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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF FRED BARTLEY,
COMPLAINANT

DISCRIMINATION PROCEEDING
Docket No. KENT 89-102-DM
Jenkins Quarry

v.

ADAMS STONE CORPORATION,
RESPONDENT

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Complainant; David Adams, Esq., Vice-President,
Adams Stone Corporation, Pikeville, Kentucky, for
Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary brings this case on behalf of Fred Bartley, and claims that on March 29, 1988, Bartley was discharged from his job with Respondent because he complained to MSHA about unsafe conditions at Respondent's limestone quarry. Respondent contends that Complainant was suspended for three days for insubordination, and was thereafter laid off in accordance with the seniority provisions of the union contract. Following a hearing before an arbitrator, Complainant was reinstated to his position as crusher operator. He was awarded and received back wages and other benefits to the date of his layoff. The three day suspension was upheld by the arbitrator. When Complainant returned to work, he was assigned to the job of plant walker. He was told not to run the crusher and was limited to working eight hours per day. the plant was on strike from January 15, 1989 to July 13, 1989. Complainant has been working since July 13, 1989.

Pursuant to Notice, the case was called for hearing in Wise, Virginia, on July 20, 1989. Fred Bartley, James G. Roberts, Jimmy Ray Woods, Vernon Denton, William R. Talley and Ernest R. Thompson testified on behalf of Complainant. Stuart H. Adams and Darrell Webb testified on behalf of Respondent. Both parties were given the opportunity to file

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post-hearing briefs. The Secretary filed such a brief; Respondent did not. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

Respondent operates a limestone quarry in Letcher County, Kentucky, known as Jenkins Quarry. The operation includes open pit mining of stone, a primary crusher plant, a secondary crusher plant, a blacktop plant, a block plant and a "ford shop" where mechanical work is performed on equipment. The crushed limestone is used in highway and building construction. The mining operation is normally discontinued in the winter months, although some of the employees are retained to do maintenance and repair work.

Complainant Bartley has been employed by Adams Stone since September 1977. In 1987 and for five or six years prior thereto, Bartley operated the gyrodisc crusher on the night shift. The gyrodisc crusher crushed stone into limestone dust, which was used in asphalt making. He worked with limited supervision. The Superintendent, Darrell Webb, complained in September 1987, that Bartley was not operating the crusher at full capacity and not enough dust was being produced. Bartley testified that Webb was intoxicated and abusive. For these reasons, Bartley shut down his machine and went home. He returned to work the next day. He underwent eye surgery in December 1987, and was off work until about March 20, 1988. Between March 20 and March 28, he was doing labor work and repair work. On March 28, he was doing repair work on the gyrodisc crushers, taking hoses off and repairing or replacing the hoses which were leaking. Stuart Adams, President of Adams Stone, who had a short time before assumed active supervision of the quarry, angrily questioned Complainant about why he was removing the hoses. He seemed satisfied after Complainant explained what he was doing. Later the same day Bartley was taking a short break after pumping 55 gallons of oil into a tank with a hand pump and lifting several 5 gallon buckets of oil onto to a beltline. Adams walked by and told Bartley to get a shovel and get back to work. Subsequently Adams asked Bartley to place some 4 x 4 pieces of wood under the secondary crusher which was being lowered to the ground by a crane. The crusher weighed about eight tons. Bartley was concerned because the crane was known to slip and fall free and he told Adams he would place the 4 x 4s under the crusher after it was lowered closer to the ground. Adams became angry. He cursed and told Bartley to put the boards under the crusher now. Bartley also became angry and told Adams he would put them down when he got "damn ready." After the crane lowered the crusher close to the ground, Bartley put the boards under it and the crusher was lowered on top of the boards. At that point Bartley

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told Adams he was tired of hearing his big mouth. Adams told him if he did not want to work, he could go home. However, Bartley continued working until the end of his shift.

The following day Adams told Bartley that he was suspended for three days for insubordination. Bartley replied that he would call the OSHA inspector who would be at the plant the next day. The following day an MSHA inspector came to the plant, having received a 103(g) complaint alleging a loader without brakes, a crane subject to free falls, drinking on the job, and failure to wear hard hats. When the Inspector contacted Adams, Adams was very angry and initially refused to permit the inspector to go on the premises. He later cooled down and the inspection proceeded. A loader was inspected and found to have adequate brakes. The crane had no load on it, so the inspector took the crane operator's word that the crane was operating properly. The inspector did not find any evidence of drinking, nor did he see anyone not wearing a hard hat who would be required to wear one. He notified the operator of his negative findings.

During the three day suspension, the operator notified Bartley that he was laid off because the night shift was being discontinued. Adams subsequently told an MSHA investigator that one reason for the "layoff" was the fact that Bartley called MSHA with a 103(g) complaint. I find as a fact that Bartley was laid off in part because he made safety complaints to MSHA which resulted in an MSHA inspection. Bartley filed a grievance under the collective bargaining contract. The grievance went to arbitration. The arbitrator decided that (1) the three day suspension was for just cause and (2) Bartley's layoff was not in accordance with the provisions of the contract. She ordered the company to reinstate Bartley to his classification of crusher operator and to pay all back wages and other benefits which he lost because of the improper layoff. He returned to work and was paid 40 hours per week straight time for the period of time that he was off.

During the time Bartley was off on his suspension, the company learned that the rock which had been ordered for a highway project in East Kentucky would not be needed until August. Adams then directed his superintendent to cut the work crew back to 8 hours per shift with no overtime and to eliminate the operation of the gyrodisc crusher for the time being.

In the winter 1987-88, Respondent essentially rebuilt its plant: each of the crushers was torn down and rebuilt; new monitoring devices and a computer system were installed, as well as new feed systems and new belt scales.

ISSUES

1. Whether the three day suspension of Complainant on March 28, 1988, was adverse action for activity protected under the Mine Act?

2. Whether the layoff or discharge of Complainant on March 29, 1988, was adverse action for activity protected under the Act?

3. If either issue No. 1 or issue No. 2 is answered in the affirmative, what remedies should be awarded and assessed?

CONCLUSIONS OF LAW

I

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

Under the Act, a miner establishes a prima facie case of discrimination if he proves that he was engaged in protected activity and was subjected to adverse action which 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

Bartley's three day suspension resulted in part from his refusal to place boards under the crusher being lowered by a crane. Bartley testified that he believed it was dangerous to approach the crusher until it was close to the ground. I conclude that this was a good faith, reasonable refusal to perform work which he considered dangerous. Therefore, the work refusal was activity protected under the Act. Because the suspension was motivated in part by the protected activity, Complainant has established a prima facie case of discrimination for the suspension. Respondent, however, has shown that the

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suspension was also motivated by unprotected activity, namely by Bartley's statement to Adams that he was tired of hearing Adams' big mouth. I am persuaded by Adams' testimony that this was the primary reason for the suspension, and I conclude that Respondent would have taken the adverse action for that reason alone.

III

Although Stuart Adams denied that he told the MSHA investigator that one of the reasons he laid off Bartley was because of his safety complaints to MSHA (Tr. 243-4), I conclude, based on the statement made to the investigator, that he did so. I further conclude that in fact he laid off Bartley primarily because of his safety complaints to MSHA. Therefore Complainant has made out a prima facie case under the Pasula test. Respondent contends that it would have laid Bartley off in any event for reasons not related to protected activity, namely because the night shift gyrodisc crusher was not being operated. I conclude that Respondent has not met its burden of proving that it would have laid off Bartley in any event for unprotected activity. Bartley was classified as a crusher operator. The arbitration proceeding established that he had seniority over another employee who was retained. I conclude that the layoff was motivated by protected activities, and the alleged business motive was a pretext. The evidence establishes that the lay off was in violation of section 105(c) of the Act.

IV

The Secretary contends that Complainant is entitled to back pay measured by the number of hours worked by Tommy Roberts, the other crusher operator, including the overtime hours worked by Roberts. The evidence does not establish that Bartley would have worked the same number of hours as Roberts or that he would have worked overtime. I conclude that Bartley is entitled only to regular time wages for forty hours per week during the time he was laid off until he was ordered back to work in September 1988 and worked until the plant was shut down for the season.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. The three day suspension of Bartley on March 29, 1988 was not in violation of section 105(c) of the Act.

2. The "layoff" of Bartley on March 29, 1988, was in violation of section 105(c) of the Act.

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3. Complainant was reinstated to his position of crusher operator by an arbitrator under the union contract. Respondent shall pay Complainant back wages, based on a 40 hour week, from the date of the layoff until the date of his reinstatement, with interest thereon computed in accordance with the Commission decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988). Respondent shall have credit for the amount paid as back wages following the arbitration decision. Respondent shall also pay Complainant other benefits to which he was entitled and which were withheld during the time of his layoff.

4. The parties shall attempt to agree on the amount due Complainant under the above order. If they cannot agree, the Secretary shall within 20 days of the date of this decision, submit a statement of the amount she believes is due. Respondent shall have 10 days thereafter to reply.

5. Respondent and its officers and agents shall CEASE and DESIST from discriminatory acts against its employees for making safety complaints to the Secretary.

6. Respondent shall expunge from its employment records all references to the unlawful layoff or discharge of Bartley.

7. Respondent shall, within 30 days of the date this decision becomes final, pay to the Secretary a civil penalty in the amount of \$1000 for the violation found herein.

8. This decision is not final until the amount due Complainant under No. 3, above, is determined.

James A. Broderick
Administrative Law Judge