

CCASE:  
UMWA V. EMERALD MINES  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

UNITED MINE WORKERS OF  
AMERICA (UMWA),  
ON BEHALF OF  
HARRY PORTER,  
COMPLAINANT

DISCRIMINATION PROCEEDING  
Docket No. PENN 84-181-D  
MSHA Case No. PITT CD 84-5  
Emerald No. 1 Mine

v.

EMERALD MINES CORPORATION,  
RESPONDENT

DECISION

Appearances: Michael J. Healey, Esq., Healey & Davidson,  
Pittsburgh, Pennsylvania, for Complainant;  
R. Henry Moore, Esq., Rose, Schmidt, Dixon &  
Hasley, Pittsburgh, Pennsylvania, for  
Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In this proceeding, Complainant Harry Porter contends that he was denied overtime by Respondent, for whom he was employed as a miner, because he had requested that a preshift examination be performed in his work area on January 5, 1984. He alleges that this request was activity protected under the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 801.

Pursuant to notice, I called the case for hearing in Pittsburgh, Pennsylvania, on December 11, 1984. Harry Porter, Mike Hogan, Arthur Kelly, and Terrance Rafferty testified for Complainant; Donald R. Zitko, Gary Michael Dubois and Guy Nyswiner testified on behalf of Respondent. Both parties have filed posthearing briefs. I have reviewed the entire record and have considered the contentions of the parties in making the following decision.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent was the owner and operator of the Emerald No. 1 Mine near Waynesburg, Pennsylvania. Complainant Harry Porter was employed at the subject mine as a miner.

2. Porter worked for Emerald or its predecessor from January, 1949 to the present. He has held various jobs including, miner operator and mechanic. He has been President of the UMWA Local Union, Chairman of the Mine Committee and Chairman of the Safety Committee. He was elected to the UMWA District Executive Board in June 1982.

3. In June 1983, Porter was appointed a full time UMWA International Health and Safety Representative. He resigned that position on December 1, 1983, and returned to Emerald as a general laborer. He was working the midnight shift on January 5, 1984.

4. Emerald had a policy of making overtime work available for its employees both on production and maintenance sections. Porter worked overtime after returning to Emerald in December, 1983, more than half the time. In most of the instances when he did not work overtime, it was by his own choice. He was the most senior employee on his shift in the general labor classification.

5. When a production shift works overtime, at least one miner is designated to bring the bus out of the section in order that the next shift have transportation in. That miner does not receive overtime.

6. On January 5, 1984, Porter was assigned to work with Terry Rafferty in a non-production area picking up cables and hoses, inspecting the battery charger and other miscellaneous duties. They were to work without supervision and were given their own mantrip or bus to travel to the work site.

7. When they arrived at the work area, Porter looked for evidence that a preshift examination had been made and was unable to find any. He called shift foreman Donald Zitko to report this fact and Zitko told him he would send someone to perform the examination. Zitko did not exhibit any annoyance or hostility toward Complainant as a result of the call.

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8. Zitko directed Construction foreman Guy Nyswiner to perform the preshift examination and he did so. Thereafter, Complainant and Rafferty began their work. Nyswiner did not display annoyance or hostility toward Complainant because he asked for the preshift examination.

9. Zitko later told Nyswiner the areas of the mine that Nyswiner should examine prior to the next shift. He also told him that the bus which Porter and Rafferty used would be needed to provide transportation in for the next shift.

10. Nyswiner told Complainant and Rafferty that they would be unable to work overtime that morning. When Complainant asked why, Nyswiner replied that Zitko directed him to have the bus available for the next shift.

11. Complainant left the mine at the end of the shift. He asked Zitko why he was refused overtime and Zitko said he did not know. Zitko denied telling Nyswiner that Complainant could not work overtime.

12. Nyswiner interpreted Zitko's instruction to have the bus available for the next shift as a direction that Complainant and Rafferty could not work overtime. Zitko testified that arrangements could have been made to have Complainant and Rafferty picked up and taken outside by another vehicle but "it would have been difficult." (Tr. 147). Complainant did not request such arrangements and the company did not offer to attempt to make them.

#### ISSUES

1. Whether Respondent discriminated against Complainant in denying him overtime because of activity protected under the Act?

2. If so, to what relief is Complainant entitled?

#### CONCLUSIONS OF LAW

Complainant and Respondent are protected by and subject to the provisions of the Mine Safety Act, and specifically section 105(c) of the Act.

In order to establish a prima facie case of discrimination, a miner has the burden of establishing that he was engaged in protected activity, and that he suffered adverse action which was motivated in any part because of that activity.

Secretary/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 (3d Cir.1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Secretary/Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984). The operator may rebut the prima facie case by establishing that the miner was not engaged in protected activity, or that the adverse action was not motivated, in any part, by the protected activity. The operator may also raise an affirmative defense, if it cannot rebut the prima facie case, by showing that it was, in part, motivated by unprotected activities and that it would have taken the adverse action for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982); Secretary/Jenkins v. Hecla-Day, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983); Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C.Cir.1984). I reject the suggestion in Respondent's brief that the Commission should adopt the test set out in the earlier Boich case: Boich v. FMSHRC, 704 F.2d 275 (6th Cir.1983), in which the court held that an operator does not bear the burden of proof to establish his affirmative defense but only the burden of coming forward with the evidence. The 6th Circuit reversed its earlier decision on the basis of NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). My reading of Commission decisions subsequent to Transportation Management persuades me that in terms and in actuality, it has followed the Pasula test and the rationale of the second Boich decision.

#### PROTECTED ACTIVITY

Complainant is a miner with extensive experience. He is safety conscious and is known by mine management to be safety conscious. He is especially concerned about the importance of preshift examinations because he took part in investigations on behalf of the Union of explosions in non-face areas (not involving Respondent's mine). His request for a preshift examination of the area to which he was assigned on January 5, 1984, was clearly related to safety, and therefore, was activity protected under the Act.

#### ADVERSE ACTION

Complainant was denied or did not receive overtime work and overtime pay on January 5, 1984. Respondent argues that the amount involved (\$20.14) is so small as to be de minimis. From the public point of view, which is the primary point of view of section 105(c), even a minimal penalty administered

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because of safety complaints is serious. I hold that the denial of 1 hour overtime work and overtime pay is adverse action under the Mine Act.

#### MOTIVATION FOR THE ADVERSE ACTION

Zitko, the shift foreman, was responsible for assigning tasks and areas of responsibility to the foremen, and to have all working areas preshifted for the following shift. Zitko was also responsible for getting the mantrips to the "bottom" for the use of the incoming day shift. When he received the call from Complainant Porter, he realized that the area in which Porter was to work had not been preshifted by the prior shift, apparently because they were not aware that the midnight shift was going to work in the area. I accept Zitko's testimony that he did not deny Complainant the opportunity for overtime, but merely instructed Nyswiner to have the car Complainant rode in at the bottom at the end of the shift. Nyswiner interpreted this to mean that Complainant could not work overtime. I find the testimony of Zitko and Nyswiner to be logical and truthful. I am persuaded that the denial of overtime to Complainant was not, in any way, related to his request for a preshift examination. There is no evidence of annoyance, anger or animosity on the part of Zitko or Nyswiner. There is no direct evidence of a discriminatory motive, and no evidence from which such a motive could reasonably be inferred. Therefore, I conclude that Complainant has failed to establish a prima facie case of discrimination under the Act, and his case must be dismissed.

#### ORDER

Based on the above findings of fact and conclusions of law, the above proceeding is DISMISSED.

James A. Broderick  
Administrative Law Judge