

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 12, 1997

STEVE NAPIER, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 96-269-D
: MSHA Case No. BARB CD 96-03
BLEDSON COAL CORP., :
f/k/a BITUMINOUS - LAUREL : No. 4 Mine
MINING, INC., : Mine ID 15-11065
: Respondent :

DECISION

Appearances: Neville Smith, Esq., Manchester, Kentucky,
for the Complainant;
Julie O. McClellan, Esq., Marco M. Rajkovich,
Street, Suite 1700, Lexington, Kentucky,
for the Respondent.

Before: Judge Weisberger

1. Statement of the Case

This case is before me based on a Complaint filed by Steve Napier alleging that he was discriminated against by Bledsoe Coal Corporation (Bledsoe) 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 Richmond, Kentucky on October 30, and 31, 1996. Subsequent to the hearing, on December 13, 1996, Complainant filed a Brief and a Proposed Decision containing Proposed Findings of Fact, and Respondent filed Proposed Findings of Fact and a Brief. On January 8, 1997, Respondent each filed objections to the other party's Proposed Findings of Fact.

2. Bledsoe's Operation

Bledsoe Coal Corporation operates the Number 4 Mine, an underground coal mine. Bledsoe's roof control plan provides for entries, 20 feet wide, to be cut to a maximum depth of 40 feet. In normal mining operations, after the entry is cut by the continuous miner, it is bolted by a Fletcher single head bolter by drilling holes in the roof and installing bolts at four foot centers in the sequence illustrated in Respondent's Exhibit No. 1.

3. Complainant's Evidence

Steven Napier had more than five years experience as a roof bolter prior to October 19, 1995, operating a Galix 300, and Fletcher single head bolter. During that period of time, Napier never received any complaints from any of his employers concerning his roof bolting. Jerry Pierson, a mine foreman at Union Mining where Napier had worked as a bolter, testified that he would judge Napier A . . . as equal, if not better, as anybody that ever worked for me@ (Tr. 190).

On October 19, 1995, Napier was interviewed by Ron Helton, mine manager at Bledsoe's No. 4 mine, for a position at Bledsoe as a bolter. Helton told Napier that he was being hired Aon a 90-day trial@ (Tr. 37), and that he was required to insert 200 to 250 bolts per 8 hour shift.

Napier commenced employment with Bledsoe on Thursday, October 5, 1995. On the first day that Napier actually worked, he removed rock from a roof fall that had left a void of 30 feet into the roof. He was then assigned to work as bolter on a Fletcher single head bolter in the third shift, which began at 3:00 p.m., and ended 11:30 p.m. According to Napier, in general, during the time he worked as a roof bolter at Bledsoe none of his supervisors voiced any complaints about his work. Napier testified that about a week prior to October 25, Clifford Sams, who was his Section Foreman for two or three days, told him that he (Napier) A . . . was doing alright as far as he [Sams] could see@ (Tr. 105). According to Napier, in the same time period Harold Hacker, the mine General Foreman, watched him bolt for about five minutes and said Akeep the good work up@ (Tr. 103).

According to Napier, during the time he worked for Bledsoe, until October 25, 1995, he had seen drawrock on a couple of occasions in the mine. Each time he saw the draw rock he pulled it down himself.

Napier testified that prior to October 25, the canopy on his the bolter had been removed. Napier indicated that a mechanic, whose first name was Rodney and whose last name Napier did not know, told him that the bolter could not clear the low roof with the canopy on. According to Napier, he asked Rodney to put the canopy on, and Rodney complied, but later on it was removed again.

According to Napier, during the time that he was working underground until October 25, he saw entries that had been cut between 42 to 60 feet.¹

¹Napier's testimony is confusing regarding the depth of the cuts that he observed that exceeded 40 feet. He indicated that

on an evening that was not October 25 he saw a deep cut. He said he counted 19 rows and the deep cut was about 76 foot (Tr. 138). He agreed with Respondent's counsel that it **A**would be 76 foot cut because there's generally one four foot per bolt@ (Tr. 138). However, at a point later on in his cross examination he was asked whether he counted the rows and he indicated that the bolt machine operator told him that **A**I've got 19 rows of bolts in this place here@ (Tr. 139).

On October 25, 1995, Napier worked the third shift which was extended 4 hours into the morning of October 26. For the first eight hours of Napier's shift, his supervisor, was James E. Owens, the section foreman. According to Napier, sometime during the shift, he noted draw rock in the roof of the Number 4 entry. He had also noted that the entry extended 60 to 65 feet rather than 40 feet as provided by the roof control plan. Napier testified that he brought these two conditions to the attention of Owens and that Owens told him that A . . . if I complained or said anything else about a deep cut, that I would be fired right on the spot, and for me to get my butt back up to work@ (Tr. 85). Napier testified that when he was traveling out of the mine in a scoop bucket, Owens told him that A . . . if he would hear me say anything about a deep cut, that he would fire me@ (Tr. 96). Napier then left the mine and went home.

The next day, when Napier arrived at the mine, another foreman, Clifford Sams, told him that Clyde Collins, Bledsoe's Superintendent, wanted to see him. Napier related that he went to see Collins, who asked him how many bolts he had put up the prior shift. Napier said that he told Collins that he put up 200 to 250 bolts. According to Napier, Collins told him that from reports he had received that Napier had not been keeping his work up. According to Napier, Collins told him that he was fired.

4. Discussion

A. Napier's Position

It is Napier's position in essence, that Collins disciplined him on October 26, because of information furnished by Owens that Napier was not competent to perform his work. ² Napier argues that Owens wanted to get rid of him because of his complaints of draw rock, and a deep cut. Napier cites Owens' testimony that a supervisor who permitted deep cuts at Bledsoe would be fired. It is thus argued that since on October 25, Owens had just

²It is significant to note that there is no evidence that Collins had the authority to fire Napier. Collins' testimony that he did not have such authority was not contradicted or impeached. Further, there is no evidence that Collins had knowledge of any safety complaints made by Napier. Moreover, Napier was not subject to any disparate treatment. The same evening that Collins spoke to Napier, he also told another employee, Steve Sizemore, that he was not doing his job and instructed him to talk to Ron Hilton, Bledsoe's General Superintendent who had the authority to fire employees.

returned from a week off for permitting a safety violation to have occurred in his section, he would have been fired if Bledsoe's management would have become aware of a deep cut.

B. Applicable Case Law and Analysis

The Commission, in Braithwaite v. Tri-Star Mining, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, Tri-Star, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. 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, 2797-800 (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 2799-800. 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).

Hence, in order for Napier to prevail, he must first establish that he was engaged in protected activities. In general, Napier testified to having observed drawrock, and entry cuts in access of 40 feet. He also testified that he had to operate a roof bolter without a canopy. These conditions could be found to be within the preview of safety concerns. However, although Napier testified to having observed these conditions prior to October 25, at no time prior to October 25, did he bring to the attention of any of Bledsoe's agents the existence of these conditions, or his concerns in these regards.

According to Napier, on the last night that he worked, i.e., October 25, he did complain to Owens regarding the deep cut, and draw rock that he had observed. Napier said that in response,

Owens told him that if I complained or said anything else about a deep cut, that I would be fired right on the spot, and for me to get my butt back up to work@ (Tr. 85). On the other hand, Owens, when asked regarding this complaint, stated that Napier never complained to him about deep cuts or draw rock. I observed the demeanor of Napier and Owens, and found Owens to be more credible on this critical point. Also, Napier failed to produce any witnesses to support his observations of draw rock and deep cuts³, and his having reported these conditions to Owens. According to Napier, when he complained to Owens on October 25, about the deep cuts and the draw rock, Joe B. Smith and another roof bolter by the name of Lonnie Hill, were located approximately eight feet away. However, neither Hill nor Smith corroborated Napier's version. Hill was not called to testify on Napier's behalf, and Smith testified that he did not hear Napier report deep cuts to Owens.

Further, in general, Napier's testimony concerning the length of the deep cut taken on October 25, and the number of bolts he installed that shift is both confusing and contradictory, and hence unreliable. Initially, Napier was asked how many 30 inch holes he had drilled and he stated that I would say approximately that 120 that night@ (Tr. 62). He said that all of these 120 holes were in the No. 4 heading (Tr. 63). Later on his testimony he indicated that he had drilled holes in a break (Tr. 69). Napier indicated that the second time the miner went into the Number 4 heading, it made a cut that was between 60 and 65 feet deep. He was asked how many rows of bolts he had put in this heading, and he indicated that he put up 15 or 16, but he was not positive and that I didn't count the bolts that day@ (Tr. 89). A little bit later on in the questioning, he was asked how many bolts he put in, and he said that after he put 40 bolts, he put up 10 or 12 more rows, each row consisting of four bolts (Tr. 90). On cross examination, he was asked whether it was

³In this connection, I note that Joe B. Smith, a miner operator who worked on the second shift testified that he had never taken any deep cuts. Also, Bledsoe's witnesses, Owens, and David Wayne Osborne, who worked in the 002 Section, and Sams who worked in the mine daily in October 1995, all testified that they never saw any deep cuts.

correct that he put up 40 bolts, and then put up 10 to 12 more rows which would have made it an 80 foot deep cut, and he answered as follows (Tr. 143):

A. Well, I said between 10 and 12. I bolted 10 rows -- 5 rows up, I think. That's when I came back and I bolted the two. That's when they had me to back out because they was going to cut the break through. Okay. After they cut that break through, then that's when they went back up in there and cut that heading again. And I wasn't even done with it yet.

17. But you're not sure how many more rows of bolts you put up?

A. No, not exactly sure, no.

Q. Well, then how do you know how deep the cut was? I mean were you just looking at it and you were thinking that it was probably 60 to 65 feet?

A. Right (Tr. 143-144).

In subsequent questioning, on cross-examination, he indicated that he put up 19 rows in the heading (Tr. 144-145). In follow-up questioning he was asked whether he counted the 19 rows and he indicated that he did (Tr. 145-146). Continued cross-examination further confuses the matter. His testimony is as follows:

Q. Now on this night, the night before you were sent into see Clyde Collins, first you said that there was about 60 or 65 and you were just judging by looking, but now is your testimony that you weren't just judging by looking, that you actually counted and you put up 19 rows? I just want to make sure I understand you.

A. Right. I put up about 18 or 19 rows, but I didn't add them up to see if it was actually 76 foot. I just knew it was over 40 foot, and I figured, you know, without adding up, it was about 60, 65 foot. I didn't add it up to make sure it was deep. But I really didn't think nothing else about it. You didn't really think what?

* * *

I said I really didn't think too much about it. I just didn't add it up to make sure that it was 76 feet. You know, I just took a guess that's what it was without adding them up.

Q. Are you saying that you counted bolts that night or not?

A. Yes.

Q. You did count them?

A. Right

Q. There were 19 rows?

A. 19 rows.

17. So you weren't just judging by looking when you're saying there was 19 rows of bolts?

1. Right (Tr. 146-147).

The redirect examination of Napier in these regards is also confusing. The pertinent testimony is as follows:

17. . . . [W]ould you, again, explain the sequence of mining in the Number 4 heading and how you got this 60 to 65 foot figure and these other figures that you've testified about?

1. Okay. When they cut it, they cut it about 60 to 65 foot. That's by me just visually looking at it.

17. That's the first time they cut it?

A. Right.

Q. Okay.

A. Okay --

HON. AVRAM WEISBERGER: You're referring to the area that's in by the break that has 3 R and 4 R in it in Complainant's Exhibit 1?

MR. NAPIER: Right. And when I started bolting, I put like five rows up. Then I backed up and --

17. And that was five rows of two bolts?

1. Right.

Q. Okay.

1. And then I backed up and I started putting two more rows up. The rest of it up here --

HON. AVRAM WEISBERGER: Excuse me. You're going fast. You started then on the two rows on the right?

MR. NAPIER: Right.

HON. AVRAM WEISBERGER: Okay

MR. NAPIER: That's when Eddie told me to back up and start drilling my 30-inch holes because they was going to cut 4 right.

HON. AVRAM WEISBERGER: Where did he tell you to drill the 30-inch holes?

MR. NAPIER: Back in the breaks, back behind.

HON. AVRAM WEISBERGER: In the breaks 3R and 4R, or in the breaks with the "X"?⁴

MR. NAPIER: Where the "X" is, the piece where I left off at.

HON. AVRAM WEISBERGER: Sir?

17. Then what happened?

A. After they cut 4 right, they backed up and went right back into 4 heading again, which was not completely bolted. That's when they cut another 10 or 12 rows deep up in it there.

17. So that when you first looked at the 4 heading in by the yellow line that's drawn on Exhibit 1 of

⁴See Complainant's Exhibit 1

the Complainant, you estimated it to be 60 to 65 feet deep?

1. Right.

Q. And then after you did that partial bolting, then the company went back in and cut that same one deeper before it was completely bolted?

1. That's right.

Q. And then did you -- was that when you counted rows, or did you ever count rows? I'm not sure about that.

A. I -- I counted them as -- at the end of the shift when I backed out. When I C when it was time to go home,, that's when I counted by rows back out.

Q. And did you count them to the point where you had initially bolted the five rows and the two rows?

A. Yes, sir.

Q. Did you include that in the count?

1. Yes. (Tr. 179-181).

Hence, the record evidences confusion and lack of clarity in Napier's testimony regarding the sequence of events on October 25, the depth of the cut that had exceeded 40 feet, when this cut was taken, and the basis for Napier's conclusion that the depth of the cut exceeded 40 feet. I find that this lack of clarity in Napier's testimony tends to taint the credibility of the balance of his uncorroborated testimony, especially that of his alleged conversation with Owens which was contradicted by Owens.

For all the above reasons, I find that Napier has failed to establish that he was engaged in protected activity, ie., that he communicated safety concerns about drawrock, the lack of a canopy, and deep cuts to Owens. Further, there is no evidence that Napier at any time communicated safety concerns to any of Bledsoe's agents. Although Napier testified that he was fired by Collins, Napier did not allege that he had communicated any safety concerns to him. For all these reasons I find that Napier has not established that he was engaged in any protected activities. As such, his claim of discrimination must fail.

5. Order

It is ORDERED that Napier's Complaint be dismissed, and that this case be DISMISSED.

Avram Weisberger
Administrative Law Judge

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