

CCASE:  
RONALD FAUST V. ASEMERA MINERALS  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

RONALD A. FAUST,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. WEST 85-116-DM  
MD 84-39

ASAMERA MINERALS (U.S.),  
INC.,  
RESPONDENT

Gooseberry Mine

DECISION

Appearances: Mr. Ronald A. Faust, Sparks, Nevada, pro se;  
Craig Haase, Esq., Haase, Harris & Morrison,  
Reno, Nevada, for Respondent.

Before: Judge Morris

This case arose upon a complaint of discriminatory discharge filed by the complainant with the Secretary of Labor under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. et seq., (the Act). The Secretary, after investigation, declined to prosecute the complaint. The complainant, Ronald A. Faust, then brought this proceeding directly before this Commission as permitted under section 105(c)(3) of the Act.

Complainant alleges he was discharged in violation of section 105(c)(1) of the Act.(FOOTNOTE 1) After notice to the parties, a hearing was held in Reno, Nevada on March 12, 1986.

Complainant was granted leave to file a post-trial submission but no such brief nor request for any extension was filed.

Review of the Case

Ronald A. Faust and Jerry Lee Moritz testified for the complainant. At the close of the complainant's case the judge granted respondent's motion to dismiss on the grounds that the evidence failed to establish that complainant had been engaged in an activity protected by the Act.

The Commission case law requires 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 that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); 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 not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively 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, 1936-38 (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, 195-96 (6th Cir.1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C.Cir.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., 462 U.S. 393, 397-403 (1983).

The evidence shows that Ronald A. Faust, 32 years of age, was employed by respondent Asamera Minerals (Asamera) from

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September 29, 1983 until July 1984. He was a contract miner at the Gooseberry mine in Storey County near Reno, Nevada (Tr. 8-10).

In September 1983 Faust with two or three partners in stope 806 mined the gold and silver ore (Tr. 10-12). Faust's initial wage was \$10.50 an hour. It was later increased to \$11 (Tr. 12).

On July 30th Faust with his partner blasted 30 holes in the stope. The blast brought down the raise. As a result the scam between raises 806 and 805 was plugged off because it filled with sand (Tr. 13-16, 20). In order to breathe Faust reduced the air pressure and breathed off of the air hose for about an hour, or until the air cleared (Tr. 14). Breathing off of the air hose caused Faust's lungs to become coated with oil (Tr. 14).

The following morning Faust went to St. Mary's Hospital where he remained for six days. A portion of the time he was in intensive care (Tr. 15).

After he returned home he did not return to work at Asamera. He was fired by his manager, Tom Lambert, for blasting in the stope (Tr. 17, 20). At no time did Faust have any conversations with the company about such blasting but he asserts it was common practice to remain in the stope while blasting (Tr. 18). Faust offered several written statements by coworkers confirming his testimony concerning blasting in the stope (Tr. 18, 19; Ex. C1 thru C5).

Faust had never been told how he should have blasted in the stope. On five prior occasions when he had blasted it had cleared in 10 minutes because the ventilation had remained open (Tr. 24). Faust's supervisor obtained the blasting material; he knew each time Faust blasted (Tr. 24, 25).

Complainant indicated that he had never told anyone at Asamera that there was a safe or unsafe way to blast (Tr. 25).

At the hearing Faust identified and read his original statement to MSHA (Tr. 27; Ex. C6). He basically reviewed his statement (Tr. 27-31). The handwritten statement concluded with several questions. They were: "why wasn't accident reported by mine?" and "why hasn't 805 raise been maintained?" and "why hasn't scam between 806 and 805 been maintained?" (Tr. 31; Ex. C6).

Faust was working 40 hours a week at Asamera. After being terminated his next employment was seven months later earning \$14 an hour. He claims loss of wages for seven months at \$11 an hour (Tr. 32, 33).

Jerry Lee Moritz testified that he was Faust's partner at the time of this incident. Moritz was also hospitalized (Tr. 34-36). He indicated that it was common practice to blast in the stope (Tr. 31). Other companies follow different procedures:

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the miners usually drill the holes, put in the blasting powder, set the charge and withdraw. They will return after the area has cleared (Tr. 36, 37).

Moritz also stated that at a safety meeting a few weeks before this incident he mentioned there was no ventilation in stope 806. The safety man replied that the condition was caused by the temperature of the outside air (Tr. 36, 37).

#### Discussion

At the close of the complainant's case respondent moved to dismiss the complaint. After considering the exhibits and the evidence the judge dismissed the complaint. The conclusion reached was that the complainant had failed to offer any evidence that he was engaged in an activity protected by the Act.

Complainant's claim against respondent rests on the proposition that it was common practice to blast while the miner remained in the stope. He followed this practice and, after being injured, he was fired (Tr. 32).

Faust's evidence develops facts that are safety related and there may be some form of discrimination in the operator's actions. But Faust's actions were not an activity protected under the Mine Safety Act. Accordingly, his claim of discrimination should be dismissed.

#### Conclusions of Law

Upon the record and the factual determinations construed most favorably to complainant, the following conclusions of law are entered:

1. The Commission has jurisdiction to hear and decide this matter.
2. Complainant failed to prove that he was engaged in an activity protected by the Act.
3. Complainant was not discharged for engaging in any activity protected by section 105(c) of the Act.

#### ORDER

Based on the entire record and the conclusions of law, I enter the following order:

The complaint of discrimination filed herein is dismissed with prejudice.

John J. Morris  
Administrative Law Judge

1 Section 105(c)(1) provides:

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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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 proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.