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LEO KLIMCZAK V. GENERAL CRUSHED STONE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LEO KLIMCZAK, COMPLAINANT	Complaint of Discharge, Discrimination, or Interference
v.	Docket No. YORK 82-21-DM
GENERAL CRUSHED STONE COMPANY, INC., RESPONDENT	MD 81-132 Rochester Mine

DECISION

Appearances: Richard A. Dollinger, Esq., Greisberger, Zicari, McConville, Cooman & Morin, P.C., Rochester, New York, for Complainant
Joseph E. Boan, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Judge Melick

This case is before me upon the complaint of Leo Klimczak under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", alleging that the General Crushed Stone Company (General) discharged him on June 29, 1981, in violation of section 105(c)(1) of the Act.(FOOTNOTE 1) Evidentiary hearings were held on Mr. Klimczak's complaint in Rochester, New York.

In order for Mr. Klimczak to establish a prima facie violation of section 105(c)(1) of the Act he must prove by a preponderance of the evidence that he has engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom, Consolidation Coal Co. v. Secretary, 663 F.2d 1211 (3rd. Cir. 1981). Before his discharge on June 29, 1981, purportedly for excessive absenteeism and a bad work attitude, Mr. Klimczak had been employed by General for almost 9 years as a mechanic welder. In this case, he asserts essentially four claims of protected activity. While challenging some of the details of

the claims, Respondent, in its brief, does not deny that complaints were in fact made by Mr. Klimczak and that they did in fact concern matters of safety. The thrust of its argument appears to be that those complaints were made in bad faith only to harass mine management and that those complaints were therefore not protected.

While a "good faith" and "reasonableness" test does apply to protected work refusals under section 105(c)(1), Robinette v. United Castle Coal Co., 3 FMSHRC 1803 (1981), I find no similar requirement under that section for protected safety complaints. In Munsey v. FMSHRC, 595 F.2d 735 (D.C. Cir. 1978), it was held that no such requirement existed (for protected safety complaints) under the similar anti-discrimination provisions of former section 110(b) of the Federal Coal Mine Health and Safety Act of 1969. The Court in Munsey was understandably concerned that imposing any "good faith" or "not frivolous" test for safety complaints would discourage the reporting of such complaints. The rationale of the Munsey decision is persuasive and I find nothing in the 1977 Act or its Legislative History to suggest that the same rationale and conclusion should not also apply to the comparable provisions of section 105(c)(1). Under the circumstances, it is not necessary at this point in the analysis to determine whether the safety complaints made by Mr. Klimczak in this case were "reasonable" and made in "good faith". Those complaints were, in any event, activities protected by the Act.

The first of these protected activities occurred during February 1981 when Mr. Klimczak complained to Assistant Mine Superintendent Ben Gardner, to his union representative (shop steward) Sam Metrano, and to his group leader (foreman), Charlie Solt, about his need for an assistant to help with his welding. Klimczak testified that he had twice been injured while struggling alone with large sheets of steel and had complained to each of these men about his need for a shop assistant to help him safely perform his work. While Solt admitted at hearing that Klimczak had complained to him about the absence of a shop helper, Solt denied that Klimczak said it was unsafe for him to work alone. Solt did not deny however, that he then knew Klimczak had previously been injured while struggling without assistance with large sheets of steel. It may therefore reasonably be inferred that Klimczak's complaints to Solt regarding his need for help was a complaint about an alleged danger within the meaning of section 105(c)(1). Moreover, neither Ben Gardner nor Sam Metrano testified in this case and no affirmative evidence has been presented to suggest that they had not received complaints of the alleged danger from Klimczak. Accordingly, I find that Klimczak did make the alleged safety complaints and that the union representative, the group leader, and the assistant mine superintendent were all aware of those complaints.

The second protected activity occurred in March 1981 when Assistant Superintendent Gardner directed Klimczak to weld some duct work from a "bucket" elevated by a crane. Klimczak protested to Gardner that this was an unsafe procedure but went

ahead and did the job anyway. As he was being lowered after completing the job, however, an accident occurred in which he was in a "free fall," dropping about 20 feet to the ground. After this incident Klimczak told Gardner and Solt that he would never get in the bucket again. The Mine Superintendent, Thomas Meehan, admitted that he also knew of this incident and, recognizing the danger posed by the bucket, ordered it removed

from service. Meehan also knew that Klimczak had complained about having to work in the elevated bucket. Klimczak's complaint about the safety of the bucket was clearly a protected complaint. In addition, I find that Klimczak's statement that he would refuse to ever again work in the bucket in that manner, was also a protected work refusal. There is no dispute that this anticipatory work refusal was reasonable under the circumstances and made in good faith. Robinette, supra.

The third protected activity occurred in April 1981. Klimczak was directed by Gardner to "hot weld" a gas cap hinge onto the crane within 12 to 14 inches of its unpurged gas tank. It is not disputed that welding in such a manner is indeed unsafe. Accordingly, Klimczak's protestation to Gardner that the assigned task was dangerous is also a protected safety complaint. The fourth and final protected activity occurred sometime in May 1981.(FOOTNOTE 2) Gardner had directed Klimczak to reweld some cracks located some 10 to 20 feet above ground in an area of the portable crusher that had no hand rails. While agreeing to do the job, Klimczak told Gardner that that would be the last time he would work on the equipment without a ladder or catwalk and threatened to report the condition to a Federal inspector.

Since Mr. Klimczak has established that he did in fact make protected safety complaints to the operator in February, March, April, and May, 1981, and did engage in a protected work refusal in March 1981, it is necessary, following the Pasula analysis, to next determine whether the operator, in discharging him, was motivated in any part by those protected activities.

Direct evidence of motivation in section 105(c) discrimination cases is, of course, rare and indirect or circumstantial evidence must ordinarily be relied upon by the Complainant. Secretary ex rel Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981). In this case, Klimczak cites several circumstantial factors that he contends demonstrate that his discharge was motivated by his protected activities. He alleges that agents of the operator had knowledge of his protected activities, that management showed hostility towards his protected activities, that he was accorded disparate treatment vis-a-vis other employees committing equally or more serious breaches of conduct, and that there was a coincidence in timing between the protected activities and the subsequent discharge.

With respect to the first allegation, the evidence is indeed uncontradicted that the assistant mine superintendent, Ben Gardner, knew of each of the protected activities and it was Gardner who composed the discharge letter based in part on his own personal knowledge (from his diary) of the Complainant's work history. In addition, Mine Superintendent Thomas Meehan admitted that he was aware of Klimczak's complaints about riding in the elevated

bucket.(FOOTNOTE 3) In light of the close working relationship between Gardner and Meehan it is reasonable to infer that Meehan was also aware of the other safety complaints as well. In any event, although Meehan contradicts himself on this point, I accept Meehan's admission that the decision to discharge Klimczak on June 29, 1981, was a joint decision by Gardner and himself. Within this framework of evidence it is clear that those responsible for Klimczak's discharge together had knowledge of all of Klimczak's protected activities.

Klimczak next claims that mine management showed hostility towards his protected activities by allegedly failing to follow the disciplinary procedures set forth in the collective bargaining agreement (Agreement) and by the alleged arbitrary manipulation of its absentee and vacation policies against him.(FOOTNOTE 4) Article II Section 4 of the Agreement sets forth the right of management to discharge an employee for excessive absenteeism. (Joint Exhibit No. 1). It provides as follows:

> Management maintains the right to discharge an employee for excessive absenteeism. Absenteeism means absence from the job without prior notice to and consent of the company.(FOOTNOTE 5) Notification will be required by the Employer within one (1) hour after the start of the employee's regular shift. This condition to apply for sickness, accident, etc., where prior notice as provided could not be given. Excessive absenteeism means absenteeism four (4) times within a calendar year. The first absence without good cause brings a written warning from the company; second absence within thirty (30) days of the previous absence shall bring suspension without pay for two (2) days; third absence within thirty (30) days of the second absence shall bring a suspension without pay for one (1) week (five [5] scheduled workdays). Four (4) such absences within the calendar year shall be cause for discharge.

In support of his argument that General applied its absentee policy in a discriminatory manner, Klimczak alleges that it did not follow the disciplinary procedures set forth in the Agreement and that it arbitrarily altered his attendance records retroactively by changing previously excused absences to unexcused absences and by counting as "unexcused" absences 10 days that he was on workers' compensation in February, 1981. The record does in fact support the Complainant's contentions that at least some of his absences which had been excused under company policies then in effect were later converted to unexcused absences. Meehan so much as conceded that Klimczak could have successfully challenged these in a grievance proceeding. It also appears that Meehan relied upon even Mr. Klimczak's excused and partial absences in concluding that he had a bad attitude toward his work--another reason cited by Meehan for the discharge.

While the use of these procedures may have been grossly unfair and indeed suggest that General may have been determined to use every means, fair or foul, to get rid of Mr. Klimczak, it does not in itself prove that General was determined to get rid of him because of his protected activities. Moreover, in spite of General's apparent reliance on a number of questionable "unexcused" absences I find that the Complainant did in fact have at least four unexcused absences during calendar year 1981. It is not disputed that his absences on April 4, April 11, and May 30, 1981, were unexcused. In addition I find for the reasons set forth below that Klimczak's absence on Friday, June 26, 1981, was also unexcused. Since that absence would have constituted the fourth unexcused absence for the calendar year sufficient cause for discharge would then have existed under the Agreement. (FOOTNOTE 6)

Mr. Klimczak testified that on the morning in question he was scheduled to begin work at 7:00 a.m. He admittedly called in "late", i.e. around 9:00 or 9:30 that morning, to report that he would be late for work. Since the Agreement requires the call to be made within one hour of the start of the shift, the absence here could, on that basis alone, be deemed an unexcused absence. In any even Klimczak claims that in this telephone call he talked to the company clerk, Wesley Lane, and told him that he "had to go get papers

from the Compensation Board, and [his] car was broke down."(FOOTNOTE 7) Mr. Klimczak testified that he later appeared on the job but only to pick up papers "for the Compensation Board" and to pick up his pay check to pay for his car repairs.

Office clerk, Marcia N. Mott, testified that it was actually she who received Klimczak's phone call on the morning of June 26. Klimczak told her that he would be late because his car had broken down and that he would show up later that day. Ms. Mott passed this information to her supervisor Wesley Lane and, several hours later, around lunch time, she saw Klimczak come in and pick up his pay check. She noticed the smell of alcohol on his breath.

Office Manager Wesley Lane, recalled being advised of Klimczak's telephone call. Later that day he saw Klimczak in the office talking with Superintendent Meehan. When Lane asked the Complainant if he was planning on working that day, he responded with a profanity. Lane also smelled alcohol on Klimczak's breath. In light of Klimczak's behavior, apparently influenced by alcohol, Lane assumed he would be unable to work. He accordingly marked Klimczak absent for the day.

Superintendent Meehan came into the office around ten o'clock that morning. Klimczak was in the hallway ready to leave. He smelled of the odor of alcohol. Klimczak explained that he had called in because of car trouble and then proceeded to complain about the "incompetence" of the assistant superintendent. He then said to Meehan "when Sam [Mitrano] and Charlie [Solt] go on vacation I'll show you how dumb I am when something breaks down and needs to be fixed." Meehan interpreted this to mean that if something broke down at the plant Klimczak would not "oversucceed" himself to fix it even though he would be capable of doing so. The decision to dismiss Klimczak was made a short time after this confrontation.

The Complainant argues that even if his absence on June 26 was otherwise unexcused, since he was subsequently awarded Worker's Compensation benefits corresponding to the time lost on that date, that absence could not under New York law be considered an "unexcused" absence. See Griffin v. Eastman Kodak Co., 436 N.Y.S. 2d 441 (1981) and LaDolce v. Regional Transit Serv. Inc., 429 N.Y.S. 2d 505 (1980). While it is undisputed that Mr. Klimczak had subsequently been awarded Workers' Compensation corresponding to a period of time including June 26, 1981, I find that to be irrelevant to the issue of whether he had complied with the requirements of the Agreement for an excused absence. By his own admission, he did not call his employer within one hour of the commencement of his shift as required. Moreover, when he did call, it is clear from the credible evidence that he reported only that he would be late

for work and did not request an excused absence for the day. According to company policy his failure to report for work under these circumstances warranted an unexcused absence. Finally when he did later appear at the office, his condition was apparently so affected by alcohol that the time clerk considered him unable to work. His absence on June 26, 1981, may therefore be considered an unexcused absence. Since I have found that Mr. Klimczak failed to report to work on June 26 for reasons other than "work related" injuries, the cited New York law is, for this additional reason, inapposite. Accordingly, as of June 26, 1981, the Complainant had four unexcused absences within calendar year 1981 and, under the Agreement, sufficient cause then existed for his discharge independent of any other reason.

The Complainant next alleges, as evidence of an unlawful motivation, that he was singled out for special disciplinary treatment because other employees had more absences over a shorter period of time but escaped without serious discipline. He first alleges that co-worker Richard L. Cowd was absent 12 times in a 3-month period without ever having been disciplined. The uncontradicted testimony of Superintendent Meehan is, however, that those absences were excused and accordingly would not be considered towards disciplinary action. Complainant next cites the record of co-worker Miller, who reportedly missed 11 days over a 6-month period. Superintendent Meehan testified, again without contradiction, that Miller's absences were all excused and therefore, again, could not be used for disciplinary purposes. Finally, the Complainant cites the records of co-worker Wright, who admittedly did receive a warning letter for absenteeism. It is alleged that Wright had missed 8 days in February and March 1981 and had received an excused absence for Saturday, March 11. Meehan testified that even though Wright did in fact receive a warning letter, all of his absences had nevertheless been excused. Within this framework of evidence. I cannot conclude that Mr. Klimczak received discriminatory treatment vis-a-vis the other employees. Klimczak had clearly accumulated four unexcused absences as of the time of his discharge whereas the uncontradicted evidence shows that none of the other employees cited had accumulated any unexcused absences.

The Complainant contends, finally, that unlawful motivation is shown in this case by the close proximity in time between the safety complaints and his discharge. It is a matter of record that the safety complaints were made in January, March, April, and May of 1981. However, the evidence shows that Complainant had received his first warning letter concerning absenteeism and work attitude as early as September 8, 1980, four months before his first safety complaint. While the second warning letter did come after two, and possibly three, of Klimczak's protected safety complaints, that letter also followed his unexcused absences on April 4 and 11. The third warning letter, dated June 1, 1981, also happened to follow another protected safety complaint (in May 1981) but this letter, just as the others, also followed another one of Klimczak's unexcused absences. In accordance with my findings (footnote 2 supra.) there were no protected activities between the third warning letter and the

letter of discharge issued June 29, 1981, but there was an unexcused absence on June 26, 1981. It would not be reasonable to infer from this inconclusive evidence that any causal relationship existed between the protected activities on the one hand and the warning letters and discharge on the other.

In summation, I do not find any direct nor sufficient circumstantial evidence of unlawful motivation in this case under section 105(c)(1) of the Act. While there is no doubt that those responsible for Mr. Klimczak's discharge were aware of his protected activities and there is evidence that some of Complainant's past absences may have been unfairly manipulated in building a record against him, I do not find these circumstances to be sufficient, in light of the other credible evidence, to establish a prima facie case. There were clearly a sufficient number of unexcused absences in this case to have warranted Complainant's discharge under the Agreement, there was no evidence that the Complainant was given less favorable treatment than other employees and no inferences can be drawn from the timing of the protected activities and the Complainant's discharge.

Other grounds for discharge also existed which Meehan characterized as a bad work attitude. The evidence shows that Klimczak regularly failed to appear for Saturday work after agreeing to do so and he did not deny the evidence that he had a problem with alcohol that affected his work. Moreover the statement he made on June 26 to Meehan that "I'll show you how dumb I am when something breaks down and needs to be fixed," might reasonably be construed as a threat to subvert or sabotage company operations.

Under all the circumstances, I do not find that the Complainant has met his burden of proving a prima facie case. Respondent has in any event established credible "business justifications" to have discharged Mr. Klimczak exclusive of any protected activities and it is apparent that it would have discharged him for his unprotected activities alone. Pasula, supra. Accordingly, the complaint of unlawful discharge is denied and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

FOOTNOTE START HERE-

1 Section 105(c)(1) of the Act provides in part as follows: "No person shall discharge * * * or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner * * * in any * * * mine subject to this Act because such miner * * * 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 miners at the * * * mine of an alleged danger or health violation in a * * * mine * * * or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this Act * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

2 Klimczak reported in his initial complaint to MSHA, filed July 13, 1981, that this incident occurred in late May 1981, but

testified at hearing more than a year later than the incident occurred on June 24, 1981. I find the former statement to be more likely correct since it was made only a short time after the event. Klimczak's time sheets also show him to have been welding on the portable crusher during May and on June 2nd but not on June 24th.

3 In light of this I give little credence to Meehan's subsequent responses to leading questions suggesting that he was not aware of Mr. Klimczak making any "safety complaints."

4 The factual analysis of these allegations is inextricably tied to the Respondent's alternative defense that it would have discharged Mr. Klimczak in any event for his unprotected activities alone and with the Complainant's rejoinder that the proffered defense was only a pretext. Accordingly, the analysis of this evidence is relevant to all of these arguments. In this stage of the analysis, however, the Complainant has the burden of proof. Pasula, supra.

5 Superintendent Meehan testified that he considered an absence "excused" during the regular work week (Monday through Friday) so long as the employee notified the company of his absence within 1 hour after the start of his shift. There was therefore no need to have the company's formal "consent" before the absence was considered excused.

6 I do not agree with the Complainant's contention that under Article II Section 4 of the Agreement the Respondent could not have discharged him without first warning or suspending him for his first three absences. He cites no interpretive authority for his position and as I read the Agreement the only procedural requirement for discharge on the basis of absenteeism (or any other reason) is the warning notice set forth in Article I Section 7 of the Agreement. Mr. Klimczak had received such notice on June 1, 1981 (Exhibit No. R-9). I note that Mr. Klimczak did not challenge this or any other aspect of his discharge under the grievance procedures set forth in the Agreement.

7 Inasmuch as Mr. Klimczak presented several contradictory versions of what he purportedly told Mr. Lane, that Mr. Lane and office clerk Marcia Mott testified that she, not Lane, actually received Klimczak's call, that Mr. Klimczak has shown some difficulty recalling this and other events, and that credible testimony from several other witnesses show that Mr. Klimczak may have been under the influence of alcohol that morning, I accord the testimony of other witnesses concerning the events on the morning of June 26th the greater weight.