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RICHARD CLEMENS V. ANACONDA MINERALS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RICHARD D. CLEMENS, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. WEST 81-298-DM
v.	
	MSHA Case No. MD 80-176
ANACONDA MINERALS COMPANY, DIVISION OF ATLANTIC RICHFIELD COMPANY, RESPONDENT	Carr Fork Mine

DECISION

Appearances: James E. Hawkes, Esq., King and Hawkes Salt Lake City, Utah, for Complainant
Leslie M. Lawson, Esq., Anaconda Minerals Company, Denver, Colorado, for Respondent

Before: Judge Vail

Procedural History

This case is before me upon the complaint of Richard Clemens under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). Clemens alleges that Anaconda Minerals Company (Anaconda) reduced his pay following a job transfer made within the Carr Fork copper mine for health reasons, and that such pay reduction constitutes a discriminatory action prohibited by section 105(c)(1) of the Act.

Anaconda filed a motion for summary decision, claiming no genuine issue of fact and that Clemens' allegations did not constitute a violation of the Act or any federal regulations promulgated thereunder. Clemens responded, and the matter was set for hearing on October 26, 1982 at Salt Lake City, Utah. At the hearing, the parties submitted stipulated facts, and elected to argue all further legal issues in post trial briefs.

Stipulated Facts

In summary, the stipulated facts establish that Clemens was employed by Anaconda on April 17, 1978 as a miner first-class. Clemens had been a miner for over thirty years, including fifteen years working underground. Prior to June 1980, he went to his own private physician due to illness and was told that he suffered from "Restrictive Pulmonary Disease with hypoxemia." Clemens provided Anaconda with the medical diagnosis, and consequently was transferred from underground duties to the job of toplander. The toplander job normally carries a lower pay-grade. Clemens claims that he accepted the

job transfer believing that his pay would not be lowered, while Anaconda claims that Clemens understood that his pay-grade would be changed upon transfer. Clemens' salary was reduced on September 2, 1980 (approximately three months after his transfer).

Issues

1) Did Clemens' reduction in pay following his job transfer constitute a discriminatory act in violation of section 105(c)(1) of the Act?

2) If so, what is the appropriate relief to be awarded Clemens and what are the proper civil penalties to be assessed against Anaconda for such discrimination?

Discussion

Section 105(c)(1) provides in pertinent part as follows:

> No person shall ... in any manner discriminate against ... or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... in any coal or other mine subject to this Act because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to 101 ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act.

To establish a prima facie case showing violation of section 105(c)(1), a complainant must introduce evidence of a connection between an adverse action and exercise by a miner of a protected activity. Two protected activities recognized by the Commission are 1) the filing or making of a complaint under or related to the Act;(FOOTNOTE 1) and 2) the exercise of any statutory right afforded by the Act.(FOOTNOTE 2) Clemens alleges that he exercised both forms of protected activity, and therefore claims that his pay reduction upon job transfer constitutes unlawful discrimination under section 105(c)(1) of the Act.

Protected activity of making a complaint.

Clemens contends that he engaged in a protected activity when he complained to Anaconda's personnel manager of unsafe and hazardous mine conditions. His good faith belief in the existence of such conditions is said to be supported by his doctor's report, urging Clemens' transfer from underground work due to work related respiratory problems. Such factors

are claimed to establish existence of a protected activity under the criteria of Sec. ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub. nom., Consolidation Coal Company v. Marshall, 663 F. 2d 1211 (3rd Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (April 1981).

Clemens accuses Anaconda of granting his transfer merely to prevent further complaints. Reduction of his pay upon transfer is therefore claimed to be an unlawful, discriminatory act. The fact that such pay reduction was delayed for three months is said to do nothing to alleviate the discriminatory impact of Anaconda's action. Anaconda, on the other hand, fails to acknowledge Clemens' exercise of such a protected activity and rejects his claim that the delay in reducing his pay upon transfer to a toplander job was an attempt to mask a discriminatory act. Instead, it claims that the delay was due only to an oversight.

Upon review of the stipulated facts, I find Clemens fails to substantiate his claimed exercise of a protected activity under the criteria of Pasula and related cases. In addressing the protected activity of filing or making a complaint, the Commission recognized in Pasula that the scope of protected activities under the Act included a miner's right to refuse to work where the miner had a reasonable good faith belief of a sufficiently severe safety hazard. However, for a miner to claim the protection of section 105(c)(1), he must, at the time he refuses to work, expressly ground his refusal on an unsafe condition. Sec. ex rel. Duncan v. T. K. Jessup, Inc., 3 FMSHRC 1880 (July 1981) (ALJ); Kaestner v. Colorado Westmoreland Inc., 3 FMSHRC 1994 (August 1981)(ALJ).

Clemens fails to satisfy such conditions as there is no indication in the stipulated facts that he indeed refused to work underground due to his belief that mine conditions presented a safety hazard. Instead, the evidence shows Clemens requested a transfer based upon his physician's advice that it might be wise to do so due to his respiratory problems. Furthermore, Clemens failed to establish that he expressly based his request for transfer on a complaint of unsafe mine conditions. The stipulated facts show no evidence of any such complaint being made, nor existence of any health or safety violations in the mine.

Therefore, I reject Clemens' claim of unlawful discrimination provoked by the protected activity of expressing a mine safety complaint. As such, I find it unnecessary to address the reason for Anaconda's delay in reducing Clemens' pay.

Protected activity of exercising a statutory right.

Clemens further contends that unlawful discrimination occurred following his exercise of a statutory right, where such statutory right constitutes a second form of protected activity under section 105(c)(1) of the Act. Clemens claims that

mandatory standard 30 C.F.R. 57.18-2 affords a basic right of transfer upon discovery of health or safety hazards in non-coal mines. Such a standard, he argues, triggers the language of section

101(a)(7) of the Act, which provides in pertinent part as follows:

> Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer.

Anaconda dismisses Clemens' arguments by pointing to the actual provisions of the Act and its health and safety regulations. Anaconda claims that Clemens' pay reduction would constitute discrimination under section 105(c)(1) only if he had been the subject of medical evaluations and potential transfer or actually transferred under the authority of a standard published pursuant to section 101(a)(7) of the Act. Anaconda contends that provisions of section 101(a)(7), regarding maintenance of pay upon transfer, cannot be read as creating an independent statutory right, but instead are to take effect only upon promulgation of related health and safety regulations. However, such mandatory health and safety regulations have only been promulgated for coal mines, under 30 C.F.R. 90 ("Health Standards for Coal Miners with Evidence of Pneumoconiosis"). Since no similar regulations (allowing transfer for medical reasons with no reduction of pay) have been promulgated for non-coal mines, Anaconda argues that there is no legal requirement to pay Clemens a wage other than that normally paid for the job into which he was transferred. Therefore, Anaconda denies that discrimination under section 105(c)(1) of the Act has occurred.

Upon careful examination of the Act and its regulatory provisions, I concur with Anaconda's arguments and conclude that no statutory right to medical evaluation, and resulting transfer with maintenance of pay, exists for non-coal mines. Section 101 of the Act provides guidelines for the development and promulgation of mandatory health and safety standards. Within that section, the Secretary is given the discretionary power to issue standards providing for the transfer of a miner upon a medical determination that exposure to hazards "covered by such mandatory standards" may result in health impairment. Further, any miner transferred under mandatory standards and as a result of exposure to such hazards shall not suffer a reduction in pay. 30 U.S.C. 811(a)(7).

Under these provisions, the key to the right of transfer with maintenance of pay is the promulgation of regulations where deemed appropriate by the Secretary. The Secretary has exercised such discretionary rule-making power by affording coal miners having evidence of mine-related lung disease the option of transfer while retaining their regular rate of pay. 30 C.F.R.

90.3, 90.102-103. However, no similar rule pertaining to non-coal mines has been promulgated. Clemens therefore fails in his attempt to establish discrimination based upon his alleged exercise of a second form of protected activity at the Carr Fork copper mine.

Clemens argues that existence of specific regulations (including medical examination procedures, optional transfer and pay-maintenance provisions) is not necessary to guarantee the maintenance of pay as provided in section 101(a)(7) of the Act. Instead, Clemens claims that the provisions of standard 30 C.F.R. 57.18-2 afford a general right of transfer, thereby triggerin pay-maintenance provisions of section 101(a)(7) of the Act.

I find this argument to be based on a misinterpretation of the Act and 30 C.F.R. 57.18-2. The regulation provides in 57.18-2(a) that each working place shall be examined at least once each shift (by a person designated by the operator) for conditions which may adversely affect safety or health. Furthermore, 57.18-2(c) provides in pertinent part as follows:

> Conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected ....

Such regulatory provision does not afford automatic rights of transfer upon a finding of conditions that may affect health or safety. Instead the operator is required to withdraw miners from an area presenting potential imminent danger. The Act defines imminent danger as a "condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. 802(j).

No evidence of such imminent danger was presented in this case. Therefore, Clemens incorrectly claims that the pay maintenance provisions of section 101(a)(7) of the Act are triggered through application of standard 57.18-2. Nor should the provisions of 101(a)(7) be read as creating an independent right to continued pay levels upon transfer, as the provision is applicable only where specific regulations regarding the right to transfer have been promulgated. Accordingly, I find that Anaconda had no duty to withdraw or transfer Clemens, and hence no duty to maintain Clemens' salary upon voluntarily granting his request for a transfer.

Summary

I find Clemens' claims of protected activities to be unsubstantiated. Therefore, I conclude that Clemens' pay reduction, following his transfer made for health reasons, does not constitute a prima facie case of discrimination in violation of section 105(c)(1) of the Act. Accordingly, a discussion of appropriate relief for the alleged discrimination is unnecessary.

ORDER

Anaconda's motion, heretofore reserved, is therefore granted and the complaint is dismissed.

Virgil E. Vail
Administrative Law Judge

FOOTNOTE_ONE

Sec. ex rel. Long v. Island Creek Coal Company, 2 FMSHRC 1529 (June 1980) (ALJ); aff'd., No. 80-1799 (4th Cir. September 14, 1981).

FOOTNOTE_TWO

United Mine Workers of America on behalf of Beaver v. North American Coal Corp., 3 FMSHRC 1428 (June 1981) (ALJ).