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IVAN MOORE V. MARTIN COUNTY COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

IVAN MOORE,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. KENT 85-183-D

v.

MARTIN COUNTY COAL CORP.,  
RESPONDENT

DECISION

Appearances: William Reaves, Esq., Ashland, Kentucky, for  
Complainant; Edwin S. Hopson, Esq., Louisville,  
Kentucky, and Leo A. Marcum, Esq., Inez, Kentucky,  
for Respondent

Before: Judge Fauver

This proceeding was brought by Complainant under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. Complainant charges a violation of section 105(c) based upon Respondent's constructive discharge of him on April 11, 1984.

Based on the hearing evidence and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Respondent, a Kentucky corporation, operates a coal mine in Martin County, Kentucky, where, at all pertinent times Complainant was employed.

2. The mine has regularly produced coal for sale or use in or substantially affecting interstate commerce.

3. Complainant began work for Respondent in 1975 and on August 4, 1983, he was employed as a fuel truck operator when he was injured as a result of a mine blast detonated by Respondent.

4. After a lengthy workmen's compensation proceeding, Complainant was found to be suffering an occupational disability of 30% (KY Workers' Compensation Board Op., Sept. 12, 1985).

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5. In the course of the workmen's compensation proceeding, a superintendent of Respondent and the foreman in charge of Complainant both testified that Complainant's job consisted of driving a fuel truck, fueling the equipment and occasionally, in the winter, putting additives into the fuel. This testimony was given in depositions on January 5, 1984.

6. Complainant decided, based on the above testimony, that he could hold Respondent bound by the limited job description in such testimony. He applied to return to work, and returned to work, in late March 1984.

7. For about 9 days on the job, Complainant operated the fuel truck and performed the fueling duties without incident. Then, on April 10, 1984, his supervisor, Herbert Meek, asked him to help out loading shot holes. Complainant stated that was not part of his job duties. Meek asked him to go with him to the superintendent, J.R. Stepp, to resolve the matter. Complainant told the superintendent that he could not load holes because his left shoulder still bothered him, and because of the testimony of the superintendent (previously referred to) that his job was only driving the truck, refueling equipment and occasionally putting additives into the fuel.

8. Stepp told Complainant that, if Meek needed him to load holes then he would have to load them, and when Complainant replied that he was not physically able to do that, Stepp suggested that he go to a doctor and get a slip showing he was restricted from loading holes. Stepp sent Complainant home with the suggestion that he get such a slip, but did not indicate whether he would be reinstated if such a slip were obtained.

9. Complainant left that day, and did not seek to get a restricted-duty slip from his physician. He has not returned to Respondent's employ since April 10, 1984.

10. Before April 11, 1983, Complainant had a number of incidents at Respondent's mine when he made safety complaints to his supervisors, and at least once he made a safety complaint to a government mine inspector with his supervisor's knowledge of such complaint. After the accident on April 11, 1983, Complainant charged Respondent with safety violations in connection with the blast and this charge was a major issue in the workmen's compensation case.

11. Respondent, through its supervisors, had regular knowledge of Complainant's history of making safety complaints, including his charge in the workmen's compensation case.

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12. When Complainant returned to work in 1984, he came back with a tape recorder, and often turned it on in the presence of his supervisors to record their conversations with him. When he went back to work in 1984, Complainant intended to make an issue of the supervisors' previous depositions so that, in the event he was asked to load holes or do other manual labor except drive the fuel truck, refuel the equipment and occasionally put additives into the fuel, he would refuse to do such work. I also find that his supervisors were aware of this plan by Complainant and were, themselves, prepared to have a "showdown" with him on that issue.

13. Complainant testified that he cannot use his left arm in work and that he would be a "one-armed" man as a fuel truck operator.

#### DISCUSSION WITH FURTHER FINDINGS

Respondent has had a policy, at least since 1980, of not accepting restricted-duty slips from physicians when an hourly employee returns to duty after disease or injury. The employee must present an unqualified medical return-to-duty slip or he will not be permitted to return to duty. Complainant knew of this policy before 1984 and, when he applied to return to work in 1984, he was careful to get an unrestricted medical return-to-duty slip. He also decided not to get a restricted-duty slip after he was sent home on April 10, 1984, because he knew or believed that Respondent would not let him return to work with a restricted-duty slip.

He contends that he is able to do the job of fuel truck operator using only one arm. However, I find that the duties of that job reasonably require the use of both arms and both hands and that the Respondent has shown a reasonable basis for refusing to reinstate Complainant as a fuel truck operator after April 10, 1984, so long as he has contended that he can use only one arm.

With respect to his refusal to load shot holes, I find that such duties are within the scope of the required duties of his position and that, before and after the accident on April 11, 1983, his job was subject to the requirement that, if his supervisor asked him to load shot holes, he was required to do that work. I therefore find that Respondent was justified in sending Complainant home on April 10, 1984, for refusing to load shot holes.

Complainant has shown substantial protected activities involving his safety complaints before and after April 11, 1983, and before April 10, 1984. However, he has not shown by a preponderance of the evidence that Respondent's decision to send him home on April 10, 1984, was in any part motivated by discrim

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ination because of his protected activities. Also, his refusal to load shot holes was a sufficient independent cause for sending him home on April 10, 1984, and refusing to reinstate him after April 10, 1984, and would reasonably have resulted in such employer actions independent of his protected activities.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.
2. Complainant has failed to meet his burden of proving a violation of section 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver  
Administrative Law Judge