

CCASE:  
RANDY J. COLLIER V. GREAT WESTERN COAL  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

RANDY J. COLLIER,  
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. KENT 89-198-D

GREAT WESTERN COAL, INC.,  
RESPONDENT

DECISION

Appearances: Charlie R. Jessee, Esq., Abingdon, Virginia,  
for Complainant; Joshua Santana, Esq., Brown,  
Bucalos, Santana & Bratt, Lexington, Kentucky,  
for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his position as heavy equipment operator with Respondent Great Western Coal, Inc. (Great Western) because of complaints of unsafe working conditions, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act). Great Western contends that he was discharged because of physical inability to perform the duties of his job. Pursuant to notice, the case was heard in Abingdon, Virginia, on October 5, 1989. Randy J. Collier, Tim Moore, and Henry Frank Doan testified on behalf of Complainant and Jerry Wayne Brown and Ben Scarse were called by Complainant as adverse witnesses; Linda Downs testified on behalf of Great Western. Both parties have filed posthearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. Complainant Randy Collier, 35 years of age, worked for Great Western for 12 years until he was terminated on March 30, 1989. During eleven of the twelve years, he worked as a heavy equipment operator.

2. Great Western was the operator of a coal mine in or near Coalgood, Kentucky, apparently having both surface and underground facilities. The operation of the mine affected interstate commerce.

3. At some time in 1979, Complainant was employed driving a Caterpillar rock truck. He attempted to move by hand a rock which had fallen in front of his truck, and injured his back. He had surgery for a ruptured spinal disc.

4. At some time in 1983, the two lower steps of Complainant's rock truck were missing, having been torn off by contract drivers. Complainant and his immediate supervisor, Ben Scarse complained about the broken steps for about a month but they were not repaired. (Scarse testified that he did not recall any such complaints and denied that the steps were broken. I am accepting Complainant's testimony on this matter.)

5. One evening in 1983, Complainant jumped to the ground (4 or 5 feet) from the bumper of the rock truck resulting in another back injury. Complainant underwent surgery for a second ruptured disc.

6. On several occasions Complainant complained to construction superintendent Jerry Brown, of extreme heat inside the cab of his truck or dozer. An operating air conditioner was not provided, although some of Great Western's equipment had air conditioners. Complainant also complained of excessive dust which affected a skin condition he had called hyperhidrosis.

7. At some unknown times in the past Complainant complained of a defective steering clutch on a John Deere dozer and defective windshield wipers on equipment which he operated.

8. In early 1987, Complainant was assigned to drive a truck carrying a crew of workmen from the mine offices to the job site, a distance of 3 or 4 miles. The truck had defective doors, both on the driver's side and the passenger's side.

9. Complainant and his immediate foreman Ben Scarse complained to the Superintendent Jerry Brown about the condition of the doors, but Brown declined to have them repaired. The last time Complainant discussed the condition with Brown was about March 1, 1987. Both Brown and Scarse denied that Complainant made such complaints, and Complainant's testimony is not supported by his coworkers Tim Moore and Henry Frank Doan. Nevertheless, I find as a fact that Complainant did in fact make such complaints to Brown and related them to safety.

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10. On April 7, 1987, Complainant struck the door twice to open it and again injured his back and neck. He was taken to the hospital. He was x-rayed and treated with medication and remained off work 4 or 5 days.

11. He returned to work but continued to have pains in his neck, chest and arm. In September 1988, Great Western told him that he could not continue to work unless he promised he would run the equipment without taking pain pills and muscle relaxers.

12. He continued working until December 1988. A myelogram was performed on December 29, 1988, and showed nerve root compression in the cervical spine. A spinal fusion was performed in February 1989. He has not worked for Great Western since that time.

13. Complainant's physician was of the opinion that Complainant was disabled for the work of heavy equipment operator or truck driver.

14. On March 30, 1989, Great Western terminated Complainant's employment "because of [his] unavailability for work." (R. Ex. 2.)

15. At the time his employment was terminated, Complainant was paid at the rate of \$13.45 an hour. He also had company-paid health insurance, retirement benefits, vacation pay and "coal bonuses," amounting to from \$1.50 to \$1.75 an hour.

16. In April 1989, Complainant filed a workers' compensation claim in which he stated he was totally disabled from performing his work. At the time of the hearing in the instant case, a decision had not been rendered in the workers' compensation case.

#### ISSUES

1. Was Complainant discharged from his employment for activities protected under the Mine Act?

2. If so, to what remedies is he entitled?

#### CONCLUSIONS OF LAW

1. Complainant Collier and Respondent Great Western 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 the subject matter of this proceeding.

2. 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.

3. Complainant's complaints in 1983 of the absence of steps on the rock truck which he was operating (Finding of Fact No. 4); his complaints of extreme heat and excessive dust inside the cab of the truck and dozer he was operating (Finding of Fact No. 6); his complaints of a defective steering clutch and defective windshield wipers on equipment he was operating (Finding of Fact No. 7); and his complaints of defective doors on the truck used to convey miners to the worksite (Finding of Fact No. 9) were all activities related to safety and protected under the Mine Act.

4. Complainant's discharge on March 30, 1989, constituted adverse action.

5. There is no evidence that Complainant's discharge was motivated in any part by the safety complaints referred to in conclusion of law No. 3, nor is there evidence from which I could infer that his discharge was motivated by such complaints. I conclude that his discharge was motivated by his inability to perform the duties of his job. Complainant worked for many years after the 1983 complaints and for almost 2 years following the 1987 complaints. The evidence is clear that none of these complaints were factors in his discharge.

6. Complainant's injuries were due in part to defective equipment at work (broken steps on the rock truck in 1983; defective door on the miner carrying truck in 1987). These facts do not establish a discrimination case under section 105(c) of the Mine Act.

7. Complainant has filed for state workers' compensation benefits, and Great Western has contested his claim. The discharge of an employee with a pending workers' compensation case does not state a case of discrimination under section 105(c) of the Mine Act.

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8. I conclude that Complainant has failed to establish a prima facie case of discrimination since he has not shown that the adverse action was motivated in any part by protected activity.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED that this proceeding is DISMISSED.

James A. Broderick  
Administrative Law Judge