

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

November 21, 2002

JAMES WOMACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 2002-138-DM
	:	WE MD 01-17
GRAYMONT WESTERN US,	:	
Respondent	:	Tacoma Plant
	:	Mine ID 45-03290

## ORDER REQUESTING ADDITIONAL INFORMATION

The hearing in this matter was conducted in Seattle, Washington on October 2 and October 3, 2002. James Womack began working for Graymont Western US (Graymont) on January 13, 1987. The record reflects Womack initially sustained a work related injury to his lower back on July 26, 1999. (Comp. Ex. 1). Womack also sustained work related burn injuries to his neck, face, back and arms on August 4, 1999. (Comp. Ex. 2). Womack received reimbursement of expenses for medical treatment and medicine for his job related injuries from the State of Washington Department of Labor and Industries (L&I) under Claim No. X445116. (Resp. Ex. 9).

Womack continued to work as a kiln operator while he received L&I benefits for the treatment of his back condition. However, Womack was placed on light-duty in recognition of his physical limitations. Graymont placed Womack on medical leave on September 21, 2001, after Womack's doctor, Gary Henriksen, provided information that the Flexeril and Darvocet prescribed for Womack "may cause drowsiness." (Comp. Ex. 9). Womack was awarded L&I disability compensation benefits as of the date he was put on medical leave. Womack's eligibility for L&I compensation was terminated effective July 8, 2002, after the medications he was taking for his back condition were discontinued.

On August 14, 2002, Womack's union representative furnished Graymont with Womack's latest ability-to-work report. Dr. Henriksen imposed lifting, pulling, and pushing restrictions of 35 pounds. Henriksen's report noted: "Patient is on NO medications that will impair his balance, judgement, or reaction time." (Comp. Ex. 20). At the hearing, Graymont stated that it was unable to determine if Womack was physically capable of returning to his job because it had not received sufficient information about his current medical condition. The record was left open for Womack to provide Graymont with additional information.

Womack provided an additional statement from Henriksen dated October 7, 2002. Henriksen, repeating Womack's limitations of lifting no more than 35 pounds, indicated Womack was capable of moderate activity levels. Henriksen expressed concern regarding Womack's ability, given the nature of his back impairment, to push or pull heavy ash balls from the kiln with a 20 foot poker.

In a letter dated October 18, 2002, Graymont informed Womack that it had hired a certified rehabilitation counselor to perform a kiln operator job analysis. Based on the job analysis and the information provide by Dr. Henriksen, Graymont concluded Womack could not perform the essential elements of the kiln operator job with or without a reasonable accommodation. Consequently, Womack's employment was terminated effective October 22, 2002.

Thus, a central post-hearing issue in this proceeding is whether Graymont's termination of Womack is a violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(1). Section 105(c)(1) of the Act provides, in pertinent part:

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 . . . subject to this Act because such miner . . . has filed or made a complaint under or related to this Act . . . including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

Womack contends that Graymont's decision to terminate his employment rather than reinstate him to the restricted duties he had performed in the past is motivated by activities he engaged in that are protected by section 105(c) of the Act. As a general proposition, Womack has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Act. In order to establish a *prima facie* case, Womack must demonstrate that he participated in protected safety related activity, and, that the adverse action complained of was motivated, in some part, by that protected activity. See *Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Graymont may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Graymont may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, and, that it would have taken the adverse action for the unprotected activity alone. See also *Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

In view of the fact that Graymont's decision to terminate Womack occurred after the initial hearing, it is necessary for **both parties** to furnish additional documentation. In this regard, the record reflects that L&I reports concerning Womack's medical condition and treatment were sent to both Womack and Graymont. Accordingly, the parties are requested to provide the following:

**ALL Copies** of reports received from L&I with respect to medical diagnoses, physical limitations, and reimbursements for medical treatment and medicine during the period from July 1999 to the present.

**ALL Copies** of physician examination reports and ability-to-work reports for Womack provided to Graymont, including all physician reports detailing Womack's physical limitations, during the period from July 1999 to the present.

**IT IS ORDERED** that the above information be provided **within 21 days of the date of this Order**. Womack should provide copies of the documentation submitted in response to this Order to Graymont's counsel. After the above information is received from both parties, I will schedule a telephone conference to determine if the hearing should be reconvened, or, whether post-hearing briefs should be filed.

Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

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