FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 5, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
on behalf of MICHAEL J. DUNMIRE and JAMES ESTLE	:	Docket Nos. WEST 80-313-D WEST 80-367-D
v.	:	
NORTHERN COAL COMPANY	:	

DECISION

This discrimination case requires us to define further the scope of the right to refuse work under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Supp. III 1979). The case also raises questions concerning appropriate remedies for miners who have suffered discrimination. The administrative law judge concluded that Northern Coal Company discriminatorily discharged two miners, in violation of section 105(c)(1) of the Mine Act, for engaging in a protected refusal to work. The judge assessed civil penalties and awarded backpay and other relief. 1/ For the reasons that follow, we affirm the judge's decision. 2/

I.

Many of the judge's essential factual findings are undisputed.

The swing shift crew at Northern's Rienau No. 2 underground coal mine near Meeker, Colorado, consisted of six miners, including shift foreman Michael Morgan and the alleged discriminatees, Michael Dunmire and James Estle. Estle operated the continuous miner, which mines the coal. Dunmire worked in support of Estle as a "miner's helper" responsible for setting support timbers and shoveling the ribs.

1/ The judge's decision is reported at 3 FMSHRC 1331 (1981).
2/ Former Commissioner Nease also voted to affirm, but resigned from the Commission before the decision was ready for signature. Chairman Collyer has taken no part in the consideration or decision of this case because of her prior association with Sherman and Howard, counsel for Northern Coal Company, at the time this case was tried.

During the period from approximately December 1979 to March 1980, Northern was mining in the northeast main entries of the Rienau mine, an area referred to as "the slopes." 3/ Although, as discussed in section II below, the witnesses varied somewhat in their specific descriptions of roof (or "top") conditions in the slopes during the December-March period, the record amply supports the judge's finding (3 FMSHRC at 1333, 1336) that, in general, the roof was bad. Pieces of coal and rock of various sizes frequently fell from the roof during this period. The ribs were also sloughing.

On the evening of Wednesday, February 27, 1980, the day before the key events in this case, the swing shift crew was working in the No. 1 entry of the slopes. Material was falling from the roof and ribs, dust generated by operation of the continuous miner had reduced visibility to almost nothing, and ventilation was bad. We affirm the judge's finding that Estle became concerned about the bad air and the possibility of injury from a roof fall, and suggested to Foreman Morgan that they stop mining until the roof could be crossbarred and additional air found. 3 FMSHRC at 1333; Tr. 85-7. As discussed in the accompanying note, the record also shows that Morgan did not respond to Estle and that Dunmire also complained about the roof and air but was told by Morgan to keep working. 4/ Mining continued and no member of the crew refused to work.

3/ The area was called the slopes because the coal seam there sloped from side to side and also pitched downhill as entries were advanced.

4/ We deem it necessary to clarify the record concerning the events of February 27 because it appears that some confusion has arisen. In finding that Estle complained to Morgan on February 27, the judge cited, in part, to Tr. 73. That portion of the transcript, however, is part of Estle's testimony about a series of different safety complaints that occurred earlier. Those complaints culminated in an incident in which both Estle and Dunmire successively complained to Morgan about working under crumbling roof, and Morgan agreed to stop the mining only after some roof material fell on him as well. Tr. 73-5. Morgan's testimony corroborates Estle's account. Tr. 273-4. In addition, the evidence establishes that on Monday, February 25, the start of the work week, Morgan allowed Dunmire to stop shoveling ribs because of bad rib and roof conditions. Tr. 160, 242, 275. Concerning the events of February 27, Estle testified that Morgan did not respond to his complaint (Tr. 86-7), and Dunmire testified that he too complained about the roof and air but was told by Morgan to keep working. Tr. 158-9, 172. On cross-examination, Morgan conceded that he did not remember if Estle and Dunmire had complained on February 27. Tr. 275.

In light of the foregoing, we believe that at some time in advance of February 27, Morgan agreed to stop mining, and on February 25, allowed Dunmire to stop shoveling ribs, on both occasions due to dangerous conditions. Because Estle and Dunmire were treated by the judge as credible witnesses and because their believable testimony is mutually corroborative and not contradicted by Morgan, we further conclude that Dunmire (as well as Estle) complained to Morgan on February 27 and that Morgan refused to act on the miners' complaints. Finally, Northern's assertion in its brief and at oral argument (Br. 12, 16, 19; Transcript of Oral Argument ("Tr. Arg.") 5, 8) that Morgan allowed Dunmire to stop shoveling the ribs on February 27 is not borne out by the record cited

(Footnote continued)

Over the previous several months, Estle and Dunmire had complained on a number of occasions to Morgan and other Northern supervisors about bad roof and the dangers of working under unsupported roof. 5/

Shortly before the start of the Thursday, February 28 swing shift, Estle and Dunmire were separately informed by Charles Daniels, the general mine foreman, that they were being transferred from the Morgan crew--Estle possibly to electrical work and Dunmire to the non-production graveyard shift. Daniels told Estle that the decision had been made "higher up" and for the reasons, among other things, that management believed the swing shift crew was too "close-knit" and was not keeping up with its safety duties for roof and ventilation control. 2 FMSHRC at 1333; Tr. 90-3, 218-20. At the hearing, Daniels testified that Morgan had not been meeting his supervisory responsibilities in these safety areas. 3 FMSHRC at 1333; Tr. 218-20, 238. Both Estle and Dunmire were upset and angry over the transfer (Tr. 92, 170), and testified that they thought the reasons for the actions were their own safety complaints. Tr. 92-3, 160-1.

After meeting with Daniels, Estle and Dunmire went into the slopes area of the mine to begin working on the February 28 swing shift. After completing some breakthrough work in the No. 1 entry (where the swing shift crew had been working the night before), the Feburary 28 day shift crew had moved into the adjacent No. 2 entry and driven it in another 60 feet or so before their shift ended. The No. 1 and 2 entries were parallel, about 60 feet apart, and connected by crosscuts. 3 FMSHRC at 1338; Tr. 187, 262-4, 309-10; Exh. P-3 (left side of map, area labelled "Northeast Mains" (mining entries numbered from left to right)).

In the mine, immediately prior to beginning his shift, Estle talked with Rod Shaw, the continuous miner operator from the previous shift. Estle asked Shaw about the roof, and Shaw said it was "just as bad" as last night and was "blowing out." 6/ Shaw indicated--and Estle understood, that he was referring to the roof in the No. 2 entry where the day shift crew had just been working. 3 FMSHRC at 1333; Tr. 94-5.

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footnote 4/ continued
above (Tr. 158-9, 160, 172, 242, 275), which includes testimony from the two Northern supervisors involved. Dunmire emphatically testified that Morgan ignored his complaint on February 27. Tr. 158-9, 172. Dunmire's comment at Tr. 160 (relied on by Northern) that he was permitted to stop shoveling ribs "the night before" his discharge on February 28 appears to have been a loose reference to Monday, February 25; in his next answer he also referred to the date in question as "the first night" -- an apparent reference to the start of the work week. In any event, the testimony of Morgan and Daniels clearly dates this incident February 25. Tr. 242, 275.

5/ As the judge correctly found, Dunmire had complained previously on a number of occasions about safety problems. 3 FMSHRC at 1333, 1335; Tr. 69-70, 148-9, 151-4, 275-6. Northern states that Dunmire had raised only one other complaint. Br. 16. In the portion of transcript Northern relies on (Tr. 158-9), we read Dunmire's answer as a narrow statement that he had only once previously complained <u>while underground</u> to a Northern supervisor <u>other than Morgan</u>. There is no question that Estle had complained previously on a number of occasions.

6/ "Blowing out" refers to chunks of coal or rock flying out under pressure from roof or rib. Tr. 82-3.

Estle then went over to the conveyor belt feeder (called "the Stamler"), where the swing shift crew, including Morgan, were gathered. The Stamler was located some distance from the face where the mining was to take place.

Estle told the crew that he had talked with Shaw and that roof conditions were bad--as bad as they had been the night before. There was no response, and Morgan directed the crew to start work. Dunmire then said that he would not work as the miner's helper, but would be willing to shovel the conveyor's tail piece. Morgan replied that he lacked experienced employees to do the helper's work, and that Dunmire would have to be the helper. Morgan added that if Dunmire did not want to do the helper's work, Dunmire knew what he could do. Estle jokingly interjected the explanation that Dunmire could get his bucket and go home. Morgan indicated that Estle was correct, and Dunmire left the work site. Estle told the crew that they should all leave with Dunmire. Morgan responded that if Estle went out, he would "be cutting [his] own throat." 3 FMSHRC at 1333, 1337 n. 3; Tr. 261. 7/ No one left. Estle, who had a chronic lower back problem, told Morgan he was sick and then left the work site. 8/

The evidence shows that when Estle and Dunmire arrived on the surface several minutes later, they stopped off in the mine office where Dunmire separately asked Daniels, the general mine foreman, and Robert Pobirk, the mine superintendent, if either wanted to talk with him. Each responded that he did not. Tr. 100, 164, 221-2, 285-6. Daniels testified that although he "assumed [Dunmire had] quit," he did "not want to say anything" to Dunmire because he felt "it was no use talking to him or having an argument with him." Tr. 222. 9/ Estle and Dunmire then went to the showers.

7/ Morgan first testified that he and Roy Petree, another member of the crew, made the "throat-cutting" remark, and, when asked to clarify his answer, then attributed the comment to Petree alone. Tr. 261. The judge credited Morgan's initial testimonial version that he himself had made such a remark. 3 FMSHRC at 1337 n. 3. At oral argument, Northern challenged this finding. The finding is a credibility resolution that seems to us based on the judge's observation of Morgan's demeanor while testifying. We will not ordinarily overturn such resolutions by the trial judge who observes the witnesses, and we affirm this one.

8/ Estle testified that "regardless" of the roof conditions, he probably would have left that day anyway due to his back problem. 3 FMSHRC at 1334; Tr. 99. Estle saw a doctor the following day.

9/ Pobirk may not have realized exactly what was going on when Dunmire first spoke with him. Tr. 285. Pobirk testified, however, that after Dunmire left, Daniels "made [him] aware that [Estle and Dunmire] had walked out...." Tr. 285-6.

After cleaning up, Estle and Dunmire returned to the office. Pobirk told them that since they had walked off the job, they had quit. 3 FMSHRC at 1334; Tr. 100, 164-5, 222-4, 286, 291. Dunmire replied that he was not quitting or refusing to work, but was only refusing to be the miner's helper. Tr. 164. Dunmire also told Pobirk that he did not think the roof was safe and wanted the miner shut down while he set timbers, established ventilation, and shoveled the ribs. Tr. 164-5, 222-4, 291. Dunmire and Pobirk argued, and finally Pobirk stated that Dunmire was terminated. Tr. 165. 10/ Estle told Pobirk that he was sick and was going to the doctor. Tr. 102. Estle and Dunmire left the mine. On the following Monday, March 3, when Estle attempted to present his medical excuse to Troy Wills, Northern's area superintendant, Wills told him that Northern considered Estle's walk out to have been a quit.

About three weeks later, Estle returned to the mine and told Wills that he would drop the discrimination complaint that he had filed with MSHA if Northern would rehire him. Wills responded that Estle could not be rehired because if anyone else wanted to walk out, they could do it and get away with it.

II.

We analyze first the central issue of whether Estle and Dunmire were unlawfully discharged for engaging in a protected refusal to work. We recognized in general terms the right to refuse work under section 105(c)(1) of the Mine Act in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and further developed the scope of the right in Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). We preface our analysis by briefly summarizing this area of law, particularly in light of the Third Circuit's Consolidation Coal decision. 11/

Under Pasula and Robinette, a miner may refuse to work if he has a good faith, reasonable belief that a hazardous condition exists. A miner's refusal may extend to "affirmative self-help", such as shutting off or adjusting equipment, so long as the self help is reasonable as well. Pasula, 2 FMSHRC at 2789-94; Robinette, 3 FMSHRC at 807-17. As we have previously indicated (Phelps Dodge Corp., 3 FMSHRC 2508, 2508 n. 1 (1981)), the court of appeals reversed Pasula solely on evidentiary grounds, holding that the miner in question had been discharged for engaging in unprotected activity. Consolidation Coal, 663 F.2d at 1216-21. We do not think that the Third Circuit's Consolidation Coal decision is inconsistent with our general holdings in Pasula and Robinette. On the contrary, we read the court's opinion as a cautious approval of the main outlines of the right to refuse work as developed in our decisions.

10/ Daniels and Pobirk denied that Pobirk told Dunmire that he was fired, but the judge credited Dunmire's contrary account of the conversation (which Estle substantially corroborated (Tr. 100)), and we affirm his resolution of this conflicting testimony.

11/ In the decision under review, the judge did not discuss or apply our Robinette decision. However, his analysis is consistent with Robinette, and the parties have presented their arguments to us in light of that decision. Accordingly, there is no need to remand for express application of a Robinette analysis.

Certainly, if the court had thought that there was no right to refuse work under the Mine Act, it would not have analyzed (as it did) whether the miner was fired for unprotected activity for there could have been no claim that he was fired for protected activity. The court prefaced its evidentiary analysis by stating that it "found it unnecessary to define the perimeters of [the] right [to refuse work] under the Mine Act." 663 F.2d at 1216 (emphasis added). The court's discussion of the right, in the detailed footnote (Id. at 1216-17) that accompanies the passage just quoted, makes clear that it agreed there was such a right in general, but did not deem it necessary to define the specifics of the right:

> Thus, although we need not address the extent of such a right, the statutory scheme, in conjunction with the legislative history of the 1977 Mine Act, supports a right to refuse work in the event that the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health.

Id. at 1217 n. 6.

We note that the court's discussion of the right accords with Robinette's holding that a work refusal must be premised on a good faith, reasonable belief in a hazard--the chief areas of contention in the present case. Indeed, in approving our refusal in Pasula to defer to an arbitral decision regarding the miner's discharge (2 FMSHRC at 2794-96), the court described reasonable, good faith belief in much the same manner as our Robinette decision (3 FMSHRC at 809-12):

> In this case, the considerations underlying the standards of gravity of injury in the Wage Agreement [between the operator and miners' representative] and in the statute are different. The Wage Agreement requires the arbitrator to determine whether the hazard was abnormal and whether there was imminent danger likely to cause death or serious physical harm. The underlying concern of the Mine Act, however, is not only the question of how dangerous the condition is, but also the general policy of anti-retaliation (against the employee by the employer). Because this is a major concern of the Mine Act, it requires proof merely that the miner reasonably believed that he confronted a threat to his safety or health. Those who honestly believe that they are encountering a danger to their health are thereby assured protection from retaliation by the employer even if the evidence ultimately shows that the conditions were not as serious or as hazardous as believed. Questions of imminence and degree of injury bear more directly on the sincerity and reasonableness of the miner's belief.

663 F.2d at 1219. 12/ We now apply the general principles controlling the right to refuse work to the issues in this case.

12/ In Pasula, we concluded that the miner was fired primarily because of his refusal to work. Although we found that his discharge was also partly motivated by his conduct in shutting down the equipment about which he had complained (conduct that we emphasized was unprotected), we found that the evidence failed to show that the operator would have

(Footnote continued)

The judge concluded that Estle and Dunmire engaged in a protected refusal to work on February 28 and that their terminations over the incident therefore violated section 105(c)(1) of the Mine Act. On review, Northern raises three major objections to the judge's conclusion: (1) that a miner must ordinarily state a safety or health complaint in order to bring a work refusal within the protection of the Mine Act, and that Estle and Dunmire failed to articulate such complaints; (2) that the work refusal of Estle and Dunmire was per se unreasonable because they failed to examine the work area that was the subject of their refusal; and (3) that in any event the mining conditions in question were not unsafe. Although Northern conceded at oral argument that Estle and Dunmire "probably" had a "subjective good faith belief of [a] danger" (Tr. Arg. 14), a number of the arguments in Northern's brief touch on good faith issues, and we therefore briefly address that subject as well.

We note at the outset that this is not a "mixed motivation" discrimination case where the evidence shows that the operator's adverse action was motivated both by the miner's protected activity and also by his separate unprotected conduct. Northern states that it terminated Estle and Dunmire solely for having "walked off their jobs," an action Northern "took as a quit on their part." Br. 3. Therefore, the only

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fn. 12/ cont'd.
terminated him in any event for this latter conduct alone. Under the discrimination analysis we developed in Pasula, these findings entitled the miner to relief. 2 FMSHRC at 2796-801. The court disagreed with our evidentiary determinations, and found that the "real" reason the miner was terminated was for shutting down the equipment and "refus[ing] to permit anyone else to operate it." 663 F.2d at 1219-21. The court concluded that this conduct was beyond the pale of the right to refuse work, and that the miner was therefore lawfully discharged for the conduct:

> There is no right in the [Mine] Act to shut down an entire shift's work. An individual is protected by the Act from retaliation for asserting and acting on his real fear that conditions are unsafe or hazardous to his health; but no one has the right to stop others from proceeding to work if they so wish.

Id. at 1219.

We do not regard the court's disposition of the discrimination issue as a holding that a miner may never engage in affirmative self help such as shutting off or adjusting equipment. The court obviously believed that the miner's actions were unreasonable and excessive. Robinette stressed that any affirmative self help must be reasonable. 3 FMSHRC at 812. Given the court's own emphasis on reasonableness, we doubt that it would have condemned a miner's reasonable action in, for example, temporarily shutting down a beltline to prevent a fire. Rather, we think that the court's opinion is entirely consistent with a case-by-case analysis of work refusals, including those that involve affirmative self-help, focused on the reasonableness of the miner's beliefs and actions.

conduct in issue is the walk off. If the walk off was a protected refusal to work, the termination over it was unlawful; if it was not protected, the termination was legal. We turn first to Northern's threshold argument that miners must state a complaint in order to trigger a protected refusal to work.

Statement of a health or safety complaint

We conclude that substantial evidence supports the judge's finding that safety complaints were in fact made, but we find it necessary to elucidate his treatment of the issue. Because the evidence surrounding these complaints is controverted and because the subject is important, we also address Northern's general argument that such complaints must be made. 13/ The judge concluded that a statement of a complaint is a prerequisite to a valid work refusal (3 FMSHRC at 1335) and, in his brief to us, the Secretary concurs. Br. 16.

A complaint requirement accords with Robinette's emphasis that a work refusal must be premised on a good faith, reasonable belief in a hazard, and is also consistent with sound safety practices and common sense. As we noted in both Pasula and Robinette, Congress intended to extend the right to refuse work under the Mine Act to "workers acting in good faith ... as responsible human beings." 14/ In our view, it would not be the conduct of a "responsible human being" to walk off the job and, for no good reason, fail to inform anyone of a possible hazard that could imperil safety or health. We agree with Northern that stating such a complaint may permit the operator to correct the condition in a timely fashion and may protect others in the mine from harm. On the other hand, we made clear in Robinette that we will not adopt complicated work refusal doctrines that may be difficult to apply in practice or that could chill the right to refuse work. 3 FMSHRC at 810 n. 12. Balancing all the foregoing considerations, we therefore adopt the following requirement.

Where reasonably possible, a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue. "Reasonable possibility" may be lacking where, for example, a representative of the operator is not present, or exigent circumstances require swift reaction. We also have used the word, "ordinarily" in our formulation to indicate that even where such communication is reasonably possible, unusual circumstances--such as futility--may excuse a failure to communicate. If possible, the communication should ordinarily be made before the work refusal, but, depending on circumstances, may also be made reasonably soon after the refusal.

13/ In Pasula, we solicited the "considered views" of the Secretary, miners, miners' representatives, and operators on "how [the right to refuse work] should be shaped." 2 FMSHRC at 2793. We thank Northern's counsel for their helpful discussion of the complaint issue in their brief and at oral argument.

14/ Pasula, 2 FMSHRC at 2792, and Robinette, 3 FMSHRC at 809 & n. 11, quoting Senate floor debate on S. 717, June 21, 1977, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 1089 (1978)("Leg. Hist.").

Not every miner involved in a work refusal need make (or attempt to make) such a complaint. A communication from one may be deemed to be on behalf of all concerned, even if not announced in such terms. As the judge correctly observed (3 FMSHRC at 1337), the Mine Act secures the right to concerted protected activity: section 105(c)(1) provides that a miner is protected in the "exercise ... on behalf of himself or others of any statutory right afforded by this Act" (emphasis added).

We stress that our purpose is promoting safety, and we will evaluate communication issues in a common sense, not legalistic, manner. Simple, brief communication will suffice, and the "communication" can involve speech, action, gesture, or tying in with others' comments. We are confident that the vast majority of miners are responsible and will communicate such concerns in any event. In short, we believe that the practical effect of this rule will be to assist in weeding out work refusals infected by bad faith--conduct that enjoys no protection under the Mine Act. We now apply these standards to the facts of this case. 15/

We conclude that the evidence summarized in the first part of this decision shows that Estle and Dunmire stated safety complaints both at the Stamler, before their work refusals, and at the mine office after they had left the work area. At the Stamler, Estle informed the entire swing shift crew, including Morgan, that he had just talked with a continuous miner operator from the day shift and had been informed that roof conditions were bad--as bad as they had been during the previous night's swing shift. In our opinion, the plain meaning of these words would convey to any reasonable miner--if not any reasonable person, a complaint concerning the roof under which the crew was about to work.

15/ The judge, Northern, and the Secretary all cited our decision in Deskins Branch Coal Co., 2 FMSHRC 2803 (1980), as support for the proposition that a miner must state a safety or health complaint in connection with a work refusal. For purposes of clarity, we note that Deskins does not mandate the result reached in the present case. Deskins arose under the 1969 Coal Act, and involved only the right under section 110(b) of that Act to "notif[y] the Secretary or his authorized representative of any alleged violation or danger." In Deskins we concluded that stating a safety complaint to an appropriate individual (whether a representative of the operator or Secretary), was the essence of the "right to notify," and that failure to make such a communication would remove the miner from the protection of section 110(b) of the 1969 Coal Act. 2 FMSHRC at 2803-4. What was required for a valid notification of the Secretary under the 1969 Coal Act does not necessarily determine what is required for a valid work refusal under the Mine Act. While there are similarities between section 110(b) of the 1969 Coal Act and section 105(c)(1) of the Mine Act, the latter section expanded the list of protected activities and was intended by Congress to be interpreted "expansively." S. Rep. No. 95-181, 95th Cong., 1st Sess. 36 (1977), reprinted in Leg. Hist. 624. Accordingly, 1969 Coal Act precedent regarding protected activity, although often helpful, must be applied carefully.

In this regard, Estle's fairly extensive history of prior complaints about bad roof conditions, most particularly his similar complaint the night before, must have enabled Morgan to grasp his meaning. 16/

While we agree with the judge that under section 105(c)(1), Estle's statement (3 FMSHRC at 1337) may be deemed a concerted complaint on behalf of the rest of the crew, including Dunmire, we also conclude that Dunmire himself complained at the Stamler. Only a minute or so after Estle mentioned the bad roof, Dunmire told Morgan he would not work as the miner's helper, although he was willing to perform other tasks. We are satisfied that this was a readily understandable followup to Estle's statement. Dunmire meant that since the roof was bad, he preferred not to work under it. We agree with the judge (3 FMSHRC at 1335) that Morgan must have understood Dunmire, especially since Dunmire had voiced the same concern to him the night before, as well as on other occasions. We think that the judge's statement that Dunmire made no complaint to Morgan (Id.) should not be read literally or in isolation. It seems to us that the judge merely meant that Dunmire's words, while if judged standing alone might not appear to be a complaint, constitute an understandable complaint when examined in context--including the normal flow of conversation.

There is no dispute that not long after leaving the Stamler, Dunmire (with whom Estle was standing) made it quite clear to Pobirk that they were complaining over roof conditions. Even were we to share Northern's view of the evidence regarding the events at the Stamler, this conversation would qualify under the standards announced in this decision as a complaint by Dunmire (on behalf of himself and Estle) made reasonably close in time to a work refusal.

In sum, we conclude that, where reasonably possible, miners should ordinarily communicate their safety or health complaints in connection with a work refusal, and that the evidence shows that Estle and Dunmire did so.

Good faith

Northern's concession at oral argument that Estle and Dunmire "probably" had a good faith belief in a danger undercuts the suggestions in Northern's brief that they lacked good faith belief. When the judge's findings are viewed as a whole, it is clear that he found Estle and Dunmire credible witnesses who had acted out of a good faith fear of dangerous conditions. Although we agree with Northern that the two miners were also unhappy about their imminent transfer, we do not regard that as sufficient evidence that they acted in bad faith. Their respective histories of concern over roof conditions persuade us of their sincerity on February 28.

16/ We reject Northern's argument that prior complaints cannot be examined in order to evaluate a miner's communications. Such history may shed light both on what the miner meant and on what a reasonable listener would have understood him to mean.

We also find misplaced Northern's specific attacks on Estle's motivations for leaving the mine. We agree with the judge (3 FMSHRC at 1337 & n. 2) that Estle testified (Tr. 99, 107, 123) that he had left the mine partly because of safety concerns and partly because of his back problem, although he mentioned only the back problem when he told Morgan he was leaving. As discussed above (pp. 2-3 & n. 4 above), Morgan had ignored Estle's safety complaint just the night before, and we regard as credible Estle's explanation (Tr. 126) that he did not wish to pursue a safety complaint any further with Morgan. Estle's reluctance is perhaps even more understandable in light of Morgan's immediately preceding admonition that Estle would be "cutting his throat" if he left in support of Dunmire. Of course, as the judge and we have found, and as Estle himself also explained (Tr. 123), Estle had articulated a general safety complaint only minutes before leaving. We deem that complaint sufficient indication of his good faith reason for leaving. 17/

Reasonable belief

There is no dispute that before leaving, Estle and Dunmire did not personally examine the work area that was the subject of their concern. The judge found that "[i]t [was] not necessary to make such an examination" where the miners otherwise possessed a reasonable basis for belief in a danger. 3 FMSHRC at 1336. Northern urges us to adopt a *per se* rule that failure to examine ordinarily removes a work refusal from the Mine Act's protection. Br. 22-4. We do not regard a *per se* approach as appropriate in this area, but agree that the matter of personal examination may be relevant to a miner's good faith, reasonable belief. We think that personal examination should be one of the many possible surrounding circumstances that should be considered on a case-by-case basis in evaluating the validity of work refusals. Certainly, we decline adopting any approach that would *require* miners to expose themselves directly to hazards, because avoidance of injury is the very reason the right to refuse work exists. For purposes of resolving this case, we re-emphasize our rule that a miner's belief must be reasonable, and hold that miners may rely on such indications of conditions as seemingly trustworthy reports from others and earlier conditions in the mine.

17/ Since we agree with the judge that Estle was partially motivated by safety concerns, we view Estle's additional reliance on his back problem as largely irrelevant. Northern introduced no evidence rebutting his medical excuse, and nothing about the right to refuse work precludes a miner from also relying on non-safety related reasons for his actions, particularly where, as here, the miner is seemingly threatened with termination if he acts on safety related grounds alone. Finally, although Northern does correctly point out that at one point in cross-examination Estle testified he left because of his "anger" and "tail-bone" (Tr. 126), the rest of his testimony makes quite clear, and we believe, that his chief reasons for acting were his safety concerns and his back problem.

Estle and Dunmire based their February 28 walk out on an apparently believable report from a miner just finishing work that roof conditions where the swing shift was about to work were bad--as bad as they had been on February 27. Both Estle and Dunmire had been concerned over the roof on February 27, and had complained to no effect. They had been observing, and complaining about, bad roof conditions in the slopes for the previous several months. We agree with the judge (3 FMSHRC at 1336) that the combination of a first-hand report from another miner and their own immediately preceding first-hand experience supplied an acceptable basis for a reasonable belief in hazardous conditions. Thus, we cannot agree that this is a case where a failure to examine reveals either bad faith or lack of reasonable belief. 18/

Moreover, we are satisfied, as was the judge, that the miners' belief in dangerous conditions was quite reasonable. There is a great deal of credible evidence that roof and rib conditions in the slopes had been bad for some time, with considerable falling, "flaking," and "blowing out" of coal and rock, and were bad on February 27 and 28. We affirm and incorporate by reference the judge's thorough analysis of this evidence (3 FMSHRC at 1333, 1336, 1338), and comment only on a few salient aspects of the evidence.

While there were differences among the witness' description of mining conditions (and while we suspect the truth lies somewhere between the most extreme accounts), virtually all the witnesses agreed that there were roof fall and rib sloughing problems in the slopes. For example, as the judge pointed out, Northern's own witness Daniels, the general mine foreman, described the roof in the No. 2 entry where the swing shift was to work on February 28 as only "fair" (Tr. 223). At another point, Daniels conceded that the slopes top was, at times, "bad" (Tr. 241), and finally stated that the Rienau mine only "got out of ... bad [roof] condition around the middle of March" (Tr. 250), some weeks after Estle's and Dunmire's work refusal. As we found above (pp. 2-3 & n. 4), Morgan, not long before the crucial events in this case, had also excused Estle and Dunmire from work when roof and rib conditions were particularly dangerous. Most tellingly, Gene Moore, a miner on the day

18/ In its brief, Northern too narrowly interprets our use of the word, "perception" in our discussion of reasonable belief in Robinette. Br. 21, 23. In Robinette, we used "perception" in its general sense as a synonym for belief, not in its more narrow sense as referring to a direct sensory impression. 3 FMSHRC at 812. We did not mean to suggest that a miner must necessarily become aware of an apparent danger through his own sensory impressions; we meant only that his belief of a danger must be reasonable, regardless of how he arrived at his belief. Of course, often the miner's own direct observations will supply the basis of his belief in a hazard. Our intent is to suggest that, just as is the case in daily life, beliefs can rest on other sources of information as well.

shift provided a detailed, first-hand account of blowing roof and sloughing ribs on February 28 in the No. 2 entry where Estle and Dunmire were scheduled to work. 3 FMSHRC at 1338; Tr. 187-90. 19/ As we pointed out in Robinette (3 FMSHRC at 812), a miner's reasonable belief can be established through the kind of corroborative evidence present here.

Thus, we agree with the judge that Estle and Dunmire had a good faith reasonable belief in a roof hazard on February 28. While perhaps Northern demonstrates that other reasonable reactions were possible on February 28, we stress that, because reasonable minds can differ, our Robinette test requires only a reasonable belief. 3 FMSHRC at 811-12 & n. 15. We also think that their reasonable belief is reflected by the reasonableness of certain aspects of Dunmire's conduct on February 28. Dunmire offered to Morgan to perform alternative work. As noted above (p. 4), Dunmire attempted to talk with Daniels and Pobirk when he arrived at the surface but was initially rebuffed. Dunmire later informed Pobirk that he was not quitting, but only refusing to work under bad roof, and made clear he would work if the roof problems were resolved. The evidence shows that Estle was acting in support of his co-worker. This is not the behavior of individuals acting on bad faith or reckless impulse.

In short, we conclude that Estle and Dunmire engaged in a protected work refusal. Because they were fired for this work refusal, the terminations violated section 105(c)(1) of the Mine Act. We now turn to the remaining issues in the case.

III.

There are three remaining issues: (1) whether the judge erred by refusing to consolidate an immediate hearing on the merits with Dunmire's temporary reinstatement hearing and whether the limited scope of the temporary reinstatement hearing comported with due process requirements; (2) whether the judge erroneously included vacation pay and hearing expenses in the back pay award for Estle and Dunmire; and (3) whether the judge erroneously calculated back pay on the basis of an incorrect back pay period for Estle. Northern has not complained about the judge's imposition of civil penalties, and therefore no penalty issue is before us.

19/ Northern correctly observes that on February 28, the swing shift crew worked in the No. 2 entry of the slopes, a different location from the No. 1 entry where they had worked the previous night. Northern argues that therefore Estle and Dunmire, absent examination, could not have had a basis for a reasonable belief in bad conditions in the new work area. However, the two parallel entries were located in the same general area of the slopes where roof and rib problems had been the rule, not the exception. We would find more force to Northern's argument had the new entry been located in an entirely different area of the mine. In any event, we affirm the judge's crediting of Moore's testimony that in fact conditions were bad in the No. 2 entry.

Temporary reinstatement

In the proceedings below, Dunmire sought temporary reinstatement pursuant to section 105(c)(2) of the Mine Act and our former Commission Rule 44, 29 C.F.R. § 2700.44 (1981), which implemented that section. 20/

20/ Section 105(c)(2) of the Mine Act provides in relevant part:

> Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of [section 105(c)] may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

Our former Rule 44 provided:

> (a) Contents of application procedure: hearing. An application for reinstatement shall state the Secretary's finding that the complaint of discrimination, discharge or interference was not frivolously brought and the basis for his finding. The application shall be immediately examined, and, unless it is determined from the face of the application that the Secretary's finding was arbitrarily or capriciously made, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon issuance. If the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made. The Judge may then dissolve, modify or continue the order.

(footnote cont'd)

On May 22, 1980, the Commission's chief judge, acting on the Secretary's application for Dunmire's interim reinstatement pursuant to section 105(c)(2) and our Rule 44, issued an order temporarily reinstating Dunmire. On May 30, 1980, Northern requested a hearing on the reinstatement order. The parties agreed to have the hearing held on June 6, 1980. The order directing the hearing indicated that the scope of the hearing would be controlled by the terms of Rule 44(a). On June 5, 1980, Northern moved for consolidation of a hearing on the merits with the hearing on the temporary reinstatement order, or in the alternative, for expedition of the hearing on the merits.

The hearing on the temporary reinstatement order was held, as scheduled, on June 6, before the same judge who decided this case on the merits, and Northern renewed its consolidation/expedition motion. Tr. 8-9. The judge denied the request for immediate consolidation on the grounds that at that time the issues had not been framed and the Secretary's complaint on the merits had not been filed. Tr. 12. The judge agreed, however, to expedite proceedings, and set the hearing on the merits for July 24, 1981. Id. The judge also indicated that although the merits of Dunmire's discrimination case were beyond the scope of the temporary reinstatement hearing, evidence concerning the factual bases relied upon by the Secretary in applying for Dunmire's reinstatement would be relevant. 3 FMSHRC at 1341; Tr. 18-22.

Objecting to the scope of the hearing, Northern waived its right to proceed with it and requested that the parties "simply proceed" with the expedited July 24 hearing on the merits. Tr. 22-3. The judge granted Northern's request. Tr. 23. Northern indicated that it wished to preserve its due process objections concerning the temporary reinstatement hearing procedure. Tr. 25. The hearing on the merits took place as scheduled, and subsequent to the hearing, Dunmire voluntarily left Northern's employ. Permanent reinstatement for Dunmire was therefore neither sought nor ordered. 3 FMSHRC at 1341.

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fn. 20/ cont'd.

(b) Dissolution of order. If, following an order of reinstatement, the Secretary determines that the provisions of section 105(c)(1) have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement. If the Secretary fails to file a complaint within 90 days, the Judge may issue an order to show cause why the order of reinstatement should not be dissolved. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act and § 2700.40 of these rules.

As we explain below, we have determined that our former Rule 44 was legally inadequate, and have replaced it with a new Interim Rule 44.

At about the time the parties filed their briefs with us, we decided that our Rule 44 provided for temporary reinstatement hearings that were too "narrow and restrictive" in scope, and therefore deprived operators of the due process to which they were entitled. Kentucky Carbon Corp., 3 FMSHRC 1707, 1711-12 (1981). We have since promulgated a new Interim Rule 44 designed to cure the deficiencies of our former procedure. 21/

While Northern has not abandoned its due process objections, we conclude that our disposition of the discrimination question and the combination of events summarized above have mooted these issues. Pursuant to Kentucky Carbon, we vacate the order of temporary reinstatement on the grounds that the hearing provided Northern was conducted under a procedure we have deemed legally inadequate. However, as in Kentucky Carbon (3 FMSHRC at 1712), we do not remand for any further proceedings because there is no need or reason for continuing interim relief. In the first place, we have determined that Dunmire was discriminatorily discharged--a conclusion that means he was entitled to temporary reinstatement. Furthermore, he has since left Northern's employ, and thus his reinstatement is not before us. Our vacation of the temporary reinstatement order makes it unnecessary to resolve Northern's due process arguments regarding consolidation and the proper scope of hearings, and we reserve consideration of such issues to a case presenting a live controversy under our revised procedure. 22/

21/ We have amended only subsection (a) of Rule 44. The new language provides:

> § 2700.44 Temporary reinstatement proceedings.
>
> (a) Contents of application; procedure; hearing. An application for temporary reinstatement shall state the Secretary's finding that the miner's complaint of discrimination, discharge or interference was not frivolously brought and shall be accompanied by a copy of the miner's complaint, an affidavit setting forth the Secretary's reasons for his finding, and proof of service upon the operator. The application and accompanying documents shall be examined upon an expedited basis, and, if it appears that the Secretary's finding is supported by the application and accompanying documents, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon receipt or actual notice. If the person against whom relief is sought requests a hearing on the order, a Judge shall within 5 days after the request is filed, hold a hearing to determine whether the miner's complaint of discrimination, discharge or interference was frivolously brought. The judge may then dissolve, modify or continue the order.

46 Fed. Reg. 39,137-38 (July 31, 1981).

22/ We note in passing that, despite our disposition of this issue, we seriously doubt whether Northern preserved its right to complain on discretionary review about the scope of the temporary reinstatement hearing. As discussed above, Northern waived its right to proceed with the hearing, thereby avoiding a concrete test of the hearing's adequacy. We also think that the judge's commendable expedition of proceedings supplied Northern with the essence of the relief it sought through consolidation.

Back pay

Northern objects to the judge's inclusion of vacation pay and hearing expenses in his back pay award for Estle and Dunmire. 3 FMSHRC at 1342-43. Before analyzing these specific questions, we discuss briefly the general subject of the Mine Act's remedies for discrimination.

Section 105(c)(2) of the Mine Act empowers the Commission to remedy discrimination by "such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." As we recently held, this broad remedial charge was designed not only to deter illegal retaliation but also to restore the employee, as nearly as possible, to the situation he would have occupied but for the discrimination. Kentucky Carbon Corp., 4 FMSHRC ____ (No. KENT 80-145-D, January 6, 1982), slip op. at 2.

As we also pointed out in Kentucky Carbon, the Mine Act's provisions are modeled largely on section 10(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(c). Id., slip op. at 2 & n. 4. In applying that section's provision for back pay awards, the National Labor Relations Board and the courts have long treated back pay as a term of art encompassing not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package. See, for example, NLRB v. Strong, 393 U.S. 357, 358-60 & n. 4 (1968); NLRB v. Rice Lake Creamery Co., 365 F.2d 888, 892 (D.C. Cir. 1966). In general, we believe that the same approach to back pay applies under the Mine Act. We also are of the view that so long as our remedial orders effectuate the purposes of the Mine Act, our judges and we possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances. See Glenn Munsey v. Smitty Baker Coal Co., Inc., 2 FMSHRC 3463, 3464 (1980) (analogous approach with regard to relief under the 1969 Coal Act). Cf. NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969)(explaining the NLRB's discretionary powers under section 10(c) of the NLRA). As the judge correctly determined (3 FMSHRC at 1343), the Mine Act's legislative history removes any doubt on these points:

> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

S. Rep. No. 95-181, above, 37, reprinted in Leg. Hist. 625. In light of the foregoing principles, we affirm the judge's back pay award of vacation pay and hearing expenses.

Regarding vacation pay, it was stipulated below that Estle and Dunmire had accrued a right under Northern's benefit package to take a week's vacation with vacation pay. The judge reasoned that "vacation pay, as part of the employment contract, accrues and has a monetary value," and therefore included vacation pay amounts in each discriminatee's back pay award. 3 FMSHRC at 1342. Northern argues that because its policies prohibit employees from taking vacation pay in lieu of time off and because the two miners were paid back pay for the days in issue, the award constitutes a form of "double dipping." (Northern does not argue that, as a general matter, vacation pay may not be part of a back pay award).

Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations. We hold that, in general, vacation pay may constitute part of a back pay award. The discriminatees in this case had earned a right to both vacation time and vacation pay and while we cannot turn back the clock to give them the lost vacation days, we can, and do, assign a value to what they lost. The award of vacation pay is intended to compensate them not only for the accrued vacation pay, but also for the vacations that they lost. Hence, we do not regard the award as a form of "double dipping," and we would also reject any suggestion that time off following a discriminatory discharge may be deemed the equivalent of a vacation. Within the framework of providing just compensation, however, we endeavor to make our awards as reasonable as possible. We therefore modify the judge's award to give Northern the option, in the event Estle accepts (or has accepted) reinstatement, either (1) to pay the compensatory vacation pay as ordered by the judge, or (2) immediately to offer Estle the opportunity to take his last week's paid vacation after reinstatement (in addition to the paid vacation time he otherwise accrues). Estle may accept either method of compensation. The second option would give Estle back his paid vacation and also avoid concurrent payment of regular wages and vacation pay. Because Dunmire has left Northern's employ, this additional option is unavailable and Northern is directed to pay him the vacation pay ordered by the judge; the same applies if Estle declines reinstatement or has also left Northern's employ since reinstatement.

Regarding incidental, personal hearing expenses incurred by Estle and Dunmire in connection with their attendance, Northern argues that because section 105(c)(3) of the Mine Act expressly provides for hearing expenses, 23/ while section 105(c)(2) does not mention the subject, Congress must have intended that such expenses were outside the scope of a section 105(c)(2) remedial award. We agree with the judge that the differences in language between the two sections are not as significant as Northern argues. Section 105(c)(2) expressly provides that

23/ Section 105(c)(3) establishes procedures under which a miner may prosecute a discrimination case in the event that the Secretary declines to file a complaint on his behalf. In addition to authorizing back pay and reinstatement if the miner's complaint is sustained, the section also provides that he shall be reimbursed for his costs and expenses.

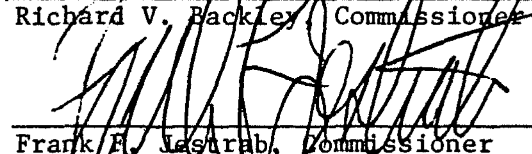
the relief it authorizes is not limited to the reinstatement and back pay mentioned. Furthermore, the "illustrative" nature of the relief listed in section 105(c)(2) is made clear by the legislative history we quoted above. Estle and Dunmire would not have borne such expenses (and inconvenience) but for Northern's discrimination. We therefore hold that reimbursement of their hearing expenses is an appropriate form of remedial relief.

Finally, Northern objects to the back pay period used by the judge in calculating Estle's back pay. The judge found that Estle's back pay period extended from his loss of employment through to his reinstatement, less net interim earnings from a job he obtained with another employer on April 15, 1980. Northern argues that Estle is tied to the Secretary's pleadings, which sought back pay only to his resumption of full employment with another employer (that is, seemingly until April 13, 1980). We affirm and incorporate by reference the judge's thorough and scholarly analysis of this issue. 3 FMSHRC at 1343-45.

We observe only that, as the judge indicated, back pay is ordinarily the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings. See, for example, OCAW v. NLRB, 547 F.2d 598, 602 (D.C. Cir. 1976). While back pay may be reduced in appropriate circumstances where an employee incurs a "willful loss of earnings" (fails to mitigate damages) (OCAW v. NLRB, 547 F.2d at 602-3), we are satisfied that Estle made reasonable efforts to mitigate his loss of income. He unsuccessfully sought rehire from Northern (p. 5 above); he was not required under the Mine Act to seek temporary reinstatement; and, in fact, he found employment in a reasonably short time. We also agree with the judge's refusal to exalt form over substance in holding that Estle was not responsible for, and was not necessarily limited by, the relief sought in the pleadings. Cf. Rule 54(c), Federal Rules of Civil Procedure. Our concern is to make miners whole, and technical problems in the pleadings can fairly be cured, as they were here, at trial.

For the foregoing reasons, we vacate the order of temporary reinstatement for Dunmire and, on the basis articulated herein, affirm the judge's decision in all other respects. The vacation pay award is modified as discussed above.

Richard V. Backley, Commissioner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