

CCASE:

WAYNE W. HOWARD, v. DOUBLE D & T COAL CO.  
AND LITTLE ROBIN COAL CO.

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

WAYNE W. HOWARD,  
COMPLAINANT

v.

DOUBLE D & T COAL CO., INC.  
AND  
LITTLE ROBIN COAL CO., INC.,  
RESPONDENTS

DISCRIMINATION PROCEEDING

Docket No. WEVA 85-48-D  
MSHA CASE NO. CD 85-1

Hickory Lick Run No. 1 Mine

DECISION

Appearances: Wayne R. Howard, Mill Creek, West Virginia,  
pro se;  
J. Fred Queen, Esq., Elkins, West Virginia,  
for Respondents

Before: Judge Melick

This case is before me upon the complaint of Wayne R. Howard, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" alleging that he was discharged by Double D & T Coal Company, Inc., (D & T) on July 8, 1984, in violation of section 105(c)(1) of the Act.(FOOTNOTE.1)

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity

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protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case.

In this case Mr. Howard asserts that he complained to D & T president and part owner Robert Thompson upon his discovery that someone had inserted the power cable to the roof bolter he was operating into a "tagged out" and defective circuit breaker. This complaint was made on the completion of Howard's shift on July 5, 1984. There is no dispute that the power cable was in fact connected to a defective circuit breaker that had been tagged out of service by electrician Charles Cogar. It is further undisputed that operating the roof bolter under that condition constituted a serious threat to the life of the roof bolter operator, in this case Mr. Howard.

At the end of his shift on July 5, Mr. Howard saw that the roof bolter he had been operating was connected to the defective circuit breaker. Howard was admittedly agitated because his father had only a few days before suffered severe electrical shock and burns at this mine while "troubleshooting" a power box in which the circuit breakers had similarly been "jumpered out". Howard went immediately to the office trailer and confronted Thompson, another part owner John Dotson, and Foreman Kyle Anderson. Howard told them that they "hadn't learned anything," apparently in reference to his father's accident and stated that he would not operate the roof bolter until it was fixed. I construe these statements to be protected safety complaints under the Act. fn 1, supra.

On the next day, July 6, 1984, Howard was not asked to operate the roof bolter and was told to perform other work. The circuit breaker had apparently not been repaired but the roof bolter was neither needed nor used that day. On the following day, July 7, 1984, Howard asked for and was given the day off to visit his father recovering from his injuries in a Pittsburgh hospital. Upon his return that evening, Howard was given a "cut off" or unemployment slip indicating that he was laid off. Cecil Dotson, the third part owner indicated to Howard that the lay-off was just temporary and

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that he would be recalled as soon possible. Howard subsequently returned several times seeking reemployment but was turned down and has never returned to work with either D & T or its successor, Little Robin Coal Company, Inc., (Little Robin).

Double D & T president and stockholder, Robert Thompson acknowledged the meeting on July 5 at which Mr. Howard reported his safety complaint. Thompson had just that day purchased the part necessary for repairing the circuit breaker and intended to have the breaker repaired that evening or the next day. Thompson testified at hearings on August 27, 1985, that Cecil Dotson unilaterally decided that Mr. Howard would be laid-off and that he, Thompson had nothing to do with that decision. According to this testimony Cecil Dotson was solely responsible for miners on that shift. Thompson further testified that another employee, Dusty Carpenter, was also laid-off the same day as Howard and that additional employees were laid-off the following week. All of the lay-offs were the result of low production.

At continued hearings on October 8, 1985, Thompson acknowledged that he controlled the financing of D & T and conceded, contrary to his previous testimony, that it was therefore his decision as to who would be laid-off. He further testified that he had discussed the possibility of lay-offs with Cecil Dotson several weeks before Howard's lay-off because of low production, poor quality coal and continued financial losses. Thompson also acknowledged that the final decision to discharge Howard was made on the day of his actual discharge, two days after Howard's protected safety complaint about the defective circuit breaker. Thompson testified at the continued hearings that in deciding to lay-off Howard he considered that Howard had been missing a lot of work and showed up an average of only 3 days a week. This evidence is not disputed.

Cecil Dotson also testified at the continued hearings. At the time of Howard's lay-off D & T had purportedly been sold to Little Robin Coal Company, Inc., (Little Robin) but Dotson was continuing to manage the mine at the request of Little Robin's owners. Dotson, his brother John Dotson, and Robert Thompson, met three weeks before Howard's lay-off to discuss the possibility of laying workers off. Production was down and they were producing "bad coal". The final decision to specifically lay off Howard and another employee, Gary Cockran, was not made however until right before that action was taken. Cecil Dotson testified that he was not aware,

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until the date of the hearing, that Mr. Howard had made the safety complaint at issue. According to Cecil, Howard and Cockran were selected for lay-off because they were among the last men hired and had been hired as "extra men".

Forest Friel, the "bridge operator" at the time of Howard's lay-off, testified that Thompson gave him the lay-off slip for Howard and said that two other employees had been laid-off. According to Friel three additional employees were laid-off only two days later. Friel agreed that coal production was then down because they had been running "dirty coal" and nobody was buying it.

Within the above framework of evidence it is clear that Mr. Howard did indeed make a protected safety complaint on July 5, 1985 to Robert Thompson, John Dotson, and Foreman Kyle Anderson. It is also clear that Howard was laid-off only two days later--a coincidence in timing from which an inference of unlawful motivation might ordinarily be drawn. Consideration of the totality of the evidence does not however support such an inference.

It is not disputed for example that at the time of Howard's safety complaint Mr. Thompson had in hand the part needed for repair of the admittedly deficient circuit breaker and that it was anticipated at that time that the breaker would have been repaired the next day. It is also undisputed that another electrical outlet was then functioning and available at the "feed-through box" within range of the roof bolter power cable. It is further acknowledged that the roof bolter was not needed for work the day following Howard's complaint and in fact was not used by anyone that day. Under these circumstances Mr. Howard's complaint did not cause any production delays nor interfere in any way with mining operations. Retaliation against Mr. Howard would therefore have been unlikely. Moreover since Howard did not report the safety hazard to any federal or state agency it is unlikely that the mine operator would have been particularly vindictive.

The existence of a facially valid business justification for the lay-off of Mr. Howard and the fact that five other miners were also laid-off, all within a period of a few days gives further credence to the operator's contention that it did not rely upon Mr. Howard's safety complaint in its decision to lay him off. In addition it is not disputed that Mr. Howard had not been appearing for work on a regular basis and had been the most recently hired employee. Thus when a

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decision was made to lay off employees it was not unreasonable based solely on non-protected business grounds, to have included Mr. Howard among the first. The undisputed testimony that the mine had been unable to sell its coal because of poor quality and that the mine continued to suffer financial losses underscores the business necessity for the lay-offs.

Under the circumstances I do not find that Mr. Howard has met his burden of proving that his lay off from D & T and/or Little Robin Coal Company, Inc. was motivated in any part by his protected activity. Pasula, supra. In any event there is ample credible evidence in this case from which I could find that Respondent's would have laid-off Howard for nonprotected business reasons alone. Pasula, supra. Under the circumstances I cannot find that Mr. Howard was discharged in violation of section 105(c)(1) of the Act and this case must therefore be dismissed.

Gary Melick  
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 Section 105(c)(1) of the Act provides in part as follows:  
"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 . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act."