

CCASE:
REX ALLEN V. UNC MINING & MILLING
DDATE:
19830111
TTEXT:

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

REX ALLEN,		Complaint of Discharge,
	COMPLAINANT	Discrimination, or Interference
	v.	Docket No. CENT 82-66-DM
UNC MINING AND MILLING,		MD 80-156
	RESPONDENT	Churchrock Operations

Appearances: Grant L. Foutz, Esq., Gallup, New Mexico, appeared for Complainant
Lindsay Lovejoy, Esq., Stephenson, Carpenter, Crout & Olmsted and Lea Brownfield, Esq., all of Santa Fe, New Mexico, appeared for Respondent

DECISION

STATEMENT OF THE CASE

The complaint filed herein alleges that Complainant was discharged on March 26, 1980, from the position he held with Respondent, as a result of activity protected under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801. Complainant filed a complaint of discrimination with MSHA on August 9, 1980. MSHA denied the complaint by a letter dated January 6, 1982. The complaint was filed with the Review Commission on January 25, 1982. Pursuant to notice, the case was heard in Gallup, New Mexico, on October 19, 1982. Rex Allen, Gilbert MacLellan, Robert Robb and Ron MacLellan were called as witnesses by Complainant. No witnesses were called by Respondent. Both parties have filed posthearing briefs with proposed findings of fact and conclusions of law. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the operator of the Northeast Church Rock Mine near Gallup, New Mexico.

2. Complaint was employed by Respondent beginning September 15, 1972, as an oiler. He was promoted to mechanic trainee and then journeyman mechanic in 1973. Later that year he became lead mechanic. In 1974 he was temporarily maintenance superintendent and then became general underground foreman. He supervised approximately 150 employees while in this position. For about 1-1/2 years he was placed in charge of planning and coordinating and in about 1976 became underground general maintenance foreman in which position he continued until January, 1980, when he temporarily did some surface projects. He returned to his underground duties in February 1980, and was classified as 1700 level foreman. He left the employ of Respondent on March 26, 1980. He was reemployed by Respondent in November 1980 washing and servicing cars. He was a journeyman mechanic at the time of the hearing.

3. In 1977 and 1978, Complainant received very few complaints regarding safety from those who worked under him--approximately 10 each year. In 1979, such safety complaints went up to perhaps 10 each day. At least two employees left the company because they were concerned about safety. The alleged unsafe conditions included loose rock, cave-ins, and improper ventilation. Complainant employees were required to travel over muck piles and ground fall piles to get to equipment. A number of citations were issued by MSHA inspectors in 1979 for these conditions. Complainant reported these conditions to his supervisors and to the Safety Department "plenty of times."

4. On one occasion in April of 1979, a loader had been taken out of service by Complainant's crew because it did not have brakes. The loader was "red-tagged." However, the production crew ignored the red tag and put the loader in service. An MSHA inspector discovered that it had no brakes and issued a citation. Complainant was upset and voiced his feelings to his supervisors. In February, 1980, a haulage truck was taken out from the shop even though it had a faulty shift lever. An accident occurred when the truck jumped out of gear.

5. On many occasions, Complainant reported inadequate ventilation in his shops which caused dizziness and disorientation in his employees. His supervisors told him they were trying to correct the condition and that if his employees didn't like it they could quit.

6. Production meetings attended by Complaint were held twice daily. Complainant brought up safety complaints at these meetings and was accused of complaining and griping.

7. In early 1979, Complainant reported that loose rock and ground falls affected part of the maintenance shop. The roof bolts had become loose. An attempt was made to correct the situation but eventually the shop roof caved in.

9. In January 1980, Complainant was transferred to the surface and was under the supervision of Jack Miller. From January 25, 1980 until March 26, 1980, his supervisor was Mike Robb who took over as maintenance superintendent. For about 9 months prior to January 25, 1980, Robb had been resident engineer at the subject mine, but during that time, he had no supervisory duties with respect to Complainant. Complainant returned to underground duties in early February, 1980. His job title was 1700 level foreman and he was under the immediate supervision of Jerry Troxell who became general underground maintenance foreman.

10. In February or early March, 1980, Robb told Complainant that he thought the truck shop "was a complete mess" and that he would have to improve the condition of the shop.

11. During the time Robb was his supervisor, Complainant did not make any safety complaints, oral or written, to him, nor was Robb aware of safety complaints made to prior supervisors.

12. On March 25, 1980, Complainant was asked by Troxell to come in to Mike Robb's office. Robb, Troxell, Wayne Bennett, head of Respondent's Industrial Relations Department and Complainant were present. Robb informed Complainant that lack of water control had caused equipment to break down, parts were not being properly handled and Complainant "did a great deal of complaining and very little action." The complaints concerned lack of parts availability and production abuse of equipment. Robb told Complainant that his performance was not satisfactory and that henceforth he would confer with Robb and Troxell every Monday morning and discuss his job performance the previous week. A deadline of May 1 was set for Complainant to show improvement. Complainant did not bring up any safety complaints or concerns during this meeting.

DISCUSSION

There is sharp disagreement between Complainant and Robb as to what took place at the meeting. Neither Bennett nor Troxell was called as a witness. According to Robb both were employed by other companies out of the State of New Mexico. Complainant stated that Robb told him he (Complainant) was not doing his job, but was going around complaining all the time. Complainant took this to refer to safety complaining. Robb testified that he pointed out specific instances where Complainant's work was unsatisfactory. Complainant testified that at the conclusions of the meeting he was told that he could resign and have "layoff status, severance pay (and) insurance coverage" for a period of time, or he would be terminated. An answer was demanded by 8:00 the following morning. Robb testified that at the conclusion of the meeting, Complainant was told that he would in effect be placed on probation, would be counselled every Monday and would have to show improvement by May 1, 1980. I am generally accepting Mr. Robb's version of the meeting. This is based in part

on my assessment of the credibility of the two men as witnesses and on the interest or lack of interest in the outcome of this litigation. More importantly, it is based on the memorandum of the meeting prepared by Robb on March 27, 1980, which is part of Complainant's Exhibit 2 and which supports Robb's version of the meeting.

13. On March 26, 1980, Complainant met with Bennett and submitted a "resignation with layoff status." He continued on the payroll with severance pay to July 15, 1980. He also retained insurance benefits.

14. Complainant's mother was seriously ill in April and May, 1980, and was under intensive care and thought to be dying.

15. On August 8, 1980, Complainant filed his initial complaint with MSHA. An investigation was conducted and MSHA denied the complaint on January 6, 1982. Complainant filed his complaint with the Review Commission on January 25, 1982.

DISCUSSION

Complainant offered in evidence a copy of the MSHA Investigation file which he received from MSHA Dallas Office. Respondent objected and I excluded the documents primarily because substantial portion of the investigation report and of the transcripts of interviews had been excised. Complainant did not attempt to subpoena the record or the investigator. The exhibit as offered is to some extent unintelligible and possibly prejudicial. I conclude that it would be unfair to the parties and unhelpful to me to admit the exhibit.

16. Robb left Respondent's employ on March 30, 1980. He knew on March 25 1980, that he was going to leave on March 30. He expected that the counselling of Complainant referred to in Finding of Fact No. 12 would be conducted by Troxell.

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.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter

shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

ISSUES

1. Whether the complaint is barred by the statute of limitations or laches.
2. Whether Complainant voluntarily left his employment with Respondent on March 26, 1980, or was discharged, actually or constructively.
3. If Complainant was discharged, was it related to activity protected under the Act.
4. If Complainant was discharged for protected activity, what relief should be awarded.

CONCLUSIONS OF LAW

1. Complainant and Respondent were subject to the provisions of the Federal Mine Safety and Health 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 complaint is not barred by the limitations for filing claims set out in section 105(c) of the Act or by laches.

DISCUSSION

Complainant filed his complaint with MSHA on August 8, 1980, and his employment was terminated March 26, 1980. However, he remained on the payroll by reason of severance pay to July 15, 1980. He claims that he was distracted because of his mother's illness at the time. Respondent asserts that prejudice resulted from the delay because former supervisors Jack Miller, Wayne Bennett, Jerry Troxell and Mike Robb have left Respondent's employ, and all but Robb are now living and working outside of New Mexico.

It has been held that the statutory filing deadlines are not jurisdictional. Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation, 3 FMSHRC 1539 (1981). See also Christian v. South Hopkins Coal Co., 1 FMSHRC 126 (1979); Local 5429 v. Consolidation Coal Co., 1 FMSHRC 1300 (1979); S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, Senate Subcommittee on Labor, Committee on Human Resources (July 1978) 624 (hereinafter LEG. HIST.) ("It should be emphasized, however, that these time-frames [in 105(c)] are not intended to be jurisdictional.")

The questions to be considered here are whether Complainant showed justifiable circumstances for his delay in filing and whether the delay prejudiced Respondent. See Herman v. Imco Services, 4 FMSHRC ____ (December 15, 1982).

The fact that Complainant remained on the payroll and suffered no monetary loss is, I conclude, sufficient reason justifying a delay in filing. It is conceivable that Complainant feared that filing a claim could jeopardize his severance pay rights. Although Respondent claims prejudice, it did not show that an attempt was made to preserve testimony when it became aware that the claim was filed, or that it attempted to obtain the testimony of the former employees by deposition. Complainant cannot be blamed for the delay between the time he filed with MSHA and MSHA's decision 16 months later.

3. The complaints which Complainant voiced to his superiors concerning unsafe and unhealthful conditions under which he and his crew worked, such as those described in findings of fact 3 through 7, constituted activity protected under the Mine Safety Act. Any adverse action because of this protected activity would violate section 105 of the Act.

4. Complainant left his employment with Respondent on March 26, 1982, voluntarily. He was not discharged and the termination of his employment was not related to any activity protected under the Mine Safety Act.

DISCUSSION

In Finding of Fact No. 12, I accepted the testimony of Robb to the effect that the discipline imposed on Complainant at the March 25, 1980, meeting was to place him on a form of probation. He was not discharged. Apparently unwilling to accept the probationary status, he voluntarily resigned. The discipline was imposed solely by Robb. It resulted from Robb's evaluation of Complainant's work performance. Whether the evaluation was accurate or whether it was fair is not a matter for me to decide. I accept the testimony of Robb that Complainant made no safety related complaints to him and that he (Robb) was not aware of any such complaints having been made to others. Therefore, the discipline imposed by Robb, such as it was, was not related to activity protected under the Act.

5. Since Complainant failed to establish that he was discharged or otherwise discriminated against in violation of section 105(c) of the Act, he is not entitled to the relief sought in his complaint.

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