

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 12, 1996

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. KENT 96-219-D
on behalf of STEVE BAKER : MSHA Case No. PIKE CD-96-02
Complainant :
v. : Mine ID No. 15-17616-F2U
: :
CEDAR COAL COMPANY INC., : Mine No. 3
Respondent :

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant;
Phil A. Stalnaker, Esq., Pikeville, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), on behalf of Steve Baker, against Cedar Coal Company, Inc., 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 Cedar Coal did not violate section 105(c) when Mr. Baker's employment terminated on November 9, 1995.

A hearing was held on August 8, 1996, in Pikeville, Kentucky. In addition, the parties filed post-hearing briefs in the case.

Background

Cedar Coal is an independent contractor, owned and operated by Larry Bruce Phillips, providing coal hauling services for, among others, Garrett Mining and Sheep Fork Energy's No. 3 and No. 4 mines. The company has trucks of its own and subcontracts with other haulage companies when additional trucks are needed.

The Complainant was hired by Cedar Coal as a truck driver in

July 1995. In September 1995 he was reassigned to operate a front-end loader near the entry to the Sheep Fork No. 3 mine. Coal is brought out of the mine and dumped in a pile. The loader fills trucks from the pile. If coal is not loaded into the trucks, coal cannot be brought from the mine.

Mr. Baker claims that he was fired on November 9, 1995, after he stopped operating his loader because it was unsafe. He filed a discrimination complaint with MSHA on November 20, 1995. Cedar Coal maintains that Baker quit on November 9 because he did not want to operate the loader without a heater.

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination, 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 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 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).

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 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corp.*

v. *FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. 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).

I find that Mr. Baker's claim that he was concerned about safety when he stopped operating the loader on November 9 is not credible. Consequently, I conclude that he neither refused to operate the loader for safety reasons, nor communicated any safety complaints to management. Therefore, he did not engage in protected activity and his termination was not a violation of the Act. I further find that even if Mr. Baker could be considered to have engaged in protected activity, his refusal to work and subsequent actions were not reasonable.

Baker testified that November 9 was a cold, misty day, with a temperature, according to the radio in his pickup truck, of 19 degrees. He stated that when he arrived at work, at about 6:30 a.m., the windows on the loader were frosted over. He further testified that he attempted to scrape the frost off of the windows with a cassette tape case.

The Complainant stated that the heater and defroster, which had not worked for two or three weeks, were not working and he was unable to keep the windows clear. As a consequence, he related that after loading three or four trucks, and hitting the last one several times, he decided to stop operating the loader. He then "hollered at the scale house man, they call him Leonard, on the radio on the CB, I told him to refer a message to Mudhole that I'm parking the loader. I'm refusing to run it because it didn't have a heater or defroster." (TrI. 32-33)¹

Baker testified that after parking the loader, at just a little after 7:00 a.m., he

got in the truck with [Jody Puckett]. I was going to ride down the road with him because the road was rough. I got out there to the dump and I heard them talking about it. I heard Mudhole and them talking about it. I told Jody the best thing to do was just hurry up and dump and take me back to my truck because I didn't want him to get fired.

(TrI. 34-35.) When asked what "they" were talking about, Baker

¹ The transcript for the Temporary Reinstatement hearing held on July 2, 1996, was made a part of the record in this case. (TrII. 5-6.) Hence, references to that transcript will be "TrI." and references to the transcript for the August 8 hearing will be "TrII."

replied: "They said I would get in trouble for getting off the loader like that. I would loose [sic] my job." (TrI. 35.) He claimed that he got into Puckett's truck "[b]ecause I was going to get him to drop me off at No. 4 Mines [sic] so I could call Larry Phillips because they told us at the No. 3 Mines [sic] that we were not allowed in the mine shop." (Id.)

The Complainant maintained that after being returned to his pickup truck by Puckett, he drove over to the No. 4 mine, arriving there at about 8:00 a.m. He alleged that he told Daniel McCoy, also known as "Mudhole," who was his supervisor, that "I refused to run that loader without no heater or defroster like it was because it was unsafe. He told me the best thing I could do was call Larry Phillips." (TrI. 38.)

Baker testified that he called Larry Phillips and "told him I refused to run that loader like it was. He told me, 'I no longer need you no more.' I asked him, 'Let me drive the red 800 [coal truck].'" (TrI. 38.) Baker claimed that Phillips replied, "No, you don't need to be on none of my equipment no more. You are fired. I no longer need you no more." (Id.)

After the telephone conversation, Baker averred that he returned to the No. 3 mine "a little after 8:00." (TrI. 39.) He testified that he got his personal belongings out of the loader and went to Ancel Little's house to help him with a truck.

Daniel McCoy testified that sometime "in the neighborhood of 8:00" Baker called him on the CB, told him that the heater was not working in the loader and asked him "to call Mr. Phillips and tell him the heater wasn't working. He said that he wasn't going to run it without a heater." (TrI. 90.) McCoy further recounted that Baker "told me that they were going to have to get the heater fixed in it or he was quitting. That he had him another job that he could go to running a loader that would pay him \$12 an hour." (TrI. 94.)

McCoy stated that he next talked to Baker a couple of hours later when Baker came over to the No. 4 mine. The Complainant wanted him to call Phillips, but he told Baker to call Phillips himself.

Lynn Perkins was operating the scales on the morning of November 9. He stated that he was communicating on CB channel 30. He testified as follows:

I was weighing coal using the CB to communicate with trucks on the scales. And Steve Baker hollered at me and told me to get ahold [sic] of Mudhole and tell him that the heater was not working in the loader. And at that point, I said, "You ain't got no heat?"

And he said, "No. I'm about to freeze to death." And then he went on to say that it was so cold there was ice on the windshield, he said he wouldn't be able to load the trucks. And Mudhole was already on the channel that we was on, and he said he heard him. And from that point on, I didn't talk no more to him.

(TrII. 210.)

Burl King, a truck driver for Kimberly Trucking, testified that he was coming through the gap with a load of coal and heard McCoy and Baker on the CB. He related that, to the best of his recollection, he heard Baker "say that the loader - the heater wasn't working." (TrII. 25.) He agreed that it was cold that morning.

Anthony Rucker, a truck driver for Greg Bentley, testified that he had come through the gap with a load of coal. He stated that his CB was on channel 23. He claimed that he "heard Steve holler at Mudhole and tell him that he couldn't run the loader because it didn't have any heater on it and it was too cold, and he couldn't see what he was doing to load the trucks." (TrII. 34.)

Jody Puckett, an independent truck driver, testified that he picked Baker up at the coal dump, which is three or four miles from the Sheep Fork No. 3 mine, between 8:00 a.m. and 9:00 a.m. He said that Baker got out of his pick-up, got into the truck with him and rode while he transported two loads, about an hour and a half to an hour and three quarters. When asked what Baker had said to him, he recalled that Baker "just told me that he wasn't going to run the loader without any heat. And I asked him what he was going to do, and he told me he was going to go down and talk to Mudhole about it and see what they was going to do." (TrII. 169.)

Baker does not claim that he was in any danger from the cold. He does maintain, however, that he stopped loading coal because he considered the loader unsafe to operate. On the other hand, it is the company's position that he parked the loader for personal comfort reasons, because he was cold. If Baker stopped operating the loader because it was unsafe, then he engaged in activity protected under the Act. If he stopped because it was cold, then he did not engage in protected activity.

I find that Baker has not established that he engaged in protected activity. None of the witnesses in the case corroborate his story. Most significantly, no one heard him claim that it was not safe to operate the loader. On the contrary, everyone recalled that he complained that the heater would not work and it was cold.

The closest to supporting him was Anthony Rucker who claimed to have heard him say that he could not see what he was doing to load the trucks. However, Rucker was not a credible witness. Not only had he filed his own discrimination complaint against Phillips, giving him ample reason to be disposed to testify against the company, but he demonstrated his hostility toward Phillips while on the stand. (TrII. 50, 52-54, 57.) Furthermore, he claims to have heard the conversation between Baker and McCoy on CB channel 23, when the evidence is clear that it occurred on CB channel 30.

Additionally, none of the rest of Baker's narrative is supported by any witness. Jody Puckett, who was not involved with either of the parties to this proceeding and had no apparent motive to lie, was a very credible witness. His testimony was contrary to the Complainant's on all important points.

Baker claimed that shortly after 7:00 he got in Puckett's truck to go to the No. 4 mine, but Puckett testified that he picked him up, not at the No. 3 mine, but at the dump between 8:00 and 9:00. Baker contended that while in the truck he heard talk on the CB concerning his situation, did not want to get Puckett in trouble, and so had him take him back to his truck. Puckett made no mention of hearing any discussions on the CB while Baker was in his truck, nor of being concerned that he might have trouble because he had Baker in his truck, and, instead, testified that Baker rode around with him for an hour and one half to an hour and three quarters.

Puckett further testified that he was hauling coal from the No. 3 mine to the dump, that he did not go to the No. 4 mine and that Baker never asked him to go to the No. 4 mine. He indicated that Baker did not seem upset, but said he was not going to run the loader without heat and would go talk to Mudhole to see what they were going to do.

Plainly, this evidence does not support Baker's claim that he arrived at the No. 4 mine about 8:00. McCoy remembered that he arrived a couple of hours later, that is, around 10:00. Curtis Thacker testified that he replaced Baker as the loader operator around 9:00 and had been operating for about half an hour when Baker got in his truck. Thacker had the impression that Baker had gotten out of Puckett's truck. Thus, Puckett, McCoy and Thacker all support the conclusion that Baker did not arrive at the No. 4 mine until sometime around 10:00 a.m.

Baker's explanation for having to go to the No. 4 mine, rather than calling from No. 3, was that the employees had been told not to use the phone in the No. 3 mine shop. None of the

witnesses agreed with that statement. Phillips said he had not told Baker or anyone else not to use that phone. John Ratliff, the No. 3 mine superintendent, testified that there was no prohibition against Cedar Coal employees or other truck drivers using the phone.

The Complainant's credibility was further undermined by his professed inability to remember any dates, or even approximate times during the year. At the time he testified, none of the important matters had occurred as much as a year before. Such a complete lack of recall, as claimed by Baker, a young man with thirteen years of schooling, is unbelievable.

I conclude that the credible evidence in this case demonstrates that Baker stopped operating the loader because the heater did not work, and not because of any concern for safety. The evidence further shows that he then rode around for several hours before attempting to discuss matters with anyone in authority. Perhaps his temper, which he displayed while testifying, (TrII. 134-35), got the better of him, but this lack of concern for a mining operation that was crucial to coal production certainly justified Phillips' response to Baker, when he finally did get around to calling him, that he was "fired," as claimed by Baker, or that he "quit" and would not be rehired, as claimed by Phillips.

Accordingly, I conclude that the Complainant was not terminated for engaging in protected activity. Since he was not engaging in protected activity, he was not discriminated against within the meaning of the Act.

Moreover, even if Baker's refusal to work could be construed to have been based on safety grounds, his refusal was not reasonable. He did not adequately communicate his safety concern to management, nor did he give management an opportunity to respond to his complaint.

The Act protects "a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous." *Gilbert v. Federal Mine Safety & Health Review Commission*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). Although not fully articulated by him, it appears that Baker's safety concern was that he was having trouble seeing out of the loader's windshield and he was afraid that he would hit either a coal truck or a miner with the loader. If, despite all attempts, the windshield could not be cleared, that might have been a reasonable concern. However, Baker made little or no attempt to clean the windshield.

No evidence was presented at the hearing about what methods were available for keeping the windshield clear. Baker testified

that his efforts consisted of using an empty cassette tape case to clean the frost off of the outside of the windshield. Thacker testified that when he took over the loader, and the inside of the windshield misted over, he used paper towels to wipe it off. The loader was in an area near the mine shop, near coal trucks and near miners' personal vehicles, yet Baker apparently did not try to find another means of clearing the windshield.

Additionally, Baker did not adequately communicate his safety concerns to management. McCoy, his immediate supervisor, understood his complaint to be that the heater did not work, not that he was concerned with being injured or injuring someone else. This understanding is supported by the recollections of all of the other witnesses who heard Baker express his complaints. Thus, management had no opportunity to address the perceived danger. Since the "responsibility for the communication of a belief in a hazard that underlies a work refusal rests with the miner," Baker's failure to do so means that his work refusal was not protected by the Act. *Smith v. Reco, Inc.*, 9 FMSHRC 992, 995 (June 1997).

Not only did Baker not convey his safety concern to management so that they could address the problem, but he also failed to give management any time to respond to the complaint. Instead, he stopped operating the loader and went off on a 90 minute ride in Puckett's truck. While the law requires management, in the normal case, to attempt to allay a miner's reasonable fears, management cannot do so if the miner is not present.

The Secretary's argument on this issue, that the company did not meet its obligation to allay Baker's fears because no one told him that a repair part for the heater/defroster was on order before he parked the loader, reveals the weakness in his case. In the first place, as noted above, Baker gave the company little or no time to make such an announcement. In the second place, the fact that a part was on order would not have solved Baker's professed claim that he could not keep the windshield clear to see out of it. Thus, the Secretary argues that by doing nothing the company did not allay Baker's fears, but if the company had told him the part was ordered, then his fears would have been allayed and, by implication, his refusal to work unreasonable. The fallacy in this argument is that either action, doing nothing or telling him the part was on order, would have had the same practical affect on his situation.

In conclusion, I do not find the Complainant's claim that he stopped working for safety reasons believable. Therefore, I

conclude that his refusal to work was not protected activity. In addition, even if the Complainant had refused to work out of a concern for his and others safety, I conclude that his refusal was not reasonable and in good faith.

ORDER

Accordingly, it is **ORDERED** that the complaint of the Secretary filed on behalf of Steve Baker against Cedar Coal Company, Inc., is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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