

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 10, 1996

MAJOR TONY THOMPSON, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 94-1191D
: PIKE CD 94-13
AERO ENERGY, INCORPORATED, :
Respondent : Mine No. 1

DECISION

Appearances: Herbert Deskins, Jr., Greg Bentley, and Robert Wright, Esqs., Pikeville, Kentucky, for the Complainant; Michael Heenan, Esq.; William I. Althen, Esq., Smith, Heenan, and Althen, Washington, D.C., for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by Major Tony Thompson alleging that he was discriminated against by Aero Energy Incorporated (Aero) in violation of Section 105 of the Federal Mine Safety and Health Act of 1977 (The Act). Pursuant to notice, the case was heard in Louisa, Kentucky on January 29 and 30, 1996.¹

¹Initially the case was scheduled for hearing on December 20, 1994. Based upon the parties' agreement, an order was issued on January 3, 1995, continuing the hearing due to a pending parallel proceeding in the Pike Circuit Court in Kentucky. On May 4, 1995, an order was issued granting Complainant's Motion to Continue and Staying Proceedings for 60 Days. On October 6, 1995, an order was issued lifting the Footnote 1 cont-d.

stay, and scheduling the case for hearing on November 13, 1995. On October 23, 1995, an order of continuance was issued based upon Respondent's request that was not opposed by Complainant, and the case was rescheduled for hearing on January 29.

Findings of Fact and Discussion

I. Complainant's Case

A. Complainant's Work History at Aero

Aero operates the Aero Energy Mine No. 1, an underground coal mine, which it had acquired in March 1989. In March 1989, Major Tony Thompson was hired as mine superintendent by Rex Fought, Aero's President, for whom he had previously worked. Fought made Thompson responsible for the overall operation of the mine. Once the mine became operational, production increased, production per man hour increased, and miners were given bonuses based on increased production usually three to four times a week.

Thompson also received production bonuses through the end of 1993, and received a Christmas bonus in 1993. He received increases in salary during the term of his employment with Aero.

B. Complainant's Activities and Aero's Responses

According to Thompson, in August 1989, he reported to Fought a methane reading of between four and six percent. Fought told him to Abe sure that I don't put it in the book because it was over two percent@ (Tr. 30). Thompson indicated that in September 1995, Fought was very upset at a withdrawal order issued by an MSHA inspector who had found methane.

On November 3, 1993, Thompson indicated that he learned that a methane reading of seven to nine percent had been found in the old works of the mine, which was not an active section. Thompson said that he notified Fought who told him to be sure not to report it. According to Thompson, on November 4, he was informed by a belt attendant, Harold Baisden, that he had overheard the fireboss, Bob Boyd, report a methane reading of between seven to nine percent in the old works. Thompson then went underground, and testing by him indicated a methane reading of one and a half percent. Thompson then reported to Fought and told him that the methane reading should be reported in the preshift book, and Fought told him not to report it.

On November 5, Thompson talked to MSHA inspector Arlie Webb. On November 8, 1993, the site was inspected by MSHA inspectors but no citations were issued for any methane accumulations.

On November 9, 1993, five MSHA inspectors inspected the site to check for methane. The inspectors reported that they had received a complaint about methane in the old works. Thompson testified that at approximately 12:30 p.m., he had a conversation with Fought, and told him that he thought that the inspectors were present because of a complaint. At about 3:30 in the afternoon, in Thompson's office, Fought informed him that there was reason to believe that he (Thompson) had called the

inspectors. According to Thompson, Fought informed him that he talked to the foremen, and they did not trust him Afor calling the inspectors@ (Tr. 75). Thompson stated that he informed Fought that he had not called the inspectors. According to Thompson, Fought told him that the foremen could not trust him anymore, and that he was going to have to let him go Afor calling the inspectors@ (Tr. 76). Thompson maintained that the methane problems that had been observed on November 3 and 4, were taken care of shortly after the methane had been discovered by shifting the ventilation in the area, and accordingly, there was no need to call the inspectors on November 8 and November 9. Thompson indicated that Fought told him that he was going to send him home until he had time to investigate. According to Thompson, Fought told him to take the rest of the week off. Thompson stated that he thought that Fought was sending him home because he had called the inspectors.

On Tuesday November 16, at 6:00 p.m., Thompson returned to the mine, and Fought informed him that he was still investigating, and trying to find out if he (Thompson) had called the inspectors, and that he (Fought) would get back to him. Between November 16, 1993, and January 7, 1994, Thompson tried to call Fought eight or nine times, and talked to him three four times.

On January 7, 1994, Thompson received a letter from Fought. In the letter, Fought indicated that he had discussions with Thompson concerning Thompson's job performance, lack of interest, and lack of commitment to the job. The letter further accused Thompson of having Aa major problem of substance abuse.@ On January 10, 1994, Thompson confronted Mr. Fought about the letter, and Fought insisted on him undergoing drug rehabilitation. Thompson refused because he maintained that he had no drug problem.

It was Thompson's testimony that prior to November 9, he had never been reprimanded or suspended by Fought. Nor did Fought indicate that he was dissatisfied with his work. Thompson maintained that he had not been insubordinate to Fought. Thompson indicated that prior to receipt of Fought's letter on January 7, Fought had never discussed with him his lack of commitment. According to Thompson, Fought had never told him that his job was suffering because of drug abuse, and that Fought had never suggested that he take any drug test. Thompson indicated that prior to November 9, 1993, he underwent drug testing on one occasion, and it was negative. According to Thompson, he was never arrested for drugs or alcohol, and has never had a substance abuse problem. He also maintained that there were no problems with morale at the site.

According to Thompson, he had a good relationship with Fought through November 1993. He was not reprimanded by him during that time and followed whatever Fought told him to do. According to Thompson, he saw his foremen daily, and had safety talks with them weekly. Thompson stated that he never refused to go underground at the request of Fought, or at a foreman's request.

Walter Thomas Kirk, a miner employed by Double Construction Company, (Double C), to work at the subject mine as a general laborer, testified for Complainant. Kirk, who is a personal friend of Thompson, indicated that on November 9, 1993, at approximately 3:45 in the afternoon, he was walking toward Thompson's office and the door was open.² Kirk indicated that no one else was in the area. According to Kirk, he was six to eight feet away from the door, and overheard a conversation between Thompson and Fought that was "A pretty loud" (Tr. 104). Kirk testified that he heard Fought say as follows: "ATony you know we had eight and nine percent methane, and you had no right to call the federal men or inspectors in at no time" (Tr. 105). According to Kirk, Thompson said that he did not call the inspectors, and Fought said "AI have reason to believe you called them Tony and I'm going to have to let you go" (Tr. 105).

According to Kirk, about a week and a half or two weeks later, Fought met with all first and second shift employees in the shower house. Kirk indicated that Fought was "Ain an outrage," and stated that "A[t]hese rumors going around is going to stop. Now, I don't know who is spreading them but they're going to stop and whoever spread this rumor about methane, they ain't no methane up there. And another thing . . . it's none of your god dam business . . . If this don't stop, I will fire every one of you . . ." (Tr. 107).

II. Respondent's Case

Fought indicated that sometime toward the end of the winter of 1993, he began to get concerned about Thompson, as he did not feel that Thompson was communicating as much as he had done in the past. Fought indicated that John Ratliff, a shift foreman,

²Records kept in the ordinary course of business by Double C indicate that Kirk did not work on November 9.

and Steven Cordial, the maintenance chief, commented to him that Thompson was not helping them as much as he used to. According to Fought, there was general talk in the mine that Thompson was not going underground to help out. Fought indicated that in the last two or three months prior to November 1993, he felt that Thompson was ignoring some things I would tell him or finding excuses not to do them@ (Tr. 140).

Fought stated that Thompson was authorized to order materials. He was responsible for checking invoices in the bookkeeping office in order to see if Aero was being properly charged. Fought stated that Thompson had stopped checking the invoices, and had to be reminded to do this task. He also indicated that Thompson was no longer getting to work prior to the commencement of the shift, as he had been doing for the last couple of years.

Fought stated that sometime in the late summer or early fall 1993, Cordial informed him that occasionally it appeared as if Thompson was under the influence of some substance. According to Fought, on three occasions between the early summer of 1993 and November 9, 1993, Thompson was listless, and exhibited slurred speech, and uncoordinated movements. In the summer of 1993, on one occasion, Fought sent Thompson home because he had placed his head on the desk, and his speech was slurred.

According to Fought, in August 1993, he spoke to Thompson and told him that he did not seem to be going underground as much as he should, that supplies were disappearing, and that it appeared that, in general, he had lost interest. According to Fought, he asked Thompson whether he realized that mine personnel were of the opinion that he was taking drugs. According to Fought, sometime around October 1993, he had the same conversation with Thompson who responded that he did not see what the problem was, and that he was doing a good job. Fought testified that on the first Wednesday in November, he told Thompson as follows: A[i]f you don't do another thing tomorrow, go to the office and okay your invoices@ (sic) (Tr. 155). According to Fought, Thompson did not work the next day. Fought indicated that two days later he told Thompson that he Awasn't going to put up with it anymore,@ and that Thompson should take off the next week and think about it, Aand then when he came back, see if we could figure out some way that we both could stay there and work together@ (Tr. 156). The following Monday when Fought called the mine, Thompson answered the telephone. Fought concluded that Thompson had ignored him by coming to work.

According to Fought, on November 9, at approximately 4:30 in

the afternoon, he and Thompson had the same conversation they had on the previous Friday. According to Fought, Thompson told him that the inspectors had come to the mine because there was a complaint about methane. Thompson said that he thought he was doing a good job. Fought indicated that he told Thompson that he was not satisfied, and that Thompson must satisfy him before he could come back. Fought indicated that he did not think that Thompson could work at the mine anymore. Fought indicated that he told Thompson to go home and to think about what they had talked about, and to see if he could conclude that there was a problem. Fought did not make a notation in Thompson's personnel file concerning the conversation he had with him about his ~~Abad~~ performance@ (Tr. 180). He could not remember any specific problem that Thompson ~~Adidn't~~ help them or look at@ (Tr. 197).

Fought said that he did not discuss methane at a meeting with all personnel subsequent to November 9. Instead, he told the assembled personnel that he wanted to stop the rumors as to why Thompson was no longer at the mine. According to Fought, he told them that Thompson was off on personal leave.

Fought indicated that on or about January 7, 1994, he sent Thompson a disciplinary letter, (Defendant's Ex. 5) because he needed to bring the matter to an end.

Fought maintained that it is not true that he told Thompson not to report methane. Fought said that on November 3, and November 4, 1993, Thompson had not complained to him about methane. He also indicated that he did not receive any report that the fireboss, Boyd, had found methane in the explosive range or at three, four, or five percent. Fought stated that it is not true that he told Thompson not to put methane readings more than two percent in the preshift book. He indicated that there was no problem controlling methane in the mine.

On cross-examination it was elicited that Fought never saw Thompson take drugs, and did not ask whether anyone else saw him take drugs. Fought also indicated that he had never smelled alcohol on Thompson's breath.

John Ratliff, who was the day shift mine foreman for the period in question, stated that in 1992, Thompson went underground every two to three weeks. Ratliff indicated that in the last six months prior to November 1993, Thompson went underground only one time. Ratliff indicated that he would have benefited from more underground visits by Thompson, as there were matters that could have been resolved more efficiently had the latter gone underground and observed the situation. He noted

that in 1993, Thompson stopped asking about what was going on in the mine. According to Ratliff, Thompson's speech was slurred, he stayed in the office by himself a lot, and took no interest in the mine. Ratliff said that five or six miners told him that they thought that Thompson was on dope or drugs. Ratliff also noted that morale was down, and that in general his relations with Thompson had deteriorated.

According to Ratliff, on November 8, at approximately 8:00 a.m., Thompson told him as follows: "John, there's all kind of talk on the bottom about a high methane build up in the old works . . . You know they'd be all kinds of inspectors here before the day's out" (sic) (Tr. 230-231). He indicated that Thompson kicked the wall and a chair, and slapped the wall.

Ratliff corroborated Fought's version of the meeting that was held in the shower house sometime after November 9.

According to Boyd, testing at the old works on November 4, indicated a methane reading of nine-tenths of one percent which he entered in the preshift examination book. He said that methane had not been found at that site before. Boyd indicated that no one told him not to report methane, and no one told him not to enter any methane readings. He corroborated Fought's version of the meeting held with the miners after Thompson had left the mine.

Cordial indicated that he told Fought that Thompson showed favoritism, and that some men were resentful and thinking of quitting. He indicated that when he started to work at the mine in 1991, Thompson was going underground four to five times a week, "and it would be probably ninety percent of the time he was underground." (Tr. 347) Cordial indicated that starting around March 1993, Thompson "wasn't going underground as much" (Tr. 347). According to Cordial, miners made comments to him as follows: "Tony's on his stuff today." (Tr. 348) According to Cordial, on several occasions, Thompson evidenced slurred speech, and "would seem either completely down or really hyper" (Tr. 348). Cordial indicated that he discussed these problems with Fought in October or September 1993, and the latter was "really concerned about it" (Tr. 349).

Cordial also corroborated Fought's version of the meeting in the shower room.

III. Analysis

The principles governing analysis of a discrimination case under the Mine Act are well established. A miner establishes a prima facie case of prohibited discrimination by proving 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 other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); 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 protected activity. Pasula, 2 FMSHRC at 2799-2800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activities

At a minimum, Thompson engaged in protected activities when he spoke to an inspector on the evening of November 5, 1993. The actions that he took in response to reports of various methane readings, and his comments to Fought that excessive methane readings should be recorded in the preshift reports are all protected.

B. Motivation

According to Thompson, he was sent home by Fought on November 9, because Fought thought he had complained to MSHA inspectors about methane at the mine, and had requested an inspection which resulted in the inspection on December 8 and 9.

In Thompson's version of relevant events, Fought (1) never expressed any dissatisfaction with his work prior to March 9; (2) manifested an animus toward his activities in reporting methane findings, and (3) told him expressly on November 9, that he was being let go for calling the inspectors (Tr. 76). I find Thompson's version to be without merit for the reasons that follow.

1. Thompson's Performance Prior to November 9

Fought was generally satisfied with Thompson's work until about six months prior to November 1993. He increased his salary, and had given him bonuses based upon production. According to Thompson, he had never been reprimanded by Fought prior to November 9, and Fought had never expressed any dissatisfaction with his work.

On the other hand, Fought referred to four specific instances prior to November 9, 1993, wherein he expressed dissatisfaction with various aspects of Thompson's work.³ It is significant that Thompson did not testify on rebuttal to rebut or contradict this specific testimony. Therefore, I accept Fought's testimony in these regards.

In general, Fought's version that he had been dissatisfied with Thompson prior to November 9, as the latter had exhibited various behavioral problems, is corroborated by Ratliff, and Cordial, who noted that Thompson exhibited slurred speech, and in his last six months at the mine, did not go underground as frequently as he had in the past. In this connection, Thompson did not rebut Fought's testimony that in the summer of 1983 he had suggested to Thompson to go home because he was exhibiting slurred speech, and had placed his head on the desk, and the former complied. For these reasons, I accept Fought's version.

2. Fought's Animus Regarding Reports of Methane

According to Thompson, in September 1989, after an MSHA inspector issued a withdrawal order based upon finding the presence of methane, Fought was Avery upset@ and Avery irate@ (Tr. 34). Fought did not rebut or impeach this testimony. According to Thompson, when he reported to Fought methane readings in excess of two percent in August 1989, November 3, and November 4, Fought told him not to enter the findings in the preshift examination books. On the other hand, Fought denied that he had told Thompson not to report methane, and not to put

³Some corroboration for Fought's testimony in this regard is found in the testimony of Cordial, whom I found to be a very credible witness, that in October and September 1993, he discussed Thompson's problems with Fought, and the latter was Areally concerned about it@ (Tr. 349).

methane readings more than two percent in the examination book. Fought also indicated that Thompson did not report to him that Boyd had found methane in an explosive range, or more than three percent. I observed the witnesses' demeanor, and found Fought to be more credible in these regards.

I also find that Fought's version finds corroboration in the testimony of Boyd that no one told him not to report methane findings, and not to enter methane readings. Indeed the examination book indicates that methane readings were noted by Boyd (Defendant's Ex. 4).

3. The November 9 Conversation Between Fought and Thompson

According to Thompson, on November 9, the date of the MSHA inspection of the mine, Fought told him he was going to let him go for calling the inspectors (Tr. 76). In support of his version, Thompson offered the testimony of Kirk. Kirk testified that at 3:45 p.m., on November 9, he overheard Fought telling Thompson that he was going to let him go because he had called the inspectors.

I discount Kirk's testimony. Based upon my observations of his demeanor, I find Fought the more credible witness. I also note that records kept by Kirk's employer in the ordinary course of business indicate that Kirk did not work in the mine on November 9.

Further, since I find more credible Fought's version of Thompson's work history prior to November 9, (See, (I)(C)(2)(b) infra,), it follows that Fought's version of the November 9 conversation is more credible. I therefore accept Fought's testimony that on November 9, he expressed his dissatisfaction with Thompson, and told him to go home to think about their conversation, and to acknowledge there were problems.

For all the above reasons, I conclude that Fought's actions in sending Thompson home on November 9, and sending him a disciplinary letter (Defendant's Ex. 5) were motivated solely by Thompson's unprotected activities which Fought was dissatisfied with. I thus find that Thompson has failed to establish that he was discriminated against in violation of Section 105(c) of the Act.

ORDER

It is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

Herbert Deskins, Jr., Esq., P.O. Box 1199, 105 2 Division Street, Pikeville, KY 41501
(Certified Mail)

Michael T. Heenan, Esq., and William I. Althen, Esq., Smith, Heenan & Althen, 1110 Vermont
Avenue, N.W., Suite 400, Washington, DC 20005-3593 (Certified Mail)

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