CCASE:
GERALD C. BRUNTON V. SHAWNEE COAL CO.
DDATE:
19870206
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

GERALD C. BRUNTON, COMPLAINANT
v.

DISCRIMINATION PROCEEDING

Docket No. LAKE 86-109-D

SHAWNEE COAL COMPANY, RESPONDENT

DECISION

Appearances: Gerald C. Brunton, Shawnee, Ohio, pro se;
Thomas F. Sands, Esq., McClelland, McCann and Ransbottom, Zanesville, Ohio, For Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as a welder with Respondent for activity protected under the Act. Pursuant to notice, the case was heard in Columbus, Ohio on January 15, 1986. Gerald C. Brunston testified on his own behalf. James N. Denny testified for Respondent. The parties waived their right to file post hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Respondent was the owner and operator of a surface coal mine near Zanesville, Ohio. Complainant began working for Respondent on November 11, 1984 as a laborer on the coal tipple. After about one and one-half months, he became a welder. He was paid $7.00 an hour plus $140 a month for the use of his truck and welding machine. He worked on the average of 50 hours per week and was paid time and one-half over 40 hours. Complainant had studied welding for 2 years at the TriÔCounty Vocational school. James Denny was Complainant's foreman during all the time he worked at Respondent.

Complainant testified that he was reprimanded ("yelled at") by his foreman about once every week and was sent home on one occasion as a disciplinary measure. Denny testified that

Complainant was unable to do "hang" or "vertical" welding, but could only weld flat. He stated that he reprimanded Complainant for failure to service the radiator on a scraper in December 1985, resulting in substantial damage to the scraper. In November 1985, a State inspector "red tagged" a piece of equipment for inadequate brakes after Complainant told the inspector to check the loader because it had no brakes. It was repaired within 3 or 4 days. Complainant testified that he was required on a couple of occasions to work under an unsafe highwall. Denny denies that allegation.

On April 17, 1986, Denny told Complainant and fellow worker Joe Humphrey to get haircuts. Denny stated that Complainant's hair stuck out on both sides of his hard hat and Denny was afraid that a spark from the welder could ignite it. Complainant stated that he had a haircut on April 14, 1986 and his hair was of moderate length and not a safety hazard. On the following Monday, April 21, Complainant was asked if he had gotten a haircut, and when he said no, was told to go home until he got it cut. Complainant did not return. He aplied for and received State unemployment compensation. Joe Humphrey did get a haircut, and continued working.

Complainant has sought employment at various places since leaving Respondent, but has not found any significant work to the date of the hearing.

ISSUE

Whether Complainant was discharged or otherwise discriminated against because of activity protected under the Mine Safety Act?

CONCLUSIONS OF LAW

Complainant and Respondent are subject to and protected by section 105(c) of the Act, the former as a miner, the latter as an operator. I have jurisdiction over the parties and subject matter of this proceeding.

To establish a prima facie case of discrimination under the Act, Complainant must show that he was engaged in activity protected by the Act, and that his discharge was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir.1981).

Complainant's refusal to get his hair cut is not activity protected under the Act. It is not related to safety complaints

or safe working conditions except insofar as it may itself (as Respondent contends) be a safety hazard. Complainant testified that there was equipment with safety defects on the premises, and that he was told to work under unsafe conditions. He did not state that he refused to work or complained of these conditions. I conclude that Complainant has failed to establish that he engaged in activity protected under the Act.

Complainant was told not to return to work until he got his hair cut. Respondent denies that he was fired. It is clear that his job was terminated however, and I conclude that this was adverse action. The reason for his termination was, everyone agrees, his refusal to get his hair cut. Since I have concluded that this was not protected activity under the Act, I must also conclude that his employment was not terminated for protected activity.

If Complainant had established that he was terminated in part because of protected activity, I would nevertheless conclude that Respondent was motivated by unprotected activities and would have taken the adverse action for the unprotected activities alone, i.e., Complainant's refusal to follow an order which Respondent believed was a safety hazard. Pasula, supra. Therefore, I conclude that Complainant has not established that Respondent discharged or otherwise discriminated against him in violation of section 105(c) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the Complaint and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge