

CCASE:
MERLE WEGWER V. ASPHALT MINING
DDATE:
19821012
TTEXT:

FINDINGS OF FACT

1. Respondent is engaged in the mining, constructing and supplying of materials for building roads and paving parking lots - primarily asphalt. It is a mine as that term is used in the Federal Mine Safety and Health Act.

2. Complainant worked for Respondent as a truck driver from September 12, 1980 to July 14, 1981. He was a miner as that term is used in the Act.

3. From about May 14, 1981 to July 14, 1981, Complainant operated a "water-pull," which consisted of a diesel operated tractor pulling a large water tank. It was used to spray water on the haulage road and around the pits, yard and scale house. It carried approximately 8,000 gallons of water, and, when fully loaded, weighed approximately 75,000 pounds. It was equipped with air brakes.

4. During the period of Complainant's employment, Respondent had irregular employee safety meetings held at least monthly.

5. At every safety meeting attended by Complainant while he drove the water pull, he complained that the brakes on the water pull were inadequate.

6. Leonard Van Wagenen, a truck driver for Respondent from about April 1980 to November 1981, operated the water pull for about 3 months. He complained of inadequate brakes on the vehicle many times at safety meetings. Leon Richardson, a truck driver for Respondent for about 10 months, and Stewart Powers, who worked for Respondent from September 1980 to November 1981, and who drove the water pull on occasion, both were present at safety meetings when the subject of the inadequacy of the water pull brakes was discussed.

7. Respondent instructed its truck drivers to submit a "Drivers Repair Report" also called a "cry sheet" at the end of each shift to point out equipment items needing repair. Of the 38 reports on the water pull introduced in evidence, six refer to the brakes. Three of these were submitted by Complainant. On July 9, he reported that "brakes are bad." On July 13, he reported that the left rear drive had a brake pancake. On July 14, he reported that "brakes are bad."

8. The brakes on the water pull were adjusted on July 13, 1981, and a brake pancake was installed. On July 14, 1981, after the accident described below, the brakes were checked and found to be in good condition.

DISCUSSION

I am generally accepting the testimony of Verle Snodgrass, the heavy equipment shop foreman, as to the condition of the brakes on the water pull. I also find that because of the kind and weight of the vehicle, it was often difficult to stop even with good brakes. I also find that the brakes required frequent adjusting. I am specifically rejecting the testimony of Complainant and the other drivers that they were told at safety meetings and by the mechanics that the water pull did not have brakes or had inadequate brakes.

9. At some time between May and July, 1981, Complainant asked Chris Reinesch, Manager of the Quarry for Respondent, if he could have a canopy or umbrella constructed on the water pull to provide shade. Reinesch refused on the ground that a canopy would interfere with the operator's standing to see back underneath the standpipe. Sometime later, when Reinesch was away from the quarry, Complainant asked Therese Sanders, Respondent's President to have the canopy installed and she agreed. When Reinesch returned he was upset and the canopy was removed.

10. On one or more occasions, Complainant complained to Robert Kreiling, truck foreman and later Assistant to the Transportation Manager, about alleged unsafe driving on the part of Chris Reinesch and near accidents between the vehicle driven by Reinesch and the water pull driven by Complainant. He made the same complaints to Therese Sanders at least once.

11. On July 13, 1981, Complainant drove the water pull to the Salt River loading area. As the tanks were being filled with water the vehicle motor stalled and Complainant was unable to restart it. He asked a truck driver in the vicinity to call the shop and have someone come down to start it. He then sat in the vehicle with his head resting on the steering wheel. After some minutes, Chris Reinesch drove up and accused him of sleeping on the job. Complainant told Reinesch that he could not start the motor. Reinesch told him he could get jumper cables from the crusher plant but Complainant refused, telling Reinesch that he did not take orders from him and threatening to "kick his ass." After about 20 minutes, a mechanic came from the shop and the water pull was started.

12. Reinesch reported the incidents described above to Byron Handy, Vice-President and general manager of Respondent. Reinesch recommended that Complainant be discharged.

13. Robert Kreiling, the truck foreman and later assistant to James Lake, Transportation Manager, hired Complainant. He assigned Complainant to drive the water pull and generally Complainant was answerable to Kreiling for the operation of the vehicle. When the water pull was operated in the area of the crusher, watering the yard roads, Reinesch had authority over the operator. This was never made clear to Complainant prior to July 13, 1981, however.

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14. Following the incidents described in Finding of Fact No. 11, Complainant, Lake, Reinesch and Ms. Sanders had a meeting concerning the incidents. Lake told Complainant that although he was under the direct supervision of Lake, he was also subject to direction by Reinesch when in the crusher plant area. Lake stated that Complainant declined to follow Reinesch's directions and that this was insubordination and would not be tolerated. There was also discussion of the canopy incident concerning which Reinesch was still upset. Reinesch said that he found Complainant asleep at the wheel of his vehicle and that Complainant threatened to kick Reinesch's ass. Lake reprimanded Complainant, but did not further discipline him at that time.

15. On July 14, 1981, while Complainant's water pull was being filled, he picked up a snake near the pond. The snake wrapped itself around Complainant's arm as he operated the pull watering the haulage road. He deviated from his normal course and drove with one hand, holding down the arm on which the snake was to avoid letting Reinesch see him with the snake on his arm. He later threw the snake away and continued on his normal duties.

16. On July 14, 1981, the water pull operated by Complainant collided with a road grader, also called a blade, which was grading or regrading the haul road. Prior to the accident, the blade was positioned in the center of the road and was travelling westerly. According to a company rule, the blade has the right-of-way over other vehicles on the road. The blade operator saw Complainant in the water-pull approximately 175 feet away coming in the opposite direction. The blade operator stopped his vehicle and stood up and waived because he wanted Complainant to discontinue watering the road at that time.

17. The water pull continued coming and attempted to pass the blade on the right but the left rear tire of the water pull struck the corner of the mold board on the blade. The grader was stopped when the collision occurred.

18. As a result of the collision, the left rear tire of the water pull was cut and the wheel rim was bent. The control arm on the blade was broken and the blade later fell off.

19. The grader was visible from the water-pull prior to the collision from at least 175 feet.

20. There was room on the road for the water pull to pass the grader without colliding with it.

21. The brakes on the water pull were operative at the time of the accident.

22. Following the accident, Complainant drove up to the yard and was told by the dispatcher to go home since the other water-pull was inoperative.

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23. When Lake arrived at work on July 14, 1981, he was told of the accident by Kreiling. Lake examined the vehicles and talked to the blade operator and a truck driver who witnessed the accident. He also discussed the condition of the brakes with the heavy equipment mechanic. He was told by Kreiling about Complainant driving earlier that morning with a snake on his arm. Lake decided to terminate Complainant because he concluded that Complainant was driving the water pull in an unsafe manner and that this caused the accident.

24. The decision to terminate Complainant was made by Lake alone.

25. Lake was appointed to the position of Transportation Manager on July 1, 1981. He did not attend any safety meetings prior to Complainant's termination and was not aware of any complaints of bad brakes on the water pull made at those meetings. He was aware of the "cry sheet" which Complainant submitted on July 13, 1981.

STATUTORY PROVISION

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

(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 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.

ISSUES

1. Whether Complainant was terminated from his employment because of safety complaints.
2. If so, what is the appropriate relief.

CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Mine Safety Act at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The complaints made by Complainant orally and in writing about the inadequacy of the brakes on the water pull described in Findings of Fact Nos. 5 and 7 related to safety and constituted activity protected under the Act.

3. Complainant failed to establish that he was terminated as a result of the safety complaints referred to above.

DISCUSSION

I accept the testimony of James Lake that at the time he discharged Complainant, Lake was not aware of any complaints concerning the brakes on the water pull voiced by Complainant at safety meetings. He was aware of the July 13, 1981, cry sheet which stated "Left rear drive has a brake pancake." I generally accept Lake's testimony that he discharged Complainant because of (1) the accident; (2) the snake incident; and (3) the reprimand issued to Complainant on July 13, 1981, for insubordination. Whether Complainant was fairly blamed for the accident, and whether the reasons given for the discharge were sufficient to justify discharge are not issues before me. See Secretary/Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981). Further, the reasons for Complainant's personality clash with Reinesch and Complainant's contention that he was not adequately informed as to his supervisors, are of no importance to a decision in this proceeding. I think the evidence establishes that the brakes on the water pull caused difficulty to the operators of the vehicle. The evidence establishes that Complainant complained of inadequate brakes on the vehicle. These complaints were made in good faith, were reasonable and were related to employee safety. But the evidence does not show a nexus between the complaints and Complainant's discharge.

4. Complainant failed to establish a violation of section 105(c) of the Act.

ORDER

On the basis of the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge