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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
JOHN VAN ALLEN,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. SE 91-543-DM

Noralyn Mine & Mill

v.

IMC FERTILIZER, INC.,
RESPONDENT

DECISION

Appearances: Glenn M. Embree, Esq., Office of the Solicitor,
U.S. Department of Labor, Atlanta, Georgia for the
Complainant;
Daintry E. Cleary, Esq., Holland & Knight, Tampa,
Florida, for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of John Van Allen, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that IMC Fertilizer, Inc., (IMC) suspended Mr. Van Allen on February 9, 1990, in violation of section 105(c)(1) of the Act.1 More particularly

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it is alleged that Van Allen, employed by IMC as an electrician, refused on February 9, 1990, to install a NEMA Type 1 electrical junction box in an unsafe location.² Van Allen maintains that as a result of such refusal he was unlawfully suspended from work for 35 hours. He seeks expungement from his employment records of reference to this suspension and back pay and interest for lost wages. The Secretary also seeks a civil penalty of \$1,500 for the alleged violation.

Van Allen has had several years of vocational training including a 2-year program at a technical school in electrical subjects. He is a licensed electrician in Polk County, Florida, and in the City of Lakeland, and has been performing electrical work for about 9 years. As an electrician for IMC, he was sent on February 9, 1990, to install a junction box on a high voltage motor in the Noralyn Mill Flotation Plant. A junction box is an enclosure that provides mechanical protection for electrical connections. In this case it was used to enclose a capacitor and wire leads exiting the motor and connecting with the conduit and wiring.

In the flotation plant impurities are separated from the phosphate product. It is a five to six story structure with open and partially steel grated floors. The mine product enters the plant at an upper level and sand and other impurities settle to the bottom of the flotation tanks while the phosphate ore floats to the top. When the plant is in operation large volumes of water are used and water pours through the gratings to the area below -- including the area in which the junction box was to be installed. The area is also periodically cleaned with water from high pressure hoses. There seems to be general agreement that the area is therefore usually wet.

On February 9, 1990, the plant was on a maintenance day and not in operation. At the assigned location the motor was also locked out by Van Allen so that it could not have been accidentally energized. Van Allen then removed the existing NEMA Type 4 junction box. He then noticed that the replacement box he was provided was not what he deemed to be of the correct NEMA classification. It was a NEMA Type 1 box having openings in its

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corners and was not waterproof. According to Van Allen if water and feed material were to accumulate around the open lugs and if a ground should become broken, an employee touching the motor or box could be electrocuted.

Van Allen testified that he had been trained in the NEMA classifications and observed that a NEMA Type 1 box is an indoor box which should not be exposed to rain, dust, or water conditions. A NEMA Type 4 box on the other hand is designed for outdoor use and for wet conditions. Concerned about the use of a NEMA Type 1 box under the circumstances, Van Allen contacted electrical foreman Rainer Theiss, and advised him that the NEMA Type 1 box was not suitable for the noted location and that he needed a NEMA Type 12 box.³ Theiss did not then order Van Allen to install the Type 1 box but told him only to continue to prepare the box for installation.

Subsequently, when Van Allen went to the electrical shop for parts, he met with Steve Davis, the IMC maintenance superintendent in Davis' nearby office. After explaining the problem to Davis, Davis agreed that Van Allen could use anything to make the NEMA Type 1 box safe in Van Allen's opinion, apparently suggesting the use of tape and a sealant. Van Allen admits that he could thereby have made the box waterproof but agreed to do this only on a temporary basis until such time as a NEMA Type 4 or Type 12 box could be obtained and installed. According to Van Allen, he would thereby "give them the opportunity to get their plant back into operation and a correct box [could] be later installed." Van Allen refused to do this however, when Davis purportedly stated that it would have to be on a permanent basis.

Curtis Wilson, an electrician's helper, was assisting Van Allen when the issue arose. After Van Allen refused to install the NEMA Type 1 box, he told Wilson to locate electrical foreman Theiss. According to Wilson when Theiss later arrived, Theiss told Van Allen that it was the correct box and ordered him to install it. Van Allen refused and asked for a "safety man,"

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purportedly a procedure under the union contract. Van Allen then agreed to "prep" the box but still refused to install it.

Wayne Scott, another IMC electrician, accompanied Theiss to this meeting with Van Allen. He overheard Van Allen state that he would perform any other work but would not install the NEMA Type 1 box. Jim Mathis, another IMC electrician, also heard the conversation between Van Allen and Theiss. Mathis added that Van Allen also stated during the conversation that if Theiss insisted that he install the box, he wanted a "safety man." Theiss then told Mathis to leave the area and he did.

On February 22, 1990, Harry Verdier, an inspector for the Federal Mine Safety and Health Administration (MSHA), examined the NEMA Type 1 junction box that had later been installed at the location at issue and observed that it had been caulked in an apparent attempt to waterproof it. He cited the box under the mandatory standard at 30 C.F.R. 56.12030 because he thought in a curious shift in the burden of proof, that it could not be proven to be waterproof.⁴ Even though he apparently believed the box not to have been waterproof he nevertheless did not believe that the cited box created either an "imminent danger" or a "significant and substantial" hazard but rather concluded that an injury or illness was "unlikely" (See Exhibit C-5A).⁵

IMC Maintenance Superintendent Steve Davis is a graduate electrical engineer and has significant experience in electrical installations and maintenance. According to Davis, a junction box is merely an enclosure for the leads from the motor and to the conduit from the electric starter. It provides mechanical protection for the wires. According to Davis, there was no need for a waterproof NEMA Type 4 or 12 box at the cited location and he noted that in any event whatever type box was used it would be mounted onto the motor with only a sealant for waterproofing. Thus it is implied that if a sealant was adequate for mounting, it should also be adequate to waterproof the box itself-- as was done here. Davis also opined that the cited box was satisfactory in any event since it was caulked, sealed and watertight. He also noted that if water should accumulate in a junction box nothing would happen in any event because the connections inside were protected with waterproof tape.

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Davis testified that around 11:00 a.m., on February 9, Theiss called advising him that Van Allen was refusing to install a junction box and had become belligerent insisting that he would not install "this piece of shit." Davis testified that before making a decision on the issue, he wanted to talk to Van Allen and determine for himself what the problem was. Subsequently Van Allen came into his office and restated his refusal to install the NEMA Type 1 box. Davis testified that he told Van Allen that with their taping standards, it would be weather proof and told him to therefore go ahead and install the box. Van Allen continued in his refusal and asked for the "third step of the grievance procedure." Davis then conferred with electrical superintendent Jim Adair, also an electrical engineer. Adair suggested that Van Allen be permitted to make the box watertight to his own satisfaction.

Davis then returned to his office and presented Van Allen the option that "if you feel like it needs to be a watertight box, I'll buy you the materials or whatever you want to make this a watertight box." According to Davis, Van Allen responded that "he did not know if that was good enough" and continued his refusal to install the box. According to Davis, both Jim Adair and Bob Myers, another electrical engineer he consulted, found that using the NEMA Type 1 box would be safe under the circumstances. Davis testified that after obtaining these additional opinions, he again met with Van Allen and told him that he was being suspended for his refusal to install the junction box.

Rainer Theiss, IMC electrical foreman testified that February 9, was a scheduled repair day and that the electrical power was accordingly disengaged. According to Theiss, Van Allen first contacted him by telephone advising him in reference to the Type 1 box that "I don't mount that piece of shit." When they later met, Van Allen told him that it was not the right box and that he would not mount it. Theiss acknowledged that Van Allen expressed that it was a safety concern and admitted that he did not know the difference between the NEMA Type 1 and NEMA Type 4 classifications.

Marvin Wolgast the IMC industrial relations manager testified that Van Allen was given six points for discipline as a result of his refusal to install the junction box and, as a result of a three-point prior disciplinary record, was subject to suspension.

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his suspension 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

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grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated by the protected activity. Failing that, the operator may defend affirmatively against the prima facie case by proving that it was also motivated by unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra, (the so-called Pasula-Robinette test). See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983).

Within this general framework, it is also well-established that in certain circumstances a miner's refusal to work constitutes protected activity. Pasula, supra, Robinette, supra; Miller v. FMSHRC, 687 F.2d 1994 (7th Cir. 1982); Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988). The genesis for the recognition of certain work refusals as protected activity is the Senate Report on the 1977 Act, which endorsed a miner's right to refuse "to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 91, 95th Cong., 1st Sess. 35 (1977).

In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." Robinette, 3 FMSHRC 812; Gilbert v. FMSHRC, 866 F.2d at 1439. The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. Robinette, 3 FMSHRC at 807-12; Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993. 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 Commission has rejected a requirement that miners who refuse to work must objectively prove that hazards existed. The miner must simply show that his perception was a reasonable one under the circumstances. Haro v. Magma Copper co., 4 FMSHRC 1935 (November 1982); Robinette, supra. In determining whether the miner's belief was reasonable under the circumstances, the judge is to look to the miner's account of the conditions precipitating the work refusal, and to the operator's response in order to evaluate the relevant testimony as to "detail, inherent logic and overall credibility." Robinette, 3 FMSHRC at 812. The perception of a hazard must be viewed from the miner's perspective at the time of the work refusal. Secretary on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529 (September 1983); Haro, supra. The Commission has eschewed the setting of a bright line threshold of severity in determining "how severe a hazard must be in order to trigger a miner's right to refuse work" Pratt v. River Hurricane Coal Co. at 1533, instead it has preferred to resolve that issue on a

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case-by-case basis. *Id.*, See also, *Price v. Monterey Coal Co.*, 12 FMSHRC 1505 (1990).

At issue herein is a work refusal based on an asserted safety hazard to miners other than the complainant himself. In *Secretary on behalf of Philip Cameron v. Consolidation Coal Co.*, 7 FMSHRC 319 (March 1985), *aff'd sub nom. Consolidation Coal v. FMSHRC*, 795 F.2d 364 (4th Cir. 1986), the Commission held that "in certain limited circumstances," the protection of section 105(c) of the Mine Act does attach to a work refusal premised on hazards to others:

Therefore, we hold that a miner who refuses to perform an assigned task because he believes that to do so will endanger another miner is protected under section 105(c) of the Mine Act, if, under all the circumstances, his belief concerning the danger posed to the other miner is reasonable and held in good faith. *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1418 (June 1984), citing *Secretary on behalf of Robinette v. United Castle Co.*, 3 FMSHRC at 807-12. We emphasize, however, the need for a direct nexus between performance of the refusing miner's work assignment and the feared resulting miner's work assignment and the feared resulting injury to another miner. In other words, a miner has the right to refuse to perform his work if such refusal is necessary to prevent his personal participation in the creation of a danger to others. Of course, as with other work refusals, it is necessary that the miner, if possible, "communicate, or at least attempt to communicate, to some representative of the operator his belief in the . . . hazard at issue," *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1397-98 (June 1984) (emphasis added), quoting *Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, *supra*, 4 FMSHRC at 133, and that the refusal not be based on "a difference of opinion -- not pertaining to safety considerations -- over the proper way to perform the task at hand." *Sammons*, 6 FMSHRC at 1398.

I find, under the circumstances of this case, that while Van Allen could otherwise have properly asserted a work refusal premised on a hazard to others, his work refusal was not a reasonable one nor one made in good faith and therefore was not protected by section 105(c) of the Act. Consequently, IMC did not violate the Act by suspending Van Allen under the terms of its disciplinary policy. I reach this conclusion initially on the basis that the "hazard" presented to Van Allen was not sufficiently serious or imminent to support the credibility of a reasonable and good faith belief in a hazard sufficient to warrant his continued refusal to comply with orders to install the NEMA Type 1 junction box.

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While the Respondent's experts denied there would have been any hazard the Complainant himself described what appears to be an unlikely scenario necessary to create a hazard in the following colloquy:

THE COURT: And what would happen if water got into the box during operation of the plant?

THE WITNESS: A mixture of water and feed on a delta system, it could build up to one side of the capacitor that was mounted -- would be mounted inside of it.

THE COURT: You say feed, f-e-e-d?

THE WITNESS: Yes, sir, phosphate feed.

THE COURT: That's the material that you say is dripping down from the upper parts of the structure?

THE WITNESS: Correct.

THE COURT: All right. And it's mixed with water?

THE WITNESS: Correct.

THE COURT: All right. And that could do what?

THE WITNESS: It could cause it to wash into the box, build up to one side, and hit the open lugs of the capacitor.

THE COURT: Open lugs, did you say?

THE WITNESS: Yes, sir.

THE COURT: What would happen then?

THE WITNESS: At that point as long as the frame ground was good in the motor, really nothing, as long as it only had one leg.

If somebody came and broke that frame ground for any reason, then he would become the potential. He would get between the 2300 and go to ground. And it could -- I would say would --

Q. (By Mr. Embree). It would do what?

A. It would do a lot of damage to him, if not kill him. It would probably become fatal to him. (Tr. 52-53).

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The necessary combination of events to create a hazard is even more remote when considering the credible testimony of IMC expert, electrical engineer Davis. Davis testified that any water dripping into the Type 1 box would drain right through because of its holes and that the leads inside would customarily be sealed with waterproof tape. Indeed even the MSHA inspector called as a witness by the Complainant, who cited the subsequently installed Type 1 box as not being waterproof, concluded that the condition was not "significant and substantial" and that injuries were "unlikely."

However, even assuming, arguendo, that Van Allen initially entertained a good faith and reasonable belief in a potential hazard, upon communicating such information to IMC officials the perceived danger was addressed by IMC. According to Van Allen himself, he could have made the NEMA Type 1 box waterproof and presumably safe to his satisfaction in order to enable the plant to resume operations. Indeed Maintenance Superintendent Davis offered Van Allen the opportunity to get whatever supplies he deemed necessary to make the box safe. Van Allen's refusal to do this shows clearly that his continued work refusal then was neither reasonable nor made in good faith. The Commission has made clear that a work refusal cannot be based on a mere difference of opinion not pertaining to safety considerations, over the proper way to perform the task at hand i.e. providing a water proof junction box. Sammons, 6 FMSHRC at 1398.

Under the circumstances, it is clear that Van Allen did not then entertain a good faith or reasonable belief in a hazard to warrant his continued work refusal. Accordingly, the Complaint herein must be dismissed.

ORDER

The Complaint of Discrimination 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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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."

2. NEMA (National Electrical Manufacturers Association) classifications explained in Exhibit C-2 provide a uniform industrywide system of classification for electrical enclosures.

3. It is not disputed that a NEMA Type 12 box, just as a NEMA Type 4 box, would provide water protection under the NEMA classifications. See Exhibit C-2. None of the classifications would appear on their face to be applicable to the enclosure at issue herein since it was for a 2300 volt motor and the cited standards are limited to enclosures for electrical equipment of "1000 volts maximum." It is also noted that compliance with NEMA standards is not required at this plant, that the Federal Mine Safety and Health Administration (MSHA) does not enforce the NEMA standards and nothing in the cited standards prohibits the installer of a Type 1 enclosure from providing his own sealant and waterproofing.

4. 30 C.F.R. 56.12030 provides that "[W]hen a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

5. The citation was subsequently settled by agreement in which IMC neither admitted nor denied the violation (Exhibits R-6 and R-7).