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RONNY BOSWELL V. NATIONAL CEMENT
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February 26, 1992
RONNY BOSWELL

v. Docket No. SE 90-112-DM

NATIONAL CEMENT COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)("Mine Act"). National Cement Company ("National Cement") seeks review of a decision by Commission
Administrative Law Judge Roy J. Maurer concluding that National Cement unlawfully disqualified Ronny Boswell from his position as a utility laborer in violation of section 105(c) of the Mine Act, 30 U.S.C. • 815(c). 13 FMSHRC 207 (February 1991)(ALJ). The Commission granted National Cement's petition for discretionary review. For the reasons that follow, we affirm the judge's decision in part, vacate it in part, and remand.
I.
Factual and Procedural Background
At the time of the alleged discrimination, Boswell had worked for National Cement at its cement plant in Ragland, Alabama, for about 14 years, including ten years in the position of utility laborer. During the preceding six years, and at the time of the events in question, his supervisor was James Allen.
National Cement disqualified Boswell from his position as a utility laborer pursuant to a "Disciplinary Action Report" ("Report") dated January 11, 1990. The Report indicated five grounds for Boswell's disqualification: (1) a kiln incident on August 8, 1989; (2) a clay shredder incident on October 1 and 2, 1989; (3) a radio incident on October 22, 1989; (4) a kiln incident on December 22, 1989; and (5) a bobcat and wheelbarrow incident on January 1, 1990.
With respect to the kiln incident of August 8, 1989, Boswell and Allen presented conflicting versions at the hearing. The judge credited Boswell's account. 13 FMSHRC at 208-09. On the day in question, two miners had been working in the kiln, tearing down brick and coating. Allen directed three other employees, including Boswell, to enter the kiln and throw the debris
~254
back up the kiln. 13 FMSHRC at 208-09. Boswell testified that, at the time

of the incident, he believed it was unsafe to have more than two miners at a time working in the kiln when pulling down brick and coating. Tr. 20-21. Boswell refused Allen's direction to go inside the kiln and requested a safety review.(Footnote 1) The company subsequently dropped the matter and the three miners, including Boswell, were not required to enter the kiln.

In the clay shredder incident of October 1, 1989, Allen asked Boswell to operate the shredder.(Footnote 2) Boswell replied that he did not want to operate it because he had never used it before, had no knowledge of how it worked, and had never received any training in its operation. Allen then told Boswell that he was willing to show Boswell how to operate the machine. Boswell responded that he would not "be responsible ... for what tears up." Tr. 27. After further discussing the matter with Boswell, Allen assigned Boswell to another task. The following day, Allen again asked Boswell to run the shredder. Boswell testified that "about the same thing happened" as had occurred the previous day. Tr. 27. Eventually Allen started the shredder and Boswell agreed to watch it run. 13 FMSHRC at 209-10.

As to the radio incident of October 22, 1989, Allen testified that he tried to call Boswell on the radio and received no answer. Allen then went looking for Boswell and found him on the eighth floor of the preheating tower "sitting with the radio on." Tr. 103, 128. Allen testified that he then asked Boswell if he had heard him calling on the radio and Boswell said he had not. Allen then checked the radio and it seemed to be in working order. Tr. 104. In contradiction, Boswell testified that no such incident had occurred, and that he was not at work on October 22, 1989. Tr. 28-29, 30, 31. See also N.C. Exh. 4. Allen conceded the date could be incorrect but stated that the incident had occurred. Tr. 127.

In the kiln incident of December 22, 1989, Boswell worked at the hood of the kiln for about eight hours, installing beams and building a platform. He testified that he had been having ear problems for a month and the cold made his ears worse. Boswell told Allen about his ears and was excused.

The bobcat and wheelbarrow incident of January 1, 1990, arose when Allen directed Boswell to use a bobcat to remove steel mill grinding balls from the

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1 Under the collective bargaining agreement at the mine, a miner has the right to call for a safety review if he believes that a situation is unsafe, and cannot be disciplined for refusing to perform an unsafe task. Under the safety review procedure, representatives of the union and company meet to review the situation. If the two sides cannot agree, they may request a review by the Department of Labor's Mine Safety and Health Administration.

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2 Clay is typically encountered in large chunks. At National Cement's mine, the clay is carried up a conveyor belt, dumped into a revolving tub, and shredded. Tr. 26.

mill basement.(Footnote 3) The task involved traveling on a 20 to 30 degree

inclined concrete ramp that was strewn with loose clinkers. The ramp was 12 feet wide and 30 to 40 feet long. There were six to eight inches of water at the bottom of the ramp in a ditch with a metal-eared safety barrier. Boswell responded that it was unsafe for him to operate the bobcat because he had no training on the machine. Allen then told Boswell to use a wheelbarrow to perform the task and Boswell refused on the grounds that it was unsafe to push the wheelbarrow. Allen testified that he then explained to Boswell various ways of performing the task safely. Boswell called for a safety review but Allen dropped his request and sent Boswell to push rock for the balance of the shift.

On January 11, 1990, management and union officials met to discuss Boswell's job performance. Boswell was then advised that, based on the five incidents referenced in the Report, he was disqualified as a utility laborer due to his unsatisfactory performance. National Cement decided that Boswell would be permitted to "roll" to another job. Boswell elected to roll to the job of payloader operator, which paid a base rate of $12.50 per hour. The utility laborer's job paid a base rate of $13.58 per hour.

On February 26, 1990, Boswell filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") based on the disqualification. By letter dated May 4, 1990, MSHA notified Boswell that it had determined that he had not been discriminated against in violation of section 105(c) of the Mine Act, 30 U.S.C. • 815(c). On June 18, 1990, Boswell filed a complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. □ 815(c)(3)

National Cement filed a motion to dismiss Boswell's complaint as untimely, on the basis that it had been filed with the Commission more than 30 days after MSHA's determination that no discrimination had occurred.(Footnote 4) The judge summarily denied the motion on the grounds that the filing time was not jurisdictional. Tr. 13. On the merits, National Cement primarily argued that Boswell's disqualification was justified by the five incidents set forth in the Report. National Cement also provided testimony and other evidence to the effect that Boswell's prior work history was poor and that the underlying cause of the problem was the fact that Boswell and Allen could not get along.

The judge determined that Boswell had engaged in protected activity. 13 FMSHRC at 213. With regard to the kiln incident of August 8, 1989, the judge found that Boswell's refusal to work and his request for a safety review

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3 The bobcat is a four-wheeled vehicle with a bucket in front that is used to pick up, transport, and dump loose material. The vehicle does not have a steering wheel and is operated with hand and foot controls. See Tr. 34.

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4 In relevant part, section 105(c)(3) of the Mine Act provides: "If the Secretary, upon investigation, determines that the provisions of [section 105(c)] 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, charging discrimination or interference...." 30 U.S.C. • 815(c)(3).

~256

were made in good faith and were reasonable and, hence, were protected. 13 FMSHRC at 209, 213. In reaching his conclusion, the judge also relied on the testimony of James Noah, a fellow employee, who testified that he informed National Cement's safety director that, if Boswell had not requested the safety review, he would have. 13 FMSHRC at 209. The judge found that the work Boswell was scheduled to perform was "patently unsafe." 13 FMSHRC at 213.

The judge further determined that Boswell's refusal to work in the bobcat and wheelbarrow incident of January 1, 1990, was a protected work refusal, and that his request for a safety review was also protected activity. 13 FMSHRC at 213. The judge found that Boswell had very limited experience operating the bobcat, and no experience operating it on a 20 degree slope. Id. In addressing Allen's wheelbarrow alternative, the judge noted that the results of a safety review were unknown because Boswell's request was not acted upon and Boswell was given another assignment. Id.

The judge concluded that Boswell's disqualification was motivated, "at least in major part," by his protected activity.(Footnote 5) 13 FMSHRC at 213. Based on that conclusion, he found that Boswell was discriminated against in violation of the Mine Act. Id. The judge held that Boswell was entitled to reinstatement to his former position as utility laborer and to have his personnel file purged of any derogatory information pertaining to his disqualification. 13 FMSHRC at 215. The judge found that Boswell was not entitled to any back pay because, as a result of 56 more hours worked, he had earned $919.54 more as a payloader operator than he would have earned as a utility laborer. 13 FMSHRC at 214-15.

On review, National Cement argues that the judge erred in not dismissing Boswell's complaint because of its untimely filing. It contends that Boswell's refusal to use the wheelbarrow to remove the steel balls from the mill basement was not protected activity and justified his disqualification and transfer. National Cement also argues that the judge erred in failing to address its defense that, notwithstanding Boswell's alleged protected activity, it would have disqualified and transferred him in any event based on his prior work history and his poor job performance. It points to the judge's failure to address Boswell's poor working relationship with Allen and his other work history, apart from the incidents listed in the Report. Finally, National Cement asserts that Boswell's disqualification and transfer were not adverse actions, since Boswell actually earned more as a payloader operator.

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5 The judge found no protected activity involved in the other three incidents discussed in the Report. With regard to the clay shredder incident, the judge did not find any protected activity on Boswell's part nor did he find any

unprotected justification for disqualifying Boswell based on this incident.
13 FMSHRC at 210. With respect to the radio incident of October 22, 1989, the judge found the evidence that the incident actually occurred to be extremely weak. Id. The judge determined that the kiln incident of December 22, 1989, neither helped nor hurt either party. 13 FMSHRC at 211.

~257

II. Disposition of Issues

A. Timeliness of Boswell's discrimination complaint

We affirm the judge's denial of National Cement's motion to dismiss Boswell's complaint. The Commission has made clear that the filing periods for section 105(c) discrimination complaints are not jurisdictional in nature. See, e.g., David Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 24 (January 1984), aff'd mem. 750 F.2d 1093 (D.C. Cir. 1984) (table) (60-day time limit under section 105(c)(2) of the Mine Act, 30 U.S.C. • 815(c)(2), for miner to file discrimination complaint with the Secretary); Secretary on behalf of Donald R. Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986)(Secretary of Labor's filing responsibilities). Thus, on a case-by-case basis, the Commission may excuse filing delays in appropriate circumstances. See Hollis, 6 FMSHRC at 24.

Under section 105(c)(3) of the Mine Act, Boswell was required to file his complaint "within 30 days of notice of the Secretary's determination" of no discrimination. The statute makes clear that the time for filing begins to run upon "notice" of the Secretary's action. Here, the record does not indicate when Boswell actually received MSHA's May 4, 1990, letter notifying him of its determination but, assuming three days for its receipt through the mail, Boswell's complaint, filed on June 18, 1990, was at most, 12 days late. The record also shows that on June 6, 1990, Boswell erroneously mailed his complaint to MSHA at its Arlington, Virginia, office and that MSHA forwarded it to the Commission.

Under these circumstances, we conclude that the lateness of Boswell's filing was de minimis and appears to have resulted, at least in part, from mistake, inadvertence, or excusable neglect. Most significantly, National Cement has shown no prejudice in connection with this brief delay (see Hale, 8 FMSHRC at 909), nor has there been any showing that Boswell knowingly slumbered on his rights. Cf. Hollis, 6 FMSHRC at 25. Accordingly, Boswell's late filing is excused.

B. The Alleged Discrimination

The Commission has long held that a miner seeking to establish a prima facie case of discrimination under section 105(c) of the Mine Act bears the burden of persuasion that he engaged in protected activity and 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, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); and 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 any protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's 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
~258
Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 7l9 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).

1. Protected Activity

The judge found that Boswell engaged in two instances of protected activity: (1) his work refusal and request for a safety review in the kiln incident of August 8, 1989; and (2) his work refusal and request for a safety review in the bobcat and wheelbarrow incident of January 1, 1990. National Cement argues on review that the judge erred in finding that Boswell engaged in protected activity in connection with his refusal to use the bobcat and wheelbarrow to remove the steel balls from the mill basement on January 1, 1990.

For a work refusal to come within the protection of the Mine Act, the miner must have a good faith, reasonable belief that the work in question is hazardous. See generally, Robinette, 3 FMSHRC at 807-12. In determining whether the miner's belief in a hazard is reasonable, the judge must look to the miner's account of the conditions precipitating the work refusal and also to the operator's response. An operator has an obligation to address the danger perceived by the miner. Secretary on behalf of Pratt v. River Hurricane Coal Company, Inc., 5 FMSHRC 1529, 1534 (September 1983); Secretary
of Labor v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985). As stated in Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), once it is determined that a miner has expressed a good faith, reasonable concern, the analysis shifts to an evaluation of whether the operator has addressed the miner's concern "in a way that his fears reasonably should have been quelled. In other words, did management explain to [the miner] that the problems in his work area had been corrected?" 866 F.2d at 1441. See also Secretary on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-99 (June 1983); Thurman v. Queen Anne Coal Co., 10 FMSHRC 131, 135 (February 1988), aff'd, 866
F.2d 431 (6th Cir. 1989)(table). Accordingly, a miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition.

National Cement's argument suggests that by itself Boswell's refusal to use the bobcat was outside the Act's protection but the thrust of its argument focuses on the wheelbarrow aspect of that work dispute. With respect to the bobcat incident, the judge concluded that Boswell's work refusal was protected. 13 FMSHRC at 213. We are satisfied that substantial evidence supports the judge's finding. Boswell had very limited experience operating the bobcat and none on a 20 degree slope. Tr. 34-36. Boswell testified that he was afraid to run the bobcat and that it was unsafe for him to attempt to do so. Tr. 34-36. See also Tr. 83-84. Boswell indicated in his written response to the Report that he had never been trained to operate the bobcat, and that he might have run it on flat ground for a total of eight hours. N.C. Exh. 4. See also Tr. 35-36. National Cement did not provide training for operation of a bobcat. Tr. 35, 84. We agree with the judge that Boswell's
~259
refusal to operate this equipment under the conditions involved lies within the zone of protected activity.

National Cement's principal challenge to the judge's finding of protected activity centers on the wheelbarrow dispute. As noted, after Boswell refused to operate the bobcat, Allen then directed him to use a wheelbarrow to remove the steel balls. When Boswell refused because of the clinkers on the ramp, Allen told Boswell to sweep it off. Allen also offered help to Boswell in removing the steel balls and told Boswell that he could carry loads as small as ten pounds. The operator argues that, under these circumstances, its direction to use the wheelbarrow did not require performance of an unsafe task, and that the judge failed to address the reasonableness of its response to Boswell's continuing work refusal.(Footnote 6)

Boswell testified that the danger presented was the clinkers on the ramp, which, in his view, made it difficult to get traction while walking up the incline. Allen testified that he told Boswell to "move the clinker[s] from the ramp" and "sweep it down [so that] you have a flat surface." Tr. 85. The judge did not address Allen's testimony in this regard, nor did he discuss Allen's testimony that Boswell was told someone would be sent to help him remove the steel balls with the wheelbarrow and that he could carry loads of about ten pounds in the wheelbarrow. Tr. 84-85.

Thus, there is testimony in the record that suggests National Cement may have adequately addressed the fears giving rise to Boswell's work refusal and that, therefore, his continued work refusal may no longer have been reasonable. If so, his work refusal lost its protected status and could provide a legitimate justification for Boswell's disqualification and transfer as well as the basis for an affirmative defense. We express no view as to whether Boswell's fears were quelled. We conclude, however, that the judge should reconsider his findings in view of the testimony referred to above and any other relevant evidence of record and determine whether Boswell's fears were adequately addressed by National Cement.

2. Adverse action

National Cement argues that no adverse action was taken against Boswell because he earned more in the job to which he transferred than he would have earned as a utility laborer. We disagree. The Report specifically states that Boswell was disqualified as a utility laborer due to unsatisfactory performance and that he was reprimanded. It states further that, in order to avoid discharge, the employee should review his work performance history. This Report clearly constitutes an adverse action subjecting Boswell to discipline or detriment in his employment. See generally Secretary on behalf of Jenkins v. Hecla-Day Mines Corp., 6 FMSHRC 1842, 1847-48 (August 1984).

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6 National Cement does not argue that the judge erred in finding that Boswell's request for a safety review regarding the bobcat and wheelbarrow incident was protected.

~260

Further, although Boswell earned $920.04 more in his new job than he would have in his previous one, his job transfer from a utility laborer to payloader operator reduced Boswell's base pay by $l.08 per hour. The annual difference in earnings found by the judge was due to additional hours worked by Boswell and premium pay received for Sunday and holiday work, shift differential, and overtime. See Tr. 43-46, 168. Thus, the evidence shows that Boswell earned more because he worked more, but that he nevertheless suffered a loss in his base pay rate. We conclude that Boswell suffered an adverse action.

3. Nexus

We agree with the judge's conclusions that National Cement's action against Boswell was motivated at least in part by Boswell's protected activity. The Report specifically refers to Boswell's August 8, 1989, refusal to remove brick from the kiln, Boswell's January 1, 1990, refusal to remove the steel balls from the mill basement using the bobcat and Boswell's requests for safety reviews associated with these work refusals. National Cement does not dispute that these activities were part of its bases for disciplining Boswell. Thus, we affirm the judge's conclusion that Boswell was disciplined, at least in part, for these protected activities and that he, therefore, established a prima facie case of discrimination.

4. Affirmative Defense

On review, National Cement argues that it would have disciplined Boswell, in any event, for his unprotected activity alone and that the judge did not address this affirmative defense. The operator presents two bases for its affirmative defense: (1) Boswell's allegedly poor work history including the wheelbarrow incident and the three other incidents set forth in the Report (the clay shredder, radio and December 22, 1989 kiln incidents) as well as his earlier work history;(Footnote 7) and (2) the inability of Boswell and Allen to get along. The judge found little evidence that the radio incident actually occurred and therefore determined that it did not affect the issue at

bar. We agree. The judge also found that the clay shredder and December 1989 kiln incidents did not involve protected activity and individually did not provide the operator with justification for disciplining Boswell. He did not, however, analyze whether National Cement had established an affirmative defense, based on the totality of unprotected activity set forth in the Report. Nor did he mention the earlier work history or Boswell's relationship with Allen. Accordingly, we remand this case to the judge for analysis of this issue. On remand, the judge shall evaluate the evidence of record on these points in light of the Pasula-Robinette affirmative defense framework. Pasula, 2 FMSHRC at 2799-800; Robinette, 3 FMSHRC at 817-20. If the judge finds that Boswell's refusal to use the wheelbarrow was not protected, he should also consider this incident when evaluating National Cement's affirmative defense.

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7 According to National Cement, Boswell had a long history of performance problems, involving seven additional incidents. See N.C. Exhs. 5-11. We note, however, that these incidents were not mentioned in the Report.

III.

Conclusion

Accordingly, on the foregoing bases, we affirm the judge's decision in part, vacate it in part, and remand for further proceedings consistent with this opinion. The judge shall consider whether the wheelbarrow incident constituted a protected work refusal. The judge shall also analyze whether National Cement proved that it would have disqualified Boswell in any event for any unprotected activities the judge may find in reconsidering the matters raised in this decision.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner