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ARNOLD SHARP V. BIG ELK CREEK COAL  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

ARNOLD SHARP,  
COMPLAINANT

v.

BIG ELK CREEK COAL COMPANY,  
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 88-109-D  
MSHA Case No. BARB CD 87-53

No. 1 Surface

DECISION

Appearances: Robin Webb, Esq., Hazard, Kentucky, for the Complainant;  
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, Louisville,  
Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant filed an initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), Hazard, Kentucky, Sub-district Office, on September 14, 1987. In a signed statement executed by the complainant on that date, he made the following claims of alleged discrimination:

I feel that I have been discriminated by Big Elk Creek Coal Co., Inc., in that Judge Fauver order Big Elk Creek Coal Co., Inc., to reinstate me to the same position I had held prior to filing Discrimination Case No. BARB CD 86 49, at the same rate of pay, status and all other benefits, as I would have attained had I not been discharged on May 28, 1986. Before my discharge on May 28, 1986, I was a rock truck driver working the day shift and making \$9.50 per hour. Since my reinstatement on September 8, 1987, I have been doing common

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labor jobs (helping mechanic, holding oiler, cleaning up around the mine) on the night shift making \$8.00 per hour. At the time I was reinstated, there was a rock truck driver position open, but they hired another man for that job.

I have also asked management about my annual refresher training, newly-employed, experienced miner training and new task training. All management would say was they would see about it.

I have not received any type training in the last 15 months.

The Secretary of Labor, Mine Safety and Health Administration, conducted an investigation of the complaint and found no evidence of discrimination. The complainant was advised of this decision by letter dated April 4, 1988, and he filed his pro se complaint with the Commission. In a letter filed with the Commission on April 12, 1988, the complainant alleged that as a result of his prior discharge by the respondent, his work record and ability to continue employment as a rock driver have been "destroyed," that his credit standing has been adversely affected, and that he has suffered certain unspecified "damages" for which he seeks compensation.

The respondent filed a timely answer denying that it has discriminated against the complainant. The respondent asserted that the complaint fails to state a claim upon relief can be granted under the Act, and it took the position that some or all of the allegations made by the complainant were settled or resolved in connection with a prior case involving these same parties. See: Arnold Sharp v. Big Elk Creek Coal Co., Inc. 9 FMSHRC 1261 (July 1987), decision by Judge William Fauver on July 22, 1987; 9 FMSHRC 1668 (September 1987), Supplemental Decision issued by Judge Fauver on September 15, 1987; and 9 FMSHRC 1822 (October 1987), Final Order issued by Judge Fauver.

A hearing was convened in Pikeville, Kentucky on August 10, 1988, and the parties appeared pursuant to notice. Although the complainant filed his complaint pro se, he subsequently retained counsel to represent him approximately 10 days prior to the commencement of the hearing.

Discussion

Prior to the taking of any testimony in this case, counsel for the parties requested an opportunity to confer with each other, and it was granted. In addition, a pretrial conference was conducted to address the issues and remedial claims raised by the complainant. During these discussions, respondent's counsel reasserted his prior claim that the complainant was attempting to relitigate matters which were before Judge Fauver in the prior case, and that these matters were resolved by a prior settlement between the parties. As an example, respondent's counsel pointed out that contrary to the complainant's claim, he is in fact employed by the respondent as a truck driver, at the prevailing mine wage rate, and that his present employment status is in compliance with the terms of the prior settlement and Judge Fauver's Supplemental Decision of September 15, 1987.

During the course of the pretrial conference, the complainant stated that he has filed at least one separate additional discrimination complaint against the respondent (Tr. 7). At the conclusion of the conference, complainant's counsel requested to withdraw the instant complaint, and stated that "we plan to proceed on in other avenues" (Tr. 6). Respondent's counsel did not object to the request to withdraw the complaint, and it was granted from the bench (Tr. 6).

ORDER

The complainant's request to withdraw his complaint IS GRANTED, and this case IS DISMISSED.

George A. Koutras  
Administrative Law Judge