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PATRICK MOONEY V. SOHIO MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

PATRICK J. MOONEY,
COMPLAINANT

v.

SOHIO WESTERN MINING COMPANY,
RESPONDENT

APPLICATION FOR REVIEW OF
DISCRIMINATION

DOCKET NO. CENT 81-157-DM

MD 81-10

MINE: L-Bar Uranium Operation

DECISION

Appearances:

Patrick J. Mooney appearing Pro Se
Albuquerque, New Mexico

Robert J. Araujo Esq.
Sohio Western Mining Company
69 West Washington Street, Suite 700
Chicago, Illinois 60602,
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

This proceeding was initiated by a complaint filed by Patrick J. Mooney (hereinafter "Mooney") under the provisions of Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et seq. (1978) (hereinafter cited as "the Act"). In his complaint, Mooney alleges that Respondent, Sohio Western Mining Company (hereinafter "Sohio"), unlawfully discriminated against him by discharging him from his employment at Sohio's mine on September 9, 1980, in violation of the Act. Mooney alleges that he had engaged in activities relating to health and safety protected by section 105(c) of the Act prior to the time of his discharge. Sohio contends that Mooney was discharged for absenteeism.

Pursuant to notice, a hearing was held on August 11, 1981, in Albuquerque, New Mexico. Mooney testified on his own behalf and called Omer Sauvageau, special investigator for the Federal Mine Safety and Health Administration (MSHA) as a witness. Witnesses for Sohio were Rudolph Siegmann, operations safety engineer, Alton H. Young, shifter and Mooney's immediate supervisor, Ruben Romero, supervisor of Area 5 of the mine, and Dorothy A. Stover, supervisor of employee relations, all employees of Sohio.

Post hearing briefs were filed by both parties. Based on the evidence presented at the hearing and the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. During the period of time involved herein, Sohio operated an underground uranium mine identified as J. J. No. 1 Mine approximately 75 miles from Albuquerque and near Sebago, New Mexico.

2. Mooney was hired by Sohio as an underground laborer on February 5, 1980 (Tr. 11 and 13).

3. On February 28, 1980, three weeks after Mooney was hired, he was absent one day from work due to illness and furnished Sohio with an explanation from the medical clinic he contacted regarding his absence (Tr. 49, Exhibit R-5).

4. On March 7, 1980, Mooney was absent from work due to dental work and furnished a note from the dentist for this one day absence (Tr. 50, Exhibit R-6).

5. On April 2, 1980, Mooney was absent from work for one day due to illness (Tr. 25). Upon his return to work on April 3, 1980, Mooney was given a warning slip by his supervisor Alton H. Young (Exhibit R-3). Mooney disputed the absence as being unexcused alleging he had called in to advise Sohio of his absence. Mooney was advised by Young that Sohio's policy was to issue a written warning if there was not a doctor's note submitted following an absence (Tr. 26).

6. On April 10, 1980, during the third shift (midnight to 8 a.m.) Mooney protested climbing a ladder underneath a shale bulge near the top of the rib because he felt it was too dangerous (Tr. 9). Another miner was sent up on the ladder instead of Mooney (Tr. 12). This protest by Mooney was made within a few hours of an injury that occurred to him that day (Tr. 12). Mooney and a second miner, Donald Benton, were standing in the bucket of a Wagner (tractor type equipment) fifteen feet in the air putting lagging up on steel sets to control the roof (Tr. 8). Mooney suffered an injury to his left foot when a slab of rock fell from the crown.

7. Mooney was off work due to his injury from April 10, 1980 until September 2, 1980 (Tr. 19)

8. Mooney reported to work on September 2, 1980 and presented to Sohio a statement from his doctor that he was released for regular duty (Tr. 18, Exhibit R-7).

9. Upon arriving at work, Mooney had a meeting with Rudolph Siegmann, Sohio's safety director. Mooney complained that there had been omissions in the accident reports regarding his injury that were filed with the workmen's compensation carrier for Sohio. He also complained that Donald Benton, the other man in

the bucket of the Wagner, had not been interviewed

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or listed as a witness, and that the area they were working in was not properly supported with rock bolts and mesh. Mooney stated that such omissions in the reports denied him a ten percent increase in his workmen's compensation benefits, which would have been paid him if Sohio failed to utilize safety equipment. Mooney told Siegmann he intended to pursue the matter further (Tr. 16, 17 and 18).

10. Following his conversation with Siegmann, Mooney was assigned to a job on the surface digging a ditch with a shovel (Tr. 19). He had failed to bring safety glasses that day and in accordance with company policy was not allowed to go underground (Tr. 170 and 171).

11. On the following day, September 3, 1980, Mooney felt pain in his left foot and did not report to work. He telephoned Sohio and talked to Ruben Romero, a supervisor at the mine. Mooney told Romero that he would not be reporting for work that day. Romero told Mooney to call the Safety Department which Mooney did talking to some person whose name he did not remember (Tr. 20).

12. Mooney made an unsuccessful attempt to see his physician on September 3, 1980 (Tr. 20).

13. On September 4, 1980, Mooney returned to work without a note from the doctor and as a result was given a three day suspension from work for an unexcused absence (Tr. 21, Exhibit R-4 (FOOTNOT 1)).

14. Mooney reported to work on September 9, 1980 ten to fifteen minutes late and was notified that he was terminated for a third warning slip (Tr. 177).

15. Mooney filed a written complaint of discrimination with the Mine Safety and Health Administration (MSHA) on October 15, 1980 (Tr. 29). An investigation was conducted by an investigator for MSHA and Mooney was advised MSHA was of the opinion that Mooney had not been discriminated against in violation of the Act. A letter dated March 5, 1981 was sent to Sohio so advising them of this decision (Exhibit R-13).

16. Mooney filed a claim of discrimination with the Federal Mine Safety and Health Review Commission on March 25, 1981.

17. Mooney also filed a claim for unemployment insurance with the State of New Mexico.

Did Mooney engage in activity protected under section 105(c) of the Act, and, if so, was he discharged because of it?

DISCUSSION

This case involves section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et seq. (Supp. III 1979), which sets forth certain types of employee activity which are protected by a prohibition against discrimination or interference, including:

. . . a complaint notifying the operator or the operator's agent . . . of an 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.

The Federal Mine Safety and Health Review Commission has previously considered questions raised concerning the burdens of proof in discrimination cases in *Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786 (1980). rev'd on other grounds, No. 80-2600 (3rd Cir. Oct. 30, 1981), and *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981). In *Pasula*, it held that a prima facie case is established:

. . . if a preponderance of the evidence proves (1) that (the miner) engaged in a protected activity, and (2) the adverse action was motivated in any part by the protected activity.

The first element of proof of a prima facie case is a showing that protected activity occurred. Mooney argues in his post-hearing brief that the motive for Sohio to discriminate against him was because of his complaints concerning safety violations and the preparation of false and inaccurate accident reports regarding his injury and except for this, Sohio had no valid reason to fire him (Mooney's post-hearing brief at page 8).

The facts show that on April 10, 1980, Mooney was injured while working in the underground shop area of Sohio's mine described as Area 5 in the J. J. No. 1 Mine. Earlier in the evening, Mooney had complained about an assignment requiring him to climb a ladder under a shale bulge at the top of the rib which situation he considered dangerous. His concerns in this matter were apparently accepted as valid and another employee was assigned to perform the task. There was no evidence presented in this case that Mooney protested his assignment later on in the shift to work in the bucket of the Wagner with Donald Benton in putting up lagging on the steel sets which resulted in his injury. The complaint by Mooney regarding his assignment on the ladder would be protected activity under the Act if it were shown that such refusal to work prompted his firing. The firing occurred approximately five months later and the ladder incident

alone would seem rather remote. However, Mooney argues that subsequent events, specifically his complaints about the accident reports, was protected activity and the cause for his firing.

Upon his return to work in September 1980, Mooney met with Siegmann and complained that the accident reports filed with the workmen's compensation carrier were not accurate. If these complaints were motivated by a sincere belief by Mooney that such matters were related to safety and health conditions in the mine, it would constitute protected activity. However, the preponderance of the evidence shows that at the time Mooney made these complaints to Siegmann and subsequent thereto, Mooney was attempting to establish his right to an additional ten percent payment he would receive on his workmen's compensation benefit if it was shown that the accident was caused by a failure to utilize safety equipment (Tr. 17). Mooney in his statement to the MSHA inspector stated as follows:

I was very angry that the report had been falsified. I was denied a substantial amount of money as a result of the report being falsified, and I wanted the report set straight it would have jeopardized my supervisors Alton Young's job" (Exhibit C-2).

Mooney testified at the hearing as follows:

I had protested to Mr. Siegmann these omissions and discrepancies and at that time I told him that I would pursue this matter because I felt that I had been unjustly denied a penalty, an additional monetary benefit from my accident that I was entitled to under state law (Tr. 17).

These statements by Mooney and a careful review of the evidence shows that Mooney's purpose of pursuing this matter upon his return to work was motivated by monetary reasons rather than safety and health and would not constitute a protected activity under the Act. Mooney's statement that Alton Young's job was in jeopardy by his actions or that such acts would cause Siegmann to lose his job was not supported by the evidence.

Mooney argues that Sohio had no valid reason to fire him. The preponderance of the evidence contradicts this. Mooney worked for Sohio from February 5, 1980 until September 9, 1980. During that period of time, he had an excused absence for medical reasons on February 28, 1980, approximately three weeks after he commenced work, an excused absence for dental work on March 7, 1980 and an unexcused absence on April 2, 1980 for which he was issued a warning slip. On April 10, 1980, he was injured by the rock fall and was off work until September 2, 1980, when he returned for regular duty assignment. Mooney had an unexcused absence for medical reasons on September 3, 1980 and upon returning to work on September 4, 1980 was given a second written warning that he would be terminated if it occurred a third time and was given a three day suspension. On September 9, 1980, the date he was to return to work, Mooney was late and was discharged.

Mooney argues that Sohio did not follow its own policy regarding absences when it fired him. He contends in his

post-hearing brief on page 6 that the two warning slips dated April 3, 1980 (Exhibit R-3) and dated

September 4, 1980 (Exhibit R-4) are unwarrantable reprisals. The fact is that the warning slip dated April 3, 1980 for the first unexcused absence was issued prior to the accident which occurred April 10, 1980 that triggered the events which Mooney claims as protected activity. This contradicts his argument that this first warning slip was a reprisal. Further, the preponderance of the evidence and particularly the two doctor's statements submitted by Mooney to Sohio for absences on February 28, and March 7, 1980 support Sohio's argument that Mooney was aware of their policy regarding attendance.

In its decision Secretary of Labor on behalf of Johnny N. Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (November 13, 1981), the Federal Mine Safety and Health Review Commission considered a similar question regarding a company's business practices regarding disciplining employees. The Commission held as follows:

. . . Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F. 2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis and meets the first part of the Pasula affirmative defense test, then a limited examination of its substantiality becomes appropriate.

The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979) (Articulating an analogous standard).

I conclude that Sohio successfully defended by showing that it did have legitimate reasons to terminate Mooney for his attendance record.

