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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 RICKY RAY
FERRELL,
COMPLAINANT

Complaint of Discharge,
Discrimination, or Interference

Docket No. VA 81-32-D

No. 11 Mine

v.

R & E COAL COMPANY,
RESPONDENT

DECISION

Appearances: Covette Rooney, Attorney, Office of the Solicitor,
U.S. Department of Labor, for Complainant;
Ronald L. King, Esq., Coleman, Robertson, Cecil &
Virginia, for Respondent,

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 10, 1981, a hearing in the above-entitled proceeding was held on September 15, 1981, in Richlands, Virginia, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2).

After the parties had completed their presentations of evidence, I rendered the bench decision which is reproduced below (Tr. 346-364):

This proceeding involves a Complaint of Discharge, Discrimination or Interference filed on January 19, 1981, in Docket No. VA 81-32-D, by the Secretary of Labor on behalf of Ricky Ray Ferrell, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, alleging that complainant was discharged by respondent, R & E Coal Company, on September 4, 1980, in violation of section 105(c)(1) of the Act, because Ferrell had made health and safety complaints to respondent or respondent's agent regarding conditions in the mine.

I also consolidated for hearing in this proceeding the civil penalty issue which would be raised if respondent should have been found to have violated section 105(c)(1) of the Act, but my decision as to the merits of the complaint renders moot the civil penalty issue. At the commencement of the hearing, counsel for complainant and respondent entered into the following stipulations:

1. The Administrative Law Judge has jurisdiction over the subject matter of the hearing.

2. R & E Coal Corporation is a Virginia corporation engaged in the operation of a coal mine and is an operator within the meaning of section 3(d) of the Act.

3. Respondent's No. 11 Mine involved in this case produces products which enter commerce or affect commerce so that respondent is subject to the provisions of the Act.

4. Respondent has no history of a previous violation of section 105(c)(1).

5. The No. 11 Mine began operating in April 1980. Its annual production in 1980 was 83,160 tons and its annual production in 1981 is estimated to be 81,428 tons. Respondent also operates another coal mine besides the No. 11 Mine and the total annual production of both mines for 1980, and estimated annual production for 1981, total 155,895 and 159,456 tons, respectively. Those production figures support a finding that respondent operates a small coal business.

6. Complainant in this proceeding was paid \$63.70 per day while he worked for respondent.

7. The parties stipulated as to the authenticity of exhibits but not to their relevance. My decision will be based on the following findings of fact. My findings of fact are based on the composite credible testimony of all witnesses. I shall indicate in my decision why I have used parts or all of the testimony of some witnesses and have rejected parts or all of the testimony of other witnesses.

1. Complainant began working for respondent as a general inside laborer toward the end of July 1980 and worked for respondent until September 4, 1980, at which time he voluntarily left the mine between 10:00 and 11:00 a.m. after complaining about excessive dust.

2. Some background information is needed for understanding what happened on September 4 to cause complainant to leave the mine. Complainant's regular job was to remain at the tailpiece in order to clean up any coal spillage at the feeder to the conveyor belt and to stop the belt in case of a malfunction of the belt.

3. On September 4, complainant went into the mine and started the day at the tailpiece, but Justus, the mine foreman, came to the tailpiece shortly after the shift started and told complainant he would have to assist Junior SESCO, the operator of the coal drill and cutting machine, because SESCO's regular helper, Jarret Praeter, had been reassigned to be the shot fireman because an inspector had cited respondent for failing

to have a certified person present when bore holes were being charged. Since Praeter was a certified shot firer, Praeter was put in charge of shooting the coal with explosives and it was, therefore, necessary to assign complainant to the position of helping the operator of the coal drill and cutting machine.

4. After complainant had assisted the operator of the drill in making 10 holes in the working face of the No. 6 entry and 10 in the adjacent crosscut, complainant told the operator of the coal drill and cutting machine that he did not like holding the drill or working in the dust which was generated by the drill. Therefore, when complainant came out of the No. 6 entry, he told Justus, the foreman, that he needed a respirator. Justus replied to complainant that respondent did not have any respirators and that complainant would have to purchase a respirator, if complainant wanted to use one.

5. Complainant returned to the drill and helped Sesco drill three holes in the No. 7 entry, at which time complainant stopped helping Sesco drill and again complained to Justus about the coal drill and the dust. Complainant asked Justus if working on the drill was going to be complainant's regular job, and Justus told complainant that helping on the drill was the only job he had for complainant at that time.

Complainant stood in the crosscut outby the No. 7 entry while Justus helped Sesco drill and cut the face of the No. 7 heading. Sesco said it took 15 minutes for him to drill the three holes in the No. 7 heading when complainant acted as his helper, and took only 10 minutes to drill the remaining seven holes with Justus, the foreman, acting as his helper.

Sesco estimated that it took 3 additional minutes to undercut the face of No. 7 heading and required 10 minutes for him, with the help of Justus, to get his cutting machine over to the No. 4 entry because of his having to get the trailing cable to the cutting machine past the roof-bolting machine. Sesco stated that Justus then told Sesco that a problem at the feeder required his attention, and Justus left Sesco at the No. 4 entry and went toward the feeder. Sesco said that complainant was still in the crosscut outby No. 7 entry when he and Justus finished drilling and cutting in the No. 7 entry, but Sesco stated that complainant did not come over to the No. 1 entry where Sesco next went. Therefore, Sesco drilled all 10 holes in that heading by himself.

Sesco learned that complainant had left the mine when Jarret Praeter, the shot firer, came to the No. 1 entry and helped Sesco undercut the No. 1 entry. Praeter had already shot the coal in the No. 7 entry before coming to the No. 1 entry. Complainant told Praeter when he left the mine on September 4, that he wouldn't drill coal for his daddy and that he was leaving.

6. When complainant left the mine on September 4, he told Bobby Coleman, the operator of the roof-bolting machine, that he was quitting. Coleman said Ferrell left before lunch, somewhere in the neighborhood of

10:30 or 11:00 a.m.

Complainant also passed Ned Taylor, the operator of the scoop, when he was leaving. Taylor said complainant held up his dinner bucket as a sign that he was leaving the mine. Taylor stated that complainant left before lunch time. Finally, when complainant left the mine on September 4, he walked past one of the owners of the mine, Robert Lester. Lester said that complainant did not tell him that complainant was leaving the

mine, even though Lester was sitting on a barrel at the time within 20 or 30 feet of the portal. Lester said that he was not aware that complainant was leaving until complainant got in the truck he drove to the mine and left. Complainant agreed that he said nothing to Lester about the fact that he was leaving or why he was leaving, although Lester was outside the mine when complainant left. Complainant stated he said nothing to Lester when he left because Lester had once said that whatever Justus, the mine foreman, said about running the mine was supported by Lester, as Justus had been put in charge of operating the mine.

7. Complainant stated that the mine foreman, Justus, placed tape over the intake of some dust pumps when they were put on some miners by an MSHA inspector. Complainant said he knew for certain Justus had put tape on the pump at complainant's position at the tailpiece, because complainant put the tape on his own pump when Justus told complainant to do so.

Justus admitted that he had taped or had had tape put on complainant's pump so as to reduce the particles going into the pump, and that he had some other miners stay out of the dust on one day so that little dust would enter the pump. Justus said he did that after the inspector told him that some pumps were used for obtaining quartz samples instead of respirable dust samples. The mine foreman had deliberately placed the pump in the dirtiest place he could find at the tailpiece after misunderstanding the inspector's instructions for obtaining quartz samples.

The inspector testified that he himself was unfamiliar with the procedure for obtaining quartz samples, and that he went to the mine on 5 days, August 25, 26 and 27, and September 2 and 3, because five different samples were required for a sampling of quartz. The inspector could not say for certain how many samples were voided by heavy particles accidentally passing into the cyclone, as opposed to the number of samples which were so light in weight as to have no validity for sampling purposes. The inspector did say that his five repeated trips to the mine on the aforesaid dates would have been necessary in any event to obtain the number of samples needed for the testing of the quartz content of the mine atmosphere.

8. Complainant also testified that during the five weeks he worked for respondent, he saw the miners haul explosives on the canopy of the cutting machine, and that the caps or detonators were not separated from the explosives at one time. Complainant said, however, that the mishandling of explosives did not contribute to his decision to leave the mine on September 4.

9. Complainant testified further that Justus did not keep curtains up at the face or maintain the mine in

good condition unless an MSHA inspector happened to come to the mine. The inspector's presence at the mine would be reported to the miners underground. At that time, the miners would all stop whatever they were doing and erect curtains, apply rock dust, and do whatever was necessary to make the mine pass inspection.

Justus, the mine foreman, agreed that he was given a signal or call when an inspector was coming into the mine, and he said they did extra

work to make the mine pass inspection. But Justus denied that he ever had the miners deliberately take down curtains just to get them out of the scoop operator's way.

10. The inspector, Franklin Perkins, who took the quartz and respirable dust samples on August 25, 26, and 27, and September 2 and 3, went into the mine to check all pumps within 15 or 20 minutes after the miners went underground. The inspector also checked all pumps on at least one other occasion on each of the 5 days. The inspector wrote two citations on August 25, 1980, at 9:00 and 9:30 a.m., which are Exhibit Nos. 1 and 2 in this proceeding. The inspector wrote three citations at about 8:30 or 9:00 a.m. on August 27, 1980, which are Exhibit Nos. 3, 4 and 5 in this proceeding. Exhibit No. 3 was an unwarrantable-failure violation. The inspector thereafter wrote three unwarrantable-failure orders on September 3, 1980, between 8:00 and 9:30 a.m. which are Exhibit Nos. 6, 7, and 8 in this proceeding. Specifically, the inspector wrote three roof-control violations which were Citation No. 938172, or Exhibit No. 4, Citation No. 938173, or Exhibit No. 5, and Order No. 938176, or Exhibit No. 8. The inspector cited three violations pertaining to explosives which were Citation No. 938171, or Exhibit No. 3, Order No. 938174, or Exhibit No. 6, and Order No. 938175, or Exhibit No. 7. The inspector wrote one citation pertaining to failure to maintain brattice curtains in the Nos. 1 and 2 entries which was Citation No. 938170, or Exhibit No. 2. Finally, the inspector wrote a citation regarding a bare wire in a trailing cable which was Citation No. 938169, or Exhibit No. 1.

Complainant's credibility was impaired for the following reasons which are not necessarily given in the order of greatest or least importance:

1. Sherman Adkins worked at R & E's No. 11 Mine while complainant was working at the mine. Adkins was a relief man and ran any item of equipment when an operator of such equipment was absent. He was complainant's brother-in-law and could be expected to support complainant's testimony, especially since Adkins had left because of a back injury and had brought suit against respondent when respondent failed to help him get unemployment compensation. Adkins, however, failed to support complainant as to a number of complainant's allegations: (a) Whereas complainant said that Justus, the mine foreman, had curtains taken down deliberately to get them out of the scoop's way, Adkins said curtains were along the rib in each entry and that Adkins never asked for curtains to be put up; also Junior SESCO, the operator of the drill and cutting machine, no longer works for respondent and had no reason to feel intimidated by telling the truth, said that curtains were in each entry and could have

been installed if complainant had wanted to put up curtains. (b) Whereas complainant testified that he went out of the mine on September 4, about 2:00 p.m., and waited in Adkins' truck until Adkins left the mine at the end of the shift, Adkins testified that he was sick with a back injury and was not at the mine on September 4 and that complainant had driven Adkins' truck to the mine on September 4. (c) Whereas complainant said he left the mine about 2:00 p.m. on September 4, all other miners who saw complainant leave, including the scoop operator,

bolting-machine operator, and part owner of the mine, testified that complainant left well before noon on September 4 and the owner of the mine said complainant got in his truck and left immediately without waiting for anyone.

2. Complainant testified that the MSHA inspector who placed the pumps on the miners on August 25 and 26 stayed out of the mine all day on August 25 and 26, whereas the inspector testified he checked the pumps at least twice by going underground to check the pumps and make an inspection of the working face. The citations and orders written by the inspector on August 25 and 27 and September 3, and described in Finding No. 10 above, show beyond any doubt that the inspector was underground checking the pumps on all 5 days he was at the mine to collect samples.

3. Although complainant stated that another miner stopped working on the drill because of dust, complainant could not give the miner's first or last name. The preponderance of the evidence shows that the man whose place the complainant took on the drill was transferred to the position of certified shot firer and that no one left the position of helper to the operator of the drill because of dusty conditions.

4. Complainant stated that the curtains were deliberately taken down in all entries and piled up in the return entry three crosscuts outby the working face. That testimony was disputed by Adkins, complainant's brother-in-law, and by Junior Sesco, both of whom testified that the curtains were lying along the rib in the headings if the miners wanted to use them. Also, since the tailpiece was situated only two crosscuts from the working face, there would have been no need or reason to carry the curtains three breaks or crosscuts outby the face.

5. Complainant testified that he helped drill 10 holes in the No. 5 heading and 10 in the crosscut at No. 5. He said it took 2 minutes per hole, so that would be 40 minutes plus time required for undercutting. Complainant also said he drilled 10 holes in the No. 6 heading which would have taken 20 minutes plus time for undercutting and that he helped drill seven holes in the No. 7 heading which would have required 14 minutes. Therefore, drilling time amounted to 40 minutes plus 20 minutes plus 14 minutes, or 1 hour and 14 minutes plus time for undercutting. Sesco stated that only 3 minutes were required to undercut the No. 7 heading, so even if one adds 30 minutes for undercutting in No. 5 heading and the crosscut and in Nos. 6 and 7 headings, complainant would have worked on the drill for 1 hour and 45 minutes, whereas complainant testified that he worked on the drill for 3-1/2 or 4 hours on September 4.

6. Complainant testified he drilled in the No. 5 heading and the break at No. 5 and then in the No. 6 heading and seven holes in the No. 7 heading, whereas both Praeter and SESCO stated that they had already drilled in the No. 5 heading and the break at No. 5 before complainant started helping. SESCO's recollection of having to get assistance from Justus to finish drilling in the No. 7 entry and his taking the cutting machine to the No. 4 entry with the help of Justus and about Justus

having to go to the feeder shows that SESCO's recollection was vivid and contained sufficient details to support my conclusion that SESCO's version of the drilling sequence is more credible than complainant's recollection of the facts.

7. Complainant testified that Justus, the mine foreman, told him on September 4, after he had complained about dust for the second time, that he would have to drill coal or else, whereas SESCO, the operator of the coal drill, testified that Justus told complainant that he would have to drill coal on September 4 because that was the job which had to be done on that day in view of the fact that Praeter had been transferred from the position of helping to drill coal to the position of shot firer. I believe that SESCO's version is more credible than complainant's version because in his complaint filed with MSHA, complainant stated that he asked Justus if the position of helper on the coal drill was going to be complainant's regular job. A reply to that question by Justus to the effect that the helper to the operator of the coal drill was the only job he had for complainant that day is a more likely reply to the question which the complainant says he asked than the complainant's allegation that Justus told complainant he would have to drill coal or else.

In *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980), the Commission held that a miner has a right under the Act to refuse to work in a hazardous condition. (FOOTNOTE 1) The Commission stated that the miner has established a prima-facie case if he shows that he was engaged in a protected activity and that the act of discharge or discrimination was motivated in any part by the protected activity. The Commission said that it is respondent's burden to show, if the miner makes out a prima-facie case, by a preponderance of evidence that the adverse action would have been taken in any event for the unprotected activity alone. In *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981), the Commission extended its holding in *Pasula* as to the miner's right to refuse to work in hazardous conditions by ruling that a miner may engage in affirmative action to abate the hazardous condition which caused him to refuse to work.

The evidence in this proceeding shows beyond any doubt, particularly as set out in Finding Nos. 5 and 6 above, that complainant refused to drill coal on September 4. Under the *Pasula* case, complainant was engaged in a protected activity when he refused to continue drilling coal. One of the witnesses called by the complainant in this proceeding was Junior SESCO, the operator of the coal drill and cutting machine on September 4. SESCO had to take his wife to the hospital on the day of the hearing in this proceeding. Before SESCO had

testified, I denied a motion by respondent's counsel for dismissal of the complaint for failure to prove a violation of section 105(c)(1). After respondent had presented two of its witnesses, respondent's case was interrupted so that complainant's final witness, Sesco, could be presented. If Sesco's testimony had been in the record when respondent's counsel made his motion to dismiss,

I would have been very doubtful that complainant had proven a prima-facie case, or that the alleged discrimination involved in this proceeding had occurred, because SESCO's testimony was devastating to complainant's contention that he was told he had to drill coal in dusty conditions without being provided with curtains or any other type of relief.

Although SESCO's testimony supports complainant's allegation that Justus told the complainant he would have to purchase his own respirator, SESCO's testimony rebuts complainant's contentions by showing that Justus did not object to complainant's hanging a curtain and that Justus did not tell complainant that he would have to drill coal in unmitigated dusty conditions or else. Instead, SESCO testified that Justus only stated that he could not offer the complainant an alternate job on September 4 in answer to the complainant's question as to whether his regular job in the mine would continue to be as helper to the operator of the coal drill and cutting machine.

The complainant, from the filing of his initial complaint with MSHA to the conclusion of this hearing, had a very tenuous case at best because his only hope of showing a violation of section 105(c)(1) was to establish that he was told that his complaint about dust would in no way be mitigated and that he would either work in dust or else -- which for the purposes of this case must be interpreted to mean that he would be discharged if he either tried to engage in affirmative action by erecting a brattice curtain or insisted that respondent provide him with a respirator.

I believe that Justus' testimony in this proceeding has a rather low credibility rating because nearly all the witnesses testified that he failed to make them put up curtains when they were working in a heading, whereas Justus stated that he made the miners hang curtains when he saw them working without curtains. The miners had no reason to say that they weren't using curtains if, in fact, they were. Also one of the inspector's citations (Exhibit No. 2) issued on August 25, 1980, was for failure of respondent to use brattice curtains in all entries. Moreover, SESCO's testimony and that of the part owner, Robert Lester, show that Justus made no attempt to get a respirator by going outside for one until after the complainant had already left the mine. Under SESCO's testimony, Justus helped SESCO drill and undercut and move the cutting machine for at least 23 minutes before Justus went to check the feeder. The complainant did not leave for at least 28 minutes after asking Justus for the respirator. Thus, if Justus had actually told the complainant he would go outside for a respirator, he could have gone out and been back in the mine with a respirator before complainant left the mine. Therefore, the preponderance of the evidence

supports the complainant's contention that Justus refused even to try obtaining a respirator for complainant.

Nevertheless, SESCO's testimony established that Justus did not threaten to discharge complainant for asking about the use of curtains, assuming complainant really did press Justus for permission to use curtains. Adkins had left respondent's mine after an injury and had sued respondent for some compensation. Therefore, Adkins would have had no reason to fail to support complainant's case, especially since Adkins

~FOOTNOTE_ONE

1 Reversed on other grounds, No. 80-2600 (3d Cir. Oct. 30. 1981).