FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 17, 1996

LINDA S. SPARKS, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. LAKE 95-378-D
	:	MSHA Case No. VINC CD 95-03
OLD BEN COAL COMPANY, Respondent	:	Central Cleaning Plant Mine

DECISION

Appearances: Linda S. Sparks, Pro se, Steeleville, IL, for the Complainant;
Thomas A. Stock, Esq., Crowell & Moring, Washington, D.C., and William A. Miller, Esq., Zeiger Coal Holdling Company, Fairview Heights, IL, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by Linda S. Sparks, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (The Act). In the Complaint, Sparks alleges, in essence, that Old Ben Coal Company (Old Ben) unlawfully discriminated against her by placing her in its Chronic and Excessive Absenteeism Program ("C & E program"), in retaliation for her having complained about the condition of steps leading up to the gob scrapper truck that she had operated. Old Ben filed an Answer. Old Ben subsequently moved to amend its Answer, and the motion was granted at the hearing held on March 12, 1996. [1]

[1]Old Ben also filed a motion for an order compelling Sparks to fully comply with a previously issued pre-hearing order. At the hearing, Old Ben was allowed to interview Sparks' witnesses' whose

Findings of Fact and Discussion

I. 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

Old Ben operates a central cleaning plant located in Randolf County Illinois, wherein coal from underground mines is cleaned and processed. Sparks started to work at this plant on May 22, 1977. Subsequently, on December 27, 1993, she was evaluated by Robert Cash, the general surface manager, for a position as an operator of a gob srapper truck (“gob truck”). Sparks, whose height is only about five feet, had difficulty negotiating the step to access the cab of the gob truck. The step consisted of a metal bar suspended by a chain from the truck. According to

---

identity had not previously been divulged by Sparks. Accordingly, the motion to comply is moot, and is denied.

Old Ben also had filed a motion in limine. At the hearing, Old Ben’s motion in limine was withdrawn.

Sparks, the step was "a good two and a half, three, four feet" below the platform of the cab. (Tr. 105). Sparks complained to Cash, and on subsequent occasions, about her difficulty getting in and out of the cab and asked that an additional step be provided. Sparks indicated that Cash responded by telling her that there was no reason why she could not do the job, and she became an operator of the gob truck. Sparks continued to complain about the steps to Cash, and to an MSHA inspector, Gene Jewell who worked in the Sparta, Illinois, MSHA office. Spark testified that subsequent to December 27, she had to take several days off from work because of the difficulty getting up and down the cab of the truck.

Sparks indicated that in the period between 1993 and 1995, she went to the MSHA office in Sparta to make various safety complaints. Among the safety complaints she made to MSHA were the following:

> (1) In 1994, Sparks' shoes and clothes, which had been left on the site, became soaked on the 2nd shift when a fire in the area was extinguished with water. When Sparks reported for work on the 3rd shift, she was provided with replacement work shoes that were too large and she was unable to work in them;
>
> (2) The lack of an adequate berm on the gob hill; [2]
>
> (3) the lack of a lock inside the women's shower which had resulted in a construction worker entering the women's shower while Sparks was showering[3]; and
>
> (4) that a boss had threatened her life.

---

[2]According to Sparks she also had communicated this concern to her supervisor, Larry Seacrest, at a safety meeting at the end of February 1995.

[3]According to Sparks, when she reported this incident to Cash, he laughed, and told her that she should have chased the intruder out with a broom.

I find that all the above complaints constituted protected activities.

On January 5, 1995, while descending from the cab of the gob truck, Sparks fell and injured her right breast and her left wrist. She described these injuries as being very painful. She subsequently underwent four surgeries, and was told by her treating physician not to work. Sparks was off from work for 28 days. I find that all these actions were within the scope of protected activities.

B. Adverse Action and Motiviation.

On or about February 10, 1995, Old Ben notified Sparks that she was being placed in step 1 of the C & E program. The notice advised her that failure to maintain an absentee rate below 9 percent for the next 12 months may result in her being moved to the next step of the C & E program i.e., a one day suspension without pay, and that continued cronic and excessive absentism may result in suspension with intend to discharge. Since placement in the C & E program could result in loss and pay, I find that placement in this program constituted an adverse action. It must next be determined whether there was any nexus between the engagement of Sparks in protected activity, and her being placed in the C & E program.

According to Bill Patterson, who was the general manager of operations at the central cleaning plant in the period at issue, the C & E program was instituted about 10 years ago. According to the program, if the rate of an employee's noncon- tractual absence[4] exceeds 9 percent, and there have been at least two occurrences during the previous six months, then an employee is to be placed in the program and given a written warning. The C & E program further provides as follows: "If an employee works one year from the date of his or her last step with an absentee rate below 9 percent, this employee will be removed from the program." (Exhibit R-3, par. 8).

[4]In essence, non-contractual absence is defined in the C & E program as absences due to, inter alia, injuries, but that contractual vacation, and personal and sick leave are excluded.

From December 16, 1993 thru December 29, 1994, Sparks did not have any absences from work as defined in the C & E program. On December 30, 1994, Sparks was absent, as defined in the C & E program, when she attended the funeral of a fellow miner. In addition, commencing January 5, 1995, she was absent, as defined in the C & E program, for 28 days. As defined in the C & E Program, this constituted an absentee rate of 12.75%.

In essence, Sparks alleges that her absence subsequent to January 5, 1995, was not her fault, as it was caused by her injury, which was in turn was caused by an unsafe step leading up to the gob truck. Patterson, who was responsible for all actions taken against emplyees under the C & E program, and Cash, who administered the program relative to Sparks, indicated that her placement in the program was automatic, and would have been taken regardless of her safety complaints.

It is not for this forum to decide the propriety or legality of the C & E program, nor whether it constituted sound management. Nor is this the proper forum to decide whether there were extenuating circumstances which, based upon principles of fairness, should have excluded Sparks from being placed in the C & E program.

There is no evidence that Sparks received any disparate treatment in being placed in the C & E program based upon her protected activities. There is no evidence that Sparks had been singled out, or that other employees with similar absentee rates were excluded from the program. I find that Sparks had not established that her placement in the C & E program was not based upon Old Ben's application of the C & E program criteria to her absentee rate, but rather was motiviated, in any part, by her protected activities. I find that Sparks has not established any causal nexus between her protected activities, and the action taken by Old Ben. For these reasons, I find that Sparks has failed to establish that she was discriminated against in violation of Section 105(c) of the Act.

II. **ORDER**

It is **ORDERED** that the Complaint be **DISMISSED**, and that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

Linda S. Sparks, 607 West Chardon, Steeleville, IL 62288 (Certified Mail)

Thomas A. Stock, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2595 (Certified Mail)

William A. Miller, Esq., Zeigler Coal Holding Company, 50 Jerome Lane, Fairview Heights, IL 62208 (Certified Mail)

/ml