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SOL (MSHA) V. RAMBLING COAL
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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 DON B. COLEMAN, COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. KENT 90-72-D PIKE-CD-89-15 No. 5 Mine
v.	
RAMBLING COAL COMPANY, INC., RESPONDENT	

DECISION

Appearances: G. Elaine Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant; Billy R. Shelton, Esq., Baird & Baird, Pikeville, Kentucky, for Respondent.

Before: Judge Maurer

This proceeding concerns a discrimination complaint filed by the Secretary of Labor (Secretary) on behalf of the affected miner, Don B. Coleman, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c), hereinafter referred to as the "Act".

On January 22, 1990, a Discrimination Complaint was filed with the Commission alleging that Mr. Coleman was unlawfully discriminated against and discharged by Respondent on August 3, 1989, for engaging in an activity protected by section 105(c)(1) of the Act. More particularly, the Complaint alleges that Coleman's discharge on August 3, 1989, was the direct result of his stated refusal to perform work (operate a machine) which he believed to be unsafe.

Pursuant to notice, a hearing on the merits was held in this matter on May 17, 1990, in Prestonsburg, Kentucky. Post-hearing proposed findings and conclusions were filed by the Secretary on July 10, 1990, and by the Respondent on July 5, 1990. I have considered these submissions along with the entire record in making this decision.

STIPULATIONS

The parties stipulated to the following which I accept:

1. Rambling Coal Company, Inc., is the owner-operator of the No. 5 mine in Pikeville, Pike County, Kentucky.

2. The mine is subject to the Federal Mine Safety and Health Act of 1977.

3. The Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge have jurisdiction to hear and decide this matter.

4. Mr. John South is a designated and authorized representative of the Secretary of Labor.

5. The Complainant, Mr. Don B. Coleman, was discharged by Rambling Coal Company, Inc. on August 3, 1989.

6. At the time of his discharge on August 3, 1989, Don B. Coleman's wage rate was $60.00 per day.

7. According to Respondent's history of previous violations in the 24 months preceding the violation charged in this action, the Respondent had 177 inspection days, 104 assessed violations, .58 violations per inspection day and no previous violations prior to that time.

8. The Respondent is a small operator producing 172,625 tons per year. The No. 5 Mine produces 172,625 tons per year.

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. Complainant (Coleman) was employed by Respondent (Rambling) as an outside man. He began his employment with Rambling in March of 1989. He was employed at the No. 5 mine from that date until his discharge on August 3, 1989. His duties as an outside man were servicing batteries, greasing equipment and checking fluid levels on the equipment and adding fluid, if required. As part and parcel of performing his job duties, he was required to operate the small front end loader that is the subject of this case.

2. Danny Skeens, a coal hauler employed by Moody Trucking Company, used this front end loader on the afternoon of August 2, 1989. He noticed that the brakes on the equipment were getting weak and he notified Coleman and another man of that fact.

3. Skeens returned to the site early on the morning of August 3, 1989. He attempted to use this front end loader, but found that it had no brakes. Skeens reported this to

Sammy Williams and Roy Alley, the superintendent.

4. On August 3, 1989, Coleman arrived at the mine site for work at approximately 6:00 a.m. for his first day on the day shift. By 7:00 a.m., he was discharged. This is also the approximate time period when Skeens discovered and reported that the front end loader had no brakes.

5. Coleman did not check the end loader's brakes that morning. He already knew the equipment did not have any brakes as of the previous evening, which was his last turn on the second shift. Coleman had reported this fact to Sam Williams, the company mechanic and only other person working with him on the previous night's shift. Shortly after his arrival at work on the morning of August 3, 1989, Coleman also informed Roy Alley that the front end loader had no brakes.

6. Coleman credibly testified concerning that conversation with Roy Alley as follows (Tr. 64):

> Q. What was the nature of your conversation with Mr. Alley?
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> A. Well, I went up to him, and I told him, I said, "Roy, that end loader doesn't have any brakes,' and I said, "And I know I'm going to have to be running it a lot,' and I said, "I would like to have them fixed,' I said, "I fear for myself as much as the other people, to run that piece of equipment, "cause it's not safe and I don't want to run it with it not safe like that, with no brakes on it.'
>
> Q. And what was Mr. Alley's response?
>
> A. He said, "Okay, I'll take care of it, I'll talk to Steve [Horton],' and then he talked to Steve, and 20 minutes later he come back over and said him and Steve decided that I've got an attitude problem.

Complainant Coleman was then discharged. Roy Alley was not available at the hearing, but it is clear from the record, both from the testimony of Coleman and Steve Horton, the owner of the business, that Coleman was fired by Alley at the direction of Mr. Horton, after registering the above safety complaint.

7. Immediately after his discharge, Coleman reported the firing and his complaint concerning the brakes to both the Kentucky Department of Mines and Minerals and the Mine Safety and Health Administration (MSHA). Both agencies responded by sending an inspector to investigate.

8. Walter Coleman (no relation to the Complainant) is a mine inspector for the state of Kentucky. He was the first inspector to arrive on the mine site. He arrived at the mine site at approximately 7:15 a.m., on August 3, 1989. He inspected the front end loader and confirmed it had no brakes. He notified Mr. Horton, who along with Sammy Williams put brake fluid in the end loader and bled the brakes.

9. Parenthetically, I find as a fact that bleeding the brakes is a two man job. Coleman could not have bled the brakes by himself, even if he knew how, which he claims he does not.

10. Horton and Williams were able to restore working brakes to the front end loader in a matter of minutes utilizing the procedure noted in Finding of Fact No. 8.

11. Mr. Horton had experienced an unrelated servicing problem with the end loader a few days prior to the incident at bar. On that occasion, the end loader could not be used because the transmission was out of fluid. At that time, Steve Horton warned both Sammy Williams, Jr. and Don Coleman to make sure the equipment was serviced and in condition to operate at all times. Both men were warned because both were considered to be responsible for the condition of the equipment.

12. Horton's stated policy was to give only one disciplinary warning before firing a worker and in this case Respondent's assertion is that as of August 3, 1989, Coleman already had his prior warning. Therefore, when he allegedly did not put brake fluid in the end loader on August 2, 1989, or let somebody know that the end loader did not have brakes prior to that morning of August 3, he was fired for this reason, i.e., not doing his job, not for complaining about the lack of brakes on the equipment.

13. However, I find as a fact that Coleman did put brake fluid into the end loader on August 2, 1989, but without bleeding the brake lines, this was ineffective. I also find as a fact that Coleman notified the company mechanic that the brakes were defective before leaving the premises on August 2, 1989.

DISCUSSION WITH FURTHER FINDINGS

Generally, 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 activity and would have taken the adverse action in any event for the unprotected activity 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 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.

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 the instant case, I find that Mr. Coleman's safety complaint to Superintendent Alley on August 3, 1989, concerning the brakes or lack thereof on the front end loader was protected activity. Without question, the end loader had no operable brakes on it and also without question it would be hazardous to mine site personnel to operate it in that condition.

Rambling's position is that this protected activity had nothing to do with Coleman's discharge. Rather, Mr. Horton states that it was Coleman's failure to perform his job, i.e., service Rambling's equipment on the second shift, that led to his discharge. It is Horton's testimony that the equipment should have had brakes on it on the morning of August 3, 1989, and if it did not it was Coleman's fault. According to Mr. Horton "[t]he problem was he [Coleman] did not put the brake fluid in the end loader or let somebody know that the end loader did not have brakes on it prior to that morning [August 3, 1989]." Tr. 131.

However, Mr. Coleman testified and I find it to be credible testimony, that on the evening of August 2, 1989, he attempted to service the equipment by adding brake fluid. This simple addition of brake fluid, however, without bleeding the brakes was ineffectual. He also testified and I find it credible that he then informed the company's mechanic that the equipment had no operable brakes. He himself had no mechanical expertise and this was all he could do prior to leaving the shift for the evening. He personally did not know what was wrong with the brakes and did not know how to fix them. Shortly after his arrival the next morning he made the same report or complaint to Roy Alley that swiftly led to his discharge.

Turning now to the issue of whether the discharge was motivated by the protected activity, I first note the close proximity in time and space between the safety complaint concerning the brakes and the resultant discharge. This alone is strong circumstantial evidence that the two events are related.

Additionally, there was one earlier incident where Coleman had failed to service a piece of equipment for which he was responsible along with another employee, Sammy Williams, and both had been warned by Horton. In this case, the same division of responsibility would seem appropriate also. Both Sam Williams, Sr., the mechanic, and his son, Sammy Williams, were also responsible for servicing and maintaining this equipment, along with Coleman. So, even if Coleman was somewhat responsible in this instance for there being no brakes on the end loader it would seem that Sam and Sammy Williams were at least equally responsible.

Importantly, only Coleman complained or made an issue of it and only Coleman was fired. I therefore find that he was discharged as a direct result of engaging in protected activity. Since the operator has been unable to rebut this prima facie case, I also find that a violation of section 105(c) of the Act stands proven. The complaint of discrimination is therefore SUSTAINED.

REMEDIES

Turning now to Complainant's remedies, I find that he was unemployed between August 3 and August 29, 1989, for a total of 18 working days at a rate of pay of $60 per day. This amounts to $1080. However, Complainant collected $414 in unemployment compensation during this time period and that must be subtracted. This leaves a total loss of pay of $666. The payment of interest will also be ordered on this award until the date of payment.

Respondent will also be ordered to reimburse Complainant for his reasonable costs. He claims $275.52 for expenses incident to locating a new job and I find this to be very reasonable.

Finally, the Secretary seeks a civil penalty in this case. Considering the criteria under section 110(i) of the Act, I find that a civil penalty of $500 is appropriate, and will be ordered.

ORDER

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

1. To pay Don B. Coleman back pay through August 29, 1989, in the amount of $666, within 30 days of the date of this order.

2. To pay Don B. Coleman 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).

3. To pay Don B. Coleman $275.52 as reimbursement for costs.

4. To pay the Secretary of Labor a civil penalty in the amount of $500 for the violation found herein within 30 days of the date of this order.

Roy J. Maurer
Administrative Law Judge