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RONNIE E. PRICE v. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Lessburg Pike
Falls Church, Virginia 2204

RONNIE E. PRICE, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. WEVA 90-308-D
CONSOLIDATION COAL COMPANY, RESPONDENT	MORG CD 90-10
	Blacksville No. 1 Mine

DECISION

Appearances: James B. Zimarowski, Esq., Morgantown,
West Virginia, for the Complainant;
Walter J. Scheller III, Esq., Consolidation
Coal Company, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a complaint of discrimination filed by Ronnie E. Price (Complainant) on August 10, 1990, alleging that Consolidation Coal Company (Respondent) discriminated against him in violation of Section 105(c) of the Act. (Footnote 1) Pursuant to notice, the case was scheduled for hearing on January 15, 1991. Subsequently, in a telephone conference call between Counsel for both Parties, Counsel for Complainant indicated that Complainant saw him for the first time on January 11, 1991, and accordingly requested an adjournment to prepare for the hearing. The request was not opposed and was granted. The case was rescheduled for March 5, 1991. On February 25, 1991, in a telephone conference call with Counsel for both Parties, Counsel for Complainant requested a further adjournment in order to effectively prepare for hearing. This request was not objected to and the case was adjourned and rescheduled for April 30 and May 1, 1991. The case was heard at

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that time in Morgantown, West Virginia. At the hearing, Ronnie Price, John Mason, Terry G. Collins, and Charles Edward Haun testified for Complainant. Francis Pethel, Peter Yost Turner, Ronald Darrah, Paul J. Borchick, Jr., and J. Robert Levo testified for Respondent. Complainant filed proposed Findings of Fact and Conclusions of Law on June 17, 1991. Respondent filed a Posthearing Brief on July 1, 1991.

Findings of Fact and Discussion

Ronnie Price is a roof bolter employed by Respondent, and during the relevant times at issue, worked in the P-9 Section on the midnight shift. In the middle of March 1990, a new foreman Donald Darrah was assigned to the section. The first day that Darrah was on the section, Price, along with John Mason, Terry G. Collins, and Doug Harper, brought a complaint to Darrah that he did not sign the date board. Also on another occasion, Price informed Darrah and Paul J. Borchick, Jr., the shift foreman, that the former had not properly ventilated the belt area when it was moved. On another occasion, Price told Borchick that Darrah had wanted to tram a miner in order to get rid of gas. According to Price, at the end of the shift on April 17, he obtained a methane reading of one percent, whereas Darrah had reported a reading of .02 percent across the face. Price informed MSHA Inspector Dale Dinning of this problem. Price was asked on cross-examination if he told Darrah about it, and he said "yes, he was told about it" (Tr. 66). Darrah denied that Price made this complaint to him. However, Borchick indicated that Price informed him that Darrah had called the section safe in spite of the fact that one percent of methane was found at the heading. I conclude that Price, in voicing safety concerns to either Darrah or Borchick, was engaged in protected activities.

Essentially, in order to establish that he has been discriminated against in violation of Section 105(c) of the Act, Complainant herein has the burden of establishing a prima facie case by proving that he engaged in protected activities and that adverse action taken against him was motivated in any part by the protected activity. (Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803, 817-81 (April 1981). The prima facie case may be rebutted by the Operator by showing either that no protected activity occurred, or that the adverse action was not motivated in any part by the protected activity (See Robinette, supra, at 818 n.20; see also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)).

Essentially, it is Complainant's position that adverse action in the form of harassment was taken against him which was motivated in any part by his protected activities.

From the middle of March when Darrah became the foreman of the section, through April 18, Price had made various safety

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complaints directly to Borchick, and to Darrah directly or indirectly through Borchick. According to Borchick and Darrah, the day after Price made a complaint about the methane gas readings, Darrah changed his location from bolting on the right to bolting on the left side. (Footnote 2) According to Price, when Darrah made this switch he (Darrah) "had a very bad attitude" (Tr. 44). He was asked to describe this attitude and answered as follows:

A. Well, just, you know, you're going to do it that way, you know. You're going to do as I said, I'm the foreman here which Mr. Levo told me the same thing. Darrah is the foreman on that section.

Q. Okay. Did Mr. Darrah use the words that he's the foreman and you're going to do it his way?

A. Well, yeah and a few others that I don't use.

Q. All right. Now, is that just his way of conversing with his crew or does he single out you in particular to talk to you that way?

A. Well, yeah, pretty well just not me, but me and two or three other ones. You know, some of the others he don't get along with (sic).

Q. Which two or three others did he kind of act very combative to?

A. Well, John Mason, Terry and his very best friend John Keener. I mean they don't even get along now.

Q. And these individuals have also raised safety issues
- - -

A. Yeah. (Tr. 45).

Darrah testified essentially that bolting from either the right or the left side requires the use of identical controls although their order is reversed. He indicated further that although the section's two bolters usually work out between themselves the side they work on, he decided to switch Price in order to remove him from working close to the miner operator,

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located on the right side, inasmuch as Price is a "talker." (Tr. 228). According to Darrah he thought such a move would increase production.

Although the performance of the task of bolting appears to be the same whether performed from the right or left side, the bolter working on the left side in the P-9 Section would also have to tug and pull the ventilation tube located on that side. According to Price, bolters are usually rotated between the right and left sides, and he would not be able to work on the left side and pull and tug the tube all the time. Darrah indicated that although he had an extra man placed on the left side who does all the tugging and lugging, he agreed that a bolter working on the left side would be required to do a "little" more physical labor (Tr. 256). Accordingly, I find that, to some degree, the switching by Darrah of Price to the left side of the bolter constituted an adverse action. Further, inasmuch as this action was taken the day following Price's complaints about methane readings, and following Price's other complaints made within the preceding approximately 30 days, I conclude that this adverse action was motivated in part by Price's complaints.

Essentially, according to Complainant, Darrah not only took adverse action against him for voicing complaints, but also manifested animus towards Collins and Mason, who also had made safety complaints. Mason had complained to Darrah about the latter having required him to continue to load coal behind the miner to such an extent, that he (Mason) was concerned that there would be inadequate space for sufficient air to provide adequate ventilation. He also was concerned that there would be inadequate room for miners to escape in the event of an emergency. The following day, on April 18, Mason was transferred from the section to a position as a bolter. However, he received the same wages and did not suffer any loss of pay as a consequence of the transfer. Borchick said he removed Mason from the section because he felt that Mason had difficulty operating the satellite miner, and that another person was available who had more experience operating such a miner. According to Borchick, the switch was made to increase production.

Collins also had complained to Darrah about his methane checks. He also had raised concerns about the safety of certain cables, and the need for bolting. Collins was transferred off the section to another section, but was given the same job at the same rate of pay. Thus, the evidence is inadequate to establish that in general Respondent has responded to protected activities by taking adverse action.

When Darrah decided to shift Price to the left side to prevent him from talking to the miner operator, the latter had been in that position for only 1 day, and had replaced Mason a close friend of Price. According to Price, he had told Darrah at

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the end of the prior shift that his (Price's) methane reading was two percent (Tr. 66, 68). However, neither Collins nor Mason who were with Price when he obtained the 2 percent methane reading, corroborated the testimony of Price that he directly informed Darrah of the reading. On cross-examination Collins indicated that when the methane was found, Darrah was at the belt heading, and that when the crew picked Darrah up at the mouth of the section, no one told him of the methane readings (Tr. 132). Based on my observation of his demeanor, I find the testimony of Darrah reliable, that he first found out about Price's methane reading when informed by Borchick at the end of the shift at approximately 8:30 a.m. According to Darrah it bothered him that the problem with the methane was not brought to his attention by Price, but was instead told to him by his supervisor. In this connection, I note that Darrah had been promoted from an hourly worker to a foreman only a few weeks before, and was younger and far less experienced in the mines than Price, Mason, and Collins. Accordingly, and taking into account the slight degree of adverse action in switching Price to the left side, I conclude that the action would have been taken in any event, based on Price's unprotected activities alone, i.e., having made the complaint to Darrah's supervisor rather than Darrah.

According to Price, he is required to take medication twice a day, 12 hours apart, a half hour before a meal, as "its the only way it would work in my system" (Tr. 30). He also testified that "it would make me sick if I take it and then didn't eat" (Tr. 41). Essentially it was Price's testimony that aside from Darrah, "all" of his foremen brought him his medication at three o'clock (Tr. 28). He also said that "most foremen would come up and say, hey, we're going to move this and we're going to do that and we'll do this. We'll have it done by such and such a time. You go take your medicine and be ready to eat at that time." (Tr. 55). This was confirmed by Collins who indicated that if a belt was down, the foreman would inform Price that they would be eating early and would bring him his medication. Otherwise, if the belt was not down, the crew would eat at 4:00 o'clock. Price also said that there were times when he had to work through lunch. He said he did not do so "willingly" and that "most" foremen advised him in advance that he would be working through lunch and eating later, so he was able to take his medication and then grab a sandwich or cup of coffee. (Tr. 55). He said that if a breakdown occurred at 3 o'clock and the crew was sent to eat, he did not take his medication, and did not eat. He said that he was able to take his medication when he was told that "we're going to be down for a half hour" (Tr. 57).

Francis Pethel who, was Price's foreman from October 1989 through March 15, 1990, indicated that normally the crew would eat at 4:00 o'clock, but that there was no set time, and "quite often," the crew would not eat at 4:00 o'clock. (Tr. 187). He indicated that he did not inform Price daily that he would be

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eating in a half hour. However, on cross-examination he indicated that if he knew in advance that the crew would not be eating at 4:00 o'clock, he would inform Price of this fact. He indicated that if the belt was down at 3:00 o'clock, Price then went to the dinner hole, took his medicine, and then ate on the way back to the working area. Price did not rebut this statement.

Price indicated that the first week that Darrah took over as foreman, the crew ate at 4:00 o'clock, unless there was a breakdown. If this occurred, he went to take his medicine at 3:30. Darrah essentially indicated that prior to April 18, the lunch time varied, but that if he did not specify the time, the crew ate at 4:00 o'clock, and he indicated that three out of five times the crew ate at 4:00 o'clock.

According to Price, on April 16 or 17, a miner had to be moved, and as a consequence he worked through lunch. He indicated that he spoke to Darrah, and told him that he would like to know what time he would eat so he could take his medicine. He indicated that all he needed was to be notified a half hour before lunch regardless of the time of lunch. According to Price, Darrah asked for a slip from his doctor, but subsequently did not want to accept the slip. Price indicated that he did not tell Darrah that he needed a designated time to eat lunch. He said that Darrah told him that lunch time is between 3 and 5, and that he is to eat when he is told to. He indicated that Darrah did not make any effort to communicate to him and inform him a half hour before eating time.

Subsequently, according to Price, he spoke with Jay Robert Levo the superintendent of the mine, and did not ask for a designated time to eat, but he repeated his request to be notified a half hour before lunch time. According to Price, Levo informed him that he will have 30 minutes before lunch to take his medicine, and that he did not need a medical slip. Price said that Levo told him that he could either continue with his past practice or he could submit the medical slip. Price said that Levo told him that if the company accepts the slip, he is no longer needed, as it is company policy not to have someone work with limitations. Charles Edward Haun, a miner who is a member of the Union Safety Committee, was with Price when he spoke with Levo, and confirmed Price's version of the conversation with Levo.

Collins testified that Price asked Darrah to inform him a half hour before the time to eat, and that this conversation occurred at the beginning of the shift, before any mining had taken place. He said that Price did not ask for a designated time, and that Darrah "snapped" at him and asked him to obtain a doctor's slip. (Tr. 122). According to Collins, the following day Price asked Darrah if he would let him know a half hour

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before lunch time and Darrah indicated that he would eat between 3 and 5, and he said it "just like being a smart aleck" (Tr. 127).

Price indicated that he filed a grievance on April 26, and that subsequently the lunch time was changed, but that Darrah did not let him take his medicine and told him he could not take his medicine. He said at times he worked through lunch and accordingly, did not eat.

According to Darrah, on April 19, 1990, when he first came on the section, he informed Price that he was transferring him to the left side of the bolter. He then firebossed for 15 minutes and upon completion of that task, Price requested of him a "set," "designated" time for dinner (Tr. 218). According to Darrah, Price told him he wanted to eat at the same time every day. Darrah stated that Price did not request a half hour notice prior to eating and that nothing preceded the request by Price. He indicated that the tenor of the discussion with Price was "conversational," rather than "confrontational" (Tr. 271), and that he (Darrah) said that the only way he could accommodate Price was if the latter would bring a doctor's note indicating that he was required to eat at a set time daily.

According to Borchick, on April 19, 1990, Price asked for a "designated" eating time. (Tr. 30, 51). Borchick stated that Price used that term "numerous times." (Tr. 51). Borchick stated that when Price told him that Darrah indicated that he could not give him a designated eating time with out a doctor's slip, he told him that such a slip is not necessary, but that he would check with Levo. Levo and Borchick both testified, in essence, that Levo told Price that a note is not necessary. Levo further told Price that if he submits a note that indicates that a set time for lunch is needed, the note may be considered documentation of restricted duty which is not allowed by the company.

Despite the conflict in the testimony between the witnesses for Complainant and Respondent as to what was requested by Price, it is clear that there is no evidence that Respondent treated Price differently than other miners. There is no evidence that any miner had a set time to eat lunch. Nor is there any evidence that any other miners were given advance notice by their foreman of the time that a lunch break would be given. In essence, both Collins and Price indicated that prior to Price's request of Darrah, the crew had lunch at 4:00 o'clock, unless work had stopped before that time due to a breakdown of equipment. According to Price, after he brought in a note from his doctor, the time for lunch was changed, Darrah told him he could not take his medicine, and Darrah did not let him take the medicine. I do not place much weight on this testimony. Price did not provide any specifics regarding any details as to exactly what occurred

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when Darrah did not let him take his medicine. He did not provide any specifics regarding the circumstances of this action, nor did he indicate when it occurred. Neither did he describe the context and content of any specific statement Darrah made in telling him that he could not take his medicine. Also, having observed the demeanor of Darrah, I find his testimony credible that, prior to April 19, there was no set time for lunch, and that although three out of five times, lunch was at 4:00 o'clock, the time did vary. This is consistent with the testimony of his predecessor Pethtel, whose testimony I found credible. In this connection, Collins indicated that the day after Price made his initial request, he again asked Darrah if he would let him know what time he would eat. According to Collins, Darrah told him "you eat between 3 and 5." (Tr. 125). Collins was asked to describe the manner in which Darrah responded, and he indicated that he was "just like being a smart aleck." (Tr. 127). However, on cross-examination, he indicated that Darrah did not change the routine as to lunch.

According to Price, Darrah requested him to bring in a note from his doctor. Even if this request is interpreted as an act of harassment, the evidence fails to establish a causal nexus between it and Price's safety complaints. I accept the testimony of Darrah, as it was corroborated by Collins, that the conversation regarding a medical slip occurred at the beginning of the shift. Although the evidence is in conflict with regard to the exact request made by Price of Darrah, the testimony is consistent in establishing that Darrah's remarks about the need for a medical note came after and in response to Price's request. I find that it was Price, not Darrah, who initiated any change in status quo with regard to lunch time. Darrah's comments with regard to the submission of documentation from Price's doctor were made the day following Price's complaints about methane readings. However, since these comments were made solely in response to a request made by Price, I conclude that there is no nexus between these comments and Price's complaints the previous evening.

Taking all the above into account, I conclude that the evidence establishes that any adverse action taken by Respondent against Price would have been taken in either event, based on unprotected activities alone. Hence, Complainant has failed to establish that he was discriminated against in violation of Section 105(c) of the Act. (Footnote 3)

ORDER

It is ORDERED that the Complaint herein be DISMISSED.

Avram Weisberger
Administrative Law Judge

1. Pursuant to the agreement of the parties at the hearing, the Complaint which was submitted at the hearing, shall be deemed to have been filed on August 10, 1990.

2. I find the testimony of Borchick and Darrah with regard to the specific dates involved more reliable as it was consistent with their contemporaneous notes.

3. In his Brief, Complainant alleges that "as a direct and proximate result" of Darrah's discriminatory and retaliatory action against him, Complainant "lost three (3) days work." The only testimony on this point is Price's statement that he was off from April 20 to April 23 "with my heart due to harassment" (Tr. 37) (sic). Complainant also offered as evidence a note from his physician, John Manchin II, D.O. which states that he was absent from work on these dates ". . . due to anxiety and nervousness caused by a situation at work in which he was not permitted to take his medication." I find this evidence insufficient to establish a good faith reasonable belief that continued work involves a hazardous condition. Further, there is no evidence of any communication made by Price to management concerning any refusal to work on the dates in question. As such, it has not been established that Price had a right not to work on the dates in question, and that Respondent is responsible for his wages on those dates (See, Secretary on behalf of Keene v. S & M Coal Company, Inc., 10 FMSHRC 1145, 1150 (1988)).