

CCASE:  
WILLIAM WILLIAMSON V. BISHOP COAL  
DDATE:  
19820713  
TTEXT:

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

WILLIAM A. WILLIAMSON,  
COMPLAINANT

Complaint of Discrimination

Docket No. VA 80-32-D

v.

Dry Fork No. 37 Mine

BISHOP COAL COMPANY,  
RESPONDENT

DECISION

Appearances: James Haviland, Esq., for Complainant  
Jerry F. Palmer, Esq., for Respondent

Before: Judge William Fauver

This proceeding was brought by Complainant, William A. Williamson, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., for review of alleged acts of discrimination. The case was heard at Charleston, West Virginia.

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

FINDINGS OF FACT

1. At all pertinent times, Respondent operated a coal mine known as the Dry Fork No. 37 Mine in Tazwell County, West Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. The mine had three working sections. Complainant was a section foreman in the First Left Section, afternoon shift (4 p.m. to midnight), which used a continuous-mining method to mine coal. The dust control and ventilation plan required that at least 3,200 cubic feet of air per minute (cfm) be supplied to each working face and that water spray pressure on the mining equipment be at least 75 pounds per square inch (psi). Dust at the working face was normally controlled by ventilation and water-suppression methods. The continuous-mining machine was equipped with water sprays to control dust. Water sprays were also installed above the chain conveyor, which transported coal from the face to shuttle cars.

~1274

3. Section foremen were primarily responsible for implementing the ventilation and dust-control plan by ensuring that the continuous miner was supplied with adequate water for the water sprays, that the sprays were working properly, and that the working section was adequately ventilated. A ventilation reading was usually taken once at the start of the shift and once at the end of a shift. A section foreman could move the check curtains closer to or farther from the face to control the flow of air to the face; however, he was not authorized to increase or decrease the amount of air by opening, closing, or modifying an air regulator, a small opening made in a stopping or wall to control the flow of air. He was also not permitted to change the water pressure for the water sprays. Only the mine foreman was allowed to change the air regulator or the water pressure for the water sprays. If a section foreman was aware that insufficient air was reaching the section, he was instructed to adjust the check curtains, notify a supervisor, or withdraw his crew from the face.

4. The dust-control program also included monitoring dust levels by issuing each miner a dust-sampling device every 6 months. This was a small pump that drew air from the miner's atmosphere and recorded the quality of air on a small cassette. Dust-sampling personnel were responsible for conducting the tests and sending the results to a lab for analysis. If the dust sampling results showed compliance with the dust-control plan, which required that levels of respirable dust not exceed 2 mg/m<sup>3</sup>, the miner would not be required to wear the sampling device for another 6 months. However, if the results showed excessive exposure to respirable dust, the miner would be retested. Miners showing high exposure, such as a continuous-miner operator, might have to wear the device for weeks at a time. Also, if a group of dust samples showed an average above the 2.0 standard, Respondent would be subject to a citation and civil penalty for a dust violation.

5. The dust-sampling pump was battery-operated and attached to the miner's belt. The cassette was supposed to be worn within arm's length of the mouth. A hose extended between the cassette and belt.

6. Only dust-control personnel were trained in the operation of the dust-sampling device; however, the device was easily turned on and off. Usually a miner was handed the device and required to put it on and wear it for an entire 8-hour shift.

7. A miner operator or shuttle car operator might find that the dust-sampling device interfered with operation of the equipment because the cassette hose would become tangled with the levers on the equipment. In such cases the operator was allowed to remove the cassette from his clothing and attach it to the machine within arm's length of his mouth. If the cassette was not kept within that distance, the operator was supposed to turn in the device, void the cassette, and undergo another test.

8. Miners assigned to wear a sampling device did not always

wear it as required. At times, the devices were left in the bathhouse, in the dinner hole, or hanging on a piece of equipment while still running. No miner had

~1275

ever been disciplined for not wearing a dust-sampling device when assigned to wear one and Respondent had never received a citation for its methods of sampling dust. Cassettes that had not been used properly for test purposes were supposed to be voided at the end of the shift, but there were times that such cassettes were not voided.

9. Both mine management and mining personnel contributed to a lax or inconsistent approach to the dust-sampling program. For example, the mine superintendent, Joseph Aman, (FOOTNOTE a) occasionally observed improper sampling practices, e.g., leaving an activated pump in the dinner hole or wearing a deactivated pump, but took no action. Luther Young, a union safety committee member, toured the mine periodically and on one occasion observed sampling pumps hanging in the dinner hole in the Four Right Section. Aman was present; however he did not inquire as to why the pumps were not being worn or take any action to ensure that the cassettes were voided.

Often, Young did not wear a pump that was assigned to him. He understood that it was supposed to be worn the entire shift; however, he would remove it if he found operation of the shuttle car difficult while wearing the pump. Sometimes he would leave the pump running in the dinner hole. He was never questioned for turning in a cassette that did not record an entire shift or that was unrepresentative of the mine atmosphere.

Complainant, when assigned a dust-sampling device, rarely wore it the entire shift. He understood that the pump was supposed to run the entire shift or the sample was to be voided, but he would turn it off if it interfered with his work or if he had to go behind a line curtain to take air readings. When Complainant had been an equipment operator, he had often disconnected his pump because he continued to get bad samples and would otherwise have been required to wear the sampler until he received good samples.

In March 1980, Complainant observed Superintendent Aman at his desk when three dust pumps were sitting on top of the desk and running. On that day, the whole crew was supposed to be wearing dust-sampling devices.

10. Respondent placed considerable pressure on section foremen to keep the dust-samples under the 2.0 level. On occasion, company officials threatened Luther Young about having bad dust-samples. In 1977 or 1978, Bubba Bradley told Young that, if samples were returned showing a violation of the law, the mine would be shut down. In 1980, Doc Davison told Young that if the samples were out of compliance, the mine would be shut down. In 1978, Young also heard a fire boss threatened by the day shift foreman when

~1276

the fire boss was going to record a bad ventilation condition in the Six Right Crosscut. The day shift foreman had stockpiled coal in the return and the flow of air was thereby reduced.

11. The First Left Section presented a number of dust problems. It was in old workings, there was only one intake and usually only one return, and the belt haulage ventilated into the working face rather than away from it. Samples taken during Complainant's shift on September 27 and October 6, 1978, included dust levels of 2.5 and 7.0. A sample taken on Johnny Woods' shift (day shift) on December 12, included a dust level of 7.7. On December 20, 1978, the First Left Section received a citation for a violation of the dust-control plan. The citation stated in part:

Based on the results of 10 dust samples collected by the operator and reported on the attached teletype message, dated 12/19/78, the cumulative concentration of respirable dust in the working environment of the high-risk occupation in Section 008, was 23.7 mg/m<sup>3</sup> of air. Management shall cause such working environment to be sampled every production shift until compliance with the applicable limit of 20.0 milligrams per cubic meter of air for this section is achieved.

After receiving these results, Aman met with the section foremen on the First Left Section, and their shift foreman, and told them that dust levels were too high and had to be decreased. He explained the dangers of high levels of respirable dust and discussed measures required to reduce those levels. Aman offered advice and help to the section foremen and solicited ideas from them. Aman received no comments or suggestions from Complainant during that meeting.

12. On March 8, 1979, the First Left Section received another citation for a violation of the dust-control plan. The citation stated in part:

Based on the results of 10 dust samples collected by the operator and reported on the attached teletype message, dated 3/05/79, the cumulative concentration of respirable dust in the working environment of the high-risk occupation in section 008, was 21.0 milligrams. Management shall cause such working environment to be sampled every production shift until compliance with the applicable limit of 20.0 milligrams per cubic meter of air for this section is achieved.

The results from the cited samples were as follows:

Date	Section	Levels
1-11-79	day	3.4
1-19-79	midnight	.5
1-19-79	day	2.8

~1277

1-25-79	evening	1.5
1-25-79	day	1.8
1-30-79	midnight	2.3
1-31-79	evening	2.4
2-01-79	evening	.8
2-20-79	evening	1.2
2-26-79	day	4.3

After receiving these results, and the citation, Aman again discussed the dust problem with the foremen and explained the required methods of reducing dust levels. Aman received no comments or suggestions from Complainant.

13. After the first or second citation, Complainant spoke with Aman and Bill Steel, the Day Shift Foreman and Complainant's immediate supervisor, about the dust conditions in the section. Complainant told them that he could not reduce the dust levels because water pressure for the sprays was too high and ventilation was inadequate. Complainant contended that when the water pressure was too great, the dust would be forced into the mine atmosphere instead of falling to the mine floor. Complainant had no tool to measure the water pressure; however, he conducted a test with his miner operator to show that, when the water hit the coal face with great force, the air and dust were forced back into the operator's face and sometimes even as far back as the shuttle car operator. The test was conducted with the miner operator and miner helper, and in the presence of the shift foreman, Bill Steel. Complainant's supervisors told him that he was exaggerating and that he could get good dust samples with the water pressure that was being used. Complainant also told Aman that the belt haulage was ventilating into the face rather than away from it. Complainant recommended that air be vented into the returns.

14. On May 21, 1979, the day shift crew, supervised by Johnny Woods, mined the No. 1 Face in the First Left Section. The crew also spot-bolted between the No. 1 and No. 2 Faces. The Mine Foreman, LaForce, and two federal mine inspectors were present. There was adequate ventilation. At about 3 p.m., before Complainant's shift, Woods told Complainant that the heading was behind and that it needed to be cut through to release the air. The No. 1 Face was about four cuts beyond the No. 2 Face in the working section. The No. 1 Face ventilated into the return, but the No. 2 Face ventilated into the old workings where the amount of air was very low. Complainant was told that a federal inspector was expected and to cut No. 2 through to get ventilation.

Complainant entered the mine, measured the air with an anemometer, and determined that no air current was reaching the No. 2 Face. He removed most of his crew from the section, to tighten and set timbers to seal off the check curtains all the way to the No. 2 Face. After about 3 hours, Complainant

~1278

recorded air movement of about 2,100 cfm and his crew resumed production, although the ventilation plan required 3,200 cfm. The miner operator was using a dust-sampling device that shift. In all, Complainant took four anemometer readings on that shift and all were below the velocity required by the company plan and the federal regulation.

At the end of the shift, Complainant told his immediate supervisor, Steel, that the air was insufficient. Complainant drew a diagram to show Steel how he thought sufficient quantities of air could be obtained. Steel then met Ermil Stacy, the Midnight Shift Foreman, and suggested a different method of ventilating the section to meet standards. Stacy made the changes and the section had sufficient quantities of air. To do this, Stacey moved one check curtain from the right rib in the No. 2 working section to the left rib and built a fly curtain in the crosscut between the return and intake entries.

15. On May 22, 1979, about 8 a.m., Aman became aware of the ventilation problem that had occurred on the afternoon shift on the previous day. Aman took air readings and found there was enough air reaching the working section; however, there was still a dust problem. Dust from the No. 2 working section would travel to the No. 1 working section and, to correct this problem, they placed each working section on its own separate split of air and the volume of air reaching the No. 2 Face was increased by adjusting the regulator to allow an additional 10,000 cfm.

Complainant met Aman leaving the mine at about 3 p.m. Aman wanted more details of the problems Complainant had encountered on May 21 and Complainant told him that the No. 2 Face had not received enough ventilation to prevent dust buildup. Later in their discussion, when Aman learned that the miner operator had been equipped with a dust-sampling device, he told Complainant that he would lose his job if the results were not in compliance.

After meeting with Aman and Steel, Complainant met the Mine Foreman in the foreman's office and learned that the ventilation problem had been corrected during the midnight shift.

16. Results of the May 21 sampling were included in an MSHA report received on the afternoon of June 4, with a citation charging the following:

Based on the results of ten dust samples collected by the operator and reported on the attached teletype message, dated 5/31/79, the cumulative concentration of respirable



~1279

dust in the working environment of the high-risk occupation in Section 008 was 22.3 milligrams. Management shall cause such working environment to be sampled every production shift until compliance with the applicable limit of 20.0 milligrams per cubic meter of air for this section is achieved.

One sample taken on Complainant's shift showed a reading of 3.0 and another, for the miner operator, was 7.6. One reading on Woods' shift showed 6.9.

Aman met with Complainant that afternoon before his shift began and told him of the results; however, they did not discuss disciplinary measures.

Aman then met with supervisors Steel and LaForce to discuss the dust problem and possible disciplinary action. They decided that, as a disciplinary measure, the two responsible section foremen would have to work weekends. On June 6, 1979, at the end of the day shift, Steel told Complainant that the miner operator's dust sample taken on May 21 was in excess of the permissible level and, as disciplinary action, Complainant would have to work weekends until he demonstrated the ability to meet the dust standards. On June 7 Aman repeated instructions of the discipline and told Complainant that he had to achieve proper levels of respirable dust by using proper ventilation and water-suppression techniques and measures or he would be discharged. By this time, Complainant had learned of his grandmother's illness; he told Aman that he could not work weekends because of her illness. Aman would not guarantee Complainant days off and told him he would have to choose between his family and work. On June 7, Complainant quit his employment rather than accept the discipline of working on weekends.

Johnny Woods, the Section Foreman on the day shift, was also disciplined for high-dust levels by having to work on weekends in June. During his discipline, Aman examined Woods' section daily and observed that there were proper line curtains, adequate amounts of water, adequate levels of air, and a general improvement of section management. Dust samples were also taken and they were below 2.0 milligrams. Water pressure was not reduced to achieve this compliance. Aman determined that Woods had demonstrated the ability and attitude to meet the dust standards, and terminated his disciplinary weekend duties after about two weekends.

17. About 2 weeks after leaving the mine, Complainant returned and asked to be reemployed. He filled out an application form, inserting "quit" in the space for reasons for leaving the last job. He has not been reemployed.

#### DISCUSSION WITH FURTHER FINDINGS

The basic issues in this case are (1) whether Complainant was engaged in protected activity under section 105(c)(1) of the Act and if so, (2) whether the Respondent discriminated against him because of such activity.

Section 105(c)(1) of the Act provides in part:

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 \* \* \* has instituted or caused to be instituted any proceeding under or related to this Act \* \* \*.

One of the purposes of the legislation is to ensure that a miner will not be inhibited in exercising his rights under the Act, including making safety complaints. The Report of the Senate Committee on Human Resources stated:

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. S. Rpt. No. 95-181, 95th Cong., 1st Sess. 31 (1977), reprinted in, Legislative History of The Federal Mine Safety and Health Act of 1977 at 623 (1978) (hereinafter "Senate Report").

The drafters of section 105(c) intended that "[w]hensoever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." Senate Report at 36, reprinted at 624. The Report also stated:

It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal. It should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved. Senate Report at 36, reprinted at 624.

In *Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2790 [1980], 2 MSHC 1001, 1006 (BNA) (October 14, 1980), the Commission stated:

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.

Complainant contends that Respondent's dust-sampling program is one means of communicating to MSHA dust concentrations in the mine and that these communications by a miner and his efforts to ensure integrity of the dust-sampling procedures are protected activities under section 105(c) of the Act. Complainant contends that his refusal to acquiesce in implied demands by the operator to permit the taking of unrepresentative dust samples was protected activity under section 105(c). He contends that Respondent violated the Act by ordering his discipline for his upholding the integrity of the dust-sampling procedures by taking a valid, representative dust sample on May 21, 1979.

Complainant argues that, although he received no express instructions to obtain improper samples, the dust-sampling program was poorly administered and notorious for unrepresentative dust samples. As examples of poor administration he points to: A lack of affirmative steps to ensure that the pumps were worn properly for an entire 8-hour shift; failure to void unrepresentative samples; threats of closing down the mine unless "good samples" (i.e., 2.0 mg/m<sup>3</sup> or less) were obtained; intentional withdrawal of miners from dusty areas while they were equipped with sampling devices; and the withholding of authority of section foremen to make necessary adjustments in the air regulators and water pressure to control dust levels.

Complainant argues that, because of the air problems on the working section Complainant mined coal in violation of the law on May 21, 1979, but that his supervisors did not object to this but threatened disciplinary action only if the dust sample results exceeded the 2.0 standard. There was no discussion concerning

his running coal without adequate quantities of air.

~1282

When the results were received and found to be in excess of 2.0, Complainant was subjected to discipline. Complainant argues that the timing of the disciplinary action demonstrates that the reason for the discipline was not related to mining coal in violation of the law, but that Complainant was disciplined because the dust samples on his shift exceeded 2.0 and this was discrimination because of his participation in a government-enforcement activity.

Respondent contends that Complainant had the options of solving the ventilation dust problem on his own, seeking assistance from his superiors, or withdrawing his crew from the section, and that he was disciplined for operating his section in violation of the dust-control plan and dust standards of the Act. It argues that two foremen were found responsible for dust violations and they were disciplined equally to achieve compliance.

Part 70.100 of the Mandatory Health Standards, 30 CFR, requires that the average concentration of respirable dust in the mine atmosphere to which each miner is exposed be at or below 2.0 milligrams of respirable dust per cubic meter.

On December 20, 1978, the 1st Left Section of the Dry Fork Mine received a citation because the respirable dust concentration on that section exceeded the allowable limits of Part 70.100. (The average level was 2.4.) Each of the section foremen on that section, i.e., Johnny Woods, Carl Horton, and William Williamson (Complainant), was told of the citation and instructed as to the importance of dust compliance. Each foreman was asked if he had any questions or needed help in having his shift comply. Complainant sought no help. The section came back into compliance on January 24, 1979, with an average concentration of 2.0.

On March 8, 1979, the 1st Left Section received another citation for excessive respirable dust (average level 2.1). Each section foremen was told of the citation and was instructed as to the importance of dust compliance. Questions were solicited and help was offered. None of the foremen offered any excuse or reason as to why his section was out of compliance. Emphasis was placed on keeping sufficient air in each place, line curtains up, and water sprays in good order. They were told if the working place became dusty, mining was to cease and the miner operator was to remove himself to good air and not to resume operation until the dust had cleared. It was mentioned that if the 1st Left Section again went out of compliance, disciplinary action would probably be taken. The section came back into compliance on April 9, 1979, with an average concentration of 1.4.

On June 4, 1979, the 1st Left Section again received a citation for respirable dust (average level 2.2), and each of the foremen on 1st Left was told of the citation and was instructed as to the importance of dust compliance. Questions as to how and why the section was again out of compliance were asked in an attempt to pinpoint the problem and its causes. It was

determined that on May 21, 1979, on Complainant's shift, the miner operator, Jimmy Bonds, had worn a dust pump and received a high sample result. The

~1283

section foreman, Complainant, acknowledged to Bill Steel (afternoon shift foreman) and Joe Aman (superintendent) that he had been lax in following the ventilation and dust-control plan. Also, a high dust sample was obtained on April 10, 1979, on the day shift, and no explanation was offered by the day shift section foreman, Johnny Woods. No high samples were found on the midnight shift.

Management decided that the performance of Complainant and Johnny Woods was unacceptable and that disciplinary action was required. It was decided that each foreman would work each weekend until he demonstrated that he could perform his job in compliance with the dust standards. Termination of both foremen was strongly considered but it was decided that the foremen would be given one last chance. It was to be made clear to them that this was the last chance and failure to achieve acceptable dust samples would result in termination in the absence of a valid excuse. The logic behind the disciplinary action of working weekends was that it was stronger than just talking to the foremen but less stringent than termination. If a foreman could not demonstrate improvement, he would be terminated but if he did, he would not be working many weekends. Suspension without pay was also considered, but past experience (with other employees) had shown it to cause more harm than good.

Johnny Woods was told of the disciplinary action to be taken and he worked June 9 and 10 (he was given off June 7 and 8). On June 6, Bill Steel told Complainant of the action to be taken. Joe Aman also discussed the action with Complainant on June 7. Complainant stated that illness in his family would prevent him from working weekends. The superintendent told him that, if there were idle days during the week he would have those off but he would be required to work on weekends until he proved himself. Complainant said that he would rather quit, and he did on June 7.

When Woods was disciplined, Superintendent Aman visited the 1st Left Section each day looking primarily at dust control and ventilation. Aman later told Woods that he had demonstrated that he could perform his job properly and that he would not have to work any more weekends except as normally required of all foremen. The section was reported back in compliance on June 21 with an average concentration of .5 milligrams. The dust samples taken after the meeting with the foremen in June averaged 0.2.

The discipline taken against Complainant and Woods, ordering them to work weekends, was to further compliance with health and safety standards at the Dry Fork Mine. They had been warned several times to follow the dust-control plan and to keep their sections in compliance. Complainant and Woods failed to do so and management applied equal and non-discriminatory discipline to effect compliance if possible. In prior meetings and warnings, it was made clear that they were expected to comply with the dust-control plan to keep dust conditions in compliance and, if they could not, they were not to work their crews in excessive dust but were to keep them out of dust and

~1284

seek assistance from supervisors to correct the dust conditions. Management had considered firing Complainant and Woods but working on weekends was considered to be a last chance. Complainant was told that this was his last chance and if he went out of compliance again without a valid excuse he would be discharged. Johnny Woods, day shift section foreman, received the same warning and discipline as did Complainant.

Complainant has shown that there were problems with the dust program, and that management exerted pressure to avoid obtaining dust samples above 2.0. However, he was also given instructions, and the authority, to remove his men from excessive dust and to seek the assistance of supervisors if he could not correct an excessive-dust condition himself. Complainant has not proven by a preponderance of the evidence that his instructions from management meant that he was to cause misrepresentative dust samples and that he was disciplined for refusing to obey such instructions. His participation in the dust-sampling program was a protected activity under section 105(c) of the Act, but he has not proven that he was discriminated against because of such activity. He was disciplined for failure to meet the dust standards.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and subject matter of this proceeding.

2. Complainant has failed to meet his burden of proving a violation of section 105(c)(1) of the Act.

Proposed findings and conclusions inconsistent with the above are rejected

ORDER

WHEREFORE, IT IS ORDERED that this proceeding is DISMISSED.

WILLIAM FAUVER  
JUDGE

AA

~FOOTNOTE\_ONE

a. In pertinent parts of 1979, Complainant was Section Foreman, Evening Shift, of the First Left Section, Joe Aman was the Mine Superintendent, Bill Steel was the Day Shift Foreman, Johnny Woods was the Day Shift Section Foreman on the First Left Section, and Doug LaForce was the Day Shift Mine Foreman.