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DAVID LEE JACK V. THE HELEN MINING
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

DAVID LEE JACK,
COMPLAINANT

v.

THE HELEN MINING COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. PENN 88-138-D

PITT CD 87-15

Homer City Mine

DECISION

Appearances: Marvin Stein, Esq., Kuhn, Engle & Stein, Pittsburgh,
Pennsylvania, for the Complainant;
Henry J. Wallace, Jr., Esq., Reed, Smith, Shaw & McClay,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On February 22, 1988, Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (the Act) alleging, in essence, that the Respondent took a discriminatory disciplinary action towards him, ". . . as a result of my work-related accident, absences from work, and need for ear surgery in order not to lose my hearing." An Answer was filed on March 28, 1988.

Pursuant to notice, the case was scheduled and heard in Pittsburgh, Pennsylvania, on June 22, 1988. At the hearing David L. Jack, Ronald H. Rhoades, and Layton Thrower testified for the Complainant. W. Duane Landacre and Clark McElhoes testified for the Respondent. Complainant filed its posthearing Proposed Findings of Fact and Memorandum of Law on August 10, 1988, and Respondent filed its Proposed Findings of Fact and Memorandum of Law August 12, 1988. Each Party filed a Reply on August 22, 1988. Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.

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2. If so, whether the Complainant's suffered adverse action as the result of the protected activity.

3. If so, to what relief is he entitled.

Findings of Fact

Stipulated Facts:

Prior to the hearing the Parties stipulated with regard to the following facts as set forth in their Prehearing Stipulation:

1. Complainant David Lee Jack ("Jack") is an adult individual residing at 431 Oak Street, Indiana, Pennsylvania, and was employed by The Helen Mining Company as a miner, as that term is defined under 30 U.S.C.A. 802(g).

2. Respondent, The Helen Mining Company ("Helen") is a Pennsylvania corporation, a wholly owned subsidiary of the Valley Camp Coal Company and an employer in an industry affecting commerce as defined by Section 2(7) of the LMRA, 29 U.S.C.A. 802(h)(1). Its principal place of business is in Homer City, Indiana County, Pennsylvania.

3. Jack was employed by Helen as a miner from October 10, 1978 until July 24, 1987, when he was discharged pursuant to Helen's Chronic and Excessive Absence Control Program.

4. In December 1985, Jack suffered a serious injury to his hand while at work, and was off work for the first 6 months of 1986.

5. During the latter part of 1986, Jack was injured in a shuttle car accident in the mine and missed more than 2 weeks of work.

6. In January 19 1987, Helen implemented a Chronic and Excessive Absence Control Program (the "Program") for hourly employees at the Helen Mine.

7. On January 14, 1987, Jack received a warning under the Program because he exceeded the 10 percent and six occurrence standard set forth in the Program.

8. On April 14, 1987, Jack received a Last and Final Warning under the Program.

9. On May 1, 1987, Jack underwent an ear operation.
10. Jack was absent from work approximately 11 days after his ear surgery.
11. In the 3 months following issuance of the Last and Final Warning, Jack was absent 22 percent of his scheduled workdays.
12. On July 24, 1987, Jack was discharged on the basis that he failed to correct his high rate of absenteeism under Helen's Chronic and Excessive Absentee Program.
13. On July 28, 1987, a grievance was filed on Jack's behalf protesting his termination, which grievance was submitted for resolution to Arbitrator Edward J. Sedlmeier.
14. On August 15, 1987, Arbitrator Sedlmeier issued a Decision and Award upholding Jack's termination.
15. On September 4, 1987, District 2, United Mine Workers of America, and Local 1619, United Mine Workers of America, filed a Complaint in the United States District Court for the Western District of Pennsylvania at Civil Action No. 87-1880 seeking to set aside Arbitrator Sedlmeier's Decision and Award on the grounds, inter alia, that the Decision and Award does not draw its essence from the labor agreement and is contrary to public policy.
16. On April 29, 1988, United States District Judge Alan N. Bloch issued an Order granting Helen's Motion for Summary Judgment, dismissing the Complaint and finding that Arbitrator Sedlmeier's Decision and Award draws its essence from the collective bargaining agreement and is in the bounds of established public policy.

I adopt the above stipulated facts.

Findings of Fact

During the course of his employment with the Respondent, David L. Jack worked underground as an indoor laborer operating a shuttle car which exposed him to coal dust at the face. He also ran a bolter and had to shovel to keep the belt line free of coal. He also performed construction work which was not generally at the face. In general, each work day he would be assigned by his foreman to perform any of the above tasks.

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Jack, for approximately 2 years prior to May 7, had suffered from a perforated right tympanic membrane with a resulting hearing lost of 25 to 45 decibels in the right ear. In March 1987, his physician, Doctor Mino Karanjia recommended surgery. Jack, subsequently in March 1987, informed Clark McElhoes, Respondent's Superintendent, of the pending operation and inquired whether he would be discharged if he would take off 3 days in May for an operation, and McElhoes indicated that it would not. (Jack had testified that, when informing McElhoes in March 1987, of the pending operation, he did not specify that he would need 3 days off. I have adopted the version testified to by McElhoes due to my observations of his demeanor, and due to the fact W. Duane Landacre, Respondent's Personnel Manager, testified that, in an arbitration hearing, Jack had said that he told McElhoes that he would not be taking for off more than 3 days. In this connection, I note that in the Arbitration Decision, the Arbitrator indicated that Jack, when he scheduled the operation, expected to be out of work for 3 or 4 days. (RX 7, page 14)).

As a consequence of the right tympanoplasty performed on May 1, 1987, Jack was provided with a graft in his ear. According to Jack, 2 days after the operation, he returned to the office of Doctor Karanjia and at that time the latter asked him what kind of work he did and Jack said that he worked in a coal mine. Jack indicated at that time there was no discussion with regard to Jack's returning to work. Jack further said, that at that time he obtained a slip from Doctor Karanjia, that he would be off from work and turned it in to the mine clerk, a Mr. Rooke, who did not have any supervisory functions. However, Jack indicated that he did not read the contents of the note. A note entitled "Certificate to return to work or school" dated April 29, 1987, signed by Doctor Karanjia and stamped by the Respondent on what appears to be May 1, indicates that Jack has been under the latter's care and contains the following remarks: "for surg 5/1/87 - will be off work until further notice." (RX 11).

Doctor Karanjia, in his deposition, stated, in essence, that, on April 29, 1987, Jack indicated his occupation to him. He further stated that he first saw Jack after the operation on May 6 (Deposition page 33), and then saw him again on May 13. He said that he told Jack, in essence, that he could not go and work in the mines and "it will be up to you." (Deposition 17 Å 18). He explained, in essence, that the postoperative ear condition, ". . . is going to be effected by a lot of dust, coal dust that might go in and things might happen." (Tr. 17). He also

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indicated that there is a very high possibility that a postoperative ear condition can be infected if a person goes in mines and works with dust. He provided his opinion that the postoperative condition is unsafe and Jack should have been off work for at least 3 months.

However, there is nothing in the record to establish exactly when Doctor Karanjia told Jack not to go back to work at the mines. Jack testified that, when he saw Doctor Karanjia the second time after the operation, he was examined and given a slip "to return to work" which he gave to Rooke the following day and that he continued working that day and continued working for 2 weeks. (Tr. 20, 21) Rooke, to whom Jack testified that he had given the slip from Doctor Karanjia 2 days after the operation, did not testify. According to McElhoes he did not have any contact with Jack between the time Jack had asked him if he could take time off for an operation in March or April 1987, until the arbitration proceedings subsequent to Jack's discharge. Based on the above I find that, prior to Jack's return to work after his operation on May 18, 1987, he did not notify Respondent prior to the Arbitration Proceedings, that he refused to return to work as directed by his Physician in order to avoid infection and possible lost of hearing as a consequence of exposure to dust and coal dust.

Jack testified that on July 24, he was called into Respondent's office and McElhoes informed him that he was being discharged pursuant to the chronic absentee program as his absenteeism had exceeded 10 percent. Pursuant to the procedure in this program, Jack requested a meeting with Respondent's agents which was held on July 28. At that time Jack indicated that he had returned to work 11 days after the surgery under his doctor's instructions as the latter had wanted his surgery to heal properly, had given him a slip 2 days after the surgery, and intended to keep him off work.

Discussion and Conclusions of Law

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

The Commission, in a recent decision, *Goff v. Youghioghney & Ohio Coal Company*, 8 FMSHRC 1660 (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).

It has been further held by the Commission that, a miner's refusal to perform work is protected under section 105(c) of the Mine Act if it is based on a reasonable, good faith belief that the work involves a hazard. Pasula, supra, Robinette, 3 FMSHRC, 803 at 812; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), Aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir.1985). Perando v. Mettiki Coal Corp., 4 FMSHRC 491 (1988).

In essence, it is Complainant's position that from the time of his operation until his return to work, he had refused to work as directed by his physician in order to avoid infection and possible loss of hearing. Doctor Karanjia testified, in his deposition, that he told Jack, in essence, not to go back to work in the mines, because the postoperative condition would be effected by a lot of dust and coal dust, and that Jack should have been off from work for a minimum of 6 weeks. Accordingly to Jack, when he saw Doctor Karanjia for the first time, 2 days after the operation, there was no discussion with regard to his return to work. Also, accordingly to Jack, although Doctor Karanjia gave him a slip at that time which he took to Rooke, Jack did not read the contents of the slip. Further, the record is not clear as to exactly when Doctor Karanjia told Jack not to return to work in the mines. Also, Jack's duties entitled a wide range of work, including construction work which was not in the area of the face. Further, Jack was aware that Respondent provided its employees with ear muffs which covers the ear entirely and Jack agreed that to obtain such a pair all he had to do was go to the supply room and ask for them. I find, based upon this evidence, that Complainant has not established that during the time he was off from work after his operation, he had refused to perform work based upon a reasonable belief that the work involved a hazard.

Even assuming arguendo that the Complainant herein engaged in a protected activity in not working for 11 days subsequent to his operation, his case must fail, as Jack has not met his burden

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in establishing that he communicated to Respondent his refusal to work. As stated by the Commission in Secretary on behalf of Sedgmer, et al v. Consolidation Coal Company, 8 FMSHRC 303, at 307 (March 1986), "The case law addressing work refusals contemplates some form of contact or communication manifesting an actual refusal to work."

Jack asserts that his absence for 11 days subsequent to his operation on May 1, 1987, was a protected work refusal, and his discharge on June 24, was a violation of the Act. However, the record is devoid of any evidence that Jack, prior to his meeting with Respondent's agents on July 28, 1987, had communicated an actual refusal to work based on a belief that his working involved a hazard. According to Jack, when he met with McElhose some time in March 1987, prior to surgery, he merely informed him of the need of surgery and was told to go and have it. There is no testimony from Jack that at that time he communicated any refusal to work subsequent to the operation based upon a perception of any hazard. According to Jack's testimony, the only contact he had with Respondent's agents between his last day of work prior to the operation and his return to work on May 18, consisted of his presenting a slip to Rooke 2 days after the surgery. Jack did not testify to any conversation that he had with Rooke, nor did he testify with regard to the contents of the note that he presented to Rooke, as Jack had indicated that he did not read it. The note itself was not offered in evidence. Also, although a note dated April 29, 1987, from Doctor Karanjia, was in Respondent's possession indicating, in essence, that Jack will undergo surgery on May 1, 1987, and "will be off work until further notice," (RX 11), there is nothing in that note communicating specifically that Jack's contemplated absence would be to avoid exposure to hazardous aspects of his job. Further, had Jack clearly communicated to Respondent his refusal to work due to a fear of exposure to the hazards of dust and coal dust, it is likely that he would have been provided with ear muffs which would have alleviated the hazard of infection.

Therefore, for all the above reasons, it is concluded that the Complainant has not engaged in a protected activity under section 105(c) of the Act, and as such, has not established a prima facie case. Accordingly, Respondent's Motion for Summary Decision, made at the Hearing, is presently GRANTED and the Complaint is DISMISSED.

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ORDER

Based on the above Findings of Fact and Conclusions of Law,
it is ORDERED that this proceeding be DISMISSED.

Avram Weisberger
Administrative Law Judge