

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 13, 1997

KENNETH L. DRIESSEN, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 96-291-DM
: :
NEVADA GOLDFIELDS INC., : WE MD 96-08
Respondent : Nixon Fork Mine

DECISION

Appearances: Patrick J. Blackburn, Esq., Anchorage, Alaska, for Complainant;
Parry Grover, Esq., Davis Wright Tremaine LLP, Anchorage, Alaska, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Kenneth L. Driessen against Nevada Goldfields, 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 the Complainant may have engaged in activities protected under the Act, he was not discharged by Nevada Gold Fields for engaging in those activities.

Driessen filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA) pursuant to section 105(c)(2) of the Act, 30 U.S.C. ' 815(c)(2),¹ on March 4, 1996. On June 4, 1996, MSHA informed both the company and the Complainant that on the basis of its investigation it had determined that ~~A~~the complainant was not discriminated against in

¹ Section 105(c)(2) provides, in pertinent part, that: ~~A~~Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.@

violation of Section 105(c).@ (Resp. Ex. C.) Driessen then instituted this proceeding before the Commission, on July 2, 1996, under section 105(c)(3), 30 U.S.C. ' 815(c)(3).²

A hearing on the complaint was held on November 13, 1996, in Anchorage, Alaska.³

Background

The Nixon Fork Mine, in the central interior of Alaska, began mining operations in October 1995. It has 50 employees and produces gold and some silver and copper. The only access to the mine is by air; everything brought in or shipped out is by airplane. The ore comes out of the mine in rocks which are then conveyed through crushers, ball mills and other processors until it is shipped out as bagged concentrate or dore ingots.

² Section 105(c)(3) provides, in pertinent part, that: AIf the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary =s determination, to file an action in his own behalf before the Commission@

³ At the hearing the parties elected to make final arguments and waive the filing of proposed findings of fact and conclusions of law. (Tr. 200.) On December 17, 1996, Driessen Afaxed@ to my office a letter which he characterized on the cover sheet as Aa few afterthoughts.@ As the parties decided not to file briefs and the record was not kept open to receive additional evidence, I have neither read nor considered this letter.

The miners work 12-hour shifts, seven days a week. The shifts begin at 7:00 a.m. and 7:00 p.m. The miners work either two weeks on, one week off, or four weeks on, two weeks off.

Kenneth Driessen began working at the mine on October 23, 1995, as a mechanic. On December 8, 1995, he was promoted to Senior Mechanic. He was fired on February 7, 1996.

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,⁴ 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 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 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

⁴ Section 105(c)(1), 30 U.S.C. ' 815(c)(1), of the Act provides that a miner cannot be discharged, discriminated against

fn. 4 (continued)

or interfered with in the exercise of his statutory rights because: (1) he **A**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 **A**is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101; @ (3) he **A**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 **A**on behalf of himself or others . . . any statutory right afforded by this Act. @

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 his complaint with MSHA as well as in his complaint before the Commission, Driessen claims to have twice engaged in protected activities. The first occurred on January 24, 1996, when he advised the mill superintendent that it would be dangerous to start up the No. 1 ball mill. The second transpired on the morning of February 7, 1996, when he informed company vice president Joe Kercher what problems he believed still existed with the No. 1 Ball Mill. The Complainant maintains that, as a result of bringing to the company's attention what he considered to be dangerous situations, he was fired shortly after talking with Kercher.

Not surprisingly, the company views the matter differently. It is the company's position that Driessen was assigned three specific tasks on the night of February 6 and the morning of February 7 and that he failed to complete any of them. In fact, the Respondent asserts that not only did the Complainant fail to do what he was assigned, but he spent his time working on matters on which he was told not to work. Consequently, the company contends that Driessen was terminated for insubordination and that his safety complaints were not considered at all.

I find that the Complainant engaged in protected activity, but that he has not established that he was fired because he engaged in that activity. I find that the Respondent's explanation of events is the more believable one. Therefore, I conclude that Driessen was not terminated in violation of section 105(c).

Driessen testified that on January 24, while working on the night shift, he was assigned to **A**clean [the No. 1 Ball Mill] and grease it, and put it back together as it was. @ (Tr. 20.) He stated that while he was performing this task he observed defects in parts of the ball mill which lead him to conclude that it would be dangerous to restart the machine. The Complainant related that in the early morning hours of January 25 he told this to Mike Rusesky, the mill superintendent, who decided, without consulting anyone else, not to restart the ball mill. ⁵

⁵ Driessen testified that the ball mill was not restarted

Driessen claimed that Ted Botnan, the maintenance supervisor and his direct supervisor, reproached him the next day for shutting down the mill. He testified:

And he said some C something. This is paraphrased because I can't get his exact words, but part of it is his exact words. He had said by making this decision to call it unsafe was a million dollar call, and that I should have not made that decision or made that statement on my own. And he also said that if there was any other problems of this type that were either dangerous or C or severe, you know, equipment problems, that I would talk only to him about these problems.

(Tr. 22.)

In fact, both Botnan and Mel Swanson, the Mine Manager, were upset that they had not been informed that the ball mill was going to be shut down. Rusesky testified that Swanson got mad at him for not informing him right away. Botnan testified with regard to his discussion with Driessen:

I told him that if you're going to make these million dollar decisions, please get me involved in it, you know, we'd like to go through the standard procedures. If you're going to shut down the mill, you know, I'd like to know about it. I don't want to find out about it when I wake up in the morning, you know, I am part of this, and Mel has to authorize any of these things. If you're going to make these big decisions, please go through the normal channels.

(Tr. 140.)

because he had advised that it was a dangerous situation Aand it was not totally put back together and ready to go at that time. @

(Tr. 21.)

As can be seen, both Botnan's and Driessen's versions of the incident are essentially the same. Viewing the matter objectively, it is apparent that what Botnan and Swanson were mad about was not being awakened and consulted before a decision to shut the mill down was made, not that Driessen had raised safety matters. Thus, I find that Driessen's subsequent conclusion that he was being admonished because he had a safety concern about the ball mill was mistaken. His claim, first articulated at the hearing, that Botnan threatened to fire him if he talked to anyone but Botnan about such problems is not corroborated by any other evidence and certainly cannot be inferred from what Driessen maintains that Botnan said to him.⁶

Turning to February 6, it was Driessen's testimony that he was assigned to troubleshoot the ball mill and not given any other assignments. His testimony, however, was so filled with inabilities to recall, irrelevancies, blanks, inconsistencies and lack of corroboration that it lacks credibility. The following are some examples of his testimony.

On direct examination, he was questioned about what he was told to do and the following colloquy took place:

Q. Were you given any specific orders for that night other than to troubleshoot the piece of equipment which you had already testified to?

A. There is **C** it's not up for exhibit, but there was a shop log which also contained work projects to do, and there was a big loader tire that was, you know, it was mentioned that we had to keep filling it up with air, and

Q. Did you . . .

⁶ It is not clear from the evidence when Driessen arrived at the conclusion that Botnan was threatening him for raising a safety issue. There is no evidence that the incident was mentioned again, or that Driessen took any actions because of the incident, until Driessen was fired and filed his discrimination complaint.

A. . . . I think it was . . .

Q. . . . in fact do that?

A. . . . in fact flat. I **C** I did not. There was also another mechanic on duty, and **C** there was at least another mechanic on duty. I did not **C** I do not believe I worked on that loader tire.

Q. But had you been given instructions to work on that loader tire?

A. The loader tire was on our list of things to do, and there was also other things on the list such as the water. We were having problems with the water freezing up and **C** and running out of water. And so I **C** as I remember, I be- **C** I worked on the mill and on the water. And there was sometimes other little chores, like if a miner needed some piece of equipment or whatever looked at, there might have been a few other things that I did.

(Tr. 31-32.) Later on he claimed that he did help work on the loader tire.

With regard to cutting the intake spout, or flange, to the ball mill, Driessen seemed to have trouble recalling what occurred. Thus, he testified: **A**I do not think that I cut the flange. I said that it should be cut or moved, but at that night I do not recall cutting any flange.@ (Tr. 32.) Later on the following discussions took place:

Judge: Was [the flange] cut?

A. I don't think that the **C** that I cut that . . .

Judge: I'm not asking . . .

A. . . . flange that night.

Judge: . . . if you cut it. Was it cut?

A. I don't **C** I don't know. I don't think **C** I don't think so be- **C** because I didn't even want it to be cut.

I wanted the flan- **C** the **C** the fill pipe to be moved or it to be aligned so that it could be tight.

Q. (By Mr. Grover.) You don't remember whether it was cut or not. Is that what you're saying?

A. Yeah. I don't think I cut it because that rubber was awful darn thick.

. . . .

Q. Mr. Driessen, Mr. Swanson and Mr. Botnan are going to testify the next morning when they got up they found that the flange had been cut. They found a half-moon piece of rubber cut laying [*sic*] on the ground underneath the mill. Do you have any idea how that happened?

A. I'm **C** I'm trying to think, you know, I was doing my best to try and get that thing going, and . . .

Q. So you don't recall. You just can't say how that happened?

A. I can't say. I **C** I don't know.

(Tr. 62-63, 65-66.) Finally, he testified, **A**I'm like in lack of memory on it, and I **C** I really don't think I cut it. And if I did, it was maybe a **C** I don't think I cut it. I really don't think I cut it that night.@ (Tr. 97.)

Conversely, Botnan and Swanson testified that after letting Driessen try various remedies to get the mill running again, none of which worked, they became convinced that the problem was electrical.⁷ Accordingly, sometime around 10:30 or 11:00 p.m. on February 6, they told Driessen to stop working on the ball mill. Swanson testified:

He **C** he was instructed to tighten up the feed chute tube, put that back as it was, put the coupling back together, put the guard back on it, and that was it. That would make the mill operative when we determined what the other problem was. And he was

⁷ They were correct. The electrical problem was corrected by the electrician the next day and the ball mill had run without incident up through the date of the trial.

given specific instructions to get that loader tire fixed because it is our prime mover on the site.

During the discussion and throughout the evening, we fixated on this rubber seal, and he pointed out that it was out of alignment and yeah, that was C we knew that, but it had never been a problem other than it does wear and it leaks, and so we replace those things every four to six weeks. And we had just C day shift had just spent about four hours fabricating a new one and installing it. And he and I had a bit of a discussion. He pointed out that the mill foundation was sinking, and C and I said no, it if was sinking then the floor must be sinking with it because I don't see any differential sinking here.

And some other, you know, strange discussions that C I had already made up my mind that it was an electrical problem. I want to wait for the electrician. And he wanted to make C he suggested cutting this flap to release that binding, and we determined though that that was not the problem. The thing failed to function when we had it relieved. And instructions were specifically given, ADo not touch that seal. Do not cut that seal.@

(Tr. 182-83.)

Botnan and Swanson testified that when they arrived at the mill on the morning of February 7, Driessen was working on some drawings of the ball mill. On going to the mill, they found that the chute had not been tightened up to the mill, the flange had been cut, the coupling had not been put back together, and nothing had been done on the loader tire since Botnan had blocked it and taken off some of the lug nuts the night before. After discussing the matter between themselves and with Joe Kercher, they decided to fire Driessen because Awe had given him three specific instructions on what to do and he failed to do them, and he had done a project that he was, you know, he was not instructed to do.@ (Tr. 186.)

Driessen bears the burden of proving that he was fired for engaging in protected activities. While in his own mind he may have convinced himself that this was why he was fired, his rambling, contradictory, inconsistent and somewhat illogical testimony has not convinced me. Furthermore, his story is not supported by any corroborating witnesses or evidence. I find that the Complainant's conclusions that it would be dangerous to

operate the ball mill on January 24 and February 6 - 7 had no bearing on his being terminated. I conclude that he was fired, as claimed by the Respondent, because he was insubordinate. Consequently, he was not discriminated against because he engaged in protected activity.

ORDER

Accordingly, since the Complainant has failed to show that he was terminated for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Kenneth L. Driessen against Nevada Goldfields, Inc., under section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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