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ALLEN ELLSWORTH V. FREEMAN COAL MINING  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

ALLEN ELLSWORTH,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 89-33-D

v.

VINC CD 88-10  
Crown II Mine

FREEMAN COAL MINING COMPANY,  
RESPONDENT

DECISION

Appearances: H. Carl Runge, Esq., Runge & Gumbel, P.C.,  
Collinsville, Illinois for Complainant;  
Harry M. Coven, Esq., Gould & Ratner,  
Chicago, Illinois for Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Allen Ellsworth under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," alleging unlawful discharge by the Freeman United Coal Mining Company (Freeman) in violation of section 105(c)(1) of the Act. More particularly the Complainant alleges that his discharge on August 4, 1988, was the direct result of his refusal to perform work which he believed to have been unsafe.

The record shows that the Complainant had been employed by Freeman as a miner since 1976. At the time of his discharge on August 4, 1988, he was classified as a rock duster but had been more recently assigned to shovel coal spillage around the beltline for several shifts. The beltline ran down the center of the entry suspended from the mine roof. The mine height in this area was 6 to 8 feet and there was approximately 6 feet of clearance on each side between the belt and the ribs. There was also a space beneath the suspended belt of between 18 to 48 inches.

On the midnight shift on August 4, 1988, the Complainant was initially assigned by his foreman, Roger Johnson, to shovel coal spillage on the east side of the belt with another miner. Two other miners were shoveling on the west side of the belt. According to Ellsworth, while shoveling the beltline during the previous night his shovel was momentarily caught in the belt. Ellsworth testified that although he was scared by this incident he never reported or complained of it to anyone nor did he refuse to work because of the incident. He further testified that he was aware at this time of a publication by the Federal Mine Safety and Health Administration (MSHA) warning as follows:

SAFETY TIP

Remember: Never put any part of your body in a position where it could be caught by a belt conveyor. Belt conveyors should be stopped when performing any type of cleaning or mechanical work. If any guards are removed, they must be replaced immediately. (Exhibit C-1)

Ellsworth testified that he was also aware at that time of miners being killed after being caught in moving belts. In spite of this knowledge Ellsworth did not complain that the practice of shoveling coal onto the beltline was in itself unsafe.

It is within this framework that Ellsworth claims he subsequently refused to perform his assigned work on August 4, 1988. During his shift that night Foreman Johnson had to assign one of the four shovelers to another job. Noting that the west side was further behind the east side in the clean-up effort Johnson assigned two miners to clean the west side leaving Ellsworth alone on the east side.

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Ellsworth protested stating that it was unsafe to shovel alone on one side of the belt. He complained that if he fell into the belt, no one would be close by to help him.

At hearing Ellsworth clarified his concerns that no one was working his side of the belt. He testified that if other miners had been working within 1 1/2 crosscuts on his side that would have been an acceptable distance away. The miners shoveling on the west side of the beltline at this time were within 1 1/2 crosscuts but in order to pull Ellsworth from the belt would have had to also pass beneath the belt. The cutoff switch to the belt was however also on the west side about 100 feet from where the miners were shoveling at the time of Ellsworth's work refusal.

Foreman Johnson testified that when Ellsworth refused to shovel on the east side Ellsworth requested an evaluation by a union safety committeeman. Johnson then called Kenneth Miller, the shift mine manager, on the mine telephone and reported the problem. Miller instructed Johnson to assign Ellsworth to shovel with the others on the west side of the belt until he arrived.

When Miller arrived at the area about a half hour later, Johnson explained that Ellsworth thought it was unsafe to shovel by himself. Miller and Johnson then inspected the east side of the belt where Ellsworth refused to work. They found nothing abnormal or unsafe about the entry or area. Miller then spoke to Ellsworth, who repeated his fears that "it was unsafe for him to shovel on the east side of the belt alone and that he was afraid if he got tangled into the belt, there wouldn't be anyone to help him". Miller explained to Ellsworth that the area did not violate any safety standards and that many other miners travel by themselves, examiners walk and examine the belts by themselves and classified belt shovelers shovel by themselves. Ellsworth still refused.

Miller then left the area and later returned with the union safety committeeman, David Owens. After inspecting the work area, Owens requested to talk privately with Ellsworth. After 25 to 30 minutes of private discussion Owens reported that he found nothing hazardous or unsafe about the job. Miller then gave Ellsworth a direct work order to return to the east side of the belt and shovel. Ellsworth refused and continued to maintain that it was unsafe. Miller gave Ellsworth 4 or 5 direct work orders to shovel on the east side of the belt each of which he refused, reading to Miller from the collective bargaining agreement and demanding that a state or federal inspector decide if it was safe.

David Webb, then mine superintendent, testified that he was awakened by a telephone call from Miller at approximately 3:50 on the morning of August 4th, and proceeded to the mine

to meet Miller. After reviewing the situation Webb proceeded underground to meet with Ellsworth. He recalled that there was a calm and unexcited interchange between he and Ellsworth during which he asked Ellsworth to get onto the golf cart and exit the mine. Ellsworth declined and showed Webb a copy of Article 3 section I (n)(3) of the collective bargaining agreement claiming that he was entitled to call a federal or state inspector to the scene. Webb explained that those provisions did not apply in circumstances where the union safety committeeman does not find a hazard. According to Webb, Ellsworth then offered to leave the mine but only on condition that he be paid for the complete shift. Finally union vice-president Fox arrived and convinced Ellsworth to leave the mine in exchange for a meeting with management at 9:00 later that morning. Ellsworth then left the mine.

The meeting convened around 9:00 or 9:30 that morning at which Ellsworth was advised by Webb that his refusal to leave the mine after a direct order constituted gross insubordination and that he was being suspended with-intent-to-discharge. Webb testified that Ellsworth was discharged because of his gross insubordination in disobeying orders to leave the mine and because of Ellsworth's refusal to obey orders to shovel coal.

Kenneth Fox the union committeeman and local union vice-president testified that he was called by Webb to meet with Ellsworth in the early morning of August 4. He discussed the provisions of the collective bargaining agreement with Ellsworth and Ellsworth continued to maintain that he had the right to call a state or federal inspector to examine the alleged hazardous condition. Fox testified that he told Ellsworth that the agreement did not grant him that right once the safety committeeman determined that the challenged procedure was not unsafe. Ellsworth finally agreed and acknowledged to Fox that "I might have messed up and I better get out of the mine".

In order to establish a prima facie violation of Section 105(c)(1) of the Act Mr. Ellsworth must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom Consolidation Coal Co., v. Marshall 6663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). A miner's "work refusal" is protected under Section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of hazardous condition. Miller v. FMSHRC 687 F.2d 1984 (7th Cir. 1982); Robinette, supra. "Good faith belief" means an honest belief that a hazard exists. The purpose of the requirement is to remove

from protection under the Act, work refusals involving fraud or other forms of deception. In evaluating this requirement consideration may be given to evidence suggesting the likelihood of a pretext or ulterior motive for the employee's actions. See Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (1986). In the Hogan and Ventura case the Commission explained that the miner's belief in the hazard must also be reasonable and noted that irrational or completely unfounded work refusals are excluded from statutory protection. The miner's perception of a hazard must also be evaluated from the viewpoint of the refusing miner at the time of the refusal. Hogan and Ventura, supra.

In this case I find that Mr. Ellsworth's work refusal was neither made in good faith nor reasonable. In this regard the evidence shows that Ellsworth was classified as a rock duster but that he had been working on at least one shift before the shift at issue shoveling loose coal onto a conveyor. Ellsworth acknowledged that none of the miners, including himself, like to shovel coal and that he was concerned because he had seen other miners not classified as rock dusters performing what he considered to be his work. Indeed at the beginning of his work shift on August 4 one of Ellsworth's co-workers had warned Foreman Johnson that Ellsworth was "upset" at having to shovel coal rather than perform his regular job rock dusting. Ellsworth had also recently asked his union committeeman whether Freeman's practice of allowing others to perform his job of rock dusting while he had to shovel violated the collective bargaining agreement. It may reasonably be inferred from this evidence that Ellsworth indeed had an ulterior motive for his refusal shortly thereafter to shovel coal for alleged "safety" reasons.

I also note that Ellsworth had shoveled coal along the beltline for the entire previous shift and continued to do so during the shift at issue without any comment or complaints that the practice in itself was unsafe. The fact that Ellsworth continued in his work refusal after examination of conditions, at his request, by his union safety committeeman who found no hazard also supports the conclusion that Ellsworth was not acting in good faith.

In addition, evaluation of alternative rescue methods shows that closely equivalent, if not preferable methods existed to aid Ellsworth. The stop switch for the belt was located on the west side and the miners working on the west side were within 1 1/2 crosscuts, a distance acceptable to Ellsworth. Assuming one miner would cut the power to the belt the other miner could legally pass beneath the belt to perform a rescue. Arguably it would be safer to have a miner on the west side with access to the cut-off switch than to

have only two miners on the east side. The apparent refusal of Ellsworth to consider alternative safety measures is also indicative of a lack of good faith.

In any event even if Ellsworth's Complaint was made in good faith, section 105(c) of the Act does not enable miners to avoid difficult or distasteful tasks even when the avoidance is based on a good faith concern for safety alone. The work refusal must also be reasonable and must involve a condition or practice which creates a safety hazard beyond the hazards inherent in the mining industry or occupation itself. UMWA/Simmons v. Southern Ohio Coal Co., 4 FMSHRC 1584, 1589 (Judge Broderick, 1982). See also Bush v. Union Carbide Corp., 5 FMSHRC 993 (1983). Thus the mere act of proceeding underground and shoveling coal under the noted circumstances can result in a good faith concern for safety in many people. However for a person accepting employment as a miner, refusal to work because of such a concern may be unreasonable. In this case the evidence shows that it was customary practice for miners to shovel coal as Ellsworth was asked to do, to inspect the beltline alone and to travel alone adjacent to the beltline. Indeed the Complainant himself had previously traveled the beltline as a mine examiner alone without complaint. In addition Ellsworth's own union safety committeeman found the job not to be hazardous. Under all the circumstances I cannot find that Ellsworth's work refusal was reasonable. Accordingly Ellsworth's work refusal was not protected by the Act and his subsequent discharge based upon his refusal to work was therefore not in violation of the Act.

ORDER

Discrimination Proceeding Docket No. LAKE 89-33-D is DISMISSED.

Gary Melick  
Administrative Law Judge

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FOOTNOTES START HERE

1. Section 105(c)(1) of the Act provides as follows:

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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any

proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.