FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 25, 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 95-125-DM ON
BEHALF OF : SE MD 94-12
BENITO OCASIO HERNANDEZ, :
Complainant : Cantera Espinosa
v. :
:
SAN JUAN CEMENT COMPANY, INC., :
Respondent :

DECISION

Appearances: James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor, New York,
New York for the Complainant;
Rafael Cuevas Kuinlam, Esq., Hato Rey, Puerto Rico
for the Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Benito Ocasio Hernandez against San Juan Cement Company under Section 105(c)
of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c). For the reasons set forth below, I find that, while Mr. Ocasio engaged in activities protected under the Act, the Respondent was not motivated in any part by that activity in suspending him for eight days.

The case was heard on June 7 and 8, 1995, in Hato Rey, Puerto Rico. Roberto Torres Aponte, Jose Luis Mojica,
Marcos E. Rivera and the Complainant testified in support of his case. Victoriano Garcia Santiago, Florentino Coreano Moreno and Rolando Melendez Santiago testified for the Respondent. The parties also filed briefs which I have considered in my disposition of this case.

MOTION TO DISMISS

As a preliminary matter, the Respondent argues that this case should be dismissed because the Secretary has not followed his own rules. Specifically, the company contends that

Commission Rule 41(a), 29 C.F.R. ' 2700.41(a), which requires the Secretary to file a discrimination complaint "within 30 days after his *written determination* that a violation has occurred" (emphasis added), was not complied with because the company never received such a written determination. This argument is without merit.

Initially, it should be noted that the rule in question is the Commission's and not the Secretary's so that the well settled principle of law that an administrative agency must follow its own rules would not be applicable in this case. Secondly, when read in conjunction with Section 105(c)(3) of the Act, 30 U.S.C. ' 815(c)(3), which requires that "[w]ithin 90 days of the receipt of a complaint . . . the Secretary shall notify, *in writing*, the miner . . . of his determination whether a violation has occurred" (emphasis added), it is apparent that the written determination referred to in Rule 41(a) is the written determination required by the Act to be given to the Complainant. Thus, there is nothing in either the Act or Rule 41(a) that requires a written determination to be given to the company.

Finally, although the record is silent concerning whether the Secretary filed this complaint within 30 days of notifying the Complainant that a violation had occurred, the Commission has long held that the time limitations in discrimination cases are not jurisdictional and that dismissal is only appropriate "if the operator demonstrates material legal prejudice attributable to the delay." *Secretary on behalf of Hale v. 4-A Coal Company, Inc.*, 8 FMSHRC 905, 908 (June 1986) (citations omitted); *see also Secretary on behalf of Nantz v. Nally & Hamilton Enterprises, Inc.*, 16 FMSHRC 2208, 2215 (November 1994); *Boswell v. National Cement Co.*, 14 FMSHRC 253, 257 (February 1992). In this case, the Respondent has not alleged any prejudice resulting from its

failure to receive a written determination, and, in fact, has admitted that it was not prejudiced by not receiving a written determination. (Tr.1, 87-8.)[1]

The Respondent's claim that the failure of the Secretary to provide it with a written determination that a violation occurred should result in the dismissal of the complaint is unsupported by either the facts or the law. Therefore, the motion to dismiss is DENIED.

FACTUAL SETTING

The basic facts are not disputed. On April 18, 1994, Victoriano Garcia, a

[1] There is a separate transcript, beginning with page one, for each day of the hearing. Accordingly, the transcript for June 7 will be cited as "Tr.1" and the transcript for June 8 will be cited as "Tr.2."

maintenance foreman, told Luis Mojica, a mechanic, and Benito Ocasio, his helper, to go the ash silo and retrieve a vibrator for use in another part of the plant. Although Mojica and Ocasio were apparently aware that the silo was in a restricted area due to dangerous conditions, they both proceeded to the area. On arriving, they discovered the area blocked off by pylons and yellow ribbons. Unable to perform their duties, they returned to the locker area to await further assignment. Garcia was informed that the vibrator was not obtained because the area could not be entered.

On April 20, 1994, Garcia assigned Mojica and Ocasio, along with Marcos Rivera, a welder, to repair a screw conveyor. While waiting for the acetylene for the welder to be brought to the conveyor, Ocasio took a piece of steel to the heavy equipment shop to have it cut into a plate to be used for heating food. When Garcia observed Ocasio in the shop, he told Ocasio to return to his workplace. Ocasio did so.

Shortly thereafter, Ocasio saw Garcia coming by the conveyor and called him over. A confrontation over the incident in the shop ensued resulting in both parties accusing the other of a lack of respect.

Garcia reported this confrontation to his supervisor, Florentino Coreano. Coreano asked Garcia to make a written report of the incident. After consulting with Rolando Melendez, the Director of Human Resources and Industrial Relations, Coreano went to where Ocasio was eating breakfast, told him he was suspended and directed him to go to Melendez' office with his union delegate.

Melendez discussed the incident with Ocasio and his delegate in his office. At that time, Melendez had Garcia's written report and some notes he had made on the report based on his telephone conversation with Coreano. (Comp. Ex. 2.) Melendez informed Ocasio that he was suspended until a meeting with the union was held the next day, April 21, at which time a further decision on discipline would be made.

The meeting with union was held on April 21, but Ocasio did not appear, so his case was not discussed. At the next meeting, April 29, Ocasio was present along with Garcia, Mojica, Marcos Rivera, Coreano and the union officials. After interviewing the witnesses, Melendez concluded that an eight day suspension was sufficient and terminated it.

The April 18 episode concerning the aborted attempt to get the vibrator was not mentioned by any party at either the
April 20 or April 29 meeting with Melendez. However, by April 29 Melendez was aware that Ocasio was claiming that his suspension was the result of his refusal to enter the restricted area to obtain the vibrator because Ocasio had filed a discrimination complaint with the Mine Safety and Health Administration (MSHA) on April 21, (Resp. Ex. N.), and the company had been informed of the complaint sometime before April 29.

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 2768 (1980), *revd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (2d Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *revd 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. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, *supra* at 817-18.

In this case, the Complainant argues that he engaged in protected activity when he refused to enter the danger area in the silo to retrieve a vibrator and that because of that refusal, the company suspended him for eight days. In response, San Juan Cement avers that Mr. Ocasio was suspended for his insubordination to his foreman two days later and maintains that the suspension had nothing to do with his refusal to enter a dangerous place. Mr. Ocasio contends that the insubordination is merely a subterfuge for action taken because of the protected activity. The evidence, however, does not support the Complainant's contention that his suspension was for having engaged in protected activity.

It is well settled that when a miner refuses to work in conditions he believes, reasonably and in good faith, to be dangerous, his refusal is protected under the Act. *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988); *Miller v. FMSHRC*, 687 F.2d 194 (7th Cir. 1982); *Secretary on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529 (September 1983); *Secretary on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993 (June 1983); *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (November 1982); *Robinette, supra*. Consequently, I conclude Mr. Ocasio engaged in protected activity when he declined to go beyond the pylons and ribbons marking the danger area to get the vibrator.

However, Mr. Ocasio has failed to show that his subsequent suspension was motivated by that refusal. The only evidence to support his claim is his own testimony and at every significant point his testimony is uncorroborated. Furthermore, his portrayal of his testimony as corroborated, when in fact it was not, among other factors, reflects adversely on his credibility.

Mr. Ocasio testified that he and Mojica went to the silo area as directed by Garcia, but could not enter because it was cordoned off. He stated that Garcia came up to them in that area and asked if the vibrator had been removed and when they told him that it had not because of the danger, Mr. Ocasio "noticed that he [Garcia] became very upset, and he removed his hardhat in order to throw it on the floor." (Tr.1, 26.)

The Complainant related that he encountered Garcia later in the afternoon and Garcia again told him to remove the vibrator. He claimed that when he again refused because of the risk, Garcia said "[t]hat if I didn't remove it, I would pay dearly." (Tr.1, 29.) Mr. Occasio testified that Mojica was not present during this encounter.

Concerning the same incident, Mr. Garcia testified that he told Mojica and Ocasio to go to the silo to get the vibrator and that later he saw them standing near the silo and Mojica yelled "Garcia, it says that you can't come in." (Tr.1, 136.) Garcia said that he did not reply to them, but "[s]ince I already had an emergency, I decided right there to just keep walking and mention it to Mr. Felipe Santiago that there was an emergency dealing with safety." (Tr.1 137.) He denied that he insisted that the Complainant enter the restricted area or tell him that he would "pay dearly" if he did not. (Tr.1, 138.)

A third version of the incident was given by Mr. Mojica. He testified that Garcia directed Ocasio and him to go to the silo to get a vibrator, that when they got to the silo they found the area cordoned off, so they returned to the tool shed. According to Mr. Mojica, after the initial order he did not see Garcia again and the Complainant, alone, "went over there and told Garcia that we couldn't go into the area because it was fenced in." (Tr.2, 53.) Mr. Mojica stated further that Ocasio did not "say anything" about Garcia's response when informed that they could not get the vibrator. (Tr.2, 54, 63.) Finally, Mr. Mojica related that Garcia had never mentioned the vibrator to him again, nor had he been subjected to any type of adverse action for refusing to remove the vibrator.

If Garcia had reacted as described by the Complainant, that is taking off his hat as if he was going to throw it on the ground and accosting Ocasio a second time to insist that he retrieve the vibrator and threatening that he would pay dearly if he did not, then it would be possible to infer that there was some connection between the refusal and the suspension. However, no other evidence supports the Complainant's version.

According to Garcia and Mojica, the refusal to enter the silo was not consequential. In addition, Mojica was not present to see Garcia become angry at the refusal as claimed by Ocasio. Finally, if Ocasio was alone when he told Garcia that they would not get the vibrator, and Garcia reacted angrily, and if Garcia later threatened Ocasio, it is curious that Ocasio never mentioned any of this to Mojica, or that Mojica was never disciplined for the refusal in view of Garcia's alleged anger.

Essentially, what the evidence in this case shows, if the Complainant's testimony is not accepted, as I do not, is a refusal to enter an unsafe area on April 18, and a suspension on April 20. Other than the proximity in time, there is nothing to connect one with the other. At the time the Complainant was suspended by the personnel director on April 20, the personnel director was not even aware of the April 18 incident. Nor did anyone, including Ocasio, mention it to Mr. Melendez when he met with Ocasio and his union delegate to inform them of the suspension.

The Commission has held that "[c]oincidental timing can be indicative of discriminatory motivation." *Meek v. Essroc Corp.*, 15 FMSHRC 606, 612 (April 1993); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 992 (June 1982); *Chacon, supra* at 2511. However, in these cases there were other indications of discriminatory intent. Here there is nothing else.

Accordingly, I conclude that the Complainant has not met his burden of proving that his suspension was based in any part on his refusal to enter a dangerous area. Furthermore, I conclude that even if Mr. Ocasio had established a *prima facie* case, the company has successfully rebutted the case by proving that the suspension was for the confrontation with Garcia on April 20 and not for the refusal on April 18, which the person suspending him did not even know about.

ORDER

Since the Secretary has failed to show that Mr. Ocasio's eight day suspension was, in any part, the result of his refusal to enter a restricted area, it is ORDERED that the complaint of the Secretary filed on behalf of Benito Ocasio Hernandez against San Juan Cement Company under Section 105(c) of the Act is DISMISSED.

T. Todd Hodgdon
Administrative Law Judge
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