FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

February 10, 1999

ROBERT D. ADKINS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 98-133-D
	:	MSHA Case No. PIKE CD 98-02
RONNIE LONG TRUCKING,	:	
Respondent	:	Millard Processing
	:	Mine ID 15-17776 HDV

DECISION

Appearances: James L. Hamilton, Esq., Pikeville, Kentucky, for Complainant;
Timothy D. Belcher, Esq., Elkhorn City, Kentucky, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Robert D. Adkins against Ronnie Long Trucking, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c). A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I find that Ronnie Long Trucking violated section 105(c) when it discharged Mr. Adkins on October 15, 1997.

Adkins 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), on October 16, 1997.[1] On February 26, 1998, MSHA informed him that, on the basis of its

[1] Section 105(c)(2) provides, in pertinent part, that: AAny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.@

investigation, it had determined that Aa violation of Section 105(c) of the Act has not occurred.@ Adkins then instituted this proceeding before the Commission on March 11, 1998, under section 105(c)(3), 30 U.S.C. ' 815(c)(3).[2]

Background

Adkins began working for Ronnie Long Trucking as a part-time truck driver in February 1997. His duties included driving to the Ratliff No. 111 mine, owned by Shipyard River Coal Terminal d/b/a Pike County Coal Corporation, getting out of his truck and loading it with coal, using a front-end loader furnished by the mine, driving the load to the Clark Elkhorn Coal Company=s Bush Siding or to the Tennessee Construction Company Preparation Plant, dumping the coal, and returning for another load. Sometime after he started, Adkins became a full time employee of the trucking company.

On October 13, 1997, Adkins told Ronnie Long, President of Ronnie Long Trucking, as he was turning his truck in after work, that the front-end loader used on that day to load coal was unsafe because the brakes did not work and the transmission was slipping. On October 14, 1997, Adkins made an anonymous telephone call to the home of MSHA Coal Mine Inspector Thomas M. Charles to complain about the loader. On October 15, 1997, Charles went to the mine site to conduct a health and safety inspection. Adkins met Charles at the mine and identified himself as the person making the complaint. However, because it had been taken out of service, no inspection of the front-end loader was conducted.

October 15, 1997, was Adkins= last day on the job. He contends that at the end of the day Long fired him for complaining about the loader. Long claims that Adkins quit; that he was not fired.

[2] Section 105(c)(3) provides, in pertinent part, that: AIf the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary=s determination, to file an action in his own behalf before the Commission . . . .@

On October 22, 1997, Adkins filed a formal complaint concerning the loader and Charles went out to inspect it. He was told by a mine employee, John Fred Dotson, that the brakes on one wheel of the loader had been Aplugged off@ a couple of months earlier, rendering the brakes on that wheel inoperative, and that there was a history of transmission problems.[3] Sometime between October 14 and the time of this inspection the loader had been repaired. Nevertheless, based on what he had been told, Charles issued a citation to the mine operator for not correcting safety defects on the loader before it was used.

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 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.

As discussed below, the evidence demonstrates that Adkins engaged in protected activity in complaining about the safety of the front-end loader on at least four occasions and that he reasonably and in good faith refused operate the loader until it was fixed. The evidence further shows that Ronnie Long was aware of Adkins= complaint, but took no action to allay his worries. Finally, the evidence establishes that Adkins did not quit as contended by the company, but was discharged because of his complaints.

Adkins testified that he told Long on the night of October 13 that he would not operate the end loader in the condition that it was in. He said that Long told him that Ahe couldn=t be there all the time on the job site and that if I didn=t want to run the loader he would find someone else to run it and drive the truck and haul the coal.@ (Tr. 65.) He further related that Long said Athat I would just make it rough on him if I said or done anything, you know, about the loader because he would be the one that would have to fix it when it was fixed.@ (Tr. 90.)

[3] Dotson=s normal job was as the outside person for the mine, which included performing maintenance work on the loader. On October 22, he told Charles that he was the acting mine manager.

On October 14, Adkins had a 9:00 a.m. doctor=s appointment in Prestonsburg. Since this was an hour away from the job site and hauling could not begin until 7:00 a.m., Adkins did not go to work that morning. He did go to work that Aevening@ and hauled stockpile coal. (Tr. 81.)

Adkins went to work as usual on October 15 and hauled coal all day. He testified that ARonnie come down and run the loader some that day and that evening. And they told me Charles was there inspecting. Ronnie come and run the end loader. And on the last load he told me that he was replacing me.@ (Tr. 67-68, *see also* Tr. 102.)

Ronnie Long=s version of the events was somewhat different. He testified:

> Anyway, he said it=s got brake problems. And I said, well, you know, what do you want me to do, like that. Then he said, if that=s the only loader you got for me to load with, you may as well find you somebody else is what he said.
>
> Q. And what did you say in response to that?
>
> A. I told him I didn=t want him to quit, and he didn=t act like he was going to, you know. It was just his usual thing, you know. And he said he had a doctor=s appointment, you know, he acknowledged that, you know, and he was supposed to be out the next morning. But he said he was going to come out and haul a few loads. He told me he was going to be off for the doctor=s appointment, but he was supposed to show up for work the next morning.
>
> Q. That was your understanding?
>
> A. Yes.
>
> Q. Now, let=s go --- so he didn=t show up on --- did you talk to Mr. Adkins on the 14th?
>
> A. The 14th, yes. I called him because he didn=t show up for work. And he said that he didn=t --- he wasn=t going to run that loader. He said if that=s the only loader you=ve got for me to run, his exact words, you may as well find somebody else to drive the truck. And I said, well, I don=t want to, I don=t want to us to part like this, you know. I said, you want to haul part time, you know --- I was trying to part on friendly terms, you know. He was mad at me over the loader that I didn=t even own or have nothing to do

> with, you know. And he said, you know, I=m just not going to run that loader . . . .

(Tr. 153-54.)

The Commission has long held that a miner=s refusal to perform work is protected activity under the Act if it is based on a reasonable, good faith belief that the work involves a hazard. *Secretary on behalf of Hannah, Payne & Mezo v. Consolidation Coal Co.*, 18 FMSHRC 2085, 2090 (December 1996); *Secretary on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133-38 (February 1982); *Robinette*, 3 FMSHRC at 807-12*; Pasula*, 2 FMSHRC at 2789-96. *See also Secretary on behalf of Cameron v. Consolidation Coal Co.*, 7 FMSHRC 319, 321-24 (March 1985), *aff=d sub nom. Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 366-68 (4th Cir. 1986); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-30 (February 1984), *aff=d sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985).

Here, Adkins believed that it was unsafe to operate the front-end loader because it lacked brakes and the transmission slipped. The Respondent presented the testimony of Long and Howard Ramey that in their opinion the loader was safe to operate. In Ramey=s opinion, A[i]t didn=t have very good brakes, but it had brakes.@ (Tr. 109.) Long said: AI=m saying that that loader would stop no problem in the place where it was at . . .,@ that is, on level ground with a rock cliff on one side and a truck on the other. (Tr. 202-03.) These are hardly ringing endorsements. Furthermore, Adkins was not required to prove that a hazard actually existed, only that his belief was in good faith and reasonable. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989); *Robinette*, 3 FMSHRC at 812. In as much as his belief was confirmed by Inspector Charles= inspection of the loader, there can be little doubt Adkins refusal to operate the loader until it was fixed was a good faith, reasonable position. Consequently, I find that Adkins engaged in protected activity when he refused to operate the loader.

Once a miner has expressed a good faith, reasonable concern about safety, the operator has a duty to address the perceived danger in a manner that should reasonably resolve the miner=s fears. *Gilbert*, 866 F.2d at 1441; *Metric Constructors*, 6 FMSHRC at 230; *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983). In this case, Long=s response was to tell Adkins not to bother him about the loader and then to terminate him.[4]

Long argues that Adkins was not terminated, but quit. This contention is not supported by the evidence. While it is true that Adkins repeatedly stated his refusal to operate the unsafe

[4] Respondent=s argument, in its brief, that since Long did not know that one of the brake lines on the loader had been plugged, he did not have notice of a safety defect on the loader is without merit. He did have notice that the brakes did not work. That was sufficient to put him on notice of Adkins=s complaint. The evidence is uncontroverted that Long made no effort either to determine if a problem existed or to attempt to alleviate Adkins= concerns.

loader in terms of quitting, it is clear from the evidence that but for the unsafe loader he would not have been threatening to quit and, in fact, wanted to continue working. Therefore, the testimony of the Respondent=s witnesses, Long, Stevens, Easterling and Howard Ramey, that they heard Adkins say that he was going to quit because of the loader, rather than supporting the company=s case, corroborates Adkins.

Furthermore, I do not credit Ronnie Long=s claim that he believed Adkins was quitting. Based on his manner and demeanor while testifying, inconsistencies in his testimony, the lack of corroboration for the most significant portions of his testimony, his obvious animosity toward Adkins, and his pronounced interest in the outcome of this proceeding, I do not find Ronnie Long=s testimony believable.

The main difference between Ronnie Long=s testimony and Adkins= testimony is the telephone call Long claims that he made to Adkins on October 14. He claims it was that call that convinced him that Adkins was quitting. This claim strains credulity. In the first place, Long is the only one who mentioned this telephone call, if there was such a call; Adkins was never asked about it on cross-examination.[5] Further, Long purportedly made the call because Adkins had not come to work. Long admitted that he knew Adkins had a doctors appointment, although he was not sure of its time, but claimed that he thought Adkins was coming to Ahaul a few loads@ before the appointment. Adkins denied that he planned to come in before going to the doctor. The time of the appointment and the logistics involved support his version. In the second place, even according to Long, the threat to quit was qualified by Aif that=s the only loader you=ve got for me to run,@ meaning if I have to operate that unsafe loader, I quit. (Tr. 154.)

Throughout his testimony Long made gratuitous remarks concerning Adkins which were apparently intended to discredit Adkins= character. Some examples of such remarks are: ABut it was a normal thing for him to do complaining every day, you know. I mean, it was just a toss-up what the complaint was going to be, you know.@ (Tr. 152.) AYou know, I just took it to understand that he was going to go back to part time because he=s never been known to stick with any full-time job.@ (Tr. 154.) AHe smothered to death for a dollar.@ (Tr. 157.) AWith Mr. Adkins, he always acted like he didn=t need money.@ (Tr. 170.) AI wasn=t really worried about the brakes because Robert is a constant complainer, constantly, all the time complaining. I thought that was another one of his complaints.@ (Tr. 176-77.) AHe=s a good worker for two or three days a week and that=s it.@ (Tr. 192.) AI mean, anything that he thought was going to knock him out of a dollar, that=s what he complained about mostly.@ (Tr. 203.) AHe was finding another excuse not to work.@ (Tr. 210.)

Rather than discrediting Adkins, the remarks demonstrate Long's bias against him. Moreover, the statements are contradictory. For instance, throughout the case, the Respondent attempted to imply that the real reason that Adkins was complaining about the loader was that it had a smaller bucket than another loader that was used to load the trucks. As a result, it took

[5] At the time Adkins testified, Ronnie Long, and presumably his counsel, were apparently the only ones who had knowledge of this call.

longer to load his truck, cutting down on the number of hauls that could be made and, therefore, the amount of money that could be made. Thus, the comments about money. However, it seems peculiar that someone who Asmothers for a dollar@ would want to work part time or always be finding excuses not to work.

I find that Adkins did not quit, but was fired by Long. The important question for this case, however, is whether he was fired because of his safety complaints about the loader. I find that the only logical conclusion that can be drawn from the evidence is that Adkins was fired as a result of his complaints and refusal to work on the loader.

Adkins engaged in protected activity at least four times in this case: (1) when he told Ronnie Long, on October 13, that he would no longer work if the unsafe loader was not repaired; (2) when he went to the mine and complained about the loader to a representative of the operator on October 14; (3) when he anonymously called Inspector Charles on October 14; and (4) when he identified himself to Charles on October 15, at the mine, and reiterated his complaint. Ronnie Long admitted that Adkins complained to him on October 13. While he was never asked whether he was aware of Inspector Charles= visit on October 15, it can be inferred from the evidence that he was since he came out to the mine to run the loader, either during or shortly after Charles= visit.

At the end of the day on October 15, Long told Adkins he was letting him go, and already had a replacement. Even if Long=s version of the events is believed, Adkins only quit because Long did nothing to address his complaints about the unsafe loader. This would be a constructive discharge and still subject the Respondent to liability. *Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2210 (November 1994). Furthermore, because of the closeness in time between the inspection and the termination, the evidence strongly suggests that Long replaced Adkins because he kept complaining about the loader and went so far as to bring MSHA into the situation.

As the Commission has noted, A[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect.@ *Chacon*, 3 FMSHRC at 2510. In the same case, the Commission held that coincidence in time between the protected activity and the adverse action was one element of circumstantial evidence to be considered in determining whether adverse action was motivated by protected activity. *Id.* In this case, the circumstantial evidence only supports one inference, that Long fired Adkins because of his protected activity. Accordingly, I so conclude.

Robert Adkins has demonstrated that he made safety complaints about the front-end loader used to load coal into his haul truck and that these complaints, along with his refusal to work until the loader was repaired, were communicated to his employer, Ronnie Long Trucking. He has further shown that the Respondent did nothing to abate his concerns or to repair the loader, but instead fired him. Finally, the evidence supports his contention that he was fired as a result of these complaints. Therefore, I conclude that he has made our a *prima facie* case of discrimination.

The Respondent has attempted to rebut this case by claiming that it did not have knowledge of the specific defect on the loader and that Adkins was not fired, but quit. While Ronnie Long probably did not know that one of brakes on the loader had been Aplugged off@ at the time of Adkins= complaints, he did know that the brakes were not working, which is all that is required. Further, his claim that Adkins quit is not credible, but rather a pretext for firing Adkins. Consequently, I conclude that the Respondent has failed to rebut the Complainant=s case.

In conclusion, I determine that Adkins was discharged on October 15, 1997, in violation of section 105(c) of the Act and is, therefore, entitled to the remedies prescribed by that section.

Order

Accordingly, it is **ORDERED** that:

1. The Respondent **REINSTATE** Mr. Adkins to his former position with full pay and benefits;

2. The Respondent **PAY** Mr. Adkins full back pay, with interest, and benefits for the period from October 16, 1997, until the date of his reinstatement;

3. The Respondent **REIMBURSE** Mr. Adkins for any other reasonable and related economic losses or litigation expenses, including reasonable attorney=s fees, incurred as a result of his discharge;

4. The Respondent **EXPUNGE** from Mr. Adkins= personnel file and from company records the discharge and all references to the circumstances involved in it.

The parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that the Respondent will undertake to carry out the remedies set out above. This may include a lump sum payment as economic reinstatement instead of actual reinstatement. If an agreement is reached, it shall be submitted within **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief.[6] If a further hearing is required on the remedial aspects of this case, the parties should so state.

[6] The proper method of calculating interest on back pay is: *Amount of interest = The quarter=s net back pay x number of accrued days of interest* (from the last day of that quarter to

In accordance with Commission Rule 44(b), 29 C.F.R. ' 2700.44(b), I am directing that a copy of this decision be sent to the Regional Solicitor having responsibility for the Commonwealth of Kentucky so that the Secretary may take the actions required by that rule.

The judge retains jurisdiction in this matter until the specific remedies Mr. Adkins is entitled to are resolved and finalized. Accordingly, **this decision will not become final** until an order granting specific relief and awarding monetary damages has been entered.

T. Todd Hodgdon
Administrative Law Judge

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the date of payment) *x the short-term federal underpayment rate*. *Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (December 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988). The applicable interest rates and daily interest factors may be obtained from the Commission=s Executive Director, 1730 K St., N.W., Washington, D.C. 20006.