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

STENSON BEGAY, COMPLAINANT
v.

LIGGETT INDUSTRIES, INC., RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. CENT 88-126-D
DENV CD 88-09

DECISION

Appearances: Earl Mettler, Esq., Mettler & LeCuyer, Albuquerque, New Mexico, for the Complainant; Charles L. Fine, Esq., O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, Phoenix, Arizona for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Complainant filed a complaint with the Commission under 105(c) of the Federal Mine Safety and Health Act of 1977, 3 U.S.C. 815(c) [hereinafter referred to as the Act] on June 26, 1988, alleging essentially that because he believed that his health and safety were endangered by inadequate ventilation of welding fumes and noxious gases from his working spaces he was compelled to quit his employment. This is a constructive discharge case. Complainant seeks reinstatement, back pay, attorney fees and any other allowable compensation that the Commission may order.

Pursuant to notice, this case was heard in Gallup, New Mexico on January 26 and 27, 1989. Both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record in making this decision.

STIPULATIONS

Pursuant to my prehearing order, the parties stipulated to the following:

1. This case arises under 105(c) of the Federal Mine Safety and Health Act of 1977.

2. Respondent, Liggett Industries, Inc., was a contractor performing work at the McKinley Mine, a coal mine, owned and

operated by Pittsburg & Midway Coal Company, Inc. (P & M Coal), which is located in northwest New Mexico.

3. Respondent's contract consisted (in major part) of the erecting and installing of two 1370W dragline bases. There were two contracts, one involving the bases on the north site, which lasted from May to October 1987; and the other contract involved the bases on the south site which commenced in October and concluded on January 29, 1988 for welders.

4. Complainant's hourly rate was $15.26 per hour and his fringe rate was $1.19, which totals $16.45 per hour. Complainant worked 40 hours per week. If he had not quit on December 10 and had worked each work day through January 29, 1988 (the date the last welder was laid off on the project), he would have worked 280 hours. Multiplied by $16.45, he would have earned gross wages in the amount of $4,606.00.

FINDINGS OF FACT

1. Complainant is a certified welder and has worked in the construction industry as such for approximately 13 years.

2. Respondent, at all times pertinent hereto, was a contractor engaged in equipment erection and maintenance for the mining industry.

3. During 1987, and early 1988, respondent was performing work, constructing two dragline bases or tubs, at the McKinley Mine, operated by the Pittsburg and Midway Coal Company (P & M) near Gallup, New Mexico.

4. Complainant started working for respondent as a welder on May 26, 1987 on the first of the two dragline bases that respondent assembled at the McKinley Mine. The second project, called the south site project, started sometime in October 1987 and the welders started actually welding inside the base during mid-November 1987. On December 10, 1987, after a meeting and confrontation with management, complainant walked off the job and for all intents and purposes quit his employment with respondent. It is this "quitting" that the complainant now alleges was a constructive discharge.

5. Each dragline base, or tub, was round and approximately 60 feet in diameter. It initially was assembled in pie-shaped sections, made-up of compartments. Each compartment is approximately four cubic feet in volume.

6. The compartments were fitted together and subsequently welded together and to the base itself.

7. There were fourteen manholes on the top of the tub, leading from the top of the base into the tub, from which smoke from inside the tub could escape.

8. There were also seams between the pie-shaped sections from which smoke could escape, at least until such time as those seams were welded up. This was one of the last procedures performed.

9. As of December 10, 1987, there were a maximum of eleven welders working on the base and in the tub at any one time. Typically, eight to ten welders were welding inside the base at the same time.

10. There were passages throughout the tub that the welders could move through from one compartment to the next by crawling through holes in the compartment walls.

11. The south site project was located on top of a hill in an area that was usually very windy. However, wind was not relied upon by the respondent to ventilate the base.

12. A canvas tent was positioned over the base. At times the sides of the tent were completely down around the circumference of the base and at other times the tent sides were rolled up or at least partially rolled up.

13. Welding on the south site project began in approximately mid-November of 1987.

14. At various times there were differing amounts and types of ventilation equipment available to clear the smoke and fumes from the working spaces inside the tub. There were at all times pertinent hereto, ten MSA air movers, sometimes referred to as "air horns" available. However, these were not actually used on the south site project ostensibly because they were compressor-powered and the compressor available did not have adequate capacity to operate them. There were also two SuperVac fans available and in use, as well as two or three household fans, by early December of 1987. Most significantly, there were five Dayton blowers available and in use from mid-November until December 9, 1987, when a sixth Dayton blower was acquired and put into service.

15. The two SuperVac fans were sometimes used by positioning one at one end of the base, on top, so that it would bring air into the canopy under the tent and the other at the opposite end of the base, also on top to exhaust air out from under the tent. The SuperVacs were capable of moving 9,200 cubic feet of air per minute. However, in this configuration they were not useful for exhausting smoke from inside the compartments where the welders were actually working, creating smoke and fumes. They were useful for maintaining airflow and removing some smoke from the

base area under the tent. The SuperVacs were also tried with fittings and hoses running down into the compartments in an attempt to pull air out of the compartments (and smoke along with it), but these attempts met with mixed results, at best.

16. The household fans on the top of the base did not contribute in any significant way to ventilation inside the tub.

17. The most significant ventilation of the compartments inside the base was accomplished by the Dayton blowers. They exhausted fumes and smoke from the compartments by suction. The Dayton blowers physically sat on top of the base. Flexible hose was used to bring the fumes and smoke from the compartments to the Dayton blowers, where it was then exhausted into the canopy under the tent on top of the base, and dispersed to some extent there by the SuperVacs and the wind, depending on the configuration of the tent sides.

18. Fresh air from outside the atmosphere that existed underneath the tent was never brought into the base where the welding was going on. Although the evidence is conflicting about the atmosphere inside the tent above the base, I find that it was generally smokey a majority of the time. Therefore, when one of the SuperVacs was put over a manhole to force air into the base, the air that went in was no better than that which was inside the tent.

19. Various kinds of welding was done inside the tub, including innershield or wire welding, stick welding and are gouging. This welding created extremely smokey conditions inside the tub where the welders were working inside the compartments as well as noxious fumes.

20. Both the Occupational Safety and Health Administration (OSHA) and the American Welding Society have published standards for ventilation for welding in closed spaces. Ms. Cheryl Lucas, testifying as a certified industrial hygienist for the complainant established that when the Dayton blowers were used with a T-coupling by two welders, as they most often were, the flow volume for each welder is reduced by half and does not meet the OSHA standard, even if all the other conditions specified in the standard are met, which they were not. She also opined that the ventilation set-up did not meet the American Welding Society standard.

I am satisfied that the ventilation inside the tub met neither standard despite the failure of Ms. Lucas to consider the effect of some of the smoke escaping via other routes such as rising up though the manholes or seams in the compartments, the other fans in use or the wind. In my opinion, which is also hers, the only significantly effective mode of ventilation inside the tub was the Dayton blowers and that is what her testimony focused on.

I hasten to add here as an aside at this point, however, that whether the ventilation at respondent's project met either of these standards or not is not directly at issue in this case and therefore I am not going to go into great detail in analyzing it. The basic issue in this case remains whether the complainant's work refusal was based upon his reasonable and good faith belief that his working conditions were unsafe and/or unhealthful due to inadequate ventilation. There was no testimony that complainant knew of or was relying on any technical standards as a basis for forming his beliefs. Neither did the respondent compare their ventilation system with any published standards for airflow. The respondent also did not introduce any evidence to the effect that the ventilation in the tub did meet OSHA standards, or any published standards, for that matter. Respondent does insist that the ventilation was adequate based on experience in the industry. I find, however, that it was not.

21. The first complaint the complainant ever made to any supervisor or manager of respondent was made during a regular safety meeting on November 23, 1987. At that time they (the welders) were just about finished with the vertical welding and were going to be starting on the overhead and flat welding. Complainant told General Manager David Jones that the fume exhausters (the Dayton blowers) were not adequate for the overhead welding, and that more ventilation equipment was needed. He related that on these type of welds the distance between the welding and the end of the air hose could be as much as two feet. The point being that at this distance the blowers would not adequately capture the smoke and fumes from the innershield welding.

22. Mr. Jones told complainant he would pass on the complaint to Mike Eslinger, the welding foreman. He also ordered another blower and more fire-proof hose which were ultimately received and put directly into service before complainant left the job.

23. The next incident occurred on November 30, 1987. On that day, Dave Johnson, another welder, made a statement to Mike Eslinger that "it was real smokey" and if the ventilation did not improve he would quit. Eslinger told Johnson to "go ahead, he didn't care". Complainant overheard this exchange and responded to Eslinger's comment by stating that he (Johnson) wasn't going to be the only one leaving. At this juncture, Eslinger said he would take care of it (the ventilation problem).

24. Complainant testified there was one other occasion prior to November 30, 1987 that he had informed Eslinger that he felt it was very smokey inside the tub especially when two or three welders were working in close proximity to each other. Eslinger stated he would tell Jones.

25. Complainant allegedly experienced coughing, productive of mucus and blood and other respiratory symptoms while working on the project, and was seen by a doctor on December 7, 1987, for respiratory complaints. However, I find that there is no evidence to show that his respiratory difficulties, to whatever extent they existed, were caused by working for respondent. Complainant did not return to the doctor between December 7, 1987 and February 15, 1988. At that time, his symptoms had increased in severity even though he had not worked for respondent or anyone else since December 10, 1987. The doctor diagnosed pneumonitis probably secondary to industrial gases. There is no evidentiary basis in the record, however, for finding that "probability" to be grounded in fact. I am not holding that complainant's respiratory difficulties were not caused by the smoke and fumes he encountered on the job. I am stating that there is insufficient evidence to prove-up that proposition. However, I will take administrative notice that working in a smokey environment is not a positive factor for someone who has a respiratory ailment, whatever its etiology.

26. Other welders who worked on the project and testified at the hearing also experienced dizziness and coughing up of mucus and blood which they attributed to welding on the respondent's project. They also believed that the ventilation in the tub was inadequate.

27. On December 9, 1987, General Manager Jones advised Eslinger that he wanted to have a meeting of all personnel the following morning, December 10, 1987, because he had recently noticed that the employees were abusing their lunch break and were leaving work early.

28. At the meeting on the morning of December 10, 1987, ventilation was also discussed. Stenson Begay testified that the following exchange took place (TR. I, pp. 65-67):

> Q. Now, was ventilation discussed at a meeting on December 10th?
>
> A. Yes.
>
> Q. Can you tell me who spoke first at that meeting?
>
> A. Dave Jones.
>
> Q. And what did he say?
>
> A. He said the problem was brought to his attention by Mike Eslinger on the ventilation.
>
> Q. And what else did he say?

A. And he said that this should have been brought to his attention ahead of time, and I interrupted him.

Q. And what did you say?

A. I told him that, "Excuse me, Dave, but this was brought to your attention on November 30th by myself."

* * * * * * *

Q. You're referring to - November 30 or November 23rd?

A. November 23rd.

Q. And did you say anything more in addition to reminding him that you had brought it up before?

A. Yes. I told him that you were making it sound like we're to blame; that he's saying that we didn't bring it to his attention, but we did, I did.

Q. And did Mr. Jones continue to discuss?

A. Yeah. He said as far as he's concerned, he's not breaking any state or federal laws and that his decision was not to purchase additional ventilation equipment and if any of the welders still felt that it was still too smokey, that he would have to discharge welders.

* * * * * * *

Q. When Mr. Jones indicated that he would not buy more ventilation equipment, what kind of equipment did you take that to refer to?

A. The Daytona [sic] blowers which we needed in our work area.

Q. Did he offer to supply other kinds of equipment?

A. He said that he had ordered some six-inch tubing or exhaust duct.

Q. Hose from welder to the --

A. Yeah, the hose. He said he ordered the fireproof ones this time.

Q. And considering what he said about not buying any more machinery or blowers, did you take that to be a definite decision?

A. Yes, the way he said it.

29. Mr. Jones testified that during the discussion of the ventilation problem at the December 10 meeting, he had stated that in his opinion the ventilation in the tub was adequate and there was only approximately two weeks of welding left inside the tub in any event. He told the welders that he would purchase additional hose if requested, but he would not purchase additional blowers because the cost was not justified by the amount of welding left to do in the tub. Furthermore, Mr. Jones also told the welders at this meeting that if the ventilation was still a problem he would lay off employees by seniority under the theory that the fewer welders that there were welding inside the tub, the less smoke there would be. At the end of this presentation he asked if there were questions. There were none.

30. To the point that I have recited it here, supra, I credit the overall substance of both Jones' and Begay's recollection of the important December 10 meeting. It is obviously slanted in each case to their particular point of view, but I find the testimony of both men to be generally credible.

31. The meeting at this point moved on to another subject--the long lunches and leaving early. An employee named Leonard Mike became insubordinate during this later portion of the meeting and quit. He most likely would have been fired for insubordination in any event had he not quit. Respondent has attempted to connect up complainant to Leonard Mike, but I find nothing in common to the two situations except the fact that they both left the job at the same time. There is no indication in the record that complainant was concerned with overstaying his lunch time or leaving early. There is also no evidence that his leaving the job had anything to do with Leonard Mike's outburst and subsequent departure.

32. Complainant was the most vocal of the welders concerning ventilation matters, and management knew he was greatly concerned with the ventilation inside the tub at the south side project.

33. Prior to the December 10 meeting, complainant was planning to go to work that day. He had already checked out tools and equipment from the toolroom in preparation for work. However, at this meeting, management for the first time took the unshakable position that there would be no further ventilation equipment provided. This was communicated to the welders,

including complainant, at that meeting. I therefore find and believe that complainant returned his tools to the toolroom because in his mind he believed the situation to be hopeless at that point. He now knew that no more Dayton blowers would be provided and that if there were further complaints, welders would go. Apparently not necessarily himself, but welders with less seniority on the job.

34. After the meeting, when it became apparent that complainant and two others were leaving the job, Mr. Jones asked them all to first come to his office before they left the premises, which they did.

35. In the office, none of the welders, including complainant, made it expressly clear to Jones why they were leaving. However, in the case of the complainant, which is the only case we are concerned with here, I find that he left the job because of the ventilation situation inside the base and more significantly, I find that management in the persons of Jones and Eslinger understood that to be the case at the time.

36. Apropos the finding in No. 35, supra, at this post-meeting meeting in the office, Mr. Eslinger became agitated with complainant specifically about the ventilation complaints. He jumped off the table he was sitting on and came right up into the face of the complainant, and using profanity said that they were the worst bunch of "crybabies" that he had ever run across. He was bent on continuing this tirade when Jones grabbed him by the arm and took him outside. Mr. Jones testified that he took him outside and told him that "we handle everything in a business-like manner and we speak to the people as they are people".

37. It is my impression that at this point the die was cast. A business decision had been made. There would be no additional monies spent on ventilation equipment, no matter what. If a couple of welders thought it was too smokey inside the base and they quit, so be it. The job was almost complete and if replacement welders were needed, they could be found. In fact, the next week, respondent did hire two additional welders.

38. Immediately after leaving the job site, complainant, accompanied by Dave Johnson, went to the P & M Mining Company safety office to inform personnel of P & M's safety department that they had quit their jobs because of ventilation problems inside the base.

39. Subsequent inspections by P & M Coal Company and MSHA failed to establish any violations of safety or health regulations on the project.

Discussion, Further Findings, and Conclusions

The general principles governing analysis of discrimination cases under the Mine Act are 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 protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (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 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 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, 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

As stated previously, this is a constructive discharge case, wherein the complainant refused to weld any further inside the base with the existing ventilation, allegedly because he believed it was unhealthy for him to do so. If I find that this work refusal equated to engaging in protected activity under the Act, then a finding of constructive discharge would be tantamount to a finding of adverse action motivated by that protected activity, and hence unlawful discrimination within the meaning of section 105(c) of the Mine Act.

The appropriate standard to apply in the context of the Mine Act is that a constructive discharge occurs whenever a miner engaged in protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Whether conditions are so intolerable that a reasonable person would feel compelled to resign is a question for the trier of fact. Simpson v. FMSHRC 842 F.2d 453, 461-463 (D.C. Cir. 1988).

It is also well settled that a miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that the work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Secretary v. Metric Constructors, Inc.,

Additionally, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (September 1983): Haro v. Magna Copper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. The Commission has also explained that "[g]ood faith belief simply means honest belief that a hazard exists." Robinette, supra at 810.

The initial question for decision then at this point is did Stenson Begay reasonably and in good faith believe that he would be required to work in hazardous and unhealthful conditions if he remained on the job on the morning of December 10, 1987.

Stenson Begay had thirteen years experience as a welder in the construction industry; he was well thought of as a welder by respondent's management and his complaints about the ventilation inside the base were taken seriously by General Manager Jones. Mr. Jones testified that Begay was the most vocal of the welders concerning the ventilation and was considered by him to be credible. Complainant's belief that the conditions inside the base were excessively smokey and therefore unhealthful and hazardous was shared by all the welders who testified at the hearing and was buttressed by the expert opinion of the industrial hygienist. For a period of some two weeks plus, Begay had been expressing his continuing concern about the smokey conditions inside the tub to management and some improvements were made, but they were insufficient. After the meeting on the morning of December 10, 1987, Begay had sufficient cause to believe that management intended to do nothing further to alleviate or improve the ventilation inside the dragline base. Respondent's position that their offer to discharge some of the welders to improve the ventilation inside the tub is not well taken. It lacks credibility given the fact that they replaced the complaining welders who quit with two more welders the following week. It was in this setting that Begay turned in his tools and equipment and left the job site, leaving behind a job that paid $16.45 an hour for unemployment.

I therefore find and conclude that complainant Begay refused to weld inside the base any longer because he reasonably and in good faith believed the inadequate ventilation inside the tub to be hazardous to his health because of the extremely smokey and noxious conditions extant there. He had every reason to believe that if he stayed on the job, he would be required to work in unhealthy conditions.

Next, respondent alleges that complainant failed to expressly communicate his reason for quitting and that such failure cannot be excused on account of futility.

While it is true that complainant did not expressly and unequivocably state his reason for quitting at the time he left the job site to a management representative of respondent, he did so state to a respresentative of the P & M Coal Company, for whom the construction work was being done. Furthermore, reading the record as a whole, I find that over the previous 2-3 weeks prior to December 10, 1987, Begay did make a good faith attempt to communicate his concerns to management, specifically to Jones and Eslinger. Approaching the communication requirement from a common sense standpoint, I believe that Begay did all that could be reasonably expected of him. Telling Mr. Jones one last time that the atmosphere inside the tub was unhealthy would not in my opinion have resulted in the procurement of the badly needed ventilation equipment or made complainant's job any safer.

I conclude that complainant was constructively discharged as a result of a protected work refusal. Accordingly, he was unlawfully discriminated against in violation of Section 105(c) of the Mine Act. The complaint of discrimination is therefore SUSTAINED.

REMEDIES

Turning now to complainant's remedies, I find that the stipulated amount of back pay, $4606, is appropriate to recompense the complainant for back pay from December 10, 1987, until welding was discontinued on this project on January 29, 1988. The payment of interest will also be ordered on this award until the date of payment.

Complainant also seeks reinstatement. However, due to the nature of the respondent's industry, which for welders involves only temporary stints of employment, generally only for the duration of a specific project, an effective reinstatement remedy is difficult to fashion.

I note from the evidence adduced at the hearing that several of the welders from the McKinley Mine dragline base projects have from time to time subsequently been rehired by respondent to work as welders on other projects. Therefore, respondent will be ordered to consider complainant's application, should he make

application, in good faith for any openings for welders on its projects without regard to his having made ventilation complaints in the past or the instant discrimination complaint. This shall include all work for which the complainant is qualified, considering his training and experience.

Finally, respondent will be ordered to reimburse complainant for his reasonable attorney fees and costs of litigation. Complainant's counsel submitted an itemized affidavit on March 27, 1989, accounting for 87.8 hours of attorney time expended for which he requests $125 per hour. This amounts to $10,975. He has also documented $3,012.92 in costs. No objection has been received from respondent.

My own review of the attorney fee petition and statement of costs satisfies me that they are reasonable considering the nature of the issues involved, the degree of skill with which complainant was represented and the amount of time and work involved. It shall be so ordered.

ORDER

Based on the stipulations and the foregoing findings of fact and conclusions of law, respondent IS ORDERED:

1. To pay Stenson Begay back pay through January 29, 1988 in the amount of $4606, within 30 days of the date of this order.

2. To pay Stenson Begay interest on that amount from the date he would have been entitled to those monies until the date of payment, at the short-term federal rate used by the Internal Revenue Service for the underpayment and overpayment of taxes, plus 3 percentage points, as announced by the Commission in Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 28, 1988), pet. for review filed, No. 88-1873 (D.C. Cir. Dec. 16, 1988).

3. To consider Stenson Begay's application for employment in the future, should he make such application, in good faith and without regard to his having made previous safety and health related complaints, or this discrimination complaint. This order encompasses all employment for which Stenson Begay is qualified, considering his training and experience.

4. To pay Stenson Begay $10,975 as reimbursement for attorney fees.

5. To pay Stenson Begay $3012.92 as reimbursement for costs.

Roy J. Maurer
Administrative Law Judge