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PROTECTED WORK REFUSALS UNDER SECTION 105(c)(1) OF THE MINE SAFETY AND HEALTH ACT

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I. INTRODUCTION

Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act") makes actionable any discrimination against a miner who complains of unsafe or unhealthful conditions in a mine, or who exercises other identified protected rights. Although refusals to work are not specifically included in the list of rights identified in section 105(c)(1), the Federal Mine Safety and Health Review Commission ("Commission") and the courts have consistently held that the right to refuse to work under unsafe or unhealthful mine conditions is protected. This conclusion is based on powerful legislative history indicating that Congress intended section 105(c)(1) to afford such a right.

Because both the statute and the legislative history are silent as to the circumstances under which a work refusal is protected, the task of defining the contours of the right has been left almost entirely to the Commission and the courts. In general, the parameters established by these bodies appear to be both clear and workable. However, these parameters fall short in one important respect: after nearly a decade of litigation applying the refusal to work principle, neither the Commission nor the courts have established any standard for how severe or immediate a hazard must be to justify a protected work refusal. The problem is that, in a business in which hazards are a way of life, almost any "hazard" arguably may justify a protected work refusal. There must be a limit.

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Five years ago when Judge James A. Broderick and Mr. Daniel Minahan described the state of the Mine Act's anti-discrimination law in these pages, they described a doctrine "still in its infancy." Even at this early date, however, Broderick and Minahan warned of the problems that could arise if the Commission failed to adopt a threshold standard of severity and imminence for hazards sufficient to trigger the Act's protections for a refusal to work. Today that warning stands unheeded and, as a result, a doctrine no longer in its infancy poses an unnecessary threat to mine discipline.

We take the occasion of the Act's first decennial to evaluate the development of this important right. Part II of this Article examines the general contours of protected work refusals, as they have grown up in the decisions of the Commission and the courts. Part III considers the need for a severity standard to limit protected work refusals to circumstances in which they are actually justified.

II. THE CONTOURS OF A PROTECTED WORK REFUSAL

A miner has the right under section 105(c) of the Mine Act to refuse work, if the miner has a good faith, reasonable belief in a hazardous condition . . . . However, this right is not unconditional. Where reasonably possible, a miner refusing work should ordinarily communicate or attempt to communicate to some representative of the operator his belief that a safety or health hazard exists . . . .

There are four basic prerequisites to a protected refusal to work: the miner must have a (1) good faith, (2) reasonable belief that (3) a hazardous condition exists, and he must ordinarily (4) communicate that belief to a representative of the operator. In some circumstances, the miner also may engage in affirmative self-help, or act to safeguard the health and safety of others. Even if the miner engages in protected conduct, of course, no action lies against the operator unless he unjustifiably retaliates against the miner on the basis of the protected conduct. This section will address each of the four basic elements of a protected work refusal, the requirements for affirmative self-help and the protection of others, and the proof of discriminatory action and causation.

A. Good Faith Belief

The first prerequisite to a protected right to refuse to work is a good faith belief that a hazard exists. In this context, "good faith" simply means "honest belief that a hazard exists." The purpose of this requirement is to remove from

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5 Id. at 1036-38.
the Act’s protection “refusals involving fraud or other forms of deception.” As the Commission has explained, such conduct is not deserving of protection and has no place under the Act.9

Good faith must be viewed from the miner’s perspective.10 Thus, the question is not whether there actually was a hazard, but whether the miner thought there was a hazard. In most cases, the question of good faith is likely to turn on the credibility of the miner’s own testimony,11 but circumstantial evidence may also be brought to bear. Relevant evidence in this regard may include evidence in the miner’s personnel history “suggesting a likelihood of pretext or ulterior motive” for the refusal to work.12 A miner’s failure to take simple safety precautions to eliminate a perceived hazard, for example, indicates pretext or bad faith.13 The Third Circuit has stated that “[q]uestions of imminence and degree of injury” may also bear upon the sincerity of a miner’s belief.14

B. Reasonable Belief

The Commission has rejected any requirement of “objective evidence” that an abnormally dangerous condition actually exists as a prerequisite for a miner’s protected refusal to work.15 As the Commission explained, dangerous conditions may develop quickly, and a miner cannot always await objective evidence of a hazard before he acts:

Unsafe conditions can occur suddenly and in remote sections of mines; the miner in question may be the only immediate witness; and physical evidence may be elusive. Situations are also bound to arise where outward appearances suggest a dangerous condition which closer subsequent investigation does not confirm. Furthermore, . . . such a test would chill the miner’s exercise of the right to refuse to work, an outcome inconsistent with the Act’s legislative history favoring a broad right in a uniquely hazardous working environment. Miners should be able to respond quickly to reasonably perceived threats, and mining conditions may not permit painstaking validation of what appears to be a danger.16

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8 Hogan, 4 Mine S. H. Cas. (BNA) at 1061; Robinette, 3 F.M.S.H.R.C. at 810.
9 Robinette, 3 F.M.S.H.R.C. at 810-11.
11 Robinette, 3 F.M.S.H.R.C. at 811 n.14; see id. at 813-14.
12 Hogan, 4 Mine S. H. Cas. (BNA) at 1061.
14 Consolidation Coal Co., 663 F.2d at 1219.
15 Hogan, 4 Mine S. H. Cas. (BNA) at 1061; Pratt, 5 F.M.S.H.R.C. at 1533; Haro v. Magma Copper Co., 4 F.M.S.H.R.C. 1935, 1944 (1982); Robinette, 3 F.M.S.H.R.C. at 811-12.
16 Robinette, 3 F.M.S.H.R.C. at 811-12.
However, the Commission has held that a miner's good faith belief in the existence of a hazard is not sufficient alone to create a right to refuse to work: the good faith belief also must be reasonable. The Commission has not required that the miner's perception be the *only* reasonable belief, but rather that it be "a reasonable one under the circumstances."17 Reasonableness, like good faith, turns largely on the miner's own testimony, which "can be evaluated for its detail, inherent logic, and overall credibility."18 The Commission will also permit the introduction of "corroborative physical, testimonial, or expert evidence" insofar as it bears upon the reasonableness of the miner's belief.19

When an operator specifically addresses a miner's safety complaints and either cures them or demonstrates that they are unfounded, a continuing refusal to work becomes unreasonable.20 However, evidence that a safety problem did not exist or had been eliminated is not relevant unless it was, or should have been, known to the miner at the time of his refusal to work.21 For this reason, an explanation or attempt to address a miner's fears should include specific information and support as to why there is in fact no problem.22 The key rule is that reasonableness must be evaluated "from the viewpoint of the refusing miner *at the time of refusal.*"23

C. *A Hazardous Condition*

The right to refuse to work arises only when a miner has a reasonable, good faith belief that "a hazard exists."24 As discussed in part III, the Commission's decisions provide minimal guidance, at best, as to how severe a condition must be to constitute a hazard. The Commission appears to have shied away from this issue, leaving an almost complete dearth of cases on the definition of "a hazard."

Some of the Commission's "reasonableness" cases, however, appear to reach the issue of whether a given condition *could* constitute a hazard. On the one hand, the Commission has held that a hazard may be found even if the danger

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17 *Pratt*, 5 F.M.S.H.R.C. at 1533; *Haro*, 4 F.M.S.H.R.C. at 1944; *Robinette*, 3 F.M.S.H.R.C. at 812.
18 *Robinette*, 3 F.M.S.H.R.C. at 812.
19 *Id.*
22 *Pratt*, 5 F.M.S.H.R.C. at 1534.
23 *Hogan*, 4 Mine S. H. Cas. (BNA) at 1061 (emphasis added).
24 *Robinette*, 3 F.M.S.H.R.C. at 810.
perceived by the miner arises out of his own physical limitations\textsuperscript{25} or exhaustion.\textsuperscript{26} The fact that no regulation or other safety standard has been violated does not necessarily mean that there is no hazard sufficient to support a protected work refusal.\textsuperscript{27}

On the other hand, a generalized complaint about mine conditions that "always pose[ ] some element of risk" will not justify a refusal to work.\textsuperscript{28} As one administrative law judge has explained, "[r]easonableness requires, at a minimum, that the miner's refusal to work concern a condition actually confronting him at the time."\textsuperscript{29} Beyond this limited case law, the Commission's decisions are virtually silent on the issue of what does, or does not, constitute a hazard.

D. Communication of Complaint

The final prerequisite to a protected work refusal is that the miner must ordinarily communicate his safety complaint to the operator before he stops work.\textsuperscript{30} As the Seventh Circuit has explained, the communication requirement is:

[A] device well suited to promoting the Act's fundamental objective of promoting mine safety and health. It gives the worker an incentive to bring a safety hazard to his employer's attention, for by doing so he gains the protection of the Act against retaliation (provided that his belief that there is a hazard is reasonable). The requirement also serves an evidentiary purpose: it helps the Commission distinguish between genuine and spurious invocations of the Act's protections. The worker who does not promptly report an alleged hazard to his employer is less likely to be sincere in his belief that there is a hazard than the worker who does.\textsuperscript{31}


\textsuperscript{26} Eldridge v. Sunfire Coal Co., 5 F.M.S.H.R.C. 408 (1983).

\textsuperscript{27} Hogan, 4 Mine S. H. Cas. (BNA) at 1061 n.3.

\textsuperscript{28} Bush, 5 F.M.S.H.R.C. at 999; see United Mine Workers ex rel. Simmons v. Southern Ohio Coal Co., 4 F.M.S.H.R.C. 1584, 1589 (1982) (work refused was "not more risky or dangerous per se than any other job in the mine.").

\textsuperscript{29} Secretary of Labor ex rel. Duncan v. T.K. Jessup, Inc., 3 F.M.S.H.R.C. 1880 (1981); see Tenney v. Eastern Associated Coal Corp., 3 F.M.S.H.R.C. 2681, 2702 (1981) (no right of work refusal because "no specific place in the mine [has been] mentioned [and no] specific safety hazard. . .has been raised in this proceeding.").

\textsuperscript{30} Miller, 687 F.2d at 194; Secretary of Labor ex rel. Dunmire v. Northern Coal Co., 4 F.M.S.H.R.C. 126 (1982).

\textsuperscript{31} Miller, 687 F.2d at 196. The Commission held that a communication requirement was mandated by Congress' intent that the right of protected work refusals extend to miners who act "as responsible human beings": "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." Dunmire, 4 F.M.S.H.R.C. at 133.
The communication requirement has three subparts: a miner must ordinarily communicate his safety complaint to his employer (1) if reasonably possible, (2) before refusing to work, and (3) in terms that will convey to his employer the general nature of the hazard that the miner believes exists. The "reasonable possibility" requirement is intended to allow workers some flexibility to deal with circumstances that require swift reaction. For example, there may be circumstances in which no advance communication is possible because no representative of the operator is readily available.

In addition, there may be occasions on which a complaint to the operator would be futile. The Commission has emphasized that futility cannot be assumed and will not be found absent "exceptional circumstances." As the Commission explained, "[p]ossible operator awareness of a hazardous condition does not mean that upon complaint by a miner an operator will continue to ignore its duty to correct the hazard." For this reason, even if the miner cannot communicate his complaint before his work refusal, he must report it reasonably soon thereafter.

In general, any communication sufficient to put the operator on "notice of the hazard that the miner believes exists" will be sufficient. Communications should be evaluated in a "common sense, not legalistic, manner," "not only in terms of the specific words used, but also in terms of the circumstances within which the words are used." The Commission has held that communication may involve "speech, action, gesture, or tying in with others' comments" and a communication from one miner "may be deemed to be on behalf of all concerned, even if not announced in such terms." In short, the communication requirement is vital to a protected work refusal, but is easily met.

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32 Dunmire, 4 F.M.S.H.R.C. at 133. The Commission explained this requirement as follows: 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.

Id.

33 Id.

34 Id.


36 Id. at 1028.

37 Dunmire, 4 F.M.S.H.R.C. at 133; Simpson, 4 Mine S. H. Cas. (BNA) at 1027.

38 Hogan, 4 Mine S. H. Cas. (BNA) at 1063.

39 Dunmire, 4 F.M.S.H.R.C. at 134.

40 Hogan, 4 Mine S. H. Cas. (BNA) at 1063.

41 Dunmire, 4 F.M.S.H.R.C. at 134.
E. Affirmative Self-Help and Help of Others

In Consolidation Coal Co. v. Marshall, the Third Circuit held that the Mine Act does not provide a right to take affirmative steps to protect fellow workers. In Marshall, the Commission found that the complaining miner had a reasonable, good faith belief that the continued operation of a damaged, and thus abnormally loud mining machine would threaten his hearing. The court of appeals did not dispute the Commission's holding that the miner's refusal to work under these circumstances was protected, but found that the miner also had shut down the machine so that other miners could not operate it. The court held that this affirmative action to prevent others from operating a dangerous machine was not protected:

While Pasula may have had a right to walk off the job pursuant to section 105(c)(1) of the Mine Act, because of a good faith belief that there was a danger to his health and safety, he went further and shut down the continuous miner machine so that no one else on his shift could work. Pasula did not have a right to close down the continuous miner machine in such a manner.

... It is still clear that the Mine Act does not provide for the right to shut down equipment so that other miners may not work. There is no right in the 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.

The subsequent decisions of the Commission have moved away from the thrust of Marshall and affirmed that miners have both the right to engage in affirmative self-help and the right to refuse to work for the protection of others. First, in Robinette v. United Castle Coal Co., the Commission held that a miner has the right to engage in affirmative self-help on the same conditions as he may refuse to work: a reasonable, good faith belief that affirmative actions is necessary. The Commission's only additional requirement is that the miner show that "his
affirmative action was a reasonable approach under the circumstances to eliminating or protecting against the perceived hazard."

Second, in Cameron v. Consolidation Coal Co., the Commission held that a miner may refuse any work assignment that would jeopardize a co-worker's safety or health. The Commission recognized a mine operator's need "to maintain its ability to control its workforce effectively," and, therefore, refused to protect "so-called 'sympathy' work stoppages." For this reason, the Commission required not only a reasonable, good faith belief of a hazard to another miner, but also "a direct nexus" between the refusing miner's work assignment and the feared. As the Commission explained, refusal to work on behalf of another is protected only "if such refusal is necessary to prevent [the refusing miner's] personal participation in the creation of a danger to others." The Fourth Circuit Court of Appeals affirmed the Commission's Cameron decision as to both the right to refuse work for the protection of others and the "direct nexus" requirement.

The Cameron and Marshall decisions are only superficially inconsistent. A miner's right to engage in affirmative action and his right to refuse work that could injure another do not carry as a necessary corollary the right to engage in affirmative action on behalf of others, as did the miner in Marshall. Certainly, nothing in Cameron states or implies that a miner may actively interfere with the work of another miner when there is no danger to himself. On the contrary, the Commission's "direct nexus" and "personal participation" requirements appear to confirm that a miner has a right to restrict only his own actions, and not those

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47 Id. The Commission attempted to harmonize the Third Circuit's Marshall decision by asserting that the miner's actions in that case had been "unreasonable and excessive": 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. . . . 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.

Dunning, 4 F.M.S.H.R.C. at 131-32 n.12 (citation omitted).

48 Cameron, 7 F.M.S.H.R.C. at 322. In Cameron, the miner believed that his operation of a train with an inadequate braking system would endanger another miner riding on the trailing locomotive. Id. at 320 & n.2. The Commission found support for this protection in the language of the Act itself, which prohibits discrimination against a miner because of his exercise of a statutory right "on behalf of himself or others." Id. at 321-23.

49 Id. at 323.
50 Id. at 324.
51 Id. (emphasis added).
52 Consolidation Coal Co., 795 F.2d 364.
of others. Under these tests, and the Commission's general "reasonableness" requirements, there is little doubt that the Marshall case would be decided the same way today as it was in 1981.

F. Discrimination and Causation

Finally, the existence of a protected work refusal alone is not sufficient to support a cause of action against a mine operator: the complaining miner also must show that he was discriminated against because of the protected work refusal. Under the Commission's decisions, a miner who engaged in a protected work refusal establishes a prima facie case of unlawful discrimination by demonstrating that some adverse action of his employer was motivated in any part by the protected activity. If the miner succeeds in establishing a prima facie case, the operator may defend affirmatively by proving that (1) the adverse action was also motivated by the miner's unprotected activity, and (2) the unprotected activity alone would have been sufficient to support the adverse action. The Commission has emphasized that although the intermediate burden of coming forward with evidence shifts to the operator when a prima facie case has been established, the "'ultimate burden of persuasion' on the question of discrimination rests with the complainant and never 'shifts.'"

A prima facie case of discriminatory intent may be established exclusively through circumstantial evidence. The most common indicia of discriminatory intent are: (1) knowledge that the miner has engaged in protected activities; (2) hostility toward the protected activities; (3) coincidence of timing between the protected activities and the adverse action; and (4) disparate treatment of the miner engaging in the protected activities. The Commission has held that a miner need not prove disparate treatment to establish a prima facie case of discrimination. Knowledge of the miner's protected activity is "probably the single most

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53 Pasula, 2 F.M.S.H.R.C. at 2799; Hogan, 4 Mine S. H. Cas. (BNA) at 1060.
54 Pasula, 2 F.M.S.H.R.C. at 2799-2800; Hogan, 4 Mine S. H. Cas. (BNA) at 1060.
57 Indeed, a miner may prove unlawful discrimination by showing that an operator discriminated against him because it believed that he had engaged in protected activity, even when the miner in fact had not. Moses v. Whitley Development Corp., 4 F.M.S.H.R.C. 1475, 1480 (1982).
58 Chacon, 3 F.M.S.H.R.C. at 2510.
59 Id. at 2513.
important aspect of a circumstantial case," and may itself be proved by circumstantial evidence.\footnote{\textit{Id.} at 2510; see Schulte v. Liza Indus. Inc., 6 F.M.S.H.R.C. 8, 15 (1984).}

Once the miner has established a prima facie case, the operator can respond by showing that the miner would have been disciplined in any case for legitimate business reasons, such as the miner's unsatisfactory work record,\footnote{Schulte, 6 F.M.S.H.R.C. at 15. Knowledge of a protected activity, in coincidence with adverse action alone, may be enough to establish a prima facie case of discrimination. See \textit{id.} at 15-16.} incompetence,\footnote{Bradley, 4 F.M.S.H.R.C. at 993; see Robinette, 3 F.M.S.H.R.C. at 819 ("'inferior' work").} or violation of company rules and practices.\footnote{Sammons, 6 F.M.S.H.R.C. at 1398. The operator need not prove that the miner was actually incompetent, only that he was fired because he was believed to be incompetent. \textit{Id.} at 1398 n.5.} In at least two cases, the Commission has suggested that a miner's improper behavior in the course of a work refusal could serve as a legitimate basis for discipline.\footnote{Mooney v. Sohio Western Mining Co., 6 F.M.S.H.R.C. 510, 514 (1984); Schulte, 6 F.M.S.H.R.C. at 16-17; Chacon, 3 F.M.S.H.R.C. at 2514-17.} The Commission has emphasized that it will not "pass on the wisdom or fairness of such asserted business justifications,"\footnote{\textit{Id.}} but rather will determine only whether they are "pretextual."\footnote{Harco, 4 F.M.S.H.R.C. at 1941 (miner's actions were allegedly "duplicious and dissembling," and "broke the 'chain of command' ")); Secretary of Labor ex rel. Cooley v. Ottawa Silica Co., 6 F.M.S.H.R.C. 516, 520-21 (1984), aff'd per curiam sub nom. Ottawa Silica Co., 780 F.2d 1022, 3 Mine S. H. Cas. (BNA) 2001 (6th Cir. 1985) ("profanity" and "upprobrious conduct" in the course of work refusal).} As the Commission explained, a judge has no business "substitut[ing] his business judgment or sense of 'industrial justice' for that of the operator."\footnote{Bradley, 4 F.M.S.H.R.C. at 993.} Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on 'good' business practice or on whether a particular adverse action was 'just' or 'wise.' \footnote{Harco, 4 F.M.S.H.R.C. at 1938.} \footnote{\textit{Id.}}

Of course, it is not enough for the operator to show that the miner could have been disciplined for other reasons; he must demonstrate that the miner's unprotected activities were an actual motivating factor and would alone have justified the adverse action taken:

It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected activity did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider
the employee deserving of discipline for engaging in the unprotected activity done and that he would have disciplined him in any event.\textsuperscript{70}

The question whether an operator would have disciplined the miner for unprotected activities alone frequently turns on the credibility of the operator's own testimony.\textsuperscript{71} However, the Commission may also undertake "a limited examination" of the "substantiality" of the proffered justification.\textsuperscript{72} In this regard, the operator may demonstrate the existence of personnel rules and practices forbidding the practice in question, the miner's knowledge of these rules or practices, prior warnings to the miner, or past discipline consistent with that meted out to the complaining miner.\textsuperscript{73}

III. TOWARD A STANDARD OF SEVERITY AND IMMINENCE FOR PROTECTED WORK REFUSALS

The case law outlined above provides a generally workable and equitable balance between the interests of miners and those of mine operators. On the one hand, miners are protected in their right to refuse to work in conditions that they reasonably—and genuinely—believe to be unsafe or unhealthy. On the other hand, mine operators may safely discipline miners who are insubordinate, incompetent, or violate established work rules. Both mine safety and mine discipline are well served by this balance.

The number of refusal to work cases has mushroomed in recent years, however, and it appears that work refusals have become a substitute for, rather than a supplement to, the statutory measures designed to address miner complaints. The fundamental problem is the lack of any standard for identifying those hazards that are sufficiently severe and imminent to justify a protected work refusal. The Commission has consistently failed to establish any such standard, and by failing to do so it may have unnecessarily tipped the balance away from and undercut mine discipline in an area in which no vital safety concerns are even at stake. The need for some clearly articulated standard of severity and immediacy for hazards justifying protected work refusals is addressed in this concluding section of the Article.

A. The Absence of a Severity Standard

From the time that it first found an implied right to refuse work in 1980, the Commission has consistently declined to address the issue of whether the right

\textsuperscript{70} Pasula, 2 F.M.S.H.R.C. at 2800 (emphasis in original).
\textsuperscript{71} Robinette, 3 F.M.S.H.R.C. at 820.
\textsuperscript{72} Chacon, 3 F.M.S.H.R.C. at 2516 (emphasis in original).
\textsuperscript{73} Schulte, 6 F.M.S.H.R.C. at 16; Bradley 4 F.M.S.H.R.C. at 993; Mooney, 6 F.M.S.H.R.C. at 514.
should be limited to hazards of some severity and immediacy. Thus, the Commission, in its initial Pasula decision, held that a miner's work refusal right could not be limited to the terms of his union contract, which authorized work refusals in the face of conditions that "could reasonably be expected to cause death or serious physical harm." Instead, the Commission decided only that the hazard faced by Pasula was "sufficiently severe whether or not the right to refuse work is limited to hazards of some severity." Three years later, the Commission again expressly declined to articulate any severity standard, insisting that it would instead rely upon "gradual" development of the law in the cases before it as "the appropriate vehicle for molding this important right."

As a result of this silence on the part of the Commission, virtually any hazard, no matter how inconsequential, could arguably support a protected work refusal. Recent cases before the Commission and its administrative law judges appear to trivialize the right, and play into the hands of miners who would abuse it. In Cooley v. Ottawa Silica Co., for example, a miner was discharged, at least in part, for his refusal to manually light the pilot on a large, natural gas operated sand dryer. The Commission found that Cooley had performed this task on at least thirty prior occasions with only a single incident, in which he had "singed the hair on the knuckles of his right hand." Indeed numerous other workers had performed the same task, and were "personally unconcerned with the danger." The Commission made no finding that any consequence greater than singed knuckle hair was likely to result from manual lighting of the pilot, and indeed failed to discuss the severity issue at all. Nonetheless, the Commission found that Cooley had a reasonable good faith belief that a "hazard" existed; therefore, his work refusal was protected.

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See Broderick & Minahan, supra note 4, at 1036-38.

Pasula, 2 F.M.S.H.R.C. 2786.

Id. at 2794.

Id. at 2793, see Robinette, 3 F.M.S.H.R.C. at 816.

Pratt, 5 F.M.S.H.R.C. at 1533.

Cooley, 6 F.M.S.H.R.C. 516.

Cooley "had a history of absenteeism, work refusals, and insubordination, and was nearing the conclusion of a one-year disciplinary probation when he was discharged." Id. at 517. Further, he engaged in "profanity" and "opprobrious conduct" in the course of his work refusal. Id. at 520. The Commission found that Cooley would not have been discharged for this unprotected conduct alone. Id.

Id. at 517.

Id.

Id. at 519.

Id. at 518. See also Perando v. Metluki Coal Corp., 8 F.M.S.H.R.C. 364 (1986) (review pending) (miner's extended absence from underground work after diagnosis of bronchitis (but not pneumoconiosis) held to be protected work refusal, entitling miners to transfer to dust free job at no loss of pay).
B. The Need for a Severity Standard

After Cooley, it may become virtually impossible for mine operators to maintain any semblance of discipline among their employees. Miners like Cooley, who have records of repeated insubordination, will be able to refuse any assignment that would pose a slight risk of even such minor injury as a cut, scrape, or bruise.\textsuperscript{85} These miners cannot be required to do their jobs, and will not be subject to any form of discipline. The problems this rule poses for mine operators cannot be overstated: virtually any job in a coal mine poses some degree of risk to health and safety; so in theory, virtually any work could be refused.\textsuperscript{86}

The Commission's requirement of a good faith, reasonable belief does not resolve this problem. For example, a miner may have a good faith, reasonable belief that a minor, insignificant hazard exists. Similarly, he may have a good faith, reasonable belief that performing a task on a repeated basis could subject him to a health risk at some point in the undetermined future. In either case, he would almost certainly have options available to him to address the risk short of refusing to work. In either case, however, the miner's belief that "a hazard exists" would be reasonable, and the Commission's standards for a protected work refusal would be met. In short, the Commission has required only that the miner's belief be reasonable, not that his refusal to work on the basis of that belief be reasonable.

Under these circumstances, any mine operator who disciplines a miner for refusing work assignments on the basis of even the flimsiest excuse could be subject to protracted litigation and second-guessing by the Commission and the courts. Moreover, the operator would not be able to prevail simply by showing that the excuses offered by the miner were flimsy—he would have to demonstrate that the miner lacked a "good faith belief" that even an insignificant or remote hazard existed. Proof of a pretextual motive is likely to be extremely difficult. In any case, this standard provides absolutely no guidance for the miners and mine operators who must resolve questions of discipline on a daily basis.

This extraordinary right of miners to walk off the job for the most minimal reason is not required by either the Mine Act or its legislative history. As the Commission has acknowledged, the language of section 105(c)(1) of the Act does not by its terms protect \textit{any} work refusal.\textsuperscript{87} Under a similarly worded provision

\textsuperscript{85} E.g., Bjes, 6 F.M.S.H.R.C. 1411 (knee banged against steering column of shuttle car because of placement of brake pedal).

\textsuperscript{86} As explained above, a miner must point to a concrete hazard that actually faces him at the time of his refusal to work. \textit{See supra} notes 28, 29, and accompanying text. As mine conditions are rarely if ever "normal," however, the creative miner is not likely to be hard pressed to find some "hazard."

\textsuperscript{87} Pasula, 2 F.M.S.H.R.C. at 2789.
of the Occupational Safety and Health Act of 1970 ("OSHA"), the Secretary of Labor has afforded workers a limited right to refuse work, but only in instances in which "there is a real danger of death or serious injury." The legislative history of the Mine Act, unlike that of OSHA, clearly indicates that Congress intended that section 105(c)(1) be construed to accord miners a right to refuse work. However, the legislative history is silent on the issue of how severe or imminent a hazard must be before a miner may refuse work. It does not state that any hazard, no matter how small, will support a protected work refusal. And it certainly does not state that a miner may refuse work even when he has less drastic alternatives available to him.

In many instances, the miner does have a less drastic alternative available: the statute affords him the right to obtain a federal inspection of the mine if he has reason to believe that a safety violation or imminent danger exists. If the federal inspector finds that the Act has been violated, he may order the condition be corrected. If the inspector finds that the violation creates an imminent danger, he may order the area closed until the condition is corrected. In cases such as Cooley, in which the allegedly unsafe condition continues over a period of months with no imminent danger of severe injury, these safety mechanisms provide the miner with ample opportunity to remedy a problem without refusing to work.

The Supreme Court has held that the existence of an effective worker complaint mechanism under OSHA supports the limitation of the implied work refusal right under that Act to cases of severe and imminent conditions. The Seventh Circuit Court of Appeals has suggested that a similar distinction between protected complaints and protected work refusals should be drawn under the Mine Act:

A complaint does not disrupt the operations of a mine, so even frivolous complaints impose few costs on the employer. But a work stoppage is invariably a source of significant cost. Thinking our way as best we can into the minds of the Senators and Representatives who voted for the 1977 amendments, we can imagine them wanting to allow miners to complain freely about the conditions of safety and health in the mine without having to worry about retaliation if the complaint was later determined to have been frivolous yet at the same time not wanting to render mine operators powerless to deal with miners who, simply by alleging a hazard to safety and health, claim a privilege to walk off the job without notice. We are unwilling to impress on a statute that does not explicitly entitle

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72 Mine Act § 103(b), (d), 30 U.S.C. § 813(b), (d) (1982).
73 Mine Act § 107, 30 U.S.C § 817 (1982).
miners to stop work a construction that would make it impossible to maintain
discipline in the mines. 95

On this basis, the Seventh Circuit determined that both the miner's belief in the
existence of a hazard, and his decision to stop work must be reasonable under the circumstances.96

In one of its earliest decisions addressing the scope of the newly-fashioned
work refusal right, the Commission refused to limit this right to cases in which
death or serious injury appeared imminent.97 While OSHA "must apply nationally
to a wide range of typical jobs and work settings," the Commission reasoned,
"the Mine Act applies more narrowly to one of the nation's most hazardous
occupations and working environments."98 This distinction may well justify, as
the Commission suggested, "a broader and simpler definition" of the work refusal
right under the Mine Act.99 However, it cannot support the absence of any severity
standard. The fact that a miner faces more dangerous conditions than other work-
ers does not make his cuts, scrapes, and bruises more dangerous than those of
any other worker. The fact that a miner must occasionally make snap judgments
as to the severity of a hazard does not mean that he should be entitled to refuse
work when he decides—after several months—that the risk of singed hair on his
knuckles is just too much to bear.

In its initial decision creating the right of protected work refusals, the Com-
mission held that this right was necessary because a miner's statutory remedies
"would be hollow indeed . . . if before the regular statutory enforcement mech-
anisms could at least be brought to bear, the condition complained of caused the
very injury that the Act was intended to prevent."100 Unfortunately, the Com-
mission appears to have lost sight of this original purpose of the right to refuse
work, making it a substitute for, rather than a supplement to the remedies af-
forded for dangerous working conditions in the Act itself. The Commission should
return to the language and intent of the Mine Act, and reserve the right to refuse
work for those serious cases in which the miner has no reasonable alternative to
the work stoppage. The standards of OSHA may not be entirely appropriate under
the Mine Act, but the Commission must place some limitations of severity and
imminence of danger upon the miner's right to walk off the job without sanction.

IV. Conclusion

The law governing discrimination under the Mine Act has developed consid-
erably since 1980, when the Commission first held that miners have a right to

95 Miller, 687 F.2d at 196 (emphasis added).
96 Id. at 195.
97 Robinette, 3 F.M.S.H.R.C. at 809 n.12.
98 Id. at 810.
99 Id.
100 Pasula, 2 F.M.S.H.R.C. at 2790.
refuse work in certain circumstances without retaliation. In most respects, the emergent law creates a reasonable and equitable balance between mine safety and mine discipline. However, the Commission consistently has failed to establish any standard of severity or imminence for hazards that will support protected work refusals. Unless the Commission soon articulates such a standard to guide mine management and miners alike, the balance between safety and discipline may be seriously threatened, and the right of protected work refusals could become more cancer than cure in the life of our nation’s mines.