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SWIFT, SNYDER & CUNNINGHAM V. CONSOLIDATION COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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LARRY E. SWIFT, MARK SNYDER and RANDY CUNNINGHAM, Complainants	DISCRIMINATION PROCEEDING
	Docket No. PENN 91-1038-D
v.	MSHA Case No. PITT CD 90-09
CONSOLIDATION COAL COMPANY, Respondent	Dilworth Mine

DECISION

Appearances: William Manion, Legal Counsel, United Mine Workers of America, Region 1, Washington, Pennsylvania, for Complainants;
Elizabeth Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon remand by decision dated February 14, 1994. See 16 FMSHRC 201. In that decision the issues were delineated as (1) whether the reporting of injuries under the Consolidation Coal Company (Consol) Program for High Risk Employees (Program) constitutes protected activity under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act";(Footnote 1)
(2) whether the

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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

Program is facially, or per se, discriminatory in violation of section 105(c)(1) of the Act; (3) whether the Program was instituted for discriminatory reasons; and (4) whether the Program was applied to miners in violation of section 105(c)(1).

In its decision the Commission affirmed the findings below that injury reporting constitutes protected activity, but a Commission majority reversed the findings that the program was facially discriminatory and remanded for consideration of the third and fourth issues.

Background

Consol operates the Dilworth Mine, an underground coal mine in Greene County, Pennsylvania. On January 1, 1990, the Dilworth Mine initiated the Program which directs that each employee report to management any incident resulting in personal injury. See 14 FMSHRC 361, 365-67 (1992). The Mine's previously adopted safety rules also require employees to report all injuries.

Step I of the Program consists of designating as "High Risk" any employee who experiences four injuries in 18 working months. Such an employee receives counseling from Consol's management. If the employee at Step I works 12 months without experiencing an additional injury, he clears his record and leaves the Program; the employee reaches Step II if he incurs an additional injury within 12 months. The employee at Step II is counseled, suspended from work for two days without pay, and required to attend a special awareness session. That employee leaves the Program if he works 12 months without experiencing further injury; if the employee experiences an injury within the 12 months, he reaches Step III. At Step III, the employee is suspended with intent to discharge. 14 FMSHRC at 365-66 (Appendix paras. 3-5).

On January 23, 1990, Dilworth employees Larry Swift, Randy Cunningham and Mark Snyder, who were members of the United Mine Workers of America (UMWA) and safety committeemen at the mine, filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration (MSHA) alleging that implementation of the Program penalized miners and restricted them from reporting all accidents. Following its investigation, MSHA determined that Consol had not violated the Mine Act and the Secretary of Labor declined

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fn. 1 (continued)
in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act."

to prosecute. Swift, Snyder and Cunningham pursued their claim with private counsel. They filed a discrimination complaint with the Commission on July 20, 1990, on behalf of themselves and all Dilworth Mine employees pursuant to section 105(c)(3) of the Act. At the initial hearings, the miners argued that the Program violated section 105(c)(1) of the Act on its face, in its motivation, and as it was applied.

Following trial, it was held in the initial decision that reporting mine injuries is a protected right under the Act and that the Program was discriminatory on its face. It was further held that, by subjecting Consol's employees to suspension and discharge based upon the filing of reports of personal injury, the Program on its face inhibited the reporting of mine injuries and, in so doing, constituted illegal interference with such protected activity. Consol was accordingly ordered to "cease and desist from implementation of any disciplinary action" under the Program and to expunge from all records any references to disciplinary action taken under the Program. 14 FMSHRC at 364. As noted, a Commission majority reversed those findings and remanded for a specifically limited determination of whether the Program was initiated for discriminatory reasons and, if not, whether the Program was applied to miners in a discriminatory manner.

Issues on Remand

The Commission has held that discriminatory motive will invalidate a policy that it considers to be otherwise facially lawful. Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc., 12 FMSHRC 1521, 1533 (1990). The Pasula-Robinette test provides the framework for analyzing the reasons for Consol's adoption of the Program. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (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 803 (1981). Under the Pasula- Robinette framework, the complainant 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 activity.

Since it has been established that two of the Complainant miners, i.e, Swift and Cunningham, engaged in protected activities on behalf of themselves and other miners by filing complaints to the Secretary pursuant to section 103(g) of the Act(Footnote 2) for Consol's alleged under-reporting of injuries prior to

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2 Exhibit Nos. C-7L, C-7N, C-7R, C-7S and C-7T; Tr. I (hearing transcript for October 3, 1991): 182 and Tr. II (hearing transcript for October 4, 1991): 36-37.

the implementation of the Program at the Dilworth Mine, the first prong of the Pasula-Robinette test has been established. Consol also acknowledges that Cunningham engaged in protected activities by participating in conferences following the issuance of citations to Consol for failure to have reported injuries.(Footnote 3)

Whether the adverse action complained of (i.e., the implementation of the Program by Consol at its Dilworth Mine) was motivated in any part by the protected activity is more difficult to establish. As the Commission has noted, direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent, Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), rev'd on other grounds, sub nom., Donovan v. Phelps Dodge Corp., 809 F.2d 86 (D.C. Cir 1982); Sammons v. Mine Service Co., 6 FMSHRC 1391 (1984). The Commission has also quoted from analogous statements by the Eighth Circuit with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the [adverse action] and the [protected activity] could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

3 FMSHRC at 2510.

In the instant case, the Complainants argue that the "primary evidence" of discriminatory motivation is the "chronology" of events (Complainants' Brief on Remand, p. 4). In particular, they note that in 1984, then Chairman of the Safety Committee, Ken Krause, began an investigation into the alleged failure of Consol to report certain accidents or injuries at the Dilworth Mine in accordance with 30 C.F.R. Part 50. Complainant Larry Swift purportedly continued to investigate allegations of Consol's failure to report accidents when he became Chairman of the Mine Safety Committee in 1986. Complainants maintain that Krause, Swift and Cunningham thereafter filed a series of complaints under Section 103(g) of the Act which also resulted in the issuance of "notices of violations" by MSHA. While they note that the initial program was voided in arbitration, essentially the same program, the Program at issue, was thereafter instituted.

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3 Tr. II: 40-41.

While the timing of the Program does appear suspicious, an equally reasonable and non-discriminatory inference from the chronology of events is that the Program was implemented as a result of, and in an attempt to reduce, the large number of injuries at the Dilworth Mine and where the records interpreted by Consol show there was the worst safety record in Consol's Eastern Region.(Footnote 4)

The Complainants next argue that discriminatory motive can be shown because "[i]t is clear that the aim of the program is not to punish and/or correct unsafe acts." (Complainants' brief on remand p. 5, emphasis in original). In alleged support of this argument they state as follows:

> The evidence offered by the claimants in this regard is both statements of general observation of the application of the program. Swift described the program in operation as qualifying people on the plan for having scrapes and bruises that did not even require first aid. (Tr. 195). He also testified that 122 mines [sic](out of 254) were on the first step of the program by June, 1991. (Tr. 210). This clearly shows that the employer is not placing people on the program only for injuries that were caused by negligence. (Id, emphasis in original).

This argument is difficult to follow but, in any event, the asserted conclusions do not logically follow from the factual assertions. The fact that the Program includes minor as well as serious injuries and that many employees may have, at some point in time, been in the first step of the Program does not, in itself, demonstrate unlawful motivation for instituting the Program. Under the circumstances, I cannot find that Complainants have met their burden of proving that Consol instituted the Program for discriminatory reasons.

In its remand order, the Commission also directed examination of the issue of whether Consol applied the Program in a disparate way to individual miners or classes of miners in contravention of the Act, citing as an example, the exclusion from the Program of an injury to one miner and inclusion of a similar injury to another miner. There is, however, simply no evidence of such discrimination in the

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4 It should also be noted that Complainants have not shown that Consol had knowledge that they had filed the confidential section 103(g) complaints with the Secretary although it may reasonably be inferred that Consol officials knew that 103(g) complaints had been filed since at least one of the resulting citations makes reference to such a complaint (Exhibit C-7 M).

record herein. Indeed, none of the Complainants even makes such a claim.

The Complainants do appear to claim in their brief, as evidence of discriminatory application of the Program, that "[v]irtually all injuries, no matter how minor (including small cuts, abrasions or abrasion [sic]) are considered injuries under the Program [and that] [v]irtually all injuries are considered as 'fault' or 'culpable' injuries even when such a finding of fault is unreasonable." (Complainants' brief on remand, p. 3)

While the assertion (that "virtually all injuries are considered 'fault' or 'culpable' injuries even when such a finding of fault is unreasonable") is not supported by record evidence, even assuming that the assertions were true, the Complainants have failed to cite or produce credible evidence that they, or any other employees, have been singled out for disparate treatment or have been discriminatorily charged with minor injuries or "no fault" injuries. Accordingly, there is no basis to support this theory of discrimination in this case. Under the circumstances, and given the criteria in the remand directive, there is no alternative but to dismiss this case.

ORDER

Discrimination Proceeding Docket No. PENN 91-1038-D is DISMISSED.

Gary Melick
Administrative Law Judge

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