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HARLAN THURMAN V. QUEEN ANNE COAL
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FMSHRC-WDC

February 10, 1988

HARLAN L. THURMAN

v. Docket No. SE 86-121-D

QUEEN ANNE COAL COMPANY

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), Commission Administrative Law Judge Avram Weisberger dismissed a discrimination complaint filed by Harlan L. Thurman. 9 FMSHRC 419 (March 1987) (ALJ). We granted Thurman's petition for discretionary review, which he prepared without assistance of counsel. For the reasons that follow, we conclude that the judge's findings are supported by substantial evidence and are consistent with applicable law. Accordingly, we affirm.

Prior to March 1986, complainant Thurman had been employed continuously for three years on the nighttime maintenance shift at the underground coal mine of Queen Anne Coal Company ("Queen Anne"). As part of a four-person supply and maintenance crew, Thurman remained on the surface at the beginning of each shift in order to load supplies on the belt conveyor and to transport them into the mine for the other crew members to unload. Upon completion of this task, Thurman would reverse the belt conveyor for the crew's eventual exit and crawl unaccompanied to the working section to complete his shift. Once Thurman entered the mine, no employee remained on the surface at the mine entrance to be within telephone contact of the miners below. 1/

1/ According to the testimony of Queen Anne's president, Bob Swisher, it had been the practice for eight or nine years to have only a night watchman on the surface while the non-production night shift was underground. He testified that the telephone communication system for the mine had been approved by the Department of Labor's Mine Safety and Health Administration, but admitted that the night watchman, who was five miles away near the locked gate of the mine property, was not in telephone communication with the miners underground. Tr. 168, 173-77,

According to Thurman's testimony at the hearing, he was harassed persistently by the two other crew members and the shift foreman, Crawford Harness, during his three-year period of employment. While the greater part of Thurman's complaints concerned episodes of personal harassment, 2/ Thurman also testified to two occasions of being directed by Harness to work alone in an adjacent underground section and another when Harness operated a continuous mining machine to make a crosscut without anyone remaining on the surface.

On March 6, 1986, Thurman began his shift as usual at 4:30 p.m., but left early at 10:30 p.m. without notifying the other members of the crew. The next morning, Friday, March 7, he appeared at the mine office and told Emory Haggard, the bookkeeper and one-third owner of Queen Anne, "what had been going on and some of the stuff that had been happening." Tr. 32. In response, Haggard arranged for Thurman to meet with Bob Swisher, the mine president, the following Monday, March 10.

Thurman and his wife met with Swisher as scheduled. Upon hearing some of Thurman's complaints, Swisher agreed to Thurman's request to arrange a meeting with all the crew members on Thursday, March 13. At this latter meeting, Thurman repeated the allegations of harassment and other complaints that he had presented to Swisher on March 10, including his concern about the lack of an outside person. Tr. 31, 35. The other crew members admitted to a few episodes of so-called "horseplay," but denied the allegations of harassment. Tr. 256, 290, 322. In response, Swisher admonished the crew members that he would not tolerate any horseplay. Tr. 77-78, 156.

Near the close of the meeting, Swisher repeated a story that he had told the Thurmans on March 10 about a fatal accident involving another mine employee, who was killed when he applied a blow torch to a fuel storage tank he had failed to flush. According to Swisher, the miner had been suffering from emotional problems. Swisher testified that he told the story in order to relate his personal efforts in helping the miner to return to work prior to the accident and to demonstrate how much he personally cared for the welfare of his employees. Tr. 150-52.

At the conclusion of the meeting on March 13, Swisher suggested to Thurman that he return to work on the night shift and it was the understanding of all in attendance that Thurman intended to do so. Tr. 190. 30 C.F.R. § 75.1600-1 requires a mine operator to have a telephone or equivalent two-way communication facility located

on the surface within 500 feet of all the main portals. At least one of the communication facilities must be located where a responsible person on duty at all times when miners are underground can hear the communication facility and respond immediately in the event of an emergency.

2/ The personal harassment recounted by Thurman included such episodes as tying his clothes in knots, pouring dish washing liquid on his clothes, locking him into the mine property, putting grease on the seat of his truck, placing logs under the wheels of his truck, and breaking a headlight on his truck. Tr. 42-43.

Shortly after leaving the meeting, however, Thurman returned to Swisher's office to request a lay-off slip and to tell Swisher and the mine superintendent, Demp Lindsay, that he could no longer work underground with the men on the shift. He stated that he feared for his life because Lindsay and Harness had been friends for 20 years, drank together, and were "a clique." Tr. 107-08. Swisher refused to issue Thurman a lay-off slip because work was available. Nevertheless, Swisher instructed Lindsay to try to find Thurman a job on Queen Anne's day shift. Tr. 187, 246. Lindsay was not successful in persuading anyone on the day shift to switch to the night shift, but he did inform Thurman shortly thereafter of an underground job opening on the day shift at the nearby S&H Coal Company. S&H is owned in part by Swisher, and Thurman had worked there previously. Tr. 246-47. Thurman did not return to work at Queen Anne after he left in the middle of his shift on March 6, nor did he seek employment at S&H. He subsequently obtained other non-mining employment.

After departing Queen Anne, Thurman filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). 30 U.S.C. § 815(c)(2). After investigation, MSHA determined that a violation of the Mine Act had not occurred and declined to prosecute a complaint on Thurman's behalf. 30 U.S.C. §§ 815(c)(2) & (3). Thurman then filed a complaint on his own behalf before this independent Commission pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3).

Following an evidentiary hearing, Administrative Law Judge Weisberger concluded that Thurman had failed to establish a prima facie case of discrimination. The judge found that Thurman's complaints about the lack of an outside person and the operation of a continuous mining machine contained allegations of safety violations and were protected activities. 9 FMSHRC at 422. He further found that the balance of Thurman's complaints were either allegations of personal harassment or were not safety-related and, thus, were not complaints protected by the Mine Act. *Id.* However, the judge determined that Queen Anne had not taken any adverse action against Thurman that was in any part motivated by his safety complaints, since there was no evidence that Thurman made any complaints about these conditions to MSHA or management prior to his leaving work on March 6. 9 FMSHRC at 423-24. He further found that Swisher's suggestion to Thurman on March 13 that he return to his section was not a constructive discharge. 9 FMSHRC at 423. The judge also rejected Thurman's apparent argument that Queen Anne's practice of operating without an outside person continued to be an adverse action,

concluding that the failure to provide a miner with a safe work place may be a violation of the Act but does not, without more, constitute discrimination. 9 FMSHRC at 424. Therefore, the judge dismissed Thurman's discrimination complaint.

On review, Thurman essentially challenges the judge's factual findings. The Commission's role in reviewing a judge's decision is to determine whether his factual findings are supported by substantial evidence and whether the judge correctly applied the law. 30 U.S.C. § 823(d)(2)(A)(ii). See, e.g., *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1628 (November 1986). After reviewing the record, we conclude

that the judge's decision is supported by substantial evidence and is consistent with applicable Commission precedent.

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under section 105(c) of the 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 protected 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. 633 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 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 Eastern Assoc. 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). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

We first consider whether Thurman engaged in protected activity. While a reading of the record reveals that Thurman's most emphatic complaints involved allegations of personal harassment, Thurman did communicate to Swisher his concern about the lack of an outside person at the meetings on March 10 and 13. Tr. 30-32. He also informed Swisher of the episode when Foreman Harness had operated the continuous mining machine while no one remained on the surface. Tr. 198-99. These concerns focused on the safety implications of operating a shift without a responsible person on duty at a surface communication facility to respond to the miners underground in the event of an emergency as required by 30 C.F.R. § 1600-1 (note 1, supra). Therefore, we affirm the judge's conclusion that these allegations of safety violations were protected complaints and conclude that Thurman established the first element of a prima facie case of discrimination.

As to the second element of a prima facie case, however, we

agree with the judge that Thurman failed to show that there was adverse action by Queen Anne motivated in any part by his safety complaints. When Thurman voluntarily walked off his shift on March 6, he did so without notice or contemporaneous explanation to the other crew members or to mine management. Subsequent to his leaving, the operator responded supportively to Thurman's complaints. When Thurman appeared at the mine office the next day, arrangements were made for a meeting with Swisher. On March 10, Swisher heard Thurman's complaints for the first time and agreed to Thurman's request for a meeting with all the miners on the shift. At that meeting on March 13, Swisher admonished the other crew members against "horseplay" and offered to put Thurman back to work on

the night shift. After Thurman returned to Swisher's office to request a lay-off slip, Swisher instructed the mine superintendent to try to place Thurman on Queen Anne's day shift. When that effort failed, the mine superintendent informed Thurman of a position on the daytime production shift at nearby S&H Mine.

These actions do not reveal a retaliatory motive by the operator. The record indicates that when confronted with Thurman's complaints Swisher responded in good faith to remedy what he thought was essentially an unfortunate interpersonal conflict among his employees. Thurman was not fired, demoted or transferred as a result of his complaints to Swisher. To the contrary, Swisher attempted to accommodate Thurman's requests. Therefore, we conclude that substantial evidence supports the judge's finding that there was no adverse action on the part of Queen Anne resulting from an impermissible motive of retaliation against Thurman for engaging in protected activities. 3/

Finally, even if Thurman's actions in leaving Queen Anne's employment on March 13 are analyzed from the standpoint of a continuing complaint, a work refusal, or a constructive discharge, the result would be the same. The evidence reveals that the operator reacted to Thurman's concerns in a reasonable and supportive manner. Although the effort to find a position for Thurman on Queen Anne's day shift failed, the operator offered alternative employment at S&H. As far as this record indicates, such employment would have served to resolve Thurman's conflict with his coworkers at the Queen Anne mine and also should have alleviated his concern about working underground without an outside person, absent any indication of a similar violative condition on the S&H daytime production shift.

Further, our review of the record suggests an unwillingness on Thurman's part to consider or accept any of the operator's efforts in response to his complaints, with the possible exception of his desire for reassignment to the day shift as an outside person. Tr. 129-30. The record suggests that Thurman's personal dissatisfaction with the members of his crew and mining in general was a strong motivation for his leaving Queen Anne's employment. Id. When he requested his lay-off slip, Thurman told Swisher that he "could not work with those men." Tr. 66, 79. Also, Lindsay, the mine superintendent, testified that when he informed Thurman of the day-shift position at S&H, Thurman requested a letter of recommendation for non.mining employment and told Lindsay that he was through with mining. Tr. 223.

3/ Thurman also suggests on review that Swisher's tank explosion story was meant as a threat on his life. As noted, Swisher testified that he told the story to demonstrate his concern for his employees. Nothing in the record suggests that Swisher's telling of the story was an impermissible interference or adverse action motivated in any part by Thurman's complaints. In addition, there is no evidence in the record to suggest that Swisher's offer to Thurman that he return to the night shift was calculated to force him to quit or was impermissibly motivated by his complaints.

We do not intend to diminish the significance of the violative condition at the Queen Anne mine suggested by this record. The obligation imposed on an operator by the requirement of 30 C.F.R. § 75.1600-1 that there be an outside person to respond to miners underground in the event of an emergency is an important requirement and any violation of the standard has serious safety implications. However, the present matter is a discrimination case, not an enforcement proceeding brought by the Secretary of Labor for a violation of this mandatory standard. Given the judge's finding of the absence of any wrongful action under section 105(c) of the Mine Act by the operator for Thurman's safety-related activities, a finding supported by substantial evidence, the dismissal of Thurman's discrimination complaint must be affirmed.

For the foregoing reasons, the judge's decision 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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