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ARNOLD SHARP V. BIG COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ARNOLD SHARP, COMPLAINANT
v.
BIG ELK CREEK COAL CO., INC., RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 86-149-D

BARB CD 86-49

No. 1 Surface Mine

DECISION

Appearances: Arnold Sharp, Bulan, KY, Pro Se;
Stephen C. Cawood, Esq., Pineville, KY, Respondent.

Before: Judge Fauver

Complainant brought this proceeding under 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., contending that he was discharged because of safety complaints made to his supervisors. Respondent contends that he was discharged for reckless driving.

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

FINDINGS OF FACT

1. Respondent operates a surface coal mine, known as No. 1 Surface Mine, in Leslie County, Kentucky, which produces coal for sale in or affecting interstate commerce.

2. Complainant had been employed by Respondent's predecessor, Bledsoe Coal Company, at the same coal mine for about one and one-half years when the mine was taken over by Respondent, in April, 1985. Complainant began working for Respondent then, and worked as a rock truck driver and at times as an auger helper or operator until he was discharged on May 28, 1986.

3. From April, 1985, until February, 1986, Complainant's immediate supervisor was M.C. Couch. From February, 1986, until his discharge in May, 1986, his immediate supervisor was M. Cornett.

4. Around September, 1985, Respondent purchased an auger and assigned Complainant to be a helper on it. Complainant made many safety complaints to Couch and later to Cornett about the auger, including excessive oil leakage, accumulations of loose coal and a broken or damaged platform. Many times he asked Respondent to have the auger repaired and made safe, but Respondent did not have it repaired and continued assigning Complainant to work on the auger. Complainant also complained to his supervisors about inoperable front horns and inoperable backup alarms on trucks.

5. For a period, Respondent shut down the auger. Complainant drove a rock truck when the auger was shut down.

6. In February, 1986, M.C. Cornett became Complainant's immediate supervisor, and Couch became a mine supervisor above Cornett.

7. Around March, 1986, Respondent started operating the auger again, and Cornett ordered Complainant to work on the auger. Complainant complained about the auger, telling Cornett that he would not work on the auger until it was repaired and made safe to operate. However, Cornett ordered Complainant to work on the auger and Complainant did so. On one occasion, Cornett instructed Complainant to come in on Sunday, April 27, 1986, to work on the auger. When Complainant told him he did not want to work on the auger until it was repaired, Cornett told Complainant to work on the auger as instructed or he would be fired. Again, Complainant worked on the auger.

8. On May 28, 1986, Complainant was driving rock truck No. 437 and Willard Miller was driving rock truck No. 438. Miller had just dumped a load of rocks, and was leaving the dumping area. Complainant's truck was loaded, and he drove up to a "switchback" area where loaded trucks would stop and then back up to the dumping site. As Miller was driving downhill from the dumping area and as Complainant was backing uphill onto the dumping area road, the trucks collided. Neither truck had an operable front horn or operable back-up alarm. The accident probably could have been prevented if the trucks had these safety devices. Complainant looked in both of his side view mirrors before he backed up, but did

not see Miller's truck in either of them because of the angle at which the trucks were approaching each other. If Miller had been able to blow his front horn, it is likely that the accident would have been prevented.

9. Supervisor Cornett arrived on the scene after the accident, on May 28, 1986. Supervisor Couch arrived later. They summarily blamed Complainant for the accident, and discharged him on that date.

10. On June 17, 1986, after evaluating the representations made by Respondent and the Complainant, the Kentucky Division of Unemployment Insurance rejected Respondent's contention that Complainant had been discharged for cause. It found that: "There is a lack of evidence to show that the accident was intentional or that misconduct was involved. Therefore, the separation is non-disqualifying." (Exh. CÄ34.)

11. On August 26, 1986, the Mine Safety and Health Administration, United States Department of Labor, informed Complainant that its investigation of his complaint of a discriminatory discharge did not indicate a violation of 105(c) of the Act. Complainant then filed the subject proceeding before this independent Commission, for a de novo hearing and adjudication of his claim of discrimination.

DISCUSSION WITH FURTHER FINDINGS

A miner may establish a prima facie case of discrimination under 105(c) of the Act (FOOTNOTE 1) by proving that (1) he was engaged in a protected activity and (2) the adverse action complained of was motivated in any part by that activity. 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 the protected activity. Smith v. Reco, Inc., 9 FMSHRC 992 (June 30, 1987).

If the operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that (1) it also was motivated by the miner's unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C.Cir1984); Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

Complainant proved that he was engaged in protected activity, i.e., making safety complaints about the condition of the auger and the trucks. He complained to Couch a number of times, and he complained to Cornett when Cornett replaced Couch as his immediate supervisor. His safety complaints included excessive oil on the auger, accumulations of coal on the auger, a broken or damaged platform on the auger and inoperable front horns and inoperable backup alarms on trucks. He also voiced safety complaints to fellow workers.

Respondent contends that Complainant had a number of prior accidents at the mine and that the accident on May 28, 1986, was the final cause for discharging him, because of reckless driving, and that this was the sole cause for his discharge. It denies any motivation to discharge him because of his safety complaints.

The evidence is in conflict as to prior accidents involving Complainant. Complainant called the former superintendent of Bledsoe Coal Company, Vernon Muncy, as a witness. Muncy testified that he saw Complainant practically every day on the job and that his work record was good while employed at Bledsoe.

Respondent's supervisor Couch testified that Complainant had several prior accidents at the mine, as follows:

(1) In the first month Complainant worked for Couch, Complainant backed a truck partly over a berm on the edge of the dumping area. One set of the rear wheels went over the berm, and that side of the truck rolled backward partly down the slope. Couch testified that backing over the berm was dangerous, because the truck could have turned over.

(2) In a later incident, Complainant backed into a high wall, damaging a railing and side mirror on his truck.

(3) In February, 1986, the last day that he worked directly under Couch, Complainant, at the end of the work day, jammed his truck into a narrow opening in an effort to get to the parking lot quickly and get away from the mine.

Respondent's foreman Cornett testified that he had worked for Bledsoe Coal Company as a supervisor and that Complainant had worked for him there for about a year and a half, and beginning in February, 1986, Cornett was his supervisor at Respondent's mine until Complainant's discharge on May 28, 1986.

Cornett testified that Complainant had a number of prior accidents at the Bledsoe Company: Once, nearly backing into a sweeping machine, and "various accidents backing into dozers" (Tr. 85). Cornett also described the accident at Respondent's mine that Couch described, contending that Complainant backed a truck partly over a berm in the dumping area.

William Bolling testified, as Respondent's witness, that he was a blaster and an equipment operator, first for Bledsoe Coal Company and then for Respondent. He first met Complainant when Complainant started working for Bledsoe Coal Company in December, 1983, or early 1984. They worked together for Respondent until Complainant was discharged. He described two accidents that occurred when they had worked for Bledsoe Coal Company: (1) Complainant backed a rock truck into a bulldozer Bolling was operating, causing some damage to the rock truck (cutting the tire and bending the rim of the truck) and (2) Complainant's truck bumped into a bulldozer Bolling was operating, without causing any damage. Bolling also testified that he saw Complainant back up too close to a bulldozer and the buldozer operator had to drive out of his way to avoid being hit.

Couch, Cornett, and Bolling testified that Complainant had a reputation at the mine of being an unsafe driver.

Complainant testified that the accident with Bolling involving the cut truck tire was at night and was caused by Bolling not having his lights on. He denied the other accidents mentioned by Bolling. He testified that the "berm" accident was due to Respondent's failure to build adequate berms. I credit Complainant's testimony on the subject of prior accidents and the accident on May 28, 1986.

The kinds of prior accidents attributed to Complainant by Respondent's witnesses were not unusual for this operator's employees. Respondent's trucks often operated without operable horns and back-up alarms and at times

equipment operated without adequate brakes or safety lights; rock blasting at times was too close to personnel or equipment; at times personnel were permitted too near, or approached too near, a high wall that was dangerous and could fall and fatally injure employees; the auger was often kept in an unsafe condition. Various employees were involved in accidents for which they were not disciplined by Respondent or by its predecessor. Nor did Respondent or its predecessor discipline Complainant for any accidents before May 28, 1986. On that date, Respondent decided to fire Complainant without conducting a reasonable investigation of the accident. When Cornett came upon the scene, he briefly talked to Miller and Complainant, looked at the damage to Miller's truck and hastily determined that Complainant was at fault. Soon after that, Couch arrived, and Couch and Cornett had a brief discussion and decided that Complainant should be dismissed. If they had viewed the accident without an animus toward Complainant, they would have considered the effect of the safety defects on the trucks as a major contributing cause of the accident, i.e., the failure to provide an operable front horn on Miller's truck and an operable back-up alarm on Complainant's truck. The same truck operated by Miller had been turned over and substantially damaged in an accident on May 9, 1986, involving a different driver, but there is no evidence that disciplinary action was taken against that driver, nor is there an explanation of that accident in relation to driver fault or safety equipment.

Earlier, Couch had threatened to fire Complainant if he continued to complain to other employees about his objections concerning the condition of the auger. Cornett was also upset with Complainant because of Complainant's safety complaints about the auger (as late as April 27, 1986) and his resistance to working on the auger when ordered to do so.

Couch and Cornett had not heeded Complainant's safety complaints about safety defects on the trucks. Had they checked the horns and backup alarms on the trucks involved in the accident on May 28, 1986, they would have found them to be inoperable. With such a finding, they could not reasonably attribute fault to either driver, but to their own failure to have the safety standard for horns and backup alarms complied with. Their summary action in blaming Complainant for the accident without checking the safety equipment on the trucks indicates a discriminatory motive toward Complaint.

For all of the above reasons, I find that Couch and Cornett were motivated at least in part by Complainant's safety complaints in their decision to fire him. The

evidence presented by Respondent does not preponderate to show that in the absence of Complainant's safety complaints Respondent would have discharged Complainant for the accident on May 28, 1986. Complainant is therefore entitled to relief under 105(c) of the Act.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 105(c)(1) of the Act by its discriminatory discharge of Complainant on May 28, 1986.

3. Complainant is entitled to an order requiring Respondent:

(1) to reinstate him in Respondent's employment in the same position, and with the same pay rate, status and all other benefits, as he would have attained therein had he not been discharged on May 28, 1986, (2) to pay him back pay and interest for all compensation he would have earned in Respondent's employment had he not been discharged on May 28, 1986, and (3) to reimburse him for costs and expenses reasonably incurred by him in connection with the institution and prosecution of this proceeding including a reasonable attorney's fee if an attorney is engaged for the remainder of this proceeding including a procedure for proposing a relief order and any review or appeal processes.

ORDER

WHEREFORE IT IS ORDERED that:

1. The parties shall confer, within 15 days of this Decision, in an effort to stipulate the amount of Complainant's back pay and interest, costs and expenses, and the position, pay rate, status and employee benefits to which Complainant is entitled to be reinstated in Respondent's employment. Interest shall be computed in accordance with the Commission's decision in Arkansas Carbona, 5 FMSHRC 2042 (1984) (copy to be distributed to each party).

2. Within five days after their conference, the parties shall file a report with the Judge, submitting either a joint proposed order for relief or a statement of the issues between the parties respecting the relief to be granted. Respondent's stipulation of the terms of a relief order will not prejudice its rights to seek review of this Decision.

3. This Decision shall not be made final until a Supplemental Decision on Relief is entered herein.

William Fauver
Administrative Law Judge

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~FOOTNOTE_1

1 Section 105(c)(1) of the Act provides in part: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner in any coal or other mine subject to this Act because such miner has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent of an alleged danger or safety or health violation in a coal or other mine or because of the exercise by such miner of any statutory right afforded by this Act."