

CCASE:

SOL (MSHA) V. BRENT COAL

DDATE:

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TTEXT:

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

SECRETARY OF LABOR,

MINE SAFETY AND HEALTH

ADMINISTRATION (MSHA),

ON BEHALF OF ALVIN CASEY,

COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. VA 86-45-D

v.

BRENT COAL CORPORATION,

RESPONDENT

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant; Robert J. Breimann, Esq., and Joseph W. Bowman, Esq., Street, Street, Street, Scott and Bowman, Grundy, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant Alvin Casey contends that he was laid off from his job as mine foreman with Respondent on August 15, 1985, because he refused to work under unsafe conditions. Pretrial discovery was initiated by both Complainant and Respondent.

Pursuant to notice, the case was called for hearing on March 10, 1987, in Bluefield, West Virginia. It was continued on March 31, 1987, in Bristol, Virginia. Respondent orally moved to dismiss the complaint at the commencement of the hearing. The motion was denied.

Alvin Casey, James Church, Minnie Mae Church, Robert Nichols, Arnold Carico, and Dorsey Evans testified on behalf of Complainant. Paul Horn, Gary Lester, Terry Lee Taylor, Robert Dale, and Billy Horn testified on behalf of Respondent. Both parties have filed post hearing briefs. I have considered the entire record, and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Complainant Alvin Casey worked for Respondent as a coal miner for approximately two years. He worked for other mines operated by Respondent's President, Billy Horn, for about 10 or 11 years of the approximately 13 years he worked in the coal mining industry. He worked as a shot fireman, roof bolter operator, cutting machine operator and mine foreman. He was certified as a shot fireman, but was not certified as a mine foreman. He has a fifth grade education, and a very limited ability to read. During his last several months with Respondent, Casey worked as a foreman on the second shift. The second shift was supposed to be a maintenance shift, but coal was produced about 80 percent of the time. Casey was paid \$8.75 per hour, and, because he acted as foreman, received pay for 9 hours although he worked only eight.

Respondent was the owner and operator of the subject mine. The mine was developed through three old abandoned mines. Respondent was given permission by MSHA to go through the old workings and develop them into an active mine. Seals were constructed and ventilation provided. The mine was ventilated by an exhaust fan, pulling intake air across the working face, and down the return air course, exiting the mine at the fan. In August 1985, there were nine working headings, being mined on a left to right cycle. The intake air and return air were separated by permanent stoppings erected in crosscuts as the mining cycle progressed. The coal was removed by belt.

The mine was 30 to 34 inches in height. It produced from 30,000 to 50,000 tons of coal annually. The maximum number of employees was fourteen. During the two year period prior to August 14, 1985, forty seven violations were paid by Respondent, eighteen of which were denominated significant and substantial.

On August 6, 1985, on the day shift, a scoop cut through in the Number 3 heading to an old abandoned mine. The cut through occurred approximately 70 feet inby the last open crosscut. The day shift foreman, Gary Lester, called Respondent's President, Billy Horn, who directed him to withdraw the miners from the area to the intake side. Horn went into the mine with a flame safety lamp and methane detector. He crawled down the Number 3 heading and into the abandoned mine. He did not detect any methane or oxygen deficiency at the mouth of the heading. After proceeding 30 to 40 feet into the abandoned mine, the flame on the flame safety lamp diminished slightly, showing some oxygen deficiency. He returned to the mouth of the heading. After checking the ventilation, he instructed the men to stay on the intake air side, and began assembling material to construct a seal. Casey testified that when he arrived at the mine for the second shift,

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Horn told him that he was ill, because "he got a whiff of bad air from where he cut into that old abandoned mines." (Tr. I, 32.) Horn denied making the statement and denied having become ill. I accept Horn's testimony on this matter and reject Casey's. Casey hung a flame safety lamp at the mouth of the Number 3 Entry, and his crew worked in Entries 4 through 9. Casey testified that he went up Entry 3 about 20 feet and his flame safety went out. This testimony was not corroborated by James Church who was present at the time.

A seal was constructed the next day (August 7) on the day shift by Gary Lester. The seal was built of cement block and mortar approximately 10 feet outby the cut through, which had been filled with rock and debris from the mine before the seal was commenced. The seal was airtight. After the seal was completed, the day shift began to fill the entry outby the seal with stone, rock and mine debris, to protect the seal, according to Horn, from being struck by mine equipment. This work (called "gobbing" the area) was not completed during the day shift on August 7. Horn testified that he told Casey of the seal and instructed him to continue the gobbing outby the seal. Casey denies that he was told of the seal or that he knew of it. He testified that he could see through the heading into the old abandoned mine for "a couple or three days after" the cut through. (Tr. I, 41.) On this issue I accept the testimony of Horn and Lester that a seal was constructed on August 7. I find Casey's testimony not credible. I also find that Casey was told that the seal had been built. James Church, who worked under Casey, testified that he was told of the seal. (Tr. I, 96.) Casey's crew did some gobbing of the area outby the seal on August 7. The gobbing was completed during the first shift on August 8, and a mud plaster seal was constructed at the mouth of the No. 3 heading. A flame safety lamp was maintained in the vicinity of the No. 3 heading. The construction of the seal did not conform to the approved sealing plan for the mine in that a test pipe was not constructed to test the mine atmosphere behind the seal. Further, because of the gobbed area outby the seal, it was not possible to inspect the integrity of the seal daily as MSHA regulations require.

On or about August 5, 1985, Casey approached Horn and asked for a raise in pay. Casey said he had another job, and would quit if he did not get a raise. Horn told him that the company's financial circumstances would not allow him to give Casey a raise. Casey renewed his request on August 12, and was told that nothing could be done at the time, but perhaps later on he could be given a raise. Casey stated he had another job as soon as the prospective employer obtained a continuous miner which was on order. On August 14, at the conclusion of the day shift, Gary Lester told Casey that a scoop was broken down and he would

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need to use the man trip to bring repair parts to the No. 2 heading where the scoop was located. Casey's crew entered the mine and found that the cutting machine was between heading two and three. Casey found that the cable in the supply box had been shortened (apparently by Lester), and ordered his crew out of the mine. The shortening of the cable by Lester had occurred previously and upset Casey. I find as a fact that Casey did not indicate that he was withdrawing the crew because he was concerned about "bad air" in the mine, or that he was afraid to proceed to the No. 2 heading, but rather because he was upset on account of the cable. Horn was not at the mine that day. The following day, August 15, Casey came to the mine early in his street clothes. Horn asked him why he withdrew his crew, and Casey replied that he could not work with Gary Lester anymore and that he quit. I find that Casey did not complain to Horn about bad air. He asked Horn for a lay off slip in order to draw unemployment benefits until he was called to work on his new job. Casey did not return to Respondent's mine after that date.

On about August 22, 1985, Respondent's pillarizing plan was approved by MSHA, and the miners began to remove pillars. In about 3 or 4 weeks, the pillars were all removed, and the mine was abandoned.

Casey received unemployment compensation after a hearing before the state employment security agency. He began working for H & H Coal Company about 9 weeks after leaving Respondent. He worked with H & H about 8 days before quitting because he "couldn't stand to work in the low coal." (Tr. I, 50.) The coal seam at H & H was about 24 inches high. He has not worked since leaving H & H.

ISSUES

1. Was claimant subjected to adverse action by Respondent for activity protected under the Act?
2. If he was, to what remedies is he entitled?

CONCLUSIONS OF LAW

JURISDICTION

Respondent was subject to the Act in the operation of the subject mine. Complainant Casey was a miner and protected by Section 105(c) of the Act. Respondent is a small operator and has an average history of prior violations.

PASULA 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 took place, or that the adverse action was not motivated in any part by the protected activity. A miner has the right to refuse to work if he has a good faith reasonable belief that the work is hazardous. *Pasula, supra*, *Simpson v. Kenta Energy, Inc.*, 7 FMSHRC 1034 (1986). Such refusal is activity protected under the Act.

PROTECTED ACTIVITY

The cut through to the old mine created a potentially hazardous condition on the return air side (headings 1, 2 and 3) in the subject mine. Claimant's refusal to work in headings 1, 2, and 3 on August 6 and 7, 1985, before the seal was constructed, was therefore protected. I have found as a fact that Casey was informed that the seal was constructed. Although the seal did not conform to MSHA requirements, or the provisions of 30 C.F.R. 75.303 (requiring a daily examination of seals), I have found as a fact that Casey and his crew worked in the first three headings between August 8 and August 14. Therefore, I conclude that he did not refuse to work because of a good faith, reasonable belief that the work was hazardous.

ADVERSE ACTION

I have found that Casey quit his employment and was not discharged. I also conclude that he was not constructively discharged because of intolerably unsafe working conditions. See *Simpson v. Kenta, supra*. The evidence shows that he quit because he thought he deserved a raise, because of disputes with Gary Lester, and because he believed that he had a better job lined up. Therefore, I conclude that he was not subjected to adverse action under the Act.

MOTIVATIONACREDIBILITY

The critical issue in this case is why Casey left the Respondent's employ. Was it because he feared that his safety and the safety of his crew were jeopardized by the threat of bad air coming from the old works? Or was it because he was denied a raise, and did not get along with his fellow-foreman Gary Lester?

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The resolution of this issue depends almost entirely on the credibility of Casey and of Horn. I have found Casey's denial that he knew of the seal not credible: Church who worked under Casey was told of it and worked in the return headings after the seal was constructed, as did others on Casey's crew. Casey's testimony that he could see from the mouth of the heading into the old mine (more than 70 feet away) for 2 or 3 days after the cut through is inherently incredible. I have found the testimony of Billy Horn, Respondent's President to be credible concerning Casey's statements when he left his job and prior thereto. For these reasons I find that Complainant Casey was not subjected to adverse action by Respondent because of activity protected under the Act. A violation of section 105(c) has not been established.

ORDER

Based on the above findings of fact and conclusions of law, the complaint and this proceeding are DISMISSED.

James A. Broderick
Administrative Law Judge