

CCASE:
JOHN DIXON HACKER V. BLACK STREAK MINING
DDATE:
19890303
TTEXT:

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

JOHN DIXON HACKER,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 89-1-D
MSHA Case No. BARB CD 88-57

BLACK STREAK MINING,
RESPONDENT

ORDER TO SHOW CAUSE

Statement of the Case

This proceeding concerns a complaint of discrimination filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The official file reflects that Mr. Hacker filed his complaint on August 15, 1988, with the Secretary of Labor, Mine Safety and Health Administration (MSHA) District 7 Field Office. The complaint states as follows:

At the end of our shift I ride the left outside. On 7/25/88 while riding the belt to the surface I observed a rock fall on the belt and where the fall was the belt was cribbed on both sides. When I jumped off the belt I hit one of the cribs and it threw me back into the belt structure. As of this date I have received no workman compensation. I have been told that I no longer have a job at this company.

I want my job back with backpay. Also I want the workman's compensation due me and all my medical bills paid.

The complaint states that Mr. Hacker was employed by the respondent as a Belt Head Man at a salary of \$6 an hour, based on a 40-hour work week. His overtime rate of pay is shown as \$9 an hour, and that he worked 8 hours of overtime each week during the 12-month period preceding the date of his complaint. The complaint shows that Mr. Darrell Middleton is the

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President of the respondent company, and that Mr. Wendell Middleton is the Vice-President.

In a statement given to an MSHA special investigator on August 19, 1988, in the course of an investigation of his complaint, Mr. Hacker stated that he began his employment with the respondent in October, 1987, and that Mr. Wendell Middleton instructed him to ride the belt into the mine to his work station, while the rest of his crew rode the scoop. Mr. Hacker stated further that while it was illegal to ride the belt, he believed that if he complained, "I wouldn't have a job." Mr. Hacker stated that he also rode the belt out of the mine at the end of his shift because it was not practical for him to crawl to the section and ride the scoop out.

Mr. Hacker stated that approximately a week prior to his injury on July 25, 1988, MSHA Inspector Chalk Myers, was in the mine, and that he (Hacker) told Mr. Myers that he rode the belt into the mine, and although the belt had a stop cord, it did not work. Mr. Hacker stated further that he also informed Mr. Myers that at various times other miners also rode the belt, and that no one preshifted the area where he worked alone. Mr. Hacker stated that Inspector Myers "cited several violations to the company." Mr. Hacker stated that Inspector Myers "wanted me to call the face and have the No. 2 belt shut down so he could make some electrical checks, but they wouldn't do it."

Mr. Hacker stated that on the morning of July 25, 1988, when he rode the belt into the mine, he observed rock falling on the No. 1 belt, and when he rode the belt out he observed a large rock fall across the belt, and in order to avoid the rock, he jumped off the belt and struck a crib which was adjacent to the belt. When he later left the mine, he realized he was injured and went to a hospital where he was x-rayed and given a shot and told to stay off work 3 days. Two days later he was admitted to the Pineville, Kentucky, hospital for 9 days.

Mr. Hacker stated that he sent doctor's excuses to Mr. Middleton through another miner, and that his wife telephoned Mr. Middleton from the hospital, but that Mr. Middleton informed his wife that when he (Hacker) left the mine on July 25, he was "o.k." and that no accident had occurred.

Mr. Hacker stated that when he subsequently called Mr. Wendell Middleton on August 16, 1988, to inquire if he still had his job, Mr. Middleton informed him that as far as

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he was concerned, Mr. Hacker had quit his job. Mr. Hacker stated that when he attempted to tell Mr. Middleton what had happened to him, Mr. Middleton would not listen to him and that "he told me to sue him."

By letter dated September 15, 1988, MSHA advised Mr. Hacker that it had investigated his complaint, and after a review of the information gathered during the investigation, made a determination that a violation of section 105(c) of the Act did not occur. Mr. Hacker was advised of his right to pursue the matter further by filing a complaint on his own behalf with the Commission within 30 days of MSHA's notification letter.

By letter dated September 26, 1988, Mr. Hacker filed his pro se complaint with the Commission, and it was received and docketed on October 4, 1988. His letter states in pertinent part as follows:

I have lost my job due to an injury that I received while being employed by Black Streak Mining. I have filed a workmen's comp. claim. I have yet to receive workmen's comp. or anything due to this injury. I want to know from you all is it right to lose your job while under a doctor care? I have doctor's statements and x-rays due to this condition, and I also have witnesses stating verification of getting treated by a doctor at the emergency room in Pineville at the hospital.

In addition to his complaint letter, Mr. Hacker submitted copies of his prior complaint statements made to MSHA, a copy of MSHA's letter of September 15, 1988, rejecting his complaint, and copies of certain hospital records incident to certain treatment he received on July 26 and August 4, 1988. Mr. Hacker subsequently submitted a letter to the Commission on October 21, 1988, stating that a copy of his complaint had been served on the respondent by certified mail, and he included the original postal service certified mailing receipt which reflects that it was received by the respondent on October 12, 1988.

On December 27, 1988, the Commission's Chief Administrative Law Judge Paul Merlin issued an order requiring the respondent to file an answer to Mr. Hacker's complaint, with the Commission within 30 days. The respondent was advised that if it did not file an answer it would be assumed that it has admitted the alleged acts of discrimination and that a

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default judgment would be entered against the respondent granting Mr. Hacker any relief to which he may be entitled. The postal service certified mailing receipt reflects that the respondent received Judge Merlin's Order on January 7, 1989. However, the respondent has not complied with the order, and has not filed an answer to Mr. Hacker's complaint. Nor has it filed a response to Judge Merlin's order directing it to file an answer.

Discussion

The Commission's rules governing discrimination complaints filed pursuant to section 105(c) of the Act are found in Part 2700, Title 29, Code of Federal Regulations. Rule 40(b), 29 C.F.R. 2700.40(b), provides as follows:

(b) * * * A complaint of discharge, discrimination or interference under section 105(c) of the Act, may be filed by the complainant miner, representative of miners, or applicant for employment if the Secretary determines that no violation has occurred, * * * .

Commission Rule 42, 29 C.F.R. 2700.42, provides as follows:

A complaint of discharge, discrimination or interference shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.

Commission Rule 43, 29 C.F.R. 2700.43 provides that within 30 days after service of a complaint filed by the complaining miner, the respondent mine operator shall file an answer.

The Commission rule governing summary disposition of any proceeding filed pursuant to its rules is Rule 63, 29 C.F.R. 2700.63, and it provides as follows:

(a) * * * When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.

The pleadings in this case, including the complaint and information supplied by Mr. Hacker in support of his claim of

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discrimination, reflect that his employment with the respondent was terminated on or about August 16, 1988. The respondent apparently takes the position that Mr. Hacker quit his job, and Mr. Hacker asserts that he was unable to return to work because of an alleged injury suffered when he jumped off a moving belt to avoid a falling rock, and that when he attempted to explain the circumstances of his failure to return to work, the respondent took the position that no accident or injury occurred, that Mr. Hacker quit his job, and that if Mr. Hacker wanted his job back, respondent invited him to sue.

Although Mr. Hacker's claim for workmen's compensation as a result of his alleged job-related injury, does not on its face present a viable discrimination complaint within the Commission's jurisdiction, his complaint does raise an inference that his job was terminated because of his informing an MSHA inspector approximately a week prior to his injury that he was instructed to ride the belt to his work place by the respondent's vice-president, and that riding the belt was illegal. Mr. Hacker purportedly informed the inspector that riding the belt was illegal, that the belt stop-cord was inoperative, and that he worked alone and his work area was not preshifted. According to the complaint, after Mr. Hacker's conversation with the inspector, several violations were served on the respondent, and there is a inference that these asserted violations were related to his riding the belt, the defective stop-cord, and the failure to preshift his work area. In these circumstances, there is a further inference that Mr. Hacker's termination may have resulted from his conversation with the inspector, and the asserted violations which followed. Since a miner has a protected right to bring any alleged violative mine conditions to the attention of an inspector, he may not be discriminated against by the respondent for exercising this right, and if the respondent terminated him for this reason, Mr. Hacker has established a prima facie complaint of discrimination. At this stage of the proceeding, and in view of the respondent's failure to file an answer, the complaint stands un rebutted.

The record in this case reflects that the respondent has failed to file an answer to the complaint as required by Commission Rule 29 C.F.R. 2700.43, and that it has also failed to respond or comply with Judge Merlin's order directing it to file an answer.

ORDER

In view of the failure by the respondent to comply with the Commission's rule requiring it to file an answer to the complaint, and in view of its further failure to respond to Judge Merlin's Order, the respondent IS ORDERED TO SHOW CAUSE, that is, to explain or state why it should not be held in default and a summary judgment entered against it finding that it has discriminated against Mr. Hacker in violation of section 105(c) of the Act, and granting the relief requested by Mr. Hacker.

The respondent IS FURTHER ORDERED to file its response to this order within thirty (30) days of its receipt.

George A. Koutras
Administrative Law Judge