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JACK GRAVELY V. RANGER FUEL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 20, 1984
JACK E. GRAVELY

v. Docket No. WEVA 83-101-D

RANGER FUEL CORP.

DECISION

This case is before us on Jack Gravelly's petition for discretionary review of an administrative law judge's decision which dismissed his discrimination complaint against Ranger Fuel Corporation. 6 FMSHRC 38 (1984). Gravelly contends that Ranger illegally discharged him from his position as foreman at the Beckley No. 2 mine, in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 115(c) (Supp. V, 1981), because it blamed him for a roof fall which occurred on his shift. According to Gravelly, Ranger discharged him in retaliation for his failure to take a crew in by a dangerboard to support the area of weak roof which later fell. Ranger argued that it had not discharged Gravelly because of the roof fall. It claimed that Gravelly's performance over the prior several months had been consistently unsatisfactory, and that it had discharged him following two incidents within one week in which his inadequate supervision had resulted in the destruction of suction pumps. Ranger's position was that it had no objections to Gravelly's actions on the night of the roof fall, when he had his crew begin roof support work at the dangerboard, and that its officials blamed him for the roof fall only because of his failure to properly support the weak roof on a prior shift.

We granted review because we perceived certain deficiencies in the judge's analysis of this case. 1 / Review of the record discloses substantial evidence to support the judge's crucial factual findings. Applying the analytical framework we have established for discrimination cases to the facts at issue here, we affirm the judge's dismissal of Gravelly's complaint.

1/ Ranger filed in opposition to Gravelly's petition for discretionary review, alleging in part that the petition was not timely filed. Section 113(d)(2)(A)(i) of the Mine Act requires that petitions for

discretionary review be filed within 30 days after issuance of a judge's decision. 30 U.S.C. § 823(d)(2)(A)(i). The 30th day following issuance of the judge's decision in this case fell on (footnote continued on next page)

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At the time of his discharge, Gravely had been employed by Ranger for almost 18 months. During this time he held a number of different supervisory assignments. The mine manager testified that these changes occurred because of problems with Gravely's performance in each job, and Ranger's continuing efforts to find a position for which he was suited.

Ranger provided several examples of Gravely's poor performance and disciplinary record, including instances of excessive or unexcused absenteeism and inadequate supervision of his crew, resulting in off center cuts and destruction of equipment. Gravely disputed the occurrence of some of these examples, denied that he had been disciplined for others, and claimed that some were not his fault.

During the last week of July 1982, while Gravely was working as a construction foreman on the night (hoot owl) shift, an area of "bad top" was encountered in the last open crosscut between the No. 1 and No. 2 entries of the No. 1 face. Harrison Blankenship, the assistant mine foreman (who worked on the day shift), testified that on July 26 he left instructions and a sketch with the evening shift foreman, Larry Burgess, telling Burgess to instruct Gravely to set "turn cribs" in the No. 1 entry intersection. "Turn cribs" are roof support cribs placed in an arc configuration to narrow the intersection and prevent a roof fall. Burgess testified that when he attempted to pass these instructions on to Gravely, Gravely told him that he already knew what to do.

Footnote No. 1 Cont'd.

a Sunday. The petition was received, and therefore filed (29 C.F.R. §2700.70(a)), on the 31st day following the issuance of the judge's decision. We have previously held that, in appropriate circumstances, petitions received after the 30th day (but before the 40th day when decisions become final orders of the Commission by operation of law) can nevertheless be accepted and considered by the Commission. *Valley Rock & Sand Corp.*, 2 BNA MSHC 1673 (Docket No. WEST 80-3-M, etc., March 29, 1982); *Victor McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202 (1980). See *Duval Corp. v. Donovan*, 650 F.2d 1051 (9th Cir. 1981). We hereby hold that where the 30th day following the issuance of a judge's decision falls on a Saturday, Sunday, or Federal Holiday, good cause exists for accepting a petition for review received by the Commission on the first business day thereafter. This policy does not significantly lessen the time available to the Commission for

considering petitions for review and also avoids unnecessarily shortening the time available to parties for determining whether to file or for preparing a petition for review. Accordingly, the operator's request that the petition be dismissed because it was received 31 days after the issuance of the judge's decision is denied.
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Gravely denied receiving any specific instructions from Burgess or Blankenship before his July 27 shift. He testified that when he reached the section and his crew independently discovered the bad top, he notified shift foreman Dennis Myers of the condition, and he and his crew spent the rest of the shift attempting to support the roof. They did not set "turn cribs" as Blankenship said he had ordered, but "breaker cribs" extending across the No. 1 entry, immediately outby the crosscut. During the shift, one of the miners on Gravely's crew ran over and destroyed a submersible suction pump valued at \$2500 to \$3000.

The next morning Blankenship discovered that the cribs had not been set the way he wanted. He testified that the use of the breaker cribs would cause a roof fall in the intersection and crosscut, and turn cribs could prevent one. He did not believe the roof was in immediate danger of falling, so he again left instructions for the setting of turn cribs. Although the No. 1 entry was now blocked off by the breaker cribs that had been put up the night before, the intersection was still accessible through the crosscut from the No. 2 entry. Sometime that day, however, the roof in the crosscut began to work, and somebody (none of the witnesses knew who) placed a dangerboard in the No. 2 entry outby the crosscut. When Gravely and his crew began work on July 28, they began shoring up the roof at the dangerboard, and moving toward the crosscut. Before they reached it, however, the roof fell in the crosscut.

On July 29 and 30, Gravely's crew worked on cleaning up the roof fall. On July 30, another miner on the crew ran over a second suction pump in the same mud hole as the one that had been destroyed earlier in the week. Although at first it appeared that the second pump had also been destroyed, it later was repaired at a cost of \$854. The next morning Blankenship discussed the pump incidents with mine manager Walter Crickmer, and he and Crickmer agreed that Gravely should be fired. Both men testified that the discharge was motivated primarily by the fact that Gravely had allowed the destruction of two pumps within a week, but that Gravely's prior unsatisfactory work history also played a part in their decision. Although they denied that the roof fall alone was the motivating factor Blankenship maintained that the fall had been caused by Gravely's failure to set turn cribs on July 27, and said that it was part of the chain of events "that led to the discharge."

In his decision, the judge found that Gravely had a history of disciplinary problems throughout his tenure at Ranger. Although he acknowledged that Ranger's poor recordkeeping practices caused it problems in documenting its assertions, he stated that he found the testimony of the three Ranger management employees who testified about Gravely's poor disciplinary record to be believable. He stated that he was unable to conclude that Ranger had fabricated the specific examples of Gravely's disciplinary problems as an

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"after the fact" justification for his discharge. The judge concluded that the record showed that Ranger discharged Gravely "after a series of incidents which finally convinced mine management that Mr. Gravely should not continue on as a foreman." 6 FMSHRC at 89.

The judge additionally found that Gravely's failure to take his crew in by a dangerboard on July 28, two days before his discharge, was not a motive for the discharge. Relying on testimony of both management employees and the miners on Gravely's crew, the judge found that there was no expectation by Ranger that Gravely take the crew in by the dangerboard, and that Gravely's belief that he had been expected to do so stemmed entirely from the fact that Gravely believed that assistant mine foreman Harrison Blankenship blamed him for the roof fall. However, the judge concluded that Blankenship's opinion that Gravely was responsible for the roof fall was not based on Gravely's failure to support the roof on the night of July 28 as Gravely claimed, but on what Blankenship perceived as Gravely's failure to follow his instructions for supporting the roof on July 27.

Although there was conflicting testimony about the specific instructions that Gravely had received on July 27, there is clearly substantial evidence in the record to support the judge's finding, based in part on specific credibility determinations, that Blankenship believed that Gravely had failed to follow his instructions on that shift. Therefore, it is apparent that to the extent that Gravely's contribution to the roof fall was one of the bases for his discharge, that contribution was not the alleged protected activity of refusing to work in by the dangerboard, but rather was the failure to properly support the roof on July 27.

Under the analytical guidelines we established in *Secretary on behalf of Pasula v. Consolidation Coal Corp.*, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. *Consolidation Coal Corp. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981), and *Secretary on behalf of Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (1981), a prima facie case of discrimination is established if a miner proves by a preponderance of the evidence (1) that he engaged in protected activity and (2) that some adverse action against him was motivated in any part by that protected activity. If a prima facie case is established, the

operator may defend affirmatively by proving that the miner would have been subject to the adverse action in any event because of his unprotected conduct alone. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. *NLRB v. Transportation Management Corp.*, ___ U.S. ____, 76 L.Ed. 2d 667 (1983). See also *Boich v. FMSHRC*, 719 F.2d. 194 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). The judge in this case did not expressly determine whether Gravelly's refusal to take his crew in by the dangerboard on July 28 was protected activity under the Mine Act. However, he clearly found that the refusal was not a motivating factor in Gravelly's

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subsequent discharge, Ranger having rebutted Gravelly's arguments to the contrary. Substantial evidence supports the judge's finding. Given these facts, Gravelly failed to establish a prima facie case under our Pasula analysis. Because no prima facie case was established, it was not necessarily required that the judge reach the second stage of our discrimination analysis and determine whether Ranger proved an affirmative defense.

In this case, the judge did not separately discuss Ranger's assertion that it fired Gravelly because of the destruction of two suction pumps within a week by miners under his supervision. It is not clear from the decision whether the judge's failure to address this issue separately was based on his belief that the evidence had been introduced to establish Ranger's affirmative defense or on his determination that the destruction of the pumps was part of the "series of incidents" which he held led to Gravelly's discharge. However, we believe that the decision can be sustained in either event. The burden was on Gravelly, as the complainant, to establish that his discharge was motivated, at least in part, by protected activity. Because he failed to meet that burden, a separate determination of the validity of any other asserted reason for the discharge was not necessary to the judge's holding. Furthermore, even if Gravelly had established a prima facie case, we believe that Ranger's evidence demonstrated that it would have discharged him in any event because of the destruction of the pumps.

Therefore, we affirm the judge's order dismissing Gravelly's complaint, on the basis that there is substantial evidence in the record to support the judge's factual findings which do not establish a prima facie case of discrimination.

Richard v. Backley, Commissioner

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