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LARRY CODY v. TEXAS SAND AND GRAVEL
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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

LARRY CODY,
COMPLAINANT

v.

TEXAS SAND AND GRAVEL COMPANY,
INCORPORATED,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. CENT 90-167-DM

MD 88-93

DECISION

Appearances: Larry Cody, Amarillo, Texas, Pro se;
Tad Fowler, Esq., Miller & Herring, Amarillo,
Texas for the Respondent.

Before: Judge Melick

This case is before me upon the complaint by Larry Cody 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 September 14, 1988, by Texas Sand and Gravel Company, Inc. (Texas Sand and Gravel) in violation of section 105(c)(1) of the Act (Footnote 1).

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

I must haul heavy equipment on a low-boy. I asked for help to load a crane. The crane had no brakes. While loading the crane, I could not see the back wheels on the right side. The wheels slipped off the low-boy and the crane turned over.

I went to the doctor, and even before I was released from the doctor, Wayne Pulliam called me in and said "You're fired."

About a month ago Wayne Pulliam told me to take the crane to Vega Texas for concrete plant use. I told Wayne the crane don't [sic] have brakes how do I get it off. So Wayne said he would go help me get it off all of this took place in the shop at Mansfield Plant. Their [sic] were witnesses. But when I had to go get it I asked Wayne how am I going to get it back on he said I could handle it. .

Subsequently in response to a Show Cause Order Mr. Cody supplemented his Complaint by noting that he believed that he was fired due to safety related discrimination because, inter alia:

Before my accident I had asked Wayne Pulliam [mine superintendent] for some 2 x 12 foot boards for the sides of the low-boy, so I could safely haul the wider equipment. As it was the crane had no brakes, and less than half of the tires were on the low boy, the other part hung off the bed. All I got as a reply from Wayne Pulliam (who was the main boss at Mansfield Plant), was a laugh.

The above response is deemed to constitute an Amended Complaint. In order to establish a prima facie case of discrimination the Complainant has the burden of proving that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected

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activity. Consolidation Coal Co, 2 FMSHRC 2786, 2797-3800 (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 alone. Pasula, supra, Robinette, supra; See also Eastern Associated Coal Corp. v. FMSHRC, 813 F.2d 6339, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194 (6th 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.

At hearing Cody testified that he was discharged by Texas Sand and Gravel on September 14, 1988, the day after the crane he was loading onto a low-boy fell off and overturned. As a result of this accident Cody was taken by a co-worker to see a doctor. Cody testified that he "couldn't walk very good--there was something wrong with something" (Footnote 2). The next morning when Cody appeared for work he met with mine superintendent Wayne Pulliam. Pulliam told Cody he had orders to let him go and in fact Cody was then fired. Cody appears to be alleging that this discharge was the result of his having the accident the day before and that this accident was the result of not having 2 by 12 outrigger boards on the low-boy that would have provided support for the wheels of the crane that overturned. According to Cody without these boards the wheels of the crane were supported by only 3 or 4 inches of the 24-inch- width tires. Cody maintains that he had complained 2 or 3 weeks before this accident to superintendent Pulliam that it would be safer to have the 2 x 12 board outriggers to support the crane on the low-boy. Pulliam purportedly only laughed in response stating that "there wasn't no way they could afford to buy them boards"

While I find therefore based upon the undisputed testimony of Cody, that he in fact did make a protected safety complaint to the Respondent I do not find that Cody has met his burden of proving that his discharge 2 or 3 weeks later was motivated in any part by that complaint. There is no evidence of any ill-will

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or retaliatory motive resulting from the complaint and Cody's discharge occurred only hours after he engaged in the unprotected activity of driving the crane off the low-boy causing it to overturn. Cody himself acknowledges that this accident was reason and the motivating factor for his discharge.

Under the circumstances I cannot find that Cody has established a prima facie case that his discharge was in violation of section 105(c)(1) of the Act. This discrimination proceeding must accordingly be 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 miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding 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. Mr. Cody subsequently received worker's compensation benefits for back injuries he sustained in this accident.