

CCASE:
WAYNE C. TURNER v. NEW WORLD MINING
DDATE:
19910328
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

WAYNE C. TURNER,
COMPLAINANT

v.

NEW WORLD MINING INC.,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. VA 90-51-D

NORT CD 90-08

No. 1 Strip

DECISION

Appearances: Donald E. Earls, Esq., Norton, Virginia, for the
Complainant;
Karen K. Bishop, Esq., Wise, West Virginia, for the
Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed on August 24, 1990, by Wayne C. Turner (Complainant) alleging, in essence, that he was discriminated against by New World Mining Incorporated (Respondent), in violation of Section 105(c) of the Federal Mine Safety Act of 1977 (the Act). Respondent filed an Answer on September 27, 1990, and the case was subsequently assigned to me on October 4, 1990. In a telephone conference call initiated by the undersigned, between Complainant and Counsel for Respondent, the former indicated that he intended to be represented by an attorney. On October 23, 1990, in a telephone conference call initiated by the undersigned, between Counsel for both Parties, it was agreed that this case be set for hearing on November 27, 1990. Subsequently, Respondent requested an adjournment which was not opposed by Complainant. The case was rescheduled and heard in Abingdon, Virginia, on December 13, 1990. At the hearing Michael D. Sturgill, Wayne Turner, and Mark McGuire testified for Complainant. Henry M. Yates, Edward Edmond Stanley, and Francis Salyers testified for Respondent.

At the conclusion of the hearing, the Parties were granted the right to file Briefs and Proposed Findings of Fact, 3 weeks subsequent to the receipt of the transcript of the hearing. Volume I of the Transcript was filed on January 24, 1991, and Volumes II and III were filed on January 28, 1991. To date,

neither Party has filed any posthearing submission. Nor has either Party requested an extension of time to file a Brief and Proposed Findings of Fact.

Findings of Fact and Discussion

Wayne C. Turner (Complainant) had been employed by Respondent for approximately 3 years until he was fired by his foreman, Francis Salyers, on Monday, April 30, 1990. It is Complainant's position that his discharge by Respondent was in violation of Section 105(c) of the Act, which, as pertinent, provides that it is unlawful to discharge a miner because of the exercise by such miner ". . . of any statutory right afford by this Act."

Discussion

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, in *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).

In the period at issue, Turner operated a drill from inside a cab located on a platform (table). The drilling operation produced large amounts of dust, but the drill apparatus was equipped with a water system, dust collector, and bushings to prevent dust from entering the cab where the drill operator worked. In addition, the cab itself was equipped with an air conditioner to allow proper ventilation in the cab, should it be closed to keep out dust. Turner indicated that none of this equipment worked properly, and that specifically the bushings had worn out, allowing quantities of dust to enter the cab. According to Turner, on numerous occasions he complained to his foreman, Francis Salyers, about these conditions. Salyers, while disputing that Turner complained to him about the worn bushings,

did acknowledge that Turner had complained to him two or three times about dust on the drill, and specifically had complained about the air conditioning not functioning. Henry M. Yates, Respondent's superintendent, who is the supervisor of Salyers, indicated that Turner had complained to him approximately two or three times about dust.

Thus, inasmuch as Respondent, in essence, has not rebutted Turner's testimony that he had complained to Respondent's managers with regard to the presence of dust in his work environment, I conclude that Turner engaged in protected activities.

II.

a. Respondent's Reaction to Turner's Complaints

On direct examination, Turner was asked what "would they" say to him when he complained about the air conditioner and the fact that he had to "breathe that dust" (Tr. 58). Turner answered that Salyers said "You're like a woman, you bitch more than a woman does about the dust on these drills" (Tr. 58). This statement by Salyers constitutes the only evidence adduced relative to any manifested adverse reaction by Respondent to Turner's protected complaints. On the other hand, Salyers indicated that on the Friday prior to the Monday on which Turner was fired (April 30), in response to the complaints as to dust that Turner had made that day, he spent the whole day purchasing and installing insulation in order to seal the cracks in the air conditioner. Also, Yates indicated that in response to Turner's complaints about dust, he ordered bushings to be made. Turner, in essence, testified that at times he had been provided with dust collectors. In essence, he also said that when he complained about the dust coming through the bushings, he was told by Salyers that he would get a replacement bushing as soon as he could. He also indicated that when he complained about the water system, Salyers indicated to him that he would get it fixed, but in fact never did. Thus, Complainant has failed to establish that Respondent manifested any significant animus towards him as a consequence of his having complained about exposure to dust.

b. The Firing of Turner

In general, the work week at Respondent's mine is Monday through Friday, with work being required on Saturday on an "as needed basis." (Claimant's Exhibit 1). On Friday, April 27, Yates informed Salyers that work was required on Saturday. There is a conflict in the record between Complainant's witnesses and Respondent's witnesses Edward Edmond Stanley, the night foreman, and Salyers, as to whether the latter had informed Turner and his

~506

crew (Michael D. Sturgill and Michael McGuire) that they were expected to work the following day i.e., Saturday. On Saturday, April 28, neither Turner nor Sturgill worked. (Footnote 1)

On the morning of Monday, April 30, 1990, when Sturgill and Turner arrived at the work site, there is a conflict in the evidence between the testimony of Complainant's witnesses and that of Salyers, as to whether the latter initiated cursing at Sturgill and Turner for not having reported to work on Saturday. However, both Complainant's witnesses and Salyers are consistent in testifying that a heated discussion ensued between Turner and Sturgill on the one hand, and Salyers on the other. According to Turner, Salyers told him that "if you're copping an attitude to me, I will fire you right now" (Tr. 71). Turner indicated that he responded by saying "well, you can take a flying leap and kiss my ass . . ." (Tr. 71), and then leaving. Sturgill indicated that there was cussing back and forth with regard to whether he and Turner were told on Friday to work on Saturday. Sturgill, in essence, corroborated Turner's version.

Salyers indicated that he told Sturgill and Turner not to curse, and whereas Sturgill then kept quite, Turner continued to curse. Salyers indicated that he told Turner that if he (Turner) continued to curse him, he (Salyers) would fire him. Salyers said that Turner said "f--- you, Buck if you're going to fire me, go ahead and fire me," and then he (Salyers) fired Turner (Tr. 274). On cross-examination Salyers said that when Turner said to him, "Buck you're a M. F." (Tr 328), it led to his termination. In rebuttal, Sturgill and Turner denied that the latter called Salyers a "M. F.," but they did not rebut Salyers' testimony that Turner had said "f--- you."

Salyers indicated that the cursing of him by Turner was the sole reason he fired Turner. Salyers further indicated specifically that Turner was not fired for not having worked on Saturday. In this connection, McGuire corroborated that this was what Salyers had said on April 30, when Turner was fired.

c. Motivation

In evaluating whether the firing of Turner was motivated in any part by his protected activities, i.e., complaints about exposure to dust, it is not necessary to make a determination as to whether Turner had been notified by Salyers that he had to work on Saturday, and whether Salyers or Turner initiated cursing. A determination of these matters does not have any bearing on the main issue herein, i.e., the nexus if any between Turner's protected activities, and his firing. I find that

~507

Salyers manifested a slight degree of animus toward Turner's complaints about exposure to dust. However, the weight of the evidence establishes that Turner continued to curse Salyers after having been warned in this regard by the latter. I find that the evidence establishes, accordingly, that Salyers would have fired Turner in any event based on Turner's cursing him. (Footnote 2) Accordingly, I find that it has not been established herein that Respondent discriminated against Complainant in violation of Section 105(c) of the Act.

ORDER

It is hereby ORDERED that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

Footnotes start here:-

1. McGuire was called by Salyers early that morning and did subsequently report to work.

2. This conclusion is not negated by the testimony of Complainant's witnesses, that other employees had cursed Salyers. I find this testimony alone insufficient to establish that Turner received disparate treatment. Specifically, the record fails to establish that there were any specific instances in which other employees had similarly cursed, not in jest, at Salyers after having been warned in that regard, and that these employees were not disciplined.