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SOL (MSHA) v. ARKANSAS-CARBONA
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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 MILTON BAILEY, COMPLAINANT	Complaint of Discharge Docket No. CENT 81-13-D Bradley - Stephen No. 1 Mine

v.

ARKANSAS-CARBONA COMPANY,

AND

MICHAEL W. WALKER,
RESPONDENTS

DECISION

Appearances: Eloise Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas for Complainant.
R. David Lewis, Esq., Little Rock, Arkansas for Respondents.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This proceeding was commenced by the Secretary of Labor, Mine Safety and Health Administration (hereinafter "MSHA') on behalf of Milton Bailey (hereinafter "Complainant") against Arkansas-Carbona Co. and Michael W. Walker (hereinafter "Respondents") pursuant to Complainant's allegation that he was discharged from his employment by Respondents on June 27, 1980, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act"), 30 U.S.C. 815(c). MSHA investigated the complaint, found it to be meritorious, and commenced this action on October 20, 1980.

Upon completion of prehearing requirements, a hearing was held in Little Rock, Arkansas, on July 7-8, 1981. At the hearing, testimony was received from the following witnesses: Complainant; David Nigus, formerly a mine safety and health consultant for the Arkansas Department of Labor; Loy McCarson, formerly superintendent at Bradley - Stephen No. 1 Mine; and Michael Walker, Respondent. Both parties filed posthearing briefs.

ISSUES

Whether Respondents violated section 105(c) of the Act in discharging Complainant and, if so, what relief shall be awarded to Complainant. MSHA's request for assessment of a civil penalty was severed and remanded to MSHA because of the failure to comply with applicable administrative procedures.

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.

STIPULATIONS

The parties stipulated the following:

1. Arkansas-Carbona Company ran and operated Bradley - Stephens No. 1 Mine at all times pertinent herein in Dardanelle, Arkansas.

2. Bradley - Stephen Mine produces coal, some or all of which is shipped out of the State of Arkansas.

3. David Nigus is a qualified mine consultant for the Department of Labor, State of Arkansas.

FINDINGS OF FACT

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

1. Arkansas-Carbona Company was the operator of a surface anthracite coal mine in Dardanelle, Arkansas at all times relevant herein.

2. Arkansas-Carbona Company was a joint venture composed of Aerth Development (70 percent) and Russell Mining (30 percent). Respondent Michael W. Walker was President and Chairman of the Board of Aerth Development at all times relevant herein.

3. Until May, 1980, Complainant, age 41, was a full time student enrolled at Arkansas Tech University majoring in geology. He attended college since he retired from the U.S. Navy in 1977. Prior to his employment by Respondents, Complainant was employed as a campus police officer at Arkansas Tech University and earned $600 per month and free tuition. Complainant also received a pension of $650 per month from the U.S. Navy and G.I. student benefits.

4. In April, 1980, Complainant was interviewed at college for employment by Respondents. In early May, 1980, Complainant was interviewed by Respondent Michael W. Walker. Although Complainant had no experience or training in coal mining or mine safety, he was hired by Respondents as an office manager and safety liasion with MSHA inspectors.

5. Complainant commenced full time employment for Respondents on May 13, 1980 at a salary of $800 per month. Complainant received on the job training in Dardanelle and Little Rock for approximately 2 weeks. At the time Complainant commenced employment for Respondents, Coy Kirshner was safety director at the mine and Loy McCarson was superintendant. Kirshner and McCarson trained Complainant at the mine and Respondent Michael W. Walker trained Complainant in Little Rock.

6. On May 28, 1980, MSHA Inspector Lester Coleman inspected the mine and advised Complainant that he would have to issue an order of withdrawal closing the entire mine because there was no

evidence that the miners had been trained in accordance with the required plan. Complainant recommended

to Respondent Walker that the mine be voluntarily closed and that all miners be trained by Coy Kirshner and David Nigus, a mine safety consultant employed by the Arkansas Department of Labor. Walker agreed and the mine was voluntarily closed for 2 days while the required training took place. The MSHA inspector issued citations concerning the lack of training and records as well as a noise citation. No order of withdrawal was issued by MSHA. Coy Kirshner quit his job on or about May 29, 1980.

7. After the May 28, 1980 MSHA inspection, Complainant was summoned to the Little Rock office of Respondent Walker. He was informed that his salary would be increased to $1,000 per month and that, thereafter, he would be the safety director as well as office manager. He was told that he was to oversee the entire operation at the mine.

8. During the first 2 weeks of June, 1980, Complainant's new job as safety director at the mine included the following: establishing training files for each miner; building a water station for the miners; compiling a list of safety equipment needed at the mine; and noting the miners' need for safety shoes and hats. During this period of time, Respondent Walker remained in Little Rock while Complainant and Loy McCarson were at the mine in Dardanelle. During this period, approximately 7 miners were employed at the mine on one production shift and approximately 300 tons of coal was produced during the month of June, 1980.

9. On June 13, 1980, Respondent Walker moved his office to the mine site and took over active control of the mine. Walker brought his secretary with him. During the next 2 weeks, Complainant raised the following safety matters in conversations with Respondent Walker: the steep and unsafe slope of the highwall, the need for safety lines above the crusher, the need for a berm on the road around the sedimentation pond, and the need to train a crew of newly hired miners.

10. On June 27, 1980, Respondent Walker engaged in an argument with superintendent McCarson regarding the failure to complete work schedules. Thereafter, Complainant approached Respondent Walker to complain about the fact that the mine's first aid kit, containing bandages and splints, had been moved from the mine office to the screened porch. Complainant told Walker that the first aid kit should remain in the mine office where it would not be exposed to dust. Walker contended that the kit was in a dust proof container. Walker was upset that Complainant was arguing with him in the presence of other employees and told Complainant that "if he could not get along, for him to clock out, get his lunch box and go home." (Tr. 182). Thereafter, Walker went outside and also discharged Loy McCarson and ordered both men off the mine property.

11. After Complainant's discharge, he sent a letter to MSHA concerning numerous safety violations of the mine to wit: safety shoes; improper records concerning training and blasting; drinking water; backup alarms, and signs. On July 8, 1980, an

MSHA inspector issued citations to Arkansas-Carbona for each of these alleged violations.

12. Complainant was employed by Respondents as a full time employee and such employment was to continue on a full time basis through the next school year.

13. From the time of Complainant's discharge on June 27, 1980 through June 4, 1981, Complainant earned wages as follows: 1980 - $1,515, 1981 - $2,291.

14. This action was commenced by MSHA on behalf of Complainant on October 20, 1980. The original complaint requested that Complainant be reinstated to his prior position. However, MSHA did not file an Application for Temporary Reinstatement. Thereafter, on January 22, 1981, Complainant moved to amend the complaint because "subsequent to his filing of the complaint the Secretary was informed by Complainant Bailey that he did not wish to be reinstated by Respondents and that in lieu of reinstatement he would accept tuition for 1 year of college plus an allowance for expenses."

DISCUSSION

This case presents the novel question of whether a safety director of a coal mine was discharged in violation of section 105(c) of the Act. Complainant contends that he was discharged for engaging in protected activity. Respondents assert that Complainant was discharged for inattention to duty, insubordination, misconduct and incompetence.

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.

A. Background

Respondent Michael W. Walker has had no formal training or education in mining. Prior to 1975 he had never operated or been employed at a mine. His company started exploration of the mine in December, 1975. The first equipment application of the mine was made in May, 1978. From that time until January, 1981, the mine proceeded on an experimental basis to determine whether it was economically feasible to mine coal. Thus, at all times relevant here, the mine was in an experimental stage, i.e., there were seven miners at the mine when Complainant began his employment and 14 miners at the time of his discharge; and only about 300 tons of coal was produced each month.

When Complainant was interviewed for a job with Respondents, he admitted that he had no mining or safety experience. Contrary to the assertion of Respondent Walker, I find that Complainant did not misrepresent himself in connection with his application for employment.

B. Violation of Section 105(c) of the Act

1. Complainant's Burden of Persuasion

In Pasula, supra, the Commission held that a Complainant in a discharge case establishes a prima facie case if he proves the following: (1) that he engaged in a protected activity; and (2) that the adverse action was motivated in any part by the protected activity. As one would suspect, most of the work activity of Complainant, the mine's safety director, involved protected activity. Illustrative of this protected activity are the following: complaints concerning miner's failure to wear safety clothing; constructing and equipping a water station; requesting the purchase of safety equipment; complaints regarding failure to train new miners; and complaints about the slope of the highwall. While these protected activities may have set the stage for the final confrontation, I find that they are not directly relevant to the circumstances surrounding Respondents discharge of Complainant. It is also clear that Complainant's complaint to Respondent Walker on June 27, 1980, concerning the location of the first aid kit, was also protected activity pursuant to section 105(c) of the Act. Section 105(c)(1) provides in pertinent part as follows:

> No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine3)..."

30 C.F.R. 77.1707(c) provides in pertinent part as follows: "All first aid supplies ... shall be stored in suitable, sanitary, dust-right, moisture-proof containers, and such supplies shall be accessible to the miners." Thus, I find that Complainant's complaint to Respondent Walker on June 27, 1980, concerning the location of the first aid kit was action protected by section 105(c) of the Act and, therefore, Complainant has satisfied the first part of his burden under Pasula, supra.

The next issue is whether the evidence establishes that Complainant's discharge was motivated in any part by the protected activity. Complainant was discharged by Respondent Walker. Respondent Walker was the operator's agent. Respondent Walker testified as follows: "I'm saying that the main reason that I fired him was because he made the big spiel that morning because of the first aid kit being in the wrong place, and that is the main reason that this man was dismissed." (Tr. 200). Thus, Respondent Walker admitted that his decision to discharge Complainant was motivated primarily by the complaint about the first aid kit which I have found to be protected activity. Complainant has established that his discharge was motivated primarily by his protected activity. Therefore, pursuant to Pasula, supra, Complainant has established a prima facie case of discrimination.

2. Respondents' Burden of Persuasion

After Complainant establishes a prima facie case of discrimination, the operator may affirmatively defend by proving that (1) he was also motivated by Complainant's unprotected activities; and (2) that he would have taken adverse action against the miner for the unprotected activities alone. As noted at the outset, Respondent's Brief contends that Complainant's discharge was motivated by unprotected activities as follows: "inattention to duty, insubordination, misconduct and incompetence." Specifically, Respondents assert the following: (1) Complainant should never have been hired for the job as safety director because he was unqualified; (2) Complainant was unable to get along with the men or get them to comply with safety requirements; (3) Complainant displayed temper tantrums from time to time; (4) Complainant refused to prepare paper work; (5) Complainant acted improperly around female employees; and (6) Complainant's work activities were unsatisfactory in that he complained about safety matters but failed to correct the problems.

I have considered all of Respondents' contentions. Neither singularly nor in combination do Respondents' contentions establish that Respondents would have discharged Complainant for the reasons given. Specifically, it appears that Complainant was, in fact, unqualified and untrained for the job of safety director. However, there is no credible evidence that Complainant misrepresented his qualifications or training. Moreover, Respondents failed to refute Complainant's assertion that Respondents had agreed to train him for the position of safety director. Whether Complainant should have been hired as safety

director is irrelevant to this proceeding. The fact is that Respondents freely hired him and assigned him the duties of safety director with full knowledge of his lack of training and experience. Respondents failed to establish that they would have fired him because he was unqualified.

Respondents failed to establish that Complainant was unable to get along with the miners or get them to comply with safety regulations. Likewise, Respondents failed to establish that Complainant displayed "temper tantrums" which would justify his dismissal. Other than the argument which immediately preceded Complainant's discharge, the only "temper tantrums' alleged by Respondent Walker involved slamming doors and throwing clip boards down. Complainant denied these allegations. Although these incidents occurred in the presence of other employees, Respondents did not call any witness except Michael W. Walker. I find that the "temper tantrum" allegation is relatively insignificant and that Respondents have not established this claim by a preponderance of the evidence.

The only example of Complainant's refusal to prepare paper work was the incident involving the preparation of work schedules. However, Respondents failed to establish that this was Complainant's duty. Complainant testified that he was unable to prepare the work schedule because he was unfamiliar with the abilities and experience of the 14 miners. In fact, Respondent Walker testified that the responsibility for scheduling the work belonged to Superintendent McCarson (Tr. 180). Respondents failed to establish that Complainant would have been fired for refusal to prepare paper work.

Respondents allege that Complainant acted improperly around female employees. This allegation is based upon hearsay evidence according to Respondent Walker. Neither of the female employees who allegedly participated in this conversation testified. Complainant and Superintendant McCarson denied the hearsay allegations of Respondent Walker. Respondent Walker did not mention this reason during his deposition and conceded at hearing that this allegation was not a major reason for discharging Complainant. Accordingly, Respondents failed to establish that Complainant would have been discharged because of his conduct around female employees.

Finally, Respondents assert that Complainant's work was unsatisfactory. This general allegation is insufficient to establish an affirmative defense. Many of the specific charges against Complainant have been examined and found wanting. Suffice it to say at this point that Respondents failed to establish their claim that Complainant was discharged because he was lazy or insubordinate. Complainant refuted the allegation that he gave only lip service to safety matters and failed to correct them. Complainant established that the uncorrected safety problems at the mine were the result of Respondent Arkansas-Carbona's financial condition or Respondent Walker's refusal to take action on Complainant's recommendations.

In conclusion, the testimony of Respondent Walker clearly establishes that the primary reason for discharging Complainant was the dispute over the location of the first aid kit. (Tr. 200, 221, 234, and 241). Thus, Respondents failed to establish that they were motivated by Complainant's unprotected activities and would have discharged him for those activities alone. Since

Respondents failed to establish an affirmative defense,
Complainant's complaint is sustained.

C. Award to Complainant

Section 105(c)(2) of the Act provides in pertinent part that if the charges are sustained, Complainant shall be granted such relief as is appropriate "including but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." The evidence of record establishes that Complainant does not seek rehiring or reinstatement. The complaint filed with the Commission on October 20, 1980, requested rehiring and reinstatement. However, on January 22, 1981, Complainant moved to amend the complaint because "subsequent to the filing of the complaint the Secretary was informed by Complainant Bailey that he did not wish to be reinstated by Respondents and that in lieu of reinstatement he would accept tuition for one year of college plus an allowance for expenses."

The Commission has no procedural rule concerning amendment of pleadings. However, Commission Rule 1(b), 29 C.F.R. 2700.1(b), provides as follows: "On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedural Act (particularly 5 U.S.C. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate." Rule 15(c) of the Federal Rule of Civil Procedure provides in pertinent part, "wherever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Application of the above principle to the instant case results in a finding that as of October 20, 1980, Complainant did not seek rehiring or reinstatement. Since MSHA was prosecuting this matter, Complainant had the right to an order of temporary reinstatement on October 20, 1980. See section 105(c)(2) of the Act. If he had pursued that right, he would have been reinstated, required to work regular hours, and received pay of $1,000 per month. The fact that Complainant elected not to be rehired or reinstated tolls the operator's backpay obligation. Since Complainant elected not to be rehired or reinstated on October 20, 1980, Respondents' obligation for backpay ends on that date. It would be unfair and improper to require a mine operator to pay a former employee backpay for a period of time when the employee has unequivocally stated that he does not want to return to his former employment. Moreover, any award for a period after Complainant elected not to return to work would be based on conjecture and speculation. Hence, in the instant case, Respondents are liable to Complainant for backpay at $1,000 per month commencing on June 27, 1980 and ending on October 19, 1980.

The evidence of record also establishes that after his discharge in 1980, Complainant had earnings from two other employers during that year. Complainant earned $1,515 in 1980 after his discharge. The evidence of record fails to establish the dates on which these sums were earned so they will be prorated over the 26-1/2 weeks after June 27, 1980. Based upon

this formula, Complainant earned $57.17 a week or $245.83 per month during calendar year 1980 after his discharge by Respondents.

Thus, for the period of Complainant's entitlement, June 27 to October 19, 1980, Complainant would have earned $3,710 at the mine. In fact, he earned $913.03 from other employment. Complainant's earnings during this period must be deducted from his backpay. Heinrich Motors, Inc. v. N.L.R.B., 403 F.2d 145, 148 (2d Cir. 1968). Therefore, Complainant is entitled to an award of $2,796.97 for backpay.

Complainant requests that the backpay award should be payable at "nine percent interest per annum." Complainant cites no authority for the award of interest at nine percent per annum. To my knowledge, the Commission has never awarded a rate of interest higher than 6 percent per annum. See Peabody Coal Co., 1 FMSHRC 1785 at 1792 (1979). Therefore, Respondents are ordered to pay Complainant $2,796.97 as backpay and interest at the rate of 6 percent per annum from the dates such payments were due.

Complainant is also entitled to an order expunging all references to this matter from his employment records and a written confirmation from Respondents of his dates of employment and position. Complainant failed to establish any entitlement to an award of 1 year of college tuition plus $400 book and miscellaneous expense allowance. Likewise, Respondents failed to establish that the backpay award should be reduced due to veteran's benefits consisting of a pension and school allowance. These amounts are not based upon any work or activity of Complainant after his discharge by Respondents. In other words, if Complainant had remained in the employ of Respondents, he would have received both of these veterans benefits in addition to his regular salary at the mine.

CONCLUSIONS OF LAW

1. At all times relevant to this decision, Complainant and Respondents were subject to the Act.

2. This Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. On June 27, 1980, Complainant engaged in activity which is protected under section 105(c)(1) of the Act as follows: complaint to Respondent Walker concerning the removal of the first aid kit from the mine office.

4. Complainant established a prima facie case of violation of section 105(c)(1) of the Act because he established by a preponderance of the evidence that he engaged in a protected activity and that his discharge was motivated by the protected activity.

5. Respondents failed to establish that they would have discharged Complainant for reasons other than his protected activity.

6. Complainant was discharged by Respondents in violation of section 105(c)(1) of the Act.

7. Effective October 20, 1980, Complainant elected not to be rehired or reinstated by Respondents and Respondents' obligation for backpay was tolled as of that date.

8. Complainant is entitled to an award of $2,796.97 as backpay plus interest at the rate of 6 percent per annum from the dates such payments were due to the date such payment is made.

9. Complainant is entitled to an order expunging all references to his discharge from his employment records and to a written confirmation of the dates of employment and his position.

10. Complainant is not entitled to backpay after October 20, 1980 due to his election not to be rehired or reinstated.

11. Respondents are not entitled to set off the Veterans benefits paid to Complainant against the award of backpay.

ORDER

WHEREFORE, IT IS ORDERED that Complainant's complaint of discharge is SUSTAINED.

IT IS FURTHER ORDERED that Respondents shall pay to Complainant the sum of $2,796.97 for backpay plus interest at 6 percent per annum from the dates such payments were due to the date such payment is made.

IT IS FURTHER ORDERED that Respondents shall expunge all references to Complainant's discharge from his employment records and shall furnish to Complainant written confirmation of his period of employment and position.

IT IS FURTHER ORDERED that MSHA's proposed assessment of a civil penalty is severed from this proceeding and remanded to MSHA for further proceedings pursuant to 29 C.F.R. 2700.25.

James A. Laurenson Judge