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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
RONNIE DALE CLARK,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 86-10-D

MSHA Case No. BARB CD 85-46

v.

ELDRIDGE COAL COMPANY,
CHARLES & JIM ELDRIDGE,
RESPONDENTS

DECISION

Appearances: William F. Taylor, Esq., U.S. Department of Labor,
for the Complainant;
Jim Eldridge and Charles Eldridge, pro se and
representing Eldridge Coal Company, Inc.

Before: Judge Fauver

This is a discrimination proceeding brought by the Secretary of Labor under 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. The complaint alleges that Ronnie Dale Clark, an underground coal miner, was constructively discharged by Respondents because the working conditions at Eldridge Coal Company's Kelloke Mine, where Clark was employed, were so unsafe and intolerable that Clark was unable to continue working.

After a hearing, post-hearing depositions were allowed and filed as part of the record.

Having considered the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

1. Ronnie Dale Clark, during his employment with Eldridge Coal Company, especially during the last few weeks of his employment in 1985, made several safety complaints to his immediate supervisors, William Blevins and Jim Eldridge. Among other things, Clark complained about an imminent danger associated with the coal feeder he was assigned to operate.

2. For about two months immediately before Clark's employment termination (March 15, 1985, his last day of work), he was

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instructed by Mine Foreman Jim Eldridge to block in the coal feeder's electrical contactor points with a capboard, thereby bypassing a breaker and the on/off switch. In order to engage or block in the contactor points, Clark was instructed by Jim Eldridge to place the on/off switch in the feeder starting box, at the operator station, in the off position, remove the electrical component lid, place his hands within the component box and reposition the capboard. Clark stated that this practice was extremely hazardous, that it created an imminent danger, and that he was afraid the practice would kill him.

3. On several occasions Clark complained about this practice to both of his supervisors, William Blevins and Jim Eldridge. On many occasions he asked Bill Blevin or Jim Eldridge to have someone repair the feeder. His pleas fell on deaf ears and it became abundantly clear to Clark that no action was going to be taken to correct the imminent danger to which he was exposed daily.

4. Clark made one last attempt to have the feeder placed in a safe condition, when he visited the home of William Blevins on Sunday afternoon, March 17, 1985. Clark stated that he went to Blevins to discuss the unsafe conditions of the coal feeder and to determine whether or not the feeder had been repaired and placed in a safe operating condition. When Blevins informed Clark that no action had been taken to repair the feeder, Clark informed Blevins that he would not report to work on Monday morning, March 18, 1985, because of the unsafe and imminently dangerous working conditions at Eldridge Coal Company.

5. About a week after informing his immediate supervisor, William Blevins, that he was withdrawing from the imminently dangerous working conditions at Eldridge Coal Company, Clark went to Mine Foreman Jim Eldridge's home to find out whether or not the coal feeder had been repaired so that he could return to work. During this conversation Clark was told that he no longer held a job with Eldridge Coal Company.

DISCUSSION WITH FURTHER FINDINGS

The testimony of Clark is confirmed by his supervisor William Blevins and by an MSHA electrical expert.

Blevins stated that Clark, on at least two occasions, expressed to him that he was greatly concerned about the unsafe condition of the feeder. Blevins was also present when Clark made complaints to Mine Foreman Jim Eldridge concerning the dangerous condition of the coal feeder. Blevins was also present when Clark made complaints to Mine Foreman Jim Eldridge concerning the dangerous condition of the coal feeder. Blevins explained the situation as follows:

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Jim [Eldridge] was present when Ronnie [Clark] asked us to fix [the coal feeder] and he said " . . . that we'd get it fixed on Saturday' I think it was one day through the week and he said "they would work on it on Saturday, on a day . . . ' you know . . . "where they could shut it down.' [Evidentiary Deposition, page 4, Response to Question D20.]

Blevins also confirmed the dangers associated with blocking in the feeder contactor points. In particular, Blevins stated that the practice of opening the starting box to reposition the capboard caused one to be exposed to energized electrical components, and using the capboard to block the contractor points was an unsafe practice.

Federal Mine Safety and Health District Electrical Supervisor Henry Standifer, with many years of electrical experience in both the private coal industry and in government safety enforcement, testified that the practice of blocking in the contactor points as described by Clark created a very unsafe condition. Standifer explained the situation as follows:

QUESTION BY TAYLOR: The situation that Mr. Clark described in turning off the breaker and placing his hands inside the starting box to put the capboards under the contactors to block them in, what type of hazard does that create?

ANSWER BY STANDIFER: He exposes himself [sic] to 480 volts anytime that you open the door and go inside that box.

QUESTION: Would you consider that in your experience as an electrical supervisor in [sic] the number of years that you've had in the coal industry in private sector and government sectors, would you consider that situation an imminent danger?

ANSWER: Absolutely. [Evidentiary Deposition at page 21, Questions 34 and 35.]

Standifer also provided statistical data showing the number of deaths and injury producing accidents associated with electrical hazards in the area of Harlan County, Kentucky where the Eldridge Coal Company was located.

In *Simpson v. Kenta Energy, Inc.*, 4 FMSHRC 1023 (1986), the Commission held that Simpson was not within the protection of 105(c) because he did not notify the operator of the perceived dangerous conditions before his work refusal. The Commission also stated that in order to establish a constructive discharge the miner must show that in retaliation for protected activity the operator created or maintained intolerable working conditions in order to force the miner to quit.

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The instant case clearly meets both tests of the Simpson case. Clark on several occasions complained about the dangers associated with blocking in the capboard. The complaints were directed to Clark's immediate supervisor/face boss William Blevins, and on at least one occasion to Mine Foreman Jim Eldridge, who is the individual responsible for creating the hazard in the first instance. Clark went to Blevins' home on the afternoon of Sunday, March 17, 1985, to complain about the hazard and to ascertain if his pleas had caused mine management to correct the dangerous working conditions. Clark met his obligation of communicating the perceived hazard to mine management before his work refusal.

Clark's situation also satisfies the second element of the Simpson test, which requires the miner to show that the operator was motivated to maintain the unsafe condition because of the miner's engagement in a protected activity.

In considering discharge motivations, the Commission has long recognized that direct proof of a discriminatory motive is not often possible. The adjudicator often must look to circumstantial evidence to draw inferences regarding the motivating factors. *Chacon v. Phelps Dodge Corp.*, 2 FMSHRC 1505 (1981); *Brazell v. Island Creek Coal Company*, 2 FMSHRC 1801 (1982); *Bradley v. Belva Coal Company*, 2 FMSHRC 1729 (1982); *Neal v. W.B. Coal Company*, 2 FMSHRC 1225 (1981) (PDR denied, reversed on other grounds 704 F.2d 275 (6th Cir.1983), vacated in part 719 F.2d 194 (6th Cir.1983)).

I find that the circumstances of this case show that the operator intended to force Clark to quit because of his protected activities, i.e., complaints about unsafe working conditions. In reaching this finding I have considered the following: (1) Clark for approximately two months prior to employment termination had lodged complaints about his exposure to an imminent electrical hazard, as well as other hazards at the mine; (2) Clark made the operator keenly aware of the hazard (in fact the hazard was specifically produced by mine management); (3) no action was taken by mine management to correct the hazard during Clark's employment; (4) Clark was given a "Hobson's choice" of working in an imminently dangerous environment or withdrawing from work; (5) Clark withdrew from his employment on March 17, 1985 by informing Blevins of his intent not to report to work on Monday, March 18, 1985; (6) immediately after Clark withdrew from the job the hazard was eliminated by management causing the feeder to be repaired; (7) Russell Kelly replaced Clark as feeder operator on March 19, 1985, the day after Clark informed management of his work refusal (Kelly stated he did not experience any problem with the feeder; the reason Kelly did not experience any problem with the feeder was explained by Blevins who stated that the feeder was repaired before Kelly was assigned to operate the feeder).

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The circumstantial evidence in this case clearly indicates that the operator was motivated to maintain the hazardous condition in retaliation of Clark's protected activities.

The Act places safety responsibility on the shoulders of both the operator and the miner. It is the miner's obligation before a work refusal to inform the operator of the hazardous conditions. A corresponding responsibility applies to the operator as well. Once the operator is placed on notice that a hazard exists the operator is obligated to address the hazard. See Secretary of Labor v. Metric Constructors, Inc., 3 FMSHRC 1259 (1984); Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co., Inc., 3 FMSHRC 1053 (1983); Secretary of Labor on behalf of Bush v. Union Carbide Corp., 2 FMSHRC 2152 (1983). If the operator chooses not to address the perceived hazard, it thereby gives the miner the right of withdrawing from the hazard and refusing to work until the condition is corrected or in some way satisfactorily addressed.

Clark was faced with an imminent danger created directly by the orders of his Mine Foreman, Jim Eldridge. MSHA Electrical Supervisor Henry Standifer stated that if he had observed the situation Clark described he would have issued an imminent danger order of withdrawal pursuant to 107(a) of the Act. Standifer considered the situation described by Clark as extremely hazardous and likely to cause death or serious injury. Clark was being exposed to 480 volts of electricity each time he was required to place his hands in the coal feeder's starting box to reposition the capboard. The practice of blocking in the capboard clearly falls within the definition of an imminent danger as that term is used in 107(a) of the Act. See Eastern Associated Coal Corporation v. IBMA, 491 F.2d 277 (4th Cir.1974), 1 FMSHRC 1119.

Clark made the operator aware of the hazard and he asked each of his supervisors to take action to repair the feeder and thereby remove the hazard. The operator chose to ignore his complaints, leaving Clark with no alternative than withdrawing from the imminent danger. Clark exercised his right to withdraw on March 17, 1985. About one week later, Clark reported to Mine Foreman Jim Eldridge to determine whether the coal feeder was repaired and if so to return to work. Eldridge told him he was no longer employed by Eldridge Coal Company.

Under the circumstances Clark was justified in removing himself from the hazard and refusing to work. Robinette v. United Castle Coal Company, 2 FMSHRC 1213 (1981). The delay of one week before reporting back to work was reasonable considering that Clark had complained of the imminent danger for several weeks without any success in obtaining relief of the situation. Eldridge Coal Company's refusal to reinstate Clark constituted adverse action motivated by a protected work refusal. Such action by the operator violates the Act and affords Clark the

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protection of 105(c). See *Pasula v. Consolidation Coal Company*, 2 FMSHRC 1001 (1980) reversed on other grounds sub. nom. *Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir.1981); *Dunmire and Estle v. Northern Coal Company*, 2 FMSHRC 1585 (1982); *Jenkins v. Hecla Day Mines Corporation*, 3 FMSHRC 1527 (1984); *Robinette*, supra.

Jim Eldridge was a supervisor and mine foreman at the time of Clark's constructive discharge on March 15, 1985. Charles Eldridge was Vice President of Eldridge Coal Company, Inc., and was a managing official on-site at the Kelloke Mine on a daily basis. Both were also in such managerial positions when Respondent refused to reinstate Clark about a week later.

Section 105(c)(1) of the Act provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner
[Emphasis added.]

The language of 105(c) makes it clear that both Jim Eldridge and Charles Eldridge, as individuals, are subject to the Act. Further, the legislative history unequivocally supports this position. The Senate Committee Report in regard to 105(c) states:

It should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved.
[Legislative History of the Federal Mine Safety and Health Act of 1977, page 624; emphasis added.]

In *Mine Workers, Local 9800 v. Dupree*, 2 FMSHRC 1077, (1980), Local 9800 filed a complaint of discrimination alleging that MSHA and its agent Dupree had engaged in activities which violated 105(c) of the Act. MSHA, in seeking a dismissal of the complaint, argued that it was not subject to liability under 105(c). Judge Broderick disagreed. In holding that MSHA comes within the scope of 105(c), the judge looked to the plain meaning of 105(c) and also to the intent of Congress. He found that the Act prohibited discrimination from any source. The judge, relying on the legislative history, states at page 1078 of the Dupree case: "Section 105(c) is 'to be construed expansively' in order 'to assure that miners will not be inhibited in any way from exercising any rights afforded by the legislation'."

The judge went on to hold:

Because the purpose of the statutory provision was to protect miners from discrimination from any source, and following an expansive construction, MSHA is found to

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be a person under Section 105(c) prohibited from discriminating against any miner. [Dupree, supra, 1078.]

I hold that Jim and Charles Eldridge come within the definition of a "person" and as such fall within the scope of 105(c). Both Jim Eldridge and Charles Eldridge will be held personally responsible for the unlawful discharge of Clark. They and the corporation will be held jointly and severally liable for sanctions including back pay, interest, and a civil penalty.

The element of damages is the amount of pay lost between the date of constructive discharge, March 15, 1985, until the date the Kelloke Mine ceased operation (May 24, 1985), plus back interest until payment of damages.

In assessing a civil penalty, I note that Respondent was a small operator during the period involved, and that the subject mine is out of business.

Considering all the criteria for assessing a civil penalty under section 110(i) of the Act, I find that a penalty of \$100 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondents violated section 105(c)(i) of the Act by constructively discharging Ronnie Dale Clark as alleged in the complaint.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondents are jointly and severally liable for, and shall pay over to the complaining miner, Ronnie Dale Clark, back wages in the amount of \$3,600.00, plus \$556.54 interest, computed from the date of discharge through December 22, 1986, for a total of \$4,156.54. Said amount shall be immediately forwarded to Ronnie Dale Clark at Post Office Box 19, Holmes Mill, Kentucky 40843. If such payment is not made, interest after December 22, 1986, shall accrue at the rate of 9% per annum until full payment is made to Ronnie Dale Clark.

2. Respondents are jointly and severally liable for, and shall pay, a civil penalty of \$100 for the violation found herein.

William Fauver
Administrative Law Judge