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K.W. HALL v. CLINCHFIELD COAL

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

KENNETH W. HALL,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. VA 85-8-D  
MSHA Case No. NORT CD  
85-4

CLINCHFIELD COAL COMPANY,  
RESPONDENT

McClure No. 1 Mine

DECISION

Appearances: Kenneth W. Hall, Castlewood, Virginia, pro se;  
Louis Dene, Esq., Abingdon, Virginia, for  
Respondent; James Leonard, Esq., Office of the  
Solicitor, U.S. Department of Labor, Arlington,  
Virginia, appeared specially for the  
Secretary of Labor.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (the Act) alleging that (1) his request for a transfer to an above-ground job was ignored, (2) his insurance was stopped, and (3) he was suspended and ultimately discharged, all because he refused to comply with his employer's order to violate a federal law concerning the distance a line curtain was to be maintained from the coal face.

Respondent filed a Motion to Dismiss on the grounds that the complaint was not timely filed, and that it did not state a cause of action under the Act. The motion was denied by order issued April 3, 1985.

Pursuant to notice, the case was heard in Abingdon, Virginia on May 29, 30, and 31, 1985. Jerry Yates, Jr., Billie L. Williams, Eugene McCoy, Ronnie Dean Deel, Ray Boggs, Jeffrey H. Greear, Roy Glovier, and Kenneth W. Hall, testified on behalf of Complainant; Thomas Asbury,

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Richard Light, Michael Wright, Wayne Fields, Henry Kiser, and Joseph Pendergast testified on behalf of Respondent.

The Secretary of Labor appeared specially on behalf of Ronald W. Franks, Vearl R. Hileman, Gary L. Roberts, Gerald E. Sloce, Donnie H. Stallard, Joseph R. Tankersley and Frank Young, all employees of the Mine Safety and Health Administration who had been subpoenaed on behalf of Respondent, and moved that the subpoenas be quashed.

The motion was argued on the record and the Secretary filed a memorandum of law. I granted the motion to quash on the ground that the testimony which might be elicited from the subpoenaed inspectors and investigator would not be helpful in deciding the issues before me in this case.

Both parties filed post hearing briefs following the close of the record. I have carefully considered the entire record and the contentions of the parties, and make the following decision.

#### FINDINGS OF FACT

Respondent is the owner and operator of an underground coal mine in Dickenson County, Virginia known as the McClure No. 1 Mine. The mine is a shaft mine and was opened in 1977. At all times pertinent to this proceeding, the mine height was approximately 5-1/2 feet, with the exception of one section where it varied from 4 to 7 feet. The mine was classified as a gassy mine, and liberated substantial amounts of methane, primarily from the coal faces.

The coal is extracted by continuous mining and long wall mining. The continuous mining operations are used to cut panels for the long wall operations. The coal is removed from the mine by belt haulage.

When the mine was opened, the working sections were ventilated by auxiliary fans and tubing installed on the row of bolts next to the rib and which was advanced by a "slider" as the miner cut in the coal face. There was sufficient height in the coal seam to permit travelling under the tubing. When the coal height declined in 1982 to the point where the machinery could not operate under the tubing, the method of ventilation was changed and line curtains were used. The procedure followed thereafter is as follows: After the coal is cut, the roof bolters come to the face area. They first install a bolt approximately 3 feet from the rib. When the rib bolt is being installed, the curtain is removed to the last row of permanent supports because the roof bolting

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machine canopy would otherwise force the curtain into the rib and cut off the ventilation to the face. After the rib bolt is installed the line curtain is advanced to this bolt and the center bolts are installed. Thus, in the case of cuts exceeding 10 feet, during the installation of the rib bolt, the curtain is not maintained to within 10 feet of the face. Prior to March 6, 1984, the approved ventilation plan required that the line curtain be maintained to within 10 feet of the face while bolts were installed. On March 5, 1984, Respondent requested a revision of the plan to permit it to remove the curtain to the last row of permanent supports while the rib bolt is being installed. The revision was approved by the Mine Safety and Health Administration on March 6, 1984.

Complainant began working in the coal mining industry from September 1971 when he was hired by Respondent as a roof bolter and utility man. He worked for other coal companies from April 1973 until March or April 1979. He was certified by the State of Virginia as a qualified mine foreman in 1976 and worked as a section foreman for Big Ten Coal Company for about a year in 1978. He also worked as a mine foreman for United Castle Coal Company from October 1978 to March or April 1979. He was rehired by Respondent in September 1981 as a section foreman, and was placed in charge of a production crew, using a continuous miner. Shortly after he began working, he questioned the General Foreman about the practice of removing the line curtain while bolting, and was told that the company had permission to do it. Complainant's crew followed the bolting procedure outlined above.

In June 1983 an explosion occurred at the subject mine as a result of which Complainant's brother was killed. Complainant did not return to work following the explosion until August 1983. In the interim he was treated at a psychiatric clinic. On January 9, 1984, Complainant sustained a back injury at work and was off work until approximately February 19, 1984.

After he returned to work in February 1984, at least three roof bolters expressed concern to Complainant about the practice followed in removing the curtain from the jack when putting up the first row of bolts. Apparently bolters had complained to Complainant and to other foremen about this practice for some time before that. Complainant asked the day shift General Mine Foreman, Johnny Kiser, about the practice and was told that the company had permission to do it. He also questioned two MSHA inspectors, Joe Tankersley and Mr. Hileman, the first of whom said the practice was legal and the second that it was not legal.

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A few days after he spoke to Kiser, Complainant and the other owl shift foremen were called in to the office of the company safety inspector Wayne Fields. The meeting was called at the request of an MSHA Inspector who told Fields that roof bolters and section foremen had raised questions about the roof bolting procedure being followed in the mine. The Inspector asked Fields to instruct the men not to ask questions about the procedure in the presence of an inspector until the ventilation plan could be modified. Fields told the foremen not to raise the issue or discuss it with union personnel in the presence of a Federal Inspector. He also instructed them to continue bolting in the usual manner. Complainant, however, shortened his cuts to ten feet in order to avoid what he considered an illegal procedure. As I stated above, the company sought a revision of the plan on March 5, 1984, and MSHA approved the revision on March 6, 1984.

About March 1, 1984, the shift prior to Complainant's had left an 18 feet deep cut, and Complainant's bolting crew refused to bolt it, because it was too deep. Complainant called Mike Wright, the General Mine foreman, who came to the area and persuaded the bolters to bolt the place.

March 2, 1984 was the last day Complainant worked at the subject mine. He left work because of anxiety, hyperventilation and other associated emotional problems. He told Richard Light, Mine Superintendent, that he could not function as a mine foreman because of his emotional problems and that he intended to consult a psychiatrist. Complainant testified that he told Light that he was afraid of being sent to jail if someone were hurt or killed because Complainant ordered him to violate the law concerning the roof bolting procedure. Light testified that Complainant briefly mentioned the roof bolting procedure being followed but denied that he related his emotional problems to that situation. Whatever the exact conversation between the men, I find that Complainant was concerned about the procedure being followed which he felt was violative of the Mine Safety law--why else would he have brought the matter up with Light at that time?--and that he claimed that he could not work in part because of that situation. Light did not talk to Complainant thereafter until the complaint involved here was filed with MSHA.

Complainant was treated by a psychiatric social worker who recommended that he discontinue underground work. Thereafter, he recontacted Henry Kiser, Vice President and Joseph Pendergast, Head of Industrial Relations seeking a

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transfer to an above ground job. He was told that no such jobs were available. He continued on salary until April 22, 1984, and then received disability insurance benefits until about June, 1984. In June he applied for workers compensation which was denied after a hearing before a State Deputy Commissioner.

He unsuccessfully sought other nonmining jobs in Southwest Virginia, and in August 1984 began working as a school custodian in Broken Arrow, Oklahoma, at a wage of \$6.04 per hour. When he left Respondent he was earning \$1370 every two weeks.

On September 30, 1984, he returned to Virginia because of inability to support his family on the wages he was earning as a custodian. He again sought an above ground job from Respondent but received no response. In November 1984 he received a letter from Respondent informing him that he was terminated because he took a job in Oklahoma. There is substantial conflict in the evidence on the issue whether Complainant told mine management of his concern over the legality and safety of the bolting procedure--specifically the practice of removing the line curtain when installing the first row of bolts. I find as a fact that he did tell Richard Light the mine Superintendent of his concern. I further find that his expression of concern was a reasonable one and was made in good faith.

#### ISSUES

1. Whether Complainant has established that he was engaged in activity protected by the Act.
2. If so, whether Complainant suffered adverse action as a result of the protected activity.
3. If so, to what relief is he entitled.

#### CONCLUSIONS OF LAW

Complainant and Respondent are protected by and subject to the provisions of the Act, Complainant as a miner, and Respondent as the operator of the McClure No. 1 Mine.

In order to establish a prima facie case of discrimination under the Act, the miner has the burden of showing (1) that he engaged in protected activity and (2) that he was subject to adverse action which was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other

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grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd 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 mine operator may rebut the prima facie case by showing that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity.

#### PROTECTED ACTIVITY

The evidence establishes that Complainant was engaged in activity protected by the Act: I have found that he questioned the General Foreman about the practice followed at the subject mine of removing the line curtain while bolting the roof. This apparently occurred a short time after he began working as a section foreman and again after he returned to work in February 1984. Complainant also questioned two MSHA inspectors about the practice and was told by one that it was illegal. After the meeting with company Safety Inspector Fields, Complainant shortened his cuts to avoid having his crew perform what he believed was an illegal procedure. Complainant told General Superintendent Light that he could not continue working as a foreman in part because of his concern that the procedure being followed was illegal. I conclude that all of these activities were safety related and are protected by the Act.

#### NONPROTECTED ACTIVITIES

Not protected by the Act were Complainant's moving to Oklahoma, and his emotional problems and psychiatric treatment. The emotional problems were caused in part by Complainant's understandable reaction to his brother's death, but I conclude that Complainant has not established that they were related to safety factors connected with his employment. Specifically, I conclude that they were not the result of his being "order[ed] to willfully violate Federal Law."

#### ADVERSE ACTION

Complainant complains of three separate adverse acts by the company:

- (1) the denial of vacation pay, and insurance benefits;
- (2) the refusal of Respondent to grant his request for a transfer to an above ground job;

(3) his discharge from employment.

I conclude that each of these acts was an adverse action.

#### MOTIVATION

1. Complainant's disability insurance payments were discontinued on the ground that he could not establish disability and had been working in Oklahoma. The termination of benefits was effected by the insurance carrier, and not by Respondent. There is no evidence in the record linking the termination of these benefits to Complainant's safety complaints or any other protected activity. The evidence in fact shows that the insurance payments were stopped because the insurance company determined that Complainant was no longer totally disabled. Complainant alleged that he did not receive vacation pay to which he was entitled after March 1984 in accordance with his employment contract. Again, there is no evidence in the record that the denial of vacation pay was motivated in any part by Complainant's protected activity.

2. Complainant testified that he requested a transfer to an outside job when he talked to Joseph Pendergast, Industrial Relations Manager, at the end of March 1984. Pendergast denied that there was any discussion of a transfer to an outside job. In any event, there is no evidence that in March 1984, Pendergast had any knowledge of Complainant's safety concerns. There is no evidence in the record that Respondent refused to transfer Complainant because he was ordered by his superiors to mine in an illegal manner.

3. In November 1984, Pendergast was notified by the Insurance Department of Respondent that Complainant's workers' compensation and insurance benefits had been denied, and that Complainant was working somewhere in Oklahoma. Based on this information, Pendergast wrote Complainant on November 7, 1984 notifying him that his employment "has been terminated as of your last day worked as a voluntary resignation to accept another position." Pendergast testified that he did not clear or discuss with Mr. Light, Mr. Fields, Mr. Wright or anyone in the Safety Department, his decision to terminate Complainant. Pendergast further testified that he had no knowledge of Complainant's contention that he was ordered to violate MSHA regulations in the roof bolting and ventilation procedures he was following. I accept the testimony of Pendergast on these two matters. Therefore, whether the termination was voluntary or forced, there is no evidence that it was motivated in any part by activity protected under the Mine Act.



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4. Whether Respondent treated Complainant unfairly in refusing his request for a transfer; whether it sufficiently considered his emotional problems; whether it violated company policy in failing to honor Complainant's vacation pay request, are not issues before me in this case. My jurisdiction is limited to considering whether Respondent disciplined Complainant for activity protected under the Mine Safety Act. I conclude that the evidence before me establishes that it did not.

5. Therefore, I conclude that Complainant has failed to establish a prima facie case of discrimination under the Act.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that this proceeding is DISMISSED.

James A. Broderick  
Administrative Law Judge