

CCASE:  
(UMWA) COLCHAGIE V. CONSOLIDATION COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA  
(UMWA) ON BEHALF OF  
DONALD E. COLCHAGIE,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. PENN 82-323-D

PITT CD 82-13

v.

Renton Mine

CONSOLIDATION COAL COMPANY,  
RESPONDENT

DECISION

Appearances: Joyce A. Hanula, United Mine Workers of America,  
Washington, D. C., for Complainant  
Robert M. Vukas, Esq., Pittsburgh, Pennsylvania,  
for Respondent

Before: Judge Melick

This case is before me upon the complaint of the United Mine Workers of America (Union) on behalf of Donald E. Colchagie, 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 Consolidation Coal Company (Consol) discriminated against Mr. Colchagie in violation of section 105(c)(1) of the Act(FOOTNOTE 1) by: (1) failing to pay him in accordance with Section 103(f) of the

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Act(FOOTNOTE 2) for accompanying a Federal Mine Safety and Health Administration (MSHA) inspector on a mine inspection during the 8:00 a.m. to 4:00 p.m. shift on Monday, April 5, 1982, and (2) issuing him an unexcused absence for missing his regular 12:00 midnight to 8:00 a.m. shift on April 6, 1982. Evidentiary hearings were held on the complaint in Washington, Pennsylvania.

During relevant times, Donald Colchagie was an elected member of the Union safety committee at the Renton Mine. On Friday, April 2, 1982, in accordance with the provisions of Section 103(f), Mr. Colchagie accompanied MSHA inspector Richard Zilka as the representative of miners on a mine inspection. On April 5, 1982, after completing his regular 12:00 midnight to 8:00 a.m. work shift, Mr. Colchagie met Inspector Zilka for a continuation of the inspection.(FOOTNOTE 3) Colchagie left the mine between 4:30 and 5:30 p.m. that day. He then lived only ten to fifteen minutes driving time from the mine. He did not report for his regular 12:00 midnight to 8:00 a.m. shift on Tuesday, April 6, 1982, and was given an unexcused absence. Although Colchagie was paid for his regular workshift on April 5, 1982, (12:00 midnight to 8:00 a.m.), he was not given any additional "walkaround" pay for accompanying Inspector Zilka on the inspection performed during the 8:00 a.m. to 4:00 p.m. shift on April 5.

The Union first alleges that Mr. Colchagie was discriminated against because he was not given "walkaround" pay for the 8:00 a.m. to 4:00 p.m. shift on April 5, 1982, purportedly in viola

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tion of that part of section 103(f) which requires that the representative of miners who is also an employee "shall suffer no loss of pay during the period of his participation in the inspection". However, since Mr. Colchagie had already worked on the 12:00 to 8:00 a.m. shift on April 5, 1982, was paid for that work, and was not scheduled to work on the 8:00 a.m. to 4:00 p.m. shift, I find that indeed he did not suffer any loss of pay during the period of his participation in that inspection on the 8:00 a.m. to 4:00 p.m. shift. See UMWA, ex rel. Norman Beaver v. North American Coal Corporation, 3 FMSHRC 1428 (1981). Since there was accordingly no adverse action taken against Colchagie in this regard, there was no unlawful discrimination against him under section 105(c)(1). 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 (3d Cir. 1981).

The Union would attempt to distinguish the Beaver case on the grounds that Mr. Colchagie, unlike Mr. Beaver, was purportedly the only qualified miner available to accompany Inspector Zilka on the April 5 inspection. The evidence does not, however, support the distinction. According to the undisputed testimony of Inspector Zilka, the sole purpose of his visit at that time was to continue interviewing motormen in regard to the "drags", i.e., an emergency braking mechanism on the coal cars. In fact, it is clear that Zilka had already interviewed most of the motormen before Colchagie appeared and, according to Zilka, there was no need for Colchagie to have been present for those interviews.

It is undisputed, moreover, that another safety committeeman, Phil Mastowski, or any other miner working the 8 a.m. to 4 p.m. shift on April 5 could have accompanied Inspector Zilka and could have received "walkaround" pay for that service. Mastowski admitted that he could have accompanied Zilka at that time and was aware of the problem with the "drags" from discussions at a safety committee meeting. The fact that Mastowski may not have physically examined the "drags" up to that point in time would not, of course, have necessarily made him unqualified, or even less qualified, to have accompanied the inspector. Under these circumstances, it is apparent that Colchagie was not the only miner or representative of miners capable of accompanying the MSHA inspector during his interviews and that Colchagie was not uniquely qualified to perform this function.

The Union also argues, however, that there was unlawful discrimination against Colchagie because he was denied an excused absence for failing to work his regular 12 midnight to 8 a.m. shift on the following day, April 6. He claims that he was charged with an unexcused absence because of his participation in the walkaround on the 8 a.m. to 4 p.m. shift on April 5. Since

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there is no dispute that Mr. Colchagie's participation in the walkaround was a protected activity, the issue is whether the operator was motivated in any part by this protected activity in giving Colchagie an unexcused absence for his failure to work on April 6. Pasula, supra.

In particular, Colchagie claims that since he had worked his regular 12:00 midnight to 8:00 a.m. shift on April 5, and had "double shifted" that day by accompanying Inspector Zilka during his interviews on the 8:00 a.m. to 4:00 p.m. shift, he was too tired to report for his regular 12:00 midnight to 8:00 a.m. shift on April 6. I note, however, that according to Colchagie himself, he left the mine between 4:30 and 5:30 p.m. on April 5 and lived only ten to fifteen minutes travel time from the mine. In spite of his alleged fatigued condition, however, he did not retire to bed until sometime after 10:30 or 11:00 that night. Since Colchagie did not use the more than six hours between shifts to rest, I do not find his alleged inability to work his regular 12 midnight to 8 a.m. shift on April 6th to be reasonably related to his "walkaround" with Inspector Zilka on the afternoon of April 5th.

In addition, Mr. Colchagie has failed to cite any case in which any other employee who had similarly double shifted had received an excused absence from reporting to his regular work shift after a similar break between shifts on the basis of his previous double shifting alone. Indeed, according to the undisputed testimony of Mine Superintendent Hathaway, it was not uncommon for miners to work their regular shift after having "double shifted" eight hours before that regular workshift. Moreover, it is undisputed that no one had ever been granted an excused absence under those circumstances.

The issuance of an unexcused absence on the facts of this case was also consistent with of Consol's Attendance Control Program (Operator's Ex. 1). Item (a)(7) of the program provides as follows:

Management may excuse days off for good cause provided:  
(a) the employee has made a reasonable effort to notify management in advance of the absence; and (b) written verification is furnished, addressing the reason for the absence. Management will make a determination of good cause on an individual case by case basis.

According to Superintendent Hathaway and the records clerk, there was no evidence in the company records that Mr. Colchagie had notified management to request an excused absence prior to his shift on April 6, 1982. While this testimony does not in

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itself prove that Colchagie did not call in and credible evidence exists that Colchagie did in fact call in to notify management of his anticipated absence, there was admittedly no written verification addressing the reasons for the absence. Hathaway testified, moreover, that even had Colchagie given proper notice, he would not have been granted an excused absence, since the basis for his absence, i.e., doubleshifting under these circumstances, had never been accepted as "good cause". As previously noted, an excused absence had never previously been granted for any other person under similar circumstances.

Under all the circumstances, I cannot find that in denying Mr. Colchagie an excused absence for his regular workshift on April 6, 1982, Consol treated him in any discriminatory manner. Thus, the Complainant has not succeeded in establishing a prima facie case of unlawful discrimination under the Act. Accordingly, the complaint is denied and this case is dismissed.

Gary Melick  
Assistant Chief Administrative Law Judge

FOOTNOTES START HERE-

1 Section 105(c)(1) of the Act provides in 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, [or] representative of miners \* \* \* in any coal \* \* \* mine subject to this Act \* \* \* because of the exercise by such miner [or] representative of miners \* \* \* on behalf of himself or others of any statutory right afforded by this Act.

2 Section 103(f) of the Act provides in part as follows:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. \* \* \*.

3 It is not alleged that it was necessary for Mr. Colchagie to be present at this inspection on the grounds that it was a continuation of the earlier inspection.