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GEORGE JACK V. MID RESOURCES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GEORGE A. JACK, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. WEST 83-72-D
MID-CONTINENT RESOURCES, INC., RESPONDENT	MSHA Case No. DENV 83-13
	Coal Basin No. 5 Mine

DECISION

Appearances: George A. Jack, Indiana, Pennsylvania, pro se;
Edward Mulhall, Jr., Esq., Delaney & Balcomb
Glenwood Springs, Colorado, for Respondent

Before: Judge Carlson

This case arose upon a complaint of discriminatory discharge filed by George A. Jack 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. Mr. Jack then brought this proceeding directly before this Commission under section 105(c)(3) of the Act.

Mr. Jack alleges that he was discharged by Mid-Continent Resources (Mid-Continent) in violation of section 105(c)(1) of the Act. (FOOTNOTE 1) Specifically, he complained that he was fired

from his job as an underground miner because he reported that he had been injured in an accident. He seeks reinstatement and back pay.

A hearing on the merits was held in Denver, Colorado on February 3, 1984. Complainant appeared pro se; respondent appeared through counsel. Both parties waived post-hearing briefs.

ISSUES

The fundamental questions to be decided are:

(1) Whether the proceeding must be dismissed because the miner's original complaint was filed with the Mine Safety and Health Administration after the statutory time period for filing had elapsed.

(2) Whether, if a valid complaint was filed, the miner was discharged by the mine operator in violation of section 105(c)(1) of the Act, as alleged.

(3) What relief the miner is entitled to receive if the discharge was unlawful.

TIMELINESS OF THE COMPLAINT

Section 105(c)(2) of the Act provides that an aggrieved miner has sixty days after a discriminatory event in which he "may" file his complaint with the Secretary of Labor. Mr. Jack was discharged on June 17, 1982. Mid-Continent urges that the present proceeding is not properly before the Commission because the miner failed to make his original complaint to the Secretary until March of 1983. The record shows that Mr. Jack signed his complaint on March 9, 1983 (respondent's exhibit 5). The form was received by the Denver, Colorado office of the Secretary's Mine Safety and Health Administration on March 15, 1983. Since these dates are not in dispute, it is clear that the complaint was filed long after the close of the sixty day period mentioned in the statute.

Relying on the Act's legislative history, the Commission has held that the sixty day time limit is not jurisdictional. The Congressional purpose was to prevent stale claims, but late filings by a miner may be excused "under justifiable circumstances." Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (1982). Questions of timeliness must thus be decided on a

"case by case basis, taking into account the unique circumstances of each situation." David Hollis v. Consolidation Coal Company, --- FMSHRC ----, Docket No. WEVA 81-480-D (January 9, 1984).

In the present case I find the complainant's delinquency excusable.

The evidence shows that Mr. Jack moved from Colorado to Pennsylvania within a week after his discharge. His testimony revealed a good deal of genuine confusion between his workman's compensation claim and his mine safety complaint. He was of the apparent belief that forms filed with the Colorado workman's compensation authority, for example, were somehow essential to the filing of complaint under the mine Act; and he had some difficulty in securing copies of the compensation form. Because of his move, he also had difficulty in determining which MSHA office should handle his complaint. The complainant's testimony on these matters is generally credible. I am convinced that Mr. Jack misunderstood his rights under the Act and was confused about the proper manner in which to proceed. I also note that no evidence indicates that Mid-Continent was prejudiced by the late filing.

REVIEW OF THE EVIDENCE

The undisputed evidence shows that complainant was interviewed by Mid-Continent for employment in its underground coal mine on June 7, 1982. He came to the mine with a letter of recommendation from an official in a Pennsylvania mine where he formerly worked. Mid-Continent hired him as an experienced miner. He spent two days, June 10 and 11, 1982 in orientation and training on the surface.

The complainant did not report for work on his next scheduled days, June 14 and 15, 1982, a Monday and Tuesday. He did report on June 16. He worked as part of a five man crew removing cable and doing other tasks preparatory to closing down a part of the mine.

According to Mr. Jack's account, which Mid-Continent does not dispute, in mid-afternoon he was laying boards under the tires of a diesel-powered buggy as it attempted to cross a bridge. The crew foreman was driving; the remaining four members of the crew were on the bridge. As the buggy moved across, a part of the bridge collapsed and Mr. Jack fell several feet. He complained of a back injury and was instructed by the foreman to walk to the surface. He did so.

On the following day he did not go to the mine. He called the personnel office and spoke ultimately to Marvin Meyers, the personnel director. Mr. Jack told Meyers that he was absent because he had been injured in the accident the previous day; Mr. Meyers told Mr. Jack that he was terminated. Later that day, Meyers sent a letter informing Jack that he was discharged.

Beyond those few facts, witnesses for the parties agreed on virtually nothing. Complainant maintains that he was fired because he "reported a mine accident," the bridge collapse. He also claims that during the course of the day he also voiced complaints about unsafe practices or conduct. According to his testimony, he twice complained to the crew foreman when the vehicle used by the crew was allowed to "drift back" while miners were behind it. He also complained, he said, that a cable he and the foreman were taking up was energized at 32,000 volts. Further, Mr. Jack insisted that both management and his fellow miners were biased against him because he was hired during a hiring freeze when the operator had made known that operations were to be cut back.

According to Mr. Jack, he was unable to work on June 14th and 15th because of altitude sickness. He claimed he had not adjusted to the 10,000 foot altitude of the mine. Since he had been in Colorado for less than a week, he said he knew no physicians. He visited a chiropractor who gave him a "disability certificate" which he in turn gave to Wally Wareham, the mine superintendent, on June 16th when he returned to work. The chiropractor's statement indicated that Mr. Jack was incapacitated on June 14th and 15th with "stomach upset and back pain" (Respondent's exhibit 2). Mr. Jack also maintained that he telephoned the mine on both the 14th anbd 15th to report his inability to work. He also testified that Grant Brady, safety director for Mid-Continent, had informed him that he was entitled to miss two days of work in six months with a doctor's excuse.

Mid-Continent provided a markedly different version of the circumstances leading to dismissal. Nannette C. Grys, the company's personnel clerk at the time in question, testified that she helped Mr. Jack fill out all his personnel papers on June 9, 1982. She claims that the complainant was "definitely intoxicated" at that time, and that she reported that impression to Marvin Meyers, the personnel director.

During his own testimony, Mr. Meyers stated that he put the complainant on the payroll only because he had been instructed to do so by Mid-Continent's president. Mr. Meyers stated, however, that the information from Ms. Grys "alerted" him to watch Mr. Jack's work attendance.

The implemented labor agreement with Mid-Continent's miners, he testified, places newly hired employees in probationary status for their first 60 days of work, (Article 11.2, respondent's exhibit 3). Under Article 6.2.9., according to Meyers, probationary employees could be discharged for any cause deemed sufficient by the company. That article is one of a series specifying causes for discharge. The text confirms his testimony. It permits discharge for:

> Any cause determined sufficient by the company as to an employee on probationary status within sixty (60) days of work by the employee after his employment.

Mr. Meyers agreed generally with the complainant's account of the telephone conversation between the two of them on the morning of June 17. Meyers insisted, however, that he had decided to discharge Jack before the call was received. He made the decision because the miner had missed his first two days of actual work in the mine, and had not called in on those days as company policy required. Despite the company's power to dismiss probationary employees for any cause, Meyers indicated that he may not have dismissed Mr. Jack had the miner called in to explain his absence.

Mr. Meyers further declared that he knew nothing of the accident on June 16th until Jack mentioned it during the telephone call on the following day. Moreover, he knew nothing of any safety complaints at the time he made his decision to fire the miner. He had heard nothing of the complaint about the vehicle backing incident or the electrical cable incident until he heard complainant's testimony at the trial, he testified.

Mr. Meyers knew that Mr. Jack had not called on June 14 or June 15 because all such telephone reports are tape recorded when made, and are then noted in a log by the mine clerk. The log, Mr. Meyers testified, contained no entries for calls on June 14 or 15.

As to what happened after Mr. Meyers told Mr. Jack that he was fired, there is little dispute. Meyers sent Jack a letter formally advising him that he was terminated for "being absent from work without good cause" (respondent's exhibit 1). Mr. Jack returned his equipment and supplied a company paramedic with information for state workman's compensation claim.

On August 26, 1983 a hearing officer for the Workmen's Compensation Division of the Colorado Division of Labor issued an order declaring that Mr. Jack was entitled to total temporary disability from June 17, 1982 (complainant's exhibit 1). Mr. Jack returned to Pennsylvania shortly after his discharge by Mid-Continent.

A miner alleging a discriminatory discharge must prove by a preponderance of the evidence (1) that he engaged in "protected activity" and (2) that the discharge was motivated at least in part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Corp., 2 FMSHRC 2786 (1980), rev'd. on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981). It is further essential that a miner seeking the protection of the Act have actually communicated a complaint concerning safety to a representative of the operator. Dunmire v. Northern Coal Co., 4 FMSHRC 126 (1982).

Complainant in the present case maintains that in his call to the personnel office on June 17, 1984 he stated that he was unable to report to work because of his injury suffered the previous day. There is no evidence that Mr. Jack gave voice to any specific or general concern relating to safety or health. The chief purposes of his call, rather plainly, were to explain why he would not be at work and to protect his rights to compensation for a job-connected injury. Similarly, it is not clear that he articulated any express safety complaint to the foreman who was present when he fell from the bridge, receiving his injury. According to his own account, the only conversation appeared to relate to whether he should go to the surface and how he should get there. The question thus raised is whether the reporting of an accident and resulting injury by the injured miner may be construed as a safety-related complaint. The general answer must be in the affirmative. Cf. Mooney v. Sohio Western Mining Co., --- FMSHRC ---- (1984), Docket No. CENT 81-157-DM, March 7, 1984; Moses v. Whitley Development Corp., 4 FMSHRC 1475 (1982). Under most circumstances an injury report from a miner hurt in a mine accident is, by its very nature, a safety complaint. Mr. Jack's telephone conversation with Mr. Meyers on June 17 involved a protected act.

In the present case we must also consider whether Mr. Jack's comments concerning the "backing" incident and the energized cable incident constituted protected activity. I must conclude that they did. In both instances he made complaints within the hearing of his foreman or leadman about safety concerns. The problem, of course, is that the miner's formal pro se complaint filed in this proceeding did not raise these specific occurrences. I hold, however, that the issues raised by these incidents were

tried by the consent of the parties and I therefore amend the pleadings to conform to the evidence under Rule 15(b) of the Federal Rules of Civil Procedure. (FOOTNOTE 2) Mr. Jack's complaints about the unsafe backing of the vehicle and the handling of an energized cable were manifestly protected activity.

Upon the entire record I conclude that the complainant failed to establish the second essential element of his proofs: that his protected activities furnished any part of the motive for his discharge.

The weight of the evidence establishes that despite Mr. Jack's having engaged in protected activity, the decision to dismiss him was based entirely upon his unprotected activity. In this regard, I found Mr. Meyers' testimony wholly convincing. His explanation of his motives emerged in a straightforward way. It was plain that he would not have hired Mr. Jack in the first place, had he had his way, because the mine was at that time reducing, not increasing, its work force. The additional information that the new miner was intoxicated when he filled out his employment papers did nothing to enhance Mr. Meyers' views on the wisdom of the hire. (FOOTNOTE 3) At that point, understandably, he became "alert" to the possibility that Mr. Jack would present a problem with absenteeism. Given this background, one can easily appreciate Mr. Meyers' reaction when he learned that the miner had missed his first two days' work underground. One can believe, in other words, that Meyers had decided to fire Mr. Jack before the latter's telephone call on June 17 and that the call merely accelerated the pronouncement of that decision.

Coincidentally, I believe Mr. Meyers assertion that at the time he formed his resolve to dismiss the complainant he had neither knowledge of the accident of June 16, nor knowledge of any other safety complaint. Thus, there was no connection between the miner's protected activity and the decision to discharge. Such a nexus is essential to a showing of a discriminatory discharge. Where a mine official who makes a decision to fire a miner has no prior knowledge that the miner made a safety or health complaint, it is axiomatic that protected activity cannot have furnished any part of the motive for the adverse action.

Some other elements in this case deserve passing mention. Mr. Jack's medical excuse from a chiropractor enjoyed some evidentiary prominence at the hearing. It did not, however, figure significantly in my decision. The evidence shows that Mr. Meyers did not see the excuse until after his June 17, 1984 declaration that Mr. Jack was dismissed. Whether Mr. Jack gave it to the mine superintendent on June 16 when he reported back to work is of little importance, as is Mid-Continent's emphasis on the fact that the document bears a date of June 17, a day after the complainant allegedly gave it to the company. This is so because the persuasive evidence shows that Mr. Meyers decided to fire Mr. Jack on the basis that the miner failed to give telephone notice on June 14 and June 15, as required by company rules, that he would not be at work.

I must also make an observation concerning Mid-Continent's work rules as set out in respondent's exhibit 3. This "Proposed Labor Agreement," was implemented on August 5, 1981. The evidence shows the provisions contained in the document were originally conceived as a part of the collective bargaining process when the company's employees were represented by a labor union. They were ultimately put in effect, however, on an essentially unilateral basis by management after the work force had determined to dispense with union representation. Mr. Meyers maintains that Mr. Jack was terminated as a probationary employee under Article 6.2.9 which declares that probationary employees may be discharged for "any cause determined sufficient by the company." He also testified that in the normal course of his interviews of a new employee he routinely gives the employee a copy of the work rules. Mr. Jack, however, insisted that he had never received a copy of the rules booklet, and therefore suggests that he could not properly be discharged under its provisions.

First, I think it unlikely that Mr. Meyers did not give the miner a copy of the booklet. Second, even if he neglected to do so, that omission would not vary the outcome of this proceeding. This Commission has no power to determine whether an adverse employment action is fair or unfair except to the extent that unfairness may in some way relate to a protected activity. Here it is plain that Mr. Meyers acted upon a good faith assumption that Mr. Jack knew that absentees were to give telephone notice of their absences in advance of the beginning of the work shift, and knew that probationary employees were subject to dismissal in the company's discretion. Thus, even if Mr. Jack did not receive the booklet, it cannot be said that that omission affected Mr. Meyer's motive in effecting the discharge. It does not, in other words, give rise to any credible inference that Meyers' real reason for the firing was based in any part on a safety complaint.

CONCLUSIONS OF LAW

Upon the entire record and upon the factual determinations embodied in the narrative portion of this decision, the following conclusions of law are made:

(1) That this Commission has jurisdiction to hear and decide this matter.

(2) That the complainant engaged in protected activity within the meaning of the Act at the times pertinent herein.

(3) That complainant's engagement in such protected activity did not furnish any part of the motive of respondent Mid-Continent in discharging complainant from his employment as a miner.

(4) That the complainant was not discharged for engaging in protected activity under Section 105(c) of the Act.

ORDER

Accordingly, this complaint of discrimination 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 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 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.

~FOOTNOTE_TWO

2 Mr. Jack's testimony on these matters was brought out under cross-examination and was at no time challenged as being beyond the scope of the pleadings.

~FOOTNOTE_THREE

3 Mr. Jack denied that he was intoxicated. At the time of her testimony, however, Mrs. Grys had long since ceased to work for Mid-Continent and had moved to Colorado Springs (Tr. 94-96). I believed her testimony because, among other reasons, she had no discernible stake in the outcome of the case. Besides, even if she had been mistaken in her belief that the miner was intoxicated, I have no doubt that Mr. Meyers took her report at face value. It is Mr. Meyers' state of mind that is important here.