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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
JAMES S. TERRY,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 89-105-D

HOPE CD 89-02

Mudlick No. 1

v.

TIMBERLINE ENERGY, INC.

AND

RANDY W. BURKE,
PERSONALLY AND AS PRESIDENT
OF TIMBERLINE ENERGY, INC.,
RESPONDENTS

DECISION

Appearances: Charles M. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia,
for Complainant;
Paul O. Clay, Jr., Esq., Conrad and Clay,
Fayetteville, West Virginia, for Respondents.

Before: Judge Maurer

This case is before me upon the Complaint by the Secretary of Labor on behalf of James S. Terry under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", alleging that Mr. Terry was discharged by the respondents on October 27, 1988, in violation of section 105(c)(1) of the Act. The Secretary seeks reinstatement, back wages and interest for Mr. Terry as well as civil penalties against the respondents. Respondents maintain that Terry was not discharged in violation of the Act, but rather was discharged for his failure to adequately perform his duties as a section foreman.

Pursuant to notice, an evidentiary hearing was held at Morgantown, West Virginia on May 4, 1989. Subsequently, both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record and considering the contentions of the parties, make this decision.

STIPULATIONS

The complainant and respondents stipulated to the following:

1. Pursuant to Section 113 of the Act, 30 U.S.C. 823, the Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.

2. At all times relevant herein, Complainant James S. Terry worked at Respondent Timberline Energy, Inc.'s Mudlick No. 1 Mine and was a miner as defined in Section 3(g) of the Mine Safety and Health Act of 1977. 30 U.S.C. 802(g).

3. Timberline Energy, Inc., Respondent, is a corporation incorporated under the laws of the state of West Virginia, and is engaged in the operation of coal mine facilities and is therefore an "operator" as defined in Section 3(d) of the Act, 30 U.S.C. 802(d).

4. The subject Mudlick No. 1 Mine, which is located near Bergoo, in Webster County, West Virginia, has products that enter commerce or has operations or products that affect commerce, and therefore is a "mine" as defined in Section 3(h)(1) of the Act, 30 U.S.C. 802(h)(1).

5. On or about October 28, 1988, Complainant James S. Terry filed a complaint with the Secretary alleging discrimination.

6. James S. Terry was employed as a miner for Timberline Energy, Inc., from October 14, 1988, to October 26, 1988.

7. Randy W. Burke is, and was at all pertinent times, President of Timberline Energy, Inc.

8. Randy W. Burke owns, and at all pertinent times owned, fifty percent (50%) of Timberline Energy, Inc.

9. Randy W. Burke is an operator as defined in Section 3(d) of the Act, 30 U.S.C. 802(d).

10. Randy W. Burke is a person as defined in Section 3(f) of the Act, 30 U.S.C. 802(f).

11. The shareholders of Timberline Energy, Inc., are Randy W. Burke, who owns fifty percent (50%) of the shares, and Eric Meador, who owns fifty percent (50%) of the shares.

12. Randy W. Burke was the person from Timberline Energy, Inc., who managed the Mudlick No. 1 mine for Timberline Energy, Inc.

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13. Randy W. Burke played a role in making decisions about business activities for Timberline Energy, Inc., at the Mudlick No. 1 mine.

14. Randy W. Burke had at least some responsibility for setting wage rates for Timberline Energy, Inc., at the Mudlick No. 1 mine.

15. Randy W. Burke took part in the hiring of employees for Timberline Energy, Inc., at the Mudlick No. 1 mine.

16. Randy W. Burke has, and at all pertinent times had, the authority to hire employees for Timberline Energy, Inc., at the Mudlick No. 1 mine.

17. Randy W. Burke has, and at all pertinent times had, the authority to lay off employees for Timberline Energy, at the Mudlick No. 1 mine.

18. Randy W. Burke has, and at all pertinent times had, the authority to reinstate employees for Timberline Energy, Inc., at the Mudlick No. 1 mine.

19. Complainant James S. Terry earned a straight time salary of \$2,800.00 per month while an employee of Timberline Energy, Inc.

20. Complainant James S. Terry worked an average of 44 hours per week while an employee of Timberline Energy, Inc.

21. Complainant James W. Terry was covered by a hospitalization plan while employed at Timberline Energy, Inc.

22. Timberline Energy, Inc., produced approximately 44,775 tons of coal at its Mudlick No. 1 mine during the period from June 1, 1988, to December 31, 1988.

23. Timberline Energy, Inc., had approximately 18 employees at any one time during the period from June 1, 1988, to December 31, 1988.

24. Order No. 2728486 and Citations Nos. 2728485 and 2728487 were issued on October 27, 1988, by Mine Safety and Health Administration Inspector Paul E. Hess, and were served on Timberline Energy, Inc., or its agent as required by the Act.

FINDINGS OF FACT

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, substantial and probative evidence establishes the following findings of fact:

1. The complainant, James S. Terry, was employed for approximately twenty-eight years in and around coal mines prior to his employment with Timberline Energy, Inc., on October 14, 1988.

2. Terry was employed as a section foreman for Timberline Energy, Inc. from October 14, 1988, to October 26, 1988, on the evening shift.

3. When Terry began working at Timberline, he felt the working conditions at the Mudlick No. 1 Mine were "good". His opinion changed, however, within the next few days as the condition of the top became adverse.

4. On October 17, 1988, Terry encountered top at the No. 2 entry which showed signs of breaking along the ridge, making noises characteristic of bad top. He drilled test holes in the affected areas which did not show any separation of the top but rather showed that the top was soft. Terry "dangered off" that particular area and recorded his action in his book on the surface.

5. On October 18, 1988, the top fell in the No. 2 entry.

6. On October 25, 1988, Terry was supposed to keep his crew after the regular shift to change the belts on the No. 2 conveyor belt. However, he did not change them because he noticed that the No. 3 entry had begun that day to show the characteristics of bad top. Accordingly, Terry instead took his bolt crew and, for approximately four to five hours after their shift, set fifty to sixty additional six foot bolts to supplement the four foot bolts that had already been placed in that area.

7. Timberline took no adverse action against Terry for his decision to set additional roof bolts rather than change belt as he had been instructed to do, other than to question him as to why he had made that decision.

8. When Terry arrived at the mine on October 26, 1988, he was told by the miners on the day shift that they were having trouble with the top and to be careful. He went underground with his crew and found that the mine foreman, Randy Key, was already underground with one of the men (Hubert Key) from the evening

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shift building cribs for additional support in the crosscut left-handed off the No. 3 entry. Terry was advised by Randy Key that they had built cribs in other areas of the mine, that they had used all of the crib blocks that were in the mine, and that the mine was safe to work at that time in his opinion. While the men began moving the equipment into the face area, Terry and Randy Key went down the No. 3 entry to talk. Randy Key advised him that there was additional support material outside being loaded onto the scoop by the outside man and that, when the scoop batteries were charged, the material would be brought down if he needed it.

9. Within a few minutes after his discussion with Terry in the No. 3 entry on October 26, 1988, Randy Key went outside. Shortly thereafter, the crew shut off their equipment while moving it to the face area to get it in place to mine coal. In the silence, they heard the top "working" again. Terry then instructed his crew to bring the equipment back out and called Randy Key on the surface to advise him that the top was again causing trouble.

10. There were insufficient crib blocks on hand at the mine site, inside or outside, to adequately support the roof.

11. Timbering is in the opinion of some equivalent to placing cribs if you set the timbers in a cluster and there were sufficient timbers outside to do the job, although some or all of these timbers would have had to first be cut to size. Terry was of the opinion, however, that the only sure method of making that roof safe to work under that evening was to build cribs and the material to build those cribs was not available that night.

12. When Terry returned to his crew after talking to Randy Key, he told them that the outside man would be bringing in some roof support material when the scoop was recharged. While waiting, the crew listened to the roof "working" and decided among themselves to go outside. By this time, Randy Key had left the mine site.

13. Terry then returned to the telephone to again attempt to talk to Randy Key, but was advised that he was already gone. At this point, Terry "dangered off" the area and with his crew, moved the mining equipment out of the affected area and taking their personal equipment, returned to the surface.

14. Upon returning to the surface of the mine with the evening crew on October 26, 1988, Terry called Randy Key's home and left a message with Mrs. Key that Randy Key should return his call as soon as he arrived. He recorded in the mine book that the area had been "dangered off" and waited in vain for the

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return telephone call from Randy Key. At 7 p.m., having heard nothing back from Randy Key, he let the crew go home. At approximately 9:00 p.m., Terry returned below and preshifted the mine for the night crew. The top was still working at that time. He then returned to the surface, filled out the preshift reports, and departed the mine site when the night crew arrived.

15. MSHA Inspector Paul E. Hess arrived at the mine site and went underground with the night crew at approximately 11 p.m. on October 26, 1988. At that time, he could not hear the top "working". However, he noticed numerous indications that the top had been "working" in the No. 3 entry and face, the No. 3 to 2 crosscut, the No. 3 to 4 crosscut, and the No. 4 entry up toward the face, including cutters, slips, and loose, broken roof that had gapped down. He thereupon advised the foreman of the night crew that he was issuing an Imminent Danger Order on the affected sections and placed red tags at the No. 3 entry and the No. 4 entry.

16. Upon returning to the mine on the evening of October 27, 1988, Inspector Hess observed that approximately twenty cribs and three or four headers had been placed in the areas containing the bad top. The material to place this amount of additional roof support had not been available to Terry the previous evening.

17. Randy Key had made the impression on Terry that the clear priority for the evening of October 26, 1988, was to mine coal in Nos. 2, 3 and 4 entries. Key, however, specifically denies telling Terry that he must run coal on this shift or he and his men would be terminated. No other witnesses corroborated Terry's assertion that this statement was made and nobody was in fact fired, except Terry. My sense of what transpired is that Randy Key left no doubt in Terry's mind that he expected some coal to be mined that night, but I do not believe that he specifically threatened Terry's job or the jobs of the men if it could not be for some reason.

18. On October 25, 1988, Randy Key and Terry had discussed changing out some 500 feet of rubber on the No. 2 belt. Terry was supposed to keep his men after their regular shift to do the job. Instead of changing the rubber out, however, Terry elected to set additional roof bolts that particular evening because he felt the top needed more support.

19. On October 26, 1988, Randy Key and Terry again spoke about the belt change. Key asked if the men could stay after that shift to do the job since it had not gotten done the night before. Terry replied that his men were tired as they had stayed over the night before, and asked if it could not be done the following night instead. Key agreed.

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20. Subsequent to encountering bad top on October 26, 1988, Terry nevertheless did not have his crew change out the rubber on the belt line that night despite the fact that there was no safety related reason that his crew could not have done so. The belt line was outside of the area of bad top.

21. Randy W. Burke made the decision to terminate the Complainant, James S. Terry, from his employment with Timberline Energy, Inc.

22. Terry was fired shortly after he arrived at the Mudlick No. 1 mine on October 27, 1988. He met with Randy Key and Randy W. Burke. When he walked into the office, Randy Key said to him, "I guess you know why you are cut off." When Terry asked why, Randy Burke gave the reply: "How does incompetence sound? It is obvious you don't know top; you can't make a judgment on top to work men under it." Burke then asked Terry why he did not put in the belt if he was afraid of the top. Terry replied that he did not feel that he could make that kind of decision and that he believed that he was "going to get fired anyway" Burke testified that "I didn't really get any good answer out of him."

DISCUSSION AND CONCLUSIONS

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, supra. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Company, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation

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Management Corporation, 462 U.S. 393, 76 L.Ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

A miner's "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. *Miller v. FMSHRC*, 687 F.2d 194 (7th Cir. 1982); *Robinette*, supra. Proper communication of a perceived hazard is also an integral component of a protected work refusal and the responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner. See *Dillard Smith v. Reco, Inc.*, 9 FMSHRC 992 (1987).

I find that Terry was engaged in protected activity when he and his men withdrew from the mine because of his concerns about hazardous roof conditions. Terry's belief was reasonable and in good faith. The reasonableness of Terry's concerns and his withdrawal from the mine is corroborated by the fact that a federal mine inspector shortly thereafter issued an Imminent Danger Withdrawal Order under Section 107(a) of the Act. Terry also made every effort to communicate with his boss, Randy Key, to inform him of what he was doing, and what he perceived to be a hazardous condition.

Unquestionably, Terry's firing by Randy Burke, on the day following his withdrawal, was motivated at least in part by his having withdrawn from the mine, and therefore, I find that the complainant has made out a prima facie case of discrimination under the Mine Act. I also find that the operator is unable to rebut this prima facie case by showing that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. The preponderance of the evidence is clearly to the effect that Terry engaged in protected activity and that his firing was motivated at least in part by that protected activity.

The remaining question is the most difficult. Respondents may affirmatively defend by showing that this was a "mixed motives" case and that Terry's unprotected activity was in and of itself sufficient motivation for taking the adverse action against him. The argument goes that even if Terry was justified in withdrawing himself and his crew from the section because of the hazardous roof conditions he encountered, he should have accomplished some other work in a non-hazardous area of the mine rather than allow the entire crew to simply go home. Respondent's position is that this unprotected activity alone provided the primary and a sufficient basis for Terry's discharge.

From the totality of the record herein, I find that there were a myriad of reasons that led to Terry's firing. To start with, Terry had been out of the mining industry for sometime and had been working for Timberline for less than two weeks when he was terminated. Prior to the night of October 26, 1988, Key and Burke had already been discussing Terry's termination for unrelated matters which Key felt had not been properly handled by Terry. On the particular night in question, Key and Burke were unhappy that Terry's crew didn't mine coal as they had expected, but were even more unhappy that he and his crew left the mine instead of supporting the roof. They believed, with some justification I think, that if in Terry's judgment, the roof needed additional support, he should have provided it. Moreover, it appears that Terry abdicated control of the situation and his crew, allowing them to go home when there was belt work he knew had to be accomplished that was outside of the area of bad top. Even if in his judgment, he believed that the proper materials to support the roof were not available, he could have at the least had his crew accomplish the belt change. His only justification for not doing so seemingly was his belief that he was going to be fired in any event because Key had told him to run coal.

As a management employee, Terry has to be charged with the exercise of some degree of judgment and supervisory ability in directing the work force. As a foreman, he has to be charged with the awareness that there is always "dead work" to be done when coal cannot be mined for some reason. In this case, he specifically knew of the belt that had to be moved. I find that the operator's termination of Terry could reasonably and justifiably have been done because of Terry's extremely poor judgment in not directing his crew to perform any work whatsoever. More specifically, I find that his failure to at least make the belt move that he had been asked to make after the shift that night, was unprotected activity and could reasonably have served as a completely independent basis for his discharge.

It appears to me that Mr. Terry was placed in a position of authority and responsibility for which he was ill-equipped to deal with when the roof conditions became adverse. A fair reading of the entire record herein, particularly his own testimony and that of Hubert Key indicates to me that he abandoned control over his men and the job when he encountered the adverse roof conditions described herein. When he could not get ahold of Randy Key for further guidance, he completely gave up his authority and his responsibility. Notably, he did not direct his men to go home, they simply left.

I conclude that although complainant established a prima facie case of discrimination, the operator has established that the adverse action was substantially motivated by an unprotected

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factor, namely, his failure to engage his crew in productive work activity after the roof conditions became too adverse to mine coal. It is certainly reasonable to expect your line supervisors to supervise and make decisions concerning the direction of the work force. I thus further conclude that the operator might reasonably and justifiably have taken the adverse action complained of for this unprotected factor alone.

Therefore, complainant has failed to establish that respondents discriminated against him in violation of the provisions 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 of discrimination be DISMISSED.

Roy J. Maurer
Administrative Law Judge