

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

January 6, 1995

LARRY J. NEASE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 94-891-D
: :
IVA COAL COMPANY, : PIKE CD 94-09
Respondent : No. 2 Mine
:

DECISION

Appearances: Mr. Larry J. Nease, Cumberland, Kentucky, *Pro Se*;
Gerald L. Gray, Esq., Gerald Gray Law Firm, P.C.,
Clintwood, Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by Larry J. Nease against Iva 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. Nease did not engage in activities protected under the Act and, therefore, was not discriminated against by Iva Coal.

Mr. Nease filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA) pursuant to Section 105(c)(2) of the Act, 30 U.S.C. ' 815(c)(2). MSHA concluded that the facts disclosed during its investigation did not constitute a violation of Section 105(c). Mr. Nease then instituted this proceeding before the Commission under Section 105(c)(3), 30 U.S.C. ' 815(c)(3).

The case was heard on November 14, 1994, in Big Stone Gap, Virginia. Gregory G. Boggs, James P. Owens, E. Randall Ferguson and Larry J. Nease testified for the Complainant. David L. Rutherford, Gary L. Rutherford and James E. Harris testified on behalf of the Respondent.

SUMMARY OF THE EVIDENCE

Mr. Nease was hired by Iva Coal sometime around Christmas 1993 as an inexperienced miner. He was assigned to work as a miner helper on the second shift. Sometime in January 1994 he

and three other employees were laid off because the company was experiencing low production. Mr. Nease was recalled to work four days later and given a job separating rock from coal at the "picking table." He was subsequently taken off of the "picking table" and reassigned as a miner helper on the first shift. On February 15, 1994, he was discharged by Iva Coal.

Mr. Nease testified that his termination was a "setup." (Tr. 35.) He said that shortly before he was laid off, he worked under unsupported roof. He claimed that he told Mr. Boggs that he was "going to report David [Rutherford] if he didn't call me back to work." (Tr. 36.) He further asserted that the incident for which he was ultimately let go, allowing a shuttle car to park on the cable between the continuous miner and the power center causing the system to shut down, did not occur in his presence and was not his fault. Finally, he denied that any of the examples of his poor performance presented by the company's witnesses happened.

Both Boggs, a scoop operator, and Owens, a roof bolter, testified that they were working the second shift and observed the Complainant accompanying a continuous miner under unsupported roof. They both warned him not to work under unsupported roof. Boggs stated that he, along with the miner operator and several other miners, reported the incident to management, but that Mr. Nease did not say anything to him at the time, nor did he hear Nease say anything to anyone else about the occurrence.

Ferguson testified that on the day before the Complainant was fired, he rode out of the mine in a scoop with Jerry Rutherford and Jamie Harris. He related that both miners were mad about Nease "letting the miner pull the cathead out of the power center." (Tr. 23.)

Gary Rutherford and Harris testified that they were both present at the incident which resulted in Nease's dismissal. Rutherford was operating the continuous miner for which Nease was the helper, and Harris was operating the shuttle car which had pulled up to the miner to take on a load of coal and got on the miner's cable causing the system to stop working. Both stated that the Complainant was present at the rear of the miner and the front of the shuttle car when this happened and that he did nothing to move the cable or to warn the shuttle car operator that the car was on the cable.

David Rutherford testified that he is the owner of Iva Coal Company and is involved in the day-to-day management of the mine. He stated that he had hired the Complainant. He asserted that Boggs told him about the unsupported roof incident, but did not

say that Nease was under unsupported roof. He maintained that he never told Nease that he had to follow the miner under unsupported roof, that Nease never told him that he had been under unsupported roof and that Nease had never stated that he was going to file a complaint for being under unsupported roof. He recounted that after investigating the episode with the shuttle car, he called Nease out of the mine and told he that he was no longer needed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 Co. v. Marshall*, 663 F2d. 1211 (2d Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 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).

In this case, the Complainant has failed to establish that he engaged in protected activity. If Mr. Nease had complained to management about working under unsupported roof, that would have constituted engaging in protected activity. However, none of the credible evidence shows that such a complaint was made to management. David Rutherford testified that while he was made aware of the incident, nothing was said to him about the Complainant making a safety complaint. Furthermore, since Boggs testified that Nease did not say anything to him about the incident, he could not have told Rutherford that Nease had a complaint about working under unsupported roof.

The Complainant did not claim to have directly reported the situation to management. Under his theory, he assumed that the miner operator had informed management that he (Nease) was going to report it. There is no evidence to support this theory. Since there is no evidence that Nease complained to management, either directly or indirectly, it cannot be said that Nease engaged in protected activity. Further, since management was not

aware of any complaints on Nease's part, it cannot be said that they discriminated against him because of the complaints.¹

Finally, even if Mr. Nease had engaged in protected activity, he has not shown that his firing was motivated in any way by his having engaged in the protected activity. There is evidence in the record that "Mr. Nease was on the lazy side and that he didn't want to listen and he used a lot of bad language," (Tr. 42.), that he would take his hard hat off and sit against the rib of the mine, that he worked under unsupported roof, that coal buyers would not buy coal that he had "picked" because there was too much rock in it and that when he was assigned to warn the miner operator that the slack was out of the miner cable, he failed to do so, which resulted in the cable being pulled out of the power center. All of these provide ample basis for discharging him.

ORDER

I conclude that Mr. Nease did not engage in protected activity and that, even if he did, no adverse action was taken against him because of it. Accordingly, it is **ORDERED** that the complaint filed by Larry J. Nease against Iva Coal Company for violation of Section 105(c) of the Act is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

¹ As there is no evidence that Nease engaged in protected activity, or that management was aware that he had engaged in protected activity, it is not necessary to decide whether a miner is engaging in protected activity when he threatens management with the reporting of a safety violation unless management does something that he wants done.

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