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JEFFREY HASTINGS V. COTTER CORP.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JEFFREY E. HASTINGS,
COMPLAINANT

v.

COTTER CORPORATION,
RESPONDENT

COMPLAINT OF DISCRIMINATION

DOCKET NO. WEST 82-198-DM

MD 82-70

Appearances:
Mr. Earl D. Dungan International Representative
Oil, Chemical and Atomic Workers International Union
425 East 10th Street
Leadville, Colorado 80461,
For the Complainant

Barry D. Lindgren Esq.
Mountain States Employers Council, Inc.
1790 Logan Street, P.O. Box 539
Denver, Colorado 80201,
For the Respondent

Before: John A. Carlson, Judge

DECISION

This case arose upon a complaint of discriminatory discharge filed by the complainant with the Secretary of Labor under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter "the Act"). The Secretary declined to prosecute the complaint, and complainant, Jeffrey E. Hastings, then brought this proceeding directly before this Commission as permitted under section 105(c)(3) of the Act.

Mr. Hastings alleges that he was discharged in violation of section 105(c)(1) of the Act.(FOOTNOTE 1) The essence of his complaint is that he was discharged after complaining of a job-related illness which he believed made it unsafe for him to bar down loose rock. He seeks reinstatement and back pay.

A full hearing on the merits was held in Denver, Colorado, following which both parties submitted briefs.

REVIEW AND DISCUSSION OF THE EVIDENCE

I

The undisputed evidence shows that complainant Hastings, a miner in respondent's underground uranium mine, was discharged by respondent at the end of his work shift on April 30, 1982. According to Hastings' testimony, the series of events leading to his discharge began on April 27, 1982, when he entered an area filled with blasting smoke and fumes out of concern for Richard Milligan, his shifter, who had walked into the area earlier and had not reappeared within two or three minutes. Hastings asserted that the smoke generated by the explosive used had a reputation for causing pneumonia-like lung symptoms. Milligan wore no respirator when he entered the smoke, according to Hastings, but Hastings did wear one. Hastings urged Milligan to come out, and Milligan obliged him. Hastings acknowledged that Milligan appeared "normal," but claimed that he, Hastings, was coughing.

That night, according to Hastings, he experienced fever, nausea and coughing. The following day he reported to work with "more or less the effects of a cold." He mentioned an earache and "a bad sore throat." Early in his shift on the morning of April 28, he testified, he complained to his mining partner, Herbert Rowe, of feeling ill, and Rowe advised him to go home. His sore throat was mild at that time, but he had developed extreme dizziness and Rowe was afraid for their mutual safety if he tried to work in that condition. Rowe, Hastings testified, advised him that he was protected by the MSHA rules under such circumstances.

Hastings further testified that he told his shifter, Milligan, when Milligan arrived at the work area, that he was too sick to work safely. He also testified that he mentioned to Milligan that his illness resulted from the smoke he breathed the day before. The conversation also touched on Hastings' accumulation of penalty points for prior absences. According to Hastings, he told Milligan he couldn't get "points for this one." Milligan, he asserted, disagreed, saying, "Don't bet on it."

Hastings thereupon left for home. On the following day he saw a physician who made a diagnosis of "pharyngitis" and prescribed an antibiotic. He also did a throat culture which later proved negative for streptococcus. On April 29, Hastings called the guard shack to report that he would not report to work that day because of continuing illness. On April 30, 1982, he returned. At the end of his shift on that day he received a discharge notice. It was dated April 29, but the parties stipulate that it was effective at the end of the April 30 workday. Hastings had worked for Cotter since April 6, 1981. He protested the discharge to Marv Murray, the mine superintendent, contending, he testified, that the absence should have been excused. Murray, according to Hastings, was only interested in counting points and told him the discharge was automatic and that he could not make an exception, especially since others had been discharged on the same basis.

Thereafter, Hastings testified, he filed a grievance through the union, and a complaint with MSHA. The record discloses that the grievance complaint was unsuccessful, and that MSHA refused to prosecute the complaint before this Commission.

Herbert Rowe, Hastings' mining partner, testified in Hastings' behalf. His testimony on the events at the mine on April 27 and 28 generally supported that of Hastings. Rowe was unable, however, to give more than vague support to Hastings' testimony about the substance of Hastings' conversation with Milligan. Specifically, he was unable to say that Hastings ever mentioned more than that he was sick and had to go home. He could not substantiate, though he was present during the April 28 conversation, that Hastings ever mentioned that the smoke incident on the April 27 was the cause of his illness.

II

Cotter based its defenses upon a straightforward denial that Hastings' discharge had any relationship to a safety complaint. According to Cotter, complainant's departure from work on April 28 was treated as an unexcused absence. Cotter's only witness, Duane Dughman, its vice president for administration, testified that he was familiar with the circumstances leading to Hastings' discharge, and made the final decision himself. It was based, he asserted, upon excessive absenteeism, and done in accordance with the company's published disciplinary policy which had been in effect since November of 1980. As described in Dughman's testimony, and set forth in respondent's exhibit 1, this policy provided for progressive discipline for "chargeable" absences. Absences for non-job-related illnesses or injuries were chargeable, the witness explained, but each period of verified illness was considered a single incident, irrespective of the number of days involved. (Absences for death in the family, union business, weather, industrial injuries, etc., "non-chargeable.") Also, miners could, through good attendance, accumulate credits against chargeable absences.

Sanctions, Dughman asserted, were applied progressively, commencing with warning, advancing through suspensions, and ending with outright termination. The testimony and disciplinary rules also explained an elaborate penalty point system with specific numbers of points allowable to each offense. When points reached 100, discharge was automatic. These were computed over a six months "moving period" so that no miner accumulated points indefinitely; those over six months old were stricken from the work record.

Dughman testified that in the six months preceding the April 28 incident, Hastings had accrued six chargeable absences and one tardiness violation. Cotter then introduced, through Dughman, copies of disciplinary and suspension notices issued to Hastings reflecting those violations. None of these, according to the witness, were appealed or challenged by Hastings. He further testified that as of April 28, a further chargeable absence meant an automatic termination, which he approved. The discharge was taken through the grievance procedure by the union. A copy of the arbitrator's decision finding a good cause discharge was introduced. (Respondent's exhibit 10). Likewise, a Colorado referee's decision granting only reduced unemployment benefits for complainant was introduced. (Respondent's exhibit 11.) The referee found insufficient proof that the discharge was for job-related illness.

Dughman also testified that the operator had a well publicized policy requiring the filing of reports of job-related illness or injury on a readily available form. Hastings, he declared, had never filed one. He further testified that Hastings had not filed for reimbursement of the physician's fee for his examination and treatment on April 29. These services, he said, would have been eligible for workman's compensation payment had they been for a job related illness or injury. Also,

according to Dughman, Cotter had a temporary injury pay policy which would have paid benefits for on-the-job illness, but Hastings never made a request for payment.

Finally, Dughman maintained that at the time he approved the discharge neither he nor any of the company officials with whom he conferred had any knowledge that Hastings' illness was, or was alleged to be, job-connected.

Complainant disputed none of the fundamental facts revealed in Dughman's testimony. He conceded the previous absences, disciplinary notices and suspensions, and the adverse point totals. He did, however, resist any inference that his failure to file an accident report or apply for the various benefits for job-related illness showed that he did not believe his injury was caused by smoke inhalation. He took no such steps, he maintained, because he was discharged as soon as he returned to work on April 30, and had no opportunity for filings (Tr. 52).

III

Upon the record before me, I must conclude that complainant has failed to prove that respondent discharged him because he engaged in protected activity under the Act. It is now well settled that the Act extends protection to miners who refuse to work under conditions they believe to be unsafe or unhealthful, so long as that belief is reasonable and held in good faith. Secretary of Labor ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds; Consolidation Coal Company v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981); Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981).

The instant case, however, does not present the common situation where a miner refuses a work assignment because of what he perceives to be unsafe or unhealthful condition or practice in the mine. Here, in a sense, Mr. Hastings perceived his own physical condition to be the hazard. He contends that he is protected against discharge because his physical symptoms made it dangerous for him to bar down loose rock. Presumably, he would have undertaken the task as a matter of routine had he felt well.

The discrimination provisions of the Act are silent, of course, upon the issue of illness or temporary physical impairment as an element in a miner's decision to refuse to work. Clearly, however, we need not linger over any notion that sickness or injury, without more, are encompassed within the protective intendments of the Congress. Nothing in the language of section 105 suggests that the miner who is ill or otherwise unfit to perform the duties ordinarily associated with his position may present himself for work

and then refuse assigned tasks with impugnity because his impairment renders their performance unsafe.(FOOTNOTE 2)

Complainant, indeed, appears to make no such contention. In his post-trial brief his able representative stresses the alleged occupational origin of Mr. Hastings' symptoms of April 28. The suggestion is that a refusal to work based upon a miner's safety concerns growing out of a partial incapacity because of an occupational illness must fall within the ambit of the Act's protection.(FOOTNOTE 3) The argument is summarized at page five of the brief in this statement:

> The facts are that the complainant was discharged because he became ill as a direct result of being exposed to unhealthful conditions while removing a fellow workman from the contaminated area.

Had it not been necessary for Hastings to retrieve his shifter from the smoke-filled blasting area, the argument goes, he would not have been too ill to safely bar down rock. Since Cotter is responsible for safety in the mine, the argument continues, the shifter's act in entering the shot area before the air had cleared - an act violative of company safety policy - was attributable to the company, and Hasting's rescue effort was to have been anticipated. Therefore, Hastings inability to work safely on April 28th took on the character of a protected activity.

The legal question posed by the argument need not be decided here because complainant has failed to present evidence sufficient to establish the necessary factual predicate: that his symptoms on April 28, 1982 were caused by entering the shot area. I must reach that conclusion for several reasons.

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First, there was no evidence that the shifter, Milligan, who entered the smoky area without a respirator, suffered any ill effects. Hastings and Rowe conceded that Milligan showed none after he emerged from the smoke. The undisputed record shows that he was at work on the following day. Hastings, on the other hand, wore a respirator (though he did question whether he had a tight fit).

Second, if Hastings was convinced that his symptoms and subsequent absence from work were attributable to smoke exposure on the job, it is noteworthy that he neither filed an accident report with Cotter (Tr. 68), nor a workman's compensation claim for payment of his physician's fee (Tr. 87), nor a claim for temporary injury pay for the days he missed work, a benefit offered by Cotter. Such actions would have been consistent with belief in a job-related respiratory condition. Nothing in the record suggests that these steps could not have been taken after his discharge.

Third, the objective medical data, to the extent such data were introduced at trial, failed to support Hastings' position. The physician's billing (exhibit C-1) shows the diagnosis as "pharyngitis," a general term for irritation or inflammation of the pharynx. Hastings urges that since a throat culture was negative for streptococcal infection, his throat problem could not have been caused by a "germ," and was therefore the product of the smoke inhalation. The assertion is too broad. Nothing of record suggests that laboratory studies were done to rule out an infective process attributable to other microorganisms including, for example, the common cold virus or an influenza virus. Neither is there any indication that the treating physician ever departed from his highly generalized and undifferentiated initial diagnosis of pharyngitis. Had he ever concluded that complainant's condition was work-related, that opinion would likely have been made known at the hearing.

Fourth, evidence that Hastings actually informed his shifter, Milligan, that he was not only ill, but suffering from a work-related illness, is at best weak and uncertain. Had Hastings believed on April 28th that his illness was job-related, it is likely that he would have stressed that belief to his supervisor. Complainant's witness Rowe testified at one point that Hastings' "total conversation" with shifter Milligan was that "he was sick and going home" (Tr. 19). Later, he testified that he "believed" safety was mentioned (Tr. 25). Then he summarized the Hastings-Milligan converstion this way:

> Basically, Mr. Hastings' told Mr. Milligan that he was not well. He was a hazard to himself and to me; that he was going home. Mr. Milligan stated, "you will probably lose your job over this." He says, "I'm not telling you to go home and I'm not telling you to stay. You have to make the decision." [Tr. 25].

When asked pointedly if Hastings told Milligan that his illness was caused by blasting smoke, he replied "I honestly don't

remember" (Tr. 25).

Hastings did testify that he informed Milligan, as his immediate supervisor, that he was ill because of the blasting smoke (Tr. 33, 105). The force of this testimony is diminished, however, by the fact that his recitals of the basis for his complaint made in the earlier stages of the case omit any mention of the smoke incident, or job-related illness generally. His original complaint filed with MSHA mentions only that he was ill with vertigo, earache, and a sore throat. His separate complaint before this Commission, filed three months later, relates the same symptoms with no reference to cause. Similarly, as brought out in cross examination, the interview statement to the MSHA investigator, which Hastings reviewed and edited, was silent on the smoke matter. He acknowledged that he responded to the investigator's question about the content of his conversation with Milligan with the statement, "Oh, yeah I told him I was sick and that I had to get out." (Tr. 54, 57). Hastings explains this by asserting that he mentioned the smoke incident to the investigator, but that in the recorded and transcribed interview the investigator asked no questions about it (Tr. 54). He also spoke of "not introducing at that stage what happened on 4/27." (Emphasis added.)(Tr. 57.) Concerning the lack of reference to the smoke matter in his two complaints he testified: "... in these complaints I'm trying to cite the article under the Act that would cover such activity as being absent on 4/28 and 4/29/82" (Tr. 57). Despite these explanations, the reasonable inference is that there was, at the very least, a marked shift in emphasis between the time of discharge and the time of trial from the mere fact of illness to a theory of job-caused illness.

Fifth, I note that in two adjudications prior to this one, complainant failed to convince the triers-of-fact that the illness occasioning his absence and consequent discharge was job-related. On August 13, 1982, a referee for the State of Colorado, ruling on an unemployment benefits claim, held that complainant had not established that his illness was caused "by conditions on his job." (Exhibit R-11.) Likewise, on September 15, 1982, the arbitrator who heard Hastings' complaint under the labor agreement between Cotter and the Oil, Chemical and Atomic Workers Local No. 2-947 found that the evidence did not establish "an occupation-related illness." (Exhibit R-10 at 9.) These collateral determinations carry no great weight in this present case, but warrant mention in that the referee and arbitrator, confronted with the same issue as this judge, also found the miner's evidence insufficient.

IV

In summary, I am convinced that complainant was ill on April 27 and April 28, 1982, as he contends. I am further convinced that he told his immediate supervisor that he was too ill to work. I am not convinced, however, that complainant's evidence showed that his illness was caused by smoke inhalation. The previously listed weaknesses in complainant's proofs, considered singly, could perhaps be explained away; taken together, however, they effectively undercut the credibility of the claim. For the reasons discussed earlier, absent a job-related cause of his

illness, Mr. Hastings can make no case that his refusal to work was reasonable, and therefore a protected activity. No sensible reading of the Act or its legislative history permits an inference that its anti-discrimination provisions were intended to supplant the customary ways in which employers and employees settle questions concerning illness and sick leave policy where the illness is not work-related. These matters remain a matter of management discretion, as tempered by the collective bargaining process.

There is a further difficulty with complainant's position. Section 105(c) plainly requires that protected activity claims be founded upon a safety complaint made to the operator.(FOOTNOTE 4) Safety concerns held privately by a miner, in other words, can scarcely furnish a discriminatory motive for discharge. Since I hold that an illness or injury, not acquired in a work situation, cannot qualify as a basis for safety-related discharge under the Act, it follows that a complaint by a miner of incapacitation due to such a condition cannot stand as a safety complaint, whether he speaks of it in terms of safety or not.

The earlier discussion in this decision concerning Hastings' April 28th illness dealt with the dual questions of whether the miner's illness was in fact job-related, and whether at that time he believed it to be job-related. As noted there, I did not find persuasive proofs that he conveyed to Milligan, his supervisor, a belief that his illness was due to inhalation of blasting smoke. Those same reservations about the content of his dialogue with Milligan are relevant to the question of whether a complaint was registered. Since respondent failed to sustain his burden of demonstrating that a meaningful complaint was made, his claim of protected activity must fail on that separate ground, as well. Any colorable complaint arising from a claim of illness must include an assertion or notice in some form that the illness was job-connected.

V

Based upon the findings that (1) complainant's illness was not shown to be job-related, and (2) that no safety related complaint cognizable under the Act was lodged with the operator, I conclude that Mr. Hastings was not discharged for engaging in protected activity.

ORDER

Accordingly, this complaint of discrimination is ORDERED dismissed with prejudice.

John A. Carlson
Administrative Law Judge

FOOTNOTES START HERE-

1 Section 105(c)(1) provides:

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 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 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.

2 The Commission, so far as I know, has never entertained the question. In Bryant v. Clinchfield Coal Company, 4 FMSHRC 1380 (1982), however, Judge Kennedy made what I consider to be a sound general statement of the law:

Any claim of protected activity that is not grounded on an alleged violation of a health or safety standard or which does not result from some hazardous condition or practice existing in the mine environment for which an operator is responsible falls without the penumbra of the statute ....

I do not believe a miner can, consistent with the good faith, reasonable belief requirement, present himself as willing and able to work ... and at the same time claim a protected right to refuse that work because of his impaired physical condition....

3 In Eldridge v. Sunfire Coal Company, 5 FMSHRC 408 (1983), Judge Koutras held that a miner's refusal to work an extra shift out of fear of exhaustion and fatigue was a reasonable, good faith, safety-related act, entitling him to a claim of protected activity under the statute. See also Bryant v. Clinchfield Coal Company, supra, note 45 at 1422, in which it is postulated that a job-related injury or illness adversely affecting a miner's capacity to work safely "may well justify a refusal to work."

4 Taylor Adkins et al v. Deskins Branch Coal Company, 2 FMSHRC 2803 (1980)