

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 24, 1995

RANDALL PATSY, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. PENN 94-132-D
: MSHA Case No. PITT CD 93-27
BIG "B" MINING COMPANY, :
Respondent :

DECISION

Appearances: Daniel Hilliard and Susan Mackalica, West Sunbury, Pennsylvania, for the Respondent.

Before: Judge Feldman

The threshold issue in this discrimination proceeding brought under color of authority of section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 815(c)(3), is whether Randall Patsy was a "miner" at the time of his alleged October 26, 1992, discriminatory discharge. It is undisputed that on the day of his discharge, Patsy was working at the Peter Rabbit Campground preparing mobile home sites. Patsy's discrimination complaint was investigated by the Mine Safety and Health Administration (MSHA). On December 1, 1993, MSHA advised Patsy that it had concluded that a violation of section 105(c) of the Act had not occurred because Patsy was not "...a 'miner' at the time of the alleged discharge and MSHA does not have jurisdiction over the campground job site."

This matter was originally scheduled for hearing on June 7, 1994, and subsequently rescheduled for September 20, 1994. However, Patsy's complaint was dismissed on May 13 and August 16, 1994, after a series of statements evidencing that he was no longer interested in pursuing his discrimination complaint. For example, Patsy stated: "...there [may be] no sense in pursuing this any farther (sic)" (April 7, 1994, letter); "I feel I would be better off to pursue this as a civil suit locally" (April 18, 1994, letter); "I can not (sic) prove I was a miner at the time I was fired" (July 20, 1994, letter); and, "I don't have a leg to stand on" (July 25, 1994, statement to secretary Linda Hudecz).

Each dismissal was vacated by the Commission and remanded for further consideration after Patsy, contrary to the above statements, expressed a desire to proceed. See Commission Orders at 16 FMSHRC 1237 (June 1994) and 16 FMSHRC 1937 (September 1994). Consequently, on November 25, 1994, a Notice of Hearing Site was sent by certified mail once again scheduling this matter for hearing on December 13, 1994, in Pittsburgh, Pennsylvania.

On November 25, 1994, contemporaneous with the mailing of the hearing notice, Raymondria Ballard, my office secretary, telephoned Patsy at his telephone number of record to advise him of the time, date and location of the upcoming hearing. On December 8, 1994, Ms. Ballard left a message on a telephone answering machine at his telephone number reminding Patsy of the hearing. On December 9, 1994, Ms. Ballard again called Patsy's telephone number and left a message about the hearing with an unidentified female who stated she did not know where Patsy was. These messages were attempts to prevent hearing expenditures in the event Patsy was no longer interested in prosecuting his complaint.

The hearing convened as scheduled at 9:00 a.m. on December 13, 1994, in Pittsburgh. Daniel Hilliard and his daughter, Susan Mackalica, appeared on behalf of the respondent. Hilliard is the sole proprietor of Hilliard Mining which owns and operates the Big "B" Mining Company. Patsy failed to appear. At 9:20 a.m. I left a message on Patsy's answering machine requesting that he immediately call my office to explain his absence at the hearing. Patsy failed to respond. The trial record was opened at 10:25 a.m., at which time Hilliard and Mackalica testified.

Hilliard testified that he operates several business ventures associated with activities involving the ownership and management of rental properties, road construction, sewer plant construction and mining. Hilliard stated that Patsy was a general handyman at Hilliard's rental properties. Patsy also operated small construction equipment and the fuel truck which serviced the equipment at Big "B" Mining's Isacco mine site as well as the equipment at several of Hilliard's other non-mining construction sites.

Hilliard testified that on the morning of Patsy's discharge on Monday, October 26, 1992, Patsy reported for work at the Peter Rabbit Campground. The Peter Rabbit Campground is a subsidiary company owned by Hilliard Mining. The campground property was being converted into a mobile home park. Patsy was operating a small dozer for the purpose of clearing brush and trees and

leveling site locations in preparation for the installation of water, sewer and electric lines. The dozer broke down and was taken out of service. Patsy was discharged on the afternoon of October 26, 1992, after he refused to tow a low-boy trailer with a replacement dozer from Hilliard's equipment shop located at 551 Mahood Road in Butler, Pennsylvania to the campground, a distance of approximately four miles. Patsy refused to tow the low-boy because its state inspection had expired. Consistent with Hilliard's testimony, Patsy has stated, "I was eating lunch at a mobile home park when I was fired." (Undated letter filed October 19, 1994).

Hilliard testified that the campground is approximately eight miles from the Isacco mine site. The equipment shop is a fenced area with a 3,000 square foot building with tin siding, a flat roof and a cement floor. The equipment shop is used to store mining and excavating equipment for Hilliard's business activities. It is located equidistant between the campground and the mine site and is not on mine property.

The hearing concluded at 11:45 a.m. At approximately 3:00 p.m. that afternoon, Patsy telephoned my office and spoke to Raymondria Ballard. Patsy stated that he had just received my recorded message about his failure to attend the hearing. He stated that he was out of town, that he never received the "certified mail" hearing notice, and, that he had just returned from California. When reminded that he had been advised of the hearing date and location by Ms. Ballard on November 25, 1994, Patsy did not respond. Although Patsy claims he did not receive the certified hearing notice,¹ the hearing notice has not been returned by the post office as unclaimed.² Therefore, I find the certified mailing of the hearing notice, the November 25, 1994, telephone conversation with Patsy, and the two subsequent

¹This is not the first time that Patsy has alleged improper service in this proceeding. In a letter dated May 16, 1994, Patsy stated that he was not served with the respondent's answer to the February 24, 1994, Prehearing Order. However, the record reflects the respondent's response was sent to Patsy by certified mail (No. P 240 182 672) and returned to the respondent as unclaimed.

² The return receipt card was not returned. The Brady, Pennsylvania Post Office has been unable to trace this mailing. Brady, Pennsylvania Postmaster Tony Ruiz has advised me that, unfortunately, certified mailings are occasionally delivered to the addressee without removing the return receipt post card.

messages left at Patsy's telephone number of record conveying the information in the hearing notice, as adequate notice of the hearing date and location.

In an unsolicited letter dated January 30, 1995, following Patsy's December 13 conversation with Ms. Ballard, Patsy stated:

We were out of town for two weeks prior to December 13th. The only notice we received were messages on our answering machine. We returned the afternoon of Dec. 13th, to find out there was hearing (sic) scheduled that morning. (Emphasis added).

On February 7, 1994, Patsy was ordered to show cause why his complaint should not be dismissed as a result of his failure to appear at the hearing. Patsy was ordered to specifically admit or deny that he had received the messages concerning the hearing date and location provided by Ms. Ballard on November 25, December 8 and December 9, 1994. In addition, Patsy was ordered to provide evidence demonstrating the dates and location of his reported out of town trip such as airline, hotel or credit card receipts.

The February 7 Order also noted that the testimony of Hilliard, who is not an attorney, was construed as a request for summary decision. Consequently, Patsy was also ordered to show cause, by filing an opposition, why summary decision for lack of jurisdiction should not be granted in favor of the respondent.

Patsy responded to the Order to Show Cause on February 10, 1995. Patsy stated he was out of town from November 20 through December 13, 1994. With respect to travel receipts, Patsy stated he traveled in a recreational vehicle and that he did not use motels, airlines or credit cards. Patsy did not identify where he purportedly traveled. Thus, Patsy provided no objective probative evidence of his trip.

Notwithstanding Patsy's inability to provide documentation of his trip, it is noteworthy that Patsy has been unable to remember the trip's duration. In a letter dated January 10, 1995, Patsy stated he was out of town for eight days. In a letter dated January 30, 1995, Patsy stated he was out of town for two weeks. Finally, in his response to the Order to Show Cause dated February 10, 1995, Patsy stated he was out of town for 23 days (November 20 through December 13, 1994.)

In addition, Patsy has failed to furnish the requisite documentation to support his denial of the November 25, 1994,

telephone conversation with Ms. Ballard and his denial of timely knowledge of the subsequent hearing messages of December 8 and December 9, 1994. Accordingly, Patsy has failed to demonstrate just cause for his failure to attend the hearing. Patsy's lack of credibility with regard to his alleged trip and his on again off again interest in his discrimination complaint evidences a contempt for this hearing process. Consequently, Patsy is in default and his complaint shall be dismissed with prejudice.

Alternatively, Patsy's February 10, 1995, response to the Order to Show Cause failed to demonstrate why summary decision should not be granted for the respondent. Commission Rule 67(b), 29 C.F.R. ' 2700.67(b), provides that summary decision shall be granted if (1) there is no genuine issue as to any material fact and (2) the respondent is entitled to summary decision as a matter of law.

Whether the low-boy trailer was located at the shop as the respondent claims, or, at the mine site as Patsy alleges, is not dispositive or otherwise material. For it is undisputed that Patsy was requested to tow the low-boy trailer in furtherance of his job duties at the mobile home site. Thus, the alleged location of the low-boy on mine property was incidental to its non-mining use and does not provide an adequate nexus to afford Patsy 105(c) statutory protection as a miner.³ Rather, the only material and dispositive issue of fact as it relates to the jurisdictional question in this case, i.e., that Patsy was not working in a mine at the time of his alleged discriminatory discharge, is not in dispute. In this regard, in correspondence dated July 20, 1994, Patsy stated:

I can not (sic) prove I was a miner at the time I was fired. I was employed by a mine operator, though I was working at a mobile home park he was developing.
(Emphasis added).

Section 3(g) of the Mine Act defines a miner as "any individual working in a coal or other mine (emphasis added)."

³ See f.n. 4, infra.

30 U.S.C. ' 802(g). In analyzing this definition of "miner" the court has stated "the [mine] statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction activities. National Industrial Sand Ass'n v. Marshall, 601 F. 2d 689, 704 (3rd Cir. 1979). Similarly, the Commission has concluded that an individual's status as a "miner" under the Act at a given point in time is determined by whether the individual works in a mine and not by whether one is employed by a mine operator. Cyprus Empire Corporation, 15 FMSHRC 10, 14 (January 1993). Simply put, a mobile home park is not a "coal or other mine" under section 3(h)(1) of the Act, 30 C.F.R. ' 802(h)(1).⁴

Likewise, an individual working at a mobile home park is not a section 3(g) "miner." Accordingly, the respondent is entitled to summary decision in this proceeding as a matter of law.

ORDER

The complainant has failed to show cause why his complaint should not be dismissed as a result of his failure to appear at the December 13, 1994, hearing. Accordingly, Randall Patsy's discrimination complaint against the Big "B" Mining Company **IS DISMISSED** with prejudice.

Alternatively, there are no outstanding material issues of fact that warrant denial of summary decision in favor of the respondent on the jurisdictional question. Accordingly, summary decision **IS GRANTED** for the respondent and the discrimination complaint filed by Randall Patsy against the Big "B" Mining Company **IS DISMISSED** with prejudice for lack of jurisdiction under the Mine Act. Nothing herein shall be construed as a finding on the merits of Patsy's complaint or whether his complaint was timely filed.

Jerold Feldman

⁴ Section 3(h)(1) of the Act defines, in pertinent part, "coal or other mine" as "... an area of land from which minerals are extracted [including equipment]...used in, or to be used in, ... the work of extracting such minerals...."

Administrative Law Judge

Distribution:

Mr. Randall Patsy, R.D. #1, Box 290, E. Brady, PA 16028
(Certified and Regular Mail)

Mr. Daniel Hilliard, Ms. Susan Mackalica, Big "B" Mining Company,
R.D. 1, West Sunbury, PA 16061 (Certified and Regular Mail)

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