FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

October 11, 2000

DONALD L. RIBBLE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 2000-25-DM
v.	:	NC MD 99-16
	:	
T & M DEVELOPMENT CO.,	:	T & M Development Pit
Respondent	:	Mine ID 20-02595

DECISION

Appearances: Donald L. Ribble, Hudsonville, Michigan, *pro se*;
James J. Boutrous II, Esq., Butzel Long, P.C., Detroit, Michigan,
on behalf of Respondent.

Before: Judge Melick

This case is before me following remand by the Commission and upon the complaint of discrimination by Donald L. Ribble (Ribble) pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*, the "Act." In his complaint Mr. Ribble alleges that his former employer, T&M Development Company (T&M), fired him on August 17, 1999, purportedly in violation of Section 105(c) of the Act, after he sustained injuries on August 11, 1999.[1]

In his complaint to the Department of Labor's, Mine Safety and Health Administration (MSHA) filed September 13, 1999, Mr. Ribble specifically alleges as follows:

---

[1] Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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 because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

> I have a back injury there [*sic*] Company Doctor was treating me for pulled muscle or torn. I stopped going to Company Doctor because they would not ok therapy. So I have gone to my family Doctor. He oked therapy. On 8-11-99 I was checking a roller on the stacker about 18 ft. up I slipped and Lost Balance. I fall about 18 ft into a pile off sand feet first I report it to Gary Benting my boss. At the time it was just a sore knee. Then the next day my back & neck began to hurt. On 8-12-99 I asked if I could go to the Company Doctor on my own. My boss Gary Benting said he needed a accident report from his boss Rick Hill. Asked everyday for the form so I could go to the Doctor. Never received it always had excuse. Rick didn't have it. So on the day of 8-17-99 when the day was over. Gary Benting fired me couldn't give me a reason. So I called main office in Belleville MI. Marlene VanPatten gave me permission to go to there Company Doctor. When I need therapy it was never ok with the Company. Company Doctor informed me I could go back on light duty. Marlene VanPatten informed me again I was fired. I still have Blue Cross Blue Shield with Thompson & McCully so that's paying medical bills. I don't know when that will quit. I have no means of income. They referred me Workman Comp. & refused to hire me back on light duty.

By letter dated November 16, 1999, MSHA advised Mr. Ribble that the facts disclosed during its investigation did not constitute a violation of Section 105(c). On December 20, 1999, Mr. Ribble filed the same complaint with this Commission. Pursuant to the Commission's remand, hearings were held in Charlotte, Michigan on August 3, 2000, and September 7, 2000. At hearings on August 3, 2000, Ribble requested a postponement to obtain the assistance of counsel. The postponement was granted over Respondent's objection. At continued hearings on September 7, 2000, Mr. Ribble proceeded without counsel.

In discrimination cases under Section 105(c) of the Act the complainant bears the burden of production and proof to establish that: (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall,* 663 F.2d 1211 (3rd Circuit 1981); *Secretary on behalf of Robinette v. United Castle Coal Company*, 3 FMSHRC 803, 817-818 (April 1981). In this case the credible evidence shows that while the Complainant may have engaged in protected activity, he engaged in such activity only after he suffered the alleged adverse action, i.e., discharge, on August 17, 1999. Accordingly the adverse action could not have been motivated by such activity.

In its remand decision the Commission held that Ribble's allegation that he requested an accident report form on which to report an injury would constitute a protected activity since this request could trigger an obligation, under 30 C.F.R. § 50.20, for T&M to report Ribble's injury to

MSHA. For the reasons set forth below I do not find that Ribble requested any such report form prior to his discharge. Accordingly, even assuming such a request would constitute a protected activity, it could not have motivated his discharge. The Commission also noted that in an interview on September 20, 1999, a week after the complaint was filed, Mr. Ribble mentioned that he had reported safety problems to a mine inspector and that this would also constitute a protected activity. Ribble testified in this regard at hearings that he reported these safety problems only after he had already been discharged. Accordingly such protected activities could not have motivated his discharge.

Ribble testified that he had been working for about a year at the T&M operation as a loader operator when, on August 11, 1999, he fell "at the most" 18 feet into a sand pile as he was climbing onto the conveyor to check a roller. The roller was "either worn-out or it came out of its bracket." He claims that although his left knee hurt, he "walked it off" and completed his work assignments that day. No one else was present at the time of this alleged incident and there is no independent corroboration that it occurred. Ribble testified that at the end of the shift, around 6:45 that evening, all the workers met with superintendent Gary Benting. According to Ribble after everyone left this meeting he told Benting that he had slipped off the conveyor and that his knee hurt. There were no other witnesses to this purported one-on-one meeting with Benting and Benting denies that Ribble ever complained to him about any injury. The medical records submitted by Ribble do not moreover reflect that he had any knee or leg injury (Exhs. C-1 and C-2).[2]

Ribble testified that around 7:30 or 8:00 on the morning of the following day he approached Benting. He testified "my leg was starting to hurt quite bad, or my knee, actually, and I might want a little time off to go to the doctor, is exactly what I said." According to Ribble, Benting responded that he could not see his own doctor but had to go to the company doctor, and needed a form to see the company doctor. According to Ribble, Benting said he did not have any forms with him at the time but would obtain one for him. Again, there were no other witnesses nor independent corroboration for this alleged conversation and Benting denies that it occurred. Ribble took off work early that day not because of any injury, but to do something with his wife.

Ribble testified that on the morning of the 13th of August, he again told Benting that he had to go to the doctor and Benting purportedly responded that he needed to get a form from Rick. Ribble claims that on August 13, he also told co-workers Miller and Bosch that he wanted to see the company doctor. Neither Miller nor Bosch was called as a witness nor statements from them provided, however, to corroborate this claim. In spite of his alleged injury there is no evidence that Ribble ever requested light duty work but continued working at his regular job.

---

[2] A question remains why a loader operator whose job was to load trucks would have taken it upon himself, without the knowledge or direction of any supervisor and in knowing violation of the law, to place himself in danger of serious injury or death, by climbing 18 feet above a sand pile without a safety belt to check on a roller. A question also remains why, since he claims he fell before repairing the alleged defective roller, Ribble did not report this condition to Benting at the end-of-shift meeting held to check on "whatever needs to be done to the plant for the next day."

Ribble testified that on Tuesday, August 17, 1999, he saw Regional Manager, Rick Hill at the mine and that he mentioned to other employees that "Rick should have the form." No witnesses or other corroboration was provided. At the end of the day on August 17, Benting purportedly told Ribble not to bother coming back to work. When Ribble was asked why he was being terminated Benting purportedly only turned and walked away. Ribble maintains that he then said to Benting "I know why, because of what I told you by the loaders the other day, that I had slipped and fell," and that Benting responded "yeah, whatever" and walked away.

Ribble testified that after he was fired he contacted Hill by phone that same night to obtain the form he purportedly needed to see the company doctor. In the telephone conversation Hill purportedly told Ribble to get the form from the company's Grand Prairie office or from Office Manager Marlene Van Patten. Ribble then purportedly contacted Ms.Van Patten who informed him the next day that his visit to the company doctor was authorized and that he did not need to first obtain any form.[3]

In his statement to the MSHA investigator Ribble claimed that the doctor took X-rays of his neck and told him that the X-rays did not show anything. Ribble stated that he then told the doctor that it was his back that hurt but that they did not want to X-ray his back. Ribble also stated that another doctor also told him that the X-rays "look good, nothing wrong." (Court Exh. No. 1, pg. 5-6). The doctor nevertheless restricted him to light duty work and authorized therapy. According to the record this visit occurred on August 19, 1999. (Exh. No. C-1).

T&M Division Manager Gary Benting testified that he had been Ribble's direct supervisor as long as Ribble had been employed for T&M. Benting testified that he terminated Ribble because he was not performing his duties. The drivers whose trucks Ribble was supposedly loading were complaining to Benting that they were waiting too long. Benting claims that he therefore warned Ribble on August 16th, to spend less time on the phone and to do more loading. The problem purportedly continued on August 17th, and, at the end of the shift, Benting told Ribble that his services were no longer needed. Ribble then purportedly responded to Benting "I'll get you, you son-of-a-bitch, you asshole."[4] According to Benting, as Ribble was leaving he also said "by the way I fell off the loader today."

---

[3] In his statement to the MSHA investigator, Ribble stated that, in this phone call, Hill said that he would get back to him about the necessary authorization form and that Ribble apparently on his own initiative and before Hill responded then called Van Patten who approved his visit to the company doctor. In his Complaint herein he does not allege that he ever asked Hill for an accident report form but claims only that after his discharge he called Ms. Van Patten at the main office for permission to see the company doctor.

[4] This statement suggests that Ribble may have indeed been vindictive for his discharge and suggests a motive for the safety complaints he subsequently made to MSHA. MSHA investigated these complaints but found no violations. It also suggests a motive for the possible fabrication of Ribble's claimed injury and his attempt after his discharge, to obtain workers' compensation benefits.

Benting testified credibly that Ribble never told him that he had been injured, that Ribble never asked him for any form to authorize him to see the company doctor, and that Ribble never made a safety complaint or complaint about the conveyor or loader. T&M Operations Manager Richard Hill likewise testified that at no time before his discharge did Ribble ever complain to him about any injuries from falling off the stacker conveyor. However, Hill recalled receiving a telephone call from Ribble after Ribble had been fired in which Ribble may have told him that he had been injured and could return to work on light duty.

Given the lack of corroboration of Ribble's testimony that he had, prior to his discharge, requested an authorization form to see a doctor, the credible denials by both Gary Benting and Richard Hill that Ribble had requested such a form prior to his discharge, the absence of any medical evidence that Ribble had any leg or knee injury and the absence of any objective medical evidence of any neck or back injury, and the inconsistencies in Ribble's testimony, his complaint and his statement to the MSHA investigator, I do not find that Ribble has sustained his burden of proving by credible evidence that he in fact had requested such a form at any time prior to his discharge on August 17, 1999. Accordingly, this alleged activity, even assuming that it was protected, could not have been a motivating factor in his discharge. This discrimination complaint must therefore be dismissed.

In reaching these conclusions I have not disregarded the decision of the state administrative law judge that Ribble was not disqualified from unemployment benefits because T&M was unable to prove that Ribble's discharge was for disqualifying conduct. Since my findings herein are limited to a determination that Ribble failed to meet his burden of proving that his discharge was motivated by an activity protected under the Act, they are not in conflict with the state judge's decision. Because the state hearings were conducted by telephone in the absence of the company's key witness and no record of the proceedings was available to evaluate, I could not in any event accord any weight to the decision. See *Pasula v. Consolidation Coal Company*, 2 FMSHRC at 2794 - 2795.

ORDER

Discrimination Proceeding Docket No. LAKE 2000-25-DM is hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

Mr. Donald L. Ribble, 4775 22nd Avenue, Hudsonville, MI 49426

James J. Boutrous, II, Esq., Butzel Long, P.C., Suite 900, 150 West Jefferson, Detroit, MI 48226