

CCASE:

SOL (MSHA) V. ST. JOE ZINC

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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:
LESTER N. SIMMONS,

Complaint of Discrimination

Docket No. YORK 80-86-DM

Balmat No. 4 Mine

COMPLAINANT

v.

ST. JOE ZINC COMPANY,

RESPONDENT

DECISION AND ORDER

This is a discrimination complaint brought pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act, as amended, 30 U.S.C. 815(c)(2), on behalf of Lester N. Simmons, a miner employed at the St. Joe Zinc Company.

The operator moves for summary decision on the ground there is no genuine issue of fact material to the question of liability, and that it is entitled as a matter of law to an order dismissing the complaint. The Solicitor, on behalf of the Secretary and the complainant, opposes the motion on the ground there are genuine disputes as to facts material to respondent's liability, but that if there are not, complainant is entitled as a matter of law to an order directing payment of the compensation claimed.

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Based on an independent evaluation and de novo review of the circumstances, I find the following facts material to liability are undisputed, (FOOTNOTE 1) and that complainant is entitled as a matter of law to recover.

Undisputed Facts

During the week of December 3, 1979, complainant Lester N. Simmons was employed at the St. Joe Zinc Company's Balmat No. 4 Mine, and was vice-president, chairman of the safety committee and the designated safety and health representative of Local 3701, United Steelworkers of America (Simmons

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Affidavit at 11). He was classified as an oiler-tool nipper, and was compensated at the rate of \$6.25 per hour (Simmons Affidavit at 2, 3). For the past 20 years, the responsibilities of oiler-tool nippers have included the cleaning of toilets (Answer to Interrogatory No. 12) and for at least 4 years the oiler-tool nippers have received 1.25 hours of pay at their base rate for each toilet cleaned per week (Answer to Interrogatory No. 10). At the end of each week, Mr. Simmons would send a list of the toilets he claimed to have cleaned to the mine superintendent (Simmons Affidavit at 6, 7).

A regular inspection of the entire mine pursuant to section 103(a) of the Mine Act was conducted by MSHA during the period of November 26, 1979, through December 10, 1979. On Monday, Tuesday and Wednesday, November 26, 27 and 28, 1979, Mr. Simmons accompanied the inspection party as designated walkaround representative. On Thursday and Friday, November 29 and 30, 1979, he performed his normal work assignments including his sanitation duties. His pay for that week included the usual amount attributable to toilet cleaning (Exh. 3 to Secretary's Opposition).

On Monday, December 3, 1979, Mr. Simmons spent 5 hours at his normal work duties, and 3 hours on union business for which he was not paid (Simmons Affidavit at 13, Exh. 4 to Secretary's Opposition). On Tuesday, December 4, 1979, he spent 8 hours in mine-rescue training for which he was paid (Simmons Affidavit at 14, Exh. 4 to Secretary's Opposition). On Wednesday, December 5, 1979, he spent 8 hours greasing machinery for which he was paid (Simmons Affidavit at 15). On Thursday and Friday, December 6 and 7, 1979, he accompanied two MSHA inspectors as designated walkaround representative (Simmons

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Affidavit at 12). Mr. Simmons did not clean any toilets that week, and he was paid for a total of 37 hours rather than the 50-3/4 hours he claims was owed him (Simmons Affidavit at 16, 17; Exh. 3 to Secretary's Opposition).

Discussion

On April 21, 1980, the Secretary of Labor filed this complaint alleging respondent interfered with the exercise of the statutory rights of Mr. Simmons as a representative of the miners in violation of section 105(c)(1) of the Act. The act of discrimination alleged is the operator's refusal to pay complainant his full weekly salary as a result of his spending 2 days as designated walkaround representative on a regular inspection of the mine pursuant to section 103(a) of the Act. Complainant prays that the operator be ordered to pay the amount of compensation withheld, \$85.94, with interest at 8 percent; that respondent expunge any and all references to the incident from complainant's work records; and that respondent be assessed an appropriate civil penalty for its interference with complainant's exercise of his statutory rights.

At issue in this litigation is the proper construction of the requirement contained in section 103(f), 30 U.S.C. 813(f), of the Act that a designated walkaround representative "shall suffer no loss of pay during the period of his participation in the inspection." (FOOTNOTE 2) Complainant contends that the plain

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language of the statute requires he be paid all his usual weekly compensation without regard to his failure to carry out all his assigned duties. He asserts that cleaning toilets was an integral part of his job, and has been part of the regularly assigned duties of oiler-tool nippers for over 20 years. He argues that the fact his employer took into account the number of toilets cleaned each week in calculating his pay is irrelevant since the statute requires he be paid all the remuneration he would have received but for the time spent in the exercise of his walkaround rights. Complainant relies on Consolidation Coal Company, 2 FMSHRC 1056 (May 5, 1980), in support of his position. In that case, a scraper operator was prevented from performing grade 5 overburden removal work when he was assigned walkaround duties. As a result of missing the premium rate work, he was paid at the grade 3 or regular rate. The operator argued that the wage agreement contemplated that the higher rate need only be awarded when the specified work is actually performed. The judge found, however, that the miner was unfairly penalized for exercising his walkaround rights, and that the failure to compensate him

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at the rate applicable to the duties he would otherwise have performed was an act of discrimination within the meaning of section 105(c) of the Act.

Respondent claims that toilet cleaning is done on a piecework basis for which miners receive bonus pay for each toilet cleaned, and that therefore it is required to pay Mr. Simmons only his regular hourly rate for the time spent accompanying the inspectors. The operator maintains it would be unfair to require it to pay him for housekeeping duties not actually performed since it had to pay another miner to clean the toilets, and since Mr. Simmons could have rearranged his work schedule to clean toilets on other days.(FOOTNOTE 3)

Whether or not Mr. Simmons could have rearranged performance of his sanitation duties is immaterial since his toilet-cleaning duties were as much a part of his regularly assigned responsibility as his equipment maintenance work. Thus, while complainant was regularly employed to work a 40-hour week at both his equipment maintenance and sanitation duties he was compensated for 53-3/4 hours. The sanitation duties were not extra or piecework performed in addition to his regular 40-hour work week, but were performed as part of that regular 40-hour work week (Answer to Interrogatory No. 4). Obviously,

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when complainant was performing his sanitation duties he was not performing his equipment maintenance work. No one has suggested that had Mr. Simmons chosen to clean toilets rather than maintain equipment he should be docked pay for his failure to do maintenance work. If nonperformance of his maintenance duties is excused by the walkaround provision, then nonperformance of his sanitation duties must likewise be excused.

That the requirement of section 103(f) that miners exercising their walkaround rights "shall suffer no loss of pay" means they are to receive their customary and usual compensation is made abundantly clear in the legislative history. In the Senate's consideration of the Mine Act, miner participation in inspections was recognized as an essential ingredient of a workable safety plan. Senator Javits explained the critical importance of the walkaround right as part of a comprehensive scheme to improve both safety and productivity in the mines:

First, greater miner participation in health and safety matters, we believe, is essential in order to increase miner awareness of the safety and health problems in the mine, and secondly, it is hardly to be expected that a miner, who is not in business for himself, should do this if his activities remain uncompensated.

In addition, there is a general responsibility on the operator of the mine imposed by the bill to provide a safe and healthful workplace, and the presence of miners or a representative of the miners accompanying the inspector is an element of the expense of providing a safe and healthful workplace * * *. But we cannot expect miners to engage in the safety-related activities if they are going to do without any compensation, on their own time. If miners are going to accompany inspectors, they are going to learn a lot about mine safety, and that will be helpful to other employees and to the mine operator.

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In addition, if the worker is along he knows a lot about the premises upon which he works and, therefore, the inspection can be much more thorough. We want to encourage that because we want to avoid, not incur, accidents. So paying the worker his compensation while he makes the rounds is entirely proper * * *. We think safe mines are more productive mines. So the operator who profits from this production should share in its cost as it bears directly upon the productivity as well as the safety of the mine * * *. It seems such a standard business practice that is involved here, and such an element of excellent employee relations, and such an assist to have a worker who really knows the mine property to go around with an inspector in terms of contributing to the health and safety of the operation, that I should think it would be highly favored. It seems to me almost inconceivable that we could ask the individual to do that, as it were, in his own time rather than as an element in the operation of the whole enterprise.

Committee Print, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess. (July 1978) at 1054-1055 (hereinafter cited as Leg. Hist.)

Senator Williams, Chairman of the Committee on Human Resources, also discussed the importance of the walkaround right in the context of improving safety-consciousness on the part of both miners and management:

It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the 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.

Leg. Hist. at 616-617.

Since the purpose of the compensation provision of the walkaround right is to encourage miner participation in inspections, I must conclude that a

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practice which has the effect of discouraging such participation is clearly contrary to the intent of the statute. Consolidation Coal Company, supra. Accordingly, I find that the operator's refusal to pay Mr. Simmons his full compensation as a result of his participation in the regular inspection on Thursday and Friday, December 6 and 7, 1979, is contrary to the requirement of the statute and constitutes an act of discrimination.

Conclusions of Law

1. Section 105(c)(1), the discrimination provision of the Act, which prohibits any form of interference with the exercise of the statutory rights of a miner or representative of miners, is a proper vehicle for review of an operator's refusal to fully compensate a representative of miners pursuant to section 103(f).

2. The requirement of section 103(f) that a miner who exercises his walkaround rights "shall suffer no loss of pay" contemplates that he will receive his regular, usual compensation without regard to whether he completely carried out all his normal duties.

3. Complainant as a matter of law is entitled to recover the back pay wrongfully withheld by the operator.

4. A civil penalty of \$100 for the violation of section 103(f) found is consistent with the purposes and policy of the Act.

ORDER

WHEREFORE, IT IS ORDERED THAT:

1. Jurisdiction is reserved over this matter until the question of the amount of back pay due complainant is resolved.
2. On or before Friday, November 14, 1980, the parties will confer and agree upon the amount of the back pay due complainant, Lester N. Simmons, with interest at 8 percent from December 7, 1979, or file herein their separate proposals with respect to the amount due.
3. Ten (10) days after a final order issues with respect to back pay, respondent will pay a civil penalty for the violation found of \$100.
4. The operator cease and desist from any conduct calculated to have a chilling effect on the exercise of the walkaround rights guaranteed miners by the Mine Safety Law.
5. Respondent expunge all references to this incident from complainant's employment records.
6. Within 15 days from the date of this order, respondent post a copy of this decision and order on a bulletin board at the mine where notices to miners are normally placed, and shall keep it posted there, unobstructed and protected from the weather, for a consecutive period of 60 days.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE_ONE

1 Counsel for the Secretary asserts there are factual differences which preclude a summary decision in this matter. A careful review of the record discloses, however, that the factual disputes cited are not material to the question of liability, and are relevant, if at all, only to the quantum of relief.

The Solicitor claims that Mr. Simmons cleaned 11 toilets each week as part of his usual duties (Simmons Affidavit at 6, 7), whereas respondent claims Mr. Simmons actually cleaned only 10 toilets each week since the toilet located at 1700 Sylvia Lake has been inaccessible since July 16, 1979 (Kreider Affidavit). The operator did pay Mr. Simmons for 11 toilets each week, but the superintendent claims he was unaware that Mr. Simmons claimed to be cleaning the toilet at 1700 Sylvia Lake since he "did not closely examine [the] list, but gave it a casual glance" (Kreider Affidavit).

Another factual dispute cited by the Solicitor concerns the number of hours for which Mr. Simmons was actually paid during the week of December 3, 1979. Mr. Simmons states he was paid for 37 hours that week because he spent 3 hours on union business on Monday, December 3, 1979 (Simmons Affidavit at 16).

Respondent's motion states that Mr. Simmons was paid for 40 hours that week. There is no actual dispute, however, since respondent's own pay records (Exh. 4 to Secretary's Opposition) disclose complainant's statement is correct. Respondent has not challenged its own records.

Neither of these disputes are material to the question of liability, and the only actual dispute, i.e., whether complainant regularly cleaned 10 or 11 toilets, is material, if at all, only to the quantum of relief. It is conceivable that if it is proven Mr. Simmons only cleaned 10 toilets the operator may have an equitable defense of unclean hands as to the compensation claimed for the 11th toilet. If necessary, the parties will, of course, be heard on this issue.

~FOOTNOTE TWO

2 Section 103(f), 30 U.S.C. 813(f), of the Act provides:

"Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. 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. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with the subsection shall not be a jurisdictional pre-requisite to the enforcement of any provision of this Act." (Emphasis added.)

~FOOTNOTE THREE

3 The operator argues that although it was Mr. Simmons' usual practice to clean the toilets on Thursdays and Fridays, he had done so on other days on three prior occasions and that "there was no absolute routine which prevented Mr. Simmons from cleaning the toilets on days other than Thursday and Friday" (Kreider Affidavit). Mr. Simmons claims, however, that "he cleaned the toilets on Thursday and Friday of each week since these days were most convenient for David Lane, who operated the underground utility vehicle and drove him to the various toilets in the mines and carried the emptied waste products to the surface" (Simmons Affidavit at 9). Complainant also requests that official notice be taken that the three prior occasions on which he cleaned toilets on other days were all in weeks which had holidays falling on Thursday or Friday. For the reasons stated in the text, this dispute is irrelevant to the disposition

of the motion.