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SOL (MSHA) V. PILOT COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
EX REL BILLY GENE KILGORE,
APPLICANT

Complaint of Discharge,
Discrimination, or Interference

Docket No. VA 79-144-D

v.

PILOT COAL COMPANY,
RESPONDENT

DECISION

Appearances: James H. Swain, Esq., and Kenneth L. Stein,
Esq., Office of the Solicitor, U.S.
Department of Labor, Philadelphia, Pennsylvania
for Applicant J. Robert Stump, Esq., Sturgill
& Stump, Norton, Virginia for Respondent

Before: Chief Administrative Law Judge Broderick

Statement of the Case

The complaint filed in this proceeding on September 20, 1979, alleges that Billy Gene Kilgore was discharged by Respondent on or about May 18, 1979, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). Pursuant to notice, a hearing on the merits was held in Norton, Virginia, on November 29, 1979. Billy Gene Kilgore and Donnie Brickley testified for the Applicant. Bruce Arwood, Darrell Baker, Mack Thacker and Kelly Fultz testified for the Respondent. Both parties were afforded the opportunity to submit post hearing briefs. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

Statutory Provision

Section 105 of the Act provides in part:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the

exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection 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 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, applicant for employment, or representative of miners 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. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

Issues

1. Whether Applicant Billy Gene Kilgore was discharged by Respondent on or about May 18, 1979?

2. If so, whether the discharge was because of activity protected under section 105 of the Act?

3. If Applicant was not discharged but resigned, was his resignation a constructive discharge?

4. If so, was it because of activity protected under section 105 of the Act?

Stipulation

The parties made the following stipulation on the record:

Number one, Pilot Coal Corporation is a coal mining corporation doing business in the Commonwealth of Virginia and maintains its principal offices in Wise, Virginia.

Number two, the corporation, as of this date, operates one underground mine and one surface mine. Surface mine No. 2 employs approximately [eight] employees on one production shift per day. The mine operations of the Respondent would be classified as "small". Total daily tonnage from the underground mine is 100 tons and 200 tons from the surface mine.

Number three, Respondent has never been found guilty civilly or criminally of a violation of the discrimination provisions of the Federal Mine Safety and Health Act (Coal Mine Health and Safety Act).

Number four, the Complainant, after termination did not seek reinstatement with the Respondent, and the Respondent did nothing to hinder the resolution of the instant matter.

Number five, if Clarence A. Goode were called to testify he would state: (A) I have been employed by MSHA

(MESA) since January of 1971. (B) I have been a special investigator since October, 1977. (C) As a special investigator I investigate complaints under Section 105(c) and Section 110 of the 1977 Act. (D) I have received extensive training totaling 240 hours in regard to the execution of my duties as a special investigator. Further, I have conducted to date approximately twelve discrimination cases and have supervised other investigations of discrimination complaints conducted by my staff. These supervised investigations total about 85 cases.

Number six, in the instant case, from my investigation, I conclude that the alleged discrimination which may have taken place did not indicate a pattern or practice of any general discriminatory action by the Respondent. Seven, in the event that the maximum penalty authorized under this Act were assessed against the Respondent, the payment of said penalty would not significantly affect the Respondent's ability to continue in business.

Number eight, if Respondent were called to testify, Kelly Fultz, corporation president, would testify that if the maximum penalty were assessed against the Respondent, it would significantly affect the Respondent's ability to continue in business. And that is the end of the stipulation.

Findings of Fact

1. The facts stated in the above stipulation are accepted and adopted as Findings of Fact.

2. Applicant was hired by Respondent in or about January, 1978, primarily to operate a front-end loader, but also to operate dozers and haulers.

3. On one occasion prior to May 1979, Applicant quit his job after spilling some oil on his person while waiting to fuel his front-end loader. After about a week, he returned, and was accepted back on the job.

4. On May 14, 1979, the front-end loader was having problems with its turbo charger and was removed from service until a needed part could be procured.

5. On May 15, 1979, Applicant was assigned to drive a 35 ton hauler truck. His only previous experience on such a vehicle was about 7 years previously when he intermittently drove a truck for about a month.

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6. On May 15, 1979, Applicant drove the hauler, most of the driving being on level ground. He complained of the brakes and brake fluid was added. Applicant did not have any other difficulties driving the hauler on that day.

7. On May 16, Applicant was required to drive his truck up a newly-made incline to the loading point. Because there was not room to turn around at the loading point, the truck had to be backed up the incline. The road was soft and with an empty truck it was difficult to back up. Applicant was unable to back up the incline and was afraid of turning the truck over. After another driver hauled several loads, there was enough room to turn around at the loading point.

8. Applicant then drove up forward and hauled approximately six loads. He testified that he was having difficulty with the retarder brakes and was unable to slow the truck sufficiently to successfully negotiate the curve coming down the incline.

9. After he got his last load that day while turning, one wheel dropped into a hole and the other ran up on a rock. Applicant got out of the hauler and it was righted by another driver.

10. Applicant then told the mechanic and the foreman that he did not think he could operate the hauler safely and he was quitting.

11. The road was over 16 feet wide, had a berm on one side and the bank on the other. There was loose material where the road had been recently regraded.

12. The foreman attempted to persuade Applicant not to quit, and offered to put him on sick leave for the remainder of the day. Applicant refused the offer.

13. On May 18, 1979, Applicant returned to the mine, having filed a complaint with MSHA the previous day, and was told that the loader was not fixed and that driving the hauler was the only work available for him.

14. Applicant was not told on May 16 or May 18 that he was discharged.

15. Applicant Billy Gene Kilgore was not discharged from his employment by Respondent on or about May 18, 1979, but voluntarily left the employment.

16. Applicant quit his job in part because he was afraid of driving the hauler up and down the incline.

17. Neither the hauler nor the road were unsafe for normal operation.

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18. The circumstances surrounding applicant's resignation did not constitute a constructive discharge.

Conclusions of Law

1. At all times relevant to this decision, Applicant and Respondent were subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. Applicant was not discharged, interfered with, or otherwise discriminated against because of activity protected under section 105 of the Act.

Discussion

The evidence establishes that Kilgore was not discharged but voluntarily quit his job. The evidence further establishes that there were no safety hazards related to the road or the hauler. He did not wish to continue work because he was fearful that he would be injured due to his lack of experience with the vehicle. I do not believe that refusal to work under these conditions is activity protected under 105(c) of the Act, or that it can be construed as a discharge or discrimination by Respondent forbidden by that section.

4. Since Respondent did not violate the Act as alleged in the complaint, no penalty is assessed.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint is DISMISSED.

James A. Broderick
Chief Administrative Law Judge