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JOSEPH S. COLAMARTINO V. GATEWAY COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

JOSEPH S. COLAMARTINO,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. PENN 89-271-D

v.

GATEWAY COAL COMPANY,
RESPONDENT

DECISION

Appearances: Paul H. Girdany, Esq., Pittsburgh, Pennsylvania,
for the Complainant; R. Henry Moore, Esq.,
Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) [hereinafter referred to as the Act], on September 1, 1989, alleging that he was assaulted by one of the Respondent's foremen, Pete Krosunger, because he wanted to rib pin an area that the foreman did not want pinned. The foreman, Krosunger, on the other hand, admits hitting Complainant, but contends that the incident occurred because of his pent-up frustration with supervising Colamartino. The Respondent (Gateway) maintains that the only adverse action taken against Complainant was taken by Mr. Krosunger and that they for their part, not only did not sanction his actions, but in fact, suspended him for 60 days without pay as a result.

Pursuant to notice, this case was heard in Pittsburgh, Pennsylvania, on March 19 and 20, 1990. Both parties have filed post-hearing proposed findings of fact and conclusions of law which I have considered along with the entire record in making this decision.

STIPULATIONS

The parties stipulated to the following at the hearing, which I accepted (Tr. 5-6):

1. The administrative law judge has jurisdiction in this proceeding.

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2. The Gateway Coal Company operates coal mine facilities, and therefore, is an operator as defined under section 3(d) of the Act.

3. Complainant Joseph Colamartino has had a job classification of roof bolter, which at the time, under the collective bargaining agreement in effect between the parties, paid \$16.92 per hour or \$122.73 per day.

4. On May 17, 1989, he was assigned certain roof bolting duties with another employee named Sylvester Richards.

5. His supervisor that day was Gerald A. (Pete) Krosunger.

6. An altercation occurred on that day from which Mr. Colamartino suffered injuries.

7. Mr. Colamartino was absent from work from May 17 to August 14, 1989.

8. Complainant, Mr. Colamartino, received workers' compensation payments during this period of time in the amount of \$399 per week.

9. Aside from the actual physical assault, there was no formal disciplinary action taken against Mr. Colamartino; i.e., adverse action.

10. From on or about June 16, 1989 until July 17, 1989, the bargaining unit employees at the Gateway Coal Company, did not report for work.

11. Pete Krosunger was suspended without pay from May 18, 1989 until July 15, 1989.

FINDINGS OF FACT

1. Complainant first started to work for Gateway Coal Company (Gateway) in January of 1977. He worked until he got laid off in 1985 and was then recalled in 1988. He worked as a roof bolter for Pete Krosunger from May of 1988 until the incident involved herein, which occurred on May 17, 1989.

2. During this year-long period, Krosunger had some problems supervising Colamartino, including several incidents of insubordination, which are documented in two notebooks received into evidence as Respondent's Exhibit Nos. 7 and 8, and summarized in Respondent's Exhibit No. 6. More specifically, there are several instances documented by Krosunger where Colamartino complained about or refused to perform rib-pinning.

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3. For example, on the very day of the incident, May 17, 1989, at the beginning of the shift, when told by Krosunger that he would have to rib-pin the No. 1 heading, Colamartino replied to the effect: "Why do we have to do it, nobody else on the other shifts is doing it?" He further testified at the hearing, by way of explanation, that he wanted to know why, if rib-pinning that entry was so important, the other two shifts were not helping with the task. He did not appreciate it that they had not done their share.

4. At the beginning of their shift on May 17, 1989, Krosunger had assigned Colamartino and his bolting partner, Richards, to rib-pin an area in the No. 1 entry. Two hours later, when Krosunger checked on their progress, he found that they had only installed about twenty rib pins despite the fact that it only takes 3 to 4 minutes to install each pin. Krosunger was upset about this and Colamartino knew it.

5. At this point in time, Colamartino informed Krosunger that they would not pin those areas of the rib where loose coal and sloughage had either fallen down or been taken down by their scaling the rib. Complainant opined that they could not safely install rib pins in that area because they could not secure safe footing. Mr. Virgili, a safety committeeman who inspected the area shortly after the incident giving rise to this case occurred, agrees that it would have been unsafe to install rib pins in that area. Krosunger believed that Colamartino had purposely scaled the rib in order to have some reason not to rib-pin it.

6. After some repartee between the two as to whether or not Colamartino did or did not want to rib-pin, Krosunger ordered Complainant and Richards to go to the No. 2 entry and bolt the roof where the continuous miner pulled out.

7. Krosunger specifically told Complainant and Richards not to rib pin in this one area of the No. 2 heading where the miner was going to begin a crosscut, perhaps on that same shift.

8. When Krosunger returned to the face of the No. 2 heading sometime later, he found Colamartino preparing to rib-pin. He testified at Tr. 279-281 and which testimony I find credible and do credit it here:

I went up on Lester's side, I said, "What are you doing, Lester?"

* * * *

Q. Lester is Mr. Richards?

A. Sylvester Richards, right.

"I told you, don't rib pin this." He went like this (indicating).

Q. He gestured with his hand?

A. Right.

* * * *

Q. Who was he motioning toward?

A. Joe, his buddy. [Colamartino]

* * * *

Q. What did you do then?

A. I went over and asked Joe, "Why are you rib pinning? I told you don't rib pin this. We are going to cut them out anyway."

Q. What did he say?

A. His response was, "The company wants these places rib pinned, they are going to get them rib pinned."

Q. What happened at that point?

A. He started to stretch out boards. I said, "Joe, don't rib pin this. We are going to cut them out anyway." This is what I said to him again, following him around the machine, because he is putting those boards down in the area they would be installed. I was picking them up and putting them back on.

Q. Do you recall how many times you went around the bolter like this?

A. I would say twice.

Q. And he was putting them down and you were picking them up?

A. Right.

Q. What happened after you did that?

A. I asked him, "What are you doing, Joe? I told you don't rib pin." . . . [A]nd he grabbed that drill and started walking to the face.

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At that point Krosunger grabbed the drill to pull it away from him. Colamartino resisted and Krosunger began hitting him until Richards yelled for him to stop.

9. The purpose of rib-pinning in this mine is to prevent the ribs from spalling and depositing accumulations of combustible materials along the ribs, however, generally the areas which are to be cut out to create crosscuts are not pinned. Installation of rib pins before the crosscut is made would require the continuous mining machine to cut out those pins which could present a hazard to the miner operator, and/or damage the equipment.

10. There is no requirement for the entire mine to be rib-pinned, and it is not unusual to have areas of unpinned rib in this mine in addition to those areas where a crosscut is planned.

11. After the incident occurred, Mr. Rodavich, the mine superintendent, went underground to inspect the area, specifically the condition of the ribs in the No. 2 entry. They looked adequate to him. They looked like the rest of the section looked. He did not see any hazards present that would have mandated rib-pinning.

12. Neither Complainant nor Krosunger knew for sure when the turnout would be made from the No. 2 entry and thus Complainant's position is that his safety concern was for other miners who would have to travel through the No. 2 entry for some undetermined period of time and would therefore be subject to injury from possible rib falls if no rib pins were installed in this area for their protection. I find as a fact that this alleged safety concern for others was not in fact the Complainant's motivation for his behavior prior to the incident at bar on May 17, 1989.

13. The Complainant never raised a safety issue with Krosunger on behalf of himself or others nor sought to exercise his individual safety rights under the union contract with regard to rib-pinning this turnout area. He likewise did not seek to inform the safety committeeman, Mr. Virgili, who was on the section, of his concern over this area's ribs.

DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS

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),

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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 not motivated in any part 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, e.g., 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).

Treating this as a work refusal case, it is also well settled that a miner has the right under section 105(c) of the Act to refuse to work if he has a good faith, reasonable belief that the work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12; Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982). Additionally, where reasonably possible, a miner refusing work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 133-135 (February 1982); Dillard Smith v. Reco, Inc. 9 FMSHRC 992 (June 1987); Miller v. Consolidation Coal Company, 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

Although by insisting on pinning the ribs in the No. 2 entry Colamartino was seeking to perform work, rather than refusing to perform work, a framework for analyzing this incident based upon a refusal to perform hazardous work is useful here. In essence, Colamartino was refusing to comply with a work order, in that he was directed several times by Krosunger not to rib pin the No. 2 entry.

Complainant's actions herein could be held to be protected activity even though he did not feel personally endangered. It would be sufficient if he were acting to confront a threat to the health or safety of other miners. Secretary on behalf of Cameron v. Consolidation Coal Co., 7 FMSHRC 319 (1985), aff'd. sub nom. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364 (4th Cir. 1986).

If the Complainant in this case engaged in protected activity at all, it was on behalf of other miners, not himself. Complainant did not feel personally endangered. Rather, he

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allegedly was concerned that if he did not rib-pin the area of the proposed turnout in the No. 2 entry, that it would remain unpinned for an unspecified period until it was cut-out. In the interim, others would be exposed to the dangers associated with rib falls or rolls.

The Complainant herein bears the burden of proof that such a hazard existed or at the very least that he had a good faith, reasonable belief in its existence. I do not believe he has carried that burden. I do not believe Colamartino had any safety-related concern whatsoever in the No. 2 entry. He only wanted to rib-pin the one exact area that his foreman specifically instructed him not to pin. There were many other areas that were unpinned, but he did not care to pin them, in fact, resisted rib-pinning in general. He only wanted to pin the one area where Krosunger told him repeatedly there was going to be a turn-out made. I find that his action in insisting on attempting to rib-pin the area in question in the No. 2 entry did not rise to the level of protected activity.

It is fairly obvious to me, or at least it is my decided impression from the totality of the record in this case, that Colamartino's purpose was to aggravate his supervisor, Krosunger. Historically, he complained about having to rib-pin. Earlier on that same shift, he refused to rib-pin an area he had been directed to, after he scaled down material in front of the rib. If insecure footing truly was the problem keeping him from the assigned rib-pinning, he could have shoveled the sloughage up and continued to pin the ribs that Krosunger wanted him to pin in the No. 1 entry.

It also appears to me from the record herein, that the ribs in the area he wanted to pin were no different than the ribs in the rest of the section. There was no particular hazard there. Additionally, there appears to be a legitimate reason why Krosunger did not want them pinned, i.e., they would only have to be cut out when the turnout was made. Furthermore, turnouts were not routinely rib-pinned and it was the usual practice for foremen to instruct the men not to pin those areas. Colamartino was apparently aware of this because on prior occasions he had asked about the locations of turnouts to avoid rib-pinning.

From Krosunger's point of view, it is apparent to me that he acted out of sheer personal animus towards Colamartino. There is no basis in this record to find that he struck the Complainant because he was reacting to any safety concerns that Colamartino may have had. First of all, Colamartino did not express any safety-related concerns to him; and in any event it is clear to me that Krosunger's actions were motivated by unprotected activity alone. Not only unprotected activity (shirking, insubordination, "mistakes", slowness to perform, etc.) that occurred on that same shift, but this same type of thing had been

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troubling Krosunger for some time already before May 17, 1989. I believe he was severely provoked by all of this and unfortunately the assault on Mr. Colamartino of May 17, 1989, resulted.

Krosunger was thereupon suspended for sixty days without pay by the operator-respondent. Since Krosunger's personal assault on Colamartino is the only "adverse action" complained of in this case, even if I find that Complainant had engaged in protected activity, he would also necessarily have to impute the actions of Krosunger to Gateway. He would have to demonstrate that Krosunger was acting within the scope of his employment as the agent of Gateway. This proposition fails of proof as well. Not only did Gateway not condone or authorize Mr. Krosunger's actions, they took severe disciplinary measures against him for assaulting Colamartino. In my opinion, when Krosunger hit Colamartino, he acted on his own behalf, not on behalf of Gateway.

CONCLUSIONS OF LAW

1. Mr. Colamartino did not engage in protected activity in the No. 2 entry on May 17, 1989.

2. Mr. Colamartino's refusal to comply with Mr. Krosunger's directives not to rib-pin in the No. 2 entry was neither made in good faith nor reasonable.

3. In any event, Mr. Colamartino did not communicate to any representative of the operator, including Mr. Krosunger, his belief that a hazardous condition existed or would come into existence to endanger himself or others in the No. 2 entry.

4. The adverse action complained of in this case was taken against the Complainant by Mr. Krosunger personally, not Respondent herein. Mr. Colamartino received no discipline from Gateway.

5. Gateway did not violate section 105(c) of the Federal Mine Safety and Health Act of 1977.

ORDER

In view of the foregoing findings and conclusions, and on the basis of a preponderance of all of the credible testimony and evidence adduced in this case, I conclude and find that the Complainant has failed to establish a violation of section 105(c)

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of the Act. Accordingly, his complaint IS DISMISSED, and his claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Judge