FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER. COLORADO 80204

1 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex rel. Alfred A. Santistevan, Applicant,	Application for Review of Discrimination
v.	DOCKET NO. WEST 80-85-D
C.F.& I. STEEL CORPORATION, Respondent.	Mine: Maxwell

DECISION AND ORDER

APPEARANCES:

Thomas E. Korson, Esq., Office of the Regional Solicitor, United States Department of Labor, for the Applicant,

Richard L. Fanyo, Esq., Welborn, Dufford, Cook, and Brown, for the Respondent,

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

This action was brought by Applicant, the Secretary of Labor, Mine Safety and Health Administration (MSHA) [hereinafter "the Secretary"], on behalf of Alfred A. Santistevan [hereinafter "Santistevan"] pursuant to the provisions of section 105(c)(2)[1] of the Federal Mine Safety and Health Act

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i/Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), reads in pertinent part:

> "Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of the subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. ... If upon .

of 1977, 30 U.S.C. 5801 et seq. (1978) [hereinafter cited as "the 1977 Act" or "the Act"]. The Secretary alleges that Santistevan received two suspensions, one for 3 days and one for 30 days, because he made complaints to his foreman of unsafe conditions in the coal mine in which he worked. The two unsafe conditions alleged in the Complaint of Discrimination filed by Applicant were that: (1) "on March 29, 1979, the tram motor of the No. 3 Lee Norse Hardhead Miner in Unit 3 was pulling and popping and was unsafe," and (2) "Romero [Jose M. Romero, Assistant Mine Foreman, hereinafter "Romero"] ordered Santistevan to put up an I-beam weighing approximately 600 pounds by himself."

The Respondent denies that it discriminated against Santistevan, and alleges that he was issued the 3 day suspension on June 26, 1979, because of insubordination and the 30 days suspension on June 27, 1979, because he instigated an unauthorized work stoppage.

Pursuant to notice, a hearing was held on the merits in Pueblo, Colorado, on March 4, 5, and 6, 1980. The completion of the filing of post hearing briefs took place on June 23, 1980.

GOVERNING PRINCIPLES

Burden of Proof.

The Applicant as the proponent of the order has the burden of proof, to a preponderance of the evidence, that the Respondent discriminated against

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> . . investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission ... alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing ... 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. * * * "

Santistevan in violation of section 105(c)(1)[2] of the Act. 30 U.S.C. § 815(c)(2), 5 U.S.C. § 556(d). The preponderance of the evidence is defined as the greater weight of evidence or evidence which is more credible and convincing to the mind. Button v. Metcalf, 80 Wis. 193, 49 N.W. 809 (1891). It is also defined as that evidence which best accords with reason and probibility. U.S. v. McCaskill, 200 F. 332 (1912).

Elements of Proof.

The Applicant must establish that he was engaged in "protected activity," that is, that he made complaints relating to mine safety, and that Respondent took discriminatory action against him because of this protected activity in which he engaged. Munsey v. Morton, 507 F.2d 1202, 1209 (D.C. Cir. 1974). The safety complaints made must be shown to be "... the moving force but for which the discriminatory action would not have occured." Shapiro v. Bishop Coal Company, 6 IMBA 28, 59 (1976).

FINDINGS OF FACT

1. Within approximately two weeks prior to March 29, 1979, Applicant Santistevan, a continuous miner machine operator for the Respondent,

2/Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), reads in pertinent part:

> "No person shall discharge or in any manner discriminate against ... or otherwise interfere with the statutory rights of any miner ... in any coal or other mine subject to this Act because such miner ... has filed or made a complaint notifying the operator or the operator's agent ... of any alleged danger or safety or health violation in a coal or other mine, ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act."

complained on several occasions to his section foreman, Jose Romero, that the track of a certain continuous miner machine was pulling to the left and that there was something wrong with it. (Tr. I-116,117)[3].

2. As a result of the complaints of Santistevan prior to March 29, 1979, in regard to the continuous miner, "take up jacks" were replaced by Kespondent, two times before March 29, 1979, and once on the graveyard shift on March 29-March 30, 1979. (Tr.II-84).

3. A safety inspection of the mine was made by MSHA inspectors on March 29, 1979. (Tr.I-19,20).

4. During the inspection on March 29, 1979, after discovering that the continuous miner had not been operating properly, an MSHA inspector requested that the machine be operated for demonstration, (Tr. I-22,23).

5. An MSHA inspector issued a citation to the Respondent for the following alleged safety violation on March 29, 1979:

> "The Lee *Norse* ... was not maintained in a safe operating condition in that the motor for the cutting head was loose and the left track was sticking. ..." (Tr. I-27).

6. A hazard posed by the use of the continuous miner at the time of the inspection was the possibility of pinning someone against the rib. (Tr. I-25).

/The transcripts of the hearing are contained in three volumes, with each volume renumbered from the first page. Therefore, references to the transcript will show in roman numeral the volume referred to, followed by the page number of that volume.

7. After the citation was issued on March 29, 1979, Romero asked his crew, including Santistevan, to come to him first with complaints before talking to the (MSHA) inspectors. (Tr. 1X1-40).

8. Between March 29, 1979, and April 25, 1979, Romero told Santistevan to put up a beam 16 feet long by 6 inches thick, weighing approximately 600 pounds, as a roof support, which Santistevan assumed was to be accomplished with the help of the continuous miner machine and the work crew. (Tr. I-125,126).

9. The beam was not installed as requested by Romero and the incident resulted in an agrument between Santistevan and Romero, Santistevan concluding that Romero wanted Santistevan to put the beam up by himself. (Tr. I-126).

10. On June 25, 1979, Santistevan was operating the continuous miner in an area where, because of the condition of the roof, the use of 6 foot roof bolts and straps were required for roof support. (Tr.I-133,134; Tr. 1X1-122).

11. After Santistevan had made a cut with the continuous miner and because it was determined that more height was needed in order to install the 6 foot roof bolts, Romero told Santistevan to cut down more of the top. (Tr. II-214).

12. Santistevan took down a small additional amount of top from the roof. Romero told him it was still not enough, and that he should take down 4, 5, or 6 inches more. (Tr.II-217).

13. Santistevan again cut down more top, but as he was backing out of the area the cutting heads of the miner continued to operate and cut a strap which had been put in place as roof support. (Tr. 11-218).

14. After cutting the strap, Santistevan brought the cutting heads of the continuous miner down, apologized to Romero, and stated that it was an accident. (Tr. I-134).

15. Romero had stopped the continuous miner by means of pushing the emergency stop switch on the left side of the machine and accused Santistevan of intentionally cutting the strap. (Tr. II-225, 226).

16. The continuous miner machine is equipped with a "panic bar" which, when activated by the operator, stops al 1 movement of the machine, including the cutting heads. (Tr. II-223).

17. As a result of the incident involving the roof strap, Romero left a note for the general mine foreman stating that Santistevan "had cut down a strap while he was backing the miner out of the face, that it was uncalled for, [that there] was no need for it, and that he did it in anger." (Tr. II-116).

18. On June 26, 1979, Santistevan was given a 3 day suspension by the Respondent for alleged insubordination. (Tr. I-138).

19. On June 27, 1979, a strike occured at Respondent's mine where Sant is tevan worked. Respondent issued a 30 day suspension to Santistevan for allegedly instigating this strike. (Tr.III-146-148,162,163).

20. In addition to the 30 day suspension given to Santistevan, Respondent issued a 30 day suspension to another miner who had also

allegedly instigated the strike, issued 10 day suspensions to union representatives who participated in the strike, and issued 5 day suspensions to all others who participated, making a total of 51 suspensions. (Tr. 11-149, Exhibit V).

21. At the time the suspensions were recommended, Respondent's manager of labor relations had no prior knowledge of any safety complaints having been made by Santistevan. (Tr.II-150).

DISCUSSION AND ADDITIONAL FINDINGS OF FACT

The Respondent admits in its post hearing brief that Santistevan was engaging in protected activity when he made complaints about the continuous miner machine, and that the two suspensions would constitute discriminatory action if they had been imposed because of protected activity. The Respondent argues that the "I-beam incident" did not constitute protected activity.

Assuming that complaints made involving the continuous miner and the I-beam incident both constitute protected activity, I find that the evidence is not convincing that the protected activity was the moving force but for which the suspensions or discriminatory action would not have occured. The evidence is convincing that the 3 day suspension was issued because of the alleged insubordination of Santistevan, and that the 30 day suspension was issued because he allegedly helped to instigate a strike.

After the citation was issued by MSHA in regard to the continuous miner, it was perfectly reasonable for Romero to tell his crew to come to him first with safety complaints. He would then be able to take care of the

problem and, as he testified, keep from receiving citations. The evidence is undisputed that he did not know about the loose motor used for the cutting head of the miner. However, he did know about the problem with the track of the miner, and general unsuccessful attempts were made to remedy the problem before the inspection which resulted in the issuance of the citation.

The evidence shows that the I-beam incident was of no particular significance with regard to the question of discrimination. Both Romero and Santistevan agreed that no one could possibly put the 600 pound beam in place by himself. Thus, no one could seriously conclude that Romero ordered Santistevan to accomplish the job by himself, but that he intended for Santistevan to use the men and machine available to do the job. When this was not done, an argument ensued between Santistevan and Romero.

Moreover, the safety complaints involving the continuous miner and the I-beam incident were too remote to be considered to be the moving force but for which the suspensions would not have occured. The incident involving the continuous miner took place approximately 3 months before the 3 day suspension. The I-beam incident took place at least 2 months before the 3 day suspension. There is no causal connection between those incidents and either of the suspensions. There is evidence that Santistevan and Romero argued about the problem involving the I-beam, but at the end of the argument both expressed apologies to each other. (Tr. II-200).

The 3 day-suspension is conclusively shown to have been issued because of the alleged insubordination. Romero testified that Santistevan became angry when he was told to cut down additional top after two attempts. The only reasonable interpretation of Santistevan's conduct involving the strap cutting incident was that he got angry at Romero for ordering him to make a third try with the continuous miner, backed out of the cut too far, and accidently cut the strap. The continuous miner machine could have been stopped immediately 'by use of the panic bar. In fact, Romero had to activate the emergency stop button to turn off the miner. I conc lude that the motive of the Respondent in issuing the 3 day suspension was not for accidently cutting the strap or for protected activity, but for alleged insubordination. As to whether or not Santistevan was in fact insubordinate, that issue is not relevant for me to decide.

As to the 30 day suspension, there is no evidence that it was prompted in retaliation against Santistevan as a result of his engaging in protected activity. The manager of labor relations for the Respondent did not know of any safety complaints by Santistevan when he recommended the suspension. Moreover, other than the length of the suspension, Santistevan was not singled out, but was included in a group of 51 employees suspended by the Respondent for participating in the allegedly unauthorized strike. The evidence does not show that the moving force was the safety complaints, but for which Santistevan would not have received a 30 day suspension. I am not making any finding as to whether Santistevan did, in fact, instigate an unauthorized strike. Rather, I conclude that Santistevan received the 30 day suspension because the Respondent concluded, rightly or wrongly, that he did do so. Thus Respondent did not issue the 30 day suspension as retaliation against Santistevan for engaging in protected activity.

CONCLUSIONS OF LAW

1. At all times relevant to these proceedings, the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter pursuant to the Federal Mine Safety and Health Act of 1977.

2. The Applicant has failed to sustain the burden of proof to a preponderence of the evidence that Respondent discriminated against him in violation of Section 105(c)(1) of the Act.

ORDER

The proposed order of the Secretary is vacated and the complaint of discrimination is dismissed.

Jon D. Boltz
Administrative Law Judge

Distribution:

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