FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 7, 1999

LOUIS W. DYKHOFF, JR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 99-26-DM
	:	MSHA Case No. WE MD 98-17
U.S. BORAX INCORPORATED,	:	
Respondent	:	Mine ID No. 04-00743
	:	Boron Operations

DECISION

Appearances: Louis W. Dykhoff, Jr., *pro se*, North Edwards, California, for the Complainant;
Neil M. Herring, Esq., on the brief, Sebastopol, California, for the Complainant;
Andrew T. Kugler, Esq., O'Melveny & Myers LLP, Los Angeles, California, for the Respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed on October 19, 1998, with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act). The complaint was filed by Louis W. Dykhoff, Jr., against the respondent, U.S. Borax Incorporated (Borax). This matter concerns Dykhoff's claim that the March 6, 1998, disciplinary notice for excessive absenteeism, given to him by Borax on March 12, 1998, violated the anti-discriminatory provisions of section 105(c) of the Act because the disciplinary action was motivated by his concern for his personal safety.[1] Consequently, the relief sought in this matter is the removal of the disciplinary action from Dykhoff's personnel records.

Section 105(c) of the Act provides, in pertinent part:

[1] Dykhoff's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on July 20, 1998, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Dykhoff's complaint was investigated by the Mine Safety and Health Administration (MSHA). On September 9, 1998, MSHA advised Dykhoff that its investigation did not disclose any section 105(c) violations. On October 19, 1998, Dykhoff filed his discrimination complaint with this Commission which is the subject of this proceeding.

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

This case was heard on April 27, 1999, in San Bernardino, California. Dykhoff appeared in his own behalf. Dykhoff was assisted at the hearing by Ray Panter, the Business Agent for Local 30 of the International Longshoremen's and Warehousemen's Union (the ILWU). Neil M. Herring, as Dykhoff's counsel, filed Dykhoff's post-hearing brief on June 15, 1999. Borax's post-hearing brief was filed on June 16, 1999.

Dykhoff's discrimination complaint primarily is based on his allegation that the March 6, 1998, Corrective Notice issued to him by Borax on March 12, 1998, for excessive absenteeism was motivated by his protected refusal to come to work during the period March 3 through March 6, 1998. Specifically, Dykhoff asserts he was absent from work during this period because he was under the influence of Percodan, a narcotic pain reliever prescribed for a jawbone infection. Consequently, Dykhoff contends he would have been a danger to himself or others at his job as a shipping fork-lift operator because he was heavily medicated. In addition, while not specifically advanced in his initial complaint, Dykhoff now claims Borax's disciplinary action concerning his absenteeism was also motivated by his history of a variety of periodic union related safety and health complaints that he made from 1994 to 1998.

For the reasons discussed below, Dykhoff's discrimination complaint is dismissed because it is undisputed that his reason for not reporting to work, *i.e.*, because he was incapacitated because he was taking a narcotic medication, was not communicated to Borax prior Borax's decision to issue the March 6, 1998, Corrective Notice. Moreover, even Dykhoff had communicated his reported inability to work due to his dental treatment prior to his written discipline, his work refusal is not protected under the Mine Act because it concerns his personal condition, rather than his exposure to a hazardous condition of employment. Finally, given Dykhoff's history of excessive absenteeism, the issuance of the Corrective Notice immediately following his latest period of absenteeism, and the lack of any evidence of disparate treatment, there is no basis for concluding that Dykhoff's long history of union related safety activities was a motivating factor in the March 6, 1998, disciplinary action complained of.

Preliminary Findings Of Fact

U.S. Borax Incorporated is a publicly-held corporation that operates a borax mine and processing facility in Boron, California. For purposes of collective bargaining, nonmanagement personnel working at the plant are represented by the ILWU.

Borax employees accrue 80 hours of sick leave a year and can carry over up to one week of unused sick leave into the following year until they accrue a maximum of nine weeks. After

nine weeks are accrued employees can accrue an additional one week of sick leave per year. Adding one week of accrued sick leave each year to the base nine week maximum, an employee can accrue an unlimited amount of sick leave.

Borax has no written excessive absenteeism policy and administers disciplinary action on a case-by-case basis because there are too many variables to establish a set policy. (Tr. 55). The collective bargaining agreement provides that absences more than two years old may not be the basis for disciplinary action. Absences necessitated by *bona fide* illness, even if certified by a physician, are considered for excessive absenteeism disciplinary purposes, while absences due to vacation, union business, funeral leave, industrial injury, or leave granted under the Family Medical Leave Act, are not counted. Personnel Manager Darryl Caillier testified, as "a rule of thumb," six "incidents", or 12 days of absence, within a 12 month period, could be deemed excessive. (Tr. 43). An "incident" is comprised of any number of days of consecutive absences. Although the company uses this threshold standard to initiate checking an employee's attendance record, Caillier conceded employees are not generally familiar with any set company sick leave abuse policy or standard.

Borax has a progressive system of disciplining employees with excessive absenteeism. The first step is verbal counseling. The second step is a Corrective Notice. If the problem persists, the third step is a written warning. If the problem is not corrected, the next steps are disciplinary time off and ultimately discharge. During the period June 1987 through January 1998, eleven employees were discharged for excessive absenteeism. The discharged employees had received Corrective Notices and a series of additional disciplinary warnings prior to their discharge. (Tr. 48-50; Resp.'s Ex. 3).

There are four steps in the union's grievance procedure. Step One is a verbal meeting with the employee's immediate supervisor. Step Two is meeting with the supervisor after a verbal and written warning. Step Three is a meeting with the company's Human Resources Department. Step Four is arbitration.

Dykhoff has been employed by Borax since January 2, 1979. He is currently employed as a shipping operator in Plant 9. Dykhoff's responsibilities as a shipping operator include operating a fork-lift for the purpose of loading packed product into railcars and trucks. Dykhoff's duties also had included lifting heavy objects and climbing stairs. However, since undergoing knee surgery in July 1994, Dykhoff has experienced increasing difficulties performing the full range of his duties due to a deteriorating bilateral knee condition. To accommodate Dykhoff's physical limitations, pursuant to the recommendations of Dykhoff's private physician, Borax modified Dykhoff's shipping duties to reduce the amount of lifting and climbing required of him. The accommodations apparently were accorded to Dykhoff consistent with the provisions of The Americans With Disabilities Act.

In addition, since 1995, consistent with the recommendation of Dykhoff's physician, in order to avoid the possibility of Dykhoff sustaining an injury due to his bilateral instability,

Borax required Dykhoff to wear bilateral knee braces as a condition of his employment. Dykhoff's knee braces were custom made in order to generate an exact fit based on a cast of each leg. A pair of braces cost approximately $1,200 and they were paid for, and replaced when necessary, by Borax's insurance carrier. The braces had to be replaced periodically. In such circumstances it took approximately one month to obtain a new pair. During such periods, Dykhoff was prevented from working without the braces. Dykhoff stated the insurance company would not pay for, and he could not afford, a back-up pair of braces that would prevent his absence from work for extended periods of time. Dykhoff kept the company informed during periods when he could not report to work because his braces were unavailable.

In December 1996, Dykhoff's supervisor, Chuck Amento, requested Personnel Manager Caillier to obtain a copy of Dykhoff's attendance record. On December 6, 1996, Dykhoff's personnel record reflected Dykhoff had been absent for 7 incidents totaling 21 days in the preceding 12 month period. (Resp.'s Ex. 4). Although Caillier believed a Corrective Notice was warranted, Amento verbally warned Dykhoff about his absenteeism. (Tr. 52-55).

Mike King was Borax's shipping foreman from January 1997 until he was replaced by David Leach in January 1998. During this time, King was responsible for keeping Dykhoff's attendance records. Although King was aware of accommodations that were made for Dykhoff due to his knee impairments, King was not aware of any special exceptions that had been granted to Dykhoff concerning leave. On or about October 20, 1997, King verbally warned Dykhoff about excessive absenteeism. (Tr. 120-24; Resp.'s Exs. 8, 9). King testified it was his decision to verbally warn Dykhoff about his absenteeism, and that he had not been requested to do so by any other company official. (Tr. 124). At the time of the warning, Dykhoff told King that the company could not count his absenteeism that was caused by his knee problems. King told Dykhoff he was not aware of such a company policy. (Tr. 120-24).

On March 3, 1998, Dykhoff reported to work and worked one hour. He then advised his supervisor, David Leach, that he was taking sick leave due to a dental problem. Dykhoff also did not report for work on March 4, March 5 or March 6. Although Dykhoff stated he told Leach he was taking sick leave because of dental problems, Leach did not remember such a conversation. However, Borax does not question Dykhoff's reported dental treatment and it does not contend that Dykhoff's March 3 through March 6, 1998, sick leave was not approved.

Leach was aware that Dykhoff had frequently been absent from work. Consequently, on March 6, 1998, Leach requested Borax's Personnel Department to check Dykhoff's absenteeism record. The Personnel Department determined Dykhoff had missed 71 full days of work and 13 partial days of work in the previous 21 months. Consequently, a Corrective Notice was written for Dykhoff on March 6, 1998. The Notice was signed by Leach and Caillier. It stated:

> Corrective Notice for excessive absenteeism. In the last 21 months you have missed 71 days on 10 incidents plus 13 partial days over the past 6 months. This record is not acceptable and must be corrected immediately or stronger action will be taken. (Resp.'s Ex. 6).

The Corrective Notice was given to Dykhoff by Leach during a March 12, 1998, meeting. The meeting was also attended by Union Shop Steward Gary Baxter. Baxter testified that he could not recall Dykhoff providing any reasons for his latest absences from March 3 through March 6, 1998. (Tr. 173). The March 12, 1998, meeting apparently was Step Two in the union grievance procedure.

Step Three of the grievance process was conducted in a June 18, 1998, meeting with Human Resources. The personnel relations official representing the company was Kevin Long. Dykhoff was accompanied by James Bates, a Borax warehouseman who was the Secretary-Treasurer of the union. Bates testified that he recalled Dykhoff asking Long if Long wanted him to come to work even if he was under the influence of Percodan. Bates stated Long responded that he wanted Dykhoff at work. Consistent with Bates testimony, Dykhoff stated that he initially raised the issue of working under the influence of Percodan in the June 18, 1998, Step 3 grievance meeting with union and company officials. (Tr. 176-83).

Dykhoff filed his initial discrimination complaint that serves as the basis for this proceeding on July 20, 1998. He requested that the disciplinary notice be removed from his record. His complaint, in pertinent part, states:

> On March 12, 1998, I was disciplined for excessive absenteeism. On at least three of the incidents, I had major dental work done and a massive jawbone infection. The Dentist had prescribed Percodan, which is a triple form, highly controlled narcotic for pain. Due to the fact that I could not function safely while taking this prescribed medication, and on two of the occasions I had only slept 3 hours out of 72 hours, I stayed home. The grievance meeting was not scheduled until June 18, 1998 for reasons beyond my control. At the meeting, I explained to Mr. Kevin Long (Manager/Human Resources), why I missed time on these specific dates. I referred to page 175, Sec.20001 of 30 CFR/56/57/58, and asked him if he wanted me working in the plant in that condition. His response was, 'we want you at work'. I then asked him if I came to work in that condition and got hurt or hurt somebody, would I be in trouble. His answer was the same. I also asked him if I came to work in that condition and had an accident and was drug tested under the Company's Drug Testing Policy, would I have to go through the 5 year Rehab period or worse, be terminated. Again his only response was, 'we want you to come to work'.

Dykhoff has been an active union member, previously serving as the Secretary-Treasurer of Local 30 of the ILWU, as well as a shop steward in the shipping department. During the period 1994 through January 1998, Dykhoff was involved in a variety of union related health and safety complaints. With the exception of the subject March 6, 1998, Corrective Notice, it has neither been contended nor shown that Dykhoff has ever experienced any adverse action as a result of his union activities. In fact, although the ILWU filed a union grievance alleging the March 6, 1998, Corrective Notice was issued without just cause, there is no evidence that the

union contended Dykhoff's disciplinary notice was in any way related to his union safety related activities. Moreover, after Borax denied the union's grievance at Step 3 of the grievance process, the union decided not to pursue the matter further by electing not to take Dykhoff's grievance to arbitration.

Further Findings and Conclusions

Dykhoff, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Dykhoff must establish that his failure to come to work from March 3 through March 6, 1998, constituted a protected work refusal, and, that the adverse action complained of, in this case the March 6, 1998, Corrective Notice, 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).

Borax 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. The respondent 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).

The gravamen of Dykhoff's discrimination complaint is that Borax's disciplinary action was motivated by Dykhoff's protective work refusal. Although the Act grants miners the right to express safety and health related concerns, it does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the Courts have recognized the right to refuse to work in the face of perceived dangers. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.*; *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp*, 5 FMSHRC 993, 997 (June 1983).

Assuming, solely for the sake of argument, that Dykhoff's refusal to report to work from March 3 through March 6, 1998, because he was under the influence of a prescribed narcotic medication is entitled to Mine Act protection, it is fundamental that, for a work refusal to be protected, a miner must first communicate his safety concerns to some representative of the operator. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133

(February 1982). In this regard, the Commission has held that, "[p]roper communication of a perceived hazard is an integral component of a protected work refusal, and responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner." *Conatser,* 11 FMSHRC AT 17, *citing Dillard Smith v. Reco, Inc.,* 9 FMSHRC 992, 995-96 (1987). "[T]he communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work." *Smith,* 9 FMSHRC 995. The miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner's concern. *Id.* Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act.

Consequently, before addressing whether the reasons for a work refusal are protected, we must consider, as a threshold matter, whether the reasons for refusing to work were communicated to the operator. Here, union steward Baxter, called as a witness for Dykhoff, testified Dykhoff did not communicate to Leach during the March 12, 1998, Step 2 grievance meeting that Dykhoff's absence was necessitated by his use of a narcotic drug. In fact, Dykhoff concedes the issue of his use of Percodan as the reason for his absence was not communicated to company officials until the June 18, 1998, Step Three grievance meeting. As a consequence, the issue of the protected nature of Dykhoff's work refusal based on his use of Percodan is not material because Dykhoff's Percodan use was unknown to management when the Corrective Notice was prepared on March 6, 1998. Thus, it could not have motivated, in any part, the adverse action complained of by Dykhoff.

Notwithstanding the communication issue, a work refusal based on illness or physical impairment is not protected by the Mine Act. The parameters for a protected work refusal were initially addressed in the report of the Senate committee that primarily was responsible for drafting the 1977 Mine Act. That report states, "[section 105(c) of the Mine Act] is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law." (Emphasis added). S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (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 623-24 (1978).

Thus, even if the nature and extent of Dykhoff's physical impairment had been communicated to Borax as the basis for his refusal to come to work, exposure to hazards because of a miner's idiosyncratic physical impairment, where the working conditions and practices of the mine operator are otherwise safe, does not give rise to a protected work refusal. *See Paula Price v. Monterey Coal Company*, 12 FMSHRC 1505, 1519-20 (August 1990) (concurring opinion); *see also Sam Collette v. Boart Longyear Company*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ). While it is true that miners have an absolute right to make good faith

safety or health related complaints, this absolute right applies to complaints about hazardous mine practices or conditions over which the operator has control.[2] *Pasula*, 2 FMSHRC at 2793; *Robinette* 3 FMSHRC at 807. Dykhoff does not contend that the fork lift he was operating was unsafe, or, that the generic performance of his job duties was hazardous. Accordingly, the reasons for Dykhoff's work refusal are not protected even if they had been communicated to mine management.

In the final analysis, this Commission's jurisdiction is limited to ensuring that miners' rights under the Mine Act are protected. The Commission's role is not to pass on the wisdom or fairness of the asserted justifications for a particular business decision, but rather to determine if such business justifications are credible and would have motivated the operator as claimed. *See Lonnie Ross and Charles Gilbert v. Shamrock Coal Company, Inc.*, 15 FMSHRC 972, 975 (June 1993) *citing Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (June 1982). In this regard, "the Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Marvin E. Carmichael v. Jim Walter Resources*, 20 FMSHRC 479, 486-87, n.13 (May 1998) (citations omitted).

The credibility and reasonableness of Borax's asserted business justification for disciplining Dykhoff for excessive absenteeism, despite Dykhoff's physical impairments, are self evident. In fact, the Commission has recently rejected a discrimination claim filed by a complainant with a back impairment, noting that actions taken by an operator because a miner cannot meet the physical requirements of a job are legitimate business decisions that are not subject to Mine Act intervention. *Secretary of Labor o.b.h. William Kaczmarczyk*, 21 FMSHRC __ , *slip op.* at 10 (June 15, 1999). Any recourse Dykhoff may have under the Americans With Disabilities Act is beyond the scope of this mine safety proceeding.

Finally, Dykhoff asserts, despite his total 71 days of absence preceding the

[2] There may be circumstances where a mine condition or practice contributes to a miner's physical limitations. For instance, fatigue caused by an operator's insistence that a miner work extended periods of overtime may give rise to a protected work refusal. In such circumstances it is the mine condition or practice that creates the hazard. *Secretary of Labor o.b.o. Lonnie Bowling and Darrell Ball v. Mountain Top Trucking Co., Inc., et al.*, 19 FMSHRC 166, 196 (January 1997) (ALJ) (citations omitted); *rev'd on other grounds*, 21 FMSHRC 265 (March 1999). However, such circumstances are not applicable in the present case.

Corrective Notice, that the Corrective Notice was motivated by his safety related union activities. As noted above, even the union grievance did not allege that Dykhoff's March 1998 disciplinary notice was motivated by his union activities that date back to 1994. Nor is there any evidence of disparate treatment that would warrant a finding that the Corrective Notice was a subterfuge that was actually motivated by a desire for retaliation because of Dykhoff's safety complaints. In fact, several of the employees previously discharged for absenteeism had significantly fewer absences than Dykhoff. (*See* Resp.'s Ex 3). Thus, there is no credible evidence that Dykhoff's past safety complaints played any part in his discipline for excessive absenteeism.

In summary, as previously noted, "the Commission has no responsibility to assure fairness in employment relations or to determine whether an employee was discharged for cause, but only to protect miners exercising their rights under the Act." *Jimmy Sizemore and David Rife v. Dollar Branch Coal Company*, 5 FMSHRC 1251, 1255 (July 1983) (ALJ). Dykhoff's history of protected safety complaints made in his capacity as a union official cannot insulate him from conduct that is not protected by the Mine Act, *i.e.*, a poor attendance record, that, in the exercise of business judgment, provides a reasonable basis for disciplinary action.

ORDER

In view of the above, Louis W. Dykhoff, Jr., has failed to carry his burden of proving that the March 6, 1998, Corrective Notice for excessive absenteeism was motivated, in any part, by any activity that is protected under section 105(c) of the Mine Act. Accordingly, Dykhoff's discrimination complaint **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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