

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

February 25, 2008

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| ROY G. PETERSON, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| | : | Docket No. CENT 2007-45-DM |
| v. | : | SC-MD 2006-12 |
| | : | |
| ALCOA WORLD ALUMINA ATLANTIC, | : | Bayer Aluminum Plant |
| Respondent | : | Mine ID 41-00320 |

DISMISSAL ORDER

Before: Judge Feldman

This case is before me based on a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (the Act). The complaint was filed by Roy G. Peterson against Alcoa World Alumina Atlantic (Alcoa). Peterson's complaint, initially filed on September 1, 2006, with the Mine Safety and Health Administration (MSHA), concerns the company's refusal to place him on light duty on several occasions that occurred after several job related injuries in 2002 and 2004. In addition, Peterson complains about tools that he alleges were taken while he was on medical leave during this period. Finally, Peterson complains about the billing of his private insurance for treatment for a job related eye irritation that he sustained in June 2006. Peterson's complaint does not allege that he engaged in any protected safety related activities.

On November 2, 2006, shortly after MSHA advised Peterson that its investigation failed to reveal any violation of section 105(c) of the Mine Act, Peterson filed his discrimination complaint with this Commission. After several delays caused by Alcoa's failure to timely respond to Peterson's complaint, Peterson's response ultimately was filed with the Commission on April 12, 2007. This matter was assigned to me for disposition on April 20, 2007.

Alcoa seeks dismissal of Peterson's complaint because Peterson has failed to allege any activities protected by the Mine Act that allegedly motivated the actions he complains of concerning his medical treatment and/or the loss of his tools.

The following statutory and case law framework is applicable in a discrimination proceeding. Section 105(c)(1) of the Mine Act provides, in pertinent part:

No person shall discharge or in any manner discriminate against . . . 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 in a coal or other mine

30 U.S.C. § 815(c)(1). Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2) requires a miner who believes he was the victim of discrimination to file a complaint within 60 days of the date of the alleged discrimination.

Peterson has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Peterson must establish that he engaged in protected activity, and that the aggrieved action was motivated, in some part, by that protected activity. *See Sec'y of Labor o/b/o 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); *Sec'y of Labor o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Alcoa may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or that the adverse action complained of by Peterson was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Alcoa may also affirmatively defend against a *prima facie* case by establishing that it would have taken the adverse actions complained of even if the protected activity had not occurred. *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 Constr. 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).

In order to determine if Peterson has demonstrated, considering the facts most favorable to him, that he has a cause of action under the Mine Act, a telephone conference was conducted with Peterson and Alcoa's counsel on April 25, 2007. Peterson stated he was 61 years old and that he had worked for Alcoa as a mechanic for 31½ years. After a medical leave due to a job related shoulder injury, Peterson returned to work in August 2004 until he voluntarily retired on February 1, 2007. During the course of the telephone conference, it was explained to Peterson that worker's compensation issues, and union issues such as reimbursement for his lost equipment, do not give rise to Mine Act jurisdiction.

Putting aside the untimeliness of Peterson's complaint concerning the company's refusal to offer him light duty after his injuries in 2002 and 2004, Peterson did not claim that the company's decision was motivated by protected activity. Similarly, Peterson did not contend that either the loss of his tools, or his worker's compensation dispute concerning his eye condition, was in any way connected to any protected activity. In short, Peterson failed to allege any conduct by Alcoa that violated the anti-discrimination provisions of section 105(c) of the Mine Act.

In view of the above, since Peterson had not identified any protected activity that provided a statutory basis for his complaint, on April 30, 2007, Peterson was ordered to show cause, in writing, why his discrimination complaint should not be dismissed. 29 FMSHRC 352. Specifically, Peterson was requested to identify any protected activity he allegedly engaged in, and to explain why he believed the protected activity was related to the adverse employment conditions he was complaining of. Peterson was advised that his failure to respond would result in the dismissal of his complaint. Peterson has failed to respond to the Order to Show Cause. Accordingly, **IT IS ORDERED** that his discrimination complaint **IS DISMISSED** with prejudice.

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

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