CCASE:
JEFFERY PATE V. WHITE OAK MINING
DDATE:
19920415
TTEXT:

JEFFERY A. PATE, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. SE 91-104-D
WHITE OAK MINING COMPANY, Respondent	:	BARB CD 90-36
	:	White Oak Mining

DECISION

Appearances: Mitch Damsky, Esq., Birmingham, Alabama, for the Complainant;
David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., Birmingham, Alabama, for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Jeffery A. Pate, against the respondent, White Oak Mining Company (White Oak), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Mr. Pate filed his initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA). Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and Mr. Pate then filed his complaint with the Commission. Pursuant to notice, a hearing was conducted in Birmingham, Alabama, on November 6, 1991. Subsequently, respondent filed a posthearing brief on January 15, 1992, which I have considered along with the entire record of proceedings in this case in making the following decision.

The complainant alleges that he was discharged or "constructively discharged" (quit) from his job with White Oak for refusing to perform a task which he believed to be unsafe and dangerous. The respondent ascribes other motives to complainant's refusal to work.

The fundamental issue in this case is whether the complainant's work refusal amounted to protected activity under section 105(c) of the Mine Act.

DISCUSSION

Pate began his "employment" at White Oak in March or April of 1990, and that "employment" ended on June 27, 1990. He was never an "employee" per se of White Oak, but rather was a subcontractor/laborer. He was paid a flat $10 per hour and neither social security nor withholding taxes were deducted from his pay. White Oak was also contractually not responsible for his insurance coverage or his personal injuries on the job. Basically he performed manual labor for a flat fee and was paid the gross amount by check every 2 weeks without deductions.

He also received no benefits or training of any kind while employed there, including the safety training mandated by the Mine Act.

Complainant was unhappy with just about everything at White Oak. He didn't like the fact that he was not considered a full-time, regular employee. He was unhappy that the company didn't deduct taxes from his paycheck as they would a regular employee. He had to pay his own insurance, social security, taxes, etc., out of his gross wages. Pate was most unhappy with the fact that one Jerry Hill was hired as a loader operator after him in time, but in Pate's words "they gave him the good jobs and stuck me with all of the bad jobs." He was also upset with the fact that of the three loader operators, Hill included, he was assigned the loader that was the least modern, i.e., was not air-conditioned.

What Mr. Pate really wanted out of White Oak was to be considered a regular, full-time loader operator ensconced in an air-conditioned cab. One thing he in particular did not want to be doing was shoveling the belt line around the stacker-blender tailpiece. This was hot, sweaty, heavy labor. It was unpleasant work, as well as being dangerous work if the guard or guards were not in place around the stacker-blender.

Over the relatively short period of time which was Pate's tenure at White Oak he also had complained about dust while he was operating the loader. He alleges they didn't keep the area watered down. And in fact, the company was cited on June 11, 1990, for poor visibility because of the dust. With regard to this dust, Pate also claims he asked for a respirator to no avail. However, I find as a fact that the company routinely supplied or at least made available the paper dust masks that they kept a supply of in the office on site. Pate had on at least one occasion refused to use this type of mask, claiming that it "smothered" him. The testimony was, however, that several other employees did use them and managed to keep breathing.

Most relevant to the instant case, he had previously complained (prior to June 27, 1990) to MSHA Inspector Early about lack of guarding around the stacker-blender belt line tailpiece where he on occasion had to shovel around the end of the belt line. He had already caught his shirt in the belt line once and he was afraid that with no guards and the belt line running while he was shoveling coal back on there, if he missed a step or lost his balance, he could fall in and possibly get rolled around back under the tailpiece. I believe it is generally conceded that it is not a recommended practice to work around this area of moving belt with the guards removed. However, Mr. Whitfield, the White Oak supervisor who ultimately fired Pate, opined that it wouldn't be dangerous. He is the lone dissenter in that respect.

In any case, on the day Pate was fired, the brakes had gone out on the loader he was operating, so he parked it and Mr. Boyd, another White Oak supervisor, instructed him to go shovel around the stacker-blender tailpiece. After going there and observing the conditions, Pate refused to perform the work because it had no guards up and he had previously spoken to Inspector Early by telephone and was told that if he thought the condition was dangerous, he didn't have to do it. He could refuse to do it. And so he did. Boyd then told him to go to the office. Once he got there he spoke with Messrs. Hollis and Whitfield. Pate told Whitfield that he didn't have to go down there and endanger his life shoveling around that unguarded belt line and that he wasn't going to do it. Whitfield told him that if he was refusing to do the job, he was in effect, fired.

To be sure, there was more on Pate's mind than the unguarded tailpiece. For one thing, when he was assigned to shovel along the belt line, Jerry Hill was still operating one of the loaders, an air-conditioned one at that. Pate admits he was angry about that and I believe it formed part of the basis for his work refusal. But only part.

The general principles governing analysis of discrimination cases under the Mine Act are well settled. 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 (October 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 (April 1981). The operator may rebut the 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 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 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).

In the instant case, we have narrowed the scope of the inquiry to a much sharper focus than the general principles cited just above. It is undisputed herein that Pate refused to perform a specific work assignment on June 27, 1990, and as a direct result of that work refusal, he was fired. The ultimate issue presented for decision then is whether Pate's work refusal was protected under the Mine Act. See, e.g., Secretary of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 229-30 (February 1984) aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (11th Cir. 1985); Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 132-33 (February 1982).

It is also well settled that the refusal by a miner to perform work is protected activity under section 105(c) of the Mine Act if it results from a good faith belief that the work involves safety hazards, and if that belief is a reasonable one. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982). See also, e.g., Metric Constructors, supra.

Further, where reasonably possible, the reason for the work refusal must be communicated to the operator. The miner must communicate his belief that a hazardous condition exists or at least attempt to do so. Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034, 1038-40 (July 1986); Dillard Smith v. Reco, Inc., 9 FMSHRC 992 (June 1987); Conatser v. Red Flame Coal Co., 11 FMSHRC 12 January 1989); Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also, e.g., Miller v. Consolidation Coal Co., 687 F.2d 194, 195-97 (7th Cir. 1982) (approving the Dunmire & Estle communication requirement).

As the Commission emphasized in Simpson: "[T]he right to make safety complaints and to refuse work under the Mine Act is premised on the belief that communication of hazards and response to such hazards are the means by which the Act's purposes will be attained." 8 FMSHRC at 1039 (citations omitted).

I find as a fact that the guard that was supposed to be around the stacker-blender tailpiece was not in place on June 27, 1990. Pate is most emphatic, of course, that it was missing. But even Mr. Whitfield concedes the guards were not always in

place. Sometimes they are working on the tail pulley assembly or the belt line and someone neglects to replace the guard(s) when they finish. Whitfield explained that usually there were guards around the stacker-blender. He testified that there was a screen at the tail pulley and handrails around the outer perimeter. But on June 27, 1990, when Pate was instructed to shovel around the stacker-blender, one guard was conceivably off of it at that time because repairs were being made or had just been made to the equipment. He estimated that if the guard or guards were down, that it would have taken probably 30 minutes to reinstall them.

I also find that Pate had a good faith, reasonable belief that the work he had been ordered to do and subsequently refused to do, was hazardous. Mr. Saunders, an independent safety trainer hired by the operator to provide their workers with safety training, agrees. He opined that it would not be prudent to shovel along that area of belt line if the guards were not there. In fact, he stated he wouldn't do it. Furthermore, Inspector Early had told the company in Pate's presence to put the guards up on or about June 1, 1990. This formed part of the basis for Pate's belief that the unguarded tailpiece was dangerous. "[B]y him verbally telling them that they needed to put some guards around that, I figured it was dangerous." (Tr. 41).

Finally, I am making a credibility choice in favor of Pate and finding that when he refused to work, he informed Whitfield that he was refusing because there were no guards on the belt line and that is why he was refusing, at least in the main. I am mindful that he had other, unrelated grievances with the company. I am also mindful that Whitfield testified that Pate made no complaint about guards prior to being fired. But on the day in question, June 27, 1990, there was a third person present at that conversation. Mr. Hollis was there and he was also present in the courtroom and even testified at the trial of this case. He could conceivably have corroborated Whitfield's testimony. The inference I draw from the fact that he didn't is that he wouldn't or couldn't.

Accordingly, I conclude that the discharge of Pate by Whitfield on June 27, 1990, violated section 105 of the Mine Act.

REMEDIES

On August 30, 1990, the operator offered to reinstate Pate, provide him with the required mine safety training and pay him $1000 in back pay. Pate turned down that offer of reinstatement and since there is a duty on the part of the complainant to mitigate his damages, I find that the ending date for Pate's

entitlement to back pay is August 30, 1990. Of course, his entitlement to back pay between the period June 27 - August 30, 1990, is also reduced by any amounts he actually earned in other employment during that time period.

Therefore, I am herein ordering back pay paid to the complainant in the amount of $10 per hour for every hour he would have worked between June 27, 1990 and August 30, 1990, but for his violative discharge, reduced by any earnings he actually made during that period. Interest is also payable on that award, computed in accordance with the Commission's Decision in UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990).

Reinstatement is no longer possible. White Oak terminated its operations on December 30, 1990, and has not employed anyone since that time and has no employees now.

Pate is also entitled to reimbursement for reasonable attorney fees and costs associated with prosecuting his case.

ORDER

It is ORDERED that:

l. The parties shall confer within 15 days of the date of this decision, in an effort to stipulate the amount due complainant under this order. If they are unable to so stipulate, complainant shall submit within 20 days of the date of this decision, its detailed, itemized statement of the amount due. Respondent may respond within 10 days thereafter. In the event that a contested issue of fact arises as to the proper type or quantum of damages due the complainant, a hearing on that issue or issues will be required, and will be held in the immediate future.

2. This decision is not final until a further order is issued with respect to complainant's relief.

Roy J. Maurer
Administrative Law Judge

Distribution:

Mitch Damsky, Esq., 3600 Clairmont Avenue, Birmingham, AL 35222 (Certified Mail)

David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., 2400 AmSouth, Harbert Plaza, Birmingham, AL 35203-2602 (Certified Mail)

dcp