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SOL (MSHA) v. ZEIGLER 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 BEHALF OF: GENE F. HAND,	COMPLAINANT	Complaint of Discharge Docket No. LAKE 80-292-D Docket No. VINC CD-80-10 Zeigler No. 11 Mine
v.		
ZEIGLER COAL COMPANY,	RESPONDENT	

DECISION

Apperances: Frederick W. Moncrief, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia, for
Complainant;
D. Michael Miller, Esq., Alexander, Ebinger, Fisher,
McAlister & Lawrence, Columbus, Ohio, and J. Halbert
Woods, Esq., Zeigler Coal Company, Des Plaines,
Illinois, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding commenced by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) on behalf of Gene F. Hand alleging that Gene F. Hand was discharged from his employment at Zeigler Coal Company (hereinafter Zeigler) on December 21, 1979, because of activities protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c) (hereinafter the Act). Gene F. Hand filed a complaint with MSHA concerning his discharge. On May 19, 1980, following its investigation, MSHA filed an application for temporary reinstatement of Gene F. Hand. That application was granted by Chief Administrative Law Judge James A. Broderick on May 20, 1980. Thereafter, Zeigler requested a hearing on the application, which was subsequently held in St. Louis, Missouri, on June 9, 1980, before Chief Judge Broderick. Following the hearing, Chief Judge Broderick held on June 17, 1980, that the order of temporary reinstatement should continue in force until further notice. On July 23, 1980, the Federal Mine Safety and

Health Review Commission (hereinafter Commission) denied Zeigler's petition for review of the order of temporary reinstatement. Thereafter, Zeigler brought an action seeking injunctive relief in the U.S. District Court for the Southern District of Illinois. Zeigler asserted that the foregoing proceedings denied it due process of law. Chief Judge Foreman denied Zeigler's motion for injunctive relief. Zeigler Coal Company v. Marshall, 502 F. Supp. 1326, (S.D. Ill. 1980).

On June 18, 1980, Complainant filed a complaint of discharge on behalf of Gene F. Hand. Upon completion of prehearing requirements, a hearing was held in St. Louis, Missouri, on January 13 and 14, 1981. The following witnesses testified on behalf of Gene F. Hand: Charles H. Morgan, Wendell Davis, Gene F. Hand, Shan W. Thomas, and Paul Tisdale. The following witnesses testified on behalf of Zeigler: Raphael C. Colombo, Daniel R. Spinnie, Jack R. Thornton, B. Carl Reidelberger, and Robert H. Wallace.

Upon completion of the testimony at the hearing, Zeigler moved for a directed verdict and for temporary relief. The motion for directed verdict was denied from the bench. After consideration of the contentions of the parties, I denied Zeigler's request for temporary relief on January 29, 1981, because I did "not find that the complaint was frivolously brought or that MSHA's finding was arbitrary or capricious." Thereafter, the parties submitted briefs and proposed findings of fact and conclusions of law.

ISSUES

Whether Complainant Gene F. Hand, a section foreman, is a "miner" entitled to the protection of section 105(c) of the Act; and, if so;

Whether Zeigler violated section 105(c) of the Act in discharging Complainant Gene F. Hand, and, if so, what relief shall be awarded to Complainant.

APPLICABLE LAW

Section 105(c) of the Act, 30 U.S.C. 815(c), provides in pertinent part as follows:

- (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, representative 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.

STIPULATIONS

The parties stipulated the following:

~695

1. At all relevant times, Zeigler Coal Company operated the No. 11 Mine, and is an operator as defined in section 3(b) of the Federal Mine Safety and Health Act of 1977 (the Act).

2. The No. 11 Mine, located in Randolph County, Illinois, is a mine defined in section 3(h)(1) of the Act, the products of which enter or affect commerce.

3. Complainant was employed as an underground section foreman by Respondent at its No. 11 Mine in December of 1979.

4. Complainant was discharged by Respondent, Zeigler Coal Company, on December 21, 1979.

5. Complainant was hired by Respondent on July 9, 1973, and employed in its Spartan Mine until its closure in 1979.

6. Complainant, originally hired as a section foreman, was promoted to assistant mine manager on January 13, 1975, and a mine manager on March 24, 1975.

7. Complainant was transferred at his request to the No. 11 Mine on April 23, 1979, after a short tenure at Respondent's No. 4 Mine.

FINDINGS OF FACT

I find that the preponderance of the evidence of record establishes the following facts:

1. Zeigler, at all times relevant to this proceeding, operated the No. 11 Mine, and Zeigler is an "operator" as defined in section 3(b) of the Act.

2. Zeigler's No. 11 Mine is located in Randolph County, Illinois, and is a "mine" as defined in section 3(h)(1) of the Act. The products of Zeigler No. 11 Mine enter and affect commerce.

3. Gene F. Hand was hired as an underground section foreman by Zeigler at its Spartan Mine on July 9, 1973, and was promoted to assistant mine manager on January 13, 1975, and mine manager on March 24, 1975. He worked at the Spartan No. 2 Mine until it closed on March 17, 1979.

4. After a short period of work at Zeigler No. 4 Mine, Gene F. Hand was transferred, at his request, to Zeigler No. 11 Mine on April 23, 1979.

5. Gene F. Hand was employed as an underground section foreman at the No. 11 Mine in December 1979.

6. On December 21, 1979, Gene F. Hand was discharged by Zeigler.

7. Between June 1979, and December 21, 1979, the date of Hand's discharge, he was the subject of disciplinary action as follows:

(a) In June 1979, Hand was reprimanded for violating Zeigler's policy requiring that accidents be reported on the day they occur.

(b) During the summer of 1979, Hand was reprimanded after he allegedly threatened a member of the United Mine Workers of America (hereinafter UMWA) and a formal complaint was lodged against him by the UMWA safety committee.

(c) In August 1979, Hand was reprimanded for failure to adequately supervise the extension of a steel air line.

(d) In August 1979, Hand was suspended for 5 days after he ordered the mine manager off his section. Upon Hand's reinstatement, Mine Superintendent Robert Wallace warned him not to engage in such conduct again.

(e) In early December 1979, Hand was reprimanded by Superintendent Wallace following a dispute between Hand and Chief Electrician Walter Dotson. Hand's dispute with Dotson was terminated when General Mine Manager, Carl Reidelberger, stepped between them. After the incident with Dotson, Superintendent Wallace told Hand that he was "not going to put up with it much longer."

(f) In mid-December 1979, a UMWA safety committeeman complained to Superintendent Wallace about Hand's conduct, which included losing his temper with the miners. Thereafter, Superintendent Wallace again reprimanded Hand.

8. In the weeks prior to December 21, 1979, there had been two major roof falls in the No. 3 section or unit of the mine. Following these occurrences, Zeigler adopted a revised roof-control plan.

9. On December 20, 1979, at Hand's request, Superintendent Wallace assigned additional roof bolters to Hand's unit to catch up on the roof bolting.

10. On the morning of December 21, 1979, a coal drill operator took some torque readings on roof bolts in the No. 3 section and reported the results to the UMWA safety committee.

11. At this time, Hand also noticed some 4-foot roof bolts which had just been installed and Hand believed that these roof bolts did not conform to the revised roof-control plan adopted by Zeigler.

12. Thereafter, Hand checked some roof bolts and found some in compliance and others out of compliance. By 11 a.m., he had not checked the required number of roof bolts for torque when Superintendent Wallace and Zeigler's Chief Mining Engineer, Ray Colombo, arrived on Hand's section. Hand informed Superintendent

Wallace of the problem concerning the torque

~697

of the roof bolts; Hand and Wallace thereupon torqued roof bolts together. Again, some of the bolts were in compliance and others were not. Wallace thereupon criticized Hand for the manner in which he had handled this problem and told him to assign a miner to torquing the roof bolts. Hand did not believe that the person suggested by Wallace was qualified to torque roof bolts. Hand became excited and argued with Wallace. Hand told Wallace to get off his section and that he, Hand, would straighten it out.

13. When Hand completed his shift on December 21, 1979, he was summoned to Wallace's office and thereupon discharged for insubordination.

14. Although Hand contends that there was a violation of federal law concerning roof bolting on his unit on December 21, 1979, he did not report any such violation in his daily report and the information in his report on the torque of roof bolts in his section showed no violation of law.

DISCUSSION

I. Whether Gene Hand, a Section Foreman, is a "Miner" Entitled to the Protection of Section 105(c) of the Act

Zeigler contends that "the Review Commission is without jurisdiction to consider Hand's claim of discrimination because Hand is not a 'miner' within the meaning of section 105(c) of the Act." Zeigler cites no specific authority for this contention but argues that in other sections of the Act, Congress "drew a distinction between supervisory personnel, such as a section foreman, and the 'miners' who work in a mine."

MSHA, on behalf of Hand, contends that the definition of "miner" in section 3(g) of the Act "is clear, unambiguous, and no reasonable basis for a restrictive interpretation exists." MSHA also relies upon a 1975 decision of the Interior Board of Mine Operations Appeals holding that an owner of a mine is a miner. Charles T. Sink, 5 IBMA 217, 225, aff'd, 538 F.2d 325 (4th Cir. 1976).

Section 3(g) of the Act, 30 U.S.C. 802(g), defines the term "miner" as "any individual working in a coal or other mine." The definition of "miner" in the Coal Mine Health and Safety Act of 1969 was as follows: "Any individual working in a coal mine." Public Law 91-173, section 3(g) December 30, 1969. Thus, for purposes of this matter, the definition of "miner" was not changed in the 1977 Act. Under the definition, it is clear that a section foreman in a coal mine is a "miner" for purposes of the Act.

Zeigler's contention, that section foremen, constituting supervisory personnel, are excluded from the definition of "miner" for purposes of section 105(c) of the Act, is erroneous. Under the 1969 Act, the Interior Board of Mine Operations Appeals held that the owner of a mine was also a miner for purposes of section 3(g) of that Act. Charles T. Sink, supra at 225. More

recently, the Third Circuit Court of Appeals held that four brothers who owned a mine were also "miners" under the Act. *Marshall v. Kraynak*, 604 F.2d 231

(3d Cir. 1979). I also agree with the Third Circuit that the definition of "miner" in section 3(g) of the Act "is free from ambiguity."

I conclude that, at all times relevant herein, Gene F. Hand, a section foreman employed by Zeigler, was a "miner" for purposes of section 105(c) of the Act. Therefore, I have jurisdiction to decide this matter.

II. Whether Zeigler Violated Section 105(c) of the Act

Recently, in *Secretary of Labor on behalf of David Pasula v. Consolidation Coal Company*, 2 FMSHRC 2786 (October 14, 1980) (hereinafter *Pasula*), the Commission analyzed section 105(c) of the Act, the legislative history of that section, and similar anti-retaliation issues arising under other federal statutes. The Commission held as follows:

We hold that the complainant has established a prima facie case of a violation of Section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues the complainant must bear the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event. *Id.* at 2799-2800.

Hand contends that he was discharged by Zeigler because of his complaints to Superintendent Wallace that the roof in his section "was unsafe and violative of the law" and that he resisted an order from the superintendent to assign an unqualified miner to torque roof bolts. Complainant's Posthearing Brief at 17. Zeigler asserts the following: (1) Hand failed to establish that he engaged in any protected activity at the time of his discharge; (2) Hand failed to establish that a safety complaint was a motivating reason for his discharge; (3) Hand was discharged for insubordination - conduct which is not protected under the Act; and (4) Zeigler would have discharged Hand for his unprotected activity alone.

A. Did Gene F. Hand Engage in Protected Activity?

Gene F. Hand contends that he engaged in protected activity when he complained to Superintendent Wallace about short roof bolts, inadequate torque of roof bolts, and the superintendent's order that an unqualified miner be assigned to check the torque of roof bolts. Superintendent Wallace testified that, on the day in question, Hand had never told him that any part of the section was unsafe. Superintendent Wallace also denied giving an order that any particular miner should torque the roof bolts.

Section 105(c)(1) of the Act sets forth certain types of protected activity including, inter alia, filing or making:

[a] complaint under or related to this Act, including a complaint notifying the operator * * * of an alleged danger or safety or health violation in a coal or other mine * * * or because of the exercise by such miner, representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c) does not prescribe the manner in which such complaint shall be made to the operator.

The evidence establishes that, in the month prior to this incident, there had been serious problems with the roof on Hand's section. Two major roof falls had occurred. MSHA reevaluated the roof-control plan and a revised roof-control plan had been adopted by Zeigler. According to Hand, production of coal in this section had been reduced because of too little roof bolting. At Hand's request, Superintendent Wallace assigned additional miners to roof bolt this section on the day before this incident. On the day in question, unbeknownst to Hand, a coal drill operator on his crew checked the torque of roof bolts and apparently reported a violation to the UMWA safety committee. Other miners apparently saw 4-foot roof bolts which had just been installed in violation of the revised roof-control plan. It is unnecessary to examine the merits of these complaints. Suffice it to say that the miners on Hand's shift on the day in question notified him of a safety complaint. When he subsequently relayed these complaints to Superintendent Wallace, he was making a "complaint notifying the operator * * * of an alleged danger or health violation * * *." Such action on Hand's part constitutes protected activity.

The evidence is less clear concerning Superintendent Wallace's purported order to assign, in Hand's opinion, an unqualified person to check the torque of roof bolts. However, I find that Superintendent Wallace did discuss with Hand the manner in which the torque of roof bolts should be checked. Hand disagreed with Wallace's suggestion or order. Under the broad language of section 105(c) of the Act, I also conclude that Hand's disagreement concerning the manner of checking the torque of roof bolts constitutes a safety complaint and, hence, protected activity under section 105(c) of the Act.

B. Was Hand's Discharge Motivated in Any Part by the Protected Activity?

An analysis of Zeigler's motivation for discharging Hand on December 21, 1979, must include an examination of the relevant events that preceded the discharge. During the 6 months prior to the discharge, Hand was the subject of five reprimands and a 5-day suspension. Of particular importance, is the fact that Hand was suspended for 5 days in August 1979, for ordering the mine manager off his section. Upon his reinstatement, Hand was warned that this conduct would not be tolerated.

On December 21, 1979, Hand notified Superintendent Wallace of his concern about the torque of roof bolts on his section. Thereafter, Hand and Wallace proceeded to check the torque of the bolts. Hand does not allege that the roof bolts torqued by him that day were in violation of the law. His daily report makes no mention of any problem with roof bolts. Thereafter, Hand left Wallace to attend to other problems. When he returned to Wallace, a discussion ensued about the manner in which roof bolts should be torqued. Although the substance of this discussion is disputed, it is clear that Hand concluded that Wallace had ordered him to assign an unqualified miner to check the torque of the roof bolts. Hand testified as follows:

At this time I was confused, and I got a little hot. And I asked Mr. Wallace, after looking at them four-foot bolts--the more I thought of those four-foot bolts after we had had this meeting with the federals and everything, and the crew was trying to get the run straightened up--after this, I got a little nervous and excited over him not getting us to proceed with the proper procedure the way the federals wanted us to comply with, and I asked him to leave my section. And to let me, the man that signed the books, that was responsible for that, try to get it straightened up to where we could run coal.

(Tr. 91).

The testimony of Superintendent Wallace concerning this confrontation was as follows:

So I started back over and here came Gene up to the face, and Gene and I and Columbo went to the face out of earshot of anybody, anybody else as far as hearing, at which point I told Gene, I said, "Gene, it was your responsibility in the first place to designate the man to take the torques and report back to you, not just anybody, it is up to you to designate a man." But I said, "If you quit your bellyaching and start doing your job and telling the men what they are supposed to do and see that it is being done, either that or quit and get your ass out of the mine." Excuse the language. At which point that is when Mr. Hand blew up.

~701

He said that he was hired there or sent there by higher ups, it was higher ups than me that would have to get rid of him. He said, "You can't run a section. That's the reason the mine is in the shape it is," and he said, "Just get your ass off my section and stay off my section." At which point I told him, I said, "Gene, as long as I'm superintendent that is my job to come to this mine and see that the jobs are being done proper."

About this time Mike Blair, the shooter, came to the mouth of the entrance. He hollered in there and he said that the shells were not going off and he was going to have to go out to the bench. I told Gene, I said, "Gene, I want you to go out there and help the shooters get the shells lined out and so we can get some shooting done." He continued to want to argue. I said, "Gene, I'm giving you a direct order. Go help the shooters get lined out." And that ended our conversation.

(Tr. 288-289).

Superintendent Wallace's reason for discharging Hand was as follows:

Well, let's say that it popped into my head right when he told me to get the hell out of his section, but I did not say anything at that time, possibly I done wrong, but as I was leaving the section I told Columbo, I said, "I'm going to discharge Gene Hand when he gets out of the mine tonight at 4:00 o'clock." I said, "I suspended him for running the mine manager off the section" and I said, "I'm not going to take it any longer. This is the last straw." Mr. Columbo said, "You done different than me. I would have fired him on the spot."

(Tr. 291).

Thus, Hand contends that he was discharged for complaining about safety both in connection with the length and torque of roof bolts and the assignment of an unqualified miner to check the torque. Zeigler asserts that Hand was discharged solely for insubordination in ordering the superintendent off the section after a prior suspension for ordering the mine manager off the section.

I conclude that while Hand engaged in protected activity by complaining about safety matters, he failed to establish that his discharge was motivated in any part by the protected activity. There is no evidence, by way of admission or otherwise, that Hand's discharge was motivated by his protected activity. Moreover, the circumstances surrounding Hand's discharge do not give rise to an inference of unlawful discrimination. Hand was suspended for 5 days in August 1979, for insubordination in ordering the mine manager off

~702

his section. He was warned that such conduct would not be tolerated. I conclude that Zeigler has established the fact that when, on December 21, 1979, Hand ordered Superintendent Wallace off the section, it was "the last straw." Clearly, Hand's order to Wallace to leave the section was activity which is not protected under section 105(c) of the Act. Since Hand's action in ordering Superintendent Wallace off the section, in conjunction with Hand's prior disciplinary problems at Zeigler, was the motivation for Hand's discharge, Hand failed to carry his burden of persuasion that his discharge was motivated in any part by his protected activity.

Assuming, arguendo, that Hand could establish that his discharge was in part motivated by his protected activity, he would, nevertheless, fail to prevail in this matter because Zeigler has established that it would have discharged him for his unprotected activity alone, that is, his insubordination in ordering the superintendent off the section. I believe that the Commission contemplated a situation such as this when it stated:

On the other hand, the Commission recognizes that it would hardly further the statutory purpose to order the reinstatement of a miner who would have been discharged for lawful reasons alone. It would put a miner who has engaged in both protected and unprotected activities in a better position than he would have occupied had he done nothing. It would require reinstatement even though the record shows that the employer would have lawfully assessed the miner as unfit for further employment.

Pasula, supra at 2800.

I conclude that Hand failed to prove that his discharge was motivated in any part by his protected activity and that Zeigler would have discharged him for his unprotected activities alone. Therefore, the Complaint of Discharge is denied and the Order of Temporary Reinstatement is dissolved.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant Gene F. Hand was a miner as defined in the Act and entitled to the protection afforded in section 105(c) of the Act.

2. Zeigler Coal Company is subject to the provisions of the Act.

3. This administrative law judge has jurisdiction over the parties and subject matter of this proceeding.

4. On December 21, 1979, Complainant Gene Hand engaged in the following activity which is protected under section 105(c) of the Act: Complaints to Superintendent Robert Wallace concerning the length and torque of the roof bolts on his section and the qualification of a miner assigned to check the torque of roof

bolts.

~703

5. Complainant Gene F. Hand failed to establish that the protected activities, supra, motivated, in any part, the decision of Zeigler Coal Company to discharge him on December 21, 1979.

6. Hand's action on December 21, 1979, ordering the mine superintendent off his section, constitutes activity which is not protected under section 105(c) of the Act.

7. Zeigler Coal Company discharged Gene F. Hand on December 21, 1979, following a 6-month history of disciplinary action consisting of five reprimands and a 5-day suspension for insubordination, because, despite a prior warning, he ordered the mine superintendent off of his section.

8. Zeigler established that it considered Hand to be deserving of discharge for insubordination in ordering the mine superintendent off his section on December 21, 1979, since in August 1979, Hand received a 5-day suspension for ordering the mine manager off his section and since Zeigler would have discharged Hand for his unprotected activities alone.

9. Zeigler's discharge of Gene F. Hand on December 21, 1979, did not violate section 105(c) of the Act.

10. Complainant Gene F. Hand's complaint of discharge is denied.

11. The Order of Temporary Reinstatement entered in favor of Gene F. Hand on May 20, 1980, is hereby dissolved.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's Complaint of Discharge is DENIED.

IT IS FURTHER ORDERED that the Order of Temporary Reinstatement of Gene F. Hand is DISSOLVED.

James A. Laurenson Judge