

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 14, 2001

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

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

This discrimination proceeding, before the Commission a second time, involves a complaint by Bryce Dolan against F&E Erection Company (“F&E”) alleging that his refusal to continue to perform lead abatement work was protected by section 105(c) of the Mine Act, 30 U.S.C. § 815(c).<sup>1</sup> In his initial decision, Administrative Law Judge Jerold Feldman concluded that Dolan’s work refusal was protected, 20 FMSHRC 591 (June 1998) (ALJ), and that, accordingly, Dolan should be awarded back pay, attorney’s fees, and litigation expenses. 20 FMSHRC 847 (Aug. 1998) (ALJ).

On review, the Commission vacated the discrimination finding. 22 FMSHRC 171 (Feb. 2000) (“*Dolan I*”). The Commission affirmed the judge’s finding that Dolan had engaged in a protected work refusal, but held that the judge erred by failing to apply the Commission’s

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<sup>1</sup> Section 105(c) provides in pertinent part:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of 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 or the operator’s agent . . . of an alleged danger or safety or health violation . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

constructive discharge doctrine, and remanded the case to the judge for a determination whether Dolan faced intolerable conditions. *Id.* at 174-81. We declined to address the issue of whether the judge erred in concluding that Dolan had incurred a willful loss of earnings and thereby failed to mitigate his damages, which the Commission had directed for review *sua sponte*. *Id.* at 181 n.12.

In his decision on remand, the judge found that F&E constructively discharged Dolan. 22 FMSHRC 554, 560 (Apr. 2000) (ALJ). Consequently, the judge reinstated his remedial order. *Id.* at 560. We granted F&E's petition for discretionary review challenging the finding of discrimination. The Commission also issued two directions for review *sua sponte*, one "on the question whether the judge properly followed the Commission's remand instruction 'to determine whether Dolan faced intolerable conditions as of the date of his resignation[.]'" and the other on whether the judge correctly determined in the reinstated decision on relief that Dolan failed to mitigate his damages. For the reasons that follow, we vacate the finding of discrimination, the determination that Dolan failed to mitigate damages, and the award of relief, and remand for further proceedings.

## I.

### Factual and Procedural Background

The facts are set forth in the Commission's prior decision and are summarized here. Dolan was an iron worker employed by F&E, a construction contractor that performed work at an alumina smelter in Point Comfort, Texas operated by the Aluminum Company of America ("Alcoa"). 22 FMSHRC at 171. As part of the process of welding "stiffeners" on trusses that supported large storage tanks, Dolan and the five to six other members of his crew removed lead paint from the trusses by burning it off using a cutting torch. *Id.* at 172. From late 1994 until March 1996, Dolan's crew was not furnished with any personal protective equipment or clothing. *Id.*

Upon learning that Alcoa employees performing similar tasks were furnished with protective clothing and respirators due to the presence of lead, Dolan complained to F&E management about the lack of personal protective gear and about lead poisoning symptoms experienced by Dolan and others in the crew. *Id.* In response, F&E had air samples taken, and provided Tyvek suits to the crew. *Id.* In addition, F&E gave half-face respirators to all crew members except the employee using the cutting torch, who was given a full-face respirator. *Id.* at 172-73.

In late March 1996, Dolan complained that the entire crew should wear full-face respirators due to their close proximity to each other, and that the Tyvek suits were inadequate to prevent lead contamination because they were easily torn and sparks from the cutting torch readily burned holes in them. *Id.* at 173. In response, F&E provided a large quantity of Tyvek

suits so they could be replaced as needed. *Id.* In addition, F&E required the crew to vacuum their clothing with high efficiency vacuums before leaving the work area. *Id.*

On April 16, 1996, following continued complaints by Dolan about the inadequacy of the half-face respirators and Tyvek suits, F&E held a meeting at which its general foreman stated that F&E would continue to use half-face respirators and Tyvek suits, and that employees who wished to transfer to non-lead work could do so. *Id.* No employees accepted the offer of reassignment. *Id.* At the conclusion of the meeting, Dolan quit his job due to his belief that the personal protective gear was inadequate to prevent lead exposure to himself and his family. *Id.*

After quitting his job, Dolan looked for work and received unemployment compensation. *Id.* In June 1996, Dolan's physician pronounced him unable to work due to pain, tremors and other neurologic symptoms. *Id.* Dolan worked on August 11 and 12, 1996 as a construction worker, but had to quit because of pains in his legs, and did not look for work thereafter. *Id.*

After MSHA declined to prosecute the claim of discrimination he filed against F&E, Dolan filed a complaint on his own behalf with the Commission under section 105(c)(3) of the Act. *Id.* at 173-74. Analyzing the case as a work refusal, the judge concluded that Dolan's work refusal was protected and that, accordingly, Dolan should be awarded back pay and other relief. 20 FMSHRC at 606, 847. Characterizing Dolan's removal from the labor market as "willful," the judge denied back pay for the period following August 12, 1996. *Id.* at 849-50.

A. *Dolan I*

In our prior decision in this case, we concluded that the judge erred by failing to analyze the case as a constructive discharge. 22 FMSHRC at 175. We distinguished between a work refusal, which is a form of protected activity, and a constructive discharge, which is a form of adverse action. *Id.* We stressed that, under the *Pasula-Robinette* test,<sup>2</sup> a finding of adverse action is a prerequisite to a finding of discrimination under section 105(c), and that a work refusal, in and of itself, did not constitute adverse action. *Id.* We noted that the judge's failure to analyze the case as a constructive discharge stemmed from his erroneous view that, in order to make out a constructive discharge claim, Dolan had to show that the operator had created intolerable conditions with the specific goal of encouraging him to quit his employment. *Id.* at 175-76. We pointed out that, under *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988), and its progeny, the focus is on the maintenance of intolerable conditions, rather than on whether the operator has retaliated against a miner's protected activities by deliberately causing hazardous conditions in an explicit effort to encourage the miner's resignation. *Id.* We stated that, in cases of constructive

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<sup>2</sup> See *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 812 (Apr. 1981).

discharge, the Commission first examines whether the miner engaged in a protected work refusal, and then whether the conditions faced by the miner were intolerable. *Id.* at 176-77.

We upheld, on substantial evidence grounds, the judge's determinations that Dolan had a good faith, reasonable belief in the hazards of continuing to perform lead abatement work, and that F&E failed to address Dolan's concerns in a way that should have quelled his fears. *Id.* at 177-78. Consequently, we affirmed the judge's conclusion that Dolan's work refusal was protected. *Id.* at 180.

We warned, however, that the work refusal issue, based largely on subjective considerations, may not be collapsed into the constructive discharge question, which is governed by an objective inquiry into the existence of intolerable conditions. *Id.* at 179. In view of the judge's failure to analyze the case as a constructive discharge, we vacated his finding of discrimination and remanded "for the judge to determine whether Dolan faced intolerable conditions as of the date of his resignation." *Id.* at 180 (footnote omitted).<sup>3</sup> The Commission further instructed the judge to "consider anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead jobs," noting that, under Commission precedent, a short-term reassignment which the miner reasonably believes will be followed by a retransfer to duties that would expose him again to intolerable conditions is an inadequate response to such conditions. *Id.* at 180-81. Finally, in view of our remand on the discrimination question, we declined to decide the mitigation of damages issue. *Id.* at 181 n.12. Consequently, we vacated the judge's finding of discrimination and remanded the case "for further proceedings consistent with this opinion." *Id.* at 181.

#### B. The Judge's Remand Decision

On remand, the judge commented that his statement at the hearing indicating that, to prove he was constructively discharged, Dolan was required to establish that F&E purposely created intolerable conditions to induce him to resign, referred to a "retaliatory constructive discharge." 22 FMSHRC 554. The judge noted the Commission's instructions that he "determine, using an objective standard, whether the working conditions at the time of Dolan's . . . resignation constituted a constructive discharge." *Id.* at 556. The judge reviewed the standard for finding a protected work refusal, reiterated that Dolan's fears were reasonable and made in good faith, and stressed that "a miner refusing work under a good faith belief that a hazard exists is not required to prove that the working conditions were, in fact hazardous." *Id.* at 558. The judge specifically declined to decide whether intolerable conditions existed, stating:

[W]hether or not full and half-face respirators and Tyvek suits were ineffective goes beyond the scope of this proceeding. The deter-

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<sup>3</sup> The Commission also noted that the burning method chosen by F&E to remove paint, which was the subject of lengthy criticism by the judge, was not in and of itself an issue in the case, although it is relevant for evaluating the adequacy of F&E's protective measures. *Id.* at 179 n.9

mining factors in concluding Dolan was compelled to resign are the reasonableness of Dolan's continuing fears, and F&E's failure to adequately quell Dolan's fears, not the actual degree of hazard presented by F&E's lead abatement procedures.

*Id.* The judge concluded that “[i]t is F&E's failure to remedy Dolan's reasonable, good faith safety concerns that provides the ‘aggravating circumstances’ necessary to support a finding of constructive discharge.” *Id.* (citation omitted).<sup>4</sup>

On the question of the effect of F&E's offer to transfer employees to non-lead work, the judge held that an offer of reassignment to complaining employees that leaves other miners exposed to the subject hazard does not mitigate the operator's conduct. *Id.* at 559. Moreover, the judge credited the testimony of Dolan and crew member Kenneth Tam that “any reassignment would have been temporary in nature.” *Id.* Consequently, the judge found that Dolan had been constructively discharged. *Id.* at 560. Finally, the judge reinstated his Supplemental Decision on Relief. *Id.*

## II.

### Disposition of Issues

#### A. Constructive Discharge

F&E argues that it did more than was required by the OSHA Construction Industry Lead Standard, that the judge ignored evidence relating to the offer to transfer Dolan to a non-lead job, and that its response to Dolan's complaints was “more than adequate.” F&E Br. at 13-14. F&E contends that, notwithstanding the Commission's remand instructions, the judge again conflated the work refusal and constructive discharge issues, and failed to make the requisite finding of intolerable conditions necessary to support a determination that F&E constructively discharged Dolan. *Id.* at 14-15. F&E asserts that, despite this failure, remand to the judge on the constructive discharge question is unnecessary because the record will not support a finding of constructive discharge. *Id.* at 15-16. Consequently, F&E requests that the Commission reverse the judge's finding of discrimination. *Id.* at 16. In response, Dolan argues that the judge identified aggravating factors, such as F&E's failure to effectively address Dolan's concerns, that are intertwined with the intolerable conditions inquiry. D. Br. at 16. Dolan asserts that substantial evidence in the record as a whole supports the judge's conclusion that F&E constructively discharged Dolan. *Id.* at 12-16.

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<sup>4</sup> Notwithstanding the Commission's statement in *Dolan I* that the burning of lead paint was not an issue in the case, the judge on remand again discussed the question and concluded that “F&E must bear the burden of departing from generally accepted methods of lead abatement.” *Id.* at 557.

We conclude that the judge failed to carry out the analysis required by the Commission's remand instructions. Instead, he basically reiterated his initial decision, again substituting the work refusal analysis for an inquiry into whether Dolan faced intolerable conditions. We find the judge's failure to follow Commission precedent, and particularly the law of the case set forth in *Dolan I*, troubling.

As we held long ago, “[a]n administrative law judge must follow the rules and precedents of the Commission.” *Sec’y of Labor on behalf of Jones v. Oliver*, 1 FMSHRC 23, 24 (Mar. 1979). This is the Commission’s formulation of the well-settled rule that requires a lower tribunal to strictly adhere to the terms, express or implied, of an appellate court’s mandate, “taking into account the appellate court’s opinion.” *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985). The “law of the case” doctrine is a specific application of the mandate rule that requires a trial court to follow appellate determinations of fact and law in subsequent proceedings in the same case, unless new evidence or an intervening change in precedent dictates a different result. *Id.* at 1120. As the Supreme Court has stated,

When a case has been once decided by this court on appeal, and remanded to the [lower] court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The [lower] court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

*In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

We have noted that “[l]aw of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” *E. Ridge Lime Co.*, 21 FMSHRC 416, 421 (Apr. 1999) (quoting 18 Charles Alan Wright, et. al., *Federal Practice and Procedure*, § 4478 at 874 (2d ed. Supp. 1999)); *see also Lion Mining Co.*, 19 FMSHRC 1774, 1777 (Nov. 1997) (matter decided by Commission becomes unassailable law of the case and may not be revisited by judge). The doctrine is “a salutary rule of practice designed to bring an end to litigation.” *Piambino*, 757 F.2d at 1120. “It also ‘protects against the agitation of settled issues and assures obedience of lower courts to the decisions of appellate courts.’” *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984) (quoting *United States v. Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984)).

Our holding and instructions to the judge in *Dolan I* could not have been clearer. We determined that the judge erred by not analyzing Dolan’s claim as a constructive discharge. We restated Commission and court precedent to the effect that proof of a constructive discharge required a showing that Dolan had engaged in a protected work refusal *and* that he faced

“intolerable conditions.”<sup>5</sup> Upholding the judge’s conclusion that Dolan had engaged in a protected work refusal, we remanded the matter to the judge with specific instructions that he determine whether Dolan faced “intolerable conditions.” This the judge failed to do. Instead, he engaged in the identical analysis that led to our remand in *Dolan I*.<sup>6</sup>

Although we sympathize with F&E’s desire to avoid another remand in this case, we are not persuaded by its argument that, because the record compels the conclusion that the operator did not constructively discharge Dolan, i.e., that Dolan did not face intolerable conditions, remand is unnecessary. F&E relies on Dolan’s blood lead levels, its use of protective measures, the lack of harm to Dolan’s family, its compliance with the OSHA Construction Industry Lead Standard and the offer of transfer to non-lead work in support of its request that the Commission dismiss Dolan’s complaint. F&E Br. at 15-16. However, the efficacy of F&E’s protective measures was disputed at the hearing by Robert Miller, the industrial hygienist called as an expert witness on

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<sup>5</sup> We stated in *Dolan I* that, since *Simpson*, the Commission has generally engaged in a two-step inquiry in constructive discharge cases: first, “whether the miner has engaged in a protected work refusal, and then whether the conditions faced by the miners constituted intolerable conditions.” 22 FMSHRC at 176-77. See *Sec’y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 272-81 (Mar. 1999), *aff’d*, 230 F.3d 1358 (6th Cir. 2000) (table); *Sec’y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2210-13 (Nov. 1994).

<sup>6</sup> In support of his refusal to apply the Commission’s objective intolerable conditions analysis, the judge cited pre-*Simpson* cases, some of which are work refusal cases involving express terminations rather than constructive discharges. See 22 FMSHRC at 557. The judge also purported to rely on *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989) and two subsequent decisions of the Commission in that case, *Gilbert v. Sandy Fork Mining Co.*, 12 FMSHRC 177 (Feb. 1990) (“*Gilbert I*”) and 12 FMSHRC 1203 (June 1990) (“*Gilbert II*”). 22 FMSHRC at 557, 558. In *Gilbert v. FMSHRC*, however, the court vacated the Commission’s work refusal holding without discussing the constructive discharge issue. And *Gilbert* cites the court’s earlier decision in *Simpson* with approval. 866 F.2d at 1439. In its decision on remand, the Commission stated that, because the miner “did not act precipitately and . . . he entertained a good faith, reasonable belief in a hazard, his departure from the mine constituted a discriminatory discharge in violation of section 105(c)(1) of the Mine Act.” *Gilbert I*, 12 FMSHRC at 181-82. However, the Commission was only deciding those issues remanded by the court (12 FMSHRC at 178) which did not include the constructive discharge question. 866 F.2d at 1441, 1443. Moreover, on petition for reconsideration filed by the operator, the Commission subsequently vacated its holding on the merits in *Gilbert I* (including the language quoted by the judge) and remanded the matter to the judge to “make the necessary factual findings’ ordered by the Court’s remand.” *Gilbert II*, 12 FMSHRC at 1205. Thus, the *Gilbert* decisions in no way altered the *Simpson* holding that to make out a constructive discharge, intolerable conditions must be proven, nor have they been interpreted to affect the intolerable conditions inquiry by subsequent Commission decisions. See *Dolan I*, 22 FMSHRC at 175-77 (citing *Gilbert v. FMSHRC*); *Bowling*, 21 FMSHRC at 272-76 (same); *Nantz*, 16 FMSHRC at 2211-13 (same) .

Dolan's behalf. 22 FMSHRC at 178-79. Miller's testimony was credited by the judge as to the half-face respirators, and undisputed concerning the Tyvek suits. *Id.* Similarly, the Commission held that the record contains evidence on both sides of the question whether F&E's transfer offer constituted an offer to a short-term reassignment, which does not mitigate intolerable conditions under Commission precedent.<sup>7</sup> *Id.* at 180-81. In addition, in light of evidence detailing Dolan's own exposure and that of his crew, lack of harm to Dolan's family would not preclude a finding of constructive discharge. Further, because the OSHA standard does not apply in this workplace, compliance with its terms concerning blood lead levels and medical removal is not necessarily dispositive here.

This is not the first instance that a Commission Administrative Law Judge has ignored remand instructions, nor is it the first time Judge Feldman has done so. In *RAG Cumberland Resources Corp.*, we noted: "Although the Commission instructed the judge on remand to consider all the record evidence regarding inspections in the haulage including [the operator's] log, and determine whether the Secretary met her burden of proving the absence of an intervening clean inspection, the judge failed to do so. . . . The judge's analysis in his remand decision is almost identical to his reasoning in the initial decision, which the Commission did not accept." 22 FMSHRC 1066, 1071 (Sept. 2000), *pet. for review docketed*, No. 00-1438 (D.C. Cir. October 6, 2000); *see also E. Ridge Lime*, 21 FMSHRC at 421-23 (noting that judge failed to carry out factfinding and analysis required by court remand). In light of the clarity of our instructions in *Dolan I*, and the judge's failure to follow them, we are inclined to remand this matter to another judge. Remand to a different judge, however, is a rarely-utilized measure, because it is inefficient administratively and results in the parties suffering an unfair delay in the final adjudication of the case. We have not recently taken the time to stress the overwhelming importance we attach to judges faithfully carrying out the remand instructions we provide in our decisions. We take the opportunity to do so now, and trust that remand to a different judge will not become necessary in this or subsequent cases.

Accordingly, we vacate the judge's determination that F&E constructively discharged Dolan in violation of section 105(c), and remand this proceeding for re-analysis of the constructive discharge issue and a determination whether Dolan faced intolerable conditions. In analyzing this question, we insist the judge reconsider his finding on the effect of F&E's reassignment offer. Although the judge did address the effect of the offer of transfer to a non-lead job on conditions faced by Dolan, contrary to the remand instructions, he examined this issue in isolation, without analyzing, or entering findings on, the overall conditions faced by Dolan at the time he quit his employment. *See* 22 FMSHRC at 180 ("[W]e remand for the judge to determine whether Dolan faced intolerable conditions as of the date of his resignation. *In so doing*, the judge must consider anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead jobs.") (emphasis supplied).

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<sup>7</sup> *See Nantz*, 16 FMSHRC at 2214.

B. Mitigation of Damages/Back Pay

In his remand decision, the judge reinstated his remedial order in which he excluded from back pay the period during which Dolan claimed to be disabled from work, based on the holding that Dolan willfully removed himself from the labor market. 20 FMSHRC at 849-50. If on remand this second time the judge concludes that F&E unlawfully discriminated against Dolan, he must again confront this issue. As In *Dolan I*, this issue was directed for review *sua sponte*. Although in *Dolan I* we determined that “it [was] not appropriate to decide the mitigation of damages issue,” 22 FMSHRC at 181 n.12, we will do so now to avoid further remands in this case.

Dolan contends that the record does not support the judge’s conclusion that Dolan willfully failed to mitigate damages. D. Br. at 22. Dolan stresses that he did all he could do to obtain work, and argues that he should not be penalized for his disabling physical condition that made it impossible for him to work. *Id.* at 21, 22. F&E responds that Dolan should have “lowered his sights” and looked for non-construction work following his inability to perform construction work on August 12, 1996. F&E Resp. Br. at 8-9. His failure to do so, according to F&E, constitutes a failure to mitigate damages. *Id.* at 9. F&E also contends that Dolan would not have worked for it after August 12 due to his claimed physical condition, and that the Commission should apply the general rule that back pay is unavailable for periods when the employee is not seeking work. *Id.* at 9-10.

The question of whether and under what circumstances an employee who is disabled from work has failed to mitigate damages is one of first impression under the Mine Act. It is well settled, however, under the National Labor Relations Act<sup>8</sup> that employees are not entitled to back pay for periods of disability rendering the employee unavailable for work, *except* where disabilities are closely related to interim employment, or arise from the discriminatory conduct, and are not a usual incident of the hazards of living generally. *See NLRB v. Louton, Inc.*, 822 F.2d 412, 415 (3d Cir. 1987) (holding back pay not awarded during period in which employee unavailable for work due to disability); *Am. Mfg. Co.*, 167 NLRB 520, 522 (1967) (recognizing exception where interim disability closely related to interim employment or arises from unlawful conduct); *Becton-Dickinson Co.*, 189 NLRB 787, 789 (1971) (same); *see also Wells v. N. Carolina Bd. of Alcoholic Control*, 714 F.2d 340, 342 (4th Cir. 1983) (approving back pay award under Title VII of 1964 Civil Rights Act for period of disability caused by unlawful discrimination and interim employment); *Mason v. Ass’n for Ind. Growth*, 817 F. Supp. 550, 554-55 (E.D. Pa. 1993) (same); *Whately v. Skaggs Cos.*, 508 F. Supp. 302, 304 n.1 (D. Colo. 1981) (adopting same rule under Age Discrimination in Employment Act), *aff’d in relevant part*, 707 F.2d 1129, 1138 & n.8 (10th Cir.), *cert. denied*, 464 U.S. 938 (1983); *Grundman v. Trans World Airlines, Inc.*, 54 FEP

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<sup>8</sup> The Commission has relied upon precedent under the National Labor Relations Act in resolving mitigation of damages questions. *See, e.g., Metric Constructors, Inc.*, 6 FMSHRC 226, 231-33 (Feb. 1984) (citing NLRA precedent on operator’s burden of proof and requirement that discriminatee make reasonable efforts to find other employment).

Cases 224, 1990 WL 165756 (S.D.N.Y. 1990) (same); *Martin v. Dep't of the Air Force*, 184 F.3d 1366 (Fed. Cir. 1999) (adopting same rule under Back Pay Act).

We agree with the National Labor Relations Board that “the practice of disallowing back pay without inquiry as to the nature of the physical disability, [and] the cause thereof . . . may be convenient but it is not always equitable.” *Am. Mfg. Co.*, 167 NLRB at 522. Therefore, we adopt the exception discussed above to ensure that miners disabled due to the conditions which gave rise to their employers’ discriminatory conduct can still receive redress. Thus, if Dolan’s exposure to lead caused his disability, he is entitled to back pay for the period of time at issue.

According to F&E, on June 11, 1999, the Texas Workers’ Compensation Commission determined that Dolan was disabled beginning August 14, 1996. F&E Resp. Br. at 10 n.9. However, this is not a matter of record in this case, and the judge did not enter any findings concerning the nature or cause of Dolan’s disability. On the contrary, in his initial decision on remedy, the judge held that whether Dolan was disabled, and whether Dolan’s health condition was caused by F&E, were questions beyond the scope of the discrimination proceeding. 20 FMSHRC at 849. Should he find unlawful discrimination, he must revisit his remedial order and reopen the record<sup>9</sup> for the purposes of 1) adducing evidence that would permit the entry of findings on the existence, nature and cause of Dolan’s disability, and 2) determining whether the period of any such disability should be excluded from back pay based on the principles we announce today.

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<sup>9</sup> When the Commission announces a new rule of law, interpretation, or elements of proof, it permits the taking of additional evidence on remand. *See, e.g., Pyramid Mining Inc.*, 16 FMSHRC 2037, 2040-41 (Oct. 1994).

III.

Conclusion

For the foregoing reasons, we vacate the judge's finding of discrimination, his determination that Dolan failed to mitigate damages, and the award of relief, and remand the case for further proceedings consistent with this opinion.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

Chairman Jordan, dissenting:

I would affirm the judge's finding that Dolan was constructively discharged. As I stated in *Dolan I*, 22 FMSHRC 171 (Feb. 2000), a judge who determines that a miner's work refusal has protected status under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), has necessarily concluded that the miner does not have to tolerate the conditions under which the employer is asking him or her to work. The conditions prompting the work refusal have therefore been deemed intolerable. *Id.* at 183. Consequently, because the judge in this case initially found that Dolan's work refusal was protected, it has never been necessary to remand this matter to him to determine whether intolerable conditions caused Dolan to quit.

My colleagues contend that, according to Commission precedent, a finding that a miner was constructively discharged and a finding that a miner engaged in a protective work refusal involve two distinct legal standards. Slip op. at 3, 6. They maintain that Commission law applies a subjective standard to determine whether a work refusal is protected, but uses an objective standard to determine if intolerable conditions prompted a miner's decision to quit. Slip op. at 4. I do not agree that such a neat dichotomy exists. Indeed, I view this case as one in which the determination that Dolan's work refusal was protected and the determination that Dolan was constructively discharged are simply two sides of the same analytical coin. A miner is considered to be engaged in a protected work refusal when that miner has a "good faith, *reasonable* belief in a hazardous condition." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 812 (Apr. 1981) (emphasis added). A refusal to work may lose its protected status if an operator takes reasonable steps to dissipate the miner's fears or ensure the safety of the challenged task or condition. *See Gilbert v. FMSHRC*, 866 F.2d 1433, 1440-41 (D.C. Cir. 1989); *Sec'y of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 998-99 (June 1983).

Notwithstanding my colleagues' suggestion to the contrary, a work refusal based on a miner's idiosyncratic, subjective belief in a hazard would not be deemed reasonable and consequently would not enjoy protected status under the Mine Act. Consider, for example, a miner who holds firmly to the belief that the number 13 is unlucky. If that miner refused to work in the section of the mine designated 0013 because of that belief, I daresay we would not consider that miner to be engaged in a protected work refusal. This is so even though there might be no doubt that the miner honestly believed he or she would be risking injury if compelled to work in section 0013. The miner's subjective fear alone would be insufficient to bring the miner within the protective ambit of section 105(c) because his or her fear would not be considered reasonable.

To determine whether a miner's belief in a hazard is reasonable, the Commission must necessarily consider more than the miner's subjective belief. We must consider the conditions confronting the miner and ask whether a reasonable miner might fear for his or her health or safety under those circumstances. This is not to say that a miner who refuses to work must be

prepared to demonstrate that an actual hazard existed in order to have the work refusal deemed protected. *See Liggett Indus. v. FMSHRC*, 923 F.2d 150 (10th Cir. 1991); *Gilbert*, 866 F.2d at 1439. The miner need only prove that he or she had a reasonable and good faith belief that such a hazard did exist. (The lack of a hazard, however could bear on the reasonableness of an employee's belief that his health or safety is in danger. *Liggett*, 923 F.2d at 152).

By the same token, I am unclear what to make of my colleagues' assertion that Commission law imposes a different, objective standard to determine whether a miner has been constructively discharged. I trust they do not mean to imply that a miner who quits because of a reasonable good faith fear for his or her safety will not prevail under section 105(c) unless that miner can demonstrate that an actual hazard did in fact exist.

Although my colleagues insist that an objective standard must be applied to constructive discharge cases, I can envision awarding relief under section 105(c) to a miner who quits work because of a purely subjective fear. Take the same superstitious miner I described earlier. What if the evidence revealed that this miner was assigned to section 0013 because management was confident this particular miner would resign under those circumstances and it wished to retaliate against the miner for reporting safety violations to MSHA? Would we apply an objective standard to the condition confronting the miner at the time he or she quit? On the one hand, it is difficult to see how the number of the mining section to which one is assigned could be considered an intolerable condition under which to work. Despite the subjective nature of the miner's fear, however, it is obvious that the protective purpose of section 105(c) would be completely thwarted if this hypothetical operator were to escape liability.

My colleagues' insistence on separate standards is all the more puzzling when one considers that, whether we say a miner was engaged in a protected work refusal or whether we say a miner has been constructively discharged, the economic implications for the operator are the same. As long as a work refusal retains its protected status, the operator cannot cause the miner to suffer lost wages. This is the same obligation that will be imposed upon an operator who is deemed to have constructively discharged a miner. Therefore, whether an employee engages in a continuing protected work refusal or quits under conditions deemed intolerable, the economic bottom line for the operator is the same: liability for lost wages.

In this case, the judge concluded that Dolan had a good faith reasonable belief that a hazardous condition existed – namely, overexposure to lead. 20 FMSHRC 591, 599, 605 (June 1998). The judge noted that Dolan did not act precipitately. 22 FMSHRC 554, 558 (Apr. 2000). Dolan initially raised safety related complaints in March 1996 and he did not resign until April 16, 1996, when it became clear that F&E would not take any further steps to alleviate Dolan's continuing concern that he was at risk for lead exposure. 20 FMSHRC at 596-98. The judge considered the steps that F&E took in response to Dolan's complaints and found they failed to address Dolan's concerns in a way that should have alleviated his fears. *Id.* at 600-604. Thus, the judge concluded that Dolan's resignation on April 16, 1996 constituted a constructive discharge.

In their earlier opinion, my colleagues concluded that substantial evidence supported the judge's finding that Dolan's refusal to perform lead abatement work was protected, but remanded the case because he had not analyzed it as a constructive discharge. 22 FMSHRC at 180. In the current proceeding, my colleagues remand this matter once again because the judge, although deeming Dolan's quit to be a constructive discharge, "engaged in the identical analysis that led to our remand in *Dolan I.*" Slip op. at 7. My colleagues attribute the judge's errors to an obstinate refusal to follow the law of the case. Slip op. at 5-7. I do not share that conviction. While they understandably consider their prior opinion to have been drafted with sufficient clarity so as to preclude inadvertent error on remand, I am unable to rule out that possibility.

I also disagree with my colleagues' determination that it is necessary to remand this matter so the judge can determine whether the operator's offer to transfer Dolan to a non-lead removal job defeated Dolan's claim that he faced intolerable conditions. Slip op. at 8. My colleagues have reiterated the view expressed in their earlier opinion (with which I agreed) that "a short-term reassignment which the miner reasonably believes will be followed by a retransfer to duties that would expose him again to intolerable conditions is an inadequate response to such conditions." Slip op. at 4. In his first opinion, the judge found that the transfer would be temporary, and he made that finding again on remand. 22 FMSHRC at 559. In light of this determination, I fail to understand why my colleagues nevertheless "insist the judge reconsider his finding on the effect of F&E's reassignment offer." Slip op. at 8.

Consequently, I would affirm the judge's holding that Dolan was constructively discharged. I would remand the case only to reopen the record for the judge to receive evidence and make a finding on the issue of mitigation of damages, according to the principles set forth in my earlier opinion and subsequently adopted by my colleagues.

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Mary Lu Jordan, Chairman

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