

CCASE:
JAVIER SANCHEZ V. LION COAL
DDATE:
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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

JAVIER SANCHEZ, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 93-460-D
: DENV CD 93-05
: LION COAL COMPANY, : Swanson Mine
Respondent :

DECISION

Appearances: Mr. Javier Sanchez, Price, Utah, pro se;
Brian Steffensen, Esq., Salt Lake City, Utah,
for Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by Javier Sanchez against Lion Coal Company under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). For the reasons set forth below, I find that Mr. Sanchez did not engage in activities protected under the Act and, therefore, was not discriminated against by Lion Coal.

Mr. Sanchez filed a discrimination complaint with the Secretary of Labor pursuant to Section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2). The Secretary concluded that the facts disclosed during its investigation did not constitute a violation of Section 105(c). Mr. Sanchez then instituted this proceeding before the Commission pursuant to Section 105(c)(3), 30 U.S.C. 815(c)(3)

The case was heard on June 14, 1994, in Green River, Wyoming. Mr. Sanchez testified in his own behalf. George Herne and Anna Marie Boden testified for Lion Coal.

FINDINGS OF FACT

Mr. Sanchez was employed by Lion Coal to work in it's Swanson Mine, located in Huntington Canyon, Utah, from October 1989 until December 31, 1992. He was seriously injured in a mine accident in August 1991 and did not return to work until August 1992. On his return he was limited to "light duty."

In September 1992, Mr. Sanchez fell off of a ladder and aggravated a back injury. After going to the doctor he was advised that he could not return to work until October 1, 1992. When he reported this to Lion Coal, he informed them that he wished to seek a second opinion. Mr. Sanchez did not return to the mine to go to work until March 10, 1993. At that time, he was told that he had been terminated by the company on December 31, 1992, and no longer worked for them.

Mr. Sanchez testified that he kept Lion Coal fully apprised of his medical status and was surprised when they would not take him back. To corroborate this, he submitted a telephone bill indicating that he had called Lion Coal on November 24, 1992. (Comp. Ex. A.)

On the other hand, the witnesses for Lion Coal testified that they never heard from Mr. Sanchez after he told them that he wanted to get a second opinion in October 1992. Ms. Boden, Lion Coal's Safety Administrator, stated that she did not remember receiving a telephone call from Mr. Sanchez on November 24, nor did she have any record of it, although she normally makes a record of all telephone calls.

Mr. Herne testified that he made the decision to terminate Mr. Sanchez at the end of 1992 after determining that the Safety Department had not been contacted by Mr. Sanchez since October. He recounted that the company had learned from Workers' Compensation that Mr. Sanchez had received temporary total disability from November 1, 1992, until November 13, 1992, at which time it was determined that Mr. Sanchez could return to work. (Resp. Ex. 2.) He stated that when Mr. Sanchez did not return to work in December or otherwise contact the company, they took him off of the payroll and transferred his status from active to terminated at the end of the month.

FURTHER FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

There is no doubt that Mr. Sanchez was discharged by Lion Coal. However, in order to establish a prima facie case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (2d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1984); 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., 709 F.2d 86 (D.C. Cir. 1983).

Mr. Sanchez has not established that he engaged in protected activity. He does not maintain that he filed or made a complaint of any dangers or safety or health violations or any other matter under, or related to, the Act. Nor is there any evidence in the record to indicate that he did so. There is no evidence that his medical condition had anything to do with evaluations and potential transfer under a standard published pursuant to Section 101 of the Act, 30 U.S.C. 801. The only proceeding, under the Act, that he instituted and testified in was the instant one, which occurred after, and as a result of, his discharge. Finally, Mr. Sanchez does not claim to have exercised any statutory right afforded him by the Act.

The record is uncontroverted that Mr. Sanchez was terminated because he neither was present for work, nor informed Lion Coal as to why he was not present for work, from October 1 until December 31, 1992. In fact, he did not return to work until March 1993. Giving him the benefit of every doubt, the record still demonstrates that he could have returned to work after November 13, 1992, and that he only contacted, or attempted to contact, the company on November 24, 1992.

It is not, however, necessary to resolve these issues because they clearly do not come within the four areas of protected activities listed in the Act. I find, as have several Commission judges before me, that a claim of protected activity must be based on an alleged violation of a health or safety standard or result from some hazardous condition or practice existing in the mine environment for which the operator is responsible. Frye v. Pittston/Clinchfield Coal Co., 11 FMSHRC 187, 190 (February 1989, Judge Weisberger); Bryant v. Clinchfield Coal Co., 4 FMSHRC 1380, 1421 (July 1982, Judge Kennedy); Kaestner v. Colorado Westmoreland Inc., 3 FMSHRC 1994, 1996 (August 1981, Judge Boltz).

Mr. Sanchez has not met this requirement. Accordingly, I conclude that the adverse action that Mr. Sanchez complains of did not result from his engaging in protected activity.

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ORDER

It is ORDERED that the complaint filed by Javier Sanchez against Lion Coal Company for violation of Section 105(c) of the Act is DISMISSED.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Mr. Javier Sanchez, P.O. Box 1603, Price, UT 84501
(Certified Mail)

Anna Marie Boden, Safety Administrator, Lion Coal Company,
P.O. Box 6117, Rock Springs, WY 82901 (Certified Mail)

Brian Steffensen, Esq., 3760 South Highland Drive, Suite 200,
Salt Lake City, UT 84106 (Certified Mail)

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