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KENNETH W. HALL V. CLINCHFIELD COAL
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FMSHRC-WDC

November 7, 1986

KENNETH W. HALL

v. Docket No. VA 85-8-D

CLINCHFIELD COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding involves a discrimination complaint brought by Kenneth W. Hall against Clinchfield Coal Company ("Clinchfield") pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982). Mr. Hall's complaint principally alleges that Clinchfield violated section 105(c)(1) of the Mine Act, 30 U.S.C. $ 815(c)(1), by denying his request for a transfer from an underground mining position to a surface mining position and by subsequently discharging him. Following a hearing on the merits, Commission Administrative Law Judge James A. Broderick concluded that Clinchfield had not discriminated against Hall and dismissed his discrimination complaint. 7 FMSHRC 1477 (September 1985)(ALJ). We granted Hall's petition for discretionary review, which he prepared without the assistance of counsel. For the reasons that follow, we conclude that the judge's findings are supported by substantial evidence and we affirm his decision.

In September 1981 Hall was hired by Clinchfield to work at its McClure No. 1 underground coal mine as a section foreman in charge of a production crew. Among other duties, Hall's crew was responsible for ventilating the face areas and for bolting the roof of the sections mined by the crew.

The ventilation plan and roof bolting procedures followed at

the McClure mine are relevant to Hall's discrimination complaint. In 1982, because of a reduction in the height of the coal seam being mined, Clinchfield began to use line curtains as the primary method of ventilating the mine. Thereafter, as found by the judge, certain procedures were followed routinely while the roof in a section was being bolted. After the coal was cut, the roof bolters installed near the face area a

roof bolt approximately three feet from the rib. During the installation of this roof bolt (referred to as a "rib" bolt), the line curtain was removed to the last row of permanent roof supports. Without such removal, the canopy of the roof bolter would have otherwise forced the line curtain into the rib and would have cut off ventilation to the face. Therefore, when cuts exceeded ten feet, the line curtain was not maintained to within ten feet of the face during the installation of the rib bolt as required by the approved ventilation plan that was in effect at the mine until March 5, 1984. 1/ Once the rib bolt was installed, however, the line curtain was advanced to the rib bolt and the center bolts were then installed. See 7 FMSHRC at 1478-79.

During Hall's first year as a section foreman he questioned then General Mine Foreman Ron Sluss about the practice of removing the line curtain before completion of the roof bolting. Sluss told him that Clinchfield had received permission to use the procedure. Hall's crew continued to follow the procedure outlined above, and Hall did not raise additional questions concerning that procedure until early 1984.

On June 23, 1983, Hall's brother was killed in an explosion at the McClure mine. After this tragedy, Hall took two weeks vacation and subsequently was given another two weeks off with pay. During this time, Hall received treatment at a mental health clinic to help him cope with the death of his brother.

In February 1984, several miners on Hall's crew complained to him about Clinchfield's roof bolting practice. They contended that not enough air was reaching the face and, consequently, air in the affected section was not circulating properly. These complaints led Hall to question Clinchfield's general foreman, Johnny Kiser, about the bolting practice. Mr. Kiser repeated what Sluss had told Hall previously, namely, that Clinchfield had permission to remove the line curtain while rib bolts were being installed. Hall posed the same questions to two inspectors of the Department of Labor's Mine Safety and Health Administration ("MSHA"). According to Hall one inspector believed that the bolting procedure was permissible but the other inspector disagreed.

In late February 1984, a few days after Hall had spoken to Kiser, Clinchfield's safety director, Wayne Fields, met with a number of shift foremen including Hall. The judge found that during this meeting,

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1/ Clinchfield's ventilation plan reflected the provisions of

30 C.F.R. $ 75.302-1, a mandatory ventilation standard that addresses the use of line brattice (curtain). Section 75.302-1 provides in part:

> Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded ... shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the [Department of Labor's Mine Safety and Health Administration] Coal Mine Safety District Manager of the area in which the mine is located.

Fields instructed the foremen not to ask questions about bolting procedures in the presence of MSHA inspectors or union personnel. 7 FMSHRC at 1480. The foremen also were instructed to continue bolting in the usual manner until a formal revision of the mine's ventilation plan could be obtained. The record reflects that in late February 1984 there were contacts between MSHA and Clinchfield officials regarding a revision of Clinchfield's ventilation plan. Tr. 358-59. 2/

Because Hall thought that the bolting process was unsafe and illegal, his crew shortened its cuts to ten feet instead of the usual 15 feet, to avoid the need for the temporary repositioning of the line curtain. Hall's production reports, however, continued to show that his crew was making 15-foot cuts.

Hall's last working day at the mine was March 2, 1984. On that date, he left the mine because of anxiety, hyperventilation, and other emotional problems. 7 FMSHRC at 1480. Hall went to see Richard Light, the mine superintendent, and explained that due to his psychological problems, he could not function as a mine foreman. Hall stated that he intended to see a psychiatrist. Hall also expressed concern about the safety of the roof bolting procedure. The judge found that, "Complainant was concerned about the procedure being followed which he felt was violative of the Mine Safety law ... and claimed [to Mr. Light] that he could not work in part because of that situation." Id. Light instructed Hall to contact him after he had seen a doctor and to inform the company whether he would be returning to work or whether he would be quitting. Hall did not contact Light until after he had filed his discrimination complaint with MSHA in late 1984.

Meanwhile, on March 5, 1984, Clinchfield submitted to MSHA a written request for revision of its ventilation plan so as to permit the temporary repositioning of the line curtain more than ten feet from the face during the installation of rib bolts. This revision was approved by MSHA one day later, on March 6, 1984.

Hall obtained further psychiatric counseling and treatment. Hall was advised by a psychiatric social worker not to return to work at the mine unless he could control his emotional problems. He was also advised to transfer to a surface position. Hall testified that, on that advice,

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2/ The roof bolting procedures required to be followed in a mine are those set forth in the mine's approved roof control plan. The

record indicates that Clinchfield, with MSHA's knowledge, changed its procedure regarding placement of line curtains without first obtaining a written revision to its approved plan. Although the revision eventually was formally sought and granted, both Clinchfield and MSHA are well aware of the proper recourse when changed mining conditions necessitate a change in mining procedures and of the consequences that can ensue when such procedures are not followed.

at some point in March 1984, he contacted Joseph Pendergast, Clinchfield's Manager of Industrial Relations, and requested a transfer to an aboveground position. Hall further testified that he was informed that there were no surface positions available to which he could be transferred. Pendergast denied that any such discussion occurred. 7 FMSHRC at 1483.

From the day that Hall left the mine on March 2, 1984, until April 22, 1984, he continued to be paid his salary by Clinchfield. From April 23 through sometime in June 1984 Hall received benefits under Clinchfield's disability insurance program. From June forward, Hall was listed by Clinchfield as an employee on leave without pay. When Hall's disability benefits stopped, he applied to the Commonwealth of Virginia for workers' compensation. On August 29, 1984, his application was denied.

At some point in August 1984, Hall learned that two miners had been transferred by Clinchfield to surface positions. Hall testified that he again contacted Mr. Pendergast who, according to Hall, informed him that he was not qualified for either position. Pendergast denied that such a conversation occurred. 7 FMSHRC at 1483. Because Hall could not find other employment in the area, he and his family moved to Broken Arrow, Oklahoma, where he was employed as a school custodian. Hall remained in Oklahoma until September 30, 1984. He then returned to Virginia, and again contacted Clinchfield concerning a possible transfer. He received a letter from Pendergast, dated November 7, 1984, informing him that he had been terminated because he had "secured work with another employer."

Subsequently, Hall filed a discrimination complaint with MSHA. MSHA determined that a violation of the Mine Act had not occurred and declined to prosecute a complaint on Hall's behalf. Hall then instituted this proceeding before this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. $ 815(c)(3). Hall's complaint alleged that Clinchfield unlawfully discriminated against him by: (1) causing his psychological problems as a result of ordering him to violate federal law; (2) failing to transfer him to a surface position; (3) terminating him because of his safety complaints; and (4) denying him certain fringe benefits.

After an evidentiary hearing, Administrative Law Judge Broderick concluded that Hall had failed to establish a prima facie case of discrimination. The judge found that while Hall's complaints and inquiries regarding Clinchfield's roof bolting procedures were protected by the Mine Act, his emotional problems stemming from his

brother's death "were not the result of his being 'order[ed] to willfully violate federal law.'" 7 FMSHRC at 1482. The judge further found that Clinchfield's refusal to transfer Hall to a surface position, its final decision to discharge him, and the denial of insurance benefits and vacation pay were all adverse actions but were not motivated in any part by Hall's protected activity. 7 FMSHRC at 1482-84. Therefore, the judge dismissed Hall's discrimination complaint.

On appeal, Hall essentially challenges the judge's factual findings and credibility resolutions. The Commission's role in reviewing a judge's decision is to determine whether the judge's findings are supported by substantial evidence and whether the judge correctly applied the law. 30 U.S.C. $ 823(d)(2)(A)(ii). After carefully examining the entire record, we conclude that the judge's decision is supported by substantial evidence and is consistent with applicable rulings of the Commission in prior discrimination cases.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) 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, 2797-2800 (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, 817-18 (April 1981). 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 protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula supra; Robinette, supra. See also 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).

As to the first element of a prima facie case, Clinchfield does not dispute the judge's findings that Hall's questions and complaints about Clinchfield's roof bolting procedures and his actions in shortening his mining cuts for safety reasons enjoyed the protection of the Mine Act. See 7 FMSHRC at 1482. As to the second element of a prima facie case the judge determined that the following adverse actions were taken against Hall: (1) the refusal to transfer him to a surface position; (2) his discharge; and (3) the denial of certain fringe benefits. The judge found, however, that these actions were in no part motivated by Hall's protected activity. 7 FMSHRC at 1483. We agree.

Concerning Clinchfield's failure to grant Hall's request for a transfer to a surface position, the record reveals that during August 1984 Clinchfield transferred three miners to certain surface

positions. Hall asserts that he should have been transferred to at least one of these positions because he had requested a transfer in March 1984 and was qualified for all three positions. He contends further that because of his safety complaints he was not transferred.

As noted, Pendergast (Manager of Industrial Relations) denied discussing a possible transfer with Hall in either March or August 1984. The judge found that, regardless of whether such conversations occurred, Pendergast had no personal knowledge of Hall's safety concerns and did not refuse to transfer Hall because of those concerns. 7 FMSHRC at 1483. The evidence supports these findings. Further, Pendergast testified that three miners -- Terry Robinson, Doug Ring, Jr., and Bob Harding -- were surface workers who were transferred to different surface positions in August 1984. He further testified that all were more qualified than Hall for these positions. Mr. Robinson, who worked as a billing clerk, was transferred to Clinchfield's Moss 3 Preparation Plant to prepare him to take over as manager of the shipping department. Mr. Ring, also a billing clerk, moved into Robinson's vacated position. This move was a lateral one for Ring, not a promotion. Finally, Mr. Harding, an employee with 30 years of service with Clinchfield, was moved into Ring's position because the position that he had held at the central warehouse was about to be terminated. Harding's move also was considered to be lateral. The proffered reasons for these transfers were not overcome during cross-examination, and we find no reason in the record to regard them as anything other than legitimate, good faith business decisions.

Pendergast testified that Hall had not been excluded from any of these positions as a result of his having engaged in protected activities. Pendergast denied that Hall had discussed his safety concerns with him and denied receiving, prior to Hall's termination, letters prepared by Hall's psychiatric social worker referring to Hall's safety concerns. The judge credited Pendergast's testimony in this regard. As the Commission often has stated, a judge's credibility resolutions cannot be overturned lightly (e.g., Robinette, supra, 3 FMSHRC at 813), and we discern nothing in the present record that would justify our taking this extraordinary step in this matter. We find that the judge's findings on the transfer issue are supported by substantial evidence and are grounded in credibility resolutions that he was in the best position to make.

With respect to Hall's discharge, the judge found that Pendergast had no knowledge of Hall's protected activity at the time he prepared the notice of discharge and that he had not consulted with any other mine officials prior to terminating Hall. 7 FMSHRC at 1483. Again, the record supports these findings. Pendergast testified that he made the decision to discharge Hall after he received a notice, dated November 5, 1984, from Clinchfield's insurance department stating that Hall could not prove his state disability claim and that

he was working elsewhere. Pendergast also stated that he made the termination decision without conferring with any other management officials or anyone who knew of Hall's safety concerns. Pendergast further asserted that Clinchfield "routinely terminate[d]" anyone who obtained another job. Tr. 513. As discussed above in connection with the transfer issue, the judge specifically found that Pendergast had no knowledge of Hall's protected activity. This finding is a credibility determination and we find no grounds for overturning the judge's resolution of this question.

We also are persuaded by the fact that when Hall voluntarily left the mine in March 1984, Clinchfield's reaction was supportive, not disciplinary. The record reflects that Clinchfield extended Hall leave with pay and then provided insurance benefits. Moreover, the termination occurred in November 1984 -- nine months after Hall's departure. There is no evidence in this record of hostility towards Hall or of retaliation for his safety concerns. In sum, the judge concluded that Hall left work voluntarily in March and was discharged for legitimate reasons in November. We find no persuasive reasons in this record to disturb the credibility resolutions and findings on which the judge's conclusions are based.

Finally, with regard to Hall's claim that he was denied disability insurance, vacation pay, and benefits, the judge found that Hall's disability insurance payments were discontinued by Clinchfield's insurance carrier on the grounds that Hall could not establish that he was disabled and because he was working in Oklahoma. 7 FMSHRC at 1483. The insurance carrier arranged for Hall to be examined by a physician, who determined that Hall was capable of working and was not disabled. There is no evidence in the record to indicate that Clinchfield requested that its insurance carrier deny Hall benefits because of his prior protected activity. As to the denial of vacation benefits, the judge found that this denial was not motivated by Hall's protected activity. This matter was not litigated in detail, and there is nothing in the record inconsistent with the judge's finding. We affirm the judge's findings on these issues.

In sum, we agree with the judge that Hall failed to carry his evidentiary burden of proving that any of the adverse actions discussed above were motivated by his protected activity.

For the foregoing reasons, the judge's decision dismissing Hall's discrimination complaint is affirmed.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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