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JAMES L. REITER, v. NEW JERSEY ZINC
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JAMES L. REITER,

COMPLAINANT

v.

NEW JERSEY ZINC COMPANY,

RESPONDENT

Complaint of Discharge

Docket No. PENN 80-171-DM

DECISION

Appearances: James L. Reiter, Summitt Hills, Pennsylvania, pro se at the hearing; and Charles W. Elliott, Esq., Thomas and Hair, Allentown, Pennsylvania on the Brief for Complainant Robert W. Frantz, Esq., and Brian C. Murchison, Esq., Hamel, Park, McCabe & Sanders, Washington, D.C., for Respondent

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by James L. Reiter (hereinafter "Complainant") against New Jersey Zinc Company (hereinafter "New Jersey Zinc") by an allegation that Complainant was discharged from his employment at New Jersey Zinc on October 1, 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) (hereinafter "the Act"). On November 13, 1979, Complainant filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration (hereinafter "MSHA"). On January 25, 1980, MSHA notified Complainant that it determined that no violation of section 105(c) had occurred but that Complainant had 30 days to file his own action with the Federal Mine Safety and Health Review Commission (hereinafter "the Commission"). This action was filed on February 15, 1980. Complainant was represented by counsel from September 24, 1980 until May 11, 1981, the day prior to the date of the hearing. On May 11, 1981, Complainant discharged his counsel and elected to represent himself at the hearing. After the hearing, he again retained counsel to prepare his brief.

Upon completion of prehearing requirements, a hearing was held in Philadelphia, Pennsylvania on May 12-13, 1981. At the hearing, testimony was received from the following witnesses: Gerald L. Beam, Michael Trobetsky, Wilson G. Dunlap, Jr., James L. Reiter, Charles W. McNeal, William Smith, Kenneth R. Cox, Donald Habersberger, Milton Gould, Steven Trimper, and Walter Toepfer. After the hearing, both parties filed briefs in support of their positions.

OBJECTIONS TO THE TRANSCRIPT

On August 13, 1981, counsel for New Jersey Zinc raised a contention that the following three errors existed in the transcript:

Review of the transcript in this case reveals that it contains some errors, which I bring to your attention:

Volume I, page 35, line 9: "and confined me ..."
Should read: "and come find me ..."

Volume I, page 136, line 16: "I wouldn't say ..."
Should read: "I would say ..."

Volume I, page 149, line 13: "Yes."
Should read: "No."

On August 17, 1981, counsel for Complainant, who was not present at the hearing, objected to the last two alleged errors.

While none of these alleged errors is material to the outcome of this case, I agree with counsel for New Jersey Zinc that the transcript of the hearing is in error and it will be corrected.

ISSUES

Whether New Jersey Zinc violated section 105(c) of the Act in discharging Complainant and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. 815(c) provides in pertinent part as follows:

(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.

(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 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).

STIPULATIONS

The parties stipulated the following:

1. At all times relevant to this proceeding, New Jersey Zinc operated the Friedensville Mine in Center Valley, Pennsylvania.
2. The Friedensville Mine is subject to the jurisdiction of the Act.
3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105(c) of the Act.
4. Complainant, James L. Reiter, was last employed by the New Jersey Zinc Company from July 22, 1976, up to October 1, 1979.
5. Mr. Reiter received his license as a blaster by the Commonwealth of Pennsylvania in August, 1977 pursuant to regulatory requirements of the Commonwealth of Pennsylvania, Department of Environmental Resources (Title 25, Rules and Regulations, Part I, Subpart D, Article IV, Sections 207.33, 210.5, 211.31, 211.51).
6. The New Jersey Zinc Company provided Mr. Reiter the necessary training to obtain a blaster's license. The Company paid the State all fees associated with applying for, obtaining, and twice renewing Mr. Reiter's license.
7. On September 24, 1979, the Company was notified by the Office of Deep Mines of the Department of Environmental Resources, Commonwealth of Pennsylvania, that Mr. Reiter and another employee, Mr. Wilson Dunlap, had returned their blaster's licenses to the Department.
8. On September 25 and 27, 1979, Mr. Reiter, acting in his capacity as miner's representative, accompanied an inspector from MSHA on a general inspection of the mine. No citations were issued by MSHA as a result of this inspection.
9. On September 28, 1979, Mr. Walter Toepfer, Mine Superintendent of the Company, had several discussions with Mr. Reiter and Mr. Dunlap, on the subject of the blaster's licenses.

10. The Complainant was engaged in activities protected under the Act in his attendance at safety meetings between Company representatives and employees in his capacity as miner's representative, in his accompanying MSHA mine inspector, John D'Augustine, in an inspection of the mine on September 25 and 27, 1979; and in his participation in a safety meeting as described aforesaid, on September 28, 1979.

11. The Complainant was trained for, able to perform, and had performed the following tasks as part of his job classification of miner which do not require a blaster's license under the laws of the Commonwealth of Pennsylvania; lead scaler, roof bolter, grout operator, jack leg, and service truck operator.

12. At no time was the Complainant or any other miner with the Complainant's job classification required to detonate explosives.

13. It is the policy of New Jersey Zinc Company that only supervisory personnel are authorized to detonate explosives.

14. On October 1, 1979, Wilson Dunlap informed Mr. Toepfer that he would request the return of his license from the Department of Environmental Resources. Mr. Dunlap subsequently requested and obtained his license from the Department.

15. On October 1, 1979, Mr. Reiter informed Mr. Toepfer that he would not request the return of his blaster's license. On October 1, 1979, Mr. Reiter was discharged from his job.

16. At the time of the Complainant's discharge, Wilson Dunlap, who was a licensed blaster, was working on the blasting crew that the Complainant was working with.

17. On November 13, 1979, Mr. Reiter filed a Complaint with the Mine Safety and Health Administration, alleging that he was discharged for his safety-related activities in violation of Section 105(c) of the Act.

18. Following investigation of the Complaint, the Mine Safety and Health Administration determined that a violation of Section 105(c) did not occur, and so informed Mr. Reiter by letter on January 25, 1980.

19. On February 15, 1980, Mr. Reiter filed with the Federal Mine Safety and Health Review Commission a Complaint of discrimination under Section 105(c) of the Act.

20. On August 5, 1980, the Company filed with the Federal Mine Safety and Health Review Commission an answer denying Mr. Reiter's allegations.

FINDINGS OF FACT

I find that the evidence of record establishes the following facts:

1. New Jersey Zinc is the operator of the Friedensville Mine, an underground mine located in Center Valley, Pennsylvania.

2. Complainant was first hired by New Jersey Zinc in 1972 as an underground laborer. He quit this job on June 5, 1973, but was rehired on August 22, 1973. He again quit this job on February 7, 1974, but was rehired on April 2, 1974. On June 10, 1974, he was promoted to "mine utility" but again quit this job on August 31, 1974. His final period of employment at New Jersey Zinc began on July 22, 1976, when he was rehired as an underground laborer. He was promoted to "mine utility" on January 10, 1977, and promoted to "miner" on May 1, 1978. He was discharged on October 1, 1979. Complainant's duties as a "miner" included, among other things, leading in the loading of explosives.

3. Pennsylvania law requires that a blaster's license is necessary for distributing, charging or blasting explosives underground.

4. In 1977, Complainant applied to the Office of Deep Mine Safety, Pennsylvania Department of Environmental Resources to take the examination for a blaster's license. Complainant passed the examination and received a blaster's license.

5. In August, 1978, Complainant's blaster's license was renewed by the State of Pennsylvania without objection by Complainant.

6. On August 14, 1978, Complainant sustained an inguinal hernia. He filed a claim for workmen's compensation with the State of Pennsylvania. New Jersey Zinc opposed this claim, but on June 12, 1979, the Pennsylvania Bureau of Occupational Injury and Disease Compensation ordered New Jersey Zinc to pay Complainant \$2,169.43 less 20 percent attorney's fee. Complainant was unhappy that New Jersey Zinc was not ordered to pay his attorney's fee in the workmen's compensation case.

7. In early August, 1979, New Jersey Zinc mailed the application to renew blaster's licenses for 28 employees, including Complainant and Wilson Dunlap, to the Pennsylvania Office of Deep Mine Safety together with a check for the cost of the renewal fees. The State processed the applications and sent new license cards to each of the 28 employees.

8. On August 31, 1979, Milton Gould, a foreman and shift boss at New Jersey Zinc, asked Complainant to bring in his new

blaster's license since the old license expired on August 31, 1979. Complainant said he would do so.

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9. On September 1, 1979, Complainant sent a letter to the State enclosing his new blaster's license and stating: "I did not send for this blaster's license and I do not wish to have one. Please refund the money forwarded by the New Jersey Zinc Company." At approximately the same time, Wilson Dunlap, one of the three license blaster's on Complainant's shift, also returned his blaster's license to the State.

10. Complainant was on vacation and did not work during the first 2 weeks of September, 1979.

11. After Complainant returned to work in mid-September, 1979, he was asked by foreman Gould why he had not produced his blaster's license. Complainant responded that he had returned the license to the State. Complainant further stated that he would request the return of his license if New Jersey Zinc would reimburse him for the \$400 attorney fees in his workmen's compensation claim. Complainant also agreed to get his license back if New Jersey Zinc would buy him a new pair of boots.

12. On September 24, 1979, the State advised New Jersey Zinc that Complainant and Dunlap had returned their blaster's licenses. New Jersey Zinc then attempted to get a determination from the State whether Complainant and Dunlap could continue to work as licensed blasters.

13. On September 25, 1979 and September 27, 1979, MSHA Inspector John D'Augustine conducted a regular inspection of the mine and New Jersey Zinc selected Complainant, a miner's representative for United Steelworkers of America, Local 5485 (hereinafter "USWA"), out of four possible men to be the union walkaround on this inspection. The operator's representative during this inspection was Donald Habersberger, the mine's safety and industrial engineer. During this inspection, Complainant complained to the inspector about the following conditions or practices: failure to scale loose ground in active workings; drilling into bootleg holes; and inexperienced employees performing complex jobs. Complainant also asked the inspector to check out a miner complaint concerning a "giraffe" or aerial platform. No crew was present in the area and permission was not obtained to operate the equipment so that it could be checked. No citations or orders were issued by the MSHA inspector during this inspection of the mine. However, the MSHA inspector recommended that New Jersey Zinc improve its maintenance of ribs and scaling of loose material.

14. On September 27, 1979, State Inspector William Smith visited the mine and advised mine management that he would issue a closure order for the mine and prosecute mine management if it used lead blaster's who did not have current State blaster's licenses.

15. On Friday, September 28, 1979, Complainant and Wilson Dunlap were called to a meeting in Mine Superintendent Walter Toepfer's office. At that time, Complainant and Dunlap stated that they had returned their blaster's licenses to the State.

Toepfer advised them of the consequences if either of them worked as a lead blaster without a blaster's licenses. Although

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Complainant initially agreed to seek the return of his blaster's license, he subsequently stated that he had changed his mind and would not request the return of his license because the license was a violation of his personal rights and he did not need the license. Superintendent Toepfer told Complainant and Dunlap that they had until the close of business on Monday, October 1, 1979, to get their blaster's licenses back or there would be no further work for them.

16. On October 1, 1979, Wilson Dunlap signed a letter to the State requesting the return of his license. Dunlap was not disciplined for this incident and is still employed at New Jersey Zinc.

17. On October 1, 1979, Complainant advised Superintendent Toepfer that he would not request the return of his blaster's license. Complainant was advised that this action would result in his discharge. Complainant alleged that New Jersey Zinc was discriminating against him because the license was not needed to perform his job. Complainant was discharged on October 1, 1979, for his refusal to request the return of his blaster's license.

18. For approximately 8 months prior to his discharge, Complainant was a member of the USWA safety committee and, in that capacity, filed safety complaints with New Jersey Zinc. Complainant's safety complaints included problems with loose ground and drilling through bootleg holes.

19. At no time prior to his discharge, did Complainant notify New Jersey Zinc that his refusal to renew his blaster's license was motivated by a concern about safety.

20. Complainant's grievance concerning his discharge was denied by New Jersey Zinc. The USWA did not request arbitration.

21. Complainant's claim for unemployment benefits was denied.

22. Complainant earned \$6.97 per hour at the time of his discharge by New Jersey Zinc. Since the date of his discharge on October 1, 1979, Complainant's income has been as follows: 1979 - wages \$252.92; 1980 - wages \$5,204.36 and unemployment benefits \$2,949.00; and 1981 to May - wages \$2,126.13 and unemployment benefits \$1,935.00.

23. From September 19, 1980 to May 11, 1981, and from June 29, 1981, to date, Attorney Charles W. Elliott represented Complainant and spent 80-1/2 hours on this matter. Attorney Elliott requests approval of attorney's fees of \$60 per hour for a total of \$4,830.

DISCUSSION

During the course of the hearing and in his posthearing brief, Complainant asserted several different claims concerning his allegation that he was discharged in violation of section

105(c) of the Act. He alleged the following claims: (1) he made safety complaints concerning loose ground and drilling into bootleg holes; (2) he complained to the MSHA inspector about

~2112

insufficient safety training and other safety problems; and (3) his refusal to renew his blaster's license was a refusal to work under unsafe conditions.

In *Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786 (October 14, 1980) (hereinafter *Pasula*), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other Federal statutes. The Commission held as follows:

We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. 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 conduct 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 alone and that he would have disciplined him in any event. *Id.* at 2799-2800.

In *Pasula*, *supra*, the Commission held that the miner's refusal to work was protected under the Act. The evidence in *Pasula* established that the miner refused to perform work he believed to be unhealthful after contacting management to obtain corrective action and requesting an MSHA inspection. The Commission further found that the miner's "good faith belief was reasonable, and was directed to a hazard that we consider sufficiently severe" *Id.* at 2793.

A. Safety Complaints to New Jersey Zinc

As a member of the USWA safety committee, Complainant filed written safety recommendations with management on February 17, 1979 and August 16, 1979. The former dealt with scaling loose ground and the latter dealt with drilling through bootleg holes. While both of these complaints constitute protected activity under section 105(c) of the Act, Complainant has failed to produce any evidence that the determination to discharge him was motivated in any part by the safety complaints. Moreover, in light of the other evidence discussed *infra*, no inference can be

drawn which would satisfy Complainant's burden under Pasula.

B. Safety Complaints to MSHA inspector

On September 25, 1979 and September 27, 1979, Complainant served as the miner's representative during the MSHA regular inspection of this mine. In that capacity, Complainant told the inspector of conditions and practices which he believed to be in violation of the law. The fact that the MSHA inspector did not issue any citations or orders is irrelevant to this issue. If Complainant's complaints to the MSHA inspector played any part in the operator's decision to discharge him, then he has established a prima facie case under Pasula, supra. Even though there is no direct evidence to connect these protected activities with the subsequent discharge, such a connection may be established by inference. While these protected activities occurred during the week prior to discharge, a consideration of all the evidence shows that Complainant's discharge was based solely upon his refusal to request the return of his blaster's license. Thus, his activities during the MSHA inspection played no part in the determination to discharge him.

C. Refusal to Request Return of Blaster's License

Pennsylvania law requires that at least one licensed blaster be present when explosives are distributed or charged underground. Complainant first obtained his blaster's license from the State in 1977. At the hearing, he alleged that one of his incorrect answers was erased by the person giving the examination and that he was given another opportunity to answer that question. This assertion, even if true, is irrelevant to the instant proceeding. Complainant did not protest or object to the renewal of his license in August, 1978. In fact, when Complainant returned his renewed blaster's license for 1979-80 to the State on September 1, 1979, he did not complain to the State or New Jersey Zinc about any safety concerns. The evidence clearly establishes that at no time prior to his discharge on October 1, 1979, did Complainant ever allege that he returned his blaster's license for safety reasons. Rather, it was Complainant's position that he had the personal right to refuse such a license and that his job did not require such a license. The issue of whether a blaster's license was required to perform the job classification of "miner" on October 1, 1979 is not a health or safety matter protected under section 105(c) of the Act, but is a contractual matter over which I have no jurisdiction. The issue before me is whether Complainant's refusal to request the return of his blaster's license is a refusal to work under unsafe conditions which constitutes protected activity under section 105(c) of the Act. On this issue, Complainant also fails. At no time did Complainant refuse to work. In fact, he insisted that he was, at all times, ready and able to work as a "miner".

While it might be possible that a good faith, reasonable refusal to request the return of a blaster's license could constitute protected activity under section 105(c), such a refusal would have to be preceded by specific complaints to the mine operator or governmental authorities concerning the safety

hazards faced by the licensee. Moreover, such a refusal must be reasonable and made in good faith. In the instant case, Complainant fails on each of the above criteria. He never made any specific safety complaint to

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New Jersey Zinc concerning the hazards he faced because of his blaster's license. His apparent willingness to be employed without a blaster's license belies his safety claim. Likewise, he made no such complaint to the State or MSHA. I find that his refusal to seek the return of his blaster's license was not made in good faith because he admitted that he would have requested the return of his license if New Jersey Zinc would have bought him a new pair of boots. Moreover, there was other credible testimony that Complainant offered to request the return of his blaster's license if New Jersey Zinc would have reimbursed him for the \$400 attorney fee paid in connection with his earlier workmen's compensation claim. These facts indicate that despite his protestations of safety matters, Complainant was attempting to use the blaster's license for an additional pecuniary gain. Thus, Complainant's refusal to seek the return of his blaster's license was not a good faith refusal to work under unsafe conditions.

The evidence establishes that Complainant was discharged by New Jersey Zinc solely for his refusal to request the return of his blaster's license. Complainant's assertion that he would have been discharged because of his safety activities, even if he had requested the return of his license, is based on speculation and conjecture and is entitled to no weight. Complainant failed to establish that New Jersey Zinc violated section 105(c) of the Act in connection with his discharge.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant and New Jersey Zinc were subject to the Act.
2. This Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.
3. Prior to October 1, 1979, Complainant engaged in the following activities which constitute protected activities under section 105(c) of the Act: (1) Safety complaints to New Jersey Zinc management concerning scaling loose ground and drilling into bootleg holes; and (2) service as a safety commiteeman for the USWA and as miner's representative during the MSHA inspection of September 25, 1979 and September 27, 1979.
4. Complainant's return of his blaster's license to the State and his refusal to request a return of his blaster's license from the State are unprotected activities under section 105(c) of the Act.
5. Complainant failed to establish that his discharge by New Jersey Zinc was motivated in any part by his protected activities.
6. New Jersey Zinc established that it discharged Complainant solely for his refusal to request a return of his blaster's license.

7. New Jersey Zinc did not violate section 105(c) of the Act in discharging Complainant.

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8. Complainant's Complaint of Discharge is dismissed.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's Complaint of Discharge is DISMISSED.

James A. Laurensen Judge