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RICHARD PETERS V. BUCKEYE INDUSTRIAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

RICHARD W. PETERS, SR.,  
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. LAKE 87-37-D

v.

MORG CD 86-19

BUCKEYE INDUSTRIAL  
MINING COMPANY, INC.,  
RESPONDENT

DECISION

Appearances: Richard W. Peters, East Palestine, Ohio,  
pro se;  
John Orr Beck, Esq., Lisbon, Ohio, for Respondent.

Before: Judge Maurer

This case is before me upon the Complaint of Discrimination filed by Richard W. Peters under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," alleging that Buckeye Industrial Mining Company discriminated against him in employment after he had an accident on the job by returning him to work as a laborer at a reduced wage from that of a truck driver, which he was prior to the accident.

The case was heard in Pittsburgh, Pennsylvania, on July 6, 1987. Both parties waived the filing of post-hearing briefs.

The parties have stipulated that:

1. Complainant has been an employee of the company since October 22, 1968.

2. During his employment, he has been employed as a laborer, pitman, "2400" dragline operator, truck driver, and for short periods as a bulldozer and highlift operator.

3. On July 14, 1986, complainant was involved in an accident on the job when the truck he was driving rolled over.

4. Following that accident, complainant was off work until on or about July 21, 1986, and then was returned to work as a laborer and pitman at a reduced wage (70¢ per hour less) from that of a truck driver.

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5. Complainant worked as a laborer-pitman until October 1986. At that time he allegedly hurt his back on the job and has been off work from the date of that injury until at least the date of the hearing (July 6, 1987).

The essence of this pro se complaint is that the respondent allegedly put the complainant in a lower-paying job on or about July 21, 1986, in violation of Section 105(c)(1) of the Act 1 in retaliation for him having the accident a week earlier, and for making repeated safety complaints about the brakes on the truck he was assigned to drive. The complainant further alleges that it was these faulty brakes that in fact caused the accident.

The general principles governing analysis of discrimination cases under the Act are well 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 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, 663 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).

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There is no question that Mr. Peters engaged in protected activity by repeatedly complaining to his foreman, Art Brown, about what he believed to be faulty and dangerous brakes on the truck he was assigned to drive. He made numerous complaints about the state of the brakes on his assigned truck in the two or three weeks prior to the accident. Each time his foreman would call maintenance and one of the mechanics would come out and check them. When the mechanic would get there, there was invariably nothing the matter with the brakes. Foreman Brown and Peters both further testified that the driver of the truck on the other shift, one Gene Liber, never complained about the truck's brakes and in fact denied having any problem when specifically asked about the brakes by Brown or Peters. Nevertheless, reading the record as a whole, I find that it is entirely possible that Peters was experiencing an intermittent problem with the truck's brakes, and, in fact, inadequate brakes may well have at least contributed to the July 14 accident. Accordingly, Mr. Peters has established the first element of a prima facie case of discrimination, i.e., he has shown to my satisfaction that he did indeed engage in protected activity.

Foreman Brown testified that in every event, in response to every complaint, even though he was beginning to wonder about Peters' complaints, he called maintenance and had the brakes checked out and they always checked okay. Peters concurs with this testimony in substantial part. I also find Brown's testimony credible to the effect that he never told Peters to operate the truck without brakes or with bad brakes, but rather told Peters that if the brakes were bad, "take it to the parking lot and park it". I therefore find that Mr. Peters has failed to establish the second element of a prima facie case, that is, he has not shown that the adverse action by the operator was motivated in any part by the protected activity.

Even had Mr. Peters established a prima facie case herein, I find that case rebutted by the operator's evidence of valid non-protected business reasons for the removal of Mr. Peters as an equipment operator. Mr. Robert J. Bacha testified that the only piece of equipment Peters was ever able to satisfactorily operate for the company was a "2400" dragline, and that particular machine is no longer in use. Thereafter Peters was tried out as a highlift operator, bulldozer operator and, lastly, as an end dump operator (truck driver).

He had problems with operating the end dump truck independent of the July 14 accident as a result of which, according to Bacha, the company removed him from the truck driving job and re-assigned him as a laborer. After he had been operating the end dump for several months there were numerous complaints

