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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  
BOB WAYNE HUBENAK,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. CENT 90-34-DM

MD 89-56

Bayer Alumina Plant

v.

ALUMINUM COMPANY OF AMERICA,  
RESPONDENT

DECISION

Appearances: Janice L. Holmes, Esq., Office of the Solicitor,  
U. S. Department of Labor, Dallas, Texas, for the  
Complainant;  
Linda F. Schneider, Esq., Aluminum Company of  
America, Pittsburgh, Pennsylvania, for the  
Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me, based on a Complaint filed by the Secretary (Complainant), on behalf of Bob Wayne Hubenak, alleging that the Operator (Respondent) violated Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2) (the Act). Pursuant to notice, the case was scheduled for hearing on May 15, 1990. On April 25, 1990, Respondent filed a Motion for Continuance, and the hearing was rescheduled to commence on June 26, 1990. On June 22, 1990, Complainant filed a Motion for Continuance, and the case was rescheduled to commence on October 10, 1990.

On July 12, 1990, the case was reassigned to the undersigned. The hearing was rescheduled and subsequently heard in Corpus Christi, Texas, on September 10-11, 1990. Bob Wayne Hubenak, Robert W. White, Harry Elrod, Kerry Keller, and Jim Isaac Simmons, Jr. testified for Complainant. Charles F. DiMascio, Jeffrey Alan Shockey, Johnny Palmer, Jr., Thomas G. Russell, Harry Elrod, and Kerry Keller testified for Respondent.

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Proposed Findings of Fact and Memorandum of Law were filed on November 6, 1990. Respondent filed a Response on March 14, 1990, and a Response was filed by Complainant on November 15, 1990, Respondent also filed a Joint Motion to Amend Pretrial Stipulations and this motion is granted. Complainant's Motion, filed November 15, 1990, for Leave to Amend its Proposed Findings of Fact, is granted.

#### Stipulations

The Parties entered into the following stipulations:

1. Jurisdiction over this action is conferred upon the Federal Mine Safety and Health Review Commission under Section 105(c)(2) and Section 133 of the Act.
2. Respondent's Bayer Alumina Plant, referred to as Point Comfort Operations, located in Calhoun County, Texas, is a mine as defined in Section 3(n) of the Act, the products of which affect commerce under Section 4 of the Act.
3. At all relevant times Respondent, Aluminum Company of America ("Alcoa"), did business and operated its Point Comfort facility in production of alumina, and therefore is an operator within the meaning of Section 3(d) of the Act.
4. Bob Wayne Hubenak was hired by Alcoa, at its Point Comfort Operations, in March 1969.
5. In April 1969, Mr. Hubenak was assigned to work in the Precipitation Department and has worked in the department since that time.
6. At all times relevant to this case, Mr. Hubenak held the position of "Area Operator" or "tank pumper" in the Precipitation Department and was therefore a miner within the meaning of Section 3(g) of the Act.
7. On or about March 24, 1989, some overhead pipeline which was suspended by several broken metal pipe hangers fell to the ground. The area was barricaded to prevent access to the area.
8. Following this incident, Company management inspected all pipe hangers in the area.

9. Company management directed the Engineering Department to initiate a detailed inspection of pipe hangers and pipe supports in the Precipitation Department.

10. After Mr. Hubenak learned that two MSHA inspectors would be inspecting the lights in his work area, he reported the broken pipe hangers to MSHA inspector Robert White.

11. Upon learning of the condition of the pipe hangers, Alcoa barricaded the area to prevent others from walking under the pipes.

12. A citation was issued to Alcoa by the MSHA Inspector for a violation of 30 C.F.R. 56.20011. Alcoa did not contest the citation and promptly abated the condition.

13. Hubenak engaged in protected activity by reporting a hazardous condition to an MSHA Inspector.

14. On or about May 4, 1989, Mr. Hubenak was given a 5 day disciplinary suspension.

15. On or about May 24, 1990, Mr. Hubenak was also advised that he would receive an additional 25 day suspension, but the suspension was not given.

16. Hubenak's complaint to the Secretary was filed on June 1, 1989.

17. After an investigation, the Secretary filed her complaint, on Hubenak's behalf, with the Commission on December 20, 1989.

18. Hubenak's damages are equal to five (5) days pay at the rate he was receiving in May 1989, or \$532.52, together with interest at the short-term Federal rate applicable to the under-payment of taxes in accordance with Local Union 2274, District 28, United Mine Workers of America v. Clinchfield Coal Co., 10 FMSHRC 1943, aff'd, 895 F.2d 773 (10th Cir. 1989).

19. Paul Ernest Kelm was the Miner's Representative for Local 4370 of the United Steelworkers of America at Alcoa's Point Comfort Operations at all times pertinent hereto. Prior to March 27, 1989, Kelm informed Hubenak that he would not represent him concerning safety complaints.

Findings of Fact and Conclusion of Law

Bob Wayne Hubenak is a miner employed by the Operator as a tank pumper in the Precipitation Department of its Point Comfort Operation. During the period in question, Hubenak worked in the area known as R-45, which contains approximately 6,000 pipe hangers spread over 200 acres. In the pertinent period at issue, Hubenak worked the 4:00 p.m. to midnight shift on March 24, 25, 26, and 27, 1990. In the R-45 area, sometime during the shift that Hubenak worked on March 24, some overhead pipeline that had been suspended by several broken metal hangers, fell to the ground. According to Hubenak at approximately 7:30 p.m. on March 27, he came by the control room in the R-45 area. He said that the operators in the control room were talking about the incident of a 150 foot section of pipe that had fallen on March 24. Hubenak went to check his work area to see if there were any broken hangers. According to Hubenak, he saw one or two broken hangers. Hubenak then went to the supervisor's office. In essence, he said that he asked his supervisor and the MSHA Inspectors who were present whether he could get in trouble by making a safety complaint to the Inspectors, and was told that he could not. According to Hubenak, while in the supervisor's office, in the presence of Kerry Keller, Paul Kelm, Bernard Gaash, and J. B. Steamer, he told the MSHA Inspectors, while looking at the former, that he had observed broken pipe hangers. He then went with the Inspectors, along with the others who were present, to inspect the broken hangers.

According to Hubenak, approximately 2 weeks later, Harry Elrod, who was the area superintendent for precipitation during the period in question, asked him what happened the night of March 27, and advised him that he should have first informed his supervisor of the broken hangers that he observed, and that accordingly, he (Elrod) was contemplating taking disciplinary action. Hubenak indicated that on May 4, Elrod again asked him what happened on March 27, and he (Hubenak) informed the latter that he told the MSHA Inspectors of the condition of the hangers, ". . . because I could get something done before somebody got hurt." (Tr.35) Elrod informed him that he was giving him a 5 day suspension.

The Commission, in a recent decision, *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, *Goff*, supra, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that

the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The 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 protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

There is no conflict in the record with regard to the fact that on March 27, 1989, Hubenak informed MSHA Inspector Robert W. White of the existence of broken pipe hangers in the R-45 area. As such, Hubenak was clearly engaged in protected activities. Further, the record establishes that Hubenak suffered adverse action, namely, a 5 day suspension. Thus, the key issue for resolution, is whether the Secretary has established a prima facie case by proving that the 5 day suspension was "motivated in any part" by Hubenak's having reported the condition of broken pipe hangers to the MSHA Inspector (protected activity). (Robinette, supra, at 817-818). In essence, it is the Secretary's position that Hubenak was suspended because he chose to report the unsafe condition to the MSHA Inspector, rather than to his supervisor. As such, it is argued that Respondent has interfered with Hubenak's right to report an unsafe condition to an MSHA Inspector. Further, the Secretary argues that Respondent has not, up to this point, disciplined any of its employees for failure to report an unsafe condition to a supervisor. I did not find merit to these arguments for the reasons that follow.

Jim Isaac Simmons, Jr., who worked for Respondent for 28 years as an area operator or tank charger in the R-45 Area, testified that he was not aware of any of Respondent's employees who had been disciplined for not turning in a safety violation to a supervisor. Also in this connection, Elrod testified that in the 3 years that he was in charge of the R-45 Area, he did not discipline any miner for failure to report a safety violation to a supervisor. I find that these statements of Simmons and Elrod do not establish any discriminatory action against Hubenak. To establish that Hubenak received disparate treatment, it must first be proven that there were situations where other employees were aware of safety violations or hazardous conditions, but did not report them to their supervisors. It next must be established that Respondent knew of these situations and did not discipline the employees in question. The record does not contain any evidence that Respondent was aware that there were other employees who had knowledge of unsafe conditions, but did

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not report them to their supervisors. Nor does the record contain evidence that there were any incidents, aside from the situation in issue, wherein Respondent's employees knew of hazardous conditions or safety violations, and did not report them to their supervisors. Accordingly, evidence that no other employees were disciplined for not reporting safety violations does not, per se, establish that Hubenak was discriminated against.

Nor does the record contain sufficient evidence to predicate an inference that Respondent's action, in suspending Hubenak, was motivated in any part by his having reported unsafe conditions to the MSHA Inspector. Any inferences in the record from which this conclusion might be drawn, have been successfully rebutted by Respondent. The only evidence of record that would tend to establish that Respondent manifested or harbored a negative attitude towards miners making safety complaints, is found in the testimony of Hubenak and Simmons. Simmons, in essence, testified that "supervisors" consider it "nitpicking" and give extra work, if a miner turns in a lot of safety complaints or repeats a safety complaint (Tr. 153). I do not place much weight upon this testimony of Simmons, as he did not cite the date or nature of any specific incidents. Also, it is significant to note that Simmons was not in Hubenak's work crew in the period in question, and there is no evidence that he was supervised at any time by Steamer, who was Hubenak's supervisor, during the period in question.1

Hubenak related that on one occasion, in June or July 1989, when he inquired of his Supervisor Ed Savalla as to how the latter checked belts, the latter indicated ". . . you just griping. You just don't want to work. Go up there and put that belt on and go to work, clean that secondary." (sic) (Tr.45). Hubenak indicated that on another occasion when he complained for the second time that a "blind" had not been placed in the correct position, Savalla said ". . . look like you never make no mistakes." (sic) (Tr. 48). Inasmuch as Savalla was not Hubenak's supervisor during the period in question, and there was no evidence that Savalla in any way had participated in the decision to suspend Hubenak, I do not place much weight on this testimony of Hubenak. Further, Elrod, who suspended Hubenak, was the individual fully responsible for taking such an action.

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There is no evidence that Elrod had ever manifested any animosity toward Hubenak or other miners making complaints to MSHA Inspectors or to management. On the contrary, the Secretary has not contradicted the testimony of Elrod, Charles F. DiMascio, Respondent's Director of Safety and Industrial Hygiene, Jeffrey Alan Shockey, who was the Safety and Industrial Hygiene Manager at Point Comfort Operation during the period in question, and Johnny Palmer, Jr., Production Manager, Alumina, all of whom described Respondent's strong policy of requiring employees to report safety and health hazards.

It appears to be the Secretary's position that, in actuality, Hubenak's suspension by Respondent was motivated, in part, by the fact that Hubenak chose to report a hazardous condition to the Inspector rather than a supervisor. On the other hand, it is Respondent's position that the only motivation for its suspension of Hubenak, was because the latter had not reported, to his supervisor, a hazardous condition which he had known about for more than 2 days. In essence, for the reasons that follow, I find the evidence establishes that a good faith reasonable belief that Hubenak did not report to his supervisor the hazardous conditions which he had known of for a few days, was the only basis for the determination by Elrod to suspend Hubenak. According to Hubenak, on the evening of March 27, he went to inspect for broken hangers, and discovered one or two. He did not seek out his supervisor, but decided to report instead to the MSHA Inspector, "because I could get something done before somebody got hurt," (Tr. 35). According to Elrod, when he confronted Hubenak a few days after March 27, he asked him why he had not notified management if he had known, for a couple of days, of the existence of broken hangers. The latter did not say that he had just discovered the hangers on March 27, but, he made this assertion the first time when he was confronted again on May 4 when he was suspended. Further, Elrod indicated that he was told by Keller that Hubenak had found the broken pipes after the 150 length of pipe had fallen on the night of March 24. Accordingly, Elrod concluded that Hubenak had known of the hazardous condition when he worked over the weekend, March 24-26, and had not reported it to his supervisor in violation of Company policy.2



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Company policy is embodied in the Safety Code of Conduct, which provides, as pertinent, as follows: "5. Be alert for unsafe conditions and report them immediately to your supervisor." (Exhibit R-3, page 000031).

I specifically find that there was a reasonable basis for Elrod to conclude that Hubenak had known about the broken hangers since the weekend commencing March 24, and had not reported this to his supervisor. Hubenak did not testify to rebut Elrod's testimony, that when he asked Hubenak a few days after March 27, why he did not inform management if he had known, for a few days, about the broken hangers, and he (Hubenak) did not maintain that he first learned of the conditions on March 27. Further, Elrod based his conclusion as to Hubenak's actions upon information provided him by Keller. This was corroborated by Keller, who indicated that Hubenak had told him that over the weekend (March 24-26) he had inspected for broken pipes and found some on a pipeline, although he (Hubenak) did not indicate exactly when this occurred. Hubenak did not rebut this testimony of Keller. Accordingly, I find that Elrod had good cause to conclude that Hubenak had known of the existence of broken hangers over the weekend, and had failed to report this condition to his supervisor. According to Elrod, he concluded that is "totally intolerable" if employees who are aware of unsafe conditions, fail to report them (Tr. 336).

I thus conclude that Respondent's action in suspending Hubenak was motivated solely by his failure to inform his supervisor, or other management officials, of the existence of broken hangers, which Respondent reasonably believed Hubenak had known about since the weekend of March 24, 1989. I thus conclude that Respondent has successfully rebutted the Secretary's case, and that the Secretary has failed to establish a prima facie case, i.e., that Hubenak's suspension was motivated, in any part, by protected activities. Accordingly, the Complaint shall be dismissed.

ORDER

It is hereby ORDERED that the Complaint filed on December 26, 1989, be DISMISSED.

Avram Weisberger  
Administrative Law Judge

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FOOTNOTES START HERE

1. On cross-examination Hubenak indicated that he did not have any problems with Steamer, and specifically was not afraid that the latter would take any action against him, if he turned in a safety complaint.

2. In this connection, the Secretary did not rebut the testimony of Respondent's witnesses that it was standard operating procedure to have placed guidelines dated April 20, 1988, on a bulletin board, which set forth, as pertinent, as

follows: "The employee who believes that safety or health hazard exists shall notify his supervisor, discuss the situation, and try to resolve the problem. . . ." (Exhibit R-5). Also, the Secretary did not rebut the evidence of Shockey that all employees are provided with a copy of the Safety Code of Conduct. Further, the personnel file of Hubenak contains notes indicating "went through" the safety book on various dates in 1977, (Exhibit R-12, page 000306).