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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FRANK ORNELAS,
COMPLAINANT

v.

PHELPS DODGE CORPORATION,
RESPONDENT

COMPLAINT OF DISCHARGE,
DISCRIMINATION OR INTERFERENCE

DOCKET NO. CENT 80-249-DM

MSHA CASE NO. MD 80-14

MINE: Tyrone Mine & Mill

DECISION

Appearances:

Mr. Frank Ornelas
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Pro Se

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James Speer Esq.
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003,
For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

On March 10, 1980, the Complainant filed a complaint of discrimination, pro se, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act"). (FOOTNOTE 1) Complainant alleged that his employment with Respondent was terminated following an investigation of an accident involving two trucks of the Respondent, one of which Complainant was driving. The accident occurred September 6, 1979. Complainant alleges that Respondent had been previously warned by its truck drivers that the procedure under which haul trucks dump ore into the ore crusher

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was dangerous. The haul truck accident occurred while Complainant was attempting to back his truck into one of the two crusher dump pockets, in order to dump the ore.

Respondent's answer denies that Complainant was discharged because he engaged in any protected activity and affirmatively alleges that Complainant was discharged because of an unsafe driving record and careless operation of the truck on September 6, 1979, resulting in damage to the truck and danger to other persons.

FINDINGS OF FACT

1. Prior to his discharge on September 8, 1979, Complainant had been a truck driver for Respondent for approximately nine and one-half years.

2. Complainant's duties as a truck driver on September 6, 1979, were to drive Respondent's 170-ton haul truck to a power shovel in Respondent's open pit copper mine and, after the truck was loaded with ore, to transport the ore to the primary crusher where it is dumped.

3. Two bays or entrances are provided in the building where ore from the truck is dumped into the primary crusher. These two bays are 25.4 feet in width and the width of the 170-ton truck is 22.3 feet. The two bays are separated by a pillar at the entrance.

4. The truck drivers are instructed that when they drive to the primary crusher to unload ore they should turn the truck directly in front of the bay they intend to use and then back the truck straight into the bay. The bed of the truck is then elevated and the ore slides into the "dump pocket."

5. On September 6, 1979, after Complainant's truck was loaded with ore, he drove it to the primary crusher. From the outside of the building and looking straight into two bays, the one on the left, or south bay, had a truck in it unloading its load of ore. Complainant began backing up his truck in order to enter the right, or north, bay.

6. Complainant's truck was not directly aligned with the north bay, but was partially in line with the south bay. While the bed of Complainant's truck was backing toward the truck in the south bay, the driver of that truck quickly existed the right side of the driver's cab before the bed of Complainant's truck struck the left front of the truck in the south bay.

7. Complainant then drove his truck forward and backed up again. On this occasion, the bed of Complainant's truck again struck the truck in the south bay and damaged the hand rail on the left hand side of that truck. Complainant's truck continued backing into the north bay until it was into position to dump ore.

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8. Complainant did not know that his truck had struck the truck in the south bay until after Complainant's truck was in final position to dump the ore. The driver of the damaged truck shouted at Complainant, informing him of the accident.

9. The damage to the truck in the south bay was approximately \$17,000 and installation costs for a new cab were from \$3,000 to \$4,000.

10. On March 13, 1979, approximately 5 months before the accident, a written safety suggestion by a truck driver for the Respondent was submitted to the supervisor. The suggestion was that the haul truck in the south bay should finish dumping its load of ore and drive out before the next truck enters the north bay, so that the truck in the south bay will not be "run over" by a truck backing into the north bay. This suggestion was supported by other truck drivers, but was rejected by management on May 9, 1979.

11. Immediately following the accident on September 6, 1979, the shift foreman gave Complainant a written notice of possible disciplinary action or suspension.

12. On September 8, 1979, Complainant was given a written "notice of discharge." The stated reason for the discharge was for careless operation of the truck Complainant was driving, resulting in extensive damage to the other truck, and for endangering the driver of the other truck.

ISSUE

The threshold questions to be answered are (1) whether or not Complainant engaged in any protected activity and, if so, (2) whether his discharge was motivated in any part by that protected activity. If these questions cannot be answered favorably for the Complainant, then Respondent did not violate section 105(c) of the Act when it fired him.

DISCUSSION

The test to be used in deciding this case is set forth in Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company 2 FMSHRC 2786 (October 14, 1980). The guidelines are as follows:

"We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.

Employee activity which is protected by the Act is set forth in section 105(c)(1), and includes:

"... 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, ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this Act."

Complainant testified that he had made complaints at safety meetings at some time prior to the date of the accident in regard to the manner in which the trucks dumped ore at the primary crusher. His testimony was that he had told his foreman that it was dangerous dumping "two trucks at a time." Another driver had made a written safety suggestion to Respondent on March 13, 1979, suggesting that the truck in the south bay finish dumping its load of ore before another truck pulled into the north bay. This suggestion had been rejected by Respondent on May 9, 1979, approximately four months before the accident occurred. Had the suggestion been followed there would have been no truck unloading or in the south bay when Complainant attempted to back his truck into the north bay. Thus, the accident could have been prevented had the suggestion been followed.

When Complainant made his complaint, notifying his foreman at the safety meetings of the alleged danger in the ore dumping procedure at the primary crusher, he was engaged in protected activity. However, there is no evidence that the termination of Complainant's employment was motivated in any part by that protected activity.

Respondent presented evidence that, in addition to the accident of September 6, 1979, Complainant had an accident on January 31, 1979, while operating a truck. He had failed to look into his rear view mirror and had backed into another truck near the primary crusher. On another occasion, while operating a truck loaded with ore, Complainant accidentally backed the truck through a berm. The berm was in place in order to protect personnel and equipment from falling approximately 100 to 150 feet downward into a dump or canyon. After backing through the berm the truck came to rest with the rear wheels hanging over the edge of the dump and the front wheels up off the ground. The bottom of the truck was resting on its fuel tanks. Respondent argued that Complainant's employment was terminated for these reasons.

Complainant stated at the hearing that he felt he had been discriminated against in that he was fired for a truck accident even though other drivers had the same type of accidents and they were not fired. Assuming Complainant's contention is true, there was, however, no evidence produced at the hearing to show that Complainant's termination of employment by the Respondent was motivated in any part by Complainant's protected activity of making a safety complaint or suggestion in regard to the manner and order in which trucks dump their ore at the primary crusher.

I conclude that Complainant's employment was terminated because Respondent had some doubts about Complainant's ability to safely operate a haul truck and that Complainant was not fired because he had made safety complaints or had engaged in protected activity.

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Thus, Complainant has failed in his burden proof to show that his termination of employment was motivated in any part by his having engaged in protected activity.

CONCLUSION OF LAW

1. The undersigned Judge has jurisdiction over the persons and subject matter of these proceedings.

2. Complainant has failed to prove by a preponderance of the evidence that Respondent violated section 105(c) of the Act when it discharged Complainant on September 8, 1979.

ORDER

The complaint is dismissed.

Jon D. Boltz
Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 105(c) reads in pertinent part as follows:

"No person shall discharge ... any miner ... because such miner ... has ... made a complaint under or relating to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation in a ... mine"