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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF E. BRUCE NOLAND,	Complaint of Discharge and Discrimination
APPLICANT	Docket No. VA 79-102-DM
	MD 79-41
v.	Leesburg Stone Co.
LUCK QUARRIES, INC.,	
RESPONDENT	

DECISION

Appearances: James Swain, Esq., and Sidney Salkin, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Applicant Henry Wickham, Esq., Mays, Valentine, Davenport and Moore, Richmond, Virginia, for Respondent, Luck Quarries, Inc.

Before: Judge Merlin

The above-captioned case is a complaint of discharge and discrimination filed by the Secretary of Labor on behalf of E. Bruce Noland against Luck Quarries, Inc.

A hearing on the merits was held April 8-9, 1980. Prior to the hearing, both parties filed preliminary statements and respondent filed a trial memorandum. At the hearing, documentary exhibits were received and witnesses testified on behalf of both parties (Tr. 8-210). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 211). A decision was rendered setting forth findings, conclusions, and determinations with respect to the alleged discriminatory discharge (Tr. 244-259).

A supplemental hearing concerning relief was held on April 17, 1980. At the close of this hearing, a second bench decision was rendered amending the first bench decision on a few matters and setting forth the relief granted.

Bench Decision Dated April 9, 1980

This is a complaint under section 105(c) of the Federal Mine Safety and Health Act of 1977, filed by the Secretary of Labor on behalf of the applicant, E. Bruce Noland, alleging a discriminatory discharge of Mr. Noland by the respondent, Luck Quarries, Inc.

Section 105(c) of the Act provides:

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representatives of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners 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 of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission with service upon the alleged violator and the

miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing; (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

* * *

Jurisdiction under the Act was admitted by both parties. I will, therefore, proceed to consider the evidence.

Several witnesses testified on behalf of both parties. Many conflicts exist in the evidence which are necessary to resolve in order to decide this case. It is undisputed that from March 1978 until April 18, 1979, applicant was a trucker who with his own truck hauled rock from the respondent's quarry to its customers at construction sites. In addition, by all accounts applicant and respondent had had a stormy relationship for a number of months over several matters including proper haul rates to be paid by respondent to the truckers. During the week of April 17th, applicant was the representative for the owner-operator truckers who hauled stone for the respondent.

The process for hauling stone is as follows: usually a Euclid truck receives stone from bins and deposits the stone in storage piles and thereafter, a front-end loader takes the stone from the storage piles and puts it on trucks such as the applicant's.

The Euclid truck is larger and heavier than the trucks of the owner-operator haulers. On April 17, a front-end loader was broken and because of this the applicant was ordered to move his truck under a bin so as to receive stone directly from a bin.

Applicant testified that he refused to load under the bin because he felt it was unsafe due to dust coming from the bins and due to rocks falling off the conveyor belt which runs along the top of and alongside the bins. I recognize that many conflicts exist in the evidence. However, after carefully listening to all the witnesses, and considering the matter, I accept as most credible applicant's testimony as to why he refused to load from the bin. I note that the applicant's testimony in this respect is corroborated by the fact that on the evening of April 17, 1979, he telephoned a Virginia State mine inspector to complain about the danger from the bins. The inspector testified to the same effect. I also accept testimony which shows that the truck operator has to leave his truck in order to press the button which opens the bin. I further accept the applicant's testimony that on April 17 he received a dusting when he went under the bin and that he then told the operator's superintendent that he did not want to load under the bin due to dust and falling rock, but that when the superintendent told him to load or leave, the applicant in fact loaded his truck.

After loading the stone directly from the bin, applicant returned to the weighing office and had an argument with both the superintendent and the foreman. The superintendent testified that on April 17, 1979, the applicant merely stated that he did not want to be a Euclid driver but that he gave no reason. I find this version inherently improbable and I reject it. The applicant was an intelligent articulate witness. I find more credible applicant's testimony that in protesting about loading from the bin he referred to the danger from dust and falling rocks; that is, he gave specific reasons why he did not want to be like a Euclid driver. Also in this connection, I accept the testimony of two other truckers who stated at the hearing that the problem of dust and falling rocks previously had been discussed with management and that at the subsequent meeting of April 18, 1979, the truckers agreed they did not want to load directly from the bins because of the dust. Finally, the written statement of respondent's foreman,(FOOTNOTE 1) whom the respondent did not call to testify, expressly sets forth that on April 17, 1979, the applicant told the superintendent and him (the foreman) that loading from the bins

was injurious to his (the applicant's) health. Based upon the foregoing, I find that on April 17, 1979, the applicant made a health and safety complaint to the operator.

As already noted, the applicant and the Virginia State mine inspector testified that on the evening of April 17, 1979, the applicant telephoned the inspector to register a health and safety complaint. According to the inspector, the applicant complained about (1) loading under the bins which exposed the truckers to silica dust, (2) lack of safety glasses and (3) lack of hard hats. I accept the testimony which shows that on the morning of April 18, 1979, at a meeting of the truckers, the truckers told the applicant who, as already noted, was their representative for that week, that they did not want to load under the bins. Applicant then returned to the office where he was fired by the superintendent. In accordance with the foregoing, I again conclude that applicant made a safety complaint notifying the operator of an alleged health and safety danger, in accordance with section 105(c) of the Act.

I further conclude that the applicant's safety complaint was made in good faith. The applicant's testimony regarding his fears from silica dust is accepted as sincere. However, I note that it has been held under the 1969 Mine Act that a miner does not have to demonstrate his state of mind at the time he makes the complaint. The Court of Appeals for the District of Columbia Circuit specifically declined to impose either a "good faith" or "not frivolous" test upon such complaints or to inquire into the merits of these complaints. Munsey v. Federal Mine Safety and Health Review Commission, 595 F.2d 735 (1978). Other interpretations of the 1969 Act by the Court of Appeals for the District of Columbia Circuit issued before the adoption of the 1977 Act were expressly accepted by Congress when it enacted the 1977 Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. 36. I have no reason to believe that the rule in Munsey also would not be accepted since it comports with the broad interpretation of the 1977 Act Congress repeatedly said it wanted. The safety complaint in this case, therefore, more than satisfies applicable law.

I acknowledge evidence which indicates dust is adequately controlled at this quarry. However, as the Court of Appeals' decision cited above demonstrates, the issue here is not whether there was a dust violation or an actual or potential threat to health or safety but only whether a protected safety complaint was made.

Congress wanted to encourage the making of safety complaints and it has therefore extended very great protection to the making of those complaints. That is what this law and in particular, this section of this law is all about.

We now turn to the question of motivation for the discharge. Why was the applicant discharged? The operator has contended that the applicant was discharged because of his disputes with management over pay and a myriad of other issues unrelated to safety. A review of the decisions of the administrative law judges of this Commission in discrimination cases reveals that applicants in these cases more often than not are, to put it mildly, not management's favorites. Admittedly, there were many matters of contention, including rates of pay, between this applicant and this operator. However, the evidence convinces me that the motivating and precipitating cause for the discharge of the applicant on April 18, 1979, was the safety complaint he made the day before on April 17, 1979. As already noted, I accept the applicant's testimony regarding what happened on April 17 and 18, 1979.

In addition, the operator's superintendent testified that the operator had decided to get rid of the applicant and that when on April 17, 1979, applicant refused to load under the bin, the superintendent told the office manager this was their chance to get rid of the applicant. So too, the office manager testified they had been looking for anything to let the applicant go. The testimony of the operator's sales manager was to the same effect. It is not for me in this proceeding to decide how respondent could have properly dispensed with applicant's services. For present purposes, what is clear is that respondent's overwhelming desire to rid itself of an individual it considered troublesome overrode its judgment to such an extent that the circumstances under which it discharged the applicant, i.e., when he was making a safety complaint, were the very ones proscribed and prohibited by the Federal Mine Safety and Health Act of 1977.

I have carefully reviewed the case law respondent's counsel has so ably brought to my attention in his trial memorandum. However, the substantive principles as well as the rules regarding burden of proof in the cited cases are not, and never have been applicable to mine safety cases. Moreover, under the evidence as already set forth, the applicant here would prevail under many of these tests even if they were relevant, which they are not. See, e.g., Marshall v. Commonwealth Acquarium, 611 F.2d 1 (1st Cir. 1979).

Finally, and most importantly, I must point out that the proof of discriminatory discharge in this case goes far beyond what is required by the Federal Mine Safety and Health Act. The legislative history of this Act states that, "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." (Emphasis supplied.) S. Rep. No. 95-181, 95th Cong., 1st Sess., 36. The Conference Committee adopted the Senate version of this section of the law. S. Rep. No. 95-461, 95th Cong., 1st Sess. 51-53. The foregoing quotation from Senate Report 95-181 is a plain explanation of the mandate of this statute. I am bound by it. The evidence in this case goes far beyond the requirements of this Act. The applicant must prevail.

Accordingly, I conclude the applicant's claim of discriminatory discharge is well founded and that relief should be granted in accordance with the statute.

Applicant testified that because his services with Luck Quarries were terminated he could not keep up the payments on his truck and so was forced to sell it in late May or early June. According to the applicant he lost all his equity since he sold the truck for the amount he owed on it.

As set forth above, section 105(c)(2) provides in pertinent part: "The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest."

With respect to relief, the legislative history also is instructive. The pertinent Senate Report states as follows: "It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to, reinstatement with full seniority rights, back pay with interest, and recompense for any special damages sustained as a result of the discrimination." S. Rep. No. 95-181, 95th Cong., 1st. Sess. 37.

In this case, the applicant was temporarily reinstated on August 8, 1979, pursuant to my order. However, the order of temporary reinstatement was not truly effective because applicant had lost his truck and could not resume his former status without a truck to haul stone.

The statutory directive with respect to relief is clear. The respondent has the duty to make the applicant whole, that is, put him in the position he would be in if there had been no discriminatory discharge. The relief awarded must effectuate this purpose. The statute is too clear to admit of any other approach.

First, the respondent's responsibility to make the applicant whole requires replacement of the lost equity in the truck. The applicant testified regarding the cost of the truck, his down payment, refinancing, repairs and sale price. All these figures are easily verifiable. I order counsel for both parties to confer and advise me one week from today in this hearing room as to the amount representing the applicant's equity in the truck which they have agreed upon.

I have not overlooked respondent's argument that the loss of the truck is attributable to the Secretary of Labor because the Secretary's investigation did not proceed promptly. It may be that in some instances the Secretary does not move fast enough in these cases. However, in this case, the applicant's uncontradicted testimony is that he lost his truck in late May or early June. The Secretary could not be expected to complete his investigation in that short span of time. The responsibility for this applicant's loss of his truck is wholly the respondent's, not the Secretary's.

Secondly, the respondent must pay the applicant for the net income he lost as an owner-operator hauling stone from April 18, 1979, until the date such payment is made. It should be possible for the parties to agree upon the gross income respondent reasonably could have expected to receive during the period in question. I recognize that at the hearing the parties offered evidence which gave widely varying estimates as to the expenses of an owner-operator hauling stone. Both estimates appear to me to be extreme. It should be possible for the parties to arrive at a mutually agreeable figure as to expenses without the necessity of an expensive and time-consuming hearing on the matter. Accordingly, I order counsel for both parties to confer and advise me one week from today in this hearing room as to the net income figure they have agreed upon. Of course, a deduction from the net income applicant reasonably could have been expected to receive as a trucker must be made in the amount of applicant's actual earnings. The amount of applicant's actual earnings also should be easily ascertainable. In this connection, I conclude from applicant's testimony yesterday that he did all he could to mitigate

damages. In particular, I conclude that applicant was not bound to accept a job at a quarry near his home which he believed would not have been profitable.

Interest on all past due amounts will run at the rate of 9 percent until the date of payment.

All references to the discharge must be removed from the applicant's file.

In light of the foregoing it is ORDERED that:

1. Respondent pay applicant for the equity in the truck which he was forced to sell due to the discriminatory discharge.

2. Respondent pay applicant the net income he would reasonably have been expected to earn from April 18, 1979, to the date of payment, less applicant's actual earnings for this period.

3. Respondent pay interest at the rate of 9 percent on the foregoing amounts.

4. All references to the discriminatory discharge be removed from applicant's file.

5. Respondent reinstate applicant as an owner-operator hauling stone as soon as applicant has a truck and requests such reinstatement.

Bench Decision Dated April 17, 1980

On Wednesday last, April 9, 1980, I rendered a bench decision, holding that applicant had proved his case under section 105(c) of the Federal Mine Safety and Health Act of 1977, and was entitled to relief.

As part of the relief due applicant, I held respondent had the responsibility to replace applicant's equity in the truck. Secondly, I held that respondent must pay applicant for the net income he lost as an owner-operator truck hauler from April 18, 1979, and that from this amount, applicant's actual earnings should be deducted.

I ordered counsel for both parties to confer and advise me with respect to the net income figure they agreed upon and as to the figure regarding the equity in the truck which they agreed upon.

After conferring at length this morning, counsel for both parties advise me that they have agreed to the following amounts:

1. $4,770 is the equity in the truck.

2. $40,000 is the lost gross income, less $20,000 for expenses, for a lost net income from trucking of $20,000.

3. Applicant's actual earnings for the period were $4,647.

I accept the foregoing amounts.

In accordance with the bench decision, the amount of $4,647 must, of course, be deducted from the net lost income of $20,000, resulting in a total lost net income of $15,353.

Accordingly, applicant is entitled to $15,353 plus $4,770, which is $20,123.

It is hereby ORDERED that respondent pay $20,123 within 30 days.

In the bench decision last week, I ordered 9 percent interest on the amount due. The bench decision award of interest is amended as follows: inasmuch as exactly a year has elapsed since the discriminatory discharge on April 18, 1979, in order to achieve an approximate average, the interest due will run beginning October 18, 1979, until the date respondent mails the check for the above-stated amount to the Solicitor on behalf of applicant. The parties have agreed to this change in the award of interest.

The bench decision ordered respondent to reinstate the applicant. The bench decision in this respect is amended as follows: the right to reinstatement shall exist for 45 days from the date respondent mails the check, in accordance with the relief granted. This should give applicant sufficient time to obtain a truck and decide whether he wishes to resume his relationship with respondent.

The parties have agreed respondent should make the check payable to the applicant and mail it to him in care of the Solicitor.

The remainder of the bench decision issued on April 9, 1980, remains in effect, as issued.

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ORDER

The bench decision dated April 9, 1980, as amended and supplemented by the bench decision dated April 17, 1980, is hereby AFFIRMED.

The bench decision dated April 17, 1980, is hereby AFFIRMED.

The respondent is ORDERED to pay applicant $20,123 plus interest as set forth herein on or before May 17, 1980.

Paul Merlin
Assistant Chief Administrative Law Judge

~FOOTNOTE 1

Admission of this exhibit was agreed to at the pre-hearing conference. However, it appears from the administrative transcript that the exhibit was inadvertently not admitted into the record. It is hereby admitted as Government Exhibit No. 1.