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J. L. WOODY V. CLINCHFIELD COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

JAMES L. WOODY,
COMPLAINANT

v.

CLINCHFIELD COAL COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. VA 89-14-D

Moss No. 3 Prep Plant

DECISION

Appearances: Jerry O. Talton, Esq., Front Royal, Virginia, for Complainant; W. Challen Walling, Esq., Penn, Stuart, Eskridge & Jones, Bristol, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discriminated against in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 815(c), in that he was required to work beyond his regular shift on August 4, 1988. Respondent denied that Complainant suffered any adverse action and asserted that if he did, it was not because of activity protected under the Act. Pretrial discovery was had, and both parties responded to my prehearing order. Pursuant to notice the case was heard on the merits in Abingdon, Virginia, on April 25, 1989. Billy L. Bise, James L. Woody, Jerry D. Hearl, and James W. Hicks testified on behalf of Complainant; Thomas Asbury, Danny Lee Cromer, Samuel Glen Sanders, and John Bel, Jr., testified on behalf of Respondent. Both parties have filed post hearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

I

At all times pertinent hereto, Respondent was the owner and operator of a coal mine in the State of Virginia known as the Moss No. 3 Preparation Plant. Complainant was employed by Respondent at the Preparation Plant as a boom shack operator and was a miner as defined in the Act. Complainant worked at the mine for approximately 28 years. The preparation plant is one of

the largest such facilities in the country. It employs approximately 150 people, and processes and ships out approximately three-and-a-half million tons of coal in a three year period.

II

In the latter part of 1987, Complainant Woody and others complained on several occasions about excessive dust in their working area. When the amount of coal coming from the mine to the preparation plant is reduced, the dryer (part of the prep plant) will, unless its heat is reduced, over-dry the coal. The result is excessive dust in the area. During such periods, the dust severely limited Woody's vision from the boom shack. It also resulted in respirable dust entering the boom shack where Woody worked. On December 15, 1987, Woody and two other miners filed a grievance alleging that Clinchfield had not controlled the dust problem at the loading out area. Woody complained that on December 14, 1987, the dust was so bad he could not see to load the railroad cars. A meeting was held concerning the grievance on January 19, 1988. Four company representatives, two union representatives and the three grievants attended. Respondent presented a written dust control plan which was accepted by the union as a settlement of the grievance. Woody testified that the condition was "a lot better" after the meeting (Tr. 127). However, he also testified that "some days it (the dust control plan) works, some days it doesn't." (Tr. 122) No further grievances were filed and no section 103(g) complaints were filed with the Mine Safety and Health Administration alleging a dust violation.

III

Beginning in late 1987, miners in the subject plant worked a mandatory six day week. Coal was processed five days a week and the sixth day (Saturday) was devoted to maintenance. Prior to that time, work on Saturday and Sunday was voluntary. The workers were paid time-and-a-half for Saturday work and double time for Sunday work. A sufficient number of workers volunteered for overtime or Sunday work to enable Respondent to maintain its five day coal production schedule. At some time in 1987 or 1988, the number of employees volunteering for Sunday work declined; this resulted in Respondent establishing what was called a mandatory overtime policy. This policy referred only to work beyond the normal work day of 7-1/2 or 8 hours. Saturday work was being performed as a matter of course. A notice was posted notifying the employees that all employees were subject to mandatory overtime effective August 1, 1987. (RX3) The policy was not implemented until the summer of 1988, when the number of volunteers for overtime and Sunday work sharply fell off.

IV

Complainant Woody is 60 years of age. He has worked for Respondent almost 29 years. He is a member of the United Mine Workers of America. He has been an officer in the union and was mine committeeman until 1984. He worked the majority of Saturdays and 13 Sundays in 1987. In 1988, he worked 20 Saturdays and two Sundays; however, he only worked one additional overtime hour (beyond his normal workday) in 1987 and 4-1/2 such hours in 1988.

V

The Union objected to the mandatory overtime policy established in 1987, and prepared a protest form. (CX1) Woody and most of the union employees signed the forms and submitted them to management. Among other things the form advised management "that because of the unsafe conditions which the extended day will create, I contend that this policy of involuntary overtime interferes with my safety rights under the Federal Mine Safety and Health Act. If my health and safety are jeopardized by this policy, I may file a 105(c) discrimination complaint . . . under the authority of Eldrige v. Sunfire Coal Company, 5 FMSHRC 480 (1983)."

VI

Beginning in July 1988, the mandatory overtime policy was implemented at the preparation plant. This was done because of large orders for coal, higher than normal absenteeism, the failure of employees to volunteer for overtime and other factors. Woody was scheduled to work four hours (4 p.m. to 8 p.m.) on Thursday, August 4, 1988 (RX7). When the schedule was posted, Woody protested to his immediate supervisor and to the acting plant superintendent. He also protested to the union safety committeeman, telling him that he had doctors' statements excusing him from working overtime. The Safety Committeeman asked Sam Sanders, the Plant Superintendent on August 3 for a meeting on the matter. Sanders said he would review the doctors' statements and tell Woody the next morning of his decision. The letters (Comp. Ex. 13 and 14) were addressed to Sanders. Dr. James Cross concluded that if possible Woody should not work more than 8 hours per day and that "12 hour days . . . I feel would cause excessive fatigue, aggravation of his hiatal hernia, increased anxiety, and deterioration of his health." Dr. W.A. Davis stated that in his opinion Woody "is able to work eight hours a day for six days a week but . . . is not able to work 12 hours a day, due to his physical condition and his age." Sanders was not satisfied with the reports, and he called Dr. Davis.

Davis told him that Woody had requested that he write the letter because Woody did not feel like working over eight hours and "felt exhausted if he worked over eight hours." (Tr. 281) Based on the letters and this conversation, Sanders concluded that there was no bona fide medical reason for Woody not working overtime. He so notified Woody during the morning shift. At the conclusion of the shift, Sanders met with Woody and the mine committee, and the evening shift foreman. Sanders repeated his decision, and Woody reacted angrily. When Woody threatened to go home and not work the overtime, Sanders told him that before he returned to work, he would have to bring a doctor's slip stating that he was "100 percent able to perform [his] . . . work." (Tr. 290). Woody took this to mean that he had to work overtime or be discharged. For this reason, he went to the job and worked the remaining 3 or 3-1/2 hours (the meeting took 30 to 45 minutes, and Woody was permitted to leave 30 minutes early because he did not take a lunch hour). He was paid four hours at the overtime rate. His work involved cleaning and washing the tipple floor with a water hose. The hose was approximately 1-1/4 or 1-1/2 inches in diameter. The floor was wet and slippery. He returned to his regular work in the boom shack the following day, and was not requested to work beyond his 8 hour day thereafter.

VII

As a boom shack operator, Woody worked in an enclosed area, operating levers to fill railroad cars with coal coming from the dryers. The work does not involve heavy lifting or other strenuous activity. When he worked on Saturdays or other overtime hours, he had various duties, including washing and cleaning the tipple floor, cleaning track, working on pumps or other machinery. Some of the work is strenuous. There are normal mining hazards in connection with some of it. Woody has a hiatal hernia, and had surgery for the removal of polyps in July 1988. He also complained of the symptoms of an ulcer. He testified that after he worked his regular shift on Saturdays, he was exhausted and had to rest all day Sunday.

ISSUES

1. Did complainant Woody suffer adverse action by being required to work 4 hours overtime on August 4, 1988?

2. If he did, was the adverse action the result of activity protected under the Mine Act?

3. If it was, what are the appropriate remedies?

CONCLUSIONS OF LAW

I

Complainant and Respondent are subject to and protected by the provisions of the Mine Act, complainant as a miner and Respondent as a mine operator. I have jurisdiction over the parties and subject matter of this proceeding.

Under the Act, a miner establishes a prima facie case of discrimination if he proves that (1) he was engaged in protected activity, and (2) was subjected to adverse action, which (3) was motivated in any part by the protected activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The mine 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 the protected activity. If the operator cannot rebut the prima facie case in this manner, it may defend affirmatively by proving that it was also motivated by the miner's unprotected activity, and would have taken the adverse action for that activity in any event.

II

Complainant Woody was not discharged, did not lose any pay, was not reprimanded or otherwise disciplined. So far as the record shows, his personnel file does not contain any reference to the incident involved here. He was required to work 4 hours overtime to which he objected ostensibly for health reasons. But he did work and was paid for the work. So far as the record shows, he did not suffer any ill effects and no safety problems were encountered. He returned to his regular work the following day and worked continually until the mine went on strike April 5, 1989.

For many personal reasons Woody disliked working overtime. The Union objected on behalf of all its members to the mandatory overtime policy of the operator. But neither Woody's distaste nor the Union's objection establishes an adverse action. Had Woody refused to work the 4 hours overtime and been disciplined, he would have suffered adverse action and, if he could show that it was related to protected activity, could make out a prima facie case of discrimination. But the facts are that he did not refuse, and was not disciplined. I conclude that Complainant James Woody has failed to show that adverse action was visited on him when he was required to work overtime on August 4, 1988.

III

Assuming that requiring Woody to work 4 hours overtime constituted adverse action, the next question is whether it resulted in any part from activity protected under the Mine Act. Complaints of excessive dust detailed in Findings of Fact II above clearly constitute protected activity. Refusal to work is protected if it results from a good faith reasonable belief that the work is unsafe or unhealthful. Pasula, supra. Refusal to perform overtime work because of a reasonable good faith belief that a miner's physical and mental exhaustion would present a safety hazard to himself and others is protected. Eldridge v. Sunfire Coal Company, 5 FMSHRC 408 (1983) (ALJ). Cf. Secretary/Bryant v. Clinchfield Coal Company, 4 FMSHRC 1379 (1982) (ALJ).

IV

There is no credible evidence that Respondent's requiring Woody to work overtime on August 4, 1988, was in any way related to his complaints of excessive dust in 1987 and thereafter. I conclude that it was not.

V

Complainant objected to the overtime work because he believed that his age, poor health and physical exhaustion, would result in safety hazards to himself or his co-workers. Although the objection to mandatory overtime was sponsored by the union, and Respondent tried to create the inference that Woody was a front or stalking horse for the union, I conclude that Complainant Woody's objections to the overtime were made in the good faith belief that his health would be endangered. The work Woody was asked to perform on August 4, 1988 after his shift was not more onerous or hazardous than the work he normally performed on Saturdays. There was nothing about the nature of the work that created special hazards, nor is the discrete (4 hours) period of overtime so onerous as to create health or safety problems per se. I conclude that in the terms of the Mine Act, complainant's objection to overtime work though made in good faith was not reasonably related to a health or safety hazard.

VI

For all the above reasons, I conclude that Complainant has failed to establish that he was subjected to adverse action because of activity protected under the Mine Act.

ORDER

Based on the above findings of fact and conclusions of law IT IS ORDERED that the complaint of discrimination filed herein is DISMISSED.

James A. Broderick
Administrative Law Judge