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ARNOLD R. SHARP v. BIG ELK CREEK COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

ARNOLD R. SHARP,
COMPLAINANT

v.

BIG ELK CREEK COAL COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 89-147-D

PIKE CD 89-08

DECISION

Appearances: Joe T. Roberts, Esq., London, Kentucky for
the Complainant;
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs,
Louisville, Kentucky for the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Arnold R. Sharp under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" alleging unlawful discharge on February 28, 1989, by the Big Elk Creek Coal Company (Elk Creek) in violation of section 105(c)(1) of the Act (Footnote 1).

More particularly Mr. Sharp alleges in his Complaint as follows:

On February 28, 1989, I was discharged from my job for missing too much work and for not signing a medical authorization form concerning an accident I had at work on January 20, 1989. The days I have missed worked [sic] were mostly due to my becoming sick after working in terrible weather conditions and I have always gave [sic] them doctor's statements. In regard to the request for a medical release, I filled out an accident report, submitted emergency room records and submitted a doctor's statement from Dr. Ratliff.

Since I won a previous discrimination case against this company and was put back to work, I have continually been harassed and have been wrongfully fired. I request reinstatement and all other relief to which I am entitled.

In his post hearing brief the Complainant appears to have abandoned this assertion that his discharge was the result of the settlement of a previous discrimination case against this mine operator and he makes new claims of certain additional protected activity, namely that he "complained to his supervisors and also to MSHA about the unsafe conditions of the burm [sic], truck, sweeper, and steam jenny as well as the health hazard to the sweeper and steam jenny".

In order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of proving that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall 663 F.2d, 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 817-818 (1981).

The mine operator may rebut a prima facie case by showing either that no protected activity occurred or that the adverse

action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity. Pasula, supra, Robinette, supra; See also Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194 (6 Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). See NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), approving a nearly identical test under the National Labor Relations Act.

While it has never been clearly articulated, it appears from the "statement of the case" in the Complainant's Brief that he is now maintaining that his discharge by Elk Creek on February 28, 1989, was a discriminatory response to the following protected health and safety complaints and activities:

* * *

(1) After Claimant, Mr. Sharp, went back to work on January 25, 1989, he went back to running the same steam jenny and also ran a blue and white broom, which sweeps the coal, and known as a coal sweeper, which had no doors, windows, roll bar protection, and no heater, and while running the broom, Mr. Sharp would get soaking wet with freezing ice covering his body and clothing and further that the sweeper had no windshield and did not have protective goggles and therefore, debris, dirt and coal came into the cab of the broom actually hitting Mr. Sharp. (Tr.28)

Mr. Sharp complained to the foreman, Harlen Couch, that the broom sweeper was unsafe and Mr. Couch told Mr. Sharp that he would run it or be fired and Mr. Sharp also complained to the superintendent Mr. M.C. Couch about the broom being unsafe and was told "you will run it or be fired." Then Mr. Sharp complained to Jim Meese at the Lexington Office and explained the situation to Mr. Meese and the condition of the broom sweeper and was told by Mr. Meese, "you will work, Mr. Sharp, or you will be fired." (Tr. 29)

The broom sweeper had no doors, no windows, no heater, and no roll bar protection and therefore Mr. Sharp, after exhausting his reports of the unsafe conditions to the company, finally reported it to the Federal Mine Safety people, and the government issued a citation but Mr. Sharp was filed [sic] before he could observe whether the unsafe conditions on the broom could be corrected by the company. (Tr. 29-30) on February 20, 1989. (Tr. 31)

Mr. Sharp also, between January 20, and February 28, 1989, complained to his supervisors and to the Federal Mine Safety people that the steam jenny was unsafe and was a health hazard,

* * *

Mr. Sharp had previously been fired and made complaint and after hearing/trial, he was ordered reinstated by the Administrative Law Judge and went back to work in September, 1987, and was supposed to go back to work on the rock truck, but at that time they put him on the steam jenny through September and October and in October, 1987, the steam jenny was parked and anti-frozen, and covered with plastic and Mr. Sharp was then put back on the rock truck in November of 1987, and from November until January 5, 1988, Mr. Sharp was the sole driver of the rock truck and at that time made complaints about the brakes, horn and lights to his foreman, Willie Martin, and the problems were not taken care of by the company, and then Mr. Sharp complained to MSHA in November of 1987 and an inspector came and looked at the truck, and Mr. Sharp also complained about the burm [sic] on the edge of the hollowfill, and the inspector wrote up a citation on the truck and on the burm [sic]. (Tr. 57-62)

* * *

(3) when he [Mr. Sharp] went back to work on February 22, 1988, he went back to work on a new rock truck in which he drove up until June and he was taken off the new truck and placed on the truck that he had previously operated and made prior complaints about which still had no horns, neither front nor rear, and the brakes were metal against metal, which had never been fixed since he had reported and MSHA had issued a citation and this was truck number 621, and again Mr. Sharp complained to Mr. M.C. Couch, Herlan Couch, and Jim Meese, who were all his immediate superiors about the safety of the truck and which they did nothing about and,

* * *

(4) Since Mr. Sharp began working for the Respondent he has driven a rock truck, helped operate an auger, a steam jenny and a coal sweeper and Mr. Sharp has made complaints to his fellow employees, foremen, supervisor, and administrators, as well as to MSHA about the unsafe conditions of all the equipment that he has operated or helped operate for the Respondent and also has made complaints about unsafe conditions of the burm [sic] where the rock trucks dump into the hollowfill, and Exhibit C-5, shows that MSHA wrote a citation on the broom for being unsafe and a health hazard which Mr. Sharp had reported on

February 20, 1989, and Mr. Sharp was fired on February 28, 1989. (Tr. 104-106).

* * *

It is noted preliminarily that several of the above allegations of protected activity and harassment have been the subject of previous complaints under section 105(c) of the Act. Those complaints have been considered and rejected by the Department of Labor's Federal Mine Safety and Health Administration and, in those cases pursued to this Commission, by a Commission administrative law judge, and have since become final. (Footnote 2)

I do however find in this case credible evidence to support many of Sharp's claims of protected safety and health complaints. While Harlen Couch denied at hearing that Sharp had ever made complaints to him neither M.C. Couch nor Willie Martin, two of Sharp's former supervisors, were called to testify. Sharp's allegations of complaints to them therefore stand un rebutted. In addition, Elk Creek Administrator, James Meese, was candid in acknowledging that not only did Sharp complain to him about alleged unsuitable rain gear and about alleged unsafe conditions on the steam jenny (Tr.189) but also that Sharp regularly told him of complaints he was making to MSHA (Tr.200).

Sharp has failed however to sustain his burden of proving that Elk Creek was thereby motivated by such activities in discharging him. According to the credible testimony of James Meese he was the person who made the final decision to fire Sharp and his decision was based solely on Sharp's attendance problems and refusal to sign the medical information release. He

specifically denied placing any reliance on Sharp's record of making health and safety complaints to the company and to MSHA. I find this testimony completely credible.

This conclusion is strongly reinforced by the evidence that Elk Creek's justification for its discharge of Sharp was based upon credible, documented and well-founded unprotected business reasons. This evidence supports both the finding that his discharge was not motivated by any protected activity but also that even assuming, arguendo, Sharp had established a prima facie case, it would have been rebutted. Robinette supra.

In this regard the letter of discharge to Mr. Sharp dated February 28, 1989, states as follows:

We have given you ample time since your first notice on November 15, 1988, to improve your attendance at Big Elk Creek Coal Company. On January 17, 1989, you were advised for the second time in two months that your attendance was unacceptable and that for the following 90 days your attendance would be closely reviewed. Since your second notice on January 17, 1989, you have missed another 5 days for various illness or personal reasons.

Also, on January 29, 1989, you claim you injured a muscle in your right leg in an alleged on-the-job injury but did not report it to your foreman at the time. You missed 4 days for this claimed injury. We have repeatedly asked you to sign a medical authorization so that we could obtain information from your doctor about this claimed injury. As recently as February 24, 1989, you were advised that if you didn't return the form, signed, you would be subject to discipline up to and including discharge. You have refused to sign and return the form.

At this time, we feel you have missed too much time during the 90-day period and, in view of all of this, we have no alternative but to terminate your employment effective February 28, 1989. (Exhibit No. C-10)

The credible evidence supports the allegations in the above letter. In particular the credible evidence shows that from the week ending November 11, 1988 through February 25, 1989, Sharp was absent from work 26 days out of 94 workdays (excluding excused absences and "injury" days) or about 25 percent of his scheduled work days. The evidence further shows that on January 17, 1989, Sharp was advised by Elk Creek for the second time in two-months that his attendance was not acceptable and that it would be closely monitored for the next 90 days. Following the second notice on January 17, 1989, the evidence shows that Sharp indeed missed another five days for various illnesses or for personal reasons. It can reasonably be inferred

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from the evidence in this case that three of those days were unexcused and indeed that Sharp was falsely claiming a medical excuse for those absences on January 21, through 23, 1989.

The discharge letter also refers, as a separate ground for discharge, Sharp's refusal three times to sign a release to permit review by Elk Creek of medical reports relating to that absence. The reports provided to the operator by Sharp are not legible and appear to offer contradictory diagnoses. Under the circumstances the operator was justified in seeking further explanation.

This procedure was even more warranted in light of Sharp's previous history of attendance deficiencies and of his predictions purportedly made to Elk Creek Administrator, James Meese, shortly before the absence, that he might very well get hurt working on the task that he was then performing. According to the credible and undisputed testimony of Meese, Sharp complained to him on January 21, 1989, about working the steam jenny and predicted that he might get hurt.

Under all the circumstances I do not find that Mr. Sharp has sustained his burden of proving that he was discharged in violation of Section 105(c)(1) of the Act.

ORDER

Discrimination Complaint Docket No. KENT 89-147-D is DISMISSED.

Gary Melick
Administrative Law Judge

Footnotes start here:

1. Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

2. Those prior 105(c) complaints were as follows:

1. BARB-CD 87-53 -- A Complaint concerning a lack of training and not being reinstated to the proper job. This was withdrawn on August 19, 1988, and approved by Judge George Koutras.

2. PIKE-CD 88-10 -- A Complaint about warnings for missing work, dismissed March 20, 1989 by Judge Koutras.

3. PIKE-CD 88-18 -- A complaint of harassment for Sharp's not reporting to work as scheduled following a training session on First Aid. this was dismissed at Sharp's request on March 30, 1989 by Judge Koutras.

4. PIKE-CD 89-02 -- A Complaint about a warning concerning absenteeism for staying home with his wife, dismissed by Judge Koutras on August 22, 1989.

5. PIKE-CD 89-07 -- A Complaint filed by Sharp alleging he was assigned to the steam jenny in retaliation for his earlier 105(c) Complaints. this was dismissed by MSHA on March 30, 1989, and no further review was sought by Sharp.