

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 29, 2009

VURNUN EDWURD JAXUN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2007-811-DM
v.	:	RM MD 2006-06
	:	
ASARCO, LLC,	:	
Respondent.	:	San Mission Mine
	:	Mine ID 02-00135

DECISION

Appearances: Vurnun Edwurd Jaxun, 5357 N. Fort Yuma Trail, Tucson, AZ 85750-5930, Complainant;
Mark Savit, Esq., Hugh C. Thatcher, Esq., Patton Boggs LLP, 1801 California St., Suite 4900, Denver, CO 80202, for Respondent.

Before: Chief Administrative Law Judge Robert J. Lesnick

Introduction

This case is before me on a complaint for discrimination filed by Complainant Vurnun Edwurd Jaxun pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (2000) (hereinafter the “Mine Act” or “the Act”).¹ Jaxun alleges that

¹ Section 105(c)(3) states:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

30 U.S.C. § 815(c)(3).

Respondent, Asarco Inc., discriminated against him in violation of Section 105(c)(1) of the Act when the company terminated his employment on February 23, 2006, allegedly for safety complaints he alleges he made before Asarco terminated him. I held a hearing in Tucson, Arizona on April 29–30, 2008. The parties submitted post-hearing and reply briefs. For the reasons stated below, I find that Jaxun engaged in protected activity within the meaning of the Mine Act; however, I find that Asarco did not discharge him in full or in part on that basis.

Background

This case has a long history. It was originally assigned to Administrative Law Judge Jacqueline Bulluck who dismissed the proceedings because of Jaxun's refusal to obtain counsel due to, in the judge's assessment, the lack of clarity in Jaxun's representation of himself. Jaxun appealed to the Commission, and in an August 12, 2007, decision, the Commission, while recognizing the judge's frustration with the lack of coherence in Jaxun's presentation of his case, held that the judge did not have authority to dismiss the case based upon Jaxun's refusal to obtain legal counsel. The Commission granted Jaxun's request that the dismissal order be set aside.

As Chief Judge, I reassigned this case to Judge Bulluck. Mr. Jaxun filed motions to reassign the case, which I denied. For reasons unconnected to those motions, I decided to reassign the case to myself and held a hearing.

At the hearing, I directed the parties to file post-hearing briefs by July 14, 2008. On May 22, 2008, Jaxun filed a Motion to Reopen the Record, which Asarco opposed on June 3, 2008. I issued an order on July 9, 2008 denying the motion. Considering Jaxun's *pro se* status and his filing of a motion, I granted the parties additional time to file briefs until August 8, 2008, with reply briefs being due by August 22, 2008. Asarco filed its brief on July 14, 2008. Jaxun then filed a motion for extension of time to file his brief, which I granted, giving Jaxun until August 22, 2008 to file a brief, and extending the time period for the filing of reply briefs until September 12, 2008. On August 8, 2008, Jaxun filed another request to reopen the record, which I denied on August 22, 2008. Jaxun filed another request for an extension of time to file a brief, which I granted, allowing Jaxun to file his brief by September 5, 2008, and extending the time for reply briefs to be filed to September 26, 2008. Jaxun filed his brief on September 5, 2008, and he filed a reply brief on September 30, 2008.

Since the filing of the final briefs at the end of September, Jaxun has filed several pleadings even as late as February 9, 2009, when he moved to strike the use of the word "muck," and April 13, 2009, when he raised an issue of a pre-employment physical examination. The large amount of post-hearing motions and document submissions delayed the issuance of this decision.

Findings of Fact

Asarco's Mission Complex and the Slurry Spill

Asarco Mission Complex in Sahuarita, Arizona produces copper and concentrate containing copper and silver. Two specific areas of the mine are at issue in this case: the pit and the mill. Copper is produced at the mill. The milling process begins when the Engineering Department lays out a drill pattern. (Tr. 433.) Once the pattern is complete, the blasting crew loads the pattern with blasting agent, the blast is initiated, and the rock mass is broken into smaller pieces. The broken pieces are loaded onto either 320-ton haul trucks or 240-ton haul trucks. The pieces are designated as either ore, which goes to the concentrators, or as waste. The cut-off for determining whether a rock is considered waste is three-tenths of one percent of copper content. The rock is dumped into a primary crusher and is broken down to six inches or smaller. The smaller rock then travels up a belt and is dumped into an ore stockpile. The rock is then drawn into a crusher where it is crushed to a half inch or smaller. The rock goes into the mill in fine ore bins where it is crushed even more by rod mills and then exits the rod mill to the ball mill. There, the material is ground to an even finer consistency. Once the material is finely ground, it is pumped to flotation tanks in which chemicals cause copper particles to adhere to bubbles that rise to the top of the tanks, enabling the copper to be skimmed off. The remaining material falls to the bottom of the tanks and is disposed of. The skimmed copper material is pumped to a filter plant where all but approximately ten percent of the moisture in the copper material is removed. The material is then hauled to the smelter. (Tr. 433–36.) The final product, called copper concentrate, is 25 to 29 percent copper. (Tr. 242.) Miners do not come into direct contact with the copper concentrate. (Tr. 275–76.)

In February 2006, there were a series of bumps or power outages at the mill that caused material – called “slurry” – in the ball mills to spill onto the mill floor. Slurry consists of water, copper bearing material, and waste rock. (Tr. 240–42.) The material that comes out of the ball mill when there is a bump is not copper concentrate. (Tr. 243.)

On February 21, 2006, the Mine Safety and Health Administration (“MSHA”) issued Asarco a citation for the spill and gave the company one week to abate the spill by cleaning it up. Asarco assigned probationary employees to assist with the cleanup. (Tr. 142–43.) The company used a combination of high-pressure water hoses, skid steers, and shovels and wheelbarrows in the cleanup process. (Tr. 332.)

Jaxun's Employment at Mission Complex

Vurnun Jaxun submitted an application to be a haul truck driver at Asarco's Mission Complex in December of 2005. (Tr. 99; Jaxun Trial Ex. 2.) He had less than one year of experience driving a truck. (Tr. 99.) Jaxun had never before worked at a mine. (Tr. 99.) After interviewing with Sheila Sweech, an Asarco human resources employee, and John Garcia, Senior Mine Supervisor at the time of the events in question, Jaxun was hired and commenced MSHA training on February 14, 2006. (Tr. 101, 489, 102, 407, 104.) He completed three days of newly

employed, inexperienced miner safety training, which was conducted by Robert Jordan, Asarco's Safety Administrator. (Tr. 104, 106, 235–36.) When Jaxun first arrived at the mine site, he again met with Sheila Sweech, and she provided Jaxun with several documents, including Rules of Conduct and the 2001 to 2004 Mission Complex Labor Agreement. (Tr. 110–11.) Jaxun understood that once he commenced employment, he would be a probationary employee for the first seventy-five days. He understood “probationary employee” to mean his employment was on a trial basis and dependent upon his behavior and work performance. (Tr. 114–15, 121–22.) He also completed four hours of environmental training on Friday, February 17, 2006, that included a mine tour with Garcia. (Tr. 129–30.) During the course of the environmental training, Garcia discussed hazard recognition and instructed the trainees to be careful. (Tr. 131.) On February 20, 2006, Jaxun commenced training on how to conduct a pre-shift examination of a haul truck. (Tr. 133.) On February 21, 2006, he began truck driver training. (Tr. 136.)

On February 22, 2006, Jaxun started the shift driving a truck, but during the shift, Jaxun and other probationary employees were picked up and taken to the mine office. (Tr. 143, 145–46.) There, they were informed by Garcia that they would be assigned to the mill to assist in the cleanup of the slurry spill. (Tr. 147, 150.) Jaxun mentioned his concern about working in the spilled material in his orthopedic boots to Garcia; however, there were no rubber boots in Jaxun's size available. (Tr. 61, 67, 336–37.) Garcia took the probationary employees to the mill for a tour which was conducted by Kenneth David, Operations Supervisor for the Mission concentrator. (Tr. 327, 412.) Due to the noise level, the employees wore ear plugs during the tour. David told the employees to be careful with electrical components and high pressure hoses, and to be mindful of slipping on the spilled material, which Jaxun assumed was copper concentrate. (Tr. 151–52, 154–57, 334.) Jaxun also assumed that the material was hazardous, stating that he believed he had to wear galoshes, hand protection, eye protection, and head protection, and to use a respirator. (Tr. 155–57.)

As David commenced to give Jaxun his cleanup instructions, Jaxun again expressed a concern about his orthopedic boots. David requested a pair of galoshes from the warehouse, which he did not immediately receive because Jaxun's size was not available. (Tr. 334–336.) Consequently, on February 22, 2006, Jaxun wore his own boots to perform cleanup. David left the crew, but returned to observe the workers before lunch. (Tr. 342.) Jaxun received a pair of galoshes on the morning of the February 23, 2006. (Tr. 69.)

On February 23, 2006, Jaxun asked to speak to the Operations Manager. (Tr. 168.) Ron Allum, Mine Manager at the time of these events, took Jaxun to speak to Mark Kalmi, who was General Manager. (Tr. 171, 433, 438.) In a sworn statement, Allum mentioned that he did not know whether a supervisor was present while the employees performed cleanup. (Tr. 176; Asarco Trial Ex. C.) Jaxun told Kalmi that the company should have hired a contractor to do the cleanup. (Tr. 180.) Kalmi told Jaxun that the company had the right to assign employees to any job at the plant. (Tr. 181–82, 438.)

After this exchange, Kalmi met with Allum and Lupita Gonzales, Human Resources Manager at the time of the events in question, and made the determination to terminate Jaxun's

employment. (Tr. 191, 458.)

The Law

Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation.

30 U.S.C. § 815(c)(1).

The Complainant bears the burden of proving that discrimination occurred. In order to establish a *prima facie* case of discrimination, he must establish that (1) he engaged in a protected activity; and (2) he suffered an adverse action that was motivated in part by the activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Robinette vs. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980).

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. *Pasula*, 2 FMSHRC at 2799–2800. If an operator cannot rebut the *prima facie* case, it may still affirmatively defend the action by proving it was also motivated by the Complainant's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817–18.

The Commission has also recognized that the Complainant might not be able to offer direct evidence that adverse action taken against him was motivated in any part by protected activity, stating “[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect.” *Chacon vs. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981).

Further Findings of Fact and Conclusions of Law

Protected Activity

The first determination to be made is whether Jaxun engaged in protected activity as defined by the Mine Act. A complaint made to an operator or its agent of “an alleged danger or safety or health violation” is described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c).

Jaxun asserts that he made several safety complaints, although at hearing, he could not

clearly state to whom some of the comments were made. Jaxun testified that he spoke to a supervisor, who was determined to be Garcia, about safety issues. (Tr. 60–61.) Garcia and Jaxun agree that Jaxun complained to Garcia about performing cleanup in his orthopedic boots. (Tr. 61, 413.) Jaxun, however, states that he also told Garcia “in so many words” that the trainees were working in the material “foot deep without galoshes, [or] [] monkey suits.” (Tr. 60.) At trial, Garcia explicitly denied that Jaxun made any safety complaints, and he denied making any representations to Jaxun about the type of equipment trainees should wear while working in the mill. (Tr. 411.) In addition to Garcia, Jaxun made complaints to David about having to wear his \$285 orthopedic boots while working on the cleanup. (Tr. 354.)

Jaxun also testified that he made safety complaints to a supervisor who escorted him to the “Mine Operation Manager’s” office. (Tr. 71.) It was established at hearing that it was Ron Allum who escorted Jaxun to Mark Kalmi’s office. (Tr. 171.) Jaxun claimed that he discussed issues related to safety complaints “to some degree” with Allum. *Id.* As Allum was unavailable for hearing, Asarco presented a written statement, which was the recording of an interview of Allum conducted by now deceased MSHA special investigator Andrew Lowe. (Tr. 172; Asarco Trial Ex. C.) Jaxun testified that at the time, the “primary problem bothering [him] was that [the trainees] were left . . . without having been introduced to any mine mill personnel and, basically, [left] unsupervised.” (Tr. 174.) In his statement, Allum denies that Jaxun mentioned any safety issue to him. (Tr. 176.) However, in that same statement, Allum says he did not know whether there was a supervisor while the trainees performed cleanup work. (Tr. 177; Asarco Trial Ex. C p. 4.)

Jaxun offered conflicting testimony about his conversation with Kalmi. Initially, he stated that he spoke to the “Operations Manager” about “safety issues relevant to galoshes, safety issues relevant to being left unsupervised, [and] safety issues relevant to being improperly equipped.” (Tr. 78.) Later, in his own cross-examination of Kalmi, Jaxun stated, “I don’t remember the exact conversation but I did not get involved in safety issues specifically with you.” (Tr. 456.) Kalmi testified that he did not receive any safety complaints from Jaxun. (Tr. 440–41.) Based upon Jaxun’s own conflicting testimony and Kalmi’s assertion, I conclude that Jaxun did not make safety complaints to Kalmi.

Asarco argues that Jaxun failed to establish a *prima facie* case of discrimination because Jaxun did not establish any credible evidence that he made a safety complaint and did not engage in protected activity. (Resp. Brief at 7.) Asarco argues that Jaxun’s testimony that he made safety complaints to the various mine personnel is unreliable because it was unclear and contradictory. I find, however, that Jaxun did make a safety complaint to mine management – Garcia, David, and Allum, specifically – and, thus, engaged in protected activity. To make a safety complaint, the Mine Act does not require one to commence the conversation with “I am making a safety complaint” or any similar statement. Jaxun’s complaints, whether valid or not, amounted to safety complaints because it is clear that he had a concern about his safety. Both Jordan and Garcia testified that Jaxun asked several questions during both the MSHA training session and the mine tour. (Tr. 408, 236.) In fact, Jordan stated that during training, Jaxun was “very active, asked a lot of questions.” (Tr. 236.) Based upon these statements, it seems

apparent that Jaxun showed an interest in safety issues. Later, Jaxun made statements about having to wear his boots during the cleanup to both Garcia and David. Ms. Gonzales admitted that while she did not view it as a “safety-related issue,” she was aware Mark Kalmi agreed to loan Jaxun his rubber boots which “could be considered as personal protective equipment.” (Tr. 500–01.) Finally, and most persuasively, Jaxun claimed he spoke to Allum about safety issues, including the lack of supervision. Allum’s statement that he did not know whether the trainees were supervised gives credence to Jaxun’s assertion that at least the issue of lack of supervision was raised. In addition, David said he left the crew and came back before lunch, which also supports Jaxun’s contention that there may have been insufficient supervision. At the very least, Jaxun must have discussed supervision with Allum for Allum to have made that assertion. Moreover, even if Jaxun did not make safety complaints to Kalmi, Kalmi testified that he met with Gonzales and Allum before Jaxun’s termination. Allum should have, if he did not do so, put Kalmi on notice that Jaxun had made complaints about safety.²

Motivation of the Adverse Action

Jaxun suffered an adverse action when he was terminated on February 23, 2006. However, the question remains whether the adverse action was caused by Jaxun’s protected activity. Asarco argues that even if Jaxun did engage in protected activity, he has not shown discriminatory intent. (Resp. Brief at 18.)

David and Kalmi testified about inappropriate statements that Jaxun allegedly made and also testified about Jaxun’s insubordinate behavior. David recounted that as he attempted to give Jaxun instructions about his cleanup duties, Jaxun “looked at [him] and said, ‘I’m not going to ruin these [expletive] \$285 orthopedic boots.’” (Tr. 335–36.) In his cross-examination of David, Jaxun admitted to complaining about the boots, but notably did not question David on the manner in which he allegedly made the complaint. (Tr. 354.) Kalmi testified:

. . . . right away Jr. Jaxun said to me he has got an issue with doing mill cleanup at the mill. He was hired to be a truck driver and he should be training on a truck at this time and he said, “At \$2.17 a pound copper, I should look in the Yellow Pages and hire Clean A Mill Company.”

I told him that we had management rights to assign people to wherever we thought they could be best utilized; and he had an exception, took exception to that.

. . . .
And then I told him his assignment was to go over to the mill and do mill clean up; and I believe at that time he stood up, he is standing up and he said, “Well we will see about that.” I said, “What do you mean by that?” He said, “I don’t care what we have done in the past.”

² Although Jaxun displayed a concern about the type of work he was being required to perform as opposed to the job he thought he was hired to perform – truck driving – contrary to Asarco’s argument, I am not convinced that this issue was at the root of his complaints.

At that time I said, “Are you special” and he said, “Yes, yes, I am.”

(Tr. 438–39.)

Jaxun denied having said “we’ll see about that” and stated that he did not recall one way or another whether he said he thought he was special. (Tr. 182–83.) However, in Jaxun’s cross-examination of Kalmi, Jaxun admits to being “a little grumpy” and “upset,” which leads me to believe Kalmi’s testimony. (Tr. 456.) Kalmi also testified that after his conversation with Jaxun, he was concerned about Jaxun’s unwillingness to perform tasks other than what Jaxun thought he was hired for, especially since Jaxun was still a probationary employee. He did not know what Jaxun would be like after the seventy-five days. He considered Jaxun’s actions to be insubordinate. (Tr. 440.)

Based upon Jaxun’s failure to rebut David’s testimony about Jaxun’s use of vulgar language, Kalmi’s testimony that Jaxun did not make safety complaints to him and was insubordinate, Jaxun’s admission that he did not make safety complaints to Kalmi, and his admission to being “grumpy” and “upset,” I credit the testimony of David and Kalmi. Moreover, because Jaxun did not make safety complaints to Kalmi, I find that Kalmi decided to terminate Jaxun’s employment based solely upon Jaxun’s insubordinate behavior.

While I do find that Jaxun made safety complaints, and, therefore, engaged in protected activity, he was clearly insubordinate and used vulgar language. Jaxun understood that he was a probationary employee and could be fired at will by the company. The Mine Act does not grant miners protection from discipline or termination if, even when making safety complaints, they behave in a threatening or insubordinate manner. Considering the record as a whole, I do not find that the adverse action was motivated in any part by Jaxun’s safety complaints.

As Jaxun has not met both criteria to establish a *prima facie* case, his complaint is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

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