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SOL (MSHA) V. CONSOLIDATION COAL
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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 ITS OWN BEHALF AND ON BEHALF OF TIMOTHY P. SCOTT, COMPLAINANTS	Complaint of Discharge, Discrimination or Interference and Civil Penalty Proceeding Docket No. LAKE 80-78-D No. 60 Mine
v.	
CONSOLIDATION COAL COMPANY, RESPONDENT	

DECISION

Appearances: Miguel Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinios, for Complainants John Vernon Head, Esq., Pittsburgh, Pennsylvania, for Respondent

Before: Administrative Law Judge Melick

This case is before me upon the complaint of the Secretary of Labor, Mine Safety and Health Administration (MSHA), on behalf of Timothy P. Scott alleging discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq., hereinafter referred to as the "Act"). MSHA also petitions on its own behalf for a civil penalty to be assessed against the Consolidation Coal Company (Consolidation) under section 110(a) of the Act for the alleged discriminatory acts. An evidentiary hearing was held on April 1, 1980, in Wheeling, West Virginia.

The issue in this case is whether Consolidation discriminated against Scott in violation of section 105(c) of the Act and, if so, what is the appropriate relief to be awarded Scott and what are the appropriate civil penalties to be assessed against Consolidation for such discrimination. Section 105(c)(1) of the Act provides in part that no person shall in any manner discriminate against, or cause discrimination against, or otherwise interfere with the exercise of the statutory rights of any miner or representative of miners because of the exercise by such miner or representative of miners of any statutory right afforded by the Act.

The essential facts are not in dispute. At all times relevant Timothy Scott was a scraper (pan) operator for Consolidation at its No. 60 Mine. Scott was also an authorized representative of miners and in this capacity spent 21-1/4 hours on March 5, 6 and 7, of 1979, accompanying an MSHA inspector in a regular inspection of the mine in accordance with section 103(f) of the Act. Under section 103(f) an authorized representative of miners such as Scott, is entitled to accompany an MSHA inspector in the course of his inspection (commonly referred to as a "walkaround"). It also provides that "such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." In commenting on the provisions of section 103(f), the Senate Human Resources Committee in its report on Senate Bill 717, the bill which was the basis for the 1977 Act, stated that: "to encourage such miner participation, [in walkaround activities] it is the committee's intention that the miner that participates in such inspection and conferences be fully compensated by the operator for time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties." Senate Report No. 181, 95th Congress, 1st Session reprinted in U.S. Code Congressional and Administrative News 3428-3429 (1977). Within this framework it is clear that if Scott suffered a loss of pay as a result of his statutorily protected walkaround activities then he suffered discrimination under section 105(c)(1).

Scraper operators such as Scott are paid in accordance with the National Bituminous Coal Wage Agreement of 1978 (Wage Agreement) at the grade 3 rate, then $64.61 per day, when performing classified work, and for vacation pay, extra days, graduated days, floating days, holiday pay, and 4 hour show-up time. Under the Wage Agreement, however, the scraper operators are paid at a grade 5 level, then $71.97 per day, when the machines are "engaged in the removal of over burden as an integral part of the overburden removal process." Consolidation compensated Scott for the 21-1/4 hours spent in walkaround activities at the grade 3 rate claiming that the Wage Agreement requires that grade 5 pay need only be awarded when the specified overburden removal is actually performed by the employee. It cites a number of arbitration decisions which it claims supports its position. MSHA and Scott contend that he should have been paid at the grade 5 rate and maintain that he was therefore discriminated against in violation of section 105(c) of the Act.

Scott testified without contradiction that on the morning of March 5, 1979, he was told that he was to perform overburden removal work (grade 5 work) and in preparation for such work began his preshift examination of the scraper at around 7 a.m. Later notified of the MSHA inspection, he began his walk around activities at 7:30 that morning and continued thereafter in that capacity for a total of 21-1/4 hours on March 5, 6, and 7. It is undisputed that other scraper operators performed overburden removal work during this period of time and were in fact paid for

this work at the grade 5 rate. At least one of these operators performed that work for the same 21-1/4-hour period at issue herein and was paid for those hours at the grade 5 rate.

Clearly there is no way to determine the amount of time Scott would have spent in grade 5 overburden removal work had he not performed his walkaround duties. Whether such work is actually performed is subject to a great many variables including weather conditions, equipment functioning, availability of operators and work priorities. Moreover from the records of other members of Scott's work crew, it is apparent that the amount of time spent by each in overburden removal varied widely during this time. Some of the operators performed no grade 5 work and at least one performed grade 5 work for the entire 21-1/4-hour period at issue. Therefore while it is impossible to determine precisely how much time Scott would have spent working at the grade 5 level, it is apparent that he could have spent the entire 21-1/4-hour period engaged in such work.

Under the circumstances I find that Scott was unfairly penalized in performing his walkaround duties as a representative of miners because he was therefore deprived of the opportunity to perform overburden removal work at the grade 5 rate of pay. In order to assure that Scott is not unfairly penalized for having perfomed his duties as a representative of miners, I find that he must be compensated in an amount equivalent to the grade 5 rate for the maximum time worked in that mine by any other single employee in the capacity of a grade 5 scraper operator during the time Scott was engaged in his walkaround activities. To provide him anything less would discourage his participation in these important functions, contrary to law and the clear intent of Congress. Since the evidence indicates that at least one other scraper operator employed at this mine performed the grade 5 work during the entire 21-1/4-hour period at issue, Scott is entitled to the grade 5 pay differential for the entire period. I therefore order Consolidation to pay Scott within 30 days of this decision the amount of $21,47 (the hourly differential in pay between grade 3 and grade 5 of $1.01 x 21-1/4 hours) plus interest computed at the rate of 10 percent per annum from the date he would ordinarily have received that pay to the date on which it is actually paid.

Since I have found that Consolidation did discriminate against Scott I must, in accordance with section 105(c)(3) of the Act, determine the appropriate civil penalty to be assessed under the relevant criteria set forth in section 110(i) of the Act. The operator is large in size but has no history of discrimination violations under section 105(c) of the Act. I find that the violation herein was serious because of its potential chilling effect on miner participation in walkaround and other health and safety related functions. I find only slight negligence however, because I believe the operator was acting in the good faith belief that it was awarding Scott the appropriate rate of walkaround pay. Thus only a nominal penalty is warranted. I therefore order that a penalty of $1 be paid by Consolidation within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge