CCASE:
SWIFT, SNYDER & CUNNINGHAM V. CONSOLIDATION COAL
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LARRY E. SWIFT,	:	DISCRIMINATION PROCEEDING
MARK SNYDER, AND	:	
RANDY CUNNINGHAM,	:	Docket No. PENN 91-1038-D
Complainants	:	MSHA Case No. PITT CD-90-09
v.	:	
	:	Dilworth Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: William Manion, Esq., Legal Counsel, UMWA Region 1, Washington, Pennsylvania, for the Complainants;
Walter J. Scheller III, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Union Safety Committeemen Larry E. Swift, Mark Snyder, and Randy Cunningham, 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 violations of section 105(c)(1) of the Act by the Consolidation Coal Company (Consol) in its implementation of its Dilworth Mine "Program for High Risk Employees." (Footnote 1)/

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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

The Dilworth Mine apparently had during the 1980's the worst safety record of Consol's mines in its Eastern Division (Complainants Exhibit C-12, pp. 13-14). Because of an active and determined union safety committee the mine has also been the subject of many complaints under section 103(g) of the Act and a resulting significant history of Federal citations for the operator's failure to report injuries under 30 C.F.R. Part 50 (Complainant's Exhibits 2, 7 and 9).

According to Dilworth Mine Superintendent, Lou Barletta, because of the high incidence of reported injuries at the Dilworth Mine he first implemented a program for purported high risk employees in October 1988. The "Program for High Risk Employees" implemented January 1, 1990, and here at issue (Appendix A) retains the same provisions of the earlier program for increasing discipline including suspension and discharge for repeated reported injuries.

In essence, the program at issue provides counselling, retraining, and increasing discipline including suspension and discharge of employees based upon "Reports of Personal Injuries" filed in response to any work related incident resulting in injury (Joint Exhibit No. 1-Appendix A). The program also directs employees, as do the shop and conduct rules (Exhibit R-2), to report to management any work related incident which results in injury in a "Report of Personal Injury." These reports may therefore include injuries in addition to those reportable to the Federal Mine Safety and Health Administration under 30 C.F.R. Part 50. (Footnote 2) In the discretion of management some reported injuries may also be excluded from consideration against an employee.

The Complainants maintain that this "Program for High Risk Employees" is facially discriminatory to themselves and to all other miners subject to this program and that, accordingly, the program itself and any action taken under the program is illegal under section 105(c)(1) of the Act.

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fn. 2 (continued)
or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

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2 Under 30 C.F.R. 50.2(e) a reportable occupational injury is defined as "any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transferred to another job."

In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that 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 Co., 3 FMSHRC 817-18 (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. If an 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, e.g., Eastern Assoc. Coal Corp, v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act). The Commission has also recognized that certain programs and policies established by a mine operator may be facially discriminatory. See Secretary on behalf of Price and Vacha and UMWA v. Jim Walter Resources, Inc., 12 FMSHRC 1521 (1990); Local Union 1110, United Mine Workers of America and Robert R. Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979).

It is not disputed that a report of a mine injury may constitute a "complaint under or related" to the Act and is the "exercise" of a protected right under the Act. It follows therefore that any interference with the exercise of that right by a mine operator constitutes a violation of section 105(c)(1) of the Act. Clearly, the "Program for High Risk Employees" at the Dilworth Mine, by subjecting its employees to suspension and discharge based upon the filing of Reports of Personal Injury inhibits and interferes with the reporting of mine injuries, and by so doing, constitutes an illegal interference with protected activity.

Consol argues that the program at issue is not based upon the report of personal injury itself but rather upon the underlying injury, and that there is no statutorily protected right to sustain injuries. While it is true there is no protected right to sustain injuries, Consol's argument is bottomed on the erroneous premise that the discipline, suspension and discharge under the program is based upon the actual injury rather than the reporting of the injury. The simple fact is however, that if an injury is not reported it is not counted

against the miner. The program accordingly creates an obvious and persuasive disincentive to report injuries. Sustaining an injury and the reporting of the injury are, moreover, so inextricably interrelated that the unprotected sustaining of an injury cannot under this program be separated from the reporting of the injury.

While it is well established that neither the Commission nor its judges sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of programs such as the Dilworth Program for High Risk Employees they do have the affirmative duty to determine whether such a program or some component thereof conflicts with rights protected by the Act. Under the circumstances of this case it is clear that the Complainants have sustained their burden of proving that the Program for High Risk Employees implemented by Consol at its Dilworth Mine on January 1, 1990, is facially discriminatory in violation of section 105(c)(1) of the Act and does indeed conflict with protected rights. Under the circumstances, there is no need to consider the Complainants' alternate theories of illegality.

ORDER

The Consolidation Coal Company is hereby ordered to immediately cease and desist from implementation of any disciplinary action under the Dilworth Mine "Program for High Risk Employees" and it is further ordered that all records be expunged of any reference to any disciplinary action taken under said program. Since no costs, damages or other remedies have been sought in this case there is no need for further proceedings and therefore this decision represents the final disposition of this case before this judge.

Gary Melick
Administrative Law Judge

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3 The injury would therefore also go unreported and not be counted against the mine operator under the Part 50 regulations. Under the circumstances another serious consequence of the Program is therefore a likelihood that injuries and potentially serious hazards would go unreported to the operator and to MSHA and that such hazards would remain uncorrected.

APPENDIX A

Dilworth Mine Program for High Risk Employees

1. This Program is effective January 1, 1990; only injuries occurring on or after January 1, 1990 will be counted in this Program.

2. Each employee continues to be obligated to report to Management any work related incident which results in personal injury to the employee and to complete a Report of Personal Injury (RPI) for each such injury.

3. Step I: An employee who experiences four injuries in eighteen working months will be counseled by Management and will be designated as a High Risk Employee.

   A High Risk employee may clear his record under this Program by working twelve working months (from the date of the injury which resulted in his being designated a High Risk employee) without experiencing an injury.

4. Step II: A High Risk employee who experiences an injury within twelve working months (of the date of the injury which resulted in his being designated a High Risk employee) will (a) be counseled, (b) be suspended from work for two days without pay, and (c) will attend a special awareness session prior to returning to work after his suspension.

   A High Risk employee who has been counseled, has been suspended, and has attended a special safety awareness session may clear his record under this Program by working twelve working months (from the date of the injury which resulted in his being counseled, suspended, and sent to the special safety awareness session) without experiencing an injury.

5. Step III: A High Risk employee who has been counseled, suspended and sent to a special safety awareness session (under Step II) who experiences an injury within twelve working months (of the date of the injury which resulted in his being counseled, suspended, and sent to a special safety awareness session - under Step II) will be suspended with intent to discharge.

6. For purposes of this Program, the term working month will mean calendar months, extended by:

   (a) The number of calendar days that the employee is eligible for (or would be eligible for upon proper application) Sickness and Accident Benefits; and

   (b) The number of calendar days that the employee is eligible for Workers' Compensation temporary total disability benefits; and

   (c) The number of Monday thru Friday calendar days on which the mine is idle, for reasons other than Regular Vacation and Holidays, and on which the employee does not perform idle day work; and

   (d) The number of calendar days that the employee is laid-off.

Example: An employee is injured on January 16, 1990. Eighteen calendar months from January 16, 1990, is July 16, 1991. If the employee misses work for a period of four calendar days due to sickness, between January 16, 1990, and July 16, 1991, the July 16, 1991, date would not be extended, since the employee is not eligible for Sickness and Accident Benefits until the eighth day of disability due to sickness. If the employee misses work for a period of thirteen calendar days due to sickness, between January 16, 1990, and July 16, 1991, the July 16, 1991, date would be extended by six days to July 22, 1991, since he would not be eligible for Sickness and Accident for the first seven days of absence due to sickness, but he would be eligible for these benefits for the last six days of the absence.

7. Nothing in this Program prohibits Management from disciplining (up to and including discharge) any employee for any action which, irrespective of the existence of this Program, would in Management's judgment constitute grounds for discipline (up to and including discharge). For example, if an employee sustains an injury due to his violation of a work or safety rule, the injury would be counted in this Program, and the employee would be subject to discipline for violation of the work or safety rule.

8. Management reserves the right to exclude an injury from this Program in a rare situation when Management's investigation of the injury reveals absolutely no culpability on the part of the injured employee and when excluding the injury from the Program appears to Management to be in the best interest of attaining a safe working environment for all employees at the mine. (Joint Exhibit No. 1).

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