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STANLEY BAKER V. KENTUCKY STONE  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

STANLEY BAKER,  
COMPLAINANT

v.

KENTUCKY STONE COMPANY,  
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 87-142-D

Pulaski Plant

DECISION

Appearances: Philip P. Durand, Esq. and Wendy Tucker, Esq., Ambrose, Wilson, Grimm & Durand, Knoxville, Tennessee, for Complainant;  
John G. Prather, Jr., Esq., Law Offices of John G. Prather, Jr., Somerset, Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.F.C. 815(c) (the Act) alleging, in essence, that he was illegally fired in violation of the Act.

Pursuant to notice of November 6, 1987, the case was set for hearing in Knoxville, Tennessee, on December 8 & 9, 1987. In a conference call initiated by the undersigned on November 30, 1987, between the undersigned and the attorneys for both Parties, the Complainant's attorney made a request for the hearing to be adjourned. This request was not objected to by Respondent's attorney. Accordingly, pursuant to notice, the case was rescheduled and subsequently heard in Knoxville, Tennessee, on March 15 & 16, 1988. Stanley Baker, Charlotte Dykes, Roger Hasty, Sherman McClure, Melvin Thomas, Mark Lueking, Dale Tabor, Johnny Bruner, and Donny Tabor testified for the Complainant. Dennis Halcomb, Glennis Miller, Danny Roberts, Earl Howard, and Herbert Robbins testified for the Respondent.

At the hearing, at the conclusion of the Complainant's case, Respondent make a motion for a directed opinion in favor of the Respondent, and decision was reserved on this motion.

Complainant filed its Proposed Findings of Fact and Memorandum of Law on June 1, 1988, and Respondent filed its Proposed Findings of Fact and Memorandum on June 1, 1988. On June 10, 1988, Complainant filed a Response to Respondent's Summary of Proceedings and Response to Respondent's Memorandum of Law.

#### Stipulations

1. Except for occasional layoffs, Complainant worked at Kentucky Stone Corporation's Pulaski Plant from September 15, 1976 until he was fired on May 2, 1985.

2. The Kentucky Stone Corporation ("Kentucky Stone") is a wholly owned subsidiary of the Kopper's Corporation and is located in Pulaski County, Kentucky.

3. The Kentucky Stone Corporation is engaged in limestone mining operations and is subject to the provisions of the Federal Mine Safety and Health Act of 1977, including 815(c)(1). Further, Kentucky Stone falls within the definition of an "operator" as provided for in the Act.

4. Complainant was operating a Caterpillar 988A (Company No. 444) front-end loader, which was owned and/or leased by Kentucky Stone at the time of his discharge on May 2, 1985. At no time did Complainant refuse to operate the Caterpillar 988A (Company No. 444) front-end loader.

5. Dennis Halcomb was acting as an agent for Kentucky Stone when he fired Complainant.

#### Findings of Fact

1. Stanley Ray Baker, Complainant herein, was first employed at Kentucky Stone Company on September 17, 1976. While employed with Kentucky Stone Company, he has also operated a bulldozer and a "front-end loader" which, for the purpose of this proceeding, pertains primarily to the operation of a Caterpillar 988A loader.

2. A Caterpillar 988A loader is a large rubber-tired piece of equipment used, by Kentucky Stone Company in its quarrying operations, to load stone into the trucks hauling stone for its customers, to clear and organize stockpile of stone, and to clear roadways and pathways from spillage within the plant area.

3. Complainant has substantial experience operating front-end loaders, having previously operated a 980C Caterpillar, a 988B, and an H100, as well as a 275 Michigan, a 125 Michigan, a 175 Michigan, and other models of loaders.

4. Kentucky Stone Company, Respondent, at its quarry in Pulaski County, Kentucky, is engaged in the business of quarrying (mining) limestone rock from an open pit. When consumers purchase the rock, trucks are obtained to haul the rock from the "plant" at the quarry to the site designated by the consumer. Complainant's job included loading those trucks from the stockpiles. Some of the locations where the trucks parked to be loaded included grades. Loading the trucks requires the loader, with the bucket in a lowered position, to be driven into the stockpile to obtain limestone rock and to then be backed out of the pile, raising the bucket as the piece of equipment moves backward, and then maneuvering the loader into a position sufficient to permit the limestone rock to be dumped from the bucket into the truck. Throughout the time that the loading of the truck occurs, the loader is kept in first gear. The distance of travel is some 10 to 20 feet and the brakes of the loader are usually applied 8 to 12 feet before reaching a truck bed.

5. Occasionally, Complainant took the loader into the pit to clear off areas in the pit, or on shelves, to provide areas for the rock drills to drill, or he would haul fuel into the pit area.

6. The loader is used, from time to time, to "push off the stockpiles." This means that the crushed material is dumped on the stockpiles and then has to be organized or pushed around on the stockpiles to permit the piles to be orderly and usable. Roadway grading with the loader involves filling small potholes that occurred in the roadways, and clearing haul roads.

7. It was Baker's responsibility to watch the quarry site for trucks which were seeking to be loaded and to load them promptly in order to avoid delaying other trucks seeking to be loaded.

8. Baker testified that he was required to complete a daily checklist on every piece of equipment that he operated, and that he always filled it out.

9. Prior to operating the 988A loader, which is principally the subject matter of this action, Baker operated a 980C loader, which was a later model loader. On the April 24, 1985, Baker marked the brakes on the 980C loader "inoperable" and that loader was taken out of service and sent off to a shop for repairs. He was then assigned to the 988A loader and continued running it until the end of the shift.

10. The safety checklist, designed and supplied by Respondent, contains two columns for marking. One column is headed "OK" and the other column is headed "INOP." Mr. Baker believed that "INOP." meant "improper" (Tr. 120) or "inoperable" (Tr. 121). Neither side of this form contains any space specifically designated for comments.

11. On the date that he first operated the loader, Baker claimed the brakes would not catch properly when they were applied and that the loader would continue to roll 5 to 10 feet. He testified, in essence, that the distance the loader rolled after the application of the brakes varied. Baker testified that because of the condition of the brakes, he was concerned for his safety because if the brakes did not catch, the loader would roll, possibly backwards into a stockpile or forwards into the side of a truck. Once the loader stopped it did so abruptly. This created a danger because the loader bucket often held 10 to 12 tons of gravel in the air while loading a truck. The sudden stop would shift the weight of the bucket and thus force the back wheels of the loader to lift off the ground, causing the gravel to scatter into the objects below. Baker was concerned that the gravel would damage the trucks and injure the truck drivers who were on the ground below. Baker said he had trouble with the windshield wiper, that the windshield was cracked, and that he also marked problems with one mirror and an accessory ladder. He also claimed he was having problems with the steering, but that he did not report the problems with the steering because there was no place on the safety checklist to report problems with steering. He alleged he did tell the Superintendent, Dennis Halcomb, he was having problems with the steering and that he also told the on-site mechanic, Glennis Miller, of such problems.

12. The safety checklists are posted on clipboards and hung on a wall in the shop.

13. Baker testified that Glennis Miller indicated on one of the early days of his usage of the loader that there was a "problem" with the brakes (Tr. 129). Also, Baker said that Sherman McClure said the brakes were "no good" and they "wouldn't catch when you first hit them" (Tr. 129). Baker also claimed that the brakes wouldn't hold, so he attempted to use the fuel control to hold the loader in place. For safety reasons, Baker did alter the way he loaded trucks. Baker normally loaded trucks on an incline so that his loader would be above (on the upper side of) the truck. After Baker detected problems with the brakes, he reversed this process and began loading from below the trucks. He also positioned his loader so that if the brakes did not catch he would roll backwards into a pile of gravel to cushion his stop.

14. Baker denied anyone inspecting the brakes on the first day that he marked the safety checklist.

15. Baker continued to operate the loader on Monday, April 30. Baker denied that anyone from Kentucky Stone Company talked to him about the brakes on the second day of operation. Two sets of checklists were marked on April 30. In filling out the checklists, throughout the entire time that he operated the 988A, Baker continued to mark the brakes "INOP."

16. Baker acknowledged that he discussed the brakes of the loader with Glennis Miller, on-site mechanic, on the first or second day that he had operated it, and told him the loader would roll before the brakes caught. Baker denied that anyone got on the loader or stood by and watched him operate the loader on the first or second day.

17. When Dennis Halcomb, Respondent's Superintendent, first received a form indicating the 988A brakes were marked "INOP.", he went to talk to Baker and was told that the brakes were inoperable. Halcomb told Baker that he would have the mechanic check the brakes. Halcomb said the mechanic, Glennis Miller, got on the loader, drove it into the pile, backed out, checked the brakes, oil, fluid, and other items to determine if there was a problem, taking approximately 10 to 15 minutes. Halcomb said Miller reported to him that there was nothing wrong with the brakes.

18. On the next day, Halcomb again had Glennis Miller check the brakes. Miller said Baker was present, but did not tell him there was anything wrong with the way he was testing the brakes. Halcomb said Miller reported back that the brakes had nothing wrong with them and that he suspected that Baker had been used to the disc brakes on the 980 loader which catch more quickly than the ballon-type brakes on the 988A. Halcomb said he told Baker what Miller said about the brakes.

However, based upon observations of his demeanor, I placed more weight on the testimony of Miller as to what he actually did. I find thus that all Miller did was to travel forward with the loader and hit the brakes two to three time. He noted after the brakes were applied, the loader would roll a few feet before stopping and he told this to Baker stating there was a problem, although he did not say the brakes were unsafe. He also noted the loader stopped in the same distance at the same speed each time and that there was no inconsistency in stopping distance.

19. On the third day, another complaint was made regarding the brakes and Halcomb felt that the machine could not continue to be operated with the brakes designated as inoperable as a

violation of MSHA policy. Miller checked the brakes again the same way he did the two previous days. Halcomb then contacted Herbert Ray Robbins, Mechanic Superintendent over the Eastern Division of Kentucky Stone Company at the Mt. Vernon Shop.

20. Robbins began to operate the loader, putting it in first gear, revving it up, then letting off the throttle and hitting the brake. He applied the brakes just one time. He found "that the brakes were still plenty safe to operate" (Tr. 566). He also tested the right brake by putting his left foot on the right brake and revving the engine to about half throttle to determine whether the brakes would hold, finding the brakes held it OK. He then told Baker "it was okay to go ahead and run it" (Tr. 569), and told Halcomb that he would give the loader a thorough check when it was taken into the shop, but he did not see any reason to take it to the shop at that time, and said there was no reason to take it out of production. Halcomb was told that it was okay to run it and that it was safe to run, but Robbins said the brakes were not as fast catching as a 980 loader with disc brakes.

21. On the last day that Baker worked, May 2, 1985, he marked the brakes "INOP." but continued to use the loader. Miller got on the loader and there was no difference in the operation of the brakes from the previous examinations, indicating that the delay in stopping was 2 to 3 feet and never 10 or 12 feet. This distance was within the normal limits established in the testimony of Complainant's expert, Mark Leuking. At about 11:00 a.m., Halcomb told Baker he (Halcomb) was sure there was nothing wrong with the brakes and that Baker was marking the checklist "false" (Tr. 438). According to Baker, Halcomb informed him that he will have to let him to go. According to Halcomb, he told Baker that if he (Baker) did not want to talk about it and work something out "I would let him go" (Tr. 438). Based on observations of Baker's demeanor, I adopt his version. Baker left and has not subsequently been employed by Kentucky Stone Company.

22. The Caterpillar 988A loader has two brakes. One brake, located on the right hand side of the steering column, applies immediate braking pressure and does not take the piece of equipment out of gear. The other brake, known as the "D-clutch," first takes the piece of machinery out of gear, then permits the engine to be revved to permit raising of the bucket, and then begins braking. It is customary in Caterpillar 988A loaders for the braking process on the application of a D-clutch to be slightly delayed.

23. On cross-examination, the Complainant acknowledged that no one informed him that the brakes on the 988A were unsafe.

24. Roger Hasty was working for Respondent at the time of the discharge of Baker. Hasty indicated that he operated the 988A for several days, approximately 2 weeks, after Baker was

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dismissed, and he had some problem with the loader stopping inconsistently. Because of this inconsistency he placed his loader on the lower side of the truck when loading on a hill side. Hasty did not fill out a safety checklist for the 988A loader.

25. Sherman McClure, an employee of Respondent, was working at the Pulaski Plant in 1985. He operated the 988A loader approximately 2 or 3 weeks after the discharge of Baker, and felt something was wrong with the brakes because they would roll 1 to 4 feet before coming to a complete stop, at which time they would hold firmly. Even though McClure did not usually fill out checklists, he indicated that he would have "probably" marked the brakes inoperable had he been requested to fill out a safety checklist (Tr. 286). During the time that he operated it, he felt that he was familiar with the length of the roll upon application of brakes and that the rolling was something that he had been able to get used to.

26. Melvin Thomas has worked for Kentucky Stone Company for 22 years and works as a mechanic at the Mt. Vernon Shop. He recalls being on the loader at approximately the same time Baker was discharged and recalls that when the brakes were applied, the loader went approximately 3 feet and then stopped.

27. Mark Leuking was presented as an expert for the Complainant. He has worked with two 988A loaders and operated one on a daily basis. He experienced situations in which the brakes on a 988A would permit rolling of varying distances before the brakes caught.

28. Dale Tabor, Johnny Bruner, and Donnie Tabor all essentially noted that Baker, in loading their trucks with the 988A loader, placed his loader below their trucks while loading on an incline.

29. When a piece of equipment is transferred in or out of a particular Kentucky Stone location, the Office Manager sending out the piece of equipment fills out a transfer form, based upon instructions from the Superintendent, and then when the piece of equipment is received, the receiving Superintendent also inspects the equipment. Each plant has its own costs charged to that particular plant. At the time the 988A loader was received in the Pulaski Plant, nothing was found wrong with it on inspection. At the time it was shipped out, there was likewise nothing indicated to be wrong with the equipment.

30. On the day that Stanley Baker was discharged, Danny Roberts, another loader operator, operated the loader for the rest of the day and for an additional period thereafter. During the period of time that Roberts operated the loader, nothing was



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indicated on any checklist to indicate that the loader brakes were inoperable. In the testimony of Roberts, he indicated that the travel on the loader when the brakes were applied, was customary and usual for a 988A and that the travel did not create a danger. The length of travel was consistent. Roberts had no trouble with the brakes during the period of time that he operated the equipment until it was transferred to Tyrone. Checklists for May 21, 22, 23, 24, 28, 30, and 31 and June 1, 3, 4, 5, 6, 7, and 8, all signed by Russell Hines, indicate the brakes were marked "OK."

31. The 988A loader was received on April 1, 1985, from Yellow Rock, near Beatyville, Kentucky, and was shipped to Tyrone, near Lawrenceburg, Kentucky, on May 7, 1985. It was shipped back to the Pulaski Plant on May 13, 1985, and remained in Pulaski County until June 20, 1985, when it was shipped to the Mt. Vernon Shop. The starter and electrical system were repaired at that time, and the brakes were serviced. No problems were reported with the brakes from the time the loader was received on May 13 until it was shipped to Mt. Vernon on June 20.

32. Halcomb also indicated that he had had certain previous problems with Baker, including cleaning up stone in the traveled areas to prevent customers' trucks from having to back their tires over them; problems with keeping Baker watching for trucks; problems with Baker being in the Control Room; problems with Baker leaving his loader; and problems with Baker not doing a good job servicing his loader. He also recalled a problem of excessive speed which resulted in damage to the pick-up truck belonging to Roberts.

33. Halcomb indicated that he would not have "sent (Baker) home if it hadn't been for the false check sheets" (Tr. 460).

34. Halcomb testified that Baker had at least two and maybe three warnings before the day that he filed the last checklist and was discharged. Halcomb said that throughout that time, Baker did not tell him that the loader brakes were inconsistent and did not stop the same way every time, although he had several opportunities to do so. Halcomb said he first heard Baker claim a variation in the way the brakes stopped on the first day of the trial proceedings. According to Halcomb, Baker did not tell Miller or Robbins of variations in the brakes at the time of stopping. In contrast Baker testified, in essence, that he told Miller the loader rolled before the brakes caught. I adopt Baker's version due to my observations of his demeanor and also as it finds some corroboration in the testimony of Miller that he checked the stopping distance of the loader.

Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.
2. If so, whether the Complainant suffered adverse action as the result of the protected activity.
3. If so, to what relief is he entitled.

Discussion

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 activity

The key issue presented for resolution is whether Baker was engaged in a protected activity when he checked the brakes "INOP.", on the daily safety checklist. In essence, according to Baker, he initially marked the brakes on the 988A front-end loader as being "INOP.", as it continued to roll between 5 and 12 feet after application of the D-clutch brake pedal, and that when the brakes did catch they would catch suddenly. Also, according to Baker, the distance that the brake on the front-end loader would roll upon application of the D-clutch was inconsistent.

Baker continued to mark the daily safety form up to and including the date of his discharge as indicating the brakes being "INOP." as the brakes continued to perform in the fashion that they had on the first day. According to Baker, he was concerned with the hazard of being unable to stop upon approaching a

truck down the incline or upon working leveling at the top of the stockpile. Halcomb, in essence, testified that marking the brakes as being "INOP." was false, especially after he had Miller drive it on three occasions after Baker had marked them to be "INOP.", and Miller had said that he could not find anything wrong with the brakes. However, according to Baker, Miller had told him that the brakes are not catching like they ought to. This is corroborated by Miller who indicated, upon cross examinations, that he told Baker that there was something wrong with the brakes. Thus, I adopt Baker's version of what Miller told him, rather than the version of Halcomb that he told Baker that Miller told him that he could not find anything wrong with the brakes.

Habcomb testified that upon driving the front-end loader Robbins had told him that the brakes were not as fast at catching as the 980 with the disc brakes and that he sure he told that to Baker. Robbins said he found that upon stopping, the brakes were plenty safe to operate and stop within a acceptable stoppage. Also, he said that any traveling of the loader upon the application of the brakes was consistent and could be adjusted to. He also opined that he could not find any danger with this traveling. Robbins had testified that he told Baker that the brakes were OK and to run the loader.

Although Robbins indicated the brakes were OK, he did not contradict the testimony of Baker on direct that specifically he (Robbins) had told him that the brakes did not catch like they ought to and that he was going to have to put on a booster on them. Also, although Robbins and Miller presented testimony at variance with Baker with regard to the distance that the 988A rolled upon application of the D-clutch and as to whether the distance of the roll was consistent or not, I note that Robbins tested it only once. Also, there is a no evidence that either Miller or Robbins drove the front-end loader under the conditions driven by Baker, i.e. loaded and down a incline. In this connection, I find that the testimony of Baker that Robbins tested the loader by driving it on the level around a pile to be uncontradicted.

In addition, in evaluating whether Baker had good cause to believe the brakes were not "OK" and were "INOP.", I placed more weight upon the testimony of Hasty and McClure, based on their demeanor, rather than on the testimony of Miller and Robbins. In this connection, I noted that Hasty corroborated Baker's testimony that the brakes were inconsistent and that once they caught they caught suddenly. Also, McClure, who similarly operated the 988A after Baker was fired, opined that something was wrong with the brakes and that he would have marked the safety form as "INOP.", as would have Hasty. Also, I find significant that Hasty, like Baker, placed the trucks that he loaded uphill from the loader as

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did Baker upon transferring to the 988A. Indeed, Baker's action in this regard was corroborated by Dale Tabor, Donny Tabor, Jack Bruner. Also, Melvin Thomas, a mechanic at the Mount Vernon plant under Robbins, had indicated that when he drove the 988A about the time when Baker was fired it rolled and stopped suddenly. Although he indicated that the rolling of the loader approximately 3 feet before it stopped was consistent, he opined that the loader in question takes longer than usual to stop than other 988As, and therefore that the brakes were not working properly and that there had to be something wrong.

Accordingly, I conclude that Baker operated in good faith in checking the brakes as being "INOP." (See, Secretary on Behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981)). No bad faith can be found by Baker not following the opinions of Miller and Robbins. Neither of them actually operated the front-end loader while driving loaded down an incline, and neither of them physically performed any mechanical investigation or examination of the braking system. I find that the record does not present sufficient evidence to conclude that Baker's motivation in checking the brakes as being "INOP.", was as a result of other than safety concerns. Accordingly, I find that Baker engaged in protected activity in filling out the daily safety forms during the period that he was riding the 988A loader, and marking the brakes as "INOP." (Robinette, supra).

#### Motivation

I find that when Halcomb sent Baker home on May 2nd, 1985, that Baker was, in essence, fired and that this constitutes an adverse action. Halcomb testified, in essence, that when he sent Baker home on May 2, 1985, for, in his opinion, falsely filling out the daily checklist, it was the straw that broke the camels back. When asked whether the sole reason for firing Baker was the false checklist, he indicated in the affirmative and "the other stuff building up to it too." (Tr. 504) In this fashion, he indicated various other complaints that he had with Baker including Baker not cleaning up stones on the road, not servicing the loader properly, driving the loader at a unsafe speed, being in the control room (an unauthorized location), and not being available when needed to service truckers. However, there is no evidence that respondent would have fired complainant for these activities alone. Indeed, when asked why Baker was fired Halcomb indicated that he was sent home "mostly" for filling out the false truck sheets and that there were no other reasons "at that time," (Tr. 460). Also, I find it most significant that when asked whether the other problems he had been having with Baker affected him in any way in determining to send Baker home on May 2, he said as follows: "No, I don't think I would have sent him home if it hadn't been for the false check sheets," (Tr. 460).

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Thus, based upon the testimony of Halcomb I conclude that the complainant here has established that the firing was motivated in any part by the protected activity. (See, Robinette, supra.)

Respondent has not rebutted the prima facie case. Indeed the evidence establishes that the sole motivation for the firing of complainant on May 2, was the protected activity. I also find that an affirmative defense of respondent cannot be sustained, as the evidence fails to establish that respondent would have fired complainant based on the nonprotected activities alone. (Robinette, supra.)

Therefore I conclude that complainant has established a cause of action under section 105(c) of the Act. In light of this conclusion, Respondent's Motion, made at the Hearing for a directed opinion, is DENIED.

#### ORDER

1. 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.

2. 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