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FRANKLIN JOHNSON V. EASTERN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FRANKLIN D JOHNSON,
COMPLAINANT
v.

COMPLAINT OF DISCHARGE,
DISCRIMINATION, OR
INTERFERENCE

EASTERN ASSOCIATED COAL CORP.,
RESPONDENT

Docket No. WEVA 80-647-D
Keystone No. 2 Mine

DECISION

Appearances: Thomas L. Butcher, Esq., Pineville, West Virginia,
for Complainant
Sally S. Rock, Esq., Eastern Associated Coal
Corporation, Pittsburgh, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the complaint of Franklin D. Johnson under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq., the "Act," alleging that Eastern Associated Coal Corp. (Eastern) discharged him on March 20, 1980, in violation of section 105(c)(1) of the Act. (FOOTNOTE 1) An evidentiary hearing was held on Mr. Johnson's complaint in Beckley, West Virginia, on August 18 and 19, 1981. On January 18, 1982, the case was transferred to the undersigned Judge and the parties agreed to submit the case to this Judge for decision on the existing record.

Mr. Johnson can establish a prima facie violation of section 105(c)(1) of the Act if he proves by a preponderance of the evidence that he has engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary of Labor ex rel David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd. on other grounds, Consolidation Coal Co. v. Secretary, 663 F2d 1211 (3d Cir. 1981). Before his discharge, Johnson was night shift foreman in the 3 right 3 west section of Eastern's

Keystone No. 2 mine. He claims as protected activity alleged safety complaints on or about March 15, 1980: (1) to Tyler Snow, the second shift mine foreman and Johnson's immediate supervisor, expressing disapproval of orders by Snow to "cut 6 foot [roof] bolts into 4 foot bolts and to put them up", and (2) to Snow and to general mine foreman Donzal Morgan, complaining that the preceding day shift foreman, Don Moore, had been leaving Johnson's workplace unsafe by "cutting places in the mine too deep and too wide" and by leaving excessive coal accumulations. Eastern denies that Johnson made any complaint to Snow about the shortening of roof bolts and maintains that although discussions during the period March 10 to March 20, 1980, did, indeed, take place among Johnson, Snow, and Morgan, concerning the conditions and mining practices where Johnson had been working, including the need for additional clean up, rock dusting, and ventilation, these discussions did not constitute "safety complaints" within the meaning of the Act.

Even assuming, *arguendo*, that the complaints were in fact made to Tyler Snow and Donzal Morgan as alleged and even assuming, *arguendo*, that those complains were protected activity under Section 105(c)(1), I do not find in this case any direct evidence, nor sufficient circumstantial evidence, to prove that the individual who made the decision to discharge Johnson had any knowledge at that time of any such complaints. I conclude therefore that Johnson's discharge could not have been motivated in any part by the alleged protected activity and that accordingly there has been no violation of the Act. *Pasula, supra.*

I find that, ultimately, the decision to discharge Johnson was independently made by the senior official of the Keystone No. 2 mine, Mine Superintendent Wayne Jones. While there is no question that mine foreman Donzal Morgan was the individual who informed Johnson of his discharge, it is apparent from the credible evidence of record that Morgan was essentially only carrying out the orders of the mine superintendent. According to Superintendent Jones, he told Morgan that "Johnson has got to go * * * [i]f you don't do it, I will". It is apparent that Jones made this decision spontaneously and independently during a personal inspection of the mine on the morning of March 20th. Jones and Eastern's safety inspector Dallas Peters were inspecting the mine early that morning in anticipation of a government "blitz" inspection. According to Jones, the 3 right 3 west section, which had last been worked by Johnson, was in "miserable" condition. It was "filthy dirty" with excessive coal dust, loose coal accumulations, and insufficient rock dusting. In particular, there was coal spillage up to the bottom of the conveyor belt some 24 to 26 inches deep for a distance of about 150 feet. In addition, Jones found seriously inadequate ventilation of the section in an area of well known methane problems. In sum, Jones found the conditions left by Johnson so unsafe he concluded there was an "imminent danger". The section was immediately closed down, and it took more than a full shift of cleanup work to get it back

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into production. Johnson does not deny that he left dangerous conditions in his section and that as foreman he was responsible for those conditions. Indeed, he unequivocally admits that his section was neither adequately cleaned nor properly rock dusted and that he was accordingly in violation of company standards.

Superintendent Jones decided on the spot that Johnson would have to go and recalled that he later directed Donzal Morgan to carry out that decision. Morgan recalled discussing Johnson's status with Jones but thought that he had made the decision to discharge Johnson by himself. I find Morgan's testimony uncertain and equivocal in this regard and I therefore find Jones' testimony the more persuasive. It is clear that no other decision would in any event have been tolerated by Jones. Since it is neither alleged nor proven that Jones had any knowledge of Johnson's purported safety complaints to Snow and Morgan, I cannot find that the discharge of Johnson by Jones was motivated in any part by such complaints.

Even assuming, *arguendo*, that Donzal Morgan had participated in the decision to discharge Johnson, it would have been untainted by any improper motive. It is not alleged that Morgan had knowledge of the complaints Johnson purportedly made to Snow about shortening roof bolts and there is insufficient evidence, in any event, to support such a claim. Johnson nevertheless initially maintained that he had complained over a period of 3 months to both Snow and Morgan about the conditions left in his section by the preceding day shift foreman, Don Moore. Under cross examination, Johnson did, however, retract and admit that he had followed Moore on no more than five occasions within a period of less than two weeks and actually complained only two or three times. Johnson continues to maintain that on one of those occasions, he called Snow to report that Moore had taken a 23 foot cut of coal in an entry -- a deeper cut than normally allowed. Johnson allegedly reported that Moore had failed to "timber it down to standard" so that it was unsafe to work in the entry until his own crew had performed that task. On the other occasions, he apparently called Snow because Moore had left the section without adequate cleaning and rock dusting.

Neither Snow nor Morgan deny that they had from time to time received such routine reports from Johnson, just as they had from other foremen. It was the regular practice at the mine for the oncoming section foreman to report such conditions to the shift foreman to explain delays in beginning production and that is the context in which Johnson's reports were taken. At no time did Johnson or his crew refuse to work because of unsafe conditions. Inasmuch as it was the accepted and routine practice at the mine for oncoming foremen to make such calls to their superiors in explaining their inability to begin immediate production, that such calls were routinely made by other foremen without any evidence of discrimination against them, and that the operator's stated grounds for discharging Johnson have a legitimate and strong factual basis in the record, I conclude that even if Morgan had participated in the decision to discharge Johnson, there is simply insufficient evidence to show that any such

participation would have been motivated in any part by the alleged protected activity.

