

CCASE:
DENNIS AYRES V. FAIRPOINT COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DENNIS AYRES,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. LAKE 86-65-D
MSHA Case No. VINC CD 86-2

FAIRPOINT COAL COMPANY,
RESPONDENT

Fairpoint Strip Mine

DECISION

Appearances: Dennis Ayres, Lantana, Florida, pro se;
Rodney D. Hanson, Esq., Thomas, Fregiato, Myser
& Hanson, Bridgeport, Ohio, for Respondent.

Before: Judge Koutras

Statement of the Case

This is a discrimination proceeding initiated by the complainant Dennis Ayres against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, alleging that the respondent discriminated against him by discharging him for exercising certain rights afforded him under the Act. Mr. Ayres' initial complaint was investigated by MSHA, and it declined to file a formal complaint with this Commission. Mr. Ayres subsequently filed this action with the Commission pro se.

A hearing was held in Wheeling, West Virginia, on August 26, 1986, and the parties appeared and participated fully therein. At the close of the complainant's case, the parties agreed to settle this dispute, and they have filed sufficient information in this regard to enable me to dispose of the matter.

Discussion

Mr. Ayres testified that he worked for the respondent off and on since May, 1978, and during intervening periods of lay-offs. He was last employed as a dozer operator on October 14, 1985. Except for two weeks between jobs, he has

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been steadily employed since leaving the respondent's employ in various construction jobs in Florida. He testified as to the circumstances surrounding his complaint, and he believed that he was discriminated against by the respondent because he was concerned about operating equipment which he believed to be unsafe. He testified about certain events concerning a portion of a highwall which fell on his dozer on October 14, 1985, and his dispute over that incident. Mr. Ayres believed that the incident resulted from the failure of the machine reverse gear to engage properly, and he stated that he had reported this condition to mine management and nothing was done about it (Tr. 8-12, 14-17).

Mr. Ayres testified that on October 14, 1985, shortly after the highwall incident, he went to the mine office and informed a secretary that November 14, 1985, would be his last day of work. He also told the secretary that if he were further "hassled," he would quit that same day, and even if he were not further "hassled," he was giving notice that November 1, 1985, would be his last day of work (Tr. 12). Later that day, he was confronted by mine foreman Louis Zaccagnini, who purportedly told him "You don't tell me when you're going to quit; I tell you when" (Tr. 13). Mr. Zaccagnini then gave him his paycheck and "it was all over" (Tr. 13-14). Mr. Ayres confirmed that Mr. Zaccagnini did not use the words "you're fired," and simply stated "you're done" (Tr. 14).

Mr. Ayres confirmed that while he was aware of the condition of his machine for 3 weeks prior to the highwall incident on October 14, and was aware of his right not to operate unsafe equipment, he nonetheless operated the machine and never refused to operate it because he believed it was unsafe. He did so because he was afraid he would be fired if he refused to operate the machine (Tr. 17-18). He also confirmed that Mr. Zaccagnini accused him of causing the highwall incident which resulted in damage to the machine, but Mr. Ayres took the position that if the reverse gear were operating properly, he could have backed away from the highwall and avoided the falling material (Tr. 18-19).

Mr. Ayres confirmed that prior to his purported discharge, he filed no complaints with MSHA, but did report the condition of his machine to mine management (Tr. 20). He conceded that management dispatched a mechanic to look at the machine the same day that he complained, and he believed that management's response was appropriate (Tr. 21). He also conceded that Mr. Zaccagnini did not tell him that he was fired because of his complaints about the machine, or that if he did not operate the

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machine in the condition that it was in, that he would be fired (Tr. 21). Mr. Ayres confirmed that after the mechanic looked at the machine, he did not inform Mr. Zaccagnini that he was still having a problem, and made no further complaints to anyone (Tr. 22).

Mr. Ayres conceded that operator error may cause the type of incident which occurred at the highwall in question. He also conceded that he operated the machine for approximately an hour and a half prior to the incident in question, did not believe that he could get hurt, and that he could run the machine "the best I could with the machine I had" (Tr. 27). He confirmed that after the highwall fall, his supervisor Bill Simmons instructed him to work with the mechanic to get it ready to operate, and no one told him to operate it in an unsafe condition (Tr. 28). He also confirmed that after thinking about it further, he became angry and decided to inform management that he quit his job (Tr. 28). He conceded that had he not been terminated earlier by Mr. Zaccagnini, November 1, 1985, would have been his last day of work, and he would have quit that day (Tr. 30-31). He also conceded that he did not inform the secretary of any reasons for giving notice that he would quit (Tr. 31.).

Mr. Ayres confirmed that he had in the past engaged in a dispute with mine management over an incident concerning his wearing of short pants on the job, but he denied cursing or threatening a foreman. He also confirmed that he was sent home on September 9, 1985, because of this dispute, but was not fired or threatened with termination (Tr. 32-36). Mr. Ayres stated that he got along well with mine management, was never disciplined, and that he had a good attendance record (Tr. 39-40).

At the close of his case, Mr. Ayres indicated to the court that he would be receptive to a settlement of his dispute with the respondent. The parties were afforded an opportunity to explore this further, and they agreed that Mr. Ayres would be paid for two weeks pay from October 14, 1985 to November 1, 1985, in the gross amount of \$760, subject to the usual deductions, and Mr. Ayres would execute a release and his complaint would be dismissed (Tr. 42-43). Mr. Ayres stated that he was satisfied with this settlement of his complaint (Tr. 44).

Conclusion

The parties have now finalized their agreed-upon settlement disposition of the complaint filed in this case. Mr. Ayres has received a cashier's check from the respondent in the net

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amount of \$556.35, after appropriate social security and income tax deductions, and he has executed a release and agreement dismissing his complaint with prejudice. Under the circumstances, I am satisfied that the agreement is reasonable and in the public interest and in accord with the intent and purposes of the Act. I see no reason why this matter should not now be dismissed.

ORDER

In view of the foregoing settlement disposition of this matter, and having concluded that the parties have complied with the terms of their agreement, this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge