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BRUCE PRATT (MSHA) V. RIVER HURRICANE COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
September 29, 1983

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

On behalf of BRUCE EDWARD PRATT

v. Docket No. KENT 81-88-D

RIVER HURRICANE COAL COMPANY, INC.

DECISION

The Secretary of Labor filed a complaint of discrimination on behalf of Bruce Pratt with this independent Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(Supp. V 1981). An administrative law judge of the Commission held that River Hurricane Coal Company violated the Mine Act when it discharged Pratt. 3 FMSHRC 2366 (October 1981)(ALJ). We subsequently granted the operator's petition for discretionary review and heard oral argument. As modified by our decision, we affirm the judge's finding of a violation.

River Hurricane operates an underground coal mine at Kimper, Kentucky, at which Bruce Pratt was employed from August 1979 to August 1980. On August 19, 1980, Pratt was the third shift mechanic and electrician. Pratt was not a certified electrician while at River Hurricane, but he took classes from William Harris, the mine's training and safety director. At approximately 11:00 p.m. on August 19, 1980, Butch Thacker, a scoop operator, came to Pratt and informed him that the scoop was on fire. Power to operate the scoop is provided by 2 trays of lead-acid batteries enclosed in a case that measures approximately 4 feet by 6 feet. The batteries are covered by a lid, which is bolted down but has louvers at the top of the casing to allow air to circulate.

The fire occurred on the mine surface at the beginning of the third shift, when Thacker was in the process of substituting discharged scoop batteries for charged ones, and recharging the batteries used by the previous shift. 1/ He had connected the scoop to freshly charged batteries and had the fresh batteries on the scoop jacks. Thacker was in the process

1/ The scoop is equipped with hydraulic jacks that raise the batteries onto a two-pronged stand, where they can be charged. With jumper cables, the scoop can then be connected to charged batteries, which are loaded onto the scoop while the dead batteries are being recharged. Thacker testified that he and miner Larry Parks, who did not testify, had removed the dead batteries from the scoop, placing them on the stand for recharging.

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of connecting the discharged batteries to the charger when Parks informed him that the batteries connected to the scoop were on fire. Thacker threw the circuit breaker on the scoop and went to get Pratt, who was at the supply house.

Pratt approached the batteries, and when he came within approximately 35 feet of them, he saw flames coming from under the lid of the battery case. He then turned back to the supply house. Pratt also prevented from approaching the fire a miner who came out of the supply room with a fire extinguisher. Pratt testified that he feared the battery would explode and believed any attempt to extinguish the fire would be futile unless the lid to the battery case were unbolted and removed. Pratt had seen the results of the explosion of a car battery at his previous place of employment and feared this battery would explode and would throw shrapnel and acid over him. He thought an explosion would have killed him. Pratt said there was nothing available in the area to neutralize acid.

After the fire went out, Pratt took the lid off the battery casing and examined the batteries. He determined that the batteries themselves had not been on fire and concluded that hydrogen gas had been burning. Pratt stated that the "cat heads," or electrical connectors to the batteries, were not damaged but that the insulation on wires connected to the cat heads was damaged. Thacker exchanged the batteries involved in the fire for freshly charged batteries and informed the shift boss, E. C. Slone, of the fire. Thacker and Pratt went into the mine and completed the working shift.

Another employee of River Hurricane, Goody Deskins, testified that he helped James Slone, the chief electrician, repair the batteries. The receptacles were replaced, as well as part of the cable to them. Insulation had burned off one of the cables, but there was no evidence of a fire on top of the battery cells themselves. James Slone also testified that the fire was in the cables (or leads) and that the "leads and the female connector" were replaced.

When the shift was over the next morning, August 20, James Slone discussed the fire with Pratt. E.C. Slone (no relation to James Slone), the third shift foreman to whom Thacker reported the fire, was present during the conversation. This conversation is critical to the case and the persons present testified consistently on its content. James Slone asked Pratt why he had not attempted to put out the fire. Pratt explained that the batteries had just been charged and he was afraid they might explode. James Slone tried to tell Pratt how to put out such a fire, generally stating that he would have made some

attempt to cut the bolts on the lid and use a fire extinguisher or rock dust. James Slone asked Pratt what he would do if such a fire happened again, and Pratt indicated he would respond in the same manner. James Slone then stated that if Pratt would make no attempt to extinguish such fires, then he had no use for Pratt, and the conversation ended. Pratt was discharged.

An expert on batteries, E. R. Eddins, testified at the hearing as to the dangers of fires such as the fire on August 19, and the preferred methods of extinguishing such fires. Eddins testified that because there is nothing combustible in the cable or receptacle, very hot temperatures are required before cables will burn or melt. He stated the odds against such an

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occurrence are high. Eddins further testified that hydrogen, an explosive gas, is formed by charging and discharging batteries. Hydrogen explodes on the first spark that contacts it; generally it does not burn. After the initial explosion, if any, the hydrogen is gone and there can be no more explosions. If an explosion occurs, according to Eddins, the main danger is from acid splashing. He testified that with the concentrations of acid found in batteries some eye damage--not permanent--might result from acid splash, and splashed cotton clothing would "dissipate" when first washed. He further testified that, if the lid were on the batteries when hydrogen exploded, nothing would happen because the explosion would be contained under the lid. He characterized the hazards from lead acid batteries as "minimal." He also stated that explosions could be prevented by washing the batteries.

Eddins further stated that the witnesses appearing prior to him at the hearing, Pratt and James Slone, were "not totally up to date" on the problems in handling battery fires. He asserted that the best means of extinguishing such a fire is to throw an entire 50-pound bag of rock dust on the fire. He stated rock dust is better than a fire extinguisher because it smothers the fire, but an extinguisher could be used in order to get close enough to throw rock dust.

Dan Grace, an expert on fire suppression systems, also testified that a spark or fire will set off hydrogen gas immediately. He stated that the danger from such an explosion is greater where the gas has no place to go, as in a well-enclosed 12-24 volt automotive battery. He stated the trays in the scoop were intentionally not well-sealed, and allowed air movement.

Mine Safety and Health Administration Inspector Lycans testified that with cables arcing, and a battery short-circuiting, he "just can't see approaching it." He recommended letting the fire burn itself out, and explained that batteries are flame resistant and probably won't be ruined. Lycans further stated that he would object if he saw someone run up to a battery fire to put it out with an extinguisher, unless the person remained 10 to 15 feet away. He said he would consider opening the battery lid foolish, and serious enough for the issuance of an imminent danger withdrawal order. Lycans agreed with the expert witnesses that hydrogen explodes on the first spark and stated that if there are flames between the top of the battery and the underside of the battery tray lid, it is a "safe assumption" that there is not sufficient hydrogen for an explosion.

The record is replete with references to similar fires and

battery problems at River Hurricane. Deskins reported he had stopped "arcing" and a "frying sound" before a fire started on a similar battery two or "three weeks before the hearing. Thacker testified concerning two fires on scoops which extinguished themselves, and estimated that in the year before the hearing he had seen five fires, including the one in question and three in the face area. Vinton Adkins stated that in his 12 or 13 years as a miner, he had seen 30 or 40 fires like the one that occurred in August 1980 and had experience with fires "a couple or three times" after the one on August 19. Finally, Raleigh Hunt testified that he put out a fire 2 or 3 weeks before the fire on August 19, 1980.

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Adkins, E.C. Slone, and Thacker, as well as Pratt, testified they had not been trained, prior to August 19, 1980, on how to extinguish battery fires. Thacker testified he was later taught to use the scoop's fire suppression system, to cover the fire with rock dust or to use a fire extinguisher. The expert on the scoop's fire suppression system, Dan Grace, testified that the fire suppression system does not cover the battery trays.

The Commission judge found two instances of protected activity: Pratt's refusal to fight the fire on the evening of August 19 and his refusal the next morning to agree to attempt to extinguish future fires under similar circumstances. 3 FMSHRC at 2369 (Findings 21, 25). He found that Pratt had a reasonable, good faith fear as to his safety justifying his first refusal, and that his reasonable fears were not allayed by the operator's explanation to him as to how to proceed in the future. In particular, he found that Slone's explanation to Pratt the morning after the fire lacked factual and technical understanding of the hazards involved. Thus, he determined that River Hurricane discharged Pratt for activity protected by the Mine Act. Based on the parties' stipulations, the judge awarded Pratt \$3,348.00 in back pay. He also awarded interest and assessed a penalty against the operator for the violation of the Act. 3 FMSHRC at 2370. No issues are raised on review concerning the amount of the award to Pratt or the penalty. 2/

2/ We note that the judge issued a bench decision at the hearing on October 8, 1981, followed by his almost identical written decision on October 19, 1981. In his written decision, the judge stated, "Any deviations in verbiage [between the bench and written decisions] are due to the unavailability of the transcript and extemporaneous interpolations that are not reflected in retained notes." 3 FMSHRC at 2366 n.1. The judge's statement shows that he failed to comply with Commission Rule 65(a), which states in part:

If a decision is announced orally from the bench, it shall be reduced to writing after the filing of the transcript.

29 C.F.R. 2700.65(a)(emphasis added). Issuing decisions before a transcript is available can hinder the parties in attempting to file a satisfactory petition for discretionary review. Section 113(d)(2)(A)(iii) of the Mine Act requires that issues raised in petitions for review "shall be supported by detailed citations to the record when assignments of error are based on the record" This is not possible if the 30-day statutory period for filing a petition

for review expires before the transcript is available.

In this case, however, the transcript was available November 2, more than 2 weeks before the petition for review was due, and counsel for River Hurricane cited to it in his petition. Further, the operator did not object to the judge's premature issuance of his decision. Accordingly, although we disapprove the judge's issuance of a decision prior to the filing of the transcript, we find his error in this case to be harmless.

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We address preliminarily two of River Hurricane's arguments. First, River Hurricane argues that any standard used to assess the legitimacy of a miner's work refusal must be an objective one supported by ascertainable evidence. Previously we have discussed the nature of the proof necessary to support a miner's perception of a danger. In *Secretary on behalf of Robinette v. United Castle Coal Company*, 3 FMSHRC 803, 809-12 (April 1981), and *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1944 (November 1982), we "rejected a requirement that miners who have refused to work must objectively prove that hazards existed Rather, we adopted 'a simple requirement that the miner's honest perception be a reasonable one under the circumstances.'" *Haro* 4 FMSHRC at 1843-44, quoting *Robinette*, 3 FMSHRC at 812. For the reasons stated in those decisions, we reject the operator's arguments for a more stringent standard in this case.

Second, the operator asserts that the Commission should articulate a standard as to how severe a hazard must be in order to trigger a miner's right to refuse to work, citing *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211, 1226 (3d Cir. 1981) (Sloviter, J., dissenting). We have declined to articulate such a standard in the past and we decline again to do so here. We continue to believe that, insofar as this adjudicatory Commission is concerned, gradual development of the law in the cases contested before us is the appropriate vehicle for molding this important right. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2793-94 (October 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, *supra*; *Robinette*, at 809 n.12, 816. We now turn to the central issue in this case.

River Hurricane does not contend that the judge erred in finding that Pratt's refusal to fight the battery fire on August 19, 1980 was protected activity. The focus of this case, therefore, is not on the actual fire, but on the conversation the next morning, and the nature of Pratt's refusal during that conversation to fight fires in the future.

The right to refuse to work has as a predicate a miner's good faith, reasonable belief in a hazardous condition. *Pasula*, *supra*, *Robinette*, *supra*. A good faith belief "simply means honest belief that a hazard exists." *Robinette*, at 810. This requirement's purpose is to "remove from the Act's protection work refusals involving frauds or other forms of deception." *Id.* The judge found that Pratt refused "to agree to attempt to extinguish a fire in or around lead acid batteries under circumstances similar to those that occurred on August 19" and that the refusal "was made in a good faith, reasonable

belief that a serious risk of injury from an exploding battery existed." 3 FMSHRC at 2369 (Finding 25). The judge's description of Pratt's refusal is supported by substantial evidence. River Hurricane does not suggest that fraud or deception motivated Pratt. Rather, River Hurricane urges that the judge erred in finding Pratt's refusal reasonable both because the hazard was not serious enough to warrant a work refusal, and because Pratt continued to refuse to work after James Slone attempted to explain what should be done.

The perception of a hazard is viewed from the miner's perspective. Robinette, *supra*. Haro, 4 FMSHRC at 1943-44; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983). Pratt

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had reason to believe the battery could explode because he had seen the results of the explosion of a car battery. Pratt feared an explosion of the scoop batteries would throw shrapnel and acid over him and might kill him. The hazard Pratt feared was severe enough to warrant his work refusal. Thus, the judge's finding that Pratt reasonably believed in a serious risk of injury from an exploding battery is supported by substantial evidence. 3 FMSHRC at 2369 (Finding 25). Once a reasonable good faith fear in a hazard is expressed by a miner, the operator has an obligation to address the perceived danger. See Bush, 5 FMSHRC at 998.

In this case the operator's explanation or attempt to address Pratt's fears did not include specific information or support as to why fighting the battery fires may not have been as dangerous as Pratt believed. Rather, the record amply supports the judge's conclusion that James Slone's "explanation and instructions to Mr. Pratt ... concerning how to cope with fires on battery trays was lacking in technical and factual understanding of the hazards and failed to allay Mr. Pratt's reasonable fears." 3 FMSHRC at 2269 (Finding 24). 3/ Slone did not know that an explosion was unlikely or that if an explosion did occur it would probably be contained within the battery casing. This technical information was only developed at the hearing. Slone did not present such information to Pratt. Rather, he simply attempted to tell Pratt how he thought Pratt should proceed to put out such a fire. Further, Slone's testimony as to his instructions was sorely lacking in detail and not entirely consistent with the safe practices testified to by Eddins at the hearing. Thus, we conclude that the judge's finding that Slone did not provide a response sufficient to allay the reasonable fears expressed by Pratt is supported by substantial evidence. 4/

3/ We agree with the judge's characterization of Slone's "instructions". At the hearing Slone testified as follows:

I tried to--I asked him why he didn't make some attempt to extinguish the fire. I asked him didn't, you know--or I tried to explain to him what he could do, you know, that he could--we have got bolt cutters and we have got fire extinguishers, anything, you know, to make an attempt to extinguish a fire, instead of, you know, letting the company loss--or damage the company property and so forth. Several different things he could have done.

Mr. Pratt told me that he had no intention of fighting any fire in such a manner as that, or-- and I told him I would have no further use for anybody like that in his position.

Tr. 171.

4/ River Hurricane also asserts that in the crucial conversation of August 20, Pratt not only refused to fight such fires, but also refused "to undertake schooling and training with regard to combating and extinguishing such electrical fires." The operator asserts that even if Pratt engaged

(Footnote continued)

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In sum, we find that substantial evidence of record supports the judge's findings that Pratt had a good faith, reasonable belief that fighting the battery fire at issue was hazardous, that the operator failed to address adequately Pratt's reasonable fears of the perceived hazard, and that the operator violated section 105(c) of the Mine Act by discharging Pratt for his refusal to perform a task still reasonably believed by him to be dangerous. 5/

Finally, although we affirm the judge's finding as to the protected work refusal and illegal discharge, we find it necessary to strike two portions of the judge's decision as not supported by the record. First, in Finding 18 the judge stated that Slone's discharge of Pratt was "largely an overreaction to Mr. Pratt's provocative rejoinder and the long simmering personality conflict between the two men." We can find no record support for this characterization of the cause of the discharge and reject it as unsupported speculation. Second, in paragraph 4 of his enforcement order the judge ordered the operator to "cease and desist from any retaliation or other disciplinary action against miners who refuse to comply with the company policy that requires miners to assume the risk of injury in order to suppress electric fires that pose no hazard other than to equipment." 3 FMSHRC at 2370. Based on our review of the record, we conclude that the requisite support for this finding concerning an asserted company "policy" is lacking and that the cease and desist order is therefore unwarranted. Accordingly, we strike Finding 18 and paragraph 4 of the enforcement order in the judge's decision.

fn. 4/ continued

in protected activities, he was legally discharged for the unprotected activity of refusing to accept training. The operator's characterization of the pivotal conversation as including an offer and refusal of "schooling and training," in "combating" electrical fires is wide of the mark. Slone's vague instructions described above did not constitute such an offer and, therefore, the refusal alluded to did not occur.

5/ We emphasize that the fire that occurred was an equipment fire on the surface that posed no threat to the safety and health of other miners if allowed to run its course. We also emphasize that we believe the judge found, and the evidence supports, that Pratt's prospective refusal to fight fires was directed at similar fires in similar circumstances, i.e., surface fires posing no danger to other miners.

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As modified by this decision, the judge's decision is affirmed.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

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