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LESTER COPELIN V. B & L S CONTRACTING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LESTER R. COPELIN,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 86-50-D

v.

B & L S CONTRACTING, INC.,
RESPONDENT

DECISION

Appearances: Lee J. Hoefling, Esq., Rusk, Overton & Hoefling,
Washington, Indiana for Complainant;
Martin J. Klaper, Esq., and Douglas C. Haney, Esq.,
Ice, Miller, Donadio & Ryan, Indianapolis, Indiana,
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as heavy equipment operator for Respondent because of activities protected under the Federal Mine Safety and Health Act of 1977 (the Act). Pursuant to notice, the case was called for hearing on June 25, 1986 in Evansville, Indiana. Lester Copelin testified on his own behalf. John Jackson, Cletus Taylor, Walter Roy, Larry Spencer and James Craig testified for Respondent. Both parties have filed post hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant worked for Respondent from about January, 1979 until he was discharged on April 9, 1985. He was a heavy equipment operator, primarily operating a 992 Caterpillar loader at Respondent's Apraw Mine, a surface coal mine near Washington, Indiana. His duties were to load overburden into the loader bucket and take it to waiting dump trucks. Prior to April, 1985, his work was generally satisfactory except for some complaints of being a little slow and not working well in the presence of water in the pit. Complainant worked the night shift, from 6:00 p.m. to 5:30 a.m. He was paid \$12.85 an hour.

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On a number of occasions beginning in about 1983, Complainant complained to foremen Walter Roy and Larry Spencer about the improper placement of light plants at the pit causing glare and shadows, and making it difficult for the loader operators to see very well. When these complaints were made, the foremen generally attempted to move the light plants to minimize the problem. There were instances when it was not possible to relocate the light to avoid glare and shadows, and there were other instances when the foremen ignored his complaints. Complainant never complained to the Mine Safety and Health Administration about the placement of light plants. Similar complaints were made by other loader operators and others working in the pit area at night.

In about March, 1985, a highwall collapsed at the mine. Larry Spencer, the foreman, in commenting on the collapse, stated that accidents like that just happen occasionally. Complainant told Spencer that they did not have to happen when cracks in the wall were evident. Complainant complained to his foremen on prior occasions of cracks in highwalls.

On April 3, 1985, night shift superintendent Frank Dermon asked Pit foreman Cletus Taylor why the 992 loader operated by Complainant was being operated at such slow pace. Dermon directed Taylor to talk to Complainant about why the work was progressing so slowly. Complainant had been assigned to dig out a ramp and haul it away from the coal seam. Taylor asked Complainant if there was anything wrong with the loader and was told that there was not. Taylor operated the loader himself and determined that there were no problems with it. He told Complainant that he was going to have to pick up his rate of speed and load a little faster. There were no light plant problems that night and the work was being performed on level ground.

At the end of the shift on April 4, 1985 at between 6 and 7 a.m., Complainant approached John Jackson, Mine Superintendent and told him that he had been reprimanded by Pit Foreman Taylor for working too slowly. Complainant thought the reprimand was unfair because he was getting as much out of the machine as it was capable of. Jackson told him he would look into the matter. Jackson timed the cycles of the 992 loader operators on the day shift. The cycle times varied from 32 to 38 seconds. Cycle time is the elapsed time from the dumping of a load in a truck, returning to the spoil pile, loading the bucket and returning to the truck. At the beginning of the next night shift (April 4), Jackson asked Taylor to time Complainant's cycles for 30 minute time periods 2 or 3 times during the shift. Taylor did time his cycles during three 30 minute periods. The average cycle time was 60 seconds. Taylor also timed Complainant's cycles on

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April 4. The times ranged from 50 to 60 seconds. He also timed the cycles on the day shift of April 5 and the cycle times varied from 32 to 38 seconds. On Monday April 8, Jackson timed the cycles on the day shift and they again ranged from 32 to 38 seconds. He timed Complainant early in his shift on April 8, and found his cycle times ranged from 50 seconds to 60 seconds plus. Jackson then went to talk to Complainant and told him that he had checked his complaint and found that Complainant's cycle times were too slow and that his work pattern was inefficient. Jackson said Complainant would have to improve quick or he would be replaced. Complainant replied: "If you don't like my work, send me down the road." (Tr. 50) Complainant was sent back to work and Jackson went home (about 8 or 9 p.m.). Jackson returned at about 4 a.m., April 9 and again checked Complainant's cycle times. They varied from 50 seconds to over 60 seconds. Jackson then decided to terminate Complainant. He informed Complainant of the decision at the beginning of the second shift on April 9.

The pit area where Complainant worked on April 3/4 was flat. Complainant contends that on April 8/9 he was "digging downhill at a reasonably steep angle . . ." (Tr. 12) He stated that the angle of the slope was "probably four to one." (Tr. 27) Jackson stated that the slope was approximately 10 percent-"somewhere about 10 feet per hundred feet drop." (Tr. 56) Pit Foreman Walter Roy stated that the slope on which Complainant worked "wasn't near that steep (four to one)" (Tr. 96). He also testified that the slope "wasn't flat. It was comfortable." (Tr. 99). I find that on April 8/9 Complainant was digging on a downhill slope of approximately a 10 percent grade, and this grade should not significantly affect the cycle time of a loader operator.

After his discharge, Complainant began working for Gohmann Asphalt and Construction Company in May, 1985 as a heavy equipment operator. He was laid off in November, 1985, and returned to work in March, 1986. He is paid \$16.50 an hour.

ISSUES

1. Was Complainant discharged for activities protected under the Act?

2. If so, what remedies are appropriate for the discriminatory discharge?

CONCLUSIONS OF LAW

1. JURISDICTION

Respondent operated a surface coal mine subject to the Act. Complainant was a miner and is protected by section 105(c) of the Act. I have jurisdiction over the parties and subject matter of this proceeding.

2. DISCRIMINATION-GENERAL RULE

Under the Act, a miner can establish a prima facie case of discrimination by showing that he engaged in protected activity and that the adverse action complained of was motivated in any part by that 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). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If the operator cannot rebut the prima facie case in this manner, it may affirmatively defend by showing that it was motivated also by the miner's unprotected activities and would have taken the adverse action for the unprotected activities alone. Pasula, supra; Simpson v. Kenta Energy Inc., 7 FMSHRC 1034 (1986).

3. PROTECTED ACTIVITY

Complainant's complaints about the improper placement of light plants causing glare and other obstructions to his vision obviously were related to the safe operation of his loader. Therefore, these complaints constituted activity protected under the Act. Complainant's discussion with Spencer following the highwall collapse in March, 1985 was a general statement of blame and is too amorphous to constitute protected activity. Complaints of visible cracks in the highwall would be protected. However, Complainant's testimony concerning such complaints was vague and totally lacking in specificity.

Refusal to work at a pace which would affect safety would be protected under the Act. But Complainant did not refuse to speed up his cycle time. He stated that he was unable to work at the required pace. Inability to work at the speed required by a mine operator is not protected by the Act. The evidence does not show that because of safety concerns, Complainant worked at a slower pace than Respondent demanded.

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ADVERSE ACTION AND MOTIVATION

Complainant was discharged ostensibly for working too slowly. There is no evidence that his previous complaints regarding the placement of light plants or the cracks in the highwall played any part of Respondent's decision to discharge him. The evidence is overwhelming that the decision to discharge was motivated solely by Complainant's slowness in operating his machine. Complainant contends that conditions in the pit made a 37 second cycle time unsafe. However, he also testified that he "went as fast as [he] could" (Tr. 18). The thrust of his testimony is that he was unable to work as fast as Respondent desired. Whether it was fair to terminate an employee with 6 years seniority on the basis of slow work performance for 3 or 4 days is not an issue that I have to resolve. I conclude that Complainant's discharge was not motivated in any part by activity protected under the Act. If it were, I would conclude that the evidence establishes that Respondent would have terminated him in any event for unprotected activities alone.

ORDER

Based upon the above findings of fact and conclusions, the complaint and this proceeding are DISMISSED because the evidence does not establish a violation of section 105(c) of the Act.

James A. Broderick
Administrative Law Judge