CCASE:
TENNIS MAYNARD V. BLOCK COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

TENNIS MAYNARD,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 84-231-D

v.

MSHA Case No. Pike CD 84-12

BLOCK COAL COMPANY,
RESPONDENT

DECISION

Appearances: Hugh M. Richards, Esq., Prestonsburg, Kentucky, for Complainant;
Thomas J. Blaha, Esq., Paintsville, Kentucky, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Complainant filed a complaint with the Commission under 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) [hereinafter referred to as the Act] on August 23, 1984 alleging that he was "not able to take time off with a paid vacation" in violation of company policy. He further alleged that he was harassed on and off the job (presumably by the Respondent) as a result of filing an earlier discrimination complaint against Block Coal Company. This "harassment" allegedly has caused him severe mental anguish and requires medical treatment. By his complaint, he sought removal of all reprimands and personnel actions from his personnel file and vacation with pay. At the hearing, this request for relief was expanded to include reinstatement to his former job at some future time when he becomes medically able to return to work, three hours of pay at time and a half (for which he had been docked) and that he be allowed to keep the medical insurance he had prior to leaving the job.

This is the second Complaint of Discrimination filed with the Commission by Mr. Maynard against essentially the same Respondent. The earlier case is styled Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Tennis Maynard, Jr. v. Diamond P. Coal Company, Inc., (Docket No. KENT 82Ä199ÄD). Exhibit No. CÄ1 herein is the settlement agreement filed in that case and is signed by Mr. Paul Pelphrey for both Diamond P. and Block Coal

Companies. That case was disposed of by Decision Approving Settlement at 5 FMSHRC 1988 on November 25, 1983. Insofar as it is relevant, it will be discussed further in the body of this decision.

Pursuant to notice, this case was heard in Prestonsburg, Kentucky on August 28 and 29, 1985. Tennis Maynard, Jr., Elbie Pickelsimer and Joe Cook testified on behalf of the Complainant; Paul Pelphrey and Dennis Marshall testified on behalf of Respondent.

I have carefully considered the entire record and the contentions of the parties, and make the following decision.

DISCUSSION AND FINDINGS

Tennis Maynard, Jr. [hereinafter Complainant] had been employed as a rock truck driver by Mr. Pelphrey in the surface coal mining business under various company names; Diamond P. and Block Coal among them, and at various locations in Eastern Kentucky. His former job with Diamond P. terminated with his firing on May 17, 1982 because he refused to work in an allegedly unsafe condition. As a consequence of this firing, he filed a Complaint of Discrimination, which was later settled prior to hearing and resulted in his reinstatement. His last job was in Morgan County, Kentucky on Route 650, where Dennis Marshall was again his supervisor on the second shift.(FOOTNOTE 1) This was the job he was reinstated in as of October, 1983 as a result of the settlement of his previous discrimination complaint, supra. He remained in this job until he quit on June 14, 1984.

After Complainant's return to work in October of 1983, he felt that there were several incidents which occurred at work which interfered with his job and amounted to "discrimination".

Among them was one case where he had backed his rock truck up a ramp into a four foot wide hole which almost caused the truck to turn over. He was not warned of the hole in time by the man "running field". Another time there was a tree improperly loaded on another truck, which broke the windshield of Complainant's truck while passing at night. I specifically find that these two incidents were serious and posed a grave danger to Complainant. However, Complainant

has failed to show that the management of Block Coal Company was culpable in bringing these occurrences about. There is simply no evidence in the record to that effect from any source, including the Complainant himself. The men involved in these accidents were rank and file workers in the same relative position as Complainant with management.

Complainant also was docked three (3) hours of overtime pay one night because he had parked his truck and was not working due to problems with the truck's headlights. His supervisor explained that the Complainant had failed to contact him concerning any difficulty with the truck and only after one of the other men had told him that Maynard was sitting out there did he go out to investigate. He found him "reared back in the seat," appearing to be asleep. He was docked three (3) hours pay because he didn't contact his foreman to either have his truck repaired or to use the spare truck which was available on the site that night. Mr. Marshall's explanation of the Company's action in this matter is credible and I so find.

With regard to malfunctioning equipment generally, a somewhat related claim is made by Complainant that his supervisor provided him with inferior equipment in comparison with the other rock truck drivers. It is not disputed that the trucks were assigned on a seniority basis, with the more desirable trucks going to the most senior men. Complainant, however, feels that he should have been assigned a better truck earlier in his employment at the Morgan County site. For purposes of this discrimination case and without deciding which particular truck Complainant should have been driving on any particular day, the important issue is safety on the job. It is unrefuted in the record that the company rule was that any truck driver having any problem with his truck is to report it to the foreman immediately and that he is not required to operate an unsafe vehicle. In several places in the record, Complainant states he did operate an unsafe vehicle but he does not state that he was required to do so or that he could not have reported the vehicle's condition to management. In fact Mr. Marshall testified that Complainant didn't report problems with the vehicles as often as others did.

Complainant further complains that on at least one occasion, he was made to work harder than the other rock truck drivers. No allegations of a derogation in job safety are made. The Respondent of course contests this and replies that the foreman involved in this instance only wanted Complainant to put in a day's work for a day's pay. I find this issue unnecessary to resolve as even if it is true, it

is not "protected activity" within the meaning of the Act. Mere complaints about job duties and general disagreements with supervisors are not "protected activities".

Finally, with regard to the issue of Complainant's entitlement to one week's vacation pay prior to his departure from the Company, there is a definite split of opinion between the parties. Complainant is aware that you have to be on the job one year in order to get one week's paid vacation, but he states he was going into his third year of employment by senority and had never had a paid vacation.

The settlement agreement which the parties signed to reinstate Complainant in 1983 (Exhibit No. CÄ1) states inter alia that: "Respondent shall pay Maynard back wages in the lump sum amount of Ten Thousand ($10,000.00) Dollars, less deductions, required by law." Block Coal Company's position on this issue, through Mr. Pelphrey, is that Complainant was paid two weeks vacation as part of the $10,000 settlement. Therefore he would have to finish a full year's work after reinstatement in order to be entitled to another week of paid vacation. I note, however, that the settlement agreement itself does not mention vacation pay. Nor does the Decision Approving Settlement. The only evidence in the record concerning this issue comes from Mr. Pelphrey, who with his counsel, personally negotiated the settlement with a Mr. Grooms, the Department of Labor attorney who was representing Complainant at the time. Since only Pelphrey, his lawyer, and Grooms were privy to these settlement negotiations, if the situation was other than as Mr. Pelphrey has testified, it was incumbent upon Complainant to produce that testimony from Grooms. Therefore, by a simple preponderance of the relevant, probative and credible evidence I find that the $10,000 settlement paid the Complainant up through the time of his reinstatement, including two weeks of paid vacation that he had accumulated in the interim less $2,000 and some odd dollars that he earned in other jobs during the time period he was off work.

By early 1984, Complainant was having medical problems with his stomach and nerves and was subsequently given Tagamet and Mylanta for his stomach, Sinequan to help him sleep at night, which was later changed to Amitriplyline, and Chlorpromazine. Complainant traces these medical problems to "harassment and discrimination" that he was going through on the job. Towards the end of his employment with Block Coal Company, he became worried about his safety and the safety of the men that worked with him because he couldn't keep his mind on his job. On June 14, 1984, Complainant filed the instant discrimination complaint with MSHA and quit his job with Block Coal Company on the advice of his personal physician, Dr. Param.

Dr. Robert P. Granacher, Jr. a Board certified psychiatrist, examined Mr. Maynard for 5 1/2 hours on June 5, 1985 in connection with a worker's compensation case in which Complainant is the Plaintiff and concluded that he is suffering a spontaneous major depression with paranoid features unrelated to working conditions or occupational cause. The doctor realized that Complainant feels very strongly that his medical problems were brought about by his work, more specifically, his problems at work, but he (the doctor) feels he is having misperceptions about the etiology of his illness, is probably paranoid and may even be delusional.

As of the date of the hearing in August of 1985, Complainant was himself still of the opinion that he could not return to work at that time, because of his emotional illness, and in fact, doesn't know if he ever will be well enough to work again.

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 a 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 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. HeclaÄDay 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.

On the facts presented in this proceeding, I cannot conclude that there is any credible evidence to suggest or support any theory that Mr. Maynard's departure from Block Coal Company or his difficulties while employed there from October 1983 until June 14, 1984 were in any way connected with any protected activity on his part. There is no evidence of any protected work refusals or retaliations for such activity nor is there any evidence that Mr. Maynard made any safety complaints to MSHA or to any state or local mining authorities during this time period.

I do conclude, however, that when Complainant filed the two Complaints of Discrimination which he has filed against Diamond P. and Block Coal Companies, he was engaged in activity protected under the Act. Further, I conclude that on those occasions during the eight (8) month period of his reinstatement with Block Coal, when Complainant reported accidents, incidents involving safety and safety-related problems with the equipment he was using to management personnel, he was engaged in activity protected under the Act. Having found Complainant engaged in activity protected by the Act, the critical issue in this case is whether Mr. Maynard's termination of his employment was in any way prompted by his engaging in protected activity under section 105(c) of the Act, or whether it resulted from his inability to handle his job because of emotional or mental illness. While there is some argument by counsel as to the proper characterization of Complainant's June 14, 1984 departure, I find that Complainant quit his job because of his emotional illness which is diagnosed as a major depression with paronoid features, not because of any discriminatory action on the part of the mine ownership or management.

The only adverse action therefore that I find in this case is the docking of Complainant's pay for three (3) hours. The crucial question here then is whether the evidence establishes that the adverse action was motivated in any part by the protected activity. I conclude for the reasons stated earlier in this decision under Discussion and Findings that it was not.

Whether the Respondent treated the Complainant unfairly by assigning him to drive older equipment vice newer and better equipment or making him work harder than other truck drivers; or whether it sufficiently considered his emotional problems are not issues properly before me in this case. My jurisdiction is limited to considering whether the Respondent discriminated against the Complainant for activity protected under the Federal Mine Safety and Health Act of 1977. I conclude that the evidence before me establishes that it did not.

CONCLUSION AND ORDER

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the Complainant here has failed to establish a prima facie case of discrimination on the part of the Respondent. Accordingly, the Complaint IS DISMISSED, and the Complainant's claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Judge

FOOTNOTE START HERE

1 The second shift was a ten hour shift from six (6) in the evening until four (4) in the morning, with frequent overtime until seven (7) in the morning.