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E.L. BRUNO V. CYPRUS PLATEAU MINING
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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| ERNIE L. BRUNO,<br>COMPLAINANT | DISCRIMINATION PROCEEDING |
| v. | Docket No. WEST 88-157-D<br>DENV CD 88-07 |
| CYPRUS PLATEAU MINING CORPORATION,<br>RESPONDENT | Starpoint No. 2 Mine |

DECISION

Appearances: Gregory J. Sanders, Esq., Kipp & Christian, Salt Lake City, Utah, for Complainant; Kent W. Winterholler, Esq., Parsons, Behle & Latimer, Salt Lake City, Utah, for Respondent.

Before: Judge Morris

This case involves a discrimination complaint filed pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

The applicable portion of the Mine Act, Section 105(c)(1), in its pertinent portion provides as follows:

Discrimination or interference prohibited; complaint; investigation; determination; hearing

> 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, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine .... 30 U.S.C. 815(c)(1).

After notice to the parties a hearing on the merits was held in Price, Utah on September 13, 1988.

Complainant filed a trial brief and respondent filed a posthearing brief.

## Applicable Case Law

The general principles of discrimination cases under the Mine Act are well settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in a protected activity, and (2) the adverse action complained of was motivated in any part by that particular activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797Ä2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817Ä18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir.1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958Ä59 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194, 195Ä96 (6th Cir.1983) (specifically approving the Commission's PasulaÄRobinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397Ä413 (1983) (approving nearly identical test under National Labor Relations Act).

## Issues

The issues are whether the complaint herein was timely filed; whether complainant was engaged in a protected activity at the time of the alleged discrimination and whether the operator would have taken adverse action in any event against complainant irrespective of any protected activity.

Filing of Complaint

The discharge of Ernie L. Bruno, on December 12, 1983, generated two lawsuits. The initial lawsuit was filed in the State of Utah District Court some 19 months after the termination. Bruno had instructed his attorney to get his job back because "he was judged on a different basis than anyone else". Bruno's claim was denied in the Utah trial court as well as on appeal (Tr. 43, 44, 76, Ex. RÄ5).

After talking to another miner Bruno learned for the first time that he had a right to file a complaint with MSHA. Such a complaint was filed and after its investigation MSHA concluded that no violation of Section 105(c) had occurred. Bruno filed a statement disagreeing with MSHA and on March 28, 1988, he filed a pro se complaint with the Commission. The basis of his complaint was that he had been fired for being in a fight. Specifically, he had been treated differently than any other employee. (The Judge agrees that fighting may be unsafe, but it is clearly not an activity protected under the Act), Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984).

Subsequently, on April 18, 1988, Bruno filed additional information with the Commission setting forth allegations involving coal float dust and giving this as the real reason for his dismissal. Bruno states that if he had known about his Section 105(c) rights in 1983, he would have immediately filed with MSHA. But he had never seen a poster advising him of such rights. (Footnote 1) (Tr. 32, 41Ä42, 46, Ex. RÄ10).

Witness Stan Warnick, Manager of Human Resources for Cyprus Plateau Mining Company, was not involved in the decision to terminate Bruno (Tr. 278Ä279). Paul Kelley and Bill Bergamo investigated a fighting incident between Bruno and Steve Stoker. Their decision to terminate was confirmed by their supervisor, Larry Rodriguez (Tr. 279Ä280). The company's investigation revealed that Bruno assaulted Steve Stoker, a fellow worker. The assault occurred in the company kitchen. He was discharged for that reason (Tr. 281).

Bergamo, the underground superintendent, is no longer with the company and lives in California. Kelley is no longer with the company and lives in the Salt Lake City area. Rodriguez does not have a current position with Cyprus Plateau Mining Company and Warnick understood that he was with Texaco (Tr. 281Ä283). Warnick did not know how to reach Rodriguez. However, he supposed he could find Bergamo but he had not made any attempt to find Kelley (Tr. 292Ä293).

## Discussion

The Commission has held that the time limitations contained in Section 105(c) of the Act were not intended to be jurisdictional and dismissal of a complaint for late filing is justified only if the operator shows a material legal prejudice attributable to the delay. Secretary ex rel. Hale v. 4ÄA Coal Company, Inc., 8 FMSHRC 905 (1986); Herman v. Imco Services, 4 FMSHRC 2135 (1982).

In this case such material legal prejudice exists: the individuals who investigated and determined that Bruno should be fired are no longer with the company. In addition, after a delay of over four years, it is questionable whether these individuals would have a present recollection of the events surrounding Bruno's alleged discrimination and termination. This is particularly true inasmuch as the uncontroverted evidence shows that the persons involved in the decision to terminate Bruno for fighting had not been advised of any alleged protected activity involving the float coal dust.

For these reasons I conclude that the complaint filed herein, more than four and one-half years after the incident, was not timely filed.

However, it is appropriate to review the case on the merits.

## Protected Activity

In December 1983, Bruno was working a normal workweek running a shuttle car and he was part of a nine-man crew. Roger Skaggs was the face foreman.

Bruno's duties required him to operate his shuttle car in an unsafe area. In particular, one of the entries was "clear

full" of float coal dust. (Footnote 2) Some of it was suspended and about a foot deep in some places. This condition plugged up his nose and his visibility was impaired (Tr. 25). The first day when he started running his car through the area he told Skaggs about it (Tr. 45Ä47). Skaggs said he would check with the material man who was responsible for watering down the roadways and maintaining them (Tr. 27). The situation remained the same. When Skaggs was again approached on the subject, he explained that the material man had not gotten to the problem (Tr. 28). After five days the condition remained the same, so Bruno shut down his buggy and went over and watered down the area. The watering took 15 to 20 minutes (Tr. 30Ä31). The same day that he had watered the area down, Skaggs asked him if he had shut down the shuttle car. When he confirmed that he had shut it down, Skaggs started "screaming and yelling" and told him never to shut down the shuttle car. (Footnote 3) If he did he would be taken off of the buggy (Tr. 31). Bruno replied that he should have the right to shut down the shuttle car and water the float coal dust (Tr. 32).

Several days after the conversation about shutting down the shuttle car Skaggs told Bruno that it was Steve Stoker who had told him that Bruno had shut down the car. (Stoker had been Bruno's helper for many years.) (Tr. 33). When Bruno confronted him, Stoker denied having made such a statement. Bruno told Stoker not to make any more trouble (Tr. 33Ä35).

Ten days to two weeks later, about December 8, 1983, Bruno again became irritated with Stoker. This arose because some miners were not wearing safety glasses; Stoker thought the company should know about it (Tr. 35Ä36).

When Bruno went to lunch that day he was relieved by fellow worker Ron Dalton who described Stoker as a "troublemaker". Bruno was upset. As he went to the lunchroom he thought about Stoker and slowly came to a "boiling point" (Tr. 37).

Stoker came into the lunchroom. Bruno immediately got up and approached him. Bruno said Stoker was nothing but a troublemaker. He then struck him a couple of time. Stoker didn't hit back; he had a bloody nose. The incident lasted five or six seconds (Tr. 37Ä38, 104Ä105).

Bruno then apologized for hitting him and they talked to each other and then went back to work (Tr. 39). Bruno finished the shift and went home. He later received a call from Paul Kelley, head of the Human Resources Department. At a conference with Bruno, Bill Bergamo, and Rulen White, the men asked Bruno about the fight and he was asked if he had struck Stoker. When he admitted it he was told to call back to learn of the committee's decision. On December 12, 1983, Bruno was told to choose between being fired or resigning. Bruno decided to resign because he was going to be fired (Tr. 40Ä42, 65, 76, Ex. RÄ4).

Bruno instructed his original attorney that he wanted to be reinstated (Tr. 72, 73). The float coal dust incident was not raised in the earlier State of Utah lawsuit (Tr. 77).

## Discussion

The threshold matter to consider here is whether Bruno's affirmative action of self help in watering down the entry was an activity protected under the Act.

In Robinette, supra, the Commission observed that occasions will arise where mere ceasing of work will not eliminate or protect against hazards while adjusting or shutting off equipment will do so. In such cases such affirmative action may represent the safest and most responsible means of dealing with the hazard. Robinette, 3 FMSHRC at 808; Wiggins v. Eastern Associated Coal Corporation, 7 FMSHRC 1766 (1985).

It could be argued that Bruno's act of shutting off the continuous miner and watering down the entry was not an integral part of a protected work refusal. However, on the authority of Robinette and Wiggins, I assume that the activities of Bruno in shutting down the miner and watering down the entry were protected under the Act.

Accordingly, it is necessary to further evaluate the evidence.

The Commission has previously observed that direct evidence of motivation is rarely encountered in a discrimination case and that motivation may be drawn from circumstantial evidence showing such factors as knowledge of the protected activity, coincidence in time between the protected activity and the adverse action and disparate treatment. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds, 709 F.2d 86 (D.C.Cir.1983); Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (1984). It is, accordingly, appropriate to analyze the evidence concerning these cardinal features.

## Knowledge of Protected Activity

The face boss, Roger Skaggs, knew Bruno had shut down the miner to water the entry. But Skaggs did not relay this information to anyone else. Skaggs' testimony on this point is both credible and uncontroverted. Skaggs neither participated in the decision to fire Bruno and the float coal dust incident was never reported to the committee that considered the discipline for the Bruno/Stokes fight (Tr. 206). This view of the evidence is further confirmed by Bruno who agrees he didn't have an opportunity to say anything about the float coal dust incident when he was fired (Tr. 76). Nor was it raised in the earlier State of Utah law suit (Tr. 77). In addition, Bruno admits the company was first made aware of his discrimination claim in June 1988 (Tr. 84).

## Coincidence in Time

I do not find any coincidence in time between Bruno's protected activity and his discharge. Approximately ten days to two weeks elapsed from the protected activity and the fight in the lunchroom between Bruno and Stoker. No adverse action was taken during this period. On the other hand, it was only a few days from the time of the lunchroom fight until Bruno was discharged. This indicates Bruno was fired because of his fight with Stoker.

## Disparate Treatment

A review of the evidence concerning disparate treatment is necessary since Bruno claims he received disparate treatment. Specifically, other miners had engaged in fights and had not been terminated. (This was Bruno's contention when he originally filed his case in Utah District Court.)

The evidence shows that Bruno had observed other fights in the mine (Tr. 46). He had observed a fight between Chad Tabor and Larry Mardoch (Tr. 50). He was also present on three different occasions when altercations occurred. Two of them were in the section where he was working and one was in the bathhouse (Tr. 50). In addition, fighting has always gone on and it was a common occurrence at the mine (Tr. 84). Bruno had never had a fight with any supervisory personnel or any other fellow employee at the mine (Tr. 105). However, on a previous occasion, Bruno admits he was involved in an incident with fellow employee, Meade. This occurred when Meade swore at Bruno on two different occasions. On the second occasion, Bruno pushed him and told him not to talk to him like that (Tr. 109). According to Bruno it was not a fight (Tr. 110). However, at the time of the termination interview with Bergamo, Bruno was asked about the Meade incident (Tr. 111).

Witness EARL MARCHELLO had observed fighting on the company's premises. Particularly he recalled Bob Bennett and Ben Darling (Tr. 117). The Bennett fight occurred underground and it was after Bruno had been terminated. Skaggs was a supervisor of the crew but did not see the fight (Tr. 117Ä121).

Witness IVAN GAGON had seen a fight between Chad Tabor and Bud Weaby where blows were exchanged. The men were not terminated for fighting. The witness also heard of other fights over the years but was not aware of any employee dismissed for fighting (Tr. 128Ä130). However, both men were called in and were "talked to" by Bergamo and Snyder (Tr. 133).

Witness KEVIN WOODS had seen three or four fights over the years at the mine. He had seen a foreman present at those fights on two occasions. The witness himself was involved in one altercation and received a letter of reprimand from the company in May 1984. Woods was not dismissed but he did receive time off (Tr. 137Ä139). Bruno was the only one terminated for fighting (Tr. 140). The witness was not aware of anyone terminated for fighting (Tr. 146).

The witness was involved in a fight in the mine with Daniel Gagon (Tr. 148). The fight occurred at the TwentyÄMile Coal Mine in Colorado managed by Plateau and still owned by it. A letter of reprimand was issued (Tr. 151) (Ex. RÄ13). As a result of the fight Gagon received a similar letter (Tr. 151). Both men were suspended for three days (Tr. 152).

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Witness MAYO O'HERRON had observed four or five fights over the years and been involved in fights himself. In 1979 he received three days off without pay and he was told if he lost his temper again he would be fired (Tr. 163). O'Herron was not aware of anyone who had been terminated for fighting in the mine (Tr. 164)

Witness ERNEST PRETTYMAN had a fight about five years ago on the mine premises with John Haughter. Prettyman was not terminated because the other party "had it coming". Prettyman knew it was against company policy to fight on the premises (Tr. 170, 173).

Witness VOPEL LANDER had seen fights, one involving a company official who took off his miner's hat and belt and called on the entire crew to fight him. This was in 1981 or 1982. The company official was Cary Jensen (Tr. 182Ä183). The witness also broke up the fight between Chad and Buddy Weaby. The face foreman witnessed this fight and Weaby quit rather than go back into the mine (Tr. 184Ä185). He also saw a fight between Chad Tabor and Randy Mabbutt (Tr. 185). The TaborÄMabbutt fight was in 1977 but no company officials were present (Tr. 186). He also heard about Bruno's altercation as well as Prettyman's altercation (Tr. 187).

Respondent's witness ROGER SKAGGS indicated the committee stated they had to make an example of Bruno and it was hoped the fighting would quit on the property (Tr. 206Ä207). Bruno was terminated for fighting (Tr. 207).

Witness DAVE DONALDSON, Human Resources Representative for the respondent, has been so employed for three and one-half years (Tr. 217). In 1983 it was against company policy to fight underground and you could be terminated if you were caught fighting (Tr. 219Ä220).

The standards of conduct at the Getty Oil Company prohibited fighting (Tr. 221).

Donaldson started working at this site in 1981 for the then operator, United Nuclear Company. The next owner-operator was Getty Oil in 1982 and the subsequent operator (in 1984) was Texaco (Tr. 242Ä243). Cyprus Minerals Company acquired the property in March 1986. Plateau Minerals is the parent company of Cyprus Plateau Mining Company (Tr. 244).

The Getty booklet contains a prohibition against fighting or horseplay. The booklet states that disciplinary action may be taken. It may include discharge (Tr. 248).

Witness ARNOLD SHAW, Director of Safety for Plateau Mining, described how safety complaints are handled at the company. The witness had never had a complaint about float coal dust (Tr. 250Ä254).

Witness STAN WARNICK, Manager of Human Resources for respondent, felt that the discharge of Bruno was consistent with company policy concerning assaults or fights. Company policy stated that discipline would be invoked if it appeared appropriate for the incident (Tr. 281). As a result of the altercation with Bruno and Stoker, Stoker received a written warning that any further involvement would result in further discipline. There are two sets of rules relating to fighting: one is a safety guideline that prohibits it, and the second is Getty's standards of conduct that prohibit it. Both documents state that discipline could be imposed depending upon the circumstances (Tr. 286).

According to the company's records three employees have been terminated for fighting. One was Bruno and the others were Buddy Weaby and Dennis Craig who was terminated in April 1982 (Tr. 287). There has always been some form of discipline when management was aware that the fighting had taken place. The company's policy remains the same (Tr. 288).

In the witness's view, Bruno was terminated for assaulting another employee. An assault is more serious than a fight (Tr. 300). However, there is nothing in the company guidelines that distinguishes assault from any other kind of a fight (Tr. 300Ä301).

## Evaluation of the Evidence

In evaluating the evidence concerning disparate treatment I credit the operator's evidence. Bruno's witnesses, as to fighting on the premises, would no doubt know the circumstances under which a particular fight occurred. However, Warnick, as manager of Human Resources would be in a position to know whether employees who have engaged in fights known to the company had been terminated. He testified that Weaby and Dennis Craig (and Bruno) were terminated (Tr. 287, 288).

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Further, I am not persuaded by Bruno's arguments that he received disparate treatment: it is not necessary to distinguish whether the Stoker incident was an assault or a fight but, in any event, Bruno was clearly the aggressor. In whatever fashion the incident is categorized, the Stoker fight was not Bruno's first incident. Bruno indicates the event involving Leroy Meade was "not a fight" (Tr. 110). However, it was a fact discussed during Bruno's termination interview with Bergamo (Tr. 111).

In sum, if Bruno had established that he was terminated in part because of protected activity, I would nevertheless conclude that respondent was motivated by unprotected activities and would have taken the adverse action for the unprotected activities alone; i.e., Bruno's fight with fellow worker Stoker in the lunchroom.

For the foregoing reasons, I conclude that complainant has not established that respondent discharged or otherwise discriminated against him in violation of Section 105(c) of the Act.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that the complaint and proceedings herein are dismissed.

John J. Morris
Administrative Law Judge

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1 I credit the operator's evidence that there were many MSHA posters in prominent places in the mine. If there had not been such informational posters, an MSHA inspector would have issued a citation to the operator. No such citation was ever issued. (Tr. 224Ä227, 255, RÄ11A through I). Further, Bruno's witnesses Marchello, O'Herron and Lander confirm that the posters were present (Tr. 116, 117, 166, 168, 188).

~Footnote_two

2 The Secretary's regulation, 30 C.F.R. 75.400 provides as follows:

[Statutory Provision]

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

~Footnote_three

3 Skaggs admits he "got on" Bruno for shutting down production but not for watering the entry (Tr. 209). A continuous miner will not operate without water (Tr. 79).