FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 9, 2002

JOHN R. PETERSON,	:	DISCRIMINATION COMPLAINT
Complainant	:	
	:	Docket No. WEST 98-307-DM
v.	:	WE MD 98-04
	:	
SUNSHINE PRECIOUS METALS, INCORPORATED,	:	Sunshine Mine
	:	Mine ID 10-00089
Respondent	:	

DECISION

Appearances: John R. Peterson, Coeur D'Alene, Idaho, *pro se*;
Fred M. Gibler, Esq., John S. Simko, Esq., EVANS, KEANE, Kellogg, Idaho, on behalf of Respondent.

Before: Judge Cetti

This case is before me upon the complaint of discrimination filed by John R. Peterson, pursuant to Section 105(c)((3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.§ 801 *et seq.*, the "Mine Act." In his original complaint filed with MSHA, Mr. Peterson states that on September 16, 1997, while employed as a Gypo contract miner by the Sunshine Mining Company, he was discharged for insubordination. His original complaint to MSHA states the date of the alleged discriminatory action occurred with his discharge on September 16, 1997.

Peterson was reinstated by Sunshine Mines to his position as a Gypo contract miner, working in the stope of his choice, in October 1998. This reinstatement was pursuant to an arbitration finding and award which Peterson's union pursued and obtained on Peterson's behalf. Pursuant to the Finding and Award and a later settlement agreement, Sunshine paid Peterson total back wages of $52,748.80, less the standard government's required deductions. The settlement was approved by the arbitrator who heard the case and issued the findings and award. (Complaint Ex. 1)

The final event that occurred just prior to Peterson's discharge involved the abatement of Citation No. 4135775, received in evidence as Complainant's Exhibit 6. The citation was issued to Sunshine Mine on September 4, 1997, and required the ventilation problem described in the complaint to be corrected by September 7. The ventilation problem was caused by waste rock that the miners placed in a drift that was the exhaust drift for an underground shop, which

maintained and serviced three loaders that were kept at the shop. This shop was located in Peterson's stope, in an area close to where he was mining. For some unknown reason, the citation was not abated by the date specified in the citation. Peterson first learned of the citation from his mining partner Mr. McNutt. Peterson's shift boss, Stan Mayo, as the first step in the abatement of the citation, instructed Peterson to install a fiberglass ventilation tubing in a mined-out area at the mine so the miners could move the blocking waste rock out of the exhaust drift of the shop into the mined out area. Ventilation of the mined out area was necessary for the miners to perform this work. Peterson's shift boss, Stan Mayo, needed this ventilation tubing installed as the first step in abatement of the citation and instructed Peterson to do that installation the first thing on the morning of September 9. The shift was half over when the shift boss Stan Mayo came to where Peterson was working and found that the ventilation tubing had not been installed. Peterson explained why the installation of the ventilation tubing had not been done. One of the primary reasons was he did not know where to obtain the needed ventilation tubing. Apparently neither Stan Mayo nor mine management believed him nor accepted his excuses as valid reasons to delay the installation of the needed ventilation tubing.

Peterson was given a five-day letter required by the Union contract before discharging him for his refusal to follow what mine management considered a direct order. The arbitrator, however, disagreed, and in his finding and award stated that Sunshine Mine had to offer something more to establish a "deliberate refusal" than the "speculative argument" that Peterson "could have" or "should have" known where to get the Y ventilation tubing. The Arbitrator therefore issued the Finding and Award reinstating Peterson and making him economically whole for all loss resulting from his discharge. Peterson, upon receiving the arbitrator funding and award wrote to the undersigned as follows:

> "Arbitrator James Reed has found in my favor, an unjust termination. He has awarded myself back wages at contract rate, my seniority, my choice of bids awarded while I was discharged, vacation, safety awards, holidays, medical and dental expenses while discharged."

Peterson was obviously pleased with the award but he still believes Sunshine should give him more back pay than the $52,748.80 gross amount back wages that Sunshine mine paid him, pursuant to the finding to award and the later settlement approved by the Arbitrator Reed who heard his case. (Resp's Exhibit 1)

At the hearing under the Mine Act, once it became clear to Peterson that there could be no recovery under the "Mine Act" for additional compensation for pain and suffering, the major issue that concerned the parties was whether or not Peterson had already received under the Arbitrator's Finding and Award and the latter approved settlement, the correct amount of back pay for loss resulting from his discharge. It is Respondent's position that Peterson has already been paid everything he could receive even if he were successful in proving his discharge constituted a violation of Section 105(c) of the Mine Act. For the reason stated in more detail below, I find Peterson has been paid in full for all economic losses that resulted from his discharge.

The union contract provides for the operator to set up an incentive pay system for Gypo contract miners where they can earn more than a day's pay. Under the incentive pay system, Sunshine Mine paid the Gypo miners additional wages called a "bonus" which was based on the number of feet the Gypo miner advanced the face of his respective stope. Under the system, the mine would periodic- ally set up a so-called contract for each stope that was ready for mining and set the price per foot for each particular stope as a bonus. The mine would then set out for bidding by the Gypo miners each of the stope contracts management prepared. The gypo miners bid on the stope they wished to mine. Mine management awarded contracts at each stope to the Gypo miners on the basis of the miner's seniority. Before bidding on this contract for a stope, each miner would team up with another Gypo miner to form a team of two for the purpose of bidding on the contract for mining the stopes of their choice. The bidding was awarded on the basis of the seniority of the senior member of each team. At times there would be a second team of Gypo miners working on the same stope but on a different shift. Thus the pay of each of the four miners would be based on the number of feet the four miners advanced the face of the stope. This advance would be measured periodically.

Adding vacation days and holidays, there apparently was a potential maximum of 2,208 hours of pay that Peterson could have earned during the time between his discharge and his reinstatement.

At the hearing, the judge asked Mr. Peterson if the wages to be paid to Gypo contract miners were set forth somewhere in the Union contract. Peterson responded "No" and emphatically elaborated his answer as follows:

Peterson: No, it's not. That's on the company's discretion, totally whether they like you or not.

Judge: What do you mean by that, "... at the company's discretion"?

Peterson: That means that they pay by the foot. But they don't gotta pay you the same as anybody else. They pay whatever they want to whoever they want per foot. Then they can do things like give somebody a two-yard loader, which–and only give you a one-yard loader to muck with. But you're only gonna haul half the rock of a two-yard loader. If they give somebody better equipment, a jumbo, they're gonna get drug away faster that you are with a jack leg. And a jumbo has a ten-foot steel on it, and a jack leg that you're manhandling has only got a six-foot steel on it.

Sunshine Mine first paid Peterson $40,048.80 for his loss of wages from the time between his discharge and his reinstatement. This amount was reduced by reimbursement of $6,360.00 for Idaho State Unemployment, which he received during the time he was off. There were also the standard government wage deductions required by law, as set forth in Respondent's

Ex. B. This figure of $40,048.80 was based on Peterson's past performance and earnings during the 18 months he worked for Sunshine Mine as a Gypo contract miner before his discharge. Under the facts of this case, it was proper to use past earnings to compute Peterson's wage loss resulting from his discharge. Any other method of computing wage loss under the fact of this case would involve considerable unacceptable speculation. Peterson's average earnings prior to his discharge were 1.584311 times a regular day's pay, which at that time was $10.45 per hour. Claimant's Ex. 3. His average pay was therefore approximately $17.00 per hour, which resulted in the $40,048.80 first paid to Peterson. However, the union, through intense negotiation with Respondent, was able to obtain an additional $12,700.00 of back wages for Peterson. The $12,700.00 was paid pursuant to settlement of his loss approved by the trial arbitrator. Peterson cashed each check of back wages he received from Sunshine, but before cashing each check, he wrote on the back of the check "partial payment." Peterson was paid a total of $52,748.80 which was about $25 per hour. Peterson contends he should have received the same amount of pay as his replacement. However, there was no replacement as such. The stope that Peterson now says he would have bid on if he were working for Sunshine at the time that contract was passed out for bidding was contracted out to a truly "independent contract company, the "Atlas Faucet Contracting Company," (Atlas Faucet), which had two employees who were paid by Atlas Faucet. There is no evidence as to what those two Atlas Faucet employees received in the way of wages. The only evidence available was the amount Sunshine paid the independent contractor, Atlas Faucet Contractors Company. Out of what Sunshine paid Atlas Faucet came not only the wages Faucet paid their two employees who did the mining but also the burden an employer carries such as workers' compensation, health insurance, holiday and vacation pay, and perhaps some profit.

Peterson had no medical or dental expenses.

On review of all the relevant evidence, I find that Respondent Sunshine Mine paid Peterson for his economic losses resulting from his discharge. He has been made "whole" economically. Sunshine Mine paid Peterson for all economic loss that could potentially be payable to him if he were to win his claim under the Mine Act.

Peterson stated several times that Sunshine management acknowledged that he was a productive worker. He then asks, "Why did they fire me?" It appears that a large part of the answer to his question can be found in Peterson's Exhibit 1, the favorable decision, findings, and award that his friend Lavern A. Milton, Subdistrict Director of United Steel Workers of America, was able to obtain for him in the arbitration proceeding. The arbitrator James C. Reed in his 11-page decision stated the following at page 2:

> During his tenure at the mine, which was about one and one half years, he displayed a work disciplinary record that, to say the least, was not exemplary. Starting in January 1997 with an attendance problem. Again in June another safety violation. In September another attendance problem.

> His personal record shows a history of twenty seven (27) days absent for various reasons. Counseling in May 1997 for harassment of other employees. Counseling in May 1977 for absenteeism. Counseling again for absenteeism in June, and at this session he was advised of the Company's employee assistance program. In June 1997, the Grievant was observed and tested for alcohol while on duty. He was removed from work for that shift. Later a grievance was filed for that incident, but it has nothing to do with this grievance concerning the Grievant's discharge. Again in August 1997 the Grievant was charged with another safety violation. In August of 1997, he was instructed to install a vent line and the work was not done two days later. Some of these items in the Grievant's record are merely notes to the file, and some are pending grievances, but the overall record are merely notes to the file, and some are pending grievances, but the overall record of this Grievant is still that of a less than good employee.

With respect to the employer's position , the Arbitrator on page 3 of his decision stated:

> The Grievant was expected to install the vent line system as a part of his job as a contract miner. It is not unusual for a work assignment of this nature and the 52-pound "Y" is light enough for one person to install, and if the Grievant needed help, he could have asked the nipper to help him.
>
> Instead of asking for help, the Grievant simply decided on his own to not install the vent line and instead installed rock bolts in the ceiling of S76A Stope, a task, which according to testimony by the Company, was not necessary at the time. The Grievant was not required to work by himself; he had plenty of help available to him.
>
> The grievant was issued a corrective action memorandum for failing to perform work as instructed. The decision to terminate the Grievant was made after reviewing his entire work record, as indicated in the Collective Bargaining Agreement at Article 15.13, where if the Grievant in question has less than five years seniority, as in this case, his entire
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> work record may be considered when the Company is making a determination concerning discipline of the Grievant.

On page 4 the Arbitrator in his decision states:

> There is also the matter of the Grievant's position on the incident changing over time. At step four of the grievance proceedings, he, or the Union,

argued that he could not hang the vent line by himself. But at hearing, the reason changed to-he did not perform the task as directed because he could not find the "Y" fitting. This position of the Union's at hearing was contradicted by the nipper's testimony that he knew where the fitting was and would have assisted the Grievant if required.

The discharge of the Grievant was appropriate since he, without a justifiable reason, disobeyed a direct order given him by the Company, which is a basis for discipline under Section 23.3 of the CBA. In addition, given the Grievant's 18-month work history, discharge was the appropriate outcome.

In the end, the Grievant could very well have done the task assigned to him if he had elected to do it. The "Y" fitting did not weigh 90 pounds as the Union argued; it weighed 50 pounds. The Grievant was not required to work alone as he has stated, instead, there was help available from the nipper if he needed it. But according to the nipper's testimony, he was never asked to help.

The Grievant made excuses why he did not install the vent line. He testified that he couldn't find the fitting, yet his partner and nipper, who worked here less than a year, knew where it was. He said he had to install the rock bolts for safety reasons, yet the Union safety representative testified it was not necessary to install the rock bolts before installing the vent line. He also said he did not have a loader to assist him, yet the nipper and his partner both had loaders.

The Grievant's testimony was brief, but a few matters became evident. Despite Article XXVI of the CBA he felt he was more competent to manage the Mine than management. His work record shows over the short period of his employment he failed to follow orders on other occasions and felt that he was "above" the work he was required to do.

In the end, there is not much question that the Grievant is a lousy employee and eventually he will be terminated for something, but not this time. There is simply not enough evidence to determine that the Grievant deliberately refused to change the ventilation system. It was a job that, according to testimony, would have taken him only about 20 to 30 minutes and it just doesn't make any sense that, unless he simply did not know where to find a "Y" he would have not installed it.

Peterson did participate in a meeting with management involving the potential disciplinary action against him for absenteeism. This occurred on June 18, about three months before he was discharged. At that meeting, Peterson asked for the telephone number and address

of MSHA but no one responded to his question. However, he could have easily gotten this information from the safety department or from one of his fellow miners who was a representative of the union. I do not believe his request for MSHA's phone number and address constituted protected activity. Peterson, at no time, called MSHA nor did he discuss any problem with an MSHA representative before his discharge.

CONCLUSION

On review of the record, I find that there is no persuasive, credible evidence of protected activity prior to his discharge. Assuming argumento that there was protected activity, there is no direct or indirect circumstantial evidence from which to draw any reasonable inference that the adverse action was motivated in whole or in part by protected activity. The complaint is **DISMISSED**.

August F. Cetti
Administrative Law Judge

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