

CCASE:

RALPH YATES V. CEDAR COAL

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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

RALPH YATES,

COMPLAINANT

v.

CEDAR COAL COMPANY,

RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. WEVA 82-360-D  
MSHA Case No. HOPE CD 82-26

Big John No. 4 Mine

DECISION

Appearances: John Boettner, Esq., Boettner and Crane, Charleston,  
West Virginia, for Complainant Joseph M. Price,  
Esq., Robinson and McElwee, Charleston, West  
Virginia, for Respondent

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant alleges that he was discharged from the position he held with Respondent as section foreman because he made complaints to his supervisor concerning improper ventilation in the subject mine and that these complaints constituted activity protected under the Mine Act. Complainant's employment was terminated on March 9, 1982. On March 11, 1982, he filed a complaint with MSHA. Following an investigation, MSHA notified Complainant by letter dated April 29, 1982, that it had determined that a violation of section 105(c) of the Act had not occurred. On August 22, 1982, Complainant filed a letter with the Commission which was accepted as a complaint. Following an order to show cause, Respondent's Answer was filed December 10, 1982. Respondent contends that the complaint was not timely filed, and that it failed to state a cause of action under the Mine Act. Further, it denied that Complainant's employment was terminated because of activity protected under the Act.

The case was heard in Charleston, West Virginia, on January 27, 1983, May 5 and May 6, 1983. The record was held open for depositions which were taken on May 18, 1983 and June 21, 1983. The record was closed July 22, 1983. Both parties were afforded an opportunity to file posthearing briefs with proposed findings of fact and conclusions of law. Respondent filed such a brief.

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Based on the entire record, and considering the contentions of the parties, I make the following decision.

#### FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent Cedar Coal Company was the operator of an underground coal mine in Keith, West Virginia, known as the Big John No. 4 Mine.

2. Complainant was employed as a section foreman by Respondent beginning November 4, 1980. He originally worked at Grace No. 2 Mine but in a short time he transferred to Big John No. 4 Mine as belt foreman. In approximately the fall of 1981, he became section foreman at Big John No. 4 Mine in the 3 South section. He continued working as section foreman through March 8, 1982. He signed a "quit slip" on March 9, 1982.

3. On November 5, 1981, State Mine Inspector Carl Val Hoffman inspected the subject mine and issued a notice of violation because in the No. 4 entry off the 3 South section, the designated escapeway was ventilated by return air and did not have reflective material at 25 foot intervals on the life line cord. On the same day, two other notices of violation were issued, one because the No. 4 entry was mined at an excessive width for a distance of 18 feet, and the other for another violation of the roof control plan in the No. 4 entry. The first violation was abated November 6, 1981, and the others by 9:30 p.m., November 5.

4. In approximately November, 1981, the evening shift mine foreman in the 3 South section of the subject mine, Gary Davita, relayed to Superintendent Forms complaints from the evening shift section foreman that the section had on occasion been left with insufficient air, had torn curtains, and was not properly cleaned and rock dusted. This continued for some weeks. Davita made a written report to Forms and participated in a meeting with Complainant and Forms, where the complaints were discussed.

5. Following that meeting, on November 6, 1981, Mine Superintendent David J. Forms wrote Complainant as follows:

"On ... November 5, 1981, I called underground to inform you that we had a State Mine Inspector in the office. I instructed you to clean your section and ventilate it properly before you came outside. You failed to follow my instructions and your dereliction of duties resulted in a loss of two hours of production on the evening shift.

Your actions of gross negligence and failure to accept and respond to instructions will not be tolerated. This letter is to inform you that any future actions of this nature will be jeopardizing your position at Cedar Coal Company."

6. A similar letter was sent the same day to section foreman Shelby Burgess.

7. In late fall, 1981, Complainant called out of the mine to mine foreman Walter Kincaid and told him that there was insufficient air to ventilate his section, and that he had pulled his miners out of the face area. Kincaid replied that if Complainant had "hung (his) damn curtains, (he) would have air." In fact the curtains were properly hung. Finally, sufficient air was introduced in the section and the crew returned to work. Shortly thereafter, the air was again insufficient. Complainant called Kincaid and the condition was rectified.

8. In approximately December, 1981, a new section was opened in the subject mine, and Respondent attempted to ventilate it with the same split of air that was used to ventilate Complainant's section. This resulted in a decrease in the air coming into Complainant's section, and he complained to the mine foreman and superintendent.

9. On February 18, 1982, notices of violation were issued by a State mine inspector to the subject mine because of insufficient air at a last open crosscut and in the faces of entries 2 and 3 in the 2 South section. Three other notices were issued for violations on the 2 South section on the same day. Three additional notices were issued for violations on the Number 1, 3 and 4 belts.

10. On March 8, 1982, while Complainant was working the day shift, he complained to Kincaid that his section did not have enough air. Kincaid came to the section and agreed that the air was insufficient. Kincaid then "went back somewhere and it was not long before we had enough air." The section continued working until the end of the shift and the air was sufficient at that time.

11. On March 8, 1982, State Mine Inspector Harry T. Linville arrived at the subject mine at about 4:00 p.m., as the afternoon shift was beginning. The inspector arrived at the 3 South section about 5:00 p.m. and he took air readings at the last open crosscut between entries 1 and 2 and found only 3,094 cubic feet per minute. Readings at the last open crosscut between entries 2 and 3 showed only 4,900 cubic feet per minute of air. (The minimum quantity of air reaching the last open crosscut is supposed to be 9,000 cubic feet per minute). A notice of violation was written which required the condition to be abated by 5:30 p.m. the same day.

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12. When the above condition was not abated by 5:30 p.m., on March 8, the Inspector issued an order of withdrawal from the last open crosscut to each of the working faces in No. 1, 2, 3 and 4 rooms in the 3 South section.

13. About 2 hours after the beginning of the day shift on March 9, the operator asked the inspector to check the air, after the curtains were rehung and the "back up flies" were tightened. Ten thousand seven hundred and ninety cubic feet of air was found at the last open crosscut between the No. 1 and 2 entries of the 3 South section and the order of withdrawal was terminated.

14. On March 9, 1982, Complainant arrived at the mine site prior to 7:30 a.m., and prepared to go underground. Mine Superintendent Forms asked him to come into the office. Forms told Complainant that the company "got fined" for not having air on the section the previous night. Complainant was told he would be fired unless he signed a termination slip indicating that he quit for personal reasons. Superintendent Forms noted on the slip that "Mr. Yates failed to conform with our program and had problems adapting to a different style of management."

15. On March 11, 1982, Complainant filed a complaint under section 105(c) of the Mine Act with MSHA. Following an investigation, MSHA informed Complainant by a letter dated April 29, 1982, that it had determined that a violation of section 105(c) had not occurred.

16. In April, 1982, mine foreman Kincaid and mine superintendent Forms were told that their employment with Respondent would be terminated. They last worked on April 28, although they were continued on the payroll until June 30, 1982.

17. In May, 1982, Complainant discussed the possibility of his being rehired with the new superintendent of the subject mine, Woody Goins. Although Goins did not promise to rehire him, Complainant was led to believe that he might be rehired. The position was in fact filled by another in about July, 1982.

#### DISCUSSION

The testimony of Complainant and that of Goins are sharply divergent on the question of whether a job offer was made or implied. I am accepting the testimony of Complainant on this issue since it is largely supported by the testimony of Roy French, President of the Local Union and a member of the Safety Committee at the subject mine.

18. Kincaid and Forms had certain written memoranda or notes present when they discussed Complainant's case with the MSHA investigator. They apparently retained such memoranda when they left Respondent's employ.

STATUTORY PROVISION

Section 105(c) of the Act provides in part as follows:

(c)(1) 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 the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine ... 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) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

\* \* \* \* \*

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing

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(in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a).

#### ISSUES

1. Whether Complainant's case is barred because of failure to timely file his complaint?
2. Whether Complainant was discharged for activity protected under the Mine Act?
3. If Complainant was discharged for protected activity, what relief should be awarded?

#### CONCLUSIONS OF LAW

1. At all times pertinent to this proceeding, Complainant and Respondent were subject to the provisions of the Federal Mine Safety and Health Act of 1977, and the undersigned administrative law judge has jurisdiction over the parties and subject matter of this proceeding.
2. From November, 1980, until March 8, 1982, Complainant was employed by Respondent as a miner.
3. The complaint is not barred by the limitations for filing claims set out in section 105(c) of the Act or by laches.

DISCUSSION

The statutory filing deadlines in the Mine Act, including the requirement that a Complainant file a complaint with the Review Commission within 30 days of the Secretary's negative determination, are not jurisdictional. *Secretary/Bennett v. Kaiser Aluminum and Chemical Corporation*, 3 FMSHRC 1539 (1981) (ALJ); *Allen v. UNC Mining and Milling*, 5 FMSHRC 30 (1983) (ALJ). See S. Rep. No. 95-181, 95th Cong., 1st Sess. at 36, reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, Senate Subcommittee on Labor, Committee on Human Resources, 624 (July 1978): "It should be emphasized, however, that these time frames [in 105(c)] are not intended to be jurisdictional." The filing deadlines are therefore to be treated as a statute of limitations, and it must be determined whether Complainant showed justifiable circumstances for his late filing, and whether the delay prejudiced Respondent. See *Herman v. Imco Services*, 4 FMSHRC 2135 (1983); *Montoya v. Valley Camp of Utah, Inc.*, 5 FMSHRC 630 (1983) (ALJ).

I have found (Finding of Fact No. 17) that Complainant was led to believe that he might be rehired by Respondent. He continued to believe in this possibility until a replacement was hired in July. I conclude this constituted justifiable circumstances for his delay. Respondent argues that it was prejudiced because Complainant's supervisors, Kincaid and Forms, left its employ and took certain notes with them before the complaint was filed with the Review Commission. However, Respondent was aware of the complaint filed with MSHA and did not show that an attempt was made to preserve testimony or documents, or that Kincaid and Forms could not have been subpoenaed or deposed. I conclude that prejudice was not shown. See *Allen v. UNC Mining and Milling*, supra.

4. The complaints which Complainant made concerning inadequate ventilation described in Findings of Fact Nos. 7, 8 and 10 herein, constituted activity protected under the Mine Act. Any adverse action because of this protected activity would violate section 105 of the Act.

5. Complainant was constructively discharged although he signed a "quit slip" since he was required to sign the slip or be fired.

6. Complainant has failed to establish that his discharge was motivated in any part by activity protected under the Act.

DISCUSSION

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act and that his discharge was motivated in any part



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by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Bush v. Union Carbide Corporation, 5 FMSHRC 993 (1983). There is no evidence here that Complainant was discharged because of his complaints of inadequate ventilation. Rather, the evidence clearly establishes that he was discharged for what was perceived to be his failure to keep adequate ventilation on his section and various other perceived inadequacies in his work as section foreman. There is substantial evidence that Complainant's supervisors were guilty of various deficiencies of their own in their supervision of the mine including a failure to provide adequate ventilation to Complainant's section. It may be that his supervisors attempted to make Complainant the scapegoat for these deficiencies and the resultant violations cited and closures ordered by the State mine inspector. The fact that Forms and Kincaid were discharged shortly after Complainant lends some support to this conclusion. Assuming that Forms and Kincaid fired Complainant because of their own inadequacies, it would still not establish a cause of action under the Mine Act. See Sizemore v. Dollar Branch Coal Company, 5 FMSHRC 1251 (1983) (ALJ). If Complainant was discharged because of the violation notices and closure orders issued by the State, and if he were only partly responsible or not at all responsible for such notices and orders, the discharge may have been unfair, but it did not result from protected activity under the Mine Act. Therefore, no violation of section 105(c) has been established.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED for failure to establish a violation of section 105(c) of the Act.

James A. Broderick  
Administrative Law Judge