 19. Wellmore responds that each of the judge=s findings is supported by substantial evidence and that the judge correctly dismissed the complaint. W. Br. at 4-24.

1. General Principles

A miner alleging discrimination under the Mine Act 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 of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev=d on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor 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 is also was motivated by the miner=s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* 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).

The Mine Act grants miners the right to complain of a safety or 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 to work in the face of a perceived danger. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff=d*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 812. In order to be protected, work refusals must be based upon the miner=s Agood faith, reasonable belief in a hazardous condition.@ *Id.*; *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 of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief Asimply means honest belief that a hazard exists.@ *Robinette*, 3 FMSHRC at 810. The purpose of this requirement is to Aremove from the Act=s protection work refusals involving frauds or other forms of deception.@ *Id.*

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 Asubstantial evidence@ means Asuch relevant evidence as a reasonable mind might accept as adequate to support [the judge=s] conclusion.@ *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (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, 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). We are

guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. Weight Requirement Complaints

1. Good Faith Belief that Weight Requirement was Hazardous

1. McClanahan=s Actions as an Employee

We conclude that substantial evidence does not support the judge=s finding that McClanahan=s actions, including his complaints about hauling 24 or more tons as an independent contractor, were not based on a good faith belief in a hazard. Although, as an employee, McClanahan hauled loads with actual weights in excess of 24 tons on the seven days enumerated by the judge, a large majority of his weighed loads over the course of his employment weighed less than 24 tons. *See* R. Ex. 2, at 27, 33-36, 38, 39, 43, 45, 46, 49, 51, 54, 59, 62, 67, 70, 74, 76. In addition, on January 4 and 5, 1990, two of the days listed by the judge, McClanahan was driving Truck No. 33, a different truck than the truck he usually drove and ultimately purchased. C. Ex. 8, at 31-33. Contrary to the judge=s finding that McClanahan did not maintain that the trucks were essentially different (17 FMSHRC at 1790), McClanahan testified that Truck No. 33 was Aa little bit heavier duty truck@ that probably had a higher GVW than Truck No. 42. Tr. 216.

Moreover, it is not clear that McClanahan knew the actual tonnage he was carrying when he hauled as an employee. McClanahan explained that, as an employee, he did not know how much weight he was hauling because the truck was loaded by an endloader operator with just one Ahump,@ or mound, of material.[7] Tr. 151-52, 227. He believed that one hump generally weighed 20 tons. Tr. 226, 228.

In any event, evidence that McClanahan hauled loads in excess of 24 tons on the occasions relied upon by the judge does not establish that McClanahan was unconcerned with his safety. On October 12 and December 20, 1990, two of the seven days listed by the judge, McClanahan complained to his supervisor that his loads were too heavy. Tr. 144, 217-18, 219. McClanahan also generally testified that when he was hauling in Kentucky or loading out of a gob pile, his weights were high and that, after he got to the scales and found out his weight, he told his supervisor at the first opportunity that Awas way too much weight for the trucks.@ Tr. 216-17. It is difficult to construe this statement as anything other than a safety-based complaint; there is no evidence that McClanahan had an economic motivation, as McClanahan did not own the truck at that time, and McClanahan was paid the same hourly rate regardless of the tonnage that he hauled. McClanahan=s failure to expressly link these complaints to safety does not preclude the characterization of those complaints as relating to safety, particularly given the possibility of

[7] In contrast, during the time that Wellmore enforced its weight requirement, truckers were responsible for operating the hopper that loaded their trucks. Tr. 509.

equipment failure resulting from hauling excessive weight. C. Ex. 16, at 2-3; Tr. 75, 108, 112, 191.

Unlike the judge, we do not find demonstrative of a lack of good faith evidence that AMcClanahan=s complaints concerning the hauling of 24 tons or more are definitely linked to safety only *after* he became the owner of the truck.@ 17 FMSHRC at 1790 (emphasis in original). The basis for the safety complaints that McClanahan made as an independent contractor was not present at the time that McClanahan was an employee. Wellmore did not begin its practice of regularly weighing trucks and sending home drivers that were not hauling at least 24 tons per load until January 1994.[8] 17 FMSHRC at 1775. McClanahan owned the truck for one-and-a-half years before making complaints that hauling 24 or more tons was hazardous. His complaints began not after he assumed ownership of the truck in August 1992 but, rather, after Wellmore implemented its policy requiring truckers to consistently haul at least 24 tons or be sent home.

Nor do we find determinative of a lack of good faith evidence that, as an employee, McClanahan repeatedly estimated that he hauled loads weighing 25 tons. *See* R. Ex. 2. The judge, relying upon such evidence, stated that Ait strikes me as completely incongruous to McClanahan=s purported belief in the inherent hazards of hauling more than 24 tons, that he would have indicated he was engaging consistently in hazardous work.@ 17 FMSHRC at 1790. The judge discredited McClanahan=s testimony that, although he estimated 25 tons, he was hauling less, relying upon evidence of the seven days in which loads were actually weighed in excess of 24 tons. *Id.* As noted, a majority of the weighed loads that McClanahan hauled as an employee had actual weights of less than 24 tons. Moreover, we do not agree with the judge that, because McClanahan signed weight sheets estimating his loads at 25 tons, McClanahan essentially acknowledged the safety of hauling loads that actually weighed that amount.[9] Section 105(c) was

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[8] Wellmore, relying upon testimony of its witnesses, asserts that there had been a 25-ton haulage requirement at the plant for years while McClanahan was an employee. W. Br. at 5-8. The judge declined to credit such testimony. 17 FMSHRC at 1775. Even if this testimony were credited, the evidence is undisputed that the policy requiring truckers to haul 24 or more tons or be sent home was not instituted at the preparation plant until January 1994. Tr. 77, 300-01, 366.

[9] There is evidence in the record supporting McClanahan=s perception that he was actually hauling less than those estimated weights. McClanahan and Curtis Christian, a former trucker for United, testified that, at the time that United owned the trucks, truckers were sent home for hauling loads that weighed more than 20 tons. Tr. 226, 249, 275-76. In addition, McClanahan testified that the truckers had estimated their loads to be 20 tons until approximately 1989, when their foreman had told them to begin estimating their loads at 25 tons although they did not have to actually load more weight. Tr. 142-43, 145-46, 215. He explained that other United operations wanted them to haul more, while the truck supervisors did not. Tr. 215. He stated that his supervisors asked the truck drivers to estimate 25 tons to Akeep them off their back[s].@ Tr. 215. McClanahan stated that management knew that the estimates of 25 tons were not accurate and told the truckers to estimate 25 tons Ano matter if you had half a load or a full load or two buckets full.@ Tr. 215, 221.

enacted in recognition that miners are sometimes placed in the situation where they must effectively choose between engaging in an activity that would compromise their safety or forfeiting employment in areas where employment opportunities are scarce. *See* S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978) (recognizing that miners must be protected against discrimination as a result of their participation in safety matters and that Amining often takes place in remote sections . . . and in places where work in the mines offers the only real employment opportunity@).

2. McClanahan=s Contacts with MSHA

The judge determined that McClanahan did not have a good faith belief that the weight requirement was hazardous because the judge found McClanahan failed to make a safety complaint to MSHA. This conclusion is premised on errors of fact and law.

Even if McClanahan had not made a safety complaint to MSHA, the judge erred in considering that as evidence of a lack of good faith. In making that inference, the judge rejected out of hand McClanahan=s testimony that he feared his identity would not be kept confidential by MSHA if he filed a complaint and that he might be the subject of retribution. 17 FMSHRC at 1792. Despite the Act=s confidentiality requirements, we do not consider McClanahan=s fear to be unreasonable. *See United Mine Workers of America on behalf of Nelson v. Secretary of Labor*, 15 FMSHRC 365 (March 1993) (involving allegations that MSHA officials failed to protect confidentiality of miners who had reported safety violations). Moreover, the Commission has previously rejected the contention that a miner must file a complaint with MSHA in order to make a protected safety complaint to an operator. *Sammon v. Mine Services Co.*, 6 FMSHRC 1391, 1396-97 (June 1984).

In any event, substantial evidence establishes that McClanahan engaged in actions that clearly constitute a safety complaint, and fails to support the judge=s conclusion to the contrary. McClanahan testified that he contacted MSHA about the weight requirement, but was informed that MSHA could not help. The judge discredited this testimony based on his findings that: (1) McClanahan later modified that testimony, stating that either he or his wife had called; (2) McClanahan=s failure to keep records of that alleged contact was inconsistent with his record-keeping habits; and (3) if Mr. or Ms. McClanahan had contacted MSHA, MSHA would not have responded that there was nothing it could do. 17 FMSHRC at 1791.

First, contrary to the judge=s findings, the record establishes that Mr. or Ms. McClanahan did, in fact, contact MSHA. Ms. McClanahan testified that she made two calls to MSHA on March 4, 1994, related the conditions at the mine, and was informed that an effort would be made to find the correct contact for her. Tr. 260-62. She stated she was given various agency names and phone numbers because MSHA was not sure that it was the appropriate agency to contact. Tr. 266. Ms. McClanahan explained that she made several calls and that every agency she contacted referred her to a different person or agency to contact. Tr. 263. She stated that MSHA called back prior to the time that McClanahan filed his discrimination complaint and spoke with each of them on different dates. Tr. 265. She stated that, at the time, MSHA Adidn=t think it was their department to handle it until [she] explained in detail, and [she] ended up sending some information to them to help them decide that they should follow up on it.@ Tr. 266. She said that they later heard from MSHA when they took McClanahan=s statement in connection with his discrimination complaint. Tr. 266. The McClanahans= phone bill introduced at trial, and ignored by the judge in his decision, indicates two calls to MSHA on March 4 for three minutes and twenty-seven minutes. C. Ex. 31.

In addition, it appears that McClanahan made a concerted effort to have his concerns addressed by other government agencies, although he may have been uncertain as to which agency to contact. The McClanahans= phone bill reflects a March 4 call to DMLR, a March 4 call to the Virginia Employment Commission, two March 4 calls to the National Labor Relations Board, and March 4, March 11 and March 14 calls to the Virginia Department of Labor. M. Br. at 13-14; C. Ex. 31. On March 7, 1994, McClanahan met with DMLR Inspector Odum at the refuse dumping site. Tr. 26. Odum also informed McClanahan that his agency was not the appropriate agency to contact and referred McClanahan to OSHA or MSHA or the Virginia Division of Mines. Tr. 26. Such repeated efforts do not support the judge=s finding of lack of good faith.

3. Summary

In sum, substantial evidence does not support the judge=s finding that McClanahan failed to demonstrate a good faith belief that hauling 24 or more tons was hazardous. Accordingly, we reverse the judge=s finding that McClanahan=s safety complaints regarding Wellmore=s weight requirements were not based on a good faith belief in a hazard.

2. Reasonableness of Belief that Weight Requirement was Hazardous

Because the judge dismissed McClanahan=s complaints regarding Wellmore=s weight requirement on the basis that they were not made in good faith, he did not reach the question of the reasonableness of McClanahan=s belief that the weight requirement was hazardous. However, the judge rejected McClanahan=s assertion that it was inherently dangerous to haul over the manufacturer=s recommended GVW. 17 FMSHRC at 1792. The judge reasoned the assertion was not supported by the record because McClanahan had consistently hauled loads in excess of that amount, and Virginia and Kentucky licensed the truck to haul loads beyond the manufacturer=s maximum GVW. *Id.* McClanahan argues that substantial evidence does not support the judge=s finding. M. Br. at 7-13.

The Commission has Arejected a requirement that miners who have refused to work must objectively prove that the hazards existed . . . [and has] adopted a >simple requirement that the miner=s honest perception be a reasonable one under the circumstances.=@ *Secretary of Labor on behalf of Pratt v. Hurricane Coal Co.*, 5 FMSHRC 1529, 1533 (September 1983), *quoting Robinette,* 3 FMSHRC at 812. Our focus, therefore, is on the reasonableness of McClanahan=s belief that the weight requirement was hazardous.

The record reveals that, after January 1994, McClanahan was required to haul on a regular basis an amount that exceeded the manufacturer=s recommended GVW by approximately 60 percent. M. Reply Br. at 4. As acknowledged by the judge, Aif the truck was going to have to haul 24 tons or more each time it was loaded, there was going to be wear and tear on the truck.@ 17 FMSHRC at 1790-91. Equipment failure could lead to serious accidents. C. Ex. 16, at 2-3;

Tr. 75, 108, 112, 191. For instance, McClanahan testified that if the driveline broke, the truck would be unable to stop and could travel over the highwall. Tr. 74-75, 85.

In recognition of such hazards, MSHA issued an alert, dated November 22, 1994, cautioning mine operators and independent contractors that accidents involving haulage trucks are the leading cause of death at surface mines. C. Ex. 16, at 1. The MSHA alert states in part that, to prevent haulage accidents, equipment operators should not overload their trucks. C. Ex. 16, at 3. *See also* C. Ex. 17, at 1 (to prevent surface haulage accidents, truck[ers] . . . should . . . [n]ever exceed the truck=s rated load capacity@). Similarly, the 1990 Ford Truck Owner=s Guide states that A[u]nder no circumstances should your vehicle be loaded in excess of the [recommended GVW],@ while the warranty booklet provides that exceeding the recommended GVW may void the truck=s warranty. C. Exs. 18, 19. A memorandum from MSHA District Manager Ray McKinney, dated November 1, 1994, also refers to problems at the mine associated with hauling in excess of the maximum GVW:

> The trucks hauling slate to the slate dump are required to haul at least 24 tons which exceeds the manufacturer recommended load by 7 to 9 tons (depending on type of truck). Several of the employees interviewed felt like at certain times this is unsafe. When the haul road is wet and muddy it is difficult to control the truck. The excessive weight that the trucks are required to haul also causes breakdowns while operating the truck which causes unsafe operating conditions. . . .

C. Ex. 27, at 3.

We find unavailing evidence relied upon by Wellmore to support its contention that McClanahan=s safety concerns about the weight requirement were unfounded. Wellmore emphasizes that, during a haulage technical inspection conducted at the mine on November 9, 1994, MSHA investigators did not observe any unsafe conditions or practices at the mine. C. Ex. 27, at 1-2. However, the trucks observed during that inspection were not weighed and could have been hauling under Wellmore=s weight limitation. C. Ex. 27, at 1-2. In addition, the Commission has repeatedly recognized that the Afact that a subsequent investigation fails to confirm an actual violative condition does not vitiate the reasonableness of a miner=s work refusal.@ *Secretary of Labor on behalf of Hogan v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1073 n.4 (July 1986) (citations omitted). Moreover, Wellmore offered no persuasive evidence to refute the assertion that consistently hauling in excess of the rated capacity of trucks posed safety risks. In fact, the only evidence it offered was testimony by its witnesses that they did not consider Wellmore=s haulage requirement unsafe. Tr. 491, 517-18; R. Ex. 1, at 25-37.[10] The

[10] Evidence was offered showing that Virginia and Kentucky licensed the truck to carry loads beyond the manufacturer=s recommended GVW. 17 FMSHRC at 1792. However, Wellmore=s counsel confirmed at oral argument that these limits applied only to highway, not off-

operator=s vice president of preparation acknowledged that Wellmore instituted the 24-ton requirement without consideration of the size of the trucks or their GVW. Tr. 302-03. Wellmore=s sole criterion in establishing the weight limit was simply the amount of refuse that needed to be hauled by each truck in order to keep the plant operating. Tr. 302-03.

We therefore conclude that the record supports no other conclusion than that McClanahan reasonably believed Wellmore=s weight requirement was hazardous. In such circumstances, a remand to the judge for consideration of the issue would serve no purpose. *See American Mine Services, Inc.*, 15 FMSHRC 1830, 1834 (September 1993), *citing Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand unnecessary because evidence could justify only one conclusion). Accordingly, we conclude that McClanahan expressed a good faith, reasonable concern about the safety of Wellmore=s weight requirement.

3. Adequacy of Operator=s Response

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 Ain a way that his fears reasonably should have been quelled.@ *Gilbert*, 866 F.2d at 1441; *see also Bush*, 5 FMSHRC at 997-99; *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff=d*, 866 F.2d 431 (6th Cir. 1989). A miner=s continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *Bush*, 5 FMSHRC at 998-99. Having dismissed McClanahan=s complaint on the ground of lack of good-faith belief in the existence of a hazardous condition, the judge did not reach the issue of the adequacy of Wellmore=s response to McClanahan=s concerns.

At the September 22 meeting, the last time McClanahan expressed his safety concerns to Wellmore about the weight requirement, McClanahan was offered work at Wellmore No. 8, where truckers were paid by the tonnage hauled rather than by the hour. 17 FMSHRC at 1775, 1782. McClanahan testified he declined the offer because he would have to haul twice the GVW just to make a living, that the truckers there were Ahaving all kinds of problems,@ and that the hazardous conditions would remain unchanged. Tr. 123. McClanahan testified that in late 1992, Clifford Hurley had informed him that since the company had begun paying truckers at Wellmore No. 8 by the ton, truckers were Amore or less racing,@ and Hurley was afraid to visit the site because he might get run over. Tr. 155-56. McClanahan testified that truckers were being paid approximately 65 cents a ton and those truckers had informed him they were hauling 35 to 40 tons per trip to make a living. Tr. 156. Wellmore presented no evidence rebutting McClanahan=s testimony.

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road, travel. Oral Arg. Tr. 51-52. Moreover, even if the Virginia weight limit had applied, it only would have permitted McClanahan to haul about 16.5 tons. 17 FMSHRC at 1778.

We conclude the record supports no other conclusion than that Wellmore=s offer for alternate employment did not adequately quell McClanahan=s safety concerns about the 24-ton weight requirement. Wellmore took no action to determine whether McClanahan=s concerns regarding consistently hauling approximately 60 percent in excess of the truck=s recommended GVW were reasonable. Rather, it ignored those concerns, essentially offering McClanahan the choice of hauling equal or greater weights than the 24-ton limit that he reasonably and in good faith believed to be unsafe, or transferring him to Wellmore No. 8 where McClanahan believed the working conditions were unsafe and where he would be taking an untenable reduction in pay. A conclusion that Wellmore adequately quelled McClanahan=s fears under such circumstances would run counter to the remedial purposes of section 105(c) of the Mine Act. *See Secretary of Labor on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469, 472 (11th Cir. 1985), *aff=g* 6 FMSHRC 226 (February 1984) (discrimination found where operator offered discriminatees the choice of returning to hazardous conditions or going home).[11] Therefore, we conclude Wellmore failed to address McClanahan=s concern about the weight requirement in a way that his fears reasonably should have been quelled. Accordingly, we hold that McClanahan=s refusal to haul Wellmore=s weight requirement was protected under the Act, and that Wellmore=s termination of McClanahan violated section 105(c)(1) of the Act.[12]

4. Remedy

Wellmore is hereby ordered to immediately reinstate McClanahan to the position he held as a trucking contractor to the operator prior to his termination on September 22, 1994. By this decision we also advise the Secretary of Labor, who was not a party to this action, that we have ordered reinstatement and that, pursuant to section 103(a)(4) of the Mine Act, 30 U.S.C. ' 813(a)(4), the Secretary has the authority and duty to ensure that Athere is compliance with the . . . decision@ rendered herein. We remand for calculation of the amount of back pay, interest, hearing expenses and reasonable attorney=s fees to be awarded McClanahan.

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[11] An offer of reemployment conditioned upon a miner=s willingness to work under dangerous conditions of which he has previously complained has been held to constitute a separately actionable violation of section 105(c) of the Mine Act. *Secretary of Labor on behalf of Keene v. Mullins*, 888 F.2d 1448 (D.C. Cir. 1989).

[12] Given our holding, we need not address whether McClanahan=s slurry basin complaints lost their protected status under the Act because management adequately addressed them.

III.

Conclusion

For the foregoing reasons, we reverse the judge=s conclusion that Wellmore did not discriminate against McClanahan in violation of section 105(c)(1) of the Mine Act. We order McClanahan=s immediate reinstatement and remand for expeditious calculation of a monetary award consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner