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ROGER A. HUTCHINSON, v. IDA CARBON CORP
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ROGER A. HUTCHINSON,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 84-120-D

v.

IDA CARBON CORPORATION,
RESPONDENT

DECISION

Appearances: Lawrence L. Moise, III, Esq., Abingdon, Virginia, for Complainant; Joseph W. Bowman, Esq., Grundy, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant's complaint with the Commission was filed pro se. He alleged that he was discharged because he had complained of the unsafe condition of company equipment, particularly the truck he was operating. He was involved in an accident with the truck on December 30 or 31, 1983, following which he was discharged. He retained counsel prior to the scheduled hearing, and the hearing was continued. Pursuant to notice, the hearing commenced in Abingdon, Virginia, on July 19, 1984. Roger A. Hutchinson, Robert Hutchinson, James Clevinger, Jerry Fletcher, Roger Lee Hunt and Freddy Keen testified on behalf of Complainant. Joe Robinson, John Slone, Harry R. Steele, Danny Joe Puckett, Avery Murphy, Elzie Yates and Ronald Barton testified on behalf of Respondent. Complainant had subpoenaed Butch Cure, an inspector for the Federal Mine Safety and Health Administration. He did not appear at the hearing, and the matter was continued for the possible taking and submission of his deposition. Inspector Cure had issued a citation on January 3, 1984, in which he alleged that an equipment defect affecting safety, including a sticking throttle linkage and an inoperative rear shock led to the accident following which Complainant was discharged. Inspector Cure entered a special appearance by counsel (the Solicitor of Labor) and moved to quash the subpoena. The Solicitor argued that Cure's appearance was prohibited "in private actions such as this case in which the Department of Labor is not a party." I denied the motion to quash, and

issued a new subpoena for the purpose of taking the deposition of Inspector Cure. The Solicitor filed a Motion for Reconsideration. The Motion for Reconsideration was denied and the matter further continued for the purpose of receiving deposition testimony. Mr. Cure did not respond to the subpoena. On November 1, 1984, I certified the record to the Commission for disciplinary proceedings against named attorneys in the Solicitor's office for ignoring my order and counselling the ignoring of a Commission subpoena. On June 25, 1985, the Commission rejected the certification and returned the case to me for disposition. The Commission suggested that when Commission subpoenas are ignored, the judge's only remedy is to himself seek enforcement of the subpoena in Federal District Court.

Following remand, Complainant offered in evidence a copy of the safety record of Respondent, having received it from MSHA. Respondent objected to its admission and I received part of the exhibit in evidence. I closed the record in this case by order issued October 25, 1985. Thereafter, both parties filed post hearing briefs.

I have considered the entire record and the contentions of the parties and make the following decision in this case.

FINDINGS OF FACT

At all times pertinent to this proceeding, Respondent was the owner and operator of a surface mine in Pike County, Kentucky, known as the No. 1 Surface Mine. Complainant was employed by Respondent as a miner. He began working at the subject mine in November 1982 as a rock truck driver, and continued on the job until January, 1984. He worked 6 days, 58 hours per week and was paid ten dollars an hour.

Respondent followed a practice of having weekly safety meetings, generally held at the beginning of the shift on Mondays. At these meetings and elsewhere, Complainant often raised questions involving safety: In about May, 1983, Complainant told his foreman that he was afraid to work under a large rock protruding from a highwall. The following day, he called a Federal mine inspector who made an inspection and required Respondent to put a berm around the area below the rock. On several occasions, Complainant complained of inadequate berms on elevated haul roads. He did not complain of the berms on the road or bench he travelled just prior to the accident.

On many occasions during a period of about 5 months prior to the accident, Complainant complained to his foreman that the

accelerator on his truck would stick. Complainant himself lubricated the linkage on an average of once per week. The condition was not repaired. He also complained of the steering--the truck had a tendency to jerk or shimmy to the left. Respondent worked on the problem but did not eliminate it. On one occasion Complainant was unable to down shift when going downhill. This happened about 2 months before the accident. He told his foreman about it. On the night of the accident, Complainant inspected his truck and found that the rear right shock was leaking oil. He told his foreman who stated that the cylinder was bad and the company had a new one which would be installed the following day.

On December 30-31, 1983, Complainant was working the night shift. He began work at about 5:00 p.m. and was scheduled to work 8 hours. (He worked 10 hours per night for 5 nights, and 8 hours on Saturday.) At some time after midnight he was driving back from the dump travelling uphill toward the bench to obtain another load of overburden. He was travelling at less than 10 miles per hour when he hit a rut in the road at the top of the hill. This seemed to increase his speed as the truck "took off" toward the left. He saw the highwall, braced himself, tried unsuccessfully to shut off the engine, lost control of the truck, and drove into the highwall. The cab of the truck was severely damaged. The steering wheel was broken, the door jarred open, the windshield destroyed. Complainant was shaken up but not seriously injured. The truck was later repaired at a cost of between $40,000 and $50,000.

Complainant testified that he did not recall whether he hit the brake. There is no evidence of any defect in the brakes or the retarder. The distance from the crest of the hill to the highwall was approximately 100 feet. The bench was about 64 feet wide. There were no skid marks on the bench. Based on these facts, I conclude that Complainant did not engage his brakes before hitting the highwall. Complainant told his foreman, and later told the company President that he could not explain why he ran into the wall. When the truck was examined after the accident, it was found to be in first gear. The maximum speed of the truck in first gear is about 7 miles per hour.

On January 2, 1984, Respondent's President, Elzie Yates, after discussing the matter with the foreman, and the safety director, told Complainant that he was discharged because he could not give a legitimate reason for running into the highwall.

On January 3, 1984, MSHA Inspector B.G. Cure conducted a 103(g) inspection, and issued a citation charging Respondent

with a violation of 30 C.F.R. 77.1606(c) (Equipment defects affecting safety shall be corrected before the equipment is used). The citation charged that equipment defects affecting safety of the 773 caterpillar refuse truck "such as the throttle linkage sticking and the right rear shock being inoperative" led to the accident. This conclusion was stated in the citation to be based on information received "from the truck operator and the eye witness." A separate citation was issued because 3 of the 10 panel and gauge lights were inoperative. The citations were subsequently modified to show that they were issued pursuant to section 104(a) of the Act rather than section 103(g). The time for abatement was extended because of the extensive repairs to the vehicle. On March 26, 1984 the citation was terminated when the Respondent told the Inspector that the right rear shock was repaired and new linkage was installed on the throttle of the truck. Since Inspector Cure did not testify, it is difficult to evaluate the citations, and particularly his conclusion that the shock and acceleration linkage defects led to the accident.

ISSUES

1. Whether Complainant was engaged in activity protected under the Mine Act?

2. If so, whether his discharge was motivated in any part because of protected acitivity?

3. If it was whether the adverse action was motivated also by unprotected activities and whether Respondent would have taken the adverse action for unprotected activities alone?

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, 633 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 conclude that when Complainant told Respondent about the rock overhanging the highwall in May, 1983, and when he called the Federal Inspector about it, he was engaged in activity protected under the Act. When he complained of inadequate berms on elevated roads, this also was protected activity. When he complained of the accelerator linkage sticking on his truck, and the steering problems, and the leaking right rear shock, he was engaged in protected activity. Complainant was discharged from his job on January 2, 1984. This was certainly adverse action. The crucial question is whether the evidence establishes that the adverse action was motivated in any part by the protected activity. I conclude that it does not. The incidents concerning the rock protruding from the highwall, and the inadequate berms are too remote in time to be related in any way to Complainant's discharge. There is no direct evidence that his complaints about the steering, the accelerator linkage or the shock were factors considered by Respondent in its decision to discharge him. Nor is there any evidence from which I could reasonably infer that these complaints were any part of the motive for discharge. Therefore, I conclude that Complainant has failed to establish a prima facie case of discrimination.

Further, the evidence establishes that Respondent had a legitimate business reason for the discharge (the damage to the truck) and would have discharged Complainant in any event for unprotected activities. For both of these reasons, Complainant has failed to establish that he was discharged in violation of section 105(c) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge