

CCASE:
JOHN S. GUIDO V. SOUTHERN OHIO COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

JOHN S. GUIDO,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. WEVA 90-64-D
MSHA Case No. MORG CD 90-02

SOUTHERN OHIO COAL COMPANY,
RESPONDENT

Martinka No. 1 Mine

DECISION

Appearances: Daniel V. Lane, Esq., Salem, West Virginia, for
the Complainant;
Joseph M. Price, Esq., Robinson & McElwee,
Charleston, West Virginia, for the Respondent.

Before: Judge Fauver

Complainant brought this action under 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. He contends that, following a mine accident in which he was injured on May 7, 1989, he requested an MSHA investigation under 103(g) of the Act and Respondent discriminated against him because of his 103(g) request to MSHA. He alleges three acts of discrimination: (1) cutting off his workmen's compensation, (2) putting him in step three of the employer's absentee control program, and (3) making derogatory statements about Complainant in Respondent's conference with MSHA concerning the May 7, 1989, incident.

The case was heard in Morgantown, West Virginia, on September 6, 1990.

DISCUSSION

Under the Act, a complaining miner has the burden to prove that he engaged in a protected activity, and that the adverse action complained of was motivated in any part by that activity. *Boich v. FMSHRC*, 719 F.2d 194, 195-196 (6th Cir. 1984).

For the reasons shown below, I find that the reliable evidence does not sustain Complainant's allegations of discrimination.

After Complainant requested MSHA to investigate the May 7, 1989, accident under 103(g) of the Act, MSHA investigated, and issued a citation for activating the conveyor belt without adequate warning. Respondent challenged the citation as to its "gravity" findings. At a conference between MSHA and Respondent, concerning the citation, Respondent contended that Complainant did not have a witness to his alleged injury and was not a reliable witness himself. During the conference, Respondent's accident prevention officer, Wesley Dobbs, stated or implied to MSHA that Complainant had some 40 accidents or injuries in the past and was not "much account" as a worker or a witness. I find that Respondent's remarks about Complainant as a worker and as a witness were part of a settlement discussion, and were not discriminatory because of Complainant's 103(g) request. It was part of Respondent's factual contention for requesting MSHA to reduce the degree of gravity alleged in the citation. Complainant testified that he had heard that Respondent's representative, Wesley Dobbs, used profanity in his description of Complainant to MSHA. However, the evidence does not sustain this hearsay.

The reliable evidence does not show that Complainant's workers' compensation was cut off. He was paid in full under workers' compensation. Although there was some delay in making some of the payments, the evidence does not show that the delays were discriminatory.

Finally, the evidence shows that at the time of the accident Complainant was already in step three of the employer's absentee control program. Respondent did not change his status or take adverse action against him under this program after his 103(g) request for an investigation.

On balance, I find that Complainant has not met his burden of proof to show a violation of 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

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FOOTNOTES START HERE

- 1. Complainant reported to his employer that he was injured when a conveyor belt was started without warning.