FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 19, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2001-24-D
ON BEHALF OF	:	NORT CD 2000-04
DONNIE LEE LOWE,	:	
Complainant	:	
v.	:	
	:	
ISLAND CREEK COAL COMPANY,	:	VP #8 Mine
Respondent	:	Mine ID 44-03795

DECISION

Appearances: Alfred R. Hernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Stephen M. Hodges, Esq., and Eric R. Thiessen, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Donnie Lee Lowe, against Island Creek Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Abingdon, Virginia. For the reasons set forth below, I find that Island Creek did not take any adverse action against the Complainant because he engaged in activities protected under the Act.

Background

The VP No. 8 Mine is a large, underground coal mine operated by Island Creek Coal Company in Buchanan County, Virginia. It was created when the VP No. 5 and VP No. 6 mines were connected in the middle. It has more than 37 miles of tunnels, approximately nine and one half miles of electrified track and seven and one half miles of belt line. Coal is produced by two continuous miner sections and one longwall section.

The mine can be entered by two portals, the Deskins portal and the Garden portal, which are five and one half to six miles apart on the surface. Each portal has two shafts, an "A" shaft for the removal of coal and a "B" shaft for the entry and exit of miners.

Underground traffic in the mine is controlled by a dispatcher located in an office on the surface near the Garden portal. A dispatcher must be on duty at all times during a shift. There is one dispatcher for each shift. Donnie Lee Lowe was the day shift dispatcher in April 2000. He also was a miners' "walk-around representative."[1]

On April 12, 2000, Lowe accompanied MSHA Inspector Ronald Blankenship on an inspection as a walk-around representative. The inspection ended on the surface at the Garden portal "B" shaft at 2:45 p.m. Shift foreman William Akers directed Lowe, through company Safety Inspector Mike Canada, to finish out the shift shoveling coal along the belt line at the bottom of the "A" shaft. Although he told Canada that he wanted to return to dispatching, Lowe went down the "B" shaft and walked to the "A" shaft to perform the assigned work. By the time he arrived the shift was over, so he never did any shoveling.

On April 13, 2000, Lowe served as a walk-around representative with MSHA Inspector Randall Ball. The inspection terminated around 1:00 p.m. on the surface at the Garden portal. Akers told Canada to take Lowe back to the belt line, to make sure that Lowe was properly task trained in shoveling and to have him shovel the belt. Lowe shoveled for a short time until the shift was over.

On April 14, 2000, Inspector Ball arrived at the Deskins portal to inspect the surface areas. Lowe elected to serve as walk-around representative for the inspection. To do that he had to travel from his office at the Garden portal to the Deskins portal. On the surface this would have taken between 15 and 20 minutes. However, Lowe was advised that no surface transportation was available so he had to travel through the mine by rail car which took a little over an hour. When he arrived, the inspection had been completed. Akers assigned Lowe to spot clean along the belt line near the Deskins "A" shaft.

On all three occasions, Lowe was replaced as dispatcher by Johnny Baker. At that time, Baker's regular position was as a belt man, whose main job was shoveling along the belt line.

In his complaint filed with the Commission, Lowe claimed that the Respondent had required him "to perform work that was more laborious than his typical job duties required, and which [he] would not perform when he did not act as a representative of miners."[2] (Comp. at 2.)

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[1] Section 103 (f) of the Act, 30 U.S.C. § 813(f), provides that: "[A] representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine."

[2] Lowe's original discrimination complaint, filed with MSHA, was not included in any of the pleadings in this matter, nor was it offered as an exhibit at the hearing.

He averred that these "actions by Respondent and its personnel constituted unlawful and discriminatory conduct . . . ."[3] (*Id.*)

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination under Section 105(c)(1) 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. *Driessen v. Nevada Goldfields,* Inc., 20 FMSHRC 324, 328 (April 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *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). 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*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

There can be no doubt that when he served as a walk-around representative, Lowe was engaging in protected activity. Indeed, the Respondent does not dispute that fact. The issues to be decided in this case, then, are whether Island Creek took any adverse actions against the Complainant, and, if it did, whether it did so because he acted as a walk-around representative. I find that while the Complainant may have shown that being required to shovel the belt line was adverse, he has not met his burden of demonstrating that the adverse action was taken as the result of his protected activity.

[3] Lowe also alleged in the complaint that such discriminatory action took place when he served as a miners' representative on April 19 and 20, 2002. However, those allegations were withdrawn at the hearing. (Tr. 19-20.)

Was the Action Adverse?

The complainant asserts that because shoveling the belt line is harder work than being a dispatcher and is more dangerous because it is underground, his temporary assignments to perform that function after serving as walk-around representative constituted adverse action. He relies on *Secretary of Labor on behalf of Glover and Kehrer v. Consolidation Coal Co.*, 19 FMSHRC 1529 (September 1997), for this proposition.

In *Glover*, two long-time "scooter barn" mechanics were transferred to positions as underground, section mechanics. Both had been serving as walk-around representatives, which took up about two-thirds of their time while at the mine. They were initially informed that they were being transferred because of their walk-around duties. Later, they were told that the "official" reason for the transfers was to make the scooter barn more productive. In affirming the judge's decision that they were discriminated against, the Commission held that "the transfer of these two longstanding scooter barn mechanics to a more dangerous assignment on the section was adverse." *Id.* at 1535.

There is, however, one major difference between this case and *Glover*. Lowe was not transferred to the position of belt man, but was temporarily assigned to perform that function to complete his shift after serving as a walk-around representative. In the first instance, there was so little time left that he did not have to do any shoveling. The second time, he only worked for a short while and the third time, while the evidence is not clear, it appears that he spent several hours underground. While the permanent transfer to a more dangerous assignment may be adverse, it does not necessarily follow that a temporary assignment to a more dangerous position is adverse, particularly in an area like underground coal mining where almost all jobs are dangerous and somewhat arduous.

Nonetheless, it is not necessary to decide whether having to shovel the belt line constituted adverse action. Even giving the Complainant the benefit of the doubt and assuming that it was adverse, he has failed to meet his burden of demonstrating that the action was taken because he engaged in protected activity.

Did Lowe Establish a Prima Facie Case?

There is no doubt that Lowe would not have been assigned to shovel if he had not been serving as walk-around representative. One ineluctably followed the other. But, that does not mean that the task was given to him because he engaged in protected activity. For example, if Lowe had gone from his dispatcher's position to perform some public relations function for the company and was assigned to shovel belts when he returned, while the one would be the direct result of the other, there could be no claim of discrimination because performing a public relations function would not be engaging in protected activity. Thus, the Complainant must demonstrate that his assignment was not merely because he had left his dispatcher's job to do something else, but because he was engaging in the protected activity of serving as a walk-around representative.

Clearly, the reason for Lowe's assignment rests with Akers' intent or motivation at the time he gave Lowe the assignments. Since it is obviously very hard to discern what a person is thinking, the Commission has set out some guidelines for determining motivation. Thus, it recently stated:

> We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.*

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (September 1999).

The Complainant has established that Akers knew that he had served as a walk-around representative and that there was a coincidence in time between his serving as a walk-around representative and the adverse action. This is sufficient to meet his burden of establishing a *prima facie* case. To rebut this, the company has presented evidence to show that the adverse action was not motivated by the protected activity.

Did Island Creek Rebut the Complainant's Prima Facie Case?

Akers testified that the reasons he assigned Lowe to shovel the belt, rather than returning him to his job as dispatcher, were: "[R]eason number one, I had no vacancy as a dispatcher. That position was already filled. Two, it just wasn't efficient to displace a second time a man that could be working." (Tr. 164.) He also stated that he did not assign Lowe to belt cleaning duties to punish him or to try to dissuade or discourage him from being a walk-around representative. (Tr. 163.) Thus, the company asserts that it required Lowe to finish his shift in a position other than dispatcher for business reasons and not to harass him because he had acted as a walk-around representative.

As the Commission has long held, when a business justification is given as the reason for an action, "[o]ur function is not to pass on the wisdom or fairness of such asserted business justifications, but rather to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982,

993 (June 1982). In determining whether a business justification is credible, the Commission has offered the following guidance:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether credible justification figured into the motivation and, if it did, whether if would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . ., then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to [take the adverse action].

Chacon at 3 FMSHRC 2516-17 (citations omitted).

Finally, the Commission has cautioned that:

> [T]he reference in *Chacon* to a "limited" and "restrained" examination does *not* mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intend that a judge, in carefully analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator.

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (November 1982).

I find that Island Creek's averred business justification for the challenged adverse action is entirely plausible and credible. Lowe occupied a unique position at the mine which accounts

for the company's actions toward him. Further, contrary to his assertions, Lowe was not treated differently than other walk-around representatives. Finally, there is no evidence that the company, generally, or Akers, specifically, had any animus or hostility toward walk-around representatives.

Island Creek is required by MSHA to have a dispatcher on duty at all times. That meant that when Lowe served as a walk-around representative, he had to be replaced. The company asserts that it was inefficient to replace the replacement by returning Lowe to dispatcher at the conclusion of his walk-around duties. No evidence was presented that any other walk-around representatives occupied jobs that required the position to be filled at all times. Since Lowe occupied the only position at the mine required to be performed at all times, the company's justification must be viewed in that context. I find that in such a situation its actions were reasonable.

Further, there is no evidence to show that Lowe was treated differently than other walk-around representatives. Johnny Baker and Danny Lyons both testified that they had served as walk-around representatives. Baker, as has already been noted, was a belt man and Lyons was an electrician. At the hearing, the Complainant attempted to show that he was treated differently than they when serving as a walk-around representative. This attempt fails for two reasons. In the first place, to show disparate treatment the Complainant would have to show that he was treated differently than similarly situated miners, that is, miners who served in a position that required that they be replaced when absent. Clearly, neither Baker nor Lyons served in such a position and no evidence was offered concerning any other walk-around who did.

Secondly, neither Baker nor Lyons testified that they always returned to the same job they had been performing before serving as a representative. When asked if he always returned to his classified position, Baker responded: "No, sir, not every time but most of the time I did go back but not every single time." (Tr. 130.) He further related that he had done such things, after completing his walk-around duties, as replacing a man at A shaft, picking up trash and moving a motor, none of which were his classified duties. Lyons testified that he did not always return to the particular job he was working on, but sometimes went to the electrical shop and performed maintenance to finish his shift. (Tr. 150-51.)

Moreover, although both Baker and Lyons had served as a walk-around representative numerous times, neither of them testified that they had ever had any adverse action taken against them by the company for doing so. Nor was any evidence offered that either the company or Akers had ever expressed any animosity or demonstrated any hostility toward walk-around representatives.[4]

[4] Baker and Lyons also testified that they were not aware of any animosity or hostility directed toward Lowe as a walk-around representative. (Tr. 132, 153.)

Finally, the Complainant spent a lot of time at the hearing and in his brief trying to demonstrate that it would have been just as easy, if not easier, to return Lowe to his dispatcher position as to have him return underground. To reach this conclusion, however, requires that the judge substitute his business judgment, views of good business practice or notions of fairness for that of the operator. This is precisely what the Commission has counseled against doing.

For the reasons discussed above, I find that Island Creek's justification for having Lowe finish out his shifts on April 12, 13, and 14, 2000, shoveling the belt line was not so weak, implausible or out of line with normal practice that it was a mere pretext to disguise the company's discriminatory motive. Therefore, I conclude the Respondent has successfully rebutted the Complainant's *prima facie* case.

Conclusion

There is no dispute that the Complainant engaged in protected activity. For the purposes of this decision, it is also assumed that his being required to shovel the belts was adverse. In addition, the Complainant has shown that Island Creek knew that he had engaged in protected activity and that there was a coincidence in time between the protected activity and the adverse action. However, the Respondent has rebutted the Complainant's claim of discrimination by credibly showing that it had a non-discriminatory reason for requiring Lowe to finish his shifts shoveling the belt line.

Order

Accordingly, since the Complainant has not established that the company took adverse actions against him because he engaged in protected activity, it is **ORDERED** that the complaint filed by the Secretary of Labor on behalf of Donnie Lee Lowe against Island Creek Coal Company is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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