

CCASE:

ALLEN E. YOUNG v. ATLAS MINERALS

JESS T. McCLEARY v. ATLAS MINERALS

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

ALLEN E. YOUNG,  
COMPLAINANT

v.

ATLAS MINERALS,  
RESPONDENT

DISCRIMINATION PROCEEDINGS

Docket No. WEST 84-4-DM  
MSHA Case No. MD 83-07

JESS T. McCLEARY,  
COMPLAINANT

v.

ATLAS MINERALS,  
RESPONDENT

Docket No. WEST 84-5-DM  
MSHA Case No. MD 83-08  
(Consolidated)

Appearances: Mr. Allen E. Young, Dove Creek, Colorado,  
pro se,  
Mr. Jess T. McCleary, Dove Creek, Colorado,  
pro se;  
John A. Snow, Esq., VanCott, Bagley, Cornwall and  
McCarthy, Salt Lake City, Utah,  
for Respondent.

DECISION

Before: Judge Morris

Complainants Allen E. Young and Jess T. McCleary bring this action on their own behalf alleging they were discriminated against by their employer, Atlas Minerals, in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The applicable statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), in its pertinent part provides as follows:

No person shall discharge or in any other manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners . . . of an alleged danger or safety or health violation . . . or because such miner . . . 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 . . . on behalf of himself or others of any statutory right afforded by this Act.

#### Procedural History

The Young case was heard in Grand Junction, Colorado on June 12, 1984. The McCleary case was not presented at that time.

Subsequently, the judge prepared a summary of the evidence in the Young case. The summary was circulated among all interested parties.

Thereafter, the parties in the McCleary case adopted the record in the Young case and filed a stipulation relating to other relevant facts.

A post-trial brief was filed by respondent.

#### Issues

The issues in these cases are whether respondent discriminated against complainants in violation of the Act.

#### Summary of the Evidence presented in Complainant Young's Case

Allen E. Young, 34 years of age, an underground uranium miner, began working for Atlas in May 1978 and was terminated in November, 1979. He was re-employed in April 1980 and finally terminated in October, 1982 (Transcript at pages 13-15).

On January 4, 1982 Young and co-worker Jess McCleary (both supervisors) avoided a general worker layoff when Atlas placed them on standby status (Tr. 37-39). Standby duties included general maintenance work in keeping areas of the mine open to minimize both time and effort if production was resumed (Tr. 37-38, 74). At the time of this layoff all miners under Young's supervision, except for David Utley, were terminated. Utley was responsible to Mr. Edington, who was also Young's supervisor (Tr. 72, 73). Utley was later transferred to control maintenance when an opening occurred (Tr. 102).

In the spring of 1982, the standby duties for Young and McCleary were terminated and the men began to do salvage work (Tr. 74). Salvage basically involved removing everything salvageable from the mine. Young and McCleary worked together in this endeavor in nine Atlas mines in the area (Tr. 41, 42).

In August or September, 1982, Young stated to some Atlas officials that his exposure to radon daughters was "coming up fast". No management official replied to his statement. Shortly

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thereafter Young and McCleary were exposed to 48 WLH's (Footnote.1), an exposure that readily exceeded the legal limit (Tr. 23, 36).

Shortly after the 48 WLH exposure, two meetings took place with management officials and the two men. Present at the meeting were Dave Axtell (superintendent), John Clements (general mine foreman), Leo Yates (mine foreman), Nick Torres, Young and McCleary (Tr. 23-27, 37, 40, 41). Roy Crowson (radon technician) was in and out of the meeting (Tr. 28).

The general thrust of the questions by management officials sought to reduce the exposure to radon daughters. They sought to reduce the time that been recorded by Young and McCleary on their radon cards (Tr. 23, 24).

Young felt his integrity was being questioned. He disagreed and became mad and upset (Tr. 23, 24, 33). The company officials denied that they were questioning Young's credibility (Tr. 34). Nick Torres and Young did most of the talking (Tr. 24).

After some of the radon cards had been changed someone suggested the proper way to make any revisions was to enter any changes on a revised card. This method was believed to be preferable rather than altering the original cards (Tr. 24). Some radon cards were changed (Tr. 26).

At the meetings Young and McCleary were not threatened. But Young "felt" the line of questioning meant they could keep their jobs if the exposure hours could be reduced (Tr. 27). No one said anything to that effect (Tr. 28).

Young estimated that 25 cards were changed. Some changes were entered on the original cards. Some new cards were made to show the revisions. Any revised cards were attached to the originals (Tr. 33). The entire record of radon cards from January 1, 1982 to September, 1982 were reviewed (Tr. 32). Young signed the revised cards under protest (Tr. 33, 80). After the radon cards were revised Young still recorded an overexposure to radon daughters (Tr. 92).

A radon card is a record kept by the worker. He notes the time he spends in a given area. The radon technician later calculates, from other data, the working level hours to which the worker has been exposed. The card then becomes part of the company's records (Tr. 25).

It is claimed by Young that he and McCleary were discriminated against because they were overexposed to radon daughters (Tr. 29). According to Young, everyone went "paranoid" after the excessive exposure of 48 WLM occurred (Tr. 37).

Young was terminated on October 20, 1982 (Tr. 15, 41). The notice he received from Atlas indicated he was being terminated because his assignment was finished and his job had been eliminated (Tr. 61-63; Exhibit R1). Leo Yates, supervisor for the two men, was also laid off at the same time (Tr. 39). Yates, who had greater seniority than Young, had not been overexposed to radon daughters (Tr. 81).

Young believed Atlas had singled them out (Tr. 40). Further, Atlas never asked them if they would like a transfer to another Atlas mine. Young thought one worker with seniority had been transferred. One shift boss was transferred to the status of a miner (Tr. 43, 50). Young agreed that he was not treated any differently than any other worker at the Calliham mine (Tr. 50). Another general layoff occurred on November 4, 1982 two weeks after Young and McCleary were terminated (Tr. 40, 68).

Young's salary was \$2,240 per month, or \$106.66 a day. In addition, he believed he lost \$853.28 in accumulated vacation pay (Tr. 44-46). But there was no written contract concerning vacation pay (Tr. 47). Young was employed elsewhere in March, 1982. He also received unemployment compensation while he was laid off (Tr. 82, 83).

In March, 1984 Atlas shut down all mining operations and laid off all of its workers (Tr. 49).

#### Respondent's Evidence

John Panos, Leo Yates, Dennis Wells, and Thomas Wilson testified for respondent.

John Panos, the administrative manager for Atlas, coordinated and implemented the Atlas layoff of January, 1982 (Tr. 95, 96). At that time the Probe, Snow and Calliham mines were shut down. The Pandora mine was reduced to one production shift from two. The Velvet mine continued as a three shift operation (Tr. 97).

It was company policy not to transfer miners from one mine to another. This would disrupt teamwork, cause resentment, and constitute a possible safety hazard (Tr. 97, 98). At the time of the reduction in force in January 1982 no miners were transferred to different mines. The work force of 223 was reduced at that time to 106 workers (Tr. 98, 99). Similar layoffs occurred with the mill, with administrative personnel and with other support staff (Tr. 99).

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Young, McCleary and other supervisors were retained to do standby work (Tr. 100). In January, 1982, there was one shift boss laid off at the Probe mine and one at the Snow mine (Tr. 100, 101). At the Pandora mine, Cruz Madrid, a shift boss employed there, was demoted to the position of miner (Tr. 101). It did not cause a disruption to transfer him (Tr. 101).

Four-fifths of the miners at the Calliham mine had longer service in the company than did Young (Tr. 102). At the Probe and Snow mines at least twelve miners were laid off who had more seniority than Young (Tr. 103). At the Pandora, with a single remaining shift, no miners were laid off that were senior to Young (Tr. 102).

When the salvage work was completed on October 20, 1982 Young, McCleary, Yates as well as three workers in the Probe and Snow mines were terminated. No workers were transferred to other positions (Tr. 103, 104).

Two weeks after Young and McCleary were terminated most of the operation was closed. The Pandora mine, which had been operating on one shift, was shut down. The Velvet mine went to one shift from three shifts. The central shops were closed and a number of support staff personnel were terminated. Thirty seven miners remained. Possibly twenty of those remaining engaged in "hands on" mining (Tr. 105, 106).

Young's service date was April, 1979. In November, 1982, thirteen or fourteen shift supervisors, with service dates prior to Young, were terminated. These included: John Clements (foreman with a 1956 service date), Jack Erwin (1975); Jim Vaughn (1976); Leo Yates (1977); Larry Riley (1968); Dee Bachelder (1967); Leroy Walker (1976); Richard Eubanks (1978). Bill Fredericks, with a service date of May 1980, was also laid off (Tr. 106, 107).

After November, 1982, two shift bosses with service dates in 1975 and 1976 returned as miners. They had been initially employed in the Velvet mine and they returned there (Tr. 108, 109). Two shift bosses also returned as mechanics. Young was not a mechanic (Tr. 108).

Radon exposure was not a factor in Atlas' decision to terminate Young and McCleary (Tr. 109).

Panos testified that Young, as a salaried employee, was not entitled to any accumulated vacation pay when he was terminated (Tr. 116).

In January, 1982, Leo Yates was directed by Clements to do repair work with Young and McCleary in the Calliham mine (Tr. 127, 128). In a few months he joined the two men for salvage work duties.

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Wilson advised Yates that they would be laid off when the salvage work was completed (Tr. 129). Yates related this information to Young and McCleary. The men discussed future plans on two or three occasions (Tr. 130).

Yates was present at a meeting about September 16, 1982 when the radon cards were discussed. The question at hand concerned the accuracy of the cards. It was an effort to account for the actual radon exposure (Tr. 131-133). The cards did not take into account the time the men spent on the surface and while traveling on the decline (Tr. 133). There were no threats to Young or McCleary. Further, there was no talk of termination if they refused to cooperate (Tr. 133, 134). At the meeting Young was upset and he asked if management didn't trust him (Tr. 134). Yates explained to him that they wanted a closer record (Tr. 134).

Dennis Wells, an electrician, discussed with Young and McCleary that a layoff would occur when the salvage work was completed (Tr. 143). Young and McCleary agreed that they would be laid off at the completion of such work (Tr. 143).

Thomas W. Wilson, chief engineer for Atlas, indicated that one of the criterion for the January/November 1982 layoffs was that there would be no transfer of workers between mines (Tr. 149-150).

The Velvet mine is relatively dangerous. If personnel transfers were permitted only ten percent of the original Velvet work force would remain (Tr. 150). Witness Wilson felt this could be a definite hazard (Tr. 150).

In February, or March, the decision was made, due to market conditions, to close the mines indefinitely. The decision was also made at that time to salvage the equipment. Further, it was decided that those involved in salvage work would be terminated when the work was completed (Tr. 151).

Wilson knew Young and McCleary had been overexposed to radon in September, 1982. His immediate reactions were to keep the two men out of the mine and to check the radon cards for any inaccuracies (Tr. 151, 152). Discrepancies in the cards were found but they did not reduce the exposures to within permissible limits (Tr. 153). Wilson instructed that the two men stay on the surface or in areas where there was no exposure to radon (Tr. 153).

Radon overexposure to Young did not effect the company's decision to let him go (Tr. 153, 154).

Stipulation

Jess McCleary and respondent entered into the following stipulation:

1. McCleary and Atlas stipulate and agree that the above captioned matter, pursuant to 29 C.F.R. 2700.12, shall be consolidated for all purposes with the matter entitled Allen E. Young v. Atlas Minerals, Docket No. WEST 84-4-DM (hereinafter the "Young proceeding"), and that all testimony and exhibits received into evidence at the hearing in the Young proceeding held on June 12, 1984, be considered and shall constitute the record for this proceeding, except that the additional stipulations contained herein shall also be included in such record for purpose of the claim of McCleary against Atlas.

2. The parties hereby stipulate that for purposes of this matter, the following facts are accurate:

a. McCleary is presently 47 years old.

b. McCleary has worked as a miner for various mining companies, but McCleary does not recall specific dates of employment for all such companies. However, until the date of the termination of the employment of McCleary at Atlas (which was October 20, 1982), McCleary had spent approximately 14 years as a miner.

c. McCleary commenced employment with Atlas on October 25, 1977, as a miner, and held such position until 1978, when McCleary was made a shift boss at the Calliham Mine of Atlas. McCleary held such position at the Calliham mine until January, 1982, when he and Allen Young ("Young") were assigned "standby" work. However, McCleary retained the title and pay of a shift boss until he was laid off on October 20, 1982.

d. During his employment after January, 1982, McCleary and Young essentially worked together in connection with "standby" work and subsequently "salvage" work.

e. Attached hereto as Exhibit "R-A" and by reference made a part hereof is a copy of a "Separation Notice" relating to the termination of employment of McCleary at Atlas on October 20, 1982.

f. Attached hereto as Exhibit "R-B" is a copy of a letter from Atlas to McCleary, dated October 21, 1982, received by McCleary shortly after said date. McCleary was paid the sum set forth in said letter.

g. McCleary claims, as damages for the alleged discrimination by Atlas, two months salary at the rate of \$2,349.00 per month and three weeks vacation pay. McCleary claims he is entitled to such sum because he was unable to work in a mine from



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the date of his termination of employment with Atlas until January 1, 1983. McCleary claims he was unable to work underground in a mine because of overexposure to radon. (Atlas does not stipulate to the substance of the claims of McCleary contained in this subparagraph, but only to the fact that McCleary makes the claims).

h. McCleary did obtain employment with another employer on February 8, 1983, at a pay of \$13.00 per hour. McCleary received unemployment compensation after his termination with Atlas.

#### Discussion and Evaluation of the Evidence

In numerous decisions the Commission has ruled that in order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of *Pasula v. Consolidation Coal Co. v. Marshall*, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir.1981); and Secretary on behalf of *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event 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, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir.1983); and *Donovan v. Stafford Constr. Co.*, No. 83-1566, D.C.Cir. (April 20, 1984) (specifically approving the Commission's *Pasula-Robinette* test). The Supreme Court has 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.*, --- U.S. ----, 76 L.Ed.2d 667 (1983).

Young claims he was discriminated against when Atlas permitted him to be overexposed to radon daughters. Young's initial claim is without merit. As noted by the above stated case law discrimination does not arise by virtue of a mere violation of a health or safety standard.

The next question here centers on the issues of whether Young and McCleary were engaged in a protected activity.

It appears from the evidence that after the radon exposure of Young and McCleary to 48 WLH two meetings took place between the two workers and management. It is uncontroverted that at the meetings Young protested the revision of the radon cards. The net result of the changing of these cards resulted in a lower radon exposure to the two workers. However, after the revisions, there was still a net overexposure.

The Act provides protection to a miner who complains of "an alleged danger or safety or health violation", Section 105(c)(1). The Act should be broadly construed. In addition, records such as the radon cards relate to the health hazard involved in radon exposure.

The Commission has broadly construed the Act in the matter of good faith safety complaints. The complaints by Young were protected under the Act.

The next question is whether the complaints by Young also encompassed McCleary and thereby placed him in a protected status. In this connection I note that Young and McCleary were essentially partners in their work activities and both were overexposed. Further, the purpose of the meeting with management was to review and to seek a method to lower the exposures recorded by the company. The presence of McCleary at the meeting under these conditions placed him in a protected status.

The next issue, respondent's affirmative defense, is whether the adverse action taken against Young and McCleary was motivated by the protected activity.

Respondent's evidence on this point is essentially uncontroverted. Atlas was in a reduction in force mode that began in January 1982. At that time Young and McCleary went to standby work. When the salvage work was completed in October, 1982 all the involved workers were terminated. None of the workers were transferred to other mines (Tr. 103, 104).

Young claims he was treated in a disparate manner because some miners were transferred to other Atlas mines in the area. It is true there were a few instances of transfers and demotions in connection with the company's other mines (Tr. 43, 51). But Young himself agrees that he was not treated differently than anyone else at the Calliham mine (Tr. 50).

The record in the Young case has failed to establish a violation. Accordingly, that case should be dismissed. The McCleary case, supplemented by the stipulation of the parties is likewise fatally defective. In short, the Act protects against discrimination. It does not vest any bumping rights in favor of the miner authorizing him to replace miners at other mines owned by the company and located elsewhere.

