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VICTOR MCCOY, v. CRESCENT COAL,
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1981
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

VICTOR MCCOY,
COMPLAINANT
v.

COMPLAINT OF DISCHARGE,
DISCRIMINATION, OR
INTERFERENCE

CRESCENT COAL COMPANY,
RESPONDENT

Docket No. PIKE 77-71

DECISION

Appearances: Stephen A. Sanders, Esq. and Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Prestonsburg and Hazard, Kentucky, for Complainant;
Henry Stratton, Esq. and David Stratton, Esq., Stratton, May & Hays, Pikeville, Kentucky, for Respondent.

Before: Chief Administrative Law Judge Broderick

On May 10, 1977, Victor McCoy filed a Complaint of Discrimination against Crescent Coal Company under 110(b) of the 1969 Coal Act, 30 U.S.C. 820(b) (1976 and Supp. I 1977). McCoy claims he was discharged on April 22, 1977, for refusing to ride an unsafe belt line into Crescent's Mine 10C. According to Crescent, he voluntarily quit because of a general distaste for underground mining.

A hearing was held on April 21, 22, 24, and May 27, 1981, in Pikeville, Kentucky.(FOOTNOTE.1) Former miners at Mine 10C who testified for McCoy were Eddie Overstreet, Teddy Overstreet, Paul Bartley, Michael Church, Jesse Spears, William Ramey, and Victor McCoy, the Complainant. George Lowers, an inspector employed by the Mine Safety and Health Administration (MSHA) also testified for McCoy. Witnesses for Crescent were William Bevins, who was a foreman during part of McCoy's tenure and mine superintendent when he left, Dennis Ratliff, McCoy's last foreman, Jerry Anderson, mine mechanic, Herbert Mack Gibson, the purchasing agent, and miners Clifford Justice, Steve Hackney, Dale Ratliff, and Jeff Wright. Morris Scott, another miner, was called at my instance and was examined by both parties.

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Post-hearing briefs have been filed and, having considered them and the record as a whole, I make the following decision.

Statutory Provision

Section 110(b) (1) of the 1969 Coal Act reads,

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

Findings of Fact

1. Crescent's Mine 10C was an underground coal mine located in Pike County, Kentucky. Coal was extracted from a low seam, the height of which varied from about 32 inches to about 40 inches.

2. The miners entered and left the mine in one of three ways. They rode to the face area in a battery-powered scoop, they walked(FOOTNOTE.2) along the belt line (miners rarely walked along the scoop entranceway), or they rode the belt line itself. Walking was very tiring and took 30 to 60 minutes, depending on a miner's size, physical fitness, and the mine conditions along the belt line. The belt line could carry a miner in a prone position into or out of the mine in less than 10 minutes. However, this was contrary to MSHA regulations. 30 C.F.R. 75.1403-5. There were no lights along the belt line, miners riding it had no way to stop it and it passed through at least one area where the roof was only inches from the belt.

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3. Company policy at Crescent ostensibly prohibited miners from riding the belt line. Nevertheless, nearly all the miners, including supervisors, rode it on a regular basis, particularly when the scoop was inoperable, which was common. Company management knew or should have known this but never disciplined a miner for it nor threatened such discipline. In fact, management encouraged the miners to ride the belt. As a result, a miner who chose not to ride the belt line was at a disadvantage. He would enter and leave the mine later than his co-workers and considerably more exhausted from the walk.

4. McCoy, like the other miners, often rode the belt line at Mine 10C. But as time passed, he grew more apprehensive. On a number of occasions, he failed to jump properly from the moving belt and fell down. Once, he "froze" on the belt and had to be dragged off. He repeatedly told his foreman, William Bevins, that he was afraid to ride the belt line.

5. On April 22, 1977, shortly after the start of his shift, McCoy emerged from the mine to tell Dennis Ratliff, who had succeeded Bevins as his foreman, that he would not ride the belt line and that he would not walk in. Bevins, who had been promoted to mine superintendent, was summoned.

6. McCoy repeated to Bevins his refusal to ride or walk the belt line and asked him for another job. Bevins told McCoy that no other jobs were available. He did not insist that McCoy ride the belt line. Instead he told McCoy that he would either ride or walk in; it would make no difference since McCoy was paid on a portal-to-portal basis. McCoy then left the mine property.

Issues

1. Was McCoy discharged or in any other way discriminated against by Crescent?

2. If so, was it because of activity protected by 110(b) of the 1969 Coal Act?

Discussion

Did McCoy Quit or was he Fired?

On April 22, 1977, Victor McCoy refused to ride the belt into Mine 10C and also refused to walk in via the beltline. Exasperated, he asked William Bevins for another job. Bevins told him no other job was available and that he would have to either ride the belt or walk in. McCoy then left.

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McCoy's quitting was equivalent to a discharge. Bevins testified that McCoy was automatically discharged when he refused to go to work. I find, therefore, that McCoy was actually discharged for refusing to work. Alternatively, for reasons which will appear below, I find that the evidence amply supports a finding that McCoy was constructively discharged.

Riding the Belt

There is no doubt that miners at Mine 10C rode the belt regularly, both into and out of the mine. Testimony to the contrary was simply not credible. Most of Crescent's witnesses admitted riding the belt, including William Bevins, who eventually became mine superintendent. If there was a company policy prohibiting it, it was not enforced. In fact, it was a policy kept in reserve to be followed when a mine inspector was present or expected.

The dangers of riding the belt are obvious. The belt line entranceway was unlighted and there were no reflectors to alert miners to their positions along the belt. The belt travelled through at least one location where the vertical clearance was barely sufficient for a miner to pass underneath. There were no accessible stop controls along the belt, so if a miner was unable to jump off, he would either be thrown into a crushing machine or off the end of the belt to a pile of coal about 70 feet below. It was not uncommon for miners to suffer various bruises and sprains in jumping from the belt. One miner was more seriously injured when his clothing became entangled in the rollers. It is clear and I find that miners who rode the belt were exposed to a real danger of serious injury.

For McCoy, riding the belt was particularly difficult. He was not as agile as the other miners and continually bruised himself jumping off the belt. He grew so apprehensive that one day he "froze" and had to be dragged from the belt or he would have dropped off the end.

Cases under 110(b) of the Coal Act and the corresponding provision of the 1977 Mine Act have established the rule that a miner may not be fired for refusing to work under conditions he reasonably believes are unsafe or unhealthful. E.g., *Phillips v. Interior Board*, 500 F. 2d 772 (D.C. Cir. 1974); *Secretary of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980). Plainly, McCoy was entitled by statute to refuse to ride the belt.

Walking to the Face Area

McCoy's only practical alternative to riding the belt was to walk into and out of the mine, except on the infrequent occasions when the scoop was operable. He claims that walking the beltline was unsafe because of hazardous conditions, particularly near the entrance. Specifically, he states that there were areas of unsupported roof and electrical cables on the floor in wet areas. This aspect of his claim was not alluded to when McCoy filed his original claim (called an Application for Review of Discharge under the 1969 Coal Mine Act). Although the testimony is in conflict, I find that McCoy did not expressly complain to his supervisors of safety conditions related to the roof or floor of the beltline. I further find that he did not indicate to Respondent that he refused to walk the beltline because he thought it was unsafe.(FOOTNOTE.3)

The crux of the matter, then, is whether McCoy was protected by the Act not only when he refused to ride the belt, but also when he refused to walk in. Ordinarily, a miner exercising the right to refuse to work must contemporaneously ground his refusal on a claim that he is exposed to hazardous conditions. Cf. Secretary of Labor ex rel. Duncan et al. v. T.K. Jessup, Inc., 3 FMSHRC 1880, 1883 (1981). In this case, however, McCoy's refusal to walk the beltline was protected because it was a grossly unreasonable alternative to riding the belt.

Substantially all the employees, including supervisors, regularly rode the belt in and out of the mine. Realistically, it was a condition of employment at Mine 10C. Although management did not specifically require the employees to ride the belt or specifically forbid them to walk, I find that it encouraged the former and discouraged the latter. For example, all the employees rode to and from the job site with the supervisor. On one occasion when McCoy walked from the mine outside, the truck had left the job site and he was required to get home on his own.

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It is not enough that the alternative work is safe.(FOOTNOTE.4)
An unreasonable alternative is really no alternative at all. Cf. 29
C.F.R. 1977.12(b)(2). The alternative which Crescent offered
to riding the belt was so onerous and so disfavored by management
that it was an unreasonable alternative to what I have found was
a dangerous condition.

Conclusion

I find, therefore, that McCoy had a right under 110(b) to
refuse to ride the belt or walk into the mine on April 22, 1977.

I do not decide that a miner who properly exercises a right
to refuse to work is entitled to other work equivalent or even
comparable to the job he refuses. However, the miner is entitled
to have management investigate and correct the problem so that he
may resume his regular duties. Management may not simply ignore
his concerns and permanently relegate him to less desirable tasks
as a condition to honoring his refusal to perform hazardous work.
The miner is protected by 110(b) when he refuses to accept such
an arrangement. Had I concluded that McCoy resigned rather than
was fired, therefore, the resignation would amount to a
constructive discharge under the facts presented in this case.

Conclusions of law

1. I have jurisdiction over the parties and subject matter
of this proceeding. Respondent was subject at all times
pertinent to this proceeding to the provisions of the Federal
Coal Mine Safety Act of 1969, and Complainant was a miner
protected under that Act.

2. Complainant Victor McCoy was discharged by Respondent on
April 22, 1977, for refusing to work. The discharge violated
110(b) of the Coal Mine Safety Act of 1969.

Order

1. Crescent Coal Company shall offer reinstatement to McCoy
in the position from which he was discharged at the rate of pay
fixed for that position on the date of reinstatement.

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2. Crescent Coal Company shall pay to McCoy back pay covering the period from April 22, 1977, until the day he is offered reinstatement. Back pay shall be computed on a quarterly basis and, for each calendar quarter, equals the gross pay McCoy would have received minus interim earnings. Crescent shall deduct from the back pay award the amounts required by state or Federal law. Interest on the net back pay award shall be computed at a rate of 7% for the period April 22, 1977, through January 31, 1978, 6% for the period February 1, 1978, through January 31, 1980, and 12% for the period thereafter.(FOOTNOTE.5)

3. Crescent Coal Company shall pay a reasonable attorney's fee for services rendered by counsel for McCoy.

4. Upon being notified that the decision in this case has become a final order of the Commission, the Secretary of Labor shall institute proceedings to assess a civil penalty against Crescent Coal Company for the violation found herein.

5. Counsel for the parties shall advise me in writing by October 15, 1981, whether they have agreed on the amounts due under paragraphs 2 and 3 of this order. If so, they shall submit those amounts. If not, further proceedings will be necessary. For the purpose of determining the proper award, I will retain jurisdiction of this case.

James A. Broderick
Chief Administrative Law Judge

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~FOOTNOTE_ONE

This case has been assigned to three administrative law judges over the past four years. After it was assigned to me, Crescent's motion for a de novo hearing was granted on March 5, 1981. In this decision, I am considering only the evidence introduced since I took jurisdiction of the case.

~FOOTNOTE_TWO

The height of the coal of course made walking upright impossible. Crawling is probably a more accurate description of the locomotion involved.

~FOOTNOTE_THREE

A Federal inspector toured the mine on June 2, 1977, approximately six weeks after McCoy left. He issued notices and orders alleging various violations, including broken roof bolts and dislodged timber supports along the beltline, loose rock hanging down between bolts, and standing water on the beltline floor so that the bottom belt was running through water. There is evidence that the conditions found by the Inspector in June which resulted in closure orders were basically the same conditions which confronted McCoy in April.

~FOOTNOTE_FOUR

I do not find it necessary to decide whether walking into the mine on April 22, 1977, was safe or unsafe.

~FOOTNOTE_FIVE

These figures are based on the adjusted prime rates used by the Internal Revenue Service for underpayments and overpayments of tax. The NLRB also uses these figures to compute interest on back pay awards. Florida Steel Corp., 231 N.L.R.B. No. 117, 1977-78 CCH NLRB 18,484. Appropriate formulae for computation of interest payments are found at 3 NLRB CASEHANDLING MANUAL, 10623, et seq. (1977).