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KENNETH WIGGINS V. EASTERN ASSOCIATED COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| KENNETH A. WIGGINS,<br>COMPLAINANT | DISCRIMINATION PROCEEDING |
| | Docket No: WEVA 82-300-D |
| v. | HOPE CD 82-32 |
| EASTERN ASSOCIATED COAL CORP,<br>RESPONDENT | Keystone No. 1 Mine |

DECISION ON THE MERITS

Appearances: William B. Talty, Esq., Talty and Carroll, 112 Central Avenue, Tazewell, Virginia for the Claimant Mark C. Russell, Esq., Jackson, Kelly, Holt & O'Farrell, P.O.B. 553, Charleston, West Virginia for the Respondent

Before: Judge Moore

On April 9, 1982, Kenneth A. Wiggins, an underground supervisor, was discharged by Eastern Associated Coal Corporation. According to Mr. Fraley, the superintendent, Wiggins was discharged because he lied about the progress his crew had made toward abatement of a citation that had been issued for coal accumulations along a beltline. Mr. Fraley also thought that Mr. Wiggins had lied about an earlier incident which will be discussed later.

Jacky Jackson may well have been a key witness in this case, had he been called. He was the assistant general mine foreman. He was directly under Mr. Fraley in the chain of command and he is the one with whom Mr. Wiggins had most of his problems. It was he who allegedly made statements to Mr. Wiggins that were critical of Mr. Wiggins because of activities which Mr. Wiggins took on behalf of safety.

Lying about the condition of a mine is not a protected activity and if that is the reason for the discharge of Mr. Wiggins he can not prevail. If, however, the "lying incident" was a trumped up charge and Mr. Wiggins was in fact fired for his earlier safety concerns then he has a legitimate case.

Respondents exhibit 5 contains excerpts from respondents discharge and discipline procedures. Insofar as salaried employees are concerned, for the first offense there should be a verbal reprimand and warning. For the second offense there should be a written warning in the presence of a witness and a written warning is to be signed by both the employee and the witness. The third offense can result in "discharge if the situation warrants." This procedure is known as the "progressive disciplinary steps". Some offenses are considered so serious that the progressive disciplinary steps are bypassed.

A list of the offenses which would require immediate discharge appears on Page 66 of the manual, but on the preceeding page and also on Page 72 it is stated that the offenses which could result in immediate suspension are not limited to the 8 listed on page 66. Lying is not one of the reasons listed on page 66. Respondent argues that the words "not limited to" means there are other offenses which would justify immediate suspension. But if respondent can add any offense it desires to the list then there is no point in having the list in the first place. I find that respondent did not follow its published discharge procedures in firing Mr. Wiggins, but regardless of whether lying is sufficiently serious to justify an immediate discharge, failure to follow the published procedures is not an act of discrimination.

On March 26, 1982 Mr. Wiggins was working a shift that began at 3 P.M. and ended at 11 P.M. It was a production shift, meaning that he was expected to produce coal during that shift. According to Mr. Wiggins, and the testimony was undisputed, the belt broke about 9 P.M. and there was a large accumulation of spilled coal along the No. 1 belt. Because he knew that he would have to be gone for a considerable time repairing the belt, he made his ventilation checks at the faces (required every 2 hours) and found that all faces had insufficient air. Before he took half of his crew with him to repair the belt he instructed the roof bolters to repair the check curtain and to check the ventilation to make sure it was sufficient in the faces. They were then given some other assignments to do before beginning roof bolting.

It took until almost the end of the shift for Mr. Wiggins and half of his crew to repair the belt, and shovel the coal on to it. And when he got back to the face area he checked all the faces and found good roof and sufficient air. He then left the mine and filled out the form describing the accomplishments made during this shift. (Exhibit B.)(FOOTNOTE 1)

When he next saw Jacky Jackson and was questioned about why he bolted only 1-1/2 places he explained the problems including the lack of ventilation and Jacky Jackson said "you're never to shut a roof drill down on a continuous mine section; that mine is usually waiting on the roof drill." (Tr. 83). As a result of the incident Mr. Wiggins received a notice of improper action (complainant's exhibit C) which complained because he "shut bolter down at 9 P.M." This is one of the incidents that Mr. Fraley said he thought that Mr. Wiggins was lying about. There were 8 men underground with Mr. Wiggins that night, and none were called to testify, nor was there any explanation as to why they could not be reached by subpoena. Jacky Jackson could have denied that he made the above-quoted statement, but as stated earlier he was not subpoenad either. According to Mr. Fraley, Mr. Jackson had been his number one assistant but when Jackson decided to leave, Fraley did not ask why he was leaving or where he was going.

Respondents exhibit 3 is the "daily and on-shift report mine foreman or assistant". Among other things it shows the times when methane examinations were made in the faces of the 5 entries involved, as well as the methane content discovered. The exhibit shows no methane found but checks made at regular intervals, and it is obvious that if Mr. Wiggins had made the methane checks in the faces at the exact times indicated on the exhibit, Mr. Wiggins' statements concerning his activity on that shift could not be true. His testimony is that the times are approximate and that's the way all foremen fill out their on-shift reports. Mr. Larry, who makes up the State's mine foremen examinations and administers the test testified that the exact time should be used on the forms represented by respondent's exhibit 3. Two other witnesses, however, testified that at this mine all foremen used approximate times and all entries were in regular intervals such as is shown on Mr. Wiggins' report. With the work that a foreman has to do it would be impossible to examine the No. 1 room at exactly 4:05, examine it again at exactly at 6:05, again at exactly at 8:05 and again at exactly 10:05. The same sequence is shown for all 5 rooms or faces. And all of these reports have to be approved by the mine foreman or mine manager. Respondents exhibit 3 may indicate a violation of a safety standard but it does not destroy Mr. Wiggins' credibility. I find that Mr. Wiggins failure to live up to expectations insofar as roof bolting was concerned, was caused by his concerns for safety and that the notice of improper action issued because of this protected activity was an act of unlawful discrimination.

About 3 weeks prior to the above incident Mr. Wiggins had a discussion with Jacky Jackson concerning the safety of certain stoppings that had been constructed. The stoppings had been leaking and cinder blocks had been falling out. At one point a stopping collapsed and fell on the portobus that Mr. Wiggins' crew was in. The stoppings were made by piling cinderblock on top of each other with no cement or mortar in the joints. He later told Jacky Jackson that he had better rebuild the stopping in accordance with the law (substantial construction) and Jackson just looked at him and said nothing. The stopping was rebuilt the same way it had been constructed in the first place. While this incident illustrates a disagreement between Mr. Wiggins and management concerning matters of safety it does not in itself constitute an act of unlawful discrimination. After the incident involving the broken belt and lack of ventilation, Mr. Wiggins was transferred to the third shift which is a non-production shift. During the week of his discharge he was told to go to a certain section and bolt as many places as he could, service the equipment and supply the section so it would be ready for the day shift (a production shift). When he got to the area in question he found two mechanics working on the cable reel of the roof bolter, (sometimes referred to as the roof drill). The reel had "burned up" on an earlier shift so that it was no longer working. Mr. Wiggins explained that by "burned up" he did not mean that the cable burned but that the inner workings that drive the reel so that it automatically takes up cable when the drill is backing, had burned up. The roof bolter had been used by an earlier shift by bypassing the cable reel and attaching the cable through the sides of the connector case. "It is not permissible and if they happened to be operating that machine and ran into an accumulation of methane, it could easily be ignited." (Tr. 102).

Mr. Wiggins was unwilling to have his men operate the drill in that condition. The cable leads were there, and in his opinion there was an electrical shock hazard.

Mr. Wiggins and his crew did other maintenance work while the roof bolter was being repaired. It took about half the shift to repair the roof bolter and after that Mr. Wiggins and his crew bolted until quitting time. When he got on the surface Mr. Jackson questioned him about the fact that he had not finished the bolting he was supposed to do. Mr. Wiggins explained the condition of the roof bolter. Mr. Jackson's response was to shake his head and turn away and leave. While he did not specifically so state, Mr. Wiggins apparently interpreted this as a rejection of his explanation.

On the last shift that Mr. Wiggins worked for respondent before being discharged, Mr. Wiggins was told to take four men to a certain area of the mine and clean the area. A

citation had been issued by a federal mine inspector for accumulations of coal and dust, and the company had been given until 7 A.M. to abate the violation. It is unclear when the citation was actually issued or, which shift, or foreman was responsible for the condition that had developed in the designated area. When Mr. Wiggins and his crew saw the area there was no doubt in their minds as to why the citation had been issued. It was a clear violation of the clean-up regulations.

Before the end of their shift Mr. Wiggins and his crew had loaded 3-1/2 cars of coal and debris. In order to get the men out of the mine by 8:00 A.M. it was necessary to leave the section at 7:00 A.M. And at 6:00 A.M. or 6:05 A.M. Mr. Wiggins informed Mr. Jackson by phone that he would not be able to get the place ready. Mr. Harris, the shift foreman, had also informed Mr. Jackson at around 6:00 A.M. that the place would not be ready by the end of the shift. Mr. Dunavant overheard the 6:00 A.M. call from Mr. Wiggins to Mr. Jackson and said that Mr. Jackson did not ask Mr. Wiggins to stay over after the shift was over. Mr. Dunavant listened on the phone as he was required to do until at least 6:45 A.M. and he at no time heard Mr. Wiggins tell Mr. Jackson that the place was ready. Mr. Harris claims that at 6:25.A.M. he was listening on the phone and heard Mr. Wiggins say that the place was ready. Mr. Harris got confused about the difference between saying a place was ready, and it would be ready, and I am not sure which he meant. According to Mr. Fraley at 6:15 A.M. Mr. Jackson told him, Mr. Fraley, that the place would not be ready but also said that Mr. Wiggins told Jackson that the place was ready at 6:35 A.M. At 7:15 A.M. while he was on his way out of the mine, Mr. Wiggins again told Mr. Jackson that the place was not ready, that it needed spot-cleaning and rockdusting. I accept this testimony since no one bothered to call Mr. Jackson to refute it. And it does not make sense to me that any foreman, having a good record for working overtime and unexcused absences as Mr. Wiggins has would lie about the condition of the place when he knew the next foreman would be there within the hour, and when he could reasonably expect a federal mine inspector to be there within a short time. Mr. Wiggins was requested to seek to get the miners to work overtime into the next shift but Mr. Wiggins was unsuccessful in attempting to get them to stay.

I also find that he was not asked to stay over even if the miners refused. I also find that Mr. Harris was confused about a telephone call between Mr. Wiggins and Mr. Jackson at 6:25 A.M. He either overheard the 6 or 6:05 call, or the 7:15 call, and if he heard the 7:15 call he was mistaken about whether Mr. Wiggins said the place was ready, would be ready, or would not be ready. When Jackson asked Harris if the place was ready Harris replied "it's ready, Kenny said it's ready". But Mr. Harris was just repeating what he thought he heard Wiggins say to Jackson.

Mr. Harris contradicted himself numerous times during cross-examination; for example, his discussion of respondents exhibit V begins on page 378 of the transcript.(FOOTNOTE 2). Not only is the testimony contradictory but exhibit V itself which was handwritten by Mr. Harris, contains the following contradictory statement: "Jacky called back into mine and Kenny said belt would not be ready, and he told Kenny to stay over and work until dayshift got there. And Kenny said the belt would be ready."

I find with respect to the events that occurred on the morning of April 8, 1982, that the version of those events as described by Kenneth Wiggins, Fred Powers and Ronny Dunavant is the more reliable. I find that Mr. Wiggins did not report that the belt was ready for inspection. I further find that he and his crew did their best to clean the belt in time, and that the firing was totally unjustified.

Mr. Fraley was the one who made the decision to discharge Mr. Wiggins. Mr. Jackson had recommended a suspension. But Mr. Fraley decided that a discharge was proper. He was told, and I find that he believed, that Wiggins had lied about the condition of the belt. He thought Mr. Wiggins had lied about the ventilation problem of March 26, 1982 which resulted in Mr. Wiggins receiving a "notice of improper action" (plaintiff's exhibit C), and he was unaware, until the trial, of the other 2 events involving some improperly constructed stoppings and the cable reel of the roof bolter. While I have found that Mr. Wiggins was not lying, I also find that Mr. Fraley thought he was.

Although I believe Mr. Fraley's testimony, that he thought that Mr. Wiggins was lying and that he had no knowledge of the other safety related incidents, knowledge of those incidents is imputed to the company by reason of the fact that a foreman was aware of those events. A foreman is a part of "management" and if a company could escape liability by denying that it knew of a foreman's activities, the Act would not work. Mr. Fraley of course, was acting for the company when he discharged Mr. Wiggins and though he made the decision personally, it was nevertheless a company decision. Inasmuch as the notice of improper action issued on March 27, 1982 was in itself an act of illegal discrimination, and inasmuch as that notice, and the events that brought it about, were in part responsible for Mr. Wiggins' discharge, then under the Pasula test Mr. Wiggins established a prima facie case and it then became the burden of Eastern Associated Coal Corporation to show that it would have discharged Mr. Wiggins in any event, even if the events of March 26 and 27, 1982 had not occurred. The company has made no attempt to

carry this burden and consequently Wiggins must prevail.

All proposed findings inconsistent with the above are REJECTED.

PENDING A FINAL ORDER

The Complainant shall have 15 days from the date of this decision to submit a proposed order granting relief for the violation found above. Respondent shall have 15 days from receipt of the Secretary's proposal to reply.

Charles C. Moore, Jr.
Administrative Law Judge

FOOTNOTES START HERE-

1 Complainants exhibits are marked with letters and respondents exhibits are marked with numbers.

2 The transcript refers to plaintiff's exhibit B. The transcript is replete with such errors. And it is the worst transcript that I have been involved with.