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L.W. LINEWEAVER SR. V. RIVERTON
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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LARRY WAYNE LINEWEAVER, SR., Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 94-46-DM
	:	MSHA Case No. NE MD 94-01
RIVERTON CORPORATION, Respondent	:	Riverton Plant

DECISION

Appearances: Larry Wayne Lineweaver, Sr., Pro Se, Front Royal, Virginia, on his own behalf;
Dana L. Rust, Esq., McGuire, Woods, Battle & Boothe, Richmond, Virginia, for the Respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed on November 10, 1993, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3) (the Act) by the complainant, Larry Wayne Lineweaver, Sr., against the Riverton Corporation.(Footnote 1) This case was heard on May 24, 1994, in Winchester, Virginia.

At trial, the parties stipulated that Lineweaver was hired in 1973 and discharged by Riverton effective September 15, 1993, and, that Riverton is an operator subject to the jurisdiction of the Mine Act (Tr. 12). Lineweaver's direct case consisted of his testimony and the testimony of his wife, Betty Jane Lineweaver, as well as the testimony of nine former colleagues at the Riverton Corporation. The respondent called four witnesses including its Manager of Operations John Earl Gray. The respondent, through counsel, filed proposed findings of fact and

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1 Lineweaver's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor in accordance with section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2). Lineweaver's complaint was investigated by the Mine Safety and Health Administration (MSHA). On January 10, 1994, MSHA advised Lineweaver that its investigation disclosed no section 105(c) violations with respect to Lineweaver's termination of employment from the Riverton Corporation. On February 4, 1994, Lineweaver filed his discrimination complaint with this Commission which is the subject of this proceeding.

conclusions of law on June 30, 1994. Lineweaver filed a response to the respondent's proposed findings and a brief in support of his discrimination complaint on July 11, 1994. For the reasons discussed below, Lineweaver's discrimination complaint against the Riverton Corporation is dismissed.

Lineweaver's Section 105(c) Complaint

Lineweaver worked approximately 20 consecutive hours on June 28 and June 29, 1992, providing emergency supervisory coverage following the breakdown of a pump at Riverton's quarry. Upon completing his shift, Lineweaver returned home whereupon he suffered a seizure. Lineweaver was hospitalized for 3 days from June 29 through July 1, 1992. Lineweaver's physician cleared him to return to work on or about July 10, 1992. Lineweaver returned to work on July 13, 1992, and continued to work for the company until his termination on September 15, 1993. Shortly after Lineweaver returned to work in July 1992, the Riverton plant reorganized and assigned additional supervisory responsibilities to Lineweaver. After this reorganization, Lineweaver's wife became concerned that her husband was working too hard and that the extensive nature of her husband's job responsibilities was adversely affecting his health.

On January 12, 1993, Mrs. Lineweaver telephoned John Gray, Manager of Operations, because she felt Gray was "pushing [her husband] to the point of total exhaustion" (Tr. 60). Mrs. Lineweaver told Gray that she had called several agencies to complain about Gray's treatment of her husband. Mrs. Lineweaver made several calls to the Mine Safety and Health Administration in Beckley, West Virginia and Criderscore, Pennsylvania, on January 12, and January 14, 1993. (Tr. 67; Complainant's Ex. No. 1).

Lineweaver was terminated on September 15, 1993. Lineweaver's discrimination complaint is based on his assertion that his termination was motivated by the fact that his wife had called the Mine Safety and Health Administration to complain about his job related stress and its effects on his and his subordinates' safety.

The Respondent's Defense

The respondent denies any knowledge of Mrs. Lineweaver's telephone calls to the Mine Safety and Health Administration. Rather, the respondent asserts that Lineweaver was terminated on September 15, 1993, after a company investigation determined that Lineweaver had exposed it to possible civil and criminal liability. This allegedly occurred after Lineweaver provided underweight bags of cement to his brother-in-law, George Cline, who then attempted to sell the underweight cement to a local

retailer. Lineweaver was authorized to use the underweight bags of cement for his personal use only.

Preliminary Findings of Fact

The complainant, Larry Lineweaver, was hired by the Riverton Corporation in 1973. Riverton manufactures stone, cement, and mortar products at two quarries located in Front Royal, Virginia. These products are used in the construction and agricultural industries. (Tr. 87, 370-371).

Riverton is regulated by the Virginia Bureau of Weights and Measures, a division of the Virginia Department of Agriculture and Consumer Services. This agency inspects manufacturers to determine if their goods meet various specifications, including weight and volume specifications. (Resp. Ex. 8). In 1983, the Bureau of Weights and Measures inspected Riverton's masonry products and determined that they were underweight. Riverton received an official notice of violation from this agency in August, 1983. In 1984 and 1986, the Bureau of Weights and Measures inspected Riverton's Front Royal quarry and found additional underweight bags of masonry products. Lineweaver was present for and participated in the 1984 inspection. On May 9, 1986, the Bureau of Weights and Measures initiated an enforcement proceeding against the Riverton Corporation because it had permitted underweight product to enter commerce on several occasions.

Riverton was informed that the Bureau of Weights and Measures could close its cement quarry if other violations occurred. (Tr. 334). Consequently, to avoid the imposition of future sanctions, Riverton purchased electronic checkweighers and other equipment designed to ensure that Riverton products were packaged at the proper weight. (Tr. 322, 332-333). Riverton also instituted new quality control procedures, effective September 30, 1987, that required supervisors to monitor packing crews to achieve proper bag weight control. (Tr. 333; Resp. Ex. 9). Denton Henry, Riverton's production manager from 1977 to 1990, explained the new operating procedures to Riverton's supervisors, including Lineweaver, when they were implemented. (Tr. 333).

Lineweaver admitted that it was critically important that the company's cement and mortar products be packaged at the proper weights. Numerous witnesses, including Lineweaver, testified that the sale of underweight cement to retailers could expose the company to liability and the employees responsible to serious discipline. (Tr. 102, 111-113, 141, 276-277, 322-323, 334).

Lineweaver opined that during his 20 years of employment at Riverton, he never had any problems working for plant managers

until John Earl Gray was hired as the Manager of Operations at the Riverton plant in September 1991 (Lineweaver posthearing brief). Lineweaver felt that Gray did not have any background in running a cement plant. Lineweaver considered himself to be Gray's teacher. However, Lineweaver reported that Gray attempted to discredit him and refused all of his suggestions concerning the operation of the plant. (Resp. Ex. No. 2; Lineweaver posthearing brief).

On June 29, 1992, Lineweaver returned home after working approximately 20 consecutive hours as a result of a breakdown of a pump in the Riverton quarry. Shortly after returning home, Lineweaver suffered a seizure and was hospitalized for 3 days. Lineweaver's physician released him to return to work without any restrictions with the exception that he should avoid heights. Lineweaver returned to work on July 13, 1992. (Complainant's Ex. No. 2).

Although Lineweaver returned to work approximately 2 weeks after his seizure, Lineweaver claimed that Gray and other company officials were concerned that he could no longer perform his supervisory duties due to his seizure condition. (Tr. 14-15; 243-244). At the time of his seizure, Lineweaver was the first shift supervisor in the pack house. Shortly after his return to work, the positions of Lineweaver and fellow supervisor, Larry Lineberry, were reorganized as a result of the retirement of Paul Huff, quarry superintendent. Lineweaver's supervisory responsibilities were extended to include the premix facility, including the preparation plant. Laborers, who had previously reported directly to Lineweaver, were transferred to the supervision of Lineberry whose supervisory responsibilities were expanded to include supervision over the maintenance shop and the laborers. (Tr. 349-350).

Lineberry testified that, after the reorganization, it was difficult to perform the supervisory jobs correctly because of the distances between the pack house, premix plant, prep plant, and maintenance facilities. (Tr. 181-182). Lineberry testified that the reorganized supervisory duties were "too much" to do the job correctly. (Tr. 181). However, Lineberry testified that, although he and Lineweaver were pretty good friends, Lineweaver never told him that the reorganized supervisory responsibilities were affecting his health. (Tr. 182). Lineberry and David Taylor, accounting supervisor, testified that Lineweaver liked to work overtime and that he requested overtime both before and after his seizure. (Tr. 89, 191, 201).

After the reorganization, Mrs. Lineweaver became concerned that her husband's job responsibilities were adversely affecting his health. On January 12, 1993, Mrs. Lineweaver telephoned Gray to express her concerns about her husband's health. She threatened to call several agencies because she believed the job

demands placed on her husband were unfair. She made several calls to the Mine Safety and Health Administration during the period January 12 through January 14, 1993. (Tr. 60, Complainant's Ex. No. 1).

Riverton denies that it had any knowledge of Mrs. Lineweaver's contacts with MSHA. Lineweaver admitted that he had no conversations with anyone at the company about his wife's phone calls to MSHA after January 12, 1993. (Tr. 39, 232, 236-237). Lineweaver's co-workers had no knowledge that either Lineweaver or his wife had ever contacted MSHA. (Tr. 103-104, 113-114, 142, 170, 190, 387).

On April 20, 1993, checkweighers in the premix plant, which Lineweaver supervised, began to malfunction. Gray instructed employees to continue production, but to spot check the bag weights to determine if they were underweight. (Tr. 193-194, 351-356). On April 22, 1993, Lineberry discovered that cement had accumulated on the checkweigher scales, causing them to malfunction. Lineberry corrected the malfunction by using an air hose to blow the accumulations off the checkweighers scales and recalibrated the equipment. (Tr. 187, 351). Lineberry testified cleaning the checkweighers was a standard procedure. (Tr. 188). Gray met with Lineweaver and explained this procedure to him, but did not discipline him. (Tr. 217-218).

On April 23, 1993, company officials conducted an internal audit and determined that approximately 13,000 bags of underweight cement, sand and mortar mix had been produced in the premix area between April 20 and April 23. (Tr. 201, 352-353). The company segregated the underweight material in its warehouse to prevent it from being shipped to Riverton's customers. (Tr. 352). Over the next several months, the company recycled a portion of the underweight cement. (Tr. 353).

On July 31, 1993, Gray met with Lineweaver and Lineberry before leaving for a vacation. Approximately 5,000 bags of underweight cement remained in the warehouse which could no longer be recycled. (Tr. 358). Lineberry suggested that the cement be given to employees. (Tr. 189). Under company policy, employees may take underweight scrap material after obtaining a bill of lading. However, to avoid sanctions by the Virginia Bureau of Weights and Measures, employees must maintain control over the underweight product to ensure that it does not enter the stream of commerce. (Tr. 102-103, 112-116, 141-142, 189, 320-321). George Gordon, Fred Lentz, Jerry Estes, Bud Lipscomb and Anthony Staubs, who all testified on behalf of Lineweaver, confirmed that employees who permitted underweight cement to be sold on the retail market could be subject to serious discipline, including discharge. (Tr. 102-103, 115-142, 168-169, 323-324).

On July 31 and August 2, 1993, Lineweaver released over 1,000 bags of underweight cement to his brother-in-law, George Cline. (Resp. Ex. 5,6; Tr. 403-404).(Footnote 2) Thomas Campbell, Manager of H.L. Borden Lumber Company, a building supply retailer located in Front Royal, testified that he received a telephone call from an individual identifying himself as George Cline on August 2 or August 3, 1993. Cline offered to sell Campbell cement mix for $1.00 per bag. The wholesale price for this product is approximately $2.50 per bag and the cement retails for $4.25 per bag. Cline gave Campbell his phone number and asked him to call if he had any questions. (Tr. 415, 418; Resp. Ex. 10). The following day, Cline visited Campbell at H.L. Borden's lumber yard and renewed his offer to sell cement at $1.00 per bag. Cline told Campbell that the bags were surplus cement from a large construction job in Winchester. (Tr. 371, 416). Campbell described Cline at the hearing as approximately 6 feet tall and heavy set.

Campbell declined to purchase the cement from Cline because he thought it was stolen merchandise. (Tr. 417). Campbell informed Ron Brown, a Riverton sales representative, about Cline's offer. Brown informed Mark Everly, Riverton's controller, who was informed by a co-worker that George Cline was Lineweaver's brother-in-law. Everly inspected copies of the shipping and receiving reports to determine if Lineweaver had taken possession of underweight cement. Everly confirmed that Lineweaver and Cline had signed for and received approximately 1,000 bags of underweight cement. (Tr. 403-404; Resp. Exs. 5, 6). Everly immediately terminated the distribution of underweight cement to employees. (Tr. 403-404).

On August 9, 1993, Gray returned to work following his vacation. On August 10, 1993, Gray spoke to Lineweaver who admitted that he had given Cline underweight cement and that Cline was his brother-in-law. (Tr. 360). Lineweaver stated that Cline told him that he was going to use the cement for a barn floor. (Resp. Ex. 10). On August 11, Gray met with Ron Brown who informed him that Cline had sold some cement to Brown's son-in-law, a local contractor for 50 cents per bag. (Tr. 364; Resp. Ex. 10).

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2 Lineweaver admits that Cline obtained approximately 700 bags of cement from the company but contends that Cline did not receive the remaining 300 bags of cement. (Tr. 25). In his posthearing brief, Lineweaver admits that Cline received approximately 500 cement bags. The precise number of bags obtained by Cline is not material in that it is undisputed that Cline acquired a significant quantity of cement.

Gray and Lineweaver met with Cline at his house on August 11, 1993. Cline admitted that Lineweaver had given him underweight cement but denied attempting to sell it. Cline claimed he had given cement to friends and neighbors. He also stated that some of the cement was located on other property he owned in Front Royal. Cline showed Gray several pallets of concrete mix, but Gray was only able to account for approximately 200 bags of cement. (Tr. 367-369).

On August 12, 1993, Gray met with Tom Campbell at H. L. Borden and confirmed that an individual identifying himself as George Cline had attempted to sell concrete mix on August 2 or August 3, 1993. Campbell described Cline for Gray. According to Gray, Campbell's description accurately described Lineweaver's brother-in-law. (Tr. 455).

Gray completed his investigation on August 18, 1993. (Resp. Ex. 10). After discussions with Toby Mercuro, President of Riverton Corporation, and Dan Hudak, Riverton's Chief Financial Officer, it was determined that Lineweaver should be terminated because he was responsible for his brother-in-law's attempts to sell the underweight cement to local retailers. Lineweaver's termination was effective September 15, 1993. (Tr. 373-374,393; Resp. Exs. 10, 13). While Lineweaver's termination was primarily based on this incident, Gray and Mercuro also considered Lineweaver's past performance, including probation for excessive tardiness in April 1992 and a December 1992 unsatisfactory performance evaluation. (Tr. 318, 375-380, 386-387; Resp. Exs. 7, 11, 12).

Further Findings and Conclusions

Lineweaver, as the complainant in this case, has the burden of proving a prima facie case of discrimination under section 105(c) of the Mine Act. In order to establish a prima facie case of discrimination, Lineweaver must prove that he engaged in protected activity, and, that the adverse action complained of, in this case his September 15, 1993, discharge, was motivated in some part by that protected activity. See Secretary on behalf of David 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 (3d Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

Riverton may rebut a prima facie case by demonstrating either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. Riverton may also affirmatively defend against a prima facie case by establishing that it was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone.

See also Jim Walter Resources, 920 F.2d at 750, citing with approval Eastern Associated 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).

A threshold question in this case is whether Lineweaver engaged in protected activity and whether the respondent corporation knew or had reason to know of this protected activity. A miner and his agent have an absolute right to make good faith safety related complaints about mine conditions which they believe present hazards to the miner's health or well being. Such complaints, whether to the operator or to MSHA, constitute protected activities under section 105(c) of the Act.

Here, Lineweaver has documented through telephone records two phone calls on January 12, 1993, and one call on January 14, 1993, to the Mine Safety and Health Administration. These calls were made by Mrs. Lineweaver as a representative of her husband. The complaints concerned Mrs. Lineweaver's belief that the demands placed upon her husband by Gray were subjecting her husband to an unreasonable degree of stress which was adversely affecting his health. Although these complaints do not identify a cognizable safety risk, Lineweaver and his wife, as his representative, have an absolute unqualified right to seek the advice of MSHA officials to determine if there are actionable hazardous conditions or practices at the mine. Consequently, while the substance of Mrs. Lineweaver's complaint was not a complaint contemplated to be protected under section 105(c) of the Act, the phone calls to MSHA were protected activities.

The next question to be determined is whether the respondent corporation knew or should have known about the protected MSHA phone calls. Although the respondent denies actual knowledge of Mrs. Lineweaver's phone calls, Gray admits that Mrs. Lineweaver threatened to contact the appropriate authorities. Therefore, the Riverton Corporation had reason to know that Mrs. Lineweaver had already contacted MSHA when she called Gray on January 12, 1993, or, that she intended to do so. Consequently, Lineweaver has prevailed on the issue that he engaged in protected activity and that his employer knew or should have known about such activity.

However, Lineweaver falls short of establishing a prima facie case if he fails to demonstrate by a preponderance of the evidence that his September 15, 1993, discharge was in any way motivated by the January 1993 protected telephone calls. In analyzing whether his termination was influenced by his protected activity, it is important to consider l) whether the protected activity and the alleged discriminatory conduct are contemporaneous; and 2) whether there is any event during the

interim period between the protected activity and the alleged discriminatory act that provides an independent basis for the adverse action complained of.

Addressing the first question, it is difficult to identify a nexus between Mrs. Lineweaver's January 1993 telephone calls and Lineweaver's discharge eight months later in September 1993. Regarding the second question, it is well documented that Riverton had past difficulties with the Virginia Bureau of Weights and Measures. It is also apparent that Riverton personnel, including Lineweaver, were aware of the importance of preventing the unauthorized resale of underweight cement and that such activities could result in serious discipline, including termination of employment.

It is undisputed that Lineweaver obtained a large quantity of underweight bags of cement which he placed in the possession of his brother-in-law, George Cline. Lineweaver's assertion that an imposter posed as his brother-in-law at H. L. Borden is unconvincing and inconsistent with his own statements. At the outset, I note that Lineweaver failed to call George Cline as a witness to refute Campbell's testimony. (TR. 71-75). Moreover, Lineweaver refused to provide Cline's address to the respondent so that Cline could be subpoenaed to appear in this proceeding. (Resp. Ex. 4; tr. 342-348). Lineweaver's failure to call Cline as a witness and his failure to facilitate the respondent's attempt to subpoena Cline warrant the adverse inference that Cline's testimony would be detrimental to the complainant. See NLRB v. Laredo Coca-Cola Bottling Co., 613 F.2d 1338 (5th Cir. l1980); NLRB v. Dorn's Transportation Co., 405 F.2d 706 (2nd Cir.). Finally, Lineweaver conceded that Cline had sold underweight cement in his February 4, 1994, discrimination complaint which serves as the basis for this proceeding wherein he stated, "[t]he relative decided to sell part of his pickup for a total of $91.00." (Resp. Ex. 3).

Thus, given Lineweaver's failure to rebut Campbell's testimony concerning his solicitation by Cline, there is ample evidence to support the Riverton Corporation's conclusion that Cline had attempted to wholesale the underweight cement. Such action by Cline could subject the Riverton Company to administrative or criminal penalties and constitutes a significant intervening event between the protected MSHA phone calls and Lineweaver's discharge.

I do not find Lineweaver's assertion that he did not know of his brother-in-law's intention as a mitigating circumstance. Having given Cline control over a large quantity of underweight cement, Lineweaver assumed the responsibility for ensuring that this cement was not placed in commerce in violation of known company policy. Accordingly, Lineweaver is responsible for Cline's activities. It is clear, therefore, that the

unauthorized sale or attempted sale of underweight cement provides an independent and reasonable basis for Lineweaver's discharge.

While I have concluded that Cline's activities provides a basis for Lineweaver's discharge, I am not unmindful of the animus between Lineweaver and Gray. However, there is no evidence that their conflict was attributable to any protected activity under the Act in that their conflict pre-existed Mrs. Lineweaver's telephone calls to MSHA. The Mine Act is a safety rather than an employment statute. Jimmy R. Mullins v. Beth Elkhorn Coal Corporation, et al., 9 FMSHRC 891, 898 (May 1987); Jimmy Sizemore and David Rife v. Dollar Branch Coal Company, 5 FMSHRC 1251, 1255 (July 1983). Thus, adverse action influenced by employee-management conflict, in the absence of pertinent protected activity, does not give rise to a discrimination complaint under Section 105(c).

Thus, I conclude that Lineweaver has failed to present a prima facie case in that he has failed to establish that his discharge was in any way motivated by the telephone calls to MSHA that occurred approximately eight months prior to his termination. Consequently, Lineweaver has failed to demonstrate that he was the victim of a discriminatory discharge.

ORDER

In view of the above, the discrimination complaint by Larry W. Lineweaver, Sr., against the Riverton Corporation in Docket No. VA 94-46-DM IS DISMISSED.

Jerold Feldman
Administrative Law Judge

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