

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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January 4, 2011

LONNIE BELCHER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. VA 2010-249-D
v.	:	NORT CD 2009-08
	:	
BATES CONTRACTING AND	:	
CONSTRUCTION, and SURFACE	:	MINE: Surface Minerals/Jones Fork
MINERALS COMPANY	:	MINE ID: 44-07126
Respondent	:	

DECISION

Appearances: Lonnie Belcher, Jr., Big Rock, VA, pro se;
Anna M. Daily, Esq., Dinsmore & Shohl, Charleston, WV
Behalf of Surface Minerals, Co.;
Randal Scott May, Esq., Barret, Haynes, May & Carter, Hazard, KY
On behalf of Bates Contracting & Construction

Before: Judge Rae

This case is before me on a complaint of discrimination filed by Lonnie Belcher ("Belcher") against Surface Minerals Company ("Surface") and Bates Contracting & Construction, Inc. ("Bates")(or collectively "Respondents"), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act" or "Mine Act"), 30 U.S.C. §815(c). A trial was held in Abingdon, Virginia on September 27, 2010.¹

I. Procedural Background

Belcher filed a complaint on October 1, 2009, with the Mine Safety and Health Administration ("MSHA"), pursuant to section 105 (c)(2) of the Mine Act, 30 U.S.C. §815(c)(2).² By letter dated

¹ The transcript from the hearing was sent back for corrections of errors. The corrected transcript still has mistakenly recorded the Complainant's name as "R"onnie Belcher rather than "L"onnie Belcher. A copy of the corrected transcript has been sent to all parties prior to issuance of this decision.

² Section 105 (c)(2) of the Mine Act states, relevant part:
Any miner---who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt

February 2, 2010, MSHA informed Belcher that, based on the information gathered during its investigation of his complaint of discrimination, it had determined that a violation of section 105 (c) of the Mine Act did not occur. Belcher, without the assistance of counsel, initiated this case in an undated request for review which was filed with the Commission, under section 105(c)(3) of the Act, 30 U.S.C. §815(c)(3).³ Belcher alleges he was terminated from employment at the Jones Fork mine by Surface and Bates for complaints he made regarding health and safety at the Jones Fork mine. He also alleges that he was demoted when assigned to direct traffic the day after he was involved in an accident with a mine truck.

Surface, a Wellmore company, operates the mine at Jones Fork. Bates was hired as an independent contractor to supply men to work at the facility, Belcher being one of the Bates employees assigned to the job. Both Surface and Bates engage in operations that affect interstate commerce and both are subject to the jurisdiction of the Mine Act.

Neither Surface nor Bates acknowledges that Belcher was engaged in protected activity or suffered any adverse action, and they assert that Belcher was removed from driving a truck due to unsafe practices which was in no way motivated by Belcher engaging in protected activity. Furthermore, Surface alleges that they are not responsible for any action taken against Belcher as they were not his employer.

For the reasons set forth below, Complainant's discrimination claim is dismissed.

II. Statement of the Case

In the summer of 2009, Surface was involved in reclamation activities at the Jones

of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as (s)he deems appropriate...If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, (s) he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner,.. alleging such discrimination or interference and propose an order granting appropriate relief.

³ Section 105(c)(3) of the Act states, in relevant part:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection 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 in violation of paragraph (1).

30 U.S.C. §815(c)(3).

Fork job site where the company had previously engaged in surface mining activities. Surface anticipated that the reclamation job would take approximately six weeks to complete and contacted Bates to supply miners to assist in the project. (TR 140.) Bates operates a contracting business supplying workers to both surface and underground mines on an as-needed basis and sent Belcher to Jones Fork on the reclamation project. (TR 144-147.) Belcher was assigned as a driver of a 35 ton Volvo A35C articulated truck. (TR 114-115.)

Belcher was supervised in his job by Foreman Jimmy Kennedy, a certified foreman with 19 ½ years of mining experience. (TR 30-31.) In addition to Kennedy, there were several other Surface employees - Tracy Cledinger, Gerald Hess, Joe Vance, Mike Southern, John Bennett, and Timothy Hibbitts- on the Jones Fork site. The reclamation work started in August 2009 and ended by mid-October 2009, when only Kennedy and Cledinger were kept on by Surface. (TR 32.)

On September 2, 2009, Belcher was involved in an accident where he drove his truck down an embankment and rolled the cab onto its side. The next day, he was informed by Bates that he was no longer needed at the job site. Belcher alleges he was fired for having engaged in protected activity prior to the accident. Bates and Surface maintain that Belcher did not engage in protected activity, that he was not fired, that he was removed from the job site due to his reckless operation of the truck, that he could have been placed in another position had he not gone out on workers compensation immediately after the accident. Also, his job as a truck driver at Jones Fork was temporary and no longer available. Bates also asserts that they informed Belcher soon after the accident that he would be given other work of a similar type at the same pay as soon as he informed them he was medically cleared to return to work. Belcher disagrees with each of these assertions.

III. Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. §815(c)(1), provides that a minor cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint...of an alleged danger or safety or health violation," (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101; "(3) he "has instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) he has exercised "on behalf of himself or others...any statutory right afforded by this Act."

In order to establish a prima facie case of discrimination under section 105 (c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated, at least partially, by that activity. *Drissen v Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr.1998); *Secretary on behalf of Robinette v. United Castle Coal, Co.*, 3FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), rev'd on other grounds sub nom *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd. Cir. 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected

activity alone. *Id.* At 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 42 (4th Cir. 1987).

The evidence, as discussed below, establishes that the Complainant engaged in protected activity and that he was discharged, or otherwise removed from his position, at least in part, as a result of his protected activity. However, the evidence also supports an affirmative defense under *Robinette*.

A. Protected Activity

Belcher was assigned to drive a Volvo articulating truck at Jones Fork. Shortly after he started working there, he made several complaints about various mechanical problems ranging from a stalling issue and an alternator problem to smoking brakes, a transmission leak and finally, on the day of the accident, a warning light on the dash board. (TR 14, 79, 81-83, 94-95.) The records from the maintenance department verify that several repairs were made on the truck including replacement of the alternator, installation of a transmission gasket to repair a leak, repair of an oil leak, and dismantling of the fuel line to remove foreign objects from the tank. (TR 82-83 and R/SM # 11, 12 and 15.) Mechanic Dale Hibbitts confirmed that he was the one who performed the multiple repairs on the truck. (TR 82-85.) Belcher testified that on September 2, 2009, he reported to Foreman Kennedy that two lights had lit up on the dashboard and Foreman Kennedy told him to keep an eye on it but keep operating the truck. (TR 14.) Belcher alleges that the brakes had caught fire two days prior to the accident and that they again malfunctioned causing him to override them, travel down the hill and flip the cab of the truck. He was fired the next day.

Respondents argue that the Complainant did not engage in protected activity. Belcher did testify that he had never made any complaints to MSHA. And when asked if he had ever refused to work due to an unsafe condition, he replied "No. I mean Foreman Kennedy he done a good job he kept everything up." (TR 21.) Daniel Bates also testified that no safety concerns were ever made known to him by Belcher. (TR 155.) Surface also introduced pre-shift reports completed by Mr. Belcher to demonstrate that he inspected the vehicle every day and never reported any issues. R/SM #4 is entitled "Pre-operational Checklists for Surface Mobile Equipment signed by Lonnie Belcher on August 4, 2009 through September 2, 2009." The testimony established that Belcher was the only person who operated the Volvo truck during that period with the exception of September 1, 2009, when he had a doctor's appointment. Quite interestingly, however, the pre-operational checklists for August 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, September 17, 18, 19, 20, 21, 24, 25, 26, 27, 28 and 29 (four weeks and one day of reports) are absent. I therefore find this evidence has little, if any, probative value.

It is quite clear from the record, however, that Belcher had made several mechanical issues known to his foreman, Jimmy Kennedy, and to the maintenance department as evidenced by the testimony of Hibbitts, the receipts produced for the repairs and Mr. Bennett's calendar entries indicating when the repairs were made. (TR 79-96 and R/SM #10-12 and 15.) Thus, I find sufficient evidence that Belcher was engaged in protected activity under the Act.

B. Adverse Action

Belcher claims that the day after the accident, on September 3, he reported to work and was put on flagging duty monitoring a red zone instead of driving a truck; a job he was not trained to do. He was then fired the evening of September 3, by Daniel Bates. His version of what occurred is that "after going home, Bates Construction and Contracting Owner Daniel Bates called me that evening at approximately 7:00 p.m. I was in church and I returned the call at 8:30 p.m. Bates told me, he and Tammy Fields had talked it over and I was no longer needed on the job. At first, I asked him if he was joking and he said no. Bates wanted to know what happened at Jones Fork mine and I told him." (Complainant's Exhibit C-1.) As Belcher understood it, he had been fired.

Respondents contend that Belcher was not fired and no adverse action occurred. Instead, they argue that Belcher was taken off his duty as a truck driver because the Volvo truck was out of commission for the remainder of the project and no other vehicle was available for Belcher to drive. Furthermore, since the job had almost come to an end, they determined that the work Belcher was doing was no longer needed. In support of their position, Foreman Kennedy testified as follows in an exchange with counsel for Surface:

A. He came to work the next morning without a return to work slip and was put on flagging duty because when he reported to work that morning, he didn't have a return to work slip, so we had to send him back off. I think he might have had to go back home to get it. And he come to Larry Dicky and showed him that he had his return to work slip and he come back up the hill and I sent him down the bottom where I flagged the road off to watch for traffic

Q. And at that juncture was the truck that he had been driving operational?

A. No.

Q. And when somebody - when you got a piece of equipment down, what sort of work will you have somebody do if there's not a piece of equipment for them to operate?

A. They would work trash, change oil in equipment, just stuff that I need, bag trash, note if we got any danger situations or something like that, work like traffic. Something -try to keep them busy.

Q. Did anybody step into the position that Mr. Belcher had been doing there at the Jones Fork job?

A. No

(TR 44-45.)

Robert Litton of the Human Resources and Safety Department further testified as follows:

Q. Would you tell the judge, Mrs. Fields has said that you told her to contact Bates and say that Mr. Belcher was no longer needed. Would you explain to the judge how you ended up telling Mrs. Fields that?

A. Well, there's more than one aspect to that. One is that the truck was out of service and no longer available, so at that point, I can't pay a contractor to sit around doing nothing. So I didn't need him from that standpoint. Plus, after reviewing the history of the issues that we had had with him over the last two or three weeks, I saw no need to have him back on the property.

(TR at 141-142.)

Mr. Litton clearly stated that there were reasons for removing Belcher from the work site, other than his truck being inoperable. Foreman Kennedy also testified that he told management, "I said I don't want him on my job no more. He's a liability risk and I didn't want this-the responsibility, because I am responsible for all the men. And I felt like he was an unsafe worker and I just didn't want the responsibility of him." (TR 43.)

Bates testified that on October 27, 2009, he sent Belcher a letter which stated, in part, "when and if we receive the proper documentation from your treating physician releasing you to return to work at full duty you will be allowed to return to the same type of work for Bates Contracting prior to your injury at the same rate of pay." (Defendant's Exhibit 4). This letter, however, was sent after Belcher filed for workers compensation, and more significantly, after he had filed this discrimination complaint. I find this letter to be self-serving and of little probative value.

Based upon a preponderance of evidence, I conclude that Belcher was fired from both Surface and Bates. I do not find, however, that his assignment to traffic duty for one day was adverse action. That was occasioned by the Volvo being out of commission and no other truck being available for Belcher to driver.

C. Causal Connection between Protected Activity and Adverse Action

Having concluded that the miner's discharge was an adverse action, I must now determine whether he was discharged because of his safety complaints. Because the intent or motivation of the respondent in these cases is difficult to discern, the Commission has set forth guidelines to assist in making this determination. It has provided:

We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect... Intent is subjective and in many cases the discrimination can be proven only by use of circumstantial evidence." Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.,³ FMSHRC 2508, 2510 (Nov. 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983) (Quoting NLRB v Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965)). In Chacon, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. Id.

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

This case is a close call in determining whether Belcher's discharge was motivated, at least in part, by his protected activity.

Belcher testified that he didn't make complaints to MSHA about safety issues because: "Kennedy, he done a good job, he kept everything up." (TR 21.) Belcher also indicated in his written statement that on the day he reported a suspected brake fire, Kennedy told him to bring the truck to the parking lot and tag it out for the mechanics to take a look at it. (Complainant's Exhibit C-1.) There was also extensive testimony from Dale Hibbitts and John Bennett, the two on-site mechanics, indicating that Surface was highly responsive to safety issues. Furthermore, Belcher offered no testimony of any hostile reaction from management in response to his reports of mechanical issues involving the Volvo truck. He did say in his written statement that Kennedy told him to stop making his reports because the company was aware of the problems but, again, he indicated no animosity. (Complainant's Exhibit C-2). The only inference that there was some exchange of words between Belcher and Kennedy after the accident on September 2 was during Belcher's cross-examination of Tracy Cledinger which went as follows:

Q. Okay. On the day after the accident -you was there during the whole meeting, I mean Daryl's had to meet me the next day?

A. Yeah, the safety meeting the next day?

Q. Okay. And you heard everything that went on that day?

A. Pretty much, yes.

Q. Okay, Now, did you hear Mr. Kennedy state that he didn't have to work for Wellmore?

A. No, sir, I didn't.

Q. That he could go back on the road?

A. No, sir. I did not come down here and y'all change the words and you told him the only reason we was working was because you were there.

Q. Yeah. Okay.

A. You remember saying that?

Q. Yes.

(TR 109.)

I am hard pressed to find this exchange amounts to an indication of hostility or animosity. I

do, however, recognize that Mr. Belcher has preceded pro se and lacks sophistication or legal expertise and is therefore at a disadvantage in adequately presenting his case. I find that there are sufficient circumstantial indicia of discriminatory intent as set forth in Chacon based upon the nexus in time between the complaints made and the discharge and management's knowledge of those complaints which effectively removed the piece of equipment from service for a substantial amount of time during the six-week reclamation project.

Accordingly, I conclude that Belcher has established a prima facie case of discrimination in violation of the Act.

D. Affirmative Defense

Respondents, in the alternative to alleging that no protected activity is involved in this case, assert an affirmative defense for removing Belcher from the North Fork mine. Their position is that Belcher engaged in several safety violations that caused management grave concern for the safety of the miners and others at the job site. Specifically, Belcher was reprimanded several times for running his truck through berms resulting in two accidents, reckless operation of his equipment and making a false official statement regarding the cause of the September 2nd accident.

The respondent has the burden of proving by a preponderance of all the evidence that it would have fired Belcher solely because of these unprotected activities. Pasula, Supra; Robinette, Supra and Eastern Assoc. Coal Corp, Supra.

The Respondent presented evidence through Foreman Kennedy and dozer driver Joe Vance that Belcher repeatedly drove over the safety berms causing great concern. Kennedy testified as follows when questioned by Ms. Dailey:

Q. And did you have an incident or a time with Lonnie Belcher where you had to talk to him about backing into berms?

A. Yes.

Q. Would you tell the judge what happened?

A. I was with Gerald Hess, we was dumping around the walls this way and with the dozer pushing them this way so we were working the walls from both ends. And Gerald Hess (sic) was in the truck backing up on the dump and he was backing up on the dump and was backing up and putting his wheels over and Gerald Hess said, "you're scaring me." And then I overheard the conversation so I went straight down to the area where the men were working and rolled out on the dump and the dump looked good -went back to where the men talked. It was Lonnie that was doing it. So I got Lonnie out of the truck and talked to him about the berm. I said that's why we got a dump dozer there to push it over. And he said he was trying to get it before the dozer saving him from making trips out there. And I said, well, you know, that's why we pay the dump dozer to be pushed over. Don't - I don't want you on the berms.

Q. Now, did you have a second opportunity to talk to Mr. Belcher about berms?

A. Yes, I did.

Q. Would you tell the judge what happened and how did that come about?

A. It was hauling in the holler field number 2 because the pond - we had a pond fill up and we were trying cleaning out the pond back up with the dozer they call a dump hole to dump the clean ones in so they can cover it up to get rid of the material... It was Joe Vance hollered at me, we need a pull cable that we got a truck stuck down here. So I got the pull cable, went down there and seen where Lonnie backed over into the hole and I talked to him again about the berms and I gathered the Bates contractors and I had three Bates contractors right there. There was one Wellmore employee and I gathered all four of them together and talked to them. I said, I don't want to see this right here no more. The next time I'll send you off the hill to HR.

Q. What did you say to Mr. Belcher?

A. I told him I didn't want to catch him on that berm. I asked him why he was backing through the berm. He said he was throwing the mud over into the dump, but once again, I told him, that's why we keep the dozers there to knock the dump down. That's his job.

Q. Did Mr. Belcher say anything about the berms during these conversations?

A. He said we wouldn't keep the berms, Joe Vance, my dump man says he couldn't keep the berms for Lonnie riding them down.

Q. Did you have any conversation with Joe Vance about the berm?

A. Yes, I did.

Q. And what did you learn from Joe Vance about the berms that day?

A. He told me that every time he pitches a good berm, the truck that Lonnie Belcher is riding them down. He said he couldn't- he said I talked to him about the berms also. Feel like we had problem at ... and Joe said that he was pitching berms, but every time he pitched the berms, Lonnie would ride them down.

(TR 33-39.)

Joe Vance testified consistently with Mr. Kennedy about Belcher riding over the berms. He testified as follows:

A. In the back to the berm they was - I was down below where they were dumping. And I

was fixing the road. They were checking the road and checking the berm itself too. And when he backed around the road I was already doing (inaudible). And when I looked to see him up there, he went through the berm. Instead of turning, he went through the berm.

Q. And did Mr. Belcher make any reply to Gerald Hess on the CB radio?

A. He said - Gerald said "excuse me" or said something to him and he said, "I know what I'm doing and I ain't going through no berm."

Q. Would you tell the judge what the berms looked like that day?

A. They looked good all except where he went through it. It was four to five foot tall, three of four foot wide across for the ride (inaudible).

Q. Were you there the day Mr. Belcher put the truck in the pond?

A. Yes.

Q. Would you tell the judge what happened?

A. Okay. When we got up there where he'd backed up into it, he'd backed up on the berm and it looked like he backed up on it and dumped his load. He backed up on it and the truck just sit there on the road.

Q. Where was the swivel part of the articulating truck?

A. Sitting on the berm.

Q. And did Mr. Belcher say anything about why he backed into the berm or backed into the pond?

A. He said there was no berm.

Q. Was that true?

A. No.

Q. And why do you believe that that was not a true statement by Mr. Belcher?

A. Because he'd been on down in the mud over the berm but the berm wasn't holding up.

(TR 65-66).

Dale Hibbitts also testified that on September 2nd when Belcher had his second accident, he was involved in towing the truck up the hill. Hibbitts testified that Belcher had driven over berm on

that date as well. When shown a photograph of the crash site, (R/SM #1, page 2), Hibbitts identified the mound of earth by the tires as what remained of the berm. (TR 92.)

After maintaining that there were no berms at any of the locations he was admonished by management for running down, Belcher admitted on cross-examination "I only talked to the mine foreman one time about that I hit the berms. And that's all I talked to him." (TR 176.)

I credit the testimony of Kennedy, Vance and Hibbitts. They testified consistently with one another giving detailed accounts of the events at issue which are corroborated by the physical evidence. R/SM # 3, is Kennedy's notebook. Kennedy testified that as a matter of course, he kept a daily log of events he felt noteworthy. An entry was made for period indicated as August 17, 2009 through August 21, 2009, which stated that Lonnie Belcher had backed through a berm and put his truck in a hole and had to be pulled out. It was further noted that this was not the first occasion on which Kennedy had trouble with Belcher driving over berms and that he had been told not to do it again or he would be sent off the hill. An entry was made on August 31, 2009 indicating Kennedy had a safety talk with his men about the berms and operating in a safe manner. These entries are entirely consistent with Kennedy's and Vance's recounting of the events leading up to September 2nd. Additionally, photographs were provided of the accident scene on September 2 in which both Kennedy and Vance were able to identify the berm material surrounding the wheels of the Volvo truck.

The accident on September 2, 2009 was the final event which led to management's decision to remove Belcher from the North Fork mine. Mr. Belcher's version of the events as he told Surface and Bates and MSHA, is that in the early afternoon hours, he was making a run with his truck when he stalled out on the upper road where he was hauling material. He called out for jumper cables to be brought to him and in the mean time, he latched the safety belt, engaged the parking brake and attempted to start the truck when it lurched forward, bypassing the brakes, and rolled down an adjacent hill where it came to rest with the cab turned over onto the driver's side. He alleged that there was no berm to retard the truck's forward movement. He was pulled out of the cab through the window.

Belcher claimed in his written statement to MSHA dated October 1, 2009, that he was knocked unconscious and came to as Cledinger was pulling him out of the truck. All he could remember was that he hurt his right rib cage. (Complainant's Exhibit C-1.) His second statement of April 16, 2010, filed in response to Surface's Answer and adopted by him at the hearing as part of his testimony, Belcher stated that it was a Surface employee who told him he was unconscious. A Surface employee came running down the hill calling his name and all Belcher could do was raise his right arm in response. He thought at the time his left arm was broken. Before he was helped out of the truck, he reached down to get his hard hat because a Surface employee asked him where it was. He retrieved it and was then helped out of the truck. (Complainant's Exhibit C-2.)

This version of events is at odds with, and contradicted by, the physical evidence as well as the testimony of those persons who responded to the scene and investigated the cause of the accident. Both Tracy Cledinger, a miner of nine years, and Joe Vance, the dozer operator, were on the scene immediately after Belcher's truck flipped over.

Cledinger testified that Belcher was conscious and was yelling for someone to get him out of the truck as he (Cledinger) was approaching the truck. (TR 107.) According to both Vance and Cledinger, after they removed Belcher from the passenger side window of the cab, he was standing to the side of the truck for a few minutes and he then crawled back inside of it for a few minutes and then climbed back out without assistance. Neither of them could see what he was doing because he was fully inside the cab and out of sight. (TR 72-73, 103-104.)

With respect to the alleged malfunctioning of the parking brake, there was a great deal of testimony offered in contradiction to Belcher's assertions. Surface mechanics testified that the parking brake was set when the cable was hooked up to tow the truck up the hill. It was evident; however, that the brake was not engaged on this 35 ton truck when it went down the hill as the four back wheels would have been locked up leaving visible skid marks in the dirt. Furthermore, it would be impossible for the brakes to fail and then reset or function properly thereafter. John Bennett superintendent for Surface with 26 years of experience as a mechanic explained as follows:

Q. Now, did you have any problem with the wheels rolling up?

A. Yeah. There were on - the park brake was locking.

Q. Is it possible then when the park brake is set where it was on the hillside - not on the hillside but on the No. 3 that's on the map there (indicating a photograph of the upper haul road), is it possible if Mr. Belcher had truly had his park brake set as he claims it was for the truck to have rolled over or through the berm and down to where the circle is on the map? (Referring to R/SM #2.)

A. No, ma'am.

Q. And why do you say that?

A. The park brake is only applied in pressure release. The park brake was fully functional, no broke spring or anything and it- there was no way it would fix itself. You know, for the truck to roll off, the park brake had to be released.

Q. Is it possible for the truck brake to have been off or broken and rolled - for the truck to have rolled in the ditch as it did, to have landed with the cab turned over and for the truck to have reset its brake itself?

A. Not with the lever. But the brake if your air pressure bleeds off would set.

Q. In this instance, was the lever brake on?

A. Yeah, the lever was in the safe position.

Q. Have you ever had a situation where a truck brake failed and then for some reason set themselves and began to work again after an accident?

A. None

(TR 120-126.)

Dale Hibbitts, roving mechanic with 24 years of experience as a mechanic, confirmed the assessment made by Bennett as well. He testified:

Q. Did you have any problem pulling the truck - you said you righted the cab?

A. Yes.

Q. Did you have any problem then rolling the truck up the hill?

A. Once we got the truck back on its wheels with the help of an excavator and a dozer, we hooked the dozer to the back of the truck and we proceeded to pull it back up over the hill and the dozer would not pull the truck back there.

Q. And why was the truck or the dozer unable to simply roll the truck back up the hill?

A. All the rear wheels on it was scooting.

Q. Was scooting?

A. Yeah. Sliding.

Q. And did you do any more inspections of the truck then about the brake or anything else?

A. Yeah. Well, we proceeded to check park brake, the service brake and actually checked to see if the truck would start in gear.

Q. And would you tell the judge what you found out about the brake on the truck?

A. The park lever was in the set position at that time. And if you put the truck in any gear other than neutral, it will not crank, or if the neutral switches out on the park brake switch itself, it will not crank.

Q. Did you test out the brake at all?

A. Actually, I drove the truck back out of the hole to see about the fuel load.

Q. And did you try the brakes while you were doing it?

A. Yes.

Q. And did you have any problem with the brakes at all?

A. No.

Q. If the park brake had been set on this truck as Mr. Belcher says it was, before it went over the - rolled over, would the tires have rolled if the park brake was set?

A. No, ma'am.

A. It would have had to slide on all four of the back tires went over the berm.

Q. And did you see any evidence of sliding or skidding?

A. No, not at that time I got there.

Q. Did you have to do anything with the brakes?

A. No, we didn't do anything with the brakes.

Q. Have there been any problems with the brakes on that Volvo truck since then?

A. No, ma'am, not any problems with the brakes on the truck. None that's been reported to me.

(TR 87-91.)

Joe Vance also confirmed the absence of skid marks at the scene and also added that in his experience brakes will not fail and then reset themselves. (TR 74-75.) The cause of the truck stalling out on the upper haul road was explained by Tracy Cledinger. From his experience in driving this Volvo A35C, he knows that the steering is hydraulic and if the driver puts the vehicle into too tight a turn, it will cause a stall. (TR 110-112.) Bennett testified that he thoroughly investigated the reported brake fire by pulling apart the brakes and found that there had not been a fire. The brakes were fine. He explained that the smoke could be caused by operating the truck at excessive speeds. (TR 95-96, 119.)

I find the assessment of the condition and functionality of the brakes offered by Bennett and Hibbitts credible. It is based upon their 50 years of collective experience as mechanics and upon their thorough examination of the brakes immediately before and after the accident. Additionally it is corroborated by the photographs taken at the scene in which skid or slide marks are clearly absent. (R/SM #1 pgs 1-2.) I find Surface's theory of the case - that Belcher set the park brake when he climbed back into the cab of the truck after being pulled out by Cledinger, quite plausible. I also accept the explanation for the truck stalling on the haul road and the cause of the smoking brakes as reasonable and consistent with Belcher's reckless disregard for the safe operation of the truck.

I find Belcher to be less than credible based upon the many discrepancies in his written

statements and his testimony, as well as from the total lack of evidentiary support for his version of the facts. Joe Vance, Tracy Cledinger, Jimmy Kennedy, and Dale Hibbitts were all present on the scene of the accident on September 2nd. While all four men saw that there was a berm present on the upper road which Belcher drove through, and identified it in a photograph, only Belcher seems not to have noticed a berm being present. (TR 130, 103, 52, 91.) Moreover, there was credible testimony from Kennedy and Vance that he had been counseled in the past for this behavior. He had, in fact, put his truck in a pond on a previous occasion by running through a berm. Only after hearing each of these witnesses testify did Belcher finally admit that he had been counseled for hitting a berm "once."

He offered differing versions of the events of September 2nd with regard to whether it was his right rib cage or left arm that was injured, whether he was conscious after the crash or whether someone with Surface told him he was or whether he crawled back into the cab to allegedly retrieve his hat or whether he retrieved it before he was pulled out of the truck. (Complainant's Exhibits C-1 and C-2.)

In addition, Belcher denied on the stand that he had ever shown to anyone at Surface a photograph he took on his cell phone of a truck he had crashed on another job site. (TR 17.) Tracy Cledinger, however, testified that he and Belcher were talking one day and Belcher showed him a picture on his cell phone of a truck turned over against a wall and said he had turned it over. (TR 106.)

Belcher testified that he was promised a full time job with Surface by Tammy Fields, Human Resources Manager, in August 2009. Belcher's testimony was that he was working at a full-time temporary job with another company when Fields called him about a job. She said it would start on Monday with Bates and then immediately thereafter, he would be a permanent employee with Surface. This testimony was contradicted by Fields who testified that Belcher contacted her asking if there was any work available as he had lost his job. She informed him that they did not have anything available. In early August, she called him and told him to contact Bates because they would be doing some temporary contract work for Surface and he might be able to find work with them. (TR 134-135.)

On cross-examination Belcher stated that he had a great temporary job with another company and would not have taken the job with Bates if he had known it was temporary. When asked which company he had been working for that he would not have left, he was evasive and responded "the company I worked for before I went to Wellmore." He went on to say he was offered a truck driving job until something on the strip came open. When asked if Ms. Fields actually said all of that to him, he admitted that she had not. Belcher insisted that he remembered the conversation with Ms. Fields "as if it was yesterday" and that Ms. Fields told him he would be full time after 60 or 90 days but then he had to "admit that, I guess, I believe it was 60 days, two months, that would be 60 days, I believe." Fields denied this entire conversation saying that she would not have offered Belcher a full time job at any time because there was none available. (TR 134-135, 171-173.) In fact, after the Bates contract ended in mid-October, all but two of Surface's employees were also laid off. (TR 141.)

In Belcher's written statement to MSHA of October 1, 2009, the relief he asked for from the alleged discrimination was to be "temporarily reinstated."⁴ (Complainant's Exhibit C-1.) This indicates that Belcher was well aware that his position was a temporary one and he had never been promised a permanent job. However, he changed his version of the facts subsequent to execution of that statement.

In sum, I find the Respondent's position that Belcher repeatedly engaged in reckless operation of his truck - disregarding berms and counseling from his foreman, and causing two accidents, one of which could have resulted in serious injuries to himself or others at the mine - is fully supported by the testimony and physical evidence produced. The decision to take Belcher off the job, as Foreman Kennedy said, was because he was "a liability risk" and "an unsafe worker" who after being told right from wrong did not listen. (TR 43.) Robert Litton of the Worker Safety and Human Resources department, who made the decision to take Belcher off the job site, confirmed that after reviewing Belcher's performance issues between mid-August and September 2nd, they felt they had no need for him on the job. Backing over the berms was not acceptable safety behavior at their mine site, he said. (TR 142.) Thus, I find that the Respondents have proven by a preponderance of evidence that they would have removed Belcher solely for his reckless operation of the vehicle coupled with his disregard for the safety of himself and others, rather than for engaging in protected activity.

IV. **ORDER**

Based upon the foregoing, the Complainant's discrimination claim is DISMISSED.

Priscilla M. Rae
Administrative Law Judge

⁴ Assuming *arguendo* that I found for Belcher, reinstatement would not be available as the job he held was temporary. Robert Litton testified that his position was not filled after September 2, 2009, as the job was nearly complete and the truck was no longer needed. Back pay would also be tolled as a result. See *Chadriuk Casebolt v. Falcon Coal Company, Inc.*, 6 FMSHRC 485 (Feb. 29 1984); and *Secretary of Labor on behalf of Robert Gatlin v. Kenamerican Resources, Inc.*, 31 FMSHR 1050 (Oct. 8, 2009). Furthermore, Belcher has been on workers compensation since the time of the accident and had not been medically cleared by his physician to return to work.

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