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ALBERT ZEISEL V. ASARCO
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ALBERT B. ZEISEL, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. WEST 83-9-DM
ASARCO, INC., RESPONDENT	MD 82-80

DECISION

Appearances: Ronald E. Gregson, Esq., Denver, Colorado, for Complainant;
Earl K. Madsen, Esq., Bradley, Campbell & Carney, Golden, Colorado, for Respondent.

Before: Judge Carlson

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., (the Act). The Secretary, after investigation, declined to prosecute the complaint. The complainant, Albert B. Zeisel, then brought this proceeding directly before this Commission as permitted under section 105(c)(3) of the Act.

Mr. Zeisel 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 from his job as a motorman's helper by ASARCO, Inc. (ASARCO) after he protested that a jack he was using was unsafe. He seeks reinstatement, back pay and bonuses, and restoration of seniority.

Mr. Zeisel's original complaint, filed pro se, indicated that he had been compelled to use a jack which was not working properly, but the pleading contained no direct allegation that he had made a safety complaint to the operator. Thereafter, Mr. Zeisel secured counsel who at a formal pretrial hearing was permitted to amend the complaint by adding the following allegation:

> [D]uring the incident that led to the second warning notice the Complainant made a complaint directly to Mike Mosher, his shift boss, concerning the safety of the jack %y(3)27 which he was using. (Prehearing transcript at 4 and 5).

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

REVIEW OF THE EVIDENCE

There was little agreement between the parties as to most of the facts concerning complainant's firing. The undisputed evidence does show that Mr. Zeisel had worked in the operator's underground metal mine at Leadville, Colorado from September 1981 to his discharge on or about May 25, 1982. At the times material here, he was a motorman's helper. In that capacity he worked, successively, under three shift bosses: Dennis Vetrano, Glen Anderson, and Mike Mosher. On October 5, 1981, he received a warning notice from Vetrano (complainant's exhibit A). The notice specifies that he failed to follow orders and performed unsatisfactory work. Although the "explanation" portion of the notice simply notes "employee not doing job correctly," there was general agreement that Vetrano was dissatisfied with the speed with which Zeisel and fellow crewman were mucking a ditch.

The witnesses also agreed that a second warning was issued, this time by Mosher, on April 29, 1982, (respondent's exhibit 8), but there was disagreement about the particulars of the incident.

The parties did agree as to the nature of the event which led Mosher to issue a third and final notice on May 25, 1982. This event involved Zeisel's use of his finger to hold a latch on a hand-operated track jack which he and his motorman were using to

replace a derailed muck car on the track. Mosher observed the incident and issued a warning notice for "safety rule violation" and "unsafe work habits." This notice triggered a decision by higher management to discharge Zeisel.

Complainant insists that ASARCO ended his employment because he made a complaint to Mike Mosher that the jack he was using to put a derailed car back on the track was defective. He did this, according to his testimony, at the very time that Mosher was reprimanding him for using his finger to hold the malfunctioning latch. Beyond that, Zeisel testified that he had a reputation as a safe and effective worker, and that Mike Mosher had evidenced a dislike for him from the first day he reported for work on Mosher's crew. Finally, Zeisel maintained that Robert Russell, the mine superintendent, resented him because he had purchased a house from ASARCO which had been the house of Russell's boss, the unit manager.

Witnesses for ASARCO testified that the complainant was discharged because he had repeatedly engaged in unsafe practices and was not an effective worker. They also maintained that the firing occurred after a series of incidents for which formal warnings were given in accordance with established disciplinary procedures.

In resolving the evidentiary disagreements some review of the testimony relating to each incident is necessary. Mr. Zeisel acknowledged that his first shift boss, Vetrano, for whom he worked about three months, had once criticized him for failing to muck a ditch far enough or deep enough. Zeisel indicated that he never saw a written notice, nor signed one. The evidence does indicate, however, that Vetrano filed one with management on October 5, 1981 on which he checked boxes marked "failure to follow orders" and "unsatisfactory work", and upon which he also wrote "Employee not doing job correctly." (Complainant's exhibit A.)

Zeisel testified that he received another warning notice for allegedly mishandling a section of rail which he and motorman Mike Dunn were lifting. According to Zeisel, Dunn's hand slipped and he dropped the rail. Zeisel asserted that he got a warning slip from his then shift boss, Mike Mosher, although Dunn himself did

not consider the incident significant and "couldn't believe" Mosher had issued a warning slip. Leroy Allan Eversole, safety director for the ASARCO Leadville unit, was called by complainant as a witness. He testified that Dunn had indicated that the dropped rail was not a "big deal." The warning slip in question (complainant's exhibit B), issued on April 4, 1982, by Mosher, shows a checkmark before the phrase "unsatisfactory work," and contains this written explanation: "not doing job properly and being unsafe." Eversole testified that he was asked by Mosher at about this time how to spell Zeisel's name because he was "thinking about" giving Zeisel a warning slip because Zeisel had been "kind of unsafe." Mosher mentioned the dropped rail incident in this connection. According to Eversole, Mosher also mentioned that Zeisel "was not totally responsive as a helper." Mike Dunn, when called as witness for ASARCO, testified that he had complained to Mosher that Zeisel had let go of the rail, which led to Dunn's finger being "smashed," and that he may have told Mosher that Zeisel had jumped between moving cars on the track. Dunn testified that he asked Mosher that Zeisel be taken off the crew.

Mosher himself, in testifying for ASARCO, indicated that Dunn had asked him to transfer Zeisel because he was "too unsafe." Mosher said Dunn had told him of Zeisel's standing on the track while signaling Dunn to back up the motor. According to Mosher, the April 4, 1982 reprimand was for Zeisel's unsafe signaling practice as reported by Dunn, not the dropped rail incident, which he did not believe "serious." Mosher testified that he moved Dunn to a different crew because of his safety complaints about Zeisel (Transcript 207).

The crucial incident is that involving Zeisel's use of the jack. That episode triggered Zeisel's discharge and furnishes the basis for his complaint in this proceeding. The undisputed evidence shows that the track jacks used to replace derailed cars on the track sometimes malfunction because particles of muck or debris jam the latch mechanism which has to be pushed to allow the jack to be raised. When this occurred it was common for one miner to use a wrench (a buzzy) to depress the latch while another operated the handle which raised or lowered the jack. On or about May 25, 1982 Zeisel was working as helper for motorman Robush when a derailment took place. The two men used a jack to get the derailed cars back on the track. No one disputes that Zeisel used his finger, rather than a buzzy, to hold the jammed latch on the jack, and that Mosher saw him do it.

Zeisel insisted throughout his testimony that use of a finger to hold the latch was not uncommon. When pressed on the matter, he stated that he had seen Dunn use a finger on a latch once and Robush do so once. Zeisel also insisted that he had never been specifically instructed in the use of the jacks, but he learned through observing the motorman. Both motormen, in their own testimony declared the practice unsafe, and denied having ever used it.

Robush and Zeisel agreed that they alternated holding the latch and operating the iron bar used on the jack handle. Zeisel insisted that he used his finger because neither man had a buzzy to use instead. Robush contradicted this, claiming that he had a buzzy which he used, and which he offered to Zeisel. According to Robush, Zeisel used it for a while, but then used his finger, which he was doing when Mosher happened on the scene for a second time. The first time when Mosher came by, Robush asserted, he himself was holding the latch with his buzzy. Robush claimed that he had warned Zeisel not use his finger and was ignored. Zeisel denied that Robush said anything.

They agreed, however, that Mosher reprimanded Zeisel on the spot. Robush testified that Mosher warned that if the jack slipped it could cut off a finger. He also testified that he told Mosher the jack was not working properly, to which Mosher replied that the jack should be "bad ordered" and sent to the surface for repair. Zeisel agreed that Mosher warned him about using his finger, but denied that Robush told Mosher anything or that Mosher "bad ordered" the jack.

The testimony differs as to what, if anything, Zeisel said to Mosher that could be considered a safety complaint. Zeisel's own testimony on this matter was not wholly clear. Early in his direct testimony, this colloquy occurred:

> Q. Was it dangerous to use your finger?
>
> A. Not at all. I mean, you either use a buzzy or you use your finger in order to get that jack to work properly if its not working at all. (Tr. 20.)

Then following this testimony:

> Q. What did you say to Mike Mosher when he said it was unsafe?
>
> A. I said it wasn't unsafe, that the whole jack or the jack itself was not working properly and that it just wouldn't--thats all we had to work with.

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> Q. Did he say he'd do anything about the jack being unsafe?
>
> A. I'm sorry?

> Q. Did he say he'd do anything about the jack being unsafe?
> A. He didn't say another word. He just walked off. (Tr. 22).

On cross examination of Zeisel, this testimony took place:

> Q. You told him [Mosher] the jack was not working properly and what you were doing was really not unsafe?
>
> A. Pushing it in, no. To my knowledge it isn't because its common practice. So I told him the jack was not working properly and this was how we had to to make it work. [Emphasis added]
>
> Q. Did you say anything else to him?
>
> A. Basically that was it. Just talking about the jack, just saying it wasn't working. And he just walked off. (Tr. 44).

Still later in the cross examination Zeisel insisted he told Mosher, specifically, the jack "was unsafe, it wasn't working right" (Tr. 46).

Under further cross examination, after being asked to review his affidavit given to an MSHA investigator, he appeared to retreat from that position:

> A. Yeah, I told him the jack wasn't working properly.
>
> Q. But there is no reference to your using the term safe or unsafe or safety?
>
> A. Well, they go together if its not working properly.
>
> Q. Thats in your opinion.
>
> A. Its a fact, it seems like.
>
> Q. But you didn't say that.
>
> A. No, but if its not working properly%y(4)27 (Tr. 49.)

Upon examination by the judge, complainant became more explicit:

> Q. Now when you were describing the incident that apparently led to your discharge, you indicated, if I followed your testimony, that you and the motorman used your finger on the latch of the jack because you didn't have a buzzy. Now that implies to me that had you had a wrench you would have preferred to use that to your finger; is that right?
>
> A. Well, its easier to use, yes sir.
>
> Q. Is that the only reason you use it, 'cause its easier to use than your finger?
>
> A. It would be, yeah.
>
> Q. Not because its safer to use than your finger?
>
> A. No. Using your finger could not get you hurt. (Emphasis added.) (Tr. 71-72).

Robush, who was called as a witness by complainant, agreed that Zeisel did complain about the jack to Mosher after being warned by Mosher about using his finger. Robush testified as follows:

> Q. What, if anything, did Mr. Zeisel say to Mr. Mosher that you heard?
>
> A. He told him that we had trouble with the jack from the very beginning.
>
> Q. Anything else?
>
> A. No. (Tr. 111).

Robush reiterated this recollection under questioning by the judge:

> Q. I want you to think before you answer this question. Did Mr. Zeisel say anything to you or Mr. Mosher about the safety or lack of safety or anything concerning danger relative to the use of the jack? Did that subject come up in his conversation?
>
> A. No, I don't believe so. (Tr. 122-123).

ASARCO officials who participated in the actual decision to terminate the complainant's employment testified at length for the company. Curtis A. Johnson, the unit manager for the Leadville unit, testified that he had the ultimate responsbility for firings. Johnson maintained that he made the decision to dismiss Zeisel after a consultation with Dave Russell, the mine superintendent. Beyond the circumstances which resulted in warning slips, Russell, he said, informed him that Zeisel was a "slow worker," and that other workers were "carrying some of his weight." The essence of Johnson's testimony was that complainant was discharged out of belief that the miner displayed unsafe work habits (although he had never had an accident), and for a general failure to perform his job properly. Johnson claimed to have no knowledge of any alleged safety complaint before the firing (Tr. 150).

Russell's testimony was in essential agreement with that of Johnson. He, too, denied any knowledge that Zeisel had made any sort of safety complaint about the jack (Tr. 228). In this regard, Russell indicated that he had discussed the two most recent warning slips with Ray Bond, the mine foreman, who in turn had talked to Mosher. Bond made no mention of any safety complaint from Zeisel.

Management's witnesses also suggested that the complainant's discharge was the natural consequence of his having received three formal warnings for work violations. Personnel records of other discharged miners were produced in an attempt to show that Zeisel's termination was consistent with an established company policy of discharge for cumulative warnings for on-the-job misconduct.

Management officials did not contend that the company had a specific rule forbidding using fingers on a sticking latch.

Basically, they contended that common sense barred such a practice. Further, unit manager Johnson believed that the practice was covered by a general provision in the company's safety rule book distributed to all employees. Rule 3 on page 1 of the book provides:

> No set of rules can more than outline a few safety procedures. Plan your work and do your work in conformity with these rules, but use good judgment. This book must be supplemented by common sense. (Respondent's exhibit 7 at 1).

All witnesses except Zeisel appeared to share a belief that use of a finger to depress a sticking latch was dangerous.

DISCUSSION

The burden of proof of an alleged discriminatee under the Act is set forth in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, (1980) rev'd on other grounds sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3rd Cir.1981). In Pasula the Commission held that complainant must carry the initial burden of showing that he engaged in a protected activity and that the protected activity was a motivating factor in his discharge or some other discriminatory act.

Having carefully considered all the evidence and the arguments of the parties, I must conclude that the complainant in this proceeding failed to establish the initial element. No case for protected activity can be made out unless the complaining miner makes known his complaint to the mine operator. Put another way, an operator can scarcely be said to have discharged a miner for making a safety complaint it knew nothing about. In Dunmire v. Northern Coal Co., 4 FMSHRC 126 (1982), the Commission considered the minimum requirements of a health or safety complaint in connection with a work refusal. The resulting holding made clear that a communication is "ordinarily" essential. Exception may be found where no representative of the operator is present, where "exigent circumstance require swift reaction," or where an attempt to communicate would be futile. The Commission amplified this concept as follows:

> We stress that our purpose is promoting safety, and we will evaluate communication issues in a common sense, not legalistic manner. Simple brief communication will suffice, and the "communication" can involve speech, action, gesture, or tying in with others' comments. We are confident that the vast majority of miners are responsible and will communicate such concerns in any event. (Id. at 134.)

Complainant, of course, was not involved in a refusal to work. On the contrary, assuming that he did in fact feel the jack unsafe, he nevertheless proceeded to join Robush in its use. His complaint, if he made one, came only after he had been verbally reprimanded for using his finger on the latch. This does not mean, however, that he could not have voiced a perfectly valid complaint at the time of the reprimand. The most favorable part of his testimony is that in which he maintained that he told the shift boss that the jack was "unsafe." One can conceive of a situation where a miner, fearful for his livelihood and having already received two warning slips, might indulge in an unsafe act where he believed he was expected to do so in conformity with a common practice in the mine. Zeisel, it will be remembered, maintained the use of the finger on the track jack was common, and no one disputed his contention that the jacks were frequently jammed with muck particles.

My difficulty with his testimony begins at this point, however. Robush, whom Zeisel called as his own witness, emphatically denied that he ever used his own finger on the jack, as did Dunn, the other motorman, who testified at the behest of the operator. These two were the only miners whom Zeisel supposedly saw using their fingers. More important, the complainant, when closely examined on the matter, ultimately acknowledged that he recognized no safety problem in using his finger on the latch, and that his only statement to Mosher was that the jack "was not working properly." Ignoring Mosher's own testimony that Zeisel said nothing about the condition of the jack, and indeed did not speak at all, I must agree with the operator that a statement that the jack "was not working properly," if made, did not rise to the level of a cognizable safety complaint. I specifically reject complainant's argument that such words carried with them a reasonable connotation that the speaker was concerned about the safety of the jack. It is far more likely that Mosher, or any reasonable person, upon hearing such words, would have assumed that they were offered as a spur-of-the-moment excuse or justification for the miner's own breach of safety principles, not as a complaint of an unsafe condition inherent in a jack with a stuck latch.

In reaching this conclusion, I have not ignored the attempts of complainant's counsel, in his excellent brief, to place his client within the exceptions to the necessity for an explicit complaint as outlined in Dunmire. The facts simply do not fit those exceptions. A management representative was present and complainant had a clear opportunity to register a complaint. I find no credible evidence that Zeisel believed that the making of a complaint would have been futile or useless. On the contrary, at the hearing he maintained that he did make a complaint by declaring that the jack was not working properly.

Although I am convinced that Mr. Zeisel made no safety-related complaint, I should add that the credible evidence also demonstrates that no such complaints ever reached the unit manager (Johnson) or the mine superintendent (Russell), who together made the decision to terminate the complainant's employment. Thus, if Zeisel did declare to Mosher that the jack was not working and Mosher managed to construe this to mean that Zeisel had a concern over the safety of the device, there is no indication that Mosher ever communicated any of this to any higher management official, let alone to those who made the decision to fire.

Complainant seeks to show a management awareness of a complaint through the following testimony by mine superintendent Russell concerning his conversation with foreman Bond:

> We Discussed why someone would stick their finger in a jack when they're jacking the car up when they've

> got a buzzy and if there's muck in the jack why don't they get it out and make things safe. Well, not safe, but make the jack work, you know, if its jammed or whatever. (Tr. 228.)

This statement does not lead to a reasonable inference that Russell somehow knew that Zeisel had lodged a complaint about the safety of the jack. Taken in the context of Russell's full testimony, it stands for nothing more than a reflection of management's dismay over a miner's use of his finger on the latch mechanism. I should note that I find that the company's concern over the use of a finger on the jack was genuine. I also find that the practice was in fact hazardous.

Some mention should also be made of the significance of shift boss Mosher's "bad ordering" of the jack when he was told that it wasn't working properly. Complainant suggests that this action should be construed as an admission that using a jack with a jammed latch was unsafe per se. (Curiously, Zeisel himself denied that Mosher issued a "bad order" (Tr. 22)). The question thus raised is whether ASARCO recognized that a jack with a jammed latch was dangerous even when used with a buzzy.

Mosher maintained that it was ordinarily safe to use a buzzy. He pointed out that the car was already raised when he got there, and that he had no recourse but to allow the miners to finish. He acknowledged, however, that because of the location of the car in the incident in question, some possibility existed that a miner could be hurt even if using a buzzy, had the jack slipped. (Tr. 212-213). Superintendent Russell, on the other hand, testified to the general effect that use of the buzzy was an acceptable technique. Demonstrating with a jack, he endeavored to show that cars needed to be raised but a small distance to replace them on the track, and that if the jack slipped the car always fell to one side or the other, not toward the end where the jacking was done. He ultimately acknowledged, however, that it was safer to use a jack in good working order, than to use anything to hold the latch. (Tr. 217-219, 244-245.) On the whole, however, it is apparent that miners and management alike tended to believe use of a buzzy was acceptable and generally safe; otherwise the transcript would not be filled with unquestioning references to the use of buzzy on sticking latches. Use of a buzzy, that is to say, was not perceived as cheating on safety. In a mine where that state of mind prevailed it is doubtful that a suggestion that the jack was "not working properly" would be seen as a safety complaint. This is especially true where the suggestion came from a miner who--seemingly alone among mine personnel--believed it was safe to use his finger directly on the latch.

Complainant contends that ASARCO's stated reason's for the discharge must be discounted because the surrounding circumstances suggest that those reasons were a mere pretext for a retaliatory dismissal based on his making of a safety complaint. In support of this contention, complainant relies on Chacon v. Phelps Dodge Corporation, 3 FMSHRC 2508 (1981), rev'd on other grounds, 709 F.2d 86 (D.C.Cir.1983). That case recognized that operators who are motivated to retaliate against miners for engaging in protected activity seldom leave a trail of direct evidence. Thus, the real motive for an adverse action may be proved by reasonable inferences drawn from such circumstances such as these: the operator's knowledge of protected activity; its hostility to the protected activity; a coincidence in time between the protected activity and the adverse action; and disparate treatment of the complaining miner and others whose alleged non-protected conduct was similar. Complainant insists that the evidence here mandates an inquiry into the areas outlined in Chacon. His brief then offers an extended analysis of evidence claimed favorable to the desired inferences.

The difficulty with complainant's position is manifest. The Chacon approach is of value only when some evidence, direct or circumstantial, establishes that protected activity took place. If such evidence is lacking, any Chacon analysis ends there. For the reasons previously discussed, I found that no credible evidence demonstrates that the miner conveyed to ASARCO any information, by word or conduct, which was or should have been understood as a safety complaint.

Some passing mention must also be made of complainant's assertion that he was the victim of an inexplicable animosity on the part of Mosher, who allegedly disliked him from the first day he reported to work under Mosher's supervision. Mosher denied any such attitude, and denied that he greeted complainant with obscenities on his first day on the crew. If Zeisel is believed, however, it adds no strength to his case. The complainant has a remedy under the Act only to the extent that his discharge was motivated by a complaint about safety. If Mosher indeed harbored an unjustified dislike of Ziesel, that fact may have furnished a discharge motive quite remote from any alleged safety complaint.

Similarily, if we are to accept complainant's view that mine superintendent Russell was somehow biased against him because he purchased a house from a unit manager for ASARCO, that fact, too, would at best furnish a separate motive for discharge.

To summarize, I find that the evidence shows that the complaining miner registered no safety-related complaint with the mine operator. I further find that his discharge was based solely upon a management perception that he tended to be an unsafe and otherwise unsatisfactory worker. I consequently conclude that the miner did not engage in protected activity under the Mine Safety and Health Act of 1977 and is therefore without a remedy under the Act.

ORDER

In accordance with the foregoing, this discrimination proceeding is ORDERED dismissed with prejudice.

John A. Carlson
Administrative Law Judge

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~FOOTNOTE_ONE

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 other wise 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.