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SOL (MSAH) V. A&L COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF GREGORY BROWN, COMPLAINANT v. A & L COAL COMPANY, INC., RESPONDENT	DISCRIMINATION PROCEEDING Docket No. SE 84-51-D MSHA Case No. BARB CD 84-14 No. 1 Mine

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant; William R. Seale, Esq., Mitchell, Clarke, Pate, Anderson & Wimberly, Morristown, Tennessee, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In a complaint filed with the Secretary of Labor on January 27, 1984, Complainant Gregory Brown alleged that he was reassigned from the position of cutting machine operator to cutting machine helper on November 9, 1983, was transferred to the afternoon shift on November 21, 1983, and was discharged on December 21, 1983, all because of activity protected under the Federal Mine Safety and Health Act of 1977. On April 2, 1984, the Secretary filed an application for temporary reinstatement on Brown's behalf. On April 3, 1984, the Commission's Chief Administrative Law Judge issued an order directing Respondent to temporarily reinstate Complainant in the position from which he was terminated or in a comparable position with the same or equivalent work duties. Complainant was restored to the payroll and later returned to the job of cutting machine helper in accordance with the order. On April 20, 1984, Respondent filed a petition for hearing on the order of temporary reinstatement. Pursuant to notice, a hearing was held in Clinton, Tennessee

on April 27, 1984. Following the hearing, I issued an order that the temporary reinstatement order should remain in effect based on my finding that the evidence failed to establish that Mr. Brown's complaint to the Secretary was frivolously brought.

The Secretary filed his complaint with the Commission on May 4, 1984. Respondent filed its answer on May 21, 1984.

On May 18, 1984, Complainant left work because of conditions he alleged were unsafe. Respondent treated his leaving as a voluntary quit. At the hearing, the parties agreed that I should decide whether Complainant's leaving work on May 18, 1984, was for activity protected under the Act, and whether Respondent's refusal to put him back to work was violative of section 105(c).

Pursuant to notice, the case was heard on June 12 and 13, 1984, in Clinton, Tennessee. Gregory Brown, Don McDaniel, Henry W. Disney, Gary E. Lowe and Vernon Ray Hawn testified on behalf of Complainant; Oscar Phillips, Howard Goad, Jim Brubaker, Gary Phillips, and Arvil Daugherty testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record, including the record made at the hearing on the temporary reinstatement order, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT (FOOTNOTE 1)

1. At all times pertinent to this proceeding, Respondent was the operator of an underground coal mine in Morgan County, Tennessee, known as the No. 1 Mine.

2. Complainant Gregory Brown was employed beginning in about 1979 by the B & D Coal Company, a predecessor to A & L Coal Company, as a cutting machine helper. In 1980 or 1981, he became a cutting machine operator. After a period of time off work, he was reemployed as a cutting machine operator beginning March 15, 1981. In 1983, A & L Coal Company, Inc., took over the mine from B & D. Complainant continued working for the new company as a cutting machine operator.

3. On about November 2, 1983, while operating the cutting machine at the subject mine, Complainant sustained electrical shocks from the frame of the machine which had become energized. Complainant told the mechanic Oscar Phillips and the foreman Carlos Lester that the machine was shocking him but they both apparently refused to believe him.

4. Arvil Daugherty, the principal owner of Respondent and the operator of the mine, knew on November 2 or 3 that the cutting machine "was getting hot," that is, it was shocking people (Tr. 336).

5. The following day, November 3, Complainant noticed that the frame ground had been removed from the cutting machine. He told Oscar Phillips that it was against the law to run the machine with the ground removed. Phillips replied: "You can run it or be replaced" (Tr. 17). The machine, however, had been torn down to try to determine why it failed to shut off. It was not operated on November 3 on the day shift.

DISCUSSION

There is some conflict and confusion in the record as to when the cutting machine frame became energized and when the ground wire was removed. I accept Complainant's testimony as to his being shocked when contacting the frame, and as to his complaints to Phillips and Lester. I accept Phillips' testimony that the machine was "torn down" to attempt to locate the problem on Thursday, November 3, 1983.

6. On November 3, 1983, after his shift, Complainant attempted to call the local MSHA office to report the condition of the cutting machine, but it was closed. He asked his wife to call the following day. His wife called the MSHA office on November 4, 1983, and an inspector came to the mine the same day.

DISCUSSION

Respondent argues that Complainant's testimony that his wife called MSHA is hearsay and insufficient proof that such a call was made. There is no dispute that in fact a call was made, which resulted in an MSHA investigation. Since this is so, I accept Complainant's testimony that his wife made the call as probative evidence that she did so. Whether technically hearsay or not, the testimony is inherently trustworthy and is corraborated by other evidence.

7. Don McDaniel, a Federal coal mine electrical inspector came to the subject mine on November 4, 1983, at about 9:00 a.m. Following an inspection he issued an imminent danger withdrawal order under section 107(a) of the Act, because of 11 temporary splices in the trailing cable of the cutting machine, because the frame ground was removed from the frame of the machine and the ground wire had 300 volts of electricity coming from a short in the cable. The machine was energized but was not being operated at the time the order was issued. He also issued citations charging violations of 30 C.F.R. - 75.603 and 30 C.F.R. - 75.701-3 for the same conditions. When he arrived at the mine, the inspector told Daugherty that he was there on a complaint concerning the cutting machine. Daugherty asked him if it was a man or a woman who made the complaint. Complainant had previously told some of the miners that his wife called MSHA.

8. The order and citations were terminated at 2:00 p.m., on November 7, 1983, after a new trailing cable was installed on the cutting machine and the ground wire was attached to the machine. Respondent had ordered a new cable for the machine on the day before the inspection.

9. During the period from January to November, 1983, Respondent on a number of occasions had to repair or replace the hydraulic pump on the cutting machine operated by Complainant. (The same machine was also operated by another employee on the second shift). On about November 8, 1983, the foreman Carlos Lester told the operator Arvil Daugherty that the pump had quit working because it was too hot. Daugherty decided to change Complainant to the job of cutting machine helper "to see if it was him or the machine" that was causing the pump problem (Tr. 323). He received the same rate of pay ($8 per hour) as a helper that he received as a machine operator. The problems with the hydraulic pumps did not continue after Complainant ceased operating the cutting machine.

10. After about a week and a half as a helper on the day shift, Complainant was transferred to the night shift as a cutting machine helper. The night shift had been opened about "the first of November" . . . "or October," 1983 (TR A 340-341). The reason it was opened was to produce more coal, since Respondent had a contract to sell all the coal it could produce.

11. Complainant was laid off December 20, 1983, along with three other miners, one of whom was Daugherty's son. Daugherty stated that the lay off was caused by having a stockpile of coal and "having extra men that we didn't need." He stated that Complainant was selected as one of those laid off because of the trouble with the cutting machine while he operated it. Complainant worked at a coal mine for a Clint Johnson for 3 weeks and 2 days at a wage of $5 per hour after he was laid off by Respondent.

12. On application of the Secretary, Complainant was ordered reinstated by an order issued April 3, 1984, and he was restored to the payroll and subsequently to the position of cutting machine helper. He was paid $8 per hour.

13. Complainant continued working as a cutting machine helper until May 18, 1984. On that date (a Friday on the evening shift), four miners on the crew left the mine because of "the way he (Gary Phillips, the acting foreman) wanted to run the coal." The crew members thought it unsafe to cut in a certain sequence but Phillips said "Well, it doesn't matter, we're going to cut it to get the coal" (Tr. 56). Neither Complainant nor the other miners told the boss why they were leaving the mine. Complainant also testified that he had become ill from the fumes of a gasoline powered chain saw which was used underground to cut timbers, but he did not mention this to anyone.

14. On Monday, May 21, 1984, Complainant reported to the mine office. Mr. Daugherty told him "You Quit, you ain't got no job" (Tr. 58). Complainant did not tell Daugherty why he left work on the previous Friday, but left thepremises.

15. About a week or 10 days after leaving Respondent's mine, Complainant went to work part time (16 to 24 hours per week) in a junkyard at a wage of $4 per hour.

STATUTORY PROVISION

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

> (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 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 such 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.

(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. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of

> miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (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, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

ISSUES

1. Whether the demotion of Complainant in November, 1983, or his lay off in December 1983, were caused by activity protected under the Mine Safety Act?

2. Whether Complainant's leaving work in May 1984, and Respondent's refusal to take him back constituted a constructive discharge for activity protected under the Act?

3. If either or both of the foregoing questions are answered in the affirmative, to what relief is Complainant entitled?

CONCLUSIONS OF LAW

1. Respondent was at all times pertinent hereto a mine operator. Complainant was in Respondent's employ as a miner. The parties are subject to the Act, and I have jurisdiction over the parties and subject matter of this proceeding.

2. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a Complainant bears the burden of production and proof to show (1) that he engaged in rotected activity and (2) that an adverse action

against him was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this matter, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears a burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion that illegal discrimination has occurred does not shift from the Complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed.2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983) (approving the Commission's Pasula-Robinette test).

3. The November and December 1983 incidents

PROTECTED ACTIVITY

I have found (Finding of Fact No. 3) that Complainant Brown told the mechanic and the section foreman on November 2, 1983, that he was receiving shocks from the frame of the cutting machine. These statements are clearly safety complaints and constitute activity protected under the Act. The following day, Complainant told the mechanic that it was against the law to run the cutting machine with the ground wire removed. I conclude that this statement was protected even though it was made to the mechanic who was not technically a management employee. The telephone call to MSHA made by Complainant's wife at his request to report the condition of the machine was also protected activity (Finding of Fact No. 6). The telephone call resulted in an MSHA inspection, and the issuance of an imminent danger closure order and a citation. Insofar as Complainant initiated and was involved in these activities, he was involved in activities protected under the Mine Act.

ADVERSE ACTION

On November 9, 1983, Complainant's job was changed from cutting machine operator to cutting machine helper. Respondent paid all its miners the same wage and thus Complainant did not suffer a reduction in pay when his job was changed. However, the job was less desirable and required less skill. I conclude that the job change constituted adverse action. On about November 18, 1983, Complainant was transferred from the day shift to the evening shift. He continued to work as a cutting machine helper. Although Complainant found the evening shift less desirable for personal reasons, I cannot conclude that the job change in any way downgraded his position. I therefore conclude that it did not constitute adverse action. On December 21, 1983, Complainant was laid off. This clearly constituted adverse action.

CAUSAL CONNECTION

Complainant Brown was downgraded on November 9, 1983, and laid off on December 21, 1983. Were either or both of these adverse actions motivated in any part by the protected activity described above? Respondent in the person of Daugherty was aware of the unsafe condition of the machine (Finding of Fact No. 4). Respondent in the person of section foreman Lester and mechanic Phillips knew that Gregory Brown was complaining about the unsafe condition of the machine. When the inspector came to the mine, Daugherty asked him whether "a man or a woman called him." Daugherty had no explanation for this rather odd question except "curiosity" (Tr. 339). I conclude (1) that Daugherty wanted to know who made the complaint and (2) that he thought an answer to his question (which was not given) would give him a clue. Although there is no direct evidence of this, I infer in part from Daugherty's evasive answers to the question at the hearing on the temporary reinstatement order as to whether Daugherty inquired as to the source of the call to MSHA (Tr. A 74-75), that Daugherty believed Gregory Brown had the call made to MSHA. The withdrawal order was terminated November 7, and Complainant was demoted to helper on November 8, 1983. I conclude that one reason for the demotion was the protected activity referred to above. Complainant therefore has made out a prima facie case of discrimination under the Mine Act for this demotion. On December 21, 1983, Complainant and three others were laid off (one of them, Daugherty's son, was call back after the Christmas vacation) ostensibly because too much coal was

being stockpiled. Respondent is a non-union mine and does not have any seniority rules. Daugherty's explanation of how he determined which employees to lay off is confusing and not entirely convincing. I conclude that here too he was motivated in part to lay off Gregory Brown because of Brown's protected activity.

The more difficult question in this case is whether the evidence shows that Respondent would have taken the adverse action against Complainant for unprotected activity alone. I have accepted as factual Respondent's contention that he had unusual problems with hydraulic pumps on the cutting machine while Complainant was operating it, and these problems disappeared after Complainant was taken off the machine. (Finding of Fact No. 9). Although Complainant was apparently regarded as a good worker by his foreman (who was not called as a witness by Respondent), it was reasonable for management to remove him as machine operator "to see if it was him or the machine" which caused the trouble. I conclude with respect to the removal of Complainant from his machine operator's job, Respondent would have taken this action for unprotected activity alone. What about the lay-off? When asked why he laid off Complainant rather than some other employees, Daugherty answered "well, I had went almost trouble-free with the cutting machine for almost a month and maybe a little longer, was'nt having no more troubles. He had cost me a lot of money in the past" (Tr. 326). There is some evidence attempting to show that Daugherty was also motivated in part because Complainant's sister was responsible for the jailing of Daugherty's son. I do not accept this latter evidence as showing motivation for the lay off. I do not believe Daugherty's rather evasive statement that it was a motive. However, the evidence concerning the problems with the pump shows a reasonable and credible motivation, and I accept it as establishing that the lay off was motivated in part by Complainant's unprotected activities. Much more difficult to answer is the question whether the adverse action would have been taken for the unprotected activities alone. The burden of proving what is an affirmative defense is on Respondent. Considering the confusing and conflicting testimony of Daugherty, I conclude that it has not carried its burden. I conclude therefore, that the evidence establishes that Complainant was laid off on December 20, 1983, in violation of section 105(c) of the Act.

4. The May 18, 1984, incident

PROTECTED ACTIVITY

Complainant's leaving work on May 18, 1984, resulted from a reasonable, good faith belief that continuing to work as directed would be unsafe. Therefore, his leaving work was protected activity. Pasula, supra. However, an employee who leaves work for safety reasons is required to "communicate or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." Secretary/Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 133 (1982). In the case before me, the evidence shows that neither Complainant nor any of the other miners who walked off the job with him made any attempt to tell management of their safety concerns. Complainant had a pending case with the Commission at the time, was represented by the Solicitor of Labor, and had been reinstated to his job by a Commission order. He clearly cannot be heard to plead ignorance of his rights and responsibilities under the Act.

ADVERSE ACTION

When Complainant returned to the mine the following work day, he was told by the operator, Daugherty, that he had quit. This is adverse action. However, he again failed to make any reference to his safety complaints. I conclude that no violation of 105(c) of the Act was shown because of Complainant's failure to communicate his safety concerns either before leaving the mine or when the adverse action occurred. The complaint of discrimination based on the May 18-21 incidents must therefore be dismissed.

RELIEF

Based on the above findings of fact and conclusions of law, I conclude: (1) Respondent did not violate secton 105(c) of the Act by assigning Complainant to a different job on or about November 8, 1983; (2) Respondent violated section 105(c) of the Act in discriminating against Complainant by laying him off on December 20, 1983; (3) Respondent did not violate section 105(c) of the Act in treating Complainant's leaving the job on May 18, 1984, as a voluntary quit and refusing to rehire him on May 21, 1984. Complainant is entitled to back pay from December 21, 1983, to the date he was rehired pursuant to the order of temporary reinstatement with interest thereon based on the formula set out in the case of Secretary/Bailey v. Arkansas-Carbona,

5 FMSHRC 2042 (1983). Any wages received during this period should be offset against his entitlement.

ORDER

Respondent is ORDERED to pay Complainant back wages from December 21, 1983 to the date of his reinstatement pursuant to Commission order with interest thereon as set out above, less any interim wages received in other employment. Respondent is ORDERED to expunge the employment records of Complainant of all references to his discharge on December 21, 1983.

Counsel are directed to confer and attempt to agree on the amount due pursuant to the above order and notify me within 30 days of their agreement or inability to agree. This decision is not final until a supplementary order is issued on back pay and interest.

The complaint of discrimination based on the May 18-21, 1984, incidents is DISMISSED.

James A. Broderick
Administrative Law Judge

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~FOOTNOTE_ONE

1 Separate transcripts were made of the hearing on the temporary reinstatement order and the hearing on the merits. Citations to the former transcript are designated herein as TR(A); the latter are designated TR.