

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 13, 2003

JASON C. SHEPERD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-466-DM
	:	RM MD 02-13
	:	
v.	:	Mine I.D. 48-00243
	:	Casper Plant
BLACK HILLS BENTONITE,	:	
Respondent	:	

DECISION GRANTING RESPONDENT’S MOTION TO DISMISS
ORDER OF DISMISSAL

Before: Judge Manning

This proceeding was brought by Jason C. Sheperd against Black Hills Bentonite (“Black Hills”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (“Mine Act”) and 29 C.F.R. § 2700.40 *et seq.* Mr. Sheperd alleges, in part, that on August 9, 2000, he sustained a serious injury to his neck “while throwing 100 pound bags of bentonite” in Respondent’s Casper, Wyoming, plant. He contends that Black Hills showed no concern for his injury and continued to require him to perform hard physical labor, which exacerbated his injury. In its answer, Black Hills denies Mr. Sheperd’s allegations and maintains that he has not stated a claim that can be remedied under section 105(c)(3) of the Mine Act.

After taking Mr. Sheperd’s deposition, Black Hills filed a motion to dismiss this case. Mr. Sheperd opposes the motion. Because I find that Mr. Shepherd has not stated a claim that can be granted relief under section 105(c) of the Mine Act, I grant the motion to dismiss. The facts described below are facts that are not in dispute or are facts provided by Mr. Sheperd.

I. BACKGROUND

In March 2000, Mr. Sheperd, who is now 33 years old, began working at the Casper Plant as a loader operator/laborer. He believed that eventually he would become a plant operator. This plant mills bentonite clay for use in kitty litter and other products. At some point in time, Shepherd suffered a back injury while moving a conveyor belt. On August 9, 2000, Sheperd was throwing heavy bags onto the bed of a truck when he strained his neck. His neck hurt so much later that day, that he could not move it. The plant operator recommended that he see a doctor. A doctor diagnosed the injury as a strained muscle in his neck. The doctor prescribed several medications and gave Sheperd a letter stating that he could return to work as long as he was assigned “light duty” tasks.

Mr. Sheperd alleges that when he returned to work, he gave the light duty letter to the plant operator who handed it to the plant superintendent, Andy Mills. Mills “read it and laughed as he handed it back to me and said ‘if you can’t throw bags then you need to go home.’” (Sheperd’s Discrimination Complaint). Sheperd apparently left for the day, but returned to work the following day because he needed to support his two children. During his deposition, Sheperd stated that Black Hills did not provide sick leave and he had not earned any vacation leave. (Depo. 93-94). When Sheperd returned to work, Mills told him to go throw bags even though he knew of Sheperd’s work restrictions, knew that he was in pain, and knew that he was taking strong medication for the pain. Sheperd states that most of his work at the plant involved lifting 100 pound bags of bentonite. He also operated loaders and forklifts. In addition, Sheperd worked in the warehouse part of the time. He states that he performed these assigned tasks on succeeding days even though he was in severe pain and on prescription medications that cause drowsiness and alter one’s judgment. Sheperd states that he was given light duty work on some days. (*Id.* at 23-24). He did not ask anyone from management if he could be put on temporary total disability through the Wyoming workers’ compensation program because he did not know that it was available. (*Id.* at 96-97). As discussed below, he started collecting workers’ compensation after his back surgery.

Mr. Sheperd further states that he visited David Iszler, a doctor of chiropractic, on August 11, 2000, because his pain was increasing. Dr. Iszler gave Sheperd a light duty letter which Black Hills also ignored. Sheperd alleges that because he continued to perform strenuous work at the plant, the pain increased in his neck and lower back and his headaches intensified. His arms and legs also became numb. His legs gave out at the plant several times causing him to fall to the ground. The plant safety manager helped him up on one occasion. When Sheperd asked the safety manager for light duty work, he was told that only Mr. Mills could assign such work. Sheperd maintains that when another employee was injured at work as a result of falling from a truck, he was assigned light duty work

On August 13, 2000, Dr. Iszler issued a letter stating that Sheperd should be restricted from lifting more than ten pounds. Sheperd was still required to lift 100 pound bags and perform his other duties. Sheperd believed that he would be fired if he refused to do the assigned work. His supervisors told him that he had to lift the bags of bentonite because there was no other work available to him. (Depo. at 35-36). On some occasions, however, he was given tasks that did not involve heavy lifting but required him to be hunched over all day. *Id.* at 37. Sheperd stated that he stayed at work most days because he needed the money. Sheperd stated that other injured employees had been given light duty work at the Casper Plant, which consisted of sweeping and vacuuming. Sheperd believes that other employees who had been injured on the job were treated better than he was treated in spite of the four restricted duty notes he obtained from doctors.

One of the light duty letters from Dr. Iszler, dated October 19, 2000, stated “Jason Sheperd has been instructed to refrain from any heavy lifting until further notice.” (Depo. Ex. 1, p. 22). After that letter was given to Black Hills, Sheperd was transferred to Respondent’s HT

Plant because the company did not want him doing any more heavy lifting. (Depo. at 53). Sheperd stated that it was “a little lighter-duty work.” *Id.* at 54. He had previously been offered a position at the Black Hills plant in Worland, Wyoming, but he turned it down despite the fact that the work at that plant was not very strenuous because he was hoping to get an easier operator job at the Casper Plant. *Id.* at 55-57. At the HT Plant, Sheperd was required to lift empty pallets weighing about 50 pounds, but he was not required to lift or carry 100 pound bags of product. *Id.* at 61-62.

At some point after October 19, 2000, Sheperd began seeing Dr. Kenneth Pettine of the McKee Medical Center in Casper. On March 7, 2001, Sheperd underwent surgery as a result of his injuries: a “posterior lumbar interbody fusion from L4 through L5-S1.” (Ex. A to Sheperd’s response to motion to dismiss). On the same day, he underwent a “C6-7 anterior cervical fusion.” *Id.* His last day at work before the surgery was about February 28, 2001. Sheperd had to return for more surgery on March 9, 2001, because “the screws were impinging into the aorta and were very close to and touching the iliac veins.” *Id.* He was given ongoing physical therapy and never returned to work after the surgery. He was placed on temporary disability by the State of Wyoming’s Division of Workers’ Safety and Compensation. In addition, he continued to receive health benefits from Black Hills. On March 26, 2002, the State of Wyoming issued a final determination of permanent partial disability benefits based on a 45% impairment of the whole person. Sheperd’s employment at Black Hills was terminated on or about April 30, 2002, because his impairment rating precluded him from returning to his job. Sheperd believes that he could do office or lab work for Black Hills. (Depo. at 75-76).

On May 10, 2002, Sheperd filed his discrimination complaint with MSHA alleging that he had been terminated from his employment and that the date of the alleged discriminatory action was August 9, 2000. MSHA notified Sheperd on July 1, 2002, that it determined that he had not been discriminated against.

Sheperd states that he engaged in protected activity after his injury when he told his supervisors that he could not lift heavy bags of bentonite. He states that he did not know that he had the right under section 105(c) of the Mine Act to refuse to work “for fear of my health or safety or for those around me.” *Id.* at 14, 35-36. He states that if he had known about section 105(c) rights, “I would have just stood there and not worked, especially with all of these narcotic prescriptions, driving the loader at night, you’re dizzy, you’re light-headed, blurred vision, you’re driving on narcotics, you could run someone over.” *Id.* 105. Sheperd believes that he was a safety hazard to himself and others after his injury but he did not go home because “that doesn’t pay the bills.” *Id.* 116. Sheperd states that Black Hills took adverse action against him by making him work even though his supervisors knew that his doctors advised the company that he could only perform light duty work. *Id.* at 39. Sheperd believes that Black Hills’ failure to honor the light duty releases constituted adverse action.

On December 11, 2002, MSHA received a hazard complaint under section 103(g)(1) of the Mine Act. The complaint alleged that since 1999 a number of employees working for Black

Hills had been under the influence of pain medications that could impair their abilities to work safely. On January 2, 2003, MSHA issued a citation at each of Black Hills' three plants alleging a violation of 30 C.F.R. § 56.20001. The citations state that the "operator has allowed employees to work while taking narcotics." The narcotics alleged to have been taken are various prescription medications. Section 56.20001 provides, in part, that persons "under the influence of alcohol or narcotics shall not be permitted on the job." Black Hills contested these citations under 29 C.F.R. § 2700.20.

II. ANALYSIS OF THE ISSUES

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine 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 mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend 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.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In its motion to dismiss, Black Hills argues that Sheperd did not engage in any protected activity and, in the alternative, that he did not suffer any adverse action as a result of engaging in protected activity. Black Hills argues that in order to exercise the right to refuse to work, the complainant must have a good faith reasonable belief that the work involves a hazardous condition. It argues that a complainant's refusal to work because of a pre-existing medical condition does not qualify. In this instance, Sheperd did not actually refuse to work because he continued working in spite of his injuries. The Commission has held that a miner's absences from work due to a medical condition exacerbated by his job duties does not constitute a work refusal. It contends that Sheperd's claim that he did not know about his rights under section

105(c) is belied by the fact that he took annual refresher training on April 5, 2000, which included a section on section 105(c). Black Hills maintains that Sheperd did not refuse to perform his job and did not exhibit conduct manifesting a work refusal. Consequently, it argues that there was no protected activity in this case.

Black Hills also argues that, even if Sheperd established that he engaged in protected activity, he did not suffer any adverse consequences as a result of that activity. Neither telling a miner to keep working nor telling him to go home when he has suffered an occupational injury can form the basis for an adverse action under section 105(c). It argues that the Mine Act does not require continued employment or provide for disability benefits when a miner is not capable of performing a job because of the miner's physical limitations, even if these limitations are the result of an on-the-job injury.

Sheperd believes that he engaged in protected activity when he was ordered to perform tasks that he was physically unable to do and he was not told that he had a right to refuse to perform these tasks. Sheperd argues that he continued working only because he did not know that he had a right to refuse to work. He states that had he known that he could refuse to work, he would have "just stood there and not worked, especially with all of these narcotic prescriptions" he was taking. (Depo. at 105). Sheperd told his supervisors that he had injured his back while throwing the bags of bentonite but he continued working because Black Hills would not permit him to take time off with pay and did not advise him that section 105(c) gave him the right to refuse to work. By continuing to work while on strong prescription medications, he presented a safety hazard to himself and to others as evidenced by the citations issued by MSHA in January. He argues that the failure of Black Hills to assign him light duty tasks that would not require heavy lifting constituted an adverse action under the Mine Act.

I find that Sheperd did not engage in protected activity. A miner's absence from work due to a medical condition that is made worse by the miner's normal job duties does not constitute a work refusal. *Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 494-95 (Apr. 1988); *Dykhoff v. U.S. Borax, Inc.*, 22 FMSHRC 1194, 1199 (Oct. 2000). In *Perando*, Ms. Perando had contracted industrial bronchitis from her exposure to coal dust in the mine. She argued that her protected activity was her request to work in a less dusty environment coupled with her doctors' letters that stated that she should no longer be required to work underground. The Commission held that neither "Perando's acceptance of Mettiki's offer of extended sick leave nor her request while on sick leave for a transfer to a surface position constitutes a work refusal." 10 FMSHRC at 495. As in *Perando*, there was no work refusal here. Sheperd's request that he be given work that did not involve heavy lifting and the letters from his doctors asking that he not be required to lift heavy objects is not a work refusal.

Sheperd believes that if he had refused to work, his refusal would have been protected by section 105(c). The anti-discrimination provisions of the Mine Act were designed to protect a miner from having to work in the face of hazards created by his employer. For example, if a mine operator requires a miner to work around equipment that has exposed moving machine

parts that are not guarded, the miner could reasonably and in good faith refuse to perform work around the equipment until guards were installed on the machinery to protect him. Section 105(c) of the Mine Act protects against hazardous conditions present in the work environment that are under the control of the mine operator rather than problems related to a particular miner. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1519 (Aug. 1990) (Commissioner Doyle concurring). “While a particular miner may hold a good faith, reasonable belief that it is unsafe or unhealthy for him or her to [lift and throw heavy bags of bentonite because of a back injury he sustained at work or to operate equipment while taking prescription medication for his injury], I do not believe that these are rights protected by the Mine Act or that Congress intended the operator to be charged with discrimination for failing to accommodate them, irrespective of the seriousness of the hazard.” *Id.* The Mine Act was not designed to “provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries, would find working most jobs in the mining industry impossible.” *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1126 (July 1995) (ALJ).

Sheperd did not have the right under section 105(c) to refuse to perform his normal job assignments when management did not give him light duty work. Section 105(c) does not grant a miner the right to refuse his assigned duties because he is no longer capable of performing them as a result of an injury. The injuries that Mr. Sheperd sustained are obviously quite devastating and lamentable. Because of these injuries, he will no longer be able to perform the type of work that is typically required in the mining industry. Nevertheless, the Mine Act was not designed to remedy such problems. “It is clearly not the purpose of the Act, but rather worker’s compensation, social security disability, and other similar laws to provide loss of income protection under these circumstances.” *Collette*, at 1126.

It appears that Sheperd started taking strong prescription medicine such as muscle relaxers and pain medication after he was injured. MSHA issued citations in January 2003 as a result of these allegations. Sheperd may have created a hazard to himself and others because he continued working at the plant while taking these medications. This fact does not establish that Sheperd engaged in protected activity, however. It merely demonstrates that he was not capable of performing work that was required by his job while taking these medications.

Sheperd also alleges that he was treated differently from other injured employees because he was not given light duty assignments while other injured employees were. Assuming that to be the case, it does not change the result because there can still be no showing that he engaged in protected activity in this case. While such disparate treatment may have been unfair, the Commission has cautioned its administrative law judges that the “Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator’s employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act.” *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted). As discussed above, requiring Mr. Sheperd to perform his standard job duties after he was injured did not violate section 105(c) and there is no evidence that Black Hills failed to assign him light duty work because of activity protected under the Mine

Act. In addition, I cannot draw such an inference from the record in this case.

III. ORDER

For the reasons set forth above, Black Hills Bentonite's motion to dismiss is **GRANTED** and the complaint of discrimination filed by Jason C. Sheperd against Black Hills Bentonite under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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