

CCASE:
HARLEY SMITH V. BOW COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

HARLEY M. SMITH,
COMPLAINANT

v.

BOW VALLEY COAL RESOURCES
INC.,

RESPONDENT

DISCRIMINATION PROCEEDINGS

Docket No. KENT 86-23-D

BARB CD 85-69

Docket No. KENT 86-84-D

BARB CD 86-7

Oxford No. 5 Mine

DECISION

Appearances: David M. Taylor, Esq., Harlan, Kentucky, for
the Complainant; Joshua E. Santana, Esq., Lexington,
Kentucky, for the Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

On or about September 18, 1985, Complainant filed a Complaint with the Federal Mine Safety and Health Administration alleging that after making safety complaints to Respondent, commencing on December 13, 1984, he was required to work both as a miner's helper and also as a ventilation man. He also alleged that he was discriminated against unlawfully in that he did not receive benefits "while I was off." On October 21, 1985, Complainant was advised that the Mine Safety and Health Administration determined that a violation of 105(c) had not occurred. On or about November 18, 1985, Complainant filed his Complaint with the Commission.

On or about November 15, 1985, Complainant filed another complaint with the Mine Safety and Health Administration alleging that he was served a letter, on November 12, 1985, terminating his employment and that the termination was related to his discrimination complaint that he filed on September 18, 1985. On February 24, 1986, the Mine Safety and Health Administration

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advised Complainant that it determined that a violation of 105(c) had not occurred. On or about March 7, 1986, Complainant filed his Complaint with the Commission.

Subsequent to notice, these cases were scheduled and heard in Harlan, Kentucky, on November 18 and 19, 1986. After the hearing, based upon a joint request from the Parties, the time to file briefs was extended until February 20, 1987. Complainant filed its brief on February 13, and Respondent filed its brief on February 20, 1987. Based on a joint request by the Parties the time to file reply briefs was extended until March 20, 1987, and reply briefs were filed on March 23, 1987.

Harley Smith, Lawrence Taylor, Larry Joe Gross, and Leon Allen testified for Complainant. Clyde E. Goins, David Howard, Dewey Simpson, Isom G. Smith, Henry Saylor, Roy Chasteen, Tom Baker, Amato Hoskins, and Glen Green testified for Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainant and Respondent are protected by, and subject to, the provisions of the Mine Safety Act, specifically Section 105(c) of the Act. I have jurisdiction to decide this case.

The Commission, in a recent decision, *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, *Goff, supra*, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2797-2800; *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 motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C.Cir.1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's *Pasula*-*Robinette* test).

Protected Activities

Harley Smith, the Complainant, who has been a mine foreman, miner operator, and scoop operator, started to work for the Respondent in 1976. In December 1984, Smith was transferred to

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the Oxford No. 5 Mine as a miner's helper. In the period from March through April 1985, Smith complained to Amato Hoskins, Respondent's section mine foreman, that roof bolts were placed more than 4 feet apart. In the same period, Smith told Leon Allen, Respondent's outside foreman, of various loose rock that was hanging and also that some bolts were not secure. Also in the same time period Smith told Hoskins and Roy Chasteen, Respondent's mine superintendent, that a ventilation curtain was down. Further in the same time period, Smith told Hoskins that there were no straps in the third and fourth entry. Smith also made a request of Chasteen for a canopy for the mining machine. It is clear that all these complaints made to Respondent's agents were safety related, and as such are protected activities within the purview of Section 105(c) of the Act.

Adverse Actions

At the hearing, Counsel for Complainant indicated that only two adverse actions were being alleged as a consequence of protected activities: (1) that Complainant was assigned the job of a miner operator and also that of a ventilation man in December 1984; and (2) that the Complainant was fired in November 1985.

1. Complainant was required to work simultaneously as a miner's helper and ventilation man.

Smith testified that on October 10, 1984 he was injured at Respondent's Dulcimer No. 1 Mine. Smith did not work for a 4 to 5 week period following his injury. Smith attempted to return to work and did so for 3 days and 2 hours, however, he claimed that when he returned to work he reinjured his back. Smith finally returned to work December 3, 1984, and at that time was transferred from the Dulcimer Mine to the Oxford No. 5 Mine. Ten days after his transfer to Oxford No. 5 Mine, the ventilation man, who had been assigned to Smith's section was transferred to another section at the Bow Valley Mine. Smith testified that from this time until he was forced to go back on sick leave on July 31, 1985, he was required by Hoskins to perform both his first assigned job as a miner's helper, and also the tasks of the ventilation man. Smith testified that to his knowledge he was not aware of any other employee of Bow Valley who was assigned both tasks.

However, in essence, it was the credible testimony of Clyde E. Goins, Respondent's president, David Howard, Respondent's operations manager, Leon Allen, outside foreman, and Glen Green, Respondent's personnel manager, all of whom have knowledge of the overall operations of Respondent's mine, that, in general, miners do perform two jobs at the mine. I adopted their testimony,

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because their knowledge of the overall operation of the mine, makes them more competent than Smith to establish the working practices in the entire mine. Howard's uncontradicted testimony was to the effect that Smith received the higher pay rate of the two jobs that he performed. Also, Goins testified that normally if a section is short handed, the miner's helper also performs work as a ventilation man. It was the testimony of Lawrence Taylor, who operated the miner on Smith's shift, that he operated the miner 4 hours, and that the rest of the time he (Taylor) hung curtains and watched out for the cable, both of which are the functions of the ventilation man. Thus, it is clear that the requirement of Respondent for Smith to perform two jobs, was a normal practice at Respondent's mine and was not an adverse action.

2. The firing of the Complainant.

It was Smith's uncontradicted testimony that on or about November 10, 1985, he received a letter from Respondent which indicated that he was being terminated from his job with Respondent. This clearly constitutes an adverse action.

Motivation

1. Complainant's prima facie case.

The evidence is uncontradicted that between February and April 1985, Smith made at least five safety complaints to Respondent. On September 18, 1985, Smith filed a complaint of discrimination alleging, in essence, discrimination in job assignment due to safety complaints he had made. On or about November 10, 1985, Smith received a letter of termination from Respondent. This letter did not state any reasons for the termination. Accordingly, due to the coincidence of time between the safety complaints, the filing of a complaint of discrimination, and the letter of termination, and due to the fact that this letter did not state any reasons, it might reasonably be inferred that the termination was motivated in part by Smith's protected activities. Thus, it is found that Complainant has established a prima facie case.

2. Respondent's rebuttal and affirmative defense.

Facts

In the latter part of 1984, when Smith returned to work after his back injury, he worked at the Dulcimer No. 1 Mine and his section foreman was Henry Saylor. During that time Saylor had noted that Smith, while using a miner, had left cap coal in the ceiling and requested Smith to remove it. Smith refused on

the ground that it would involve, in essence, cutting the rock. Dewey Simpson, the roof bolter on Saylor's crew in the Dulcimer No. 1 Mine, indicated that he had asked Smith to remove cap coal, that Smith refused and that he (Simpson) then told Saylor about Smith's refusal. Simpson also testified that there were problems getting Smith to clean up. Saylor testified that both Isom G. Smith, a roof bolter on his crew, and Simpson complained of Smith not cleaning up and his refusing to cut cap coal. Both Tom Baker, Respondent's safety director, and Leon Allen, Respondent's outside foreman, testified that they had received complaints, from the bolters in Dulcimer No. 1 Mine, that Smith had left cap coal and had not cleaned up before the bolters. David Howard, Respondent's operations manager, testified, in general, that he was aware of complaints that Smith had not been cleaning up before the bolters and had left cap coal. He also testified that Saylor had told him that Smith was making complaints about the other employees in the section and that there were lots of disruptions. He said, in essence, that Saylor had stated that he (Saylor) would rather quit than work with Complainant. (This was corroborated by Saylor.) Subsequently, Howard and Chasteen met with Green concerning the difficulty that the roof bolters had with complaints from Smith, and with the latter not cleaning up. It was determined that Smith be transferred to the Oxford No. 5 Mine as the foreman there, Amato Hoskins, had more experience.

Hoskins testified that, after Smith was assigned to Oxford No. 5 Mine, in general, there were no problems with Smith operating the miner, that he never left cap coal, and that he was "pretty good" at cleaning up. (Tr. II, 170.)

Hoskins further testified that Smith complained to him that the bolters " . . . were leaving the bolts too wide, not strapping the rocks, stuff like that." (Tr. II, 173.) Hoskins indicated that two of the bolters told him that Smith told them that they were not performing their job properly. However, Hoskins indicated that Smith was not a disruptive influence in the section.

Lawrence Taylor, who ran the miner at Oxford No. 5 Mine on Smith's shift, testified, in essence, that Smith complained to him about the face boss not having the straps and bolts put in properly. Taylor indicated initially upon direct examination that Smith did not make any complaints to him about Hoskins. However, upon cross examination he indicated that Smith did tell him that Hoskins was not doing his job. I observed the witness' demeanor and find the latter version testified to upon cross examination to be credible. In addition, Taylor testified that several times Smith said that the repairman should help with the curtains.

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Smith, in rebuttal, indicated that he did not make any complaints to the bolting crew at Oxford No. 5 Mine, but that he did show Hoskins where the bolting crew missed kettle bottoms. He also told both Chasteen and Howard that hill seams were not being strapped.

Howard indicated that after Smith was transferred to Oxford No. 5 Mine, he complained that the bolters were not doing their job and that, in general, Smith was disruptive. Chasteen also characterized Smith as being disruptive in Oxford No. 5 Mine. Green testified that after being told by Chasteen, Ditty, and primarily Howard, that Smith was complaining about problems with the bolters not doing their job properly, he had a meeting with the miners in the section to prevent friction between the miners. According to Howard, he consulted with Goins three or four times in June 1985, concerning, in general, Smith's complaints about the work performance of others. In June or July 1985, Howard, Chasteen, and Ditty met with Green and discussed whether they should take any action or make any recommendation with regard to Smith. No action was taken at that time. On or about July 31, 1985, Smith injured his back and went out on sick leave. He did not receive any benefits while on sick leave.

In a follow up meeting called by Green in August 1985, with Howard, Chasteen, and Ditty it was decided that the Smith was disruptive and that termination was the only solution. Hoskins was not consulted with regard to the firing of Smith.

Green testified that he was not aware of the nature or the numbers of Smith's safety complaints. Green discussed with Goins the decision to terminate, and the latter agreed.

Goins testified that in August 1985, he made the decision to dismiss Smith, effective when Smith would be able to return to work from sick leave, so that Smith would be able to get sick leave benefits in the interim. Goins testified that he did not have any knowledge of the safety complaints made by Smith.

On or about November 7, 1985, Smith's physician released him to go back to work effective November 11, 1985. Smith took the doctor's statement to Green, who would not accept it. The latter explained that he would have to have a doctor's report. Subsequently, on or about November 10, Smith received notification that he was terminated, but the notification did not contain any reason. Prior to receiving the letter of termination Complainant had never been reprimanded or suspended.

Discussion

I conclude that the Respondent has not rebutted Complainant's prima facie case, nor has it established an affirmative defense. It has not adduced sufficient evidence to rebut the credible testimony of Smith that he engaged in protected activities in making safety related complaints. Nor has Respondent presented sufficient evidence to establish either that its action, in terminating Smith, was in no part motivated by Smith's protected activities, or that it would have terminated Smith based only on unprotected activities.

Respondent, in essence, argues that Smith was terminated because of disruptive behavior in criticizing co-workers, and because of his poor performance in not cleaning the mine floor properly, not cutting cap coal, cutting roof bolts, and operating a miner in high tram. The record establishes that there were conflicts between Smith and the roof bolters at Dulcimer No. 1 Mine with regard to Smith's performance. The weight of the testimony establishes that after Smith was transferred to Oxford No. 5 Mine, he continued to complain about the performance of the roof bolters. The only testimony with regard to the specific contents of the complaints to or about the roof bolters, was from Hoskins, Smith, and Taylor. I conclude, based on their testimony, that any complaints made to or about the roof bolters or face boss had to do with alleged improper bolting and strapping. Accordingly, these complaints are safety related and are protected activities. Since these complaints were part of the reason to fire Smith, I can not conclude that Respondent was in no part motivated by the protected activities.

I further find that any allegations with regard to Smith's poor performance, related solely to the period when he worked at Dulcimer No. 1 Mine, and that there is no evidence of poor performance at Oxford No. 5 Mine. Goins testified that after Smith was transferred to Oxford No. 5 Mine, he continued to receive reports that the latter was continuing to cut out roof bolts and operate the miner in high tram. However, the balance of the testimony does not establish that there were any complaints of these alleged activities by Smith after he was transferred to Oxford No. 5 Mine. Saylor, who was Smith's foreman at Dulcimer No. 1 Mine, was the only witness to the alleged cutting of coal in high tram. There was no testimony from any witness who observed Smith performing this activity at Oxford No. 5 Mine. The only other witnesses who indicated any knowledge of any alleged high tramming was Howard. However, his knowledge was based upon what Saylor had told him about Smith's operation of the miner only at Dulcimer No. 1 Mine. Also, the only evidence concerning Smith's cutting of roof bolts and leaving cap coal or not cleaning up was testimony from Howard, Simpson, Isom Smith,

Saylor, and Baker, and related only to incidents at Dulcimer No. 1 Mine. Significantly, Hoskins, the foreman at Oxford No. 5 Mine, indicated that Smith never left cap coal and was pretty good at cleaning up. Thus, it can be seen that any alleged acts of Smith indicative of poor performance occurred only at Dulcimer No. 1 Mine. Inasmuch as Respondent allegedly decided to terminate Smith in August 1985, 8 months after he was transferred out of Dulcimer No. 1 Mine, it can not be found that the decision to terminate was motivated solely by the alleged unprotected activities of poor performance at Dulcimer No. 1 Mine.

Even if evidence of Smith's alleged improper performance at Dulcimer No. 1 Mine is considered in combination with evidence of nonsafety complaints by Smith to and about other miners, I find that it has not been established that the Respondent would have terminated Smith for the unprotected activities alone. In reaching this conclusion, I considered the fact that the decision to terminate Smith allegedly came 8 months after he was transferred from Dulcimer No. 1 Mine, where all alleged acts of poor performance occurred. Also Goins who made the final decision to terminate Smith did not specifically indicate that Smith's alleged failure to perform his job properly was one of the reasons for termination. (Tr. I, 118-119.) Further, it is significant that Hoskins, the foreman at Oxford No. 5 Mine, who had indicated that Smith was not a disruptive influence, was not consulted when Green, Howard, Ditty, and Chasteen discussed the firing of Smith. Further, it is significant that the termination notice did not indicate any of the alleged unprotected activities as the reason for the termination. Indeed, the notice did not give any reason for the termination. Goins had testified that, in essence, pursuant to customary company practice the notice of termination was sent to Smith not in August when the decision was made (when Smith was off work on sick leave), but in November (when Smith was able to return to work), in order to enable Smith to get sick leave benefits, and that Respondent continued him on benefits while he was off on sick leave. However, it was Smith's testimony that during this period he did not receive any benefits, and to his knowledge his medical bills were not paid. Based on my observations of the witness' demeanor I adopted Smith's version. Therefore, I do not find credible Goins' explanation of the time lag between the decision to terminate in August and the notification of Smith in November. It is more credible that the actual decision to terminate was taken in November 1985, on or about the date the notice to terminate was sent to Smith. It is thus significant that the termination decision was made within 2 month of Smith's filing of a complaint of discrimination with MSHA, and within a few months after he had made various safety related complaints.

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Taking into the account all the above factors, it is concluded, that the Complainant has established a prima facie case that a violation by Respondent of Section 105(c) of the Act occurred when his employment was terminated. This prima facie case has not been rebutted by Respondent, nor has Respondent established an affirmative defense.

It is further concluded that the Complainant has abandoned his allegation as contained in the first Complaint that he filed in September 1985, that he was discriminated against unlawfully in not being paid benefits in 1984 when he was injured and was off from work.

ORDER

It is ORDERED that:

1. The complaint filed in November 1985, Docket No. KENT 86Ä23-D is DISMISSED.

2. Complainant shall file a statement within 20 days of this decision indicating the specific relief requested. This statement shall show the amount he claims as back pay, if any, and interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984). The statement shall also show the amount he requests for attorney's fees and necessary legal expenses if any. The statements shall be served on Respondent who shall have 20 days from the date service is attempted to reply thereto.

3. This decision is not final until a further order is issued with respect to Complainant's relief and the amount of Complainant's entitlement to back pay and attorney's fees.

Avram Weisberger
Administrative Law Judge