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ROGER ANDERSON V. ITMANN COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ROGER A. ANDERSON, COMPLAINANT	Complaint of Discrimination
v.	Docket No. WEVA 80-73-D
ITMANN COAL COMPANY, RESPONDENT	Itmann No. 3A Mine

DECISION

Appearances: F. Alfred Sines, Jr., Esq., for Complainant
Jerry F. Palmer, Esq., for Respondent

Before: Judge William Fauver

This proceeding was brought by Roger D. Anderson under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 891 et seq., for an alleged discriminatory discharge. The case was heard in Charleston, West Virginia. Both parties were represented by counsel, who have submitted their proposed findings, conclusions, and briefs.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Itmann Coal Company, operated a coal mine known as the Itmann No. 3A Mine in Itmann, West Virginia, which produced coal for sales in or substantially affecting interstate commerce. The Complainant, Roger D. Anderson, was employed by Respondent as a section foreman on the evening shift at the Itmann No. 3A Mine.

2. Complainant began his employment with the Consolidation Coal Company on February 24, 1970, as a coal sampler at the Rowland Coal Preparation Plant. On November 18, 1972, he was promoted to environmental technician and on August 1, 1973, to safety coordinator. On January 1, 1974, he was promoted to safety inspector and on December 1, 1974, to section foreman. On March 1, 1975, he received another promotion to safety inspector and a transfer to the Itmann Operations. On February 1, 1977, he became an assistant accident investigator. On July 1, 1978, he was promoted to section foreman at Itmann No. 3A mine, which position he held at the time of his discharge on July 30, 1979.

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3. The 3A mine is a large coal mine involving approximately 250 miles of entryways and airways, 30 beltheads, 8 active sections, and extensive amount of gob area.

4. At all pertinent times, Dave Bailey was the mine superintendent at the Itmann 3A mine. The Itmann 3A mine ran three shifts: the hootowl (12-8), the dayshift (8-4), and the evening shift (4-12). The mine superintendent was in overall charge of all three shifts, and had six assistants. These were categorized as lead foreman (shift foremen) and assistant foremen. Each shift would have one of each and the dayshift lead foreman and his assistant were also known as the mine foreman and assistant mine foreman.

5. On the evening shift on July 29, 1979, Roger Lamastus was the lead foreman, Larry Kiser was assistant lead foreman, Mickey Sizemore was the belt foreman, and Complainant was a section foreman.

6. As section foreman, for about 15 months, Complainant reported to his immediate supervisor, Roger Lamastus, lead foreman on the evening shift.

7. Complainant attended various training classes and courses held by the Itmann Coal Company and scored 88 percent or better on various tests and exams given by Respondent. Complainant attended a managerial grid school in 1975 in Dallas, Texas. This school was sponsored by Respondent and all expenses were paid for Complainant for one week. Complainant attended a job safety analysis school in Pittsburgh, Pennsylvania, sponsored by the Respondent in which all of his expenses were paid. Complainant also attended the Dale Carnegie course sponsored by the Consolidation Coal Company. All courses, seminars, and schools attended by Complainant were completed without missing any classes or failing any exams.

8. As section foreman, Complainant regularly worked 5 weekdays; every other weekend he also worked either on Saturday or Sunday.

9. Weekend duties normally involved preparing the mine to produce coal on the next coal producing shift. Usually on Thursday, the lead foreman would assign men to report for duty the upcoming weekend. Roger Lamastus and his assistant, Larry Kiser, were in charge of assigning weekend duties and seeing that they were carried out. Roger Lamastus and his assistant alternated as lead foreman on weekends.

10. On Thursday, July 26, 1979, Roger Lamastus, evening shift mine foreman (4:00 p.m. to 12:00 midnight shift), instructed Mickey Sizemore and Complainant to report for weekend duty on the Sunday shift, July 29 (4:00 p.m. to 12:00 midnight). Roger Lamastus had scheduled several UMW employees to report for the Saturday shift (4:00 p.m. to 12:00 midnight) to make an equipment move.

11. On Sunday, Mickey Sizemore and Complainant reported to the mine office about 3:10 p.m. About 3:30, Complainant picked up the mine fireboss book and

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opened to the last entry in the book, read and countersigned that entry. This was the entry for the 12:01 a.m. to 8:00 a.m. shift on Sunday, July 29. Roger Lamastus picked up the mine fireboss book and looked at the last entry, but did not sign it.

12. Minutes later, Lamastus summoned Mickey Sizemore, Complainant and the UMW employees around the company's supply truck. Lamastus explained the equipment move he and his crew had started on the Saturday evening shift. Lamastus drew a diagram in the dust on the truck hood to explain his instructions to Complainant to complete the equipment move. He said it had to be finished so that the Sunday, midnight shift could run coal.

Lamastus then led Complainant to the foremen's room, where he showed him on the mine map what had to be done, and to the superintendent's office, where he drew on a legal pad to illustrate the configuration of the equipment move. He stressed the importance of doing it correctly so coal could be produced on the upcoming midnight shift.

Shortly after 4:00 p.m., while Complainant was sitting in his buggy, Roger Lamastus stepped from the mine office door opening, looked at his watch, looked at Complainant, and shouted a curt order to Complainant to get underground. Complainant went underground as directed.

13. About 7:30 that evening, Foreman Sizemore was notified by the dispatcher that James Bowman, MSHA inspector, wanted Sizemore and Complainant to come outside the mine.

Sizemore and Complainant Anderson reached the outside about 7:45 p.m. James Bowman, who was waiting for them, directed questions to Complainant, because he knew Complainant and did not know Sizemore. He asked Complainant how many men were underground. When Complainant replied, "seven or eight," Bowman asked whether he was aware that there had not been a preshift examination of the mine in the hours from 8:00 to 4:00. Complainant said he knew that, but company policy, and federal regulations to his knowledge, required preshift examinations only once every 24 hours on weekends. Inspector Bowman then said, "Your mine is now under a 104(d)(2) order, which is under the Act an unwarrantable failure closure order."

At the hearing, Inspector Bowman explained that he questioned the foremen as to their knowledge of the lack of a preshift examination in order to determine what kind of order should be issued. Complainant's admission was an important factor in Bowman's decision to issue an unwarrantable failure order.

14. Complainant called Bobby McBride, dispatcher, and instructed him to call the men underground out of the mine. Mickey Sizemore called Roger Lamastus to inform him that James Bowman had issued a 104(d)(2) closure order.

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While Mickey Sizemore was talking to Roger Lamastus on the phone, James Bowman and Complainant discussed their opposing interpretations of Part 75.303 of the regulations requiring preshift examinations.

At about 9:30 p.m., David Bailey, superintendent, arrived at the mine and talked to Mickey Sizemore concerning the fireboss book.

The following day, Monday, July 30, 1979, David Bailey called Complainant to his office and gave Complainant a choice of resigning or being discharged. Complainant asked, "Why?", and David Bailey pointed to the closure order. Complainant said it was not his nature to quit. Complainant was discharged on that date.

DISCUSSION WITH FURTHER FINDINGS

The MSHA inspector issued the order of withdrawal on Sunday, July 29, 1979, after examining the preshift books and discovering the mine had been last preshifted more than 8 hours before the evening shift, in violation of 30 C.F.R. 75.303. (FOOTNOTE 1) The Complainant and another foreman working that shift had been called to the surface to speak with the inspector before the order was issued. The inspector asked the Complainant if he knew the mine had not been preshifted within 8 hours. The Complainant stated that he knew that, but that company policy, and federal regulations, to his knowledge, required preshift examinations only once every 24 hours during weekends. Thereupon, the inspector showed Complainant the text of the regulation and issued an order. That order, not the subject of this proceeding, reads in part:

A preshift examination was not made within 8 hours immediately preceding the entrance of miners scheduled to work in active workings. The section foremen in charge of the mine stated that they knew the mine had not been preshift examined on the preceding shift. Four other men worked over-time from the preceding shift making a total of 11 miners underground on the 4:00 p.m. shift, and a preshift was not made.

Mine management subsequently discharged the Complainant for knowingly violating a federal mine safety law, whereupon Complainant filed this action.

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The facts show that the Complainant, the belt foreman, and the supervisory shift foreman all believed that company policy required preshift examinations of the mine only once every 24 hours on weekends. The evidence clearly shows that on Sunday, July 29, they acted according to this belief.

Complainant's supervisor held the same mistaken beliefs concerning the regulations requirements and he knew Complainant was unaware that the 8-hour inspection rule applied during weekends. These facts were apparently ignored by, or not communicated to, the company vice presidents who decided to fire Complainant for "knowingly" violating a federal mine safety law.

The result was that management discharged Complainant for conduct which in fact was a good faith belief by Complainant and was simply his compliance with orders from his immediate supervisor, who received no discipline. If the company management discharged Complainant knowing this situation, their action was arbitrary and discriminatory. If they discharged him without knowing this situation, they were arbitrary, discriminatory, and grossly negligent in failing to interview Lamastus and check with other personnel, and examine the preshift books, to investigate Complainant's side of the story, which would have been borne out by any reasonable investigation into the facts.

Management's arbitrary treatment of Complainant establishes, by a preponderance of the evidence, that the effective motivation for his discharge was Complainant's admission to the inspector in which he stated that he knew the mine had not been preshifted within 8 hours. It was this admission that contributed to the federal inspector's issuance of a closure order.

Section 105(c)(1) of the Act (FOOTNOTE 2) protects miners against discrimination for filing or making a safety complaint under the Act, for instituting a proceeding under or related to the Act, and for other protected activities. The drafters of section 105(c)(1) stated that "(t)he listing of protected rights contained in section (105)(c)(1) is intended to be illustrative and not exclusive (and should) be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rpt. No. 95-181, 95th Cong., 1st Sess. 36 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978). I find that Complainant's statements to the inspector were protected activities under the Act. Complainant made his statements in response to a question posed by a federal inspector. He responded truthfully and to the best of his knowledge. As such, he was participating in an investigation of mine safety with a federal inspector, actions which fall under the protection of the Act. Cf. *Pace v. Consolidation Coal Company*, 3 FMSHRC 176 (January 13, 1981). I therefore find that the Complainant was engaged in activities protected by section 105(c).

To find otherwise would frustrate the purposes of the Act. Miners in positions similar to Complainant's would be encouraged not to cooperate with safety inspectors, thereby creating danger for themselves and other miners, if they knew they could be discharged for their statements. The government's investigative functions would be severely impaired and the policy of the Act would be thwarted.

Complainant engaged in protected activities and those activities were an effective or substantial motive for his discharge. His discharge was therefore discriminatory, in violation of section 105(c) of the Act.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject of this proceeding.
2. Respondent violated section 105(c)(1) of the Act by a discriminatory discharge of Complainant, as found above.
3. Complainant is entitled to reinstatement, back pay with 12 percent interest, attorney's fee, and other reasonable costs of prosecuting his complaint herein, and other relief to be specified in a final order.

PENDING A FINAL ORDER

Pending a final order, counsel for the parties are directed to confer in an effort to stipulate the amount of back pay, interest, attorney's fee, and costs due Complainant under this decision, and to stipulate the other terms of a proposed final order.

If counsel are unable to stipulate as to any particular point, counsel for Complainant should file a proposed final order and Respondent shall be granted leave to reply to it and, if necessary and appropriate, a further evidentiary hearing will be held on issues of material fact bearing on the relief to be accorded to the Complainant.

Accordingly, counsel for Complainant should file herein, not later than 30 days from receipt of this decision, either (1) a joint proposed final order or (2) his own proposed final order with an explanation of issues existing between the parties as to such order.

WILLIAM FAUVER
JUDGE

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~FOOTNOTE_ONE

2 quoted on p. 7
Section 75.303 provides, in part:

"(a) Within 3 hours immediately preceding the

beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative * * *. Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary * * *.

~FOOTNOTE_TWO

Section 105(c(1) 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.