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SOL (MSHA) V. JIM WALTER RESOURCES
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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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DONALD B. CARSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 93-109-D
	:	BARB CD 92-38
v.	:	
	:	No. 4 Mine
JIM WALTER RESOURCES, INC., Respondent	:	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Secretary;
R. Stanley Morrow, Jim Walter Resources, Inc., Brookwood, Alabama, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

The Secretary brings this case on behalf of Donald B. Carson and claims that Carson was unlawfully discriminated against in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the Act), in that he was at least impliedly threatened with the loss of his job for engaging in protected safety-related activity.

Pursuant to notice, a hearing was held on the merits of this case on May 25, 1993, in Hoover, Alabama. Subsequently, the parties have both filed posthearing arguments which I have considered in the course of my adjudication of this matter. I make the following decision.

FINDINGS OF FACT

l. At all times relevant to this complaint, Carson was employed by respondent at their No. 4 Mine; he has been employed at the respondent's No. 4 Mine for approximately 17 years and has served on both the safety committee and grievance committee during that period of time, although he no longer does so.

2. On June 3, 1992, Carson was assigned to work in a relatively remote section of the mine (Southwest bleeders) repairing seals. He spent the entire shift in that area rebuilding a seal, and at times experienced some lightheadedness and nausea of unknown etiology. Prior to leaving this area at the end of his shift, he walked down to where the next sealed area was to be built, thinking that the next shift would probably finish-up the seal he had been working on and start on the next one. In that area, he observed adverse roof conditions in that there were roof channels or mats broken and the roof was sagging. Upon leaving the mine, Carson went to the safety office and informed David Millwood and Ronnie Smith, who are UMWA Safety Committeemen, of the unsafe roof conditions he had found in the mine.

3. At the same time as Carson was relating his tale about the adverse roof conditions to the safety committeemen, MSHA Coal Mine Inspector Bill Deason was also in the mine's safety office. He overheard the conversation and became concerned about miners being in the area, not only because of the roof conditions he was hearing about, but because he knew that he had previously issued a citation in that area for low oxygen.(Footnote 1) Deason queried Carson about who, if anyone, had preshifted the area and about whether he had had a CO monitor or a methane detector with him while he was working in that area. As far as Carson knew, no one had preshifted the area and he had none of the aforementioned equipment with him. After inspecting the area himself and discussing the situation with management, Inspector Deason issued two section 104(d)(2) orders; one for failure to conduct a preshift examination and a second for failure to comply with the mine's ventilation plan.

4. Carson returned to work the next night and found out that the two aforementioned orders had been issued by Inspector Deason after he left the previous morning. Towards the end of his shift, he was approached by Bob O'Malley, the owlshift mine foreman, who purportedly told him that what he did was "low-down and dirty" and that he no longer respected him. Carson then asked O'Malley what he was talking about and O'Malley replied "you know what I'm talking about, its about the seals." Carson

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1 Inspector Deason issued section 104(a) Citation No. 3016975 on May 7, 1992, for a purported violation of 30 C.F.R. 75.301. Subsequently, it was determined that no violation existed and the citation was vacated by MSHA.

then attempted, without success, to explain to O'Malley that he hadn't had anything to do with the inspector issuing the (d)(2) orders.(Footnote 2)

5. Upon returning to the surface after finishing his shift, Carson went straight away to the safety office to see the UMWA Safety Committeemen and Inspector Deason about what he perceived to be intimidation and/or harassment concerning the (d)(2) orders Inspector Deason had issued. It was about this time that Mr. Oliver, the general mine foreman, told Carson that Mr. Cooley, the mine manager, wanted to talk to him. Carson in turn asked his UMWA Safety Committeeman, Millwood, to accompany him into the meeting. Carson testified that because of his earlier confrontation with O'Malley, he was concerned about being threatened and wanted a union representative with him when he met with the mine manager.

6. Carson and Millwood met with General Mine Foreman Oliver, Mine Manager Cooley, and Fred Kozel, the deputy mine manager, in Mr. Oliver's office. There is a dispute about precisely what was said at that meeting, but the clear preponderance of the evidence made the impression on me that the mine management was upset over receiving the two (d)(2) orders from Deason and they were operating under the assumption that Carson was somehow responsible for their issuance. The meeting was described by Millwood as a "tongue lashing, at the least." Millwood further opined that it was a "heated conversation" in a "threatening" atmosphere. Carson also credibly testified in my opinion, that he personally felt threatened. I find as a fact that there was an implied threat made by Cooley against Carson's future employment, or at the least, a reasonable basis for Carson to believe there had been.

7. In April of 1992, 2 months before the incident at bar took place, there was a reduction in the work force at this mine. At that time, Carson was "rolled back" from a more desirable

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2 It is important to note that the only evidence of this entire conversation comes from the testimony of Mr. Carson. It is nowhere refuted in the record and is therefore uncontroverted. That does not mean, however, that it is undisputed. Respondent does dispute it, but unfortunately, Mr. O'Malley, the foreman who is credited with making these remarks, was killed in a boating accident and was therefore unavailable to testify in this proceeding.

outside position to a less desirable one inside the mine. At the same time, his wife was laid off. Both were unhappy with the company as a result.

DISCUSSION, FURTHER FINDINGS AND CONCLUSIONS

Respondent ascribes "revenge" as Carson's motive for filing this discrimination complaint. This because of the alleged mistreatment that he and his wife feel they suffered at the hands of the company as more fully set out in Finding of Fact No. 7, supra.

Be that as it may, 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).

It is undisputed that Carson did engage in protected activity when he made the safety-related complaint or report of unsafe conditions to his safety committeemen and unwittingly, to the MSHA Inspector who overheard the conversation. See Findings of Fact Nos. 2 and 3, supra.

Therefore, the only remaining issue in complainant's prima facie submission is adverse action. That is, did mine management threaten and/or intimidate Carson as a result of his engaging in the aforesaid protected activity. And if they did, does a verbal

threat, or what in this case is more properly denominated an implied threat, constitute "adverse action" within the meaning of the Act.

I find generally credible that testimony of Carson and Millwood that the meeting described in Finding of Fact No. 6, supra, emphasized management's distress over the issuance of the two (d)(2) orders, the cost that would be attributable to them and the assignment of blame for their issuance squarely onto Carson. It was also clearly intimated at that meeting, if not stated outright, that it was just exactly this type of activity that could result in further layoffs or even a shutdown of the mine. In my mind, this is an implied threat to his job, designed to have a chilling effect on not only Carson, but on anyone else who knew of the situation, and management's quick response.

Respondent's attempt to explain this meeting away by their concern over Carson not coming to mine management first to report the unsafe conditions he found or their hunger for more knowledge about those conditions is not well taken and is rejected. There is plenty of testimony in this record that Carson's chosen procedure to notify his UMWA Safety Committeeman of the unsafe conditions he found is normal and routine in this mine. Furthermore, by the time of the meeting, management knew a lot more about the "safety violations" described in the two orders than Carson did. It must be remembered that Carson did not write the (d)(2) orders; Inspector Deason did. Carson was not even on the premises by the time Deason got around to inspecting the area and issuing the two orders. Also, Carson did not intentionally report the condition to the inspector prior to first notifying the company. As I have stated earlier, the usual procedure for notifying the company is to inform the safety committeeman who in turn notifies the appropriate company management and/or safety personnel.

Accordingly, to the extent that respondent argues that the adverse action complained of herein was not motivated in any part by the complainant's protected activity; that argument is rejected.

I also believe that the implied threat to his job is "adverse action" within the meaning of the Act in this instance. The threat itself is adverse action. There is no need to wait until the threat is carried out.

The Commission has previously stated in Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (August 1982) that: "[C]oercive interrogation and harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act." Section 105(c)(1) states that "no person shall discharge or in any manner discriminate against. . . or otherwise interfere with the exercise of the statutory right of any miner." (Emphasis added).

In making these broad statements, the Commission was guided by the legislative history of the Mine Act which referred to "the more subtle forms of interference, such as promises of benefit or threats of reprisal. Moses, supra, at 1478, citing Legislative History at 624. (Emphasis added). The Commission observed that a "natural result" of such subtle forms of interference "may be to instill in the minds of employees fear of reprisal or discrimination." Moses, supra, at 1478.

An illustrative ALJ decision which is clearly on point is Denu v. Amax Coal Company, 11 FMSHRC 317 (March 1989) (ALJ). In that case, a supervisor repeatedly asked a miner if he knew the consequences of his actions and told him that those consequences included discharge. Although the miner was later told at that same meeting that he would receive no disciplinary action, Judge Melick nonetheless concluded that the questioning itself constituted unlawful interference. The Judge stated in the conclusion to his decision that:

> I find however that threats of disciplinary action and discharge directed to a miner exercising a protected right clearly constitute unlawful interference under section 105(c)(1), whether or not those threats are later carried out. Such threats place the miner under a cloud of fear of losing his job. In addition, while under such threats, a miner would be even less likely to exercise his protected rights when future situations might clearly warrant such an exercise.

Denu v. Amax Coal Company, 11 FMSHRC 317, 322 (March 1989) (ALJ).

I concur that this type of behavior engaged in by high-ranking management personnel in a coercive, hostile atmosphere is a violation of the Mine Act whose primary purpose can only be to cause miners to refrain from asserting their rights under the Mine Act. It unquestionably has a chilling effect on the miners.

Even though Carson was not discharged, suspended, or demoted, nor did he suffer any pecuniary loss as a result of engaging in protected activity in this instance, he nevertheless

did undergo discrimination, within the meaning of the Mine Act. Accordingly, I find and conclude that the evidence supports a finding that respondent unlawfully retaliated against Carson for engaging in protected safety-related activity in violation of section 105(c) of the Mine Act.

I further conclude and find that mine management knew or should have known that they were in serious violation of the Mine Act at the time they engaged in the June 5, 1992, meeting with Carson. And considering all the circumstances in this case, I find a penalty of $1000 to be appropriate for the violation of the Mine Act found herein.

ORDER

THEREFORE, IT IS ORDERED:

l. Respondent shall post a copy of this Decision on a bulletin board at the subject mine which is available to all employees, and it shall remain there for a period of at least 60 days.

2. Respondent shall pay to the Department of Labor a civil penalty of $1000 within 30 days of the date of this Decision.

This Decision constitutes my final disposition of this proceeding.

Roy J. Maurer
Administrative Law Judge

Distribution:

William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, 2015 Second Avenue North, Suite 201, Birmingham, AL 35203 (Certified Mail)

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P. O. Box 133, Brookwood, AL 35444 (Certified Mail)

Mr. Donald B. Carson, 7166 Ridge Road, Bessemer, AL 35203 (Certified Mail)

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