

CCASE:  
JAMES CRUMBAKER V. PYRO MINING  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

JAMES F. CRUMBAKER,  
COMPLAINANT

Complaint of Discharge,  
Discrimination, or  
Interference

v.

PYRO MINING COMPANY,  
RESPONDENT

Docket No. BARB 79-313

Pyro Mine No. 11

DECISION

Appearances: William R. Thomas, Esq., Spenard & Thomas, 18 Court Street, Madisonville, Kentucky, for Complainant  
Kirby Gordon, Esq., Gordon & Gordon, 111 Frederica Street, Owensboro, Kentucky, for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued September 21, 1979, a hearing in the above-entitled proceeding was held on November 28, 1979, in Evansville, Indiana, under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

Upon completion of the evidence presented by the parties, I rendered the following bench decision which is reproduced below (Tr. 281-289):

The application or complaint, I should say, in this case was filed on March 13, 1979, and as my opening statement indicated, was filed by Mr. Crumbaker after the Secretary of Labor had made a finding that the complainant was not involved in an activity protected by provisions of Section 105(c)(1) of the Act at the time he was discharged. Therefore, I base all the findings that I shall make in my decision entirely on what the witnesses have said here today.

The issue, of course, is whether Mr. Crumbaker was engaged in a protected activity under Section 105(c)(1), so as to be entitled to a finding of discrimination and a ruling that he should be given the relief provided for in Section 105(c)(3).

I shall first make some findings of fact and if those facts are entirely inconsistent with some of the witnesses' testimony, I shall in the subsequent part of my decision indicate, briefly, why I have ruled in favor of one witness as against another.

The incident which led up to Mr. Crumbaker's discharge occurred on November 21, 1978. Mr. Crumbaker had come to work on the day shift and the section foreman or unit foreman on that day shift was Mr. Griffin. Mr. Crumbaker first went to the number four entry and found that it needed to have some bolts installed and he proceeded to make that his first work of the day.

After he had completed his roof bolting in the number four entry, he constructed some crossovers at the intersection of the number four entry at the last open crosscut. And after completing those, he traveled into the crosscut between the fifth and sixth entries where Mr. Griffin had made some marks, indicating that additional roof bolts should be installed.

Mr. Crumbaker was in the process of beginning to install roof bolts in the crosscut when Mr. Griffin came into the crosscut and told Mr. Crumbaker that he wanted Mr. Crumbaker to go and get his roof bolting machine loaded with an additional supply of bolts, so as to be able to bolt the number six entry ... the face of number six entry. At that time, Mr. Crumbaker told Mr. Griffin that the crosscut was unsafe, in his opinion, until such time as the additional roof bolts had been installed.

At that point, Mr. Griffin told Mr. Crumbaker that his roof bolting machine was not where he wanted it to be and that Mr. Crumbaker should move the roof bolting machine out of the crosscut.

It appears on the basis of both Mr. Griffin's and Mr. Crumbaker's testimony that Mr. Crumbaker might have had an option to whether he should continue on through that crosscut or back out of it and go down to the number two crosscut and over to the number six entry. But, at this point, it appears that both of the parties, the section foreman and Mr. Crumbaker, were probably somewhat heated in their emotional state and Mr. Griffin did not pursue any discussion on the topic, but simply gave Mr. Crumbaker an option of either moving the roof bolting machine out of the crosscut or going to the house, which everyone agrees in the case, meant if Mr. Crumbaker did not move the roof bolting machine at that moment out of the crosscut, that he would be discharged.

Mr. Crumbaker felt strongly that it was unsafe to...for anyone, himself or anyone else, to go through the crosscut; therefore, he took the option of going to the telephone and calling the mine foreman's office to advise the mine foreman that he needed transportation out of the mine because he'd been discharged by Mr. Griffin. Those are the basic facts that have to be found in order for one to apply Section

105(c)(1) to them, to determine whether Mr. Crumbaker was involved in a protected activity or not.

And, of course, Section 105(c)(1) reads and I quote, "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine \* \* \*". And I shall stop quoting at that point, because I think that that's as far as[is] needed to apply as much of the Section as is [required] to apply the facts that we have in this case.

And I find that on the basis of the facts that Mr. Crumbaker was engaged in protected activity at the time of his discharge, because if there's any evidence in the case that's clear, it is that there was a violation of the roof control plan because the roof bolts in the crosscut between the number five and six entries were farther apart than they should have been.

They're supposed to be no more than five feet apart and even Mr. Griffin admits that they were between six and six and a half feet apart. And he conceded that in his deposition. He may have been correct in saying that they were up to seven feet apart. Now, I have [in] many cases, civil penalty cases, assessed substantial penalties for violations of the roof control plan which were no greater than the one involved in this proceeding. And I have had, in many cases, many [i]nspectors testify that more miners are killed in underground mines for violation of the roof control plans than any other cause of death and injury in mines. And therefore, if there's any kind of complaint that a miner can make which is beneficial to the preservation of the safety of the miners, it is for a man to insist that a roof control plan be followed and that roof bolts be installed before equipment or people pass through entries or crosscuts which have not been bolted in accordance with the plan.

Now, there's been testimony that the roof in the unit number three was safe and appeared sound, but [i]nspectors are constantly telling me, it's good roof that kills people because an unsafe or a hazardous looking roof gets supported, while the good roof is allowed to be unsupported and that's the time that a hunk of roof falls and injures or [k]ills someone. So, we cannot say that because Mr. Griffin walked under this unsupported roof that that made i[t] okay for everyone else to do so.

Now, I agree with Mr. Thomas that the testimony of Mr. Wilson is very helpful in substantiating the position of Mr. Crumbaker in this case. Mr. Wilson was very certain of where the power center should have been and where the trailing cables for all the equipment was and while he disagreed with both Mr.

Griffin and Mr. Crumbaker as to the location of those trailing cables, but still ... his testimony was still supportive of the fact that Mr. Crumbaker was involved in trying to support a place in this crosscut. And Mr. Wilson's testimony shows it was his intention to go through that crosscut between the number five and number six entr[ies] and that was his way of going across the unit in order to mine or load from the number six entry, across to the number one entry. And, therefore, Mr. Wilson's testimony does support the complaint as it was stated by Mr. Crumbaker, namely that Mr. Crumbaker was entitled to assume, based on normal operating stages that the roof bolting machine was right behind ... excuse me, the loading machine was right behind Mr. Crumbaker's roof bolting machine and that Mr. Wilson had every intention of going under that unsafe roof if Mr. Crumbaker had gone under that unsafe roof and had passed on out with the roof bolting machine to the number six entry.

The testimony of Mr. Griffin in this proceeding was extremely erratic. He changed his position several times about the location of trailing cables and whether they were supported and not supported. And I was not at all certain that he was clear in his mind as to the situation that existed at the time that Mr. Crumbaker was discharged. And I think that the discussion that occurred on the morning after Mr. Crumbaker's discharge, on November 22, were largely an effort by the mine foreman, Mr. Ramsey, to support the action which M[r]. Griffin had taken.

It's normal for one supervisor to try to sustain the act of another supervisor, because that's the only way to establish discipline in a mine or anywhere else. So, I'm not surprised that Mr. Ramsey supported Mr. Griffin. The fact that Mr. Ramsey declined to give Mr. Crumbaker a job even after Mr. Crumbaker was willing to concede that he was wrong, shows that management was not overly pleased with Mr. Crumbaker's insist[ence] upon complying with safety regulations. And I think that the fact that Mr. Crumbaker refused to operate the shuttle car that was not in good mechanical condition would be a reason for management to be just as happy to not have that sort of man on their payroll. But the fact remains that Mr. Crumbaker has a history, based on this record, of trying to support safety in the mines and that if there's any reason at all for having Section 105(c)(1) in the Act, it is to give protection to a man who is willing to take a position as to safety in the mine. And therefore, instead of our condemning Mr. Crumbaker for his contentiousness or his inability to get along with people, I think instead we owe him an apology and we should congratulate him for being willing to [complain about unsafe conditions].

As Mr. Thomas has recognized, that sort of individual

is, perhaps, not going to be liked by management, but sometimes a thorn in the flesh is a beneficial tool to bring about the kind of safety that this Act was intended to accomplish in coal mines.



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I may not have touched on all the points that the arguments have, but I've tried to ... that all the arguments have considered, but I have tried to give my reasons for finding in Mr. Crumbaker's favor.

WHEREFORE, it is ordered:

(A) The complaint filed by Mr. James F. Crumbaker is granted on the basis of my findings that Mr. Crumbaker was engaged in a protected activity under Section 105(c)(1) at the time of his discharge. And, therefore, he's entitled to the relief which is provided for in Section 105(c)(3).

(B) James F. Crumbaker is reinstated to his position of roof bolting machine operator at Pyro Mine, Number Eleven and he shall be paid back wages beginning on November 21 at ten a.m. and extending up to the present time, including interest at eight percent less \$6,200 earned by Mr. Crumbaker for work for Mid-America Canning Corporation during the period covered by his discharge.(FOOTNOTE 1) The pay will be computed on the basis of nine dollars and twenty-eight cents an hour on the basis of a forty-one hour week, less insurance and state and federal taxes. Mr. Crumbaker shall also be entitled to whatever royalty and incentive pay other miners would have received for that same period. Additionally, he shall be entitled to payment for medical benefits for his family which he has personally paid during that period, and for reimbursement for all attorney's fees.(FOOTNOTE 1)

(C) Finally, there shall be removed from Mr. Crumbaker's personnel file, any references to the discharge on November 21, 1978.

Richard C. Steffey  
Administrative Law Judge

~FOOTNOTE 1

The provisions for offset for earnings and for reimbursement for attorney's fees were not part of my bench decision.