FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 28, 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-147-D
ON BEHALF OF GARY BELVEAL,	:	DENV CD 94-03
Petitioner	:	
v.	:	Deserado Mine
	:	Mine ID 05-03505
WESTERN FUELS UTAH, INC.,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
J. Keith Killian, Esq., Keith Killian & Associates, P.C., Grand Junction, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a complaint of discrimination brought by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), on behalf of Gary Belveal against Western Fuels Utah, Inc., 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. Belveal engaged in activities protected under the Act, the Respondent was not motivated in any part by that activity when Mr. Belveal was placed on temporary total disability or reprimanded.

A hearing was held on July 24 and 25, 1995, in Grand Junction, Colorado. MSHA Inspectors Art C. Gore, Jr., and Gary W. Jones, miners Charles Cudo, John J. Jones, Curtis Roy and Bradley K. Allen, and the Complainant testified in support of his case. Western Fuels employees Roland Heath, Terry Gunderson and

Gelean H. Bell, and David F. Hamilton testified for the Respondent. In addition, deposition testimony of Paul W. Miller, M.D., (Govt. Ex. 1), and Ronald C. Pinson, M.D., (Resp. Ex. A), was presented. The parties also submitted briefs which I have considered in my disposition of this case.

FACTUAL SETTING

The basic facts are not disputed. As of the hearing, Gary Belveal had been employed by Western Fuels for nine and one-half years. Most of that time, and specifically during the fall of 1993 that is significant to this case, he worked as a roof bolter. Throughout his employment with Western Fuels he was an active member of the union. During the period when the activities resulting in this case occurred, he was the chairman of the union safety committee.

On September 28, 1993, Mr. Belveal injured his right knee stepping off of his roof bolting machine. He reported the incident to his immediate supervisor, but did not seek medical attention and continued performing his job as a roof bolter.

Prior to, and during, this period, Mr. Belveal had been participating in discussions between the union and management concerning the company=s Accident, Violation, Reduction Program (AVRP) which had apparently resulted in some miners being reprimanded by the company for accidents that they reported. It was the union=s position that this program was similar to one which Consolidation Coal Company had in effect at its Dilworth Mine and which a Commission judge had determined to be facially discriminatory in violation of Section 105(c) of the Act.[1]

Unable to reach an accord about the implementation of the AVRP, the Complainant, with other union members, filed a 105(c) complaint concerning the program with the local MSHA office on October 6, 1993. On or about October 8, Mr. Belveal informed mine management that the complaint had been filed.

In the meantime, Mr. Belveal=s knee had not shown any signs of improvement and he decided to go to the doctor. On October 11, he told Gelean Bell, a safety specialist who handled workman=s compensation claims for the company, that he wanted to see a doctor the next day. She told him to tell his supervisor when he was going so that his supervisor could accompany him to the appointment.

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[1] *Swift et al v. Consolidation Coal Co.*, 14 FMSHRC 361 (Judge Melick, February 1992). This decision was subsequently reversed by the Commission. *Swift et al v. Consolidation Coal Co.*, 16 FMSHRC 201 (February 1994).

Mr. Belveal made an appointment with Dr. Miller for 9:00 a.m. on October 12. He worked the midnight shift on October 11-12, getting off of work at 7:00 a.m. He did not tell his supervisor that he had a doctor=s appointment, although he did mention it to Ed Daniels of the safety office in the course of discussing some non-related safety issues with him prior to leaving for the appointment.

Mr. Belveal went to his appointment with Dr. Miller unaccompanied by anyone from the mine. Dr. Miller diagnosed that the Complainant had a strained anterior cruciate ligament and prescribed a knee brace and Relafen, an anti-inflammatory medication. He also instructed Mr. Belveal not to do a lot of bending, stooping or lifting, to work only on flat surfaces and to return to see him in a week.

During the visit, Dr. Miller had a telephone conversation with Roland Heath, the mine superintendent, concerning what Mr. Belveal would do on his return to work. While all agreed that he would return to full time work, but not full duty, *i.e.* that he would be working full time but not performing all of the functions required of a roof bolter, there was confusion as to exactly what type of job he would be performing. Notwith-standing, Mr. Belveal returned to work as a roof bolter. His partner, Brad Allen, tried to do as much as he could to help him. Other than initally discussing it with Mr. Gunderson, Mr. Belveal made no further attempts to be placed in some other type of work.

Mr. Belveal returned to see Dr. Miller on October 19, as scheduled. Dr. Miller concluded that his knee had not improved and referred him to an orthopedic specialist. When the doctor called Gelean Bell to tell her what he was doing, she told him to tell Mr. Belveal that he was on disability. In his chart, Dr. Miller indicated that Mr. Belveal could return to work the next day, subject to the findings of the orthopedist.

The Complainant saw Dr. Pinson, the orthopedist, the next day, October 20. Dr. Pinson determined that Mr. Belveal should not return to work until he saw him again on October 28. When Dr. Pinson examined Mr. Belveal on October 28, he concluded that the Complainant could return to work. During the period from October 20 to October 28 that he did not work, the Complainant received workers= compensation wage loss benefits for total temporary disability.

Because he had not been given duties driving a tractor as had fellow roof bolters Chuck Cudo, when he injured his hand, and John Jones, when he injured his left knee, Mr. Belveal began inquiring into the mine=s practices concerning injuries. He

concluded that the company was not properly reporting injuries to MSHA and discussed the matter with Bob Hanson, the safety director. Concurrently, he filed the instant 105(c) complaint on November 15, 1993. He also filed a 103(g) complaint[2] concerning injury reporting with MSHA on November 24, 1993. As a result of the 103(g) complaint, MSHA investigated the matter and issued two citations to the company for improperly reporting injuries. (Govt. Exs. 3A and 3B.)

Sometime during the last week of November and the first week of December 1993, Mr. Belveal and Mr. Allen brought to the attention of their foreman a concern that some of the entries in the mine were in excess of the permitted width. Not receiving satisfaction from him, they took the matter to their shift

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[2] Section 103(g)(1) of the Act, 30 U.S.C. ' 813(g)(1), provides, in pertinent part:

> Whenever a representative of the miners . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such . . . representative shall have a right to obtain an immediate inspection by giving notice to the Secretary . . . of such violation or danger. Any such notice shall be reduced to writing, signed by the representative . . . and a copy shall be provided the operator or his agent no later than at the time of the inspection . . . . The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification . . . .

foreman, Mr. Gunderson. He proposed a solution that they found reasonable.

The matter apparently would have ended there, except that in a discussion with Bob Hanson about safety matters in general, Belveal and Allen used the entries as an example of safety problems in the mine. Evidently not aware that they were satisfied with Gunderson=s solution, Hanson called Mr. Heath into the meeting and apprised him of the situation.

Mr. Heath, believing that the two miners had taken the specific problem from Gunderson to the Safety Director, rather than to him, gave the miners oral reprimands on December 3, 1993, for not following the chain of command. Although the reprimands were oral, they were noted in the miners=s personnel files as disciplinary letters.

On December 5, the two miners mailed a 105(c) complaint to MSHA concerning the reprimands. On December 6, Belveal and Allen informed Mr. Heath that they did not agree with the reprimands and were invoking the grievance procedures to have them removed. After several steps in the grievance procedure, the letters were removed from Belveal=s and Allen=s files on January 20, 1994. In February 1995, Belveal and Allen wrote to MSHA stating that they wished to drop the 105(c) action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,[3] 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), *rev'd 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*

[3] Section 105(c) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he Ahas 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 Ais the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;@ (3) he Ahas 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 Aon behalf of himself or others . . . any statutory right afforded by this Act.@

Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC 1842 (1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd 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*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. 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 the Amended Complaint of Discrimination filed by the Secretary on behalf of Mr. Belveal it was alleged that he suffered the following acts of discrimination: (1) As a result of filing a 105(c) complaint on October 6, 1993, he was placed on temporary total disability on October 19, 1993, for a knee injury received on September 28, 1993, rather than being placed on light duty like other miners; and (2) As a result bringing a safety problem to the attention of the mine manager, he received disciplinary action on December 3, 1993.

The allegations of discrimination are phrased somewhat differently in his post-hearing brief. There he argues:

> When Mr. Belveal injured his knee and subsequently saw Dr. Miller, he was to be placed on alternate duty, as Cudo and Jones had been. Instead, Belveal was returned to his original job of roof bolting and saw no improvement in his knee. As a result of being refused modified duty, Mr. Belveal was forced to be placed on temporar a reprimand was certainly not justified.

(Br. at 17.)

There is no doubt that filing 105(c) complaints, 103(g) investigation requests and raising safety concerns with management, either as a representative of miners or individually, is activity protected under the Act. Therefore, I find that Mr. Belveal engaged in protected activity. However, I conclude that, with respect to his knee injury, Mr. Belveal did not suffer any adverse action and that, even if he did, it was not related to his protected activity. I further conclude, with respect to the

reprimand, that it was not in any part motivated by his engaging in protected activity.

The Complainant waited two weeks to decide that he needed medical attention for his knee. When he did decide to go, he failed to follow company policy and notify his supervisor, even though he knew he was supposed to do that, he had been reminded the day before that he was supposed to do that and he knew that someone from management was supposed to accompany him to the doctor. Consequently, I find that any confusion over his work status after his first visit to the doctor was caused by him.

The two other instances of roof bolters being assigned to drive a tractor are distinguishable from his. In the first place, a supervisor had accompanied both miners to the doctor so that both management and the miner were aware of the limitations established by the doctor. In the second place, both miners specifically asked for other assignments when they returned to work.[4]

On the other hand, since no one from the company went to the doctor=s with Mr. Belveal, the evidence is confused, although not necessarily contradictory, as to what Mr. Belveal could do on his return. Dr. Miller testified that A[i]t was my understanding that he would not be doing his regular job.@ (Govt. Ex. 1, p. 12.) Mr. Heath testified that:

> . . . I suggested to the doctor that, you know, as a roof bolter that he works on a platform, and I explained to him how the bolter was laid out and basically what he could do, and as we discussed that more and more the doctor felt, or my understanding of the conversation, was that the platform would be the best place for him, and I reached the same thought.

(Tr. 416.) Mr. Heath further stated AI told him [Dr. Miller] that other jobs that he normally would do along with the roof bolter, that we would see that someone else did that.@ (Tr. 419.) Finally, the Complainant testified that AI was under the impression I was to return to something other than my regular job, which was not roof bolting.@ (Tr. 240.)

[4] Mr. Cudo=s amputated finger obviously left no doubt that he could not return to roof bolting, even if he had not requested other work.

When Mr. Belveal returned to work that night, he questioned Terry Gunderson about returning to roof bolting. He testified that:

> I talked to him a little bit about it, indicated that I didn't think that the doctor was -- you know, going back and running the bolter was really what the doctor had in mind as far as taking care of my knee, and he indicated to me that he had talked with Mr. Heath about that, and he had been told that everything was okay and that I was basically to take care of it.

(Tr. 248.) He further testified that he did not recall Mr. Gunderson offering any other type of work in the mine.

On the other hand, Terry Gunderson testified as follows concerning Mr. Belveal's return to work:

> Q. . . . Did you have a conversation with Gary Belveal on October 12 at the beginning of the swing shift about his trip to the doctor?
>
> A. Yes, I did.
>
> Q. Did he advise you about what he understood had occurred as far as the doctor visit?
>
> A. No. Somehow I knew, and I believe Roland had said something to the effect of climbing and walking up a grade.
> Q. Okay. That would be problems that he would have?
>
> A. Yes.
>
> Q. Okay. Did you discuss with Gary Belveal the fact that you understood he had some limitations?
>
> A. I went out and I told Gary that I had other work available.
>
> Q. Okay. Did you discuss what these other jobs were?
>
> A. No.
>
> Q. Okay. You told Gary that he could do work other than roof bolting for you?
>
> A. That I had other work available, yes.
>
> Q. Okay. And did Gary Belveal ask to be assigned to some job other than a roof bolter?

A. No.

(Tr. 460-61.)

There is no doubt that on his release, Dr. Miller only limited Mr. Belveal to working on level surfaces. This is certainly consistent with Mr. Heath=s recounting of his discussion with Dr. Miller that a roof bolter worked on a level platform and is not refuted by the doctor=s deposition.

More significantly, by his own account, Mr. Belveal made no complaint or request not to return to roof bolting after his initial discussion with Mr. Gunderson. Furthermore, Mr. Belveal=s failure to recall whether Mr. Gunderson offered him other work is particularly consequential in view of the fact that Mr. Belveal went to great lengths to document his case as evidenced by the three file folders of notes he brought with him to the hearing and one would not expect him to be unable to recall so crucial a matter.

Finally, while there is evidence that Mr. Belveal=s knee injury was not aggravated by his return to roof bolting, the record is silent as to whether the extra week prevented the knee from healing and, therefore, caused him to be placed on temporary total disability. There is no doubt that Dr. Pinson=s taking the Complainant off of work for eight days was purely a medical decision in no way influenced by the company.

Accordingly, I conclude that Mr. Belveal=s return to roof bolting was not an adverse action by the company, but was mainly the result of his actions. I further find that, based on the evidence in this record, Mr. Belveal would have been put on temporary disability the next week even if he had been given other work, so that even if returning him to roof bolting was an adverse action, it did not result in his being placed on disability. Lastly, even if returning the Complainant to his job was an adverse action which did cause him to be placed on temporary disability, there is nothing, other than a closeness in time, to connect his filing of the 105(c) complaint on behalf of all miners with the adverse action of which he complains.

Nor is there any evidence that the reprimand received by Mr. Belveal for not following the chain of command was related to any of his complaints or safety questions. Viewing the matter two years after it occurred, it is apparent that Mr. Heath misunderstood the situation when he issued the reprimand. However, there is no evidence that he deliberately misunderstood or that the reprimand was merely a subterfuge to get back at Mr. Belveal for his complaints and investigation requests.

In addition, I do not find it significant that at the first step grievance proceeding Mr. Heath suggested that the 105(c) complaints over the reprimands be withdrawn if he removed the reprimands from Messrs. Belveal=s and Allen=s files. That seems to be a reasonable *quid pro quo*. Furthermore, it appears that the only reason that the complaints were not withdrawn until over a year later was so that the miners could use them as leverage in negotiating with the company over exactly what the chain of command would be.

ORDER

I conclude that Mr. Belveal engaged in protected activity but that he either was not discriminated against by the company for engaging in that activity, or if he was treated adversely, it was not because he engaged in the protected activity but because of his own real or perceived misconduct. Accordingly, it is **ORDERED** that the complaint of the Secretary filed on behalf of Gary Belveal against Western Fuels Utah, Inc., under Section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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