FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

February 2, 2009

RICHARD JAIMES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. LAKE 2008-486-DM
	:	NC-MD-08-05
	:	
	:	Robinson Run No. 95 Mine
STANSLEY MINERAL RESOURCES, INC.	:	Mine ID 11-00176 D170
Respondent	:	

DECISION

Appearances: Richard Jaimes, Adrian, Michigan, *pro se*;
Richard B. Stansley Jr., Sylvania, Ohio, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a complaint of discrimination filed by Mr. Richard Jaimes alleging that he was discharged by Stansley Mineral Resources Inc.(Stansley Minerals), on September 19, 2007, in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 C.F.R. § 801 et seq., the "Act."[1] Stansley Minerals denies the allegations of unlawful discharge and, alternatively, seeks dismissal of the complaint on the grounds that the complaint was not filed within the time limits set forth in Section 105(c)(2) of the Act.

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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 the 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 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 this Act.

Section 105(c)(2) provides that "any miner...who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination...". The Commission has long held, however, that this 60-day limit is not jurisdictional and a judge is required to review the facts on a case-by-case basis, taking into account the unique circumstances of each situation in order to determine whether a miner's late filing should be excused. *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21, 24(January 1984), aff'd mem. 750 F.2d 1093 (D.C. Cir. 1984); *Herman v. Imco Services*, 4 FMSHRC 2135 (December 1982).

In this case there is no dispute that Mr. Jaimes' alleged protected activities began in August 2007 and continued until shortly before his discharge on September 19, 2007. There is also no dispute that Mr. Jaimes' complaint of unlawful discharge to the Department of Labor's Mine Safety and Health Administration (MSHA)was dated April 9, 2008, or almost five months after the 60-day deadline set forth in Section 105(c)(2). At hearings, Mr. Jaimes explained that he delayed filing his complaint to MSHA because:

> I wanted to be very determined, I mean, very reasoned in my, you know, redress. I wanted to make sure that I wasn't, frivolous. So, I waited for the EEOC [Equal Employment Opportunity Commission] to make a rendering on their case. And when they, when they made their rendering, then I figured, that I determined I would just, you know, follow that up through the Mine Safety Health Administration. And that's why - - and that's the thing that I noted on the, on my request is that I was trying to be very prudent and very, you know, measured. I wasn't just, I wasn't just throwing everything up, you know, on the wall and seeing what would stick. (Tr. 99-100).

Significantly, Mr. Jaimes does not claim that he was unaware of the filing deadlines under the Act and bases his excuse for late filing solely on his election to give priority to his EEOC complaint wherein he asserted that his discharge was the result of age discrimination. I do not find this reason to be a grounds to excuse his late filing in this case. See *Wilson v. CSR Southern Aggregates*, 22 FMSHRC 1218 (ALJ)(October 2000). Under the circumstances the complaint herein must be dismissed.

Even assuming , *arguendo*, that the complaint was filed timely, I find that Mr. Jaimes would have, in any event, failed to sustain his burden of proving that his discharge was in violation of the Act. He alleges in his complaint to MSHA on April 9, 2008, as follows:

> On Sept 18, 2007, I was hauling brown clay to a dump site under construction. While in the process of lifting my load, the load shifted resulting in the truck box flipping on its side. The failure of the company to properly train me to operate the haul truck along with the absence of a safety berm on an uneven slope contributed to the accident. In addition, my repeated requests to replace bad tires and leaking wheel cylinder all went unheeded leading to this accident. My safety concerns were noted on the daily vehicle report. As a result of this accident on (9-18-2007) and the accumulative effect of other discrinitaory[sic] practices, I was terminated [as] of (9-19-2007) I am seeking recovery of lost wages and compensation to be made whole.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under section 105(c) of the Act 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. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on grounds, *sub nom*. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 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 the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis on the miner's unprotected activity alone. *Pasula, supra; Robinette, supra*. See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commissions' 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.)

The record shows that Mr. Jaimes was hired by Stansley Minerals in April 2007, as a loader operator/customer service representative, loading semi-trucks and checking them in and out of the mine. A month or two after he was hired, he was transferred to the mine at issue where he operated the 30-ton No. 4 haul truck. Jaimes was discharged on September 19, 2007, following verbal and written warnings issued as a result of several vehicular accidents (Exhibits R-1,R-2, and R-3). These incidents were summarized by Respondent's president, Richard Stansley, as follows:

> On 6/20/2007, Mr. Jaimes was involved in a haul truck rollover accident exposing his co-workers and himself to unwarranted hazardous condition [sic] which could have resulted in loss of life or limb. The accident resulted in substantial damage to the equipment and lost production time. The disciplinary action included verbal discussion and a written warning.
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> On 8/31/2007, Mr. Jaimes was involved in a backing incident where he was in a haul truck that was backed into by a co-worker. After an investigation and review of witness statements, it was found that Mr. Jaimes [sic] actions contributed to the accident which was found to be avoidable. The accident exposed his co-workers and himself to unwarranted hazardous condition [sic] which could have resulted in loss of life or limb. The accident resulted in substantial damage to the equipment and lost production time. The disciplinary action included verbal discussion and a written warning.
>
> On 09/18/2007, Mr. Jaimes was involved in a second haul truck rollover accident exposing his co-workers and himself to unwarranted hazardous condition [sic] which could have resulted in loss of life or limb. The accident resulted in substantial damage to the equipment and lost production time. The incident resulted in termination of employment.
> (Exhibit R-18)

At hearings, Jaimes acknowledged that, prior to his discharge, he did not in fact make any complaints about his alleged lack of training and the alleged absence on September 18, 2008, of a berm at the accident site. He clarified and amplified his other allegations of protected activity as follows: (1) beginning in early August of 2007, he reported on an almost daily basis on his daily

vehicle reports that the tire treads on the No. 4 truck were "in very bad shape", (2) that two or three times he verbally told his supervisor, Mr. Francis Tandoh, that he needed new tires, (3) that he reported in his daily vehicle reports that he had a leaking wheel cylinder, and (4) that he reported to his supervisor that other employees were acting irresponsibly by "playing chicken" and using their cell phones (Tr.42-43).

Tire Complaints

There is no dispute that Mr. Jaimes frequently reported on his daily vehicle, reports, complaints about the tires on his haul truck. (See Exhibit R-15). Mr. Jaimes' supervisor, Francis Tandoh, holds a university degree in mining engineering and is experienced in the mining industry. Tandoh testified that he was aware of Jaimes' complaints regarding the condition of the tread on the tires of his haul truck. As a result of these complaints Tandoh inspected the tires himself and brought in an outside contractor to examine the tires. Both found the tires to be in safe condition. Jaimes also acknowledged that on August 30, 2007, MSHA performed a complete inspection at the mine and that no citations were issued. Jaimes admitted that even though the MSHA inspector examined his truck he (Jaimes) did not report any problem with his tires. On the daily inspection report earlier that same date, Jaimes had reported several defects i.e. "Tires Damage/Low" and "Body, Blade, Bucket" (Exhibit R-15).

Mr. Tandoh testified that the same tires remained on the No. 4 haul truck following the MSHA inspection and even after Mr. Jaimes' discharge on September 19, 2007. According to Tandoh, when an employee reports a safety condition, it is Tandoh's obligation to make sure it is corrected. Tandoh maintained that he does not interfere with the employees' right to report conditions the employee feels are unsafe. Tandoh checks out those conditions but if found not to be unsafe he, in essence, does nothing further. Tandoh testified that he made no recommendation as to whether Jaimes should be discharged following his third accident on September 18, 2007. It was his opinion, however, that Jaimes was not competent to operate either the front end loader or the haul truck. According to Tandoh, Jaimes was a safety risk to himself and others.

Complaints about a leaking wheel cylinder

Jaimes testified that he had a leaking wheel cylinder on his haul truck but did not know whether it affected safety. The leaking wheel cylinder was apparently reported on his daily inspection reports under the category "Body, Blade, Bucket (Exh. R-15).

Jaimes' supervisor, Mr. Tandoh, testified that he was aware of the oil leak of which Jaimes was complaining but testified, without contradiction, that it was, in fact, not a safety issue and that they maintained the appropriate level of oil on the No. 4 haul truck. Under the circumstances, I do not find that Jaimes' complaint regarding a leaking wheel cylinder was a protected activity under the Act.

Complaint about employees acting irresponsibly

In this regard, Jaimes testified that, about a week before his accident on September 18, 2007, he had complained to Mr. Tandoh about other employees acting irresponsibly in using cell phones in violation of company policy and trying to race other truck drivers into line.(Tr. 42-43). Significantly, Mr. Jaimes failed to cite this allegation in his complaint to MSHA and in his complaint to this Commission, and, since Mr. Tandoh credibly testified that he received no such complaints from Jaimes, I give no weight to the allegation.

Analysis

As previously noted, the mine operator may rebut a *prima face* case of discrimination by showing that the adverse action, (in this case Mr. Jaimes discharge on September 19, 2007), was in no part motivated by the protected activity. In this regard this Commission observed in *Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508 (November 1981) that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility toward protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment.

Richard Stansley, president of Stansley Minerals, testified at hearings that Jaimes was terminated on September 19, 2007, because of his unsafe operation of the haul truck. Stansley testified, and it is undisputed, that Jaimes was involved in three accidents prior to his discharge and had twice before been issued verbal and written warnings(Exhibits R-1, R-2 and R-3). These warning reports confirm the credible testimony of Jaimes' supervisor, Francis Tandoh, that Jaimes was not competent to operate the haul truck. Tandoh opined that Jaimes was indeed a safety risk to himself and others. I find that the asserted unprotected grounds for Mr. Jaimes discharge to be credible and convincing and, in the absence of any evidence of hostility toward Jaimes' protected activity or other improper motivation by Stansley Minerals, I conclude that Mr. Jaimed would have, in any event, failed to establish that his discharge was motivated in any part by his protected activity.

Even assuming, *arguendo*, that Jaimes' discharge was motivated in part by his protected activity, it is clear that the operator would have successfully affirmatively defended by establishing that the adverse action would have been taken in any event on the basis of Jaimes' unprotected activity alone. Under all the circumstances, I conclude that Mr. Jaimes would not, in any event, have met his burden of proving that his discharge was in violation of Section 105(c)(1) of the Act, and his complaint must, for this additional reason, be dismissed.

ORDER

Discrimination complaint Docket No. LAKE 2008-486-DM is hereby dismissed.

Gary Melick
Administrative Law Judge
202-434-9977

Distribution: (Certified Mail)

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