

CCASE:  
DONALD PORTER V. NORTH STAR CONTRACTORS  
DDATE:  
19930216  
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

DONALD PORTER, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 93-60-D  
: PIKE CD 92-11  
NORTH STAR CONTRACTORS, INC., :  
Respondent : Mine No. 4

DECISION

Appearances: Mr. Donald Porter, Deboard, Kentucky, pro se;  
Keith Bartley, Esq., Prestonsburg, Kentucky, for  
Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Complaint filed by Donald Porter alleging that he was discriminated against by North Star Contractors, Inc., ("North Star"), in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, ("the Act") 30 U.S.C. 815(c). Pursuant to Notice, the case was heard in Huntington, West Virginia on January 6, 1993, and the transcript of the hearing was filed February 8, 1993. At the hearing, Mr. Donald Porter appeared pro se and testified in his behalf. William Johnson also testified on behalf of the Complainant. At the conclusion of Complainant's case, Respondent made a Motion for summary decision. After listening to argument on the motion, I rendered a bench decision dismissing this case. The decision, with the exception of minor corrections not relating to matters of substance, is set forth as follows:

I have reached a decision in this matter and I wish to place the decision on the record at this time. The Complainant in this case, Donald Porter, on July 27, 1992, was working as an operator of a miner for North Star Contractors, Inc. On that day, nothing unusual had occurred and all the operations were normal. Mr. Porter operated his continuous miner in the number five heading, entered a break in the number six heading and then proceeded to cut headings one and two in breaks off of the No. 6 heading. In cutting heading number two after taking a cut he noticed a hole in the middle of the break approximately two feet in diameter.

After making the cut in heading number two, he noticed his foreman, Eugene Williams, was hollering at him and he heard him say, "I'm really proud of you boys". After that Mr. Williams then turned to the helper of Donald Porter, Mr. Willy Johnson, and told him that he could not understand why Donald would do something like that. Mr Porter then said that he was going to the house, left the underground mine and went home.

As I stated at the commencement of the hearing, in order to establish a case of discrimination under section 105(c) of the Act the Complainant, and I'm quoting at this point from *Boswell v. National Cement Company*, 14 FMSHRC 253 at 257,

...bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. The Secretary on behalf of *Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on other grounds, sub nom *Consolidation Coal Company v. Marshall*, 663 F.2d 1211, (3rd Cir. 1981); and Secretary on behalf of *Robinette v. United Castle Coal Company* 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that the protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the prima facie case in this matter, it may nevertheless defend affirmatively by proving that it would have taken the adverse action, in any event, on the basis of the miner's unprotected activity alone. *Pasula*, supra, *Robinette*, supra. See also *Eastern Associated Coal Corporation v. FMSHRC* 813 F.2d 639, 642, (4th Cir. 1987); *Donovan v. Stafford Construction*, 732 F.2d 954, 958-959, (D.C. Cir. 1984); *Boich v. FMSHRC* 719 F.2d 194, 195-196, (6th Cir. 1983), specifically approving the Commission's *Pasula-Robinette* test).

I note in this case first of all that the foreman did not expressly fire Mr. Porter and indeed did not make any complaints against him at this point. There is no evidence that the Company took any adverse action against Mr. Porter. There were no remarks that Mr. Williams made to Mr. Porter that could, in any way, be interpreted as indicating that Mr. Porter was fired

or that any other adverse action was being taken against him. Also, although the law provides that a work refusal could be considered as a protected activity, "the miner must have a good faith and reasonable belief that the work in question is hazardous, See generally Robinette supra, 3 FMSHRC at 807-812". Boswell, supra at 258. In addition,

Once it is determined that a miner has expressed a good faith and reasonable concern the analysis shifts to an evaluation of whether the operator has addressed the miner's concern in a way that his fears reasonably should have been quelled. In other words the management explained to (the miner) that the problem in his work area had been corrected. Boswell, supra, at 258.

The evidence here does not established any work refusal. There is no evidence that Mr. Porter was required to perform any work that was in any way hazardous. Mr. Porter did not indicate that any work was assigned to him that he believed to be hazardous, nor did he communicate to management any safety concerns that he had.

For all these reasons, I find that there is no basis under the law to sustain a case of discrimination under the Act and accordingly the Complaint must be DISMISSED.

ORDER

It is ORDERED that this case be DISMISSED.

Avram Weisberger  
Administrative Law Judge

Distribution:

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