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F. G. BRADLEY v. BELVA COAL

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

FREDERICK G. BRADLEY, COMPLAINANT	Complaint of Discharge, Discrimination or Interference
v.	
BELVA COAL COMPANY, RESPONDENT	Docket No. WEVA 80-708-D No. 5B Mine

DECISION

Appearances: Daniel F. Hedges, Esq., Appalachian Research and Defense Fund, Inc., Charleston, West Virginia, for Complainant  
Ricklin Brown, Esq., Bowles, McDavid, Graff and Love, Charleston, West Virginia, for Respondent

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

Complainant brought this action under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c), alleging that he was discharged on June 11, 1980, because of safety-related activities. Respondent's position is that Complainant was discharged for insubordination and poor work performance. Pursuant to notice, the matter was heard on January 28, 1981, in Charleston, West Virginia. Frederick G. Bradley, Thomas Minton, Alonzo Tomblin, Elon Fillinger, Joseph Stollings, Randall Samson, Willard Spence, Roger Sargent, and Harrison Spaulding testified on behalf of Complainant. Larry Davis, Theodore Wilburn, Max West, and Douglas Harris testified on behalf of Respondent. At the conclusion of the testimony, counsel orally argued their positions and each waived the right to file written proposed findings of fact and conclusions of law.

ISSUE

Was Complainant discharged by Respondent because of activities protected under section 105(c) of the Act?

STATUTORY PROVISION

Section 105(c) of the Act provides:

(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 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, 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 this paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). 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, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

RES JUDICATA AND COLLATERAL ESTOPPEL

Complainant herein has instituted a proceeding before the West Virginia Coal Mine Board of Appeals under an antidiscrimination provision of the West Virginia Coal Mine Safety Law, W. Va. Code Sec. 22-1-21(a). At the hearing, Respondent renewed its contention that the decision of the West Virginia Board which denied the complaint, bars this action before the Review Commission. For the reasons given in my order of January 21, 1981, I reject the contention. I did admit as evidence in this proceeding, the transcript of the hearing before

the Board and a copy of the Board's decision.

FINDINGS OF FACT

1. Respondent was at all times pertinent to this decision the operator of a coal mine in Logan County, West Virginia, known as the No. 5B Mine.

2. Complainant was employed as a section foreman at Respondent's No. 5B Mine from January or February 1980, until June 11, 1980. He worked, except for a short period at the beginning of his employment, on the day shift.

3. On June 11, 1980, Complainant was discharged from his position as section foreman for Respondent.

4. On many occasions prior to June 10, 1980, Complainant complained to his supervisors about the condition of the section at the beginning of his shift. Among the conditions he complained of were coal spillage in the roadways, ventilation curtains down or torn, short roof bolts, cables being run over by mobile equipment, etc.

5. For approximately 1 month prior to June 11, 1980, Larry Davis was mine foreman at Respondent's No. 5B Mine and was Complainant's immediate supervisor. He was the person to whom the complaints referred to in Finding No. 4 were primarily directed. He also received complaints from the second shift foreman about the condition of the section at the beginning of the second shift.

6. On June 10, 1980, Randall Samson, a Federal mine inspector and an authorized representative of the Secretary of Labor, inspected the subject mine. He issued three withdrawal orders under section 104(d) of the Act for imminent dangers and nine or 10 citations for violations of mandatory safety standards. The conditions cited included accumulations of combustible materials, inadequate short-circuit protection, and curtains hung incorrectly. The orders were terminated the same day and most of the violations were corrected.

7. On June 11, 1980, Inspector Samson inspected the subject mine primarily as part of a dust-sample survey. He again found accumulations of combustible materials, a trailing cable damaged by mobile equipment and failure to follow the roof-control plan in the face area. Three withdrawal orders were issued, one of which covered the trailing cable, and two or three other citations were issued.

8. The inspector originally told Respondent to take the trailing cable from the mine but later agreed that the damaged part could be removed and a permanent splice installed. The cable was tagged. It had not been energized at the time the order was issued but was still engaged to the continuous miner.

9. Complainant directed the scoop operator, Thomas Minton, to take his scoop and get a load of cribs for the roof in the face area which was inadequately supported.

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10. Complainant and Alonzo Tomblin began hanging the miner trailing cable so that the scoop could pass.

11. Larry Davis told Complainant not to bother hanging the cable since it had already been run over and was to be spliced. He directed him to have the scoop run over the cable.

12. Complainant refused to comply with Davis' order and hung the cable while Minton drove by in the scoop.

13. Shortly thereafter, Davis told Complainant to bring a tape line up to the face area where the cribs were being built to measure an area which the Federal inspector said was too wide. Complainant was involved with other compliance work at the time and replied that he could not do two things at the same time. Heated words were exchanged and Davis told Complainant that he was fired. Complainant left the premises.

14. Complainant was discharged for failing to comply with the orders to his superior: (a) to have the scoop operator run over a trailing cable, and (b) To bring a tape line to the face area.

15. Complainant believed in good faith that to run the scoop over the trailing cable would be (1) dangerous, and (2) a violation of Federal safety regulations.

#### DISCUSSION

There is no dispute that Complainant was told by his superior to have the scoop operator run over the cable which was already the subject of a closure order. Respondent asserts that because it was not energized and was tagged, this was not dangerous. The inspector's testimony was not clear whether he would consider the act another violation. I note: (1) that the cable was not "locked out" and could easily have been energized, and (2) running over the cable again could damage additional areas on the cable. At any rate, the test is whether Complainant in good faith believed the act to be hazardous. I find that he did.

Although he was not discharged immediately, the firing came very soon after his refusal, and I find that one of the reasons for the firing was the refusal to have the scoop operator drive over the trailing cable.

#### CONCLUSIONS OF LAW

1. At all times pertinent to this decision, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of its No. 5B Mine.

2. At all times pertinent to this decision, Complainant was a miner under the Act and protected by the terms of section 105(c) of the Act.

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3. On June 11, 1980, Complainant was discharged by Respondent for activities protected under section 105(c) of the Act.

4. Respondent violated the provisions of section 105(c) of the Act by so discharging Complainant.

ORDER

Therefore, IT IS ORDERED:

1. That Respondent reinstate Complainant in the position from which he was discharged or in a similar position at the same rate of pay;

2. That Respondent reimburse Complainant for back pay to the date of his discharge with interest thereon at the rate of 9 percent per annum, less any amount that Complainant has earned by working during the period;

3. That the employment record of Complainant be expunged of any reference to said discharge;

4. That Respondent reimburse Complainant for all costs and attorney's fees incurred in connection with this proceeding; and

5. That a copy of this decision be placed on Respondent's mine bulletin board.

IT IS FURTHER ORDERED that counsel confer on or before February 27, 1981, with respect to the amount of back pay due under the above order and the amount of costs and attorney's fees due under the above order. If counsel can agree on these amounts, I should be so notified on or before March 6, 1981. If they cannot agree, each side shall state its position on this issue and submit it to me in writing on or before March 6, 1981.

For the above purposes, I retain jurisdiction of this proceeding.

James A. Broderick  
Chief Administrative Law Judge