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SOL (MSHA) V. SOUTH 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),

Complaint of Discharge,
Discrimination, or Interference

Docket No. KENT 81-124-D

ON BEHALF OF
ISAAC A. BURTON, ET AL.,
COMPLAINANTS

No. 8 Mine

v.

SOUTH EAST COAL COMPANY, INC.,
RESPONDENT

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainants
James W. Craft, Esq., Polly, Craft, Asher & Smallwood, Whitesburg, Kentucky, for Respondent

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

The above proceeding was heard by Administrative Law Judge James A. Laurenson in Lexington, Kentucky, on December 2 and 3, 1981. William J. McCool, Rex V. Fields, Isaac A. Burton and Charles Miller testified on behalf of Complainants; William T. Cahoon, Estel Brown and Charles Holbrook testified on behalf of Respondent. At the conclusion of the hearing, both parties waived their rights to submit closing argument and to file posthearing briefs. Judge Laurenson left the Commission before he was able to decide the case and it was assigned to me. The parties have agreed that I may decide the case on the record made before Judge Laurenson and have stated that they do not desire to file posthearing briefs.

The proceeding involves the claims of nine miners, Isaac A. Burton, Alex Combs, Curtis Day, Donnie Dixon, Rex V. Fields, Henry Heron, Jack H. King, William J. McCool and Eugene Spencer that they were discriminated against in violation of section 105(c)(1) of the Mine Act by their employer, Respondent. As a result of the alleged discrimination, Complainants contend they lost time from work and lost pay and other employment benefits.

On the basis of the entire record, including the transcript of testimony, the exhibits introduced and the contentions of counsel I make the following decision:

FINDINGS OF FACT

1. Respondent was at all times pertinent to this case the operator of an underground coal mine in Letcher County, Kentucky, known as the No. 8 Mine.

2. The products of Respondent's No. 8 Mine enter into and its operations affect interstate commerce.

3. At all times pertinent Complainants Isaac A. Burton, Alex Combs, Curtis Day, Donnie Dixon, Rex V. Fields, Henry Heron, Jack H. King, William J. McCool and Eugene Spencer were employed by Respondent as miners.

4. The miners named above worked in the same continuous miner crew at the subject mine. McCool was the continuous miner operator; Dixon was the miner helper, also called the cable puller; Fields was a shuttle car operator; Burton was a scoop operator, the others had various other jobs in the production crew.

5. In mid-June, 1980, the development of the subject mine was in the direction of an old mine, which had been mined by the Smith-Elkhorn Coal Co. Both mines were in the Elkhorn No. 3 coal seam. Respondent intended to cut into the old mine and recover some of the coal that had not been mined out.

6. Respondent's mining engineer, under whose supervision the mine map of the subject mine was prepared, had done the engineering work on the Smith-Elkhorn Coal Co. Mine and was aware of the location of the workings in the latter mine.

7. About 3 or 4 weeks prior to June 18, 1980, a cut was made from the subject mine into the Smith-Elkhorn Mine. This occurred on a Saturday while the No. 8 Mine was otherwise idle. Test boreholes had been previously drilled and water had been pumped out.

8. A flame safety lamp check of the air coming from the old mine was made. It did not show the existence of "black damp."

DISCUSSION

There is a dispute between the testimony of William McCool, the miner operator and Charles Holbrook the mine foreman on this point. McCool was operating the miner and Holbrook handled the flame safety lamp. Therefore Holbrook was in the best position to testify on whether the lamp went out. McCool may have misunderstood Holbrook and clearly was not in as good a position to see the lamp.

9. Holbrook instructed McCool and the others to put a danger board in the entry with the notation "Danger. Keep Out," and they did so.

DISCUSSION

Once again the testimony of McCool and Holbrook is in conflict. I accept McCool's version since it is more definite (when asked if McCool hung such a sign, Holbrook answered "I don't think so") (Tr. II, 91) and since McCool was one of those who actually hung the sign.

10. About 1 week prior to June 18, 1980, McCool again cut into the old mine. He told Holbrook and Estel Brown, the section foreman. Brown performed a flame safety lamp test and the flame went out indicating bad air.

DISCUSSION

There is dispute as to whether this was an accidental cutting into the old mine or a planned one and as to whether the mine map was accurate. I accept Respondent's testimony on those issues, but I accept McCool's testimony concerning the flame safety lamp test. It was not clearly disputed by Brown.

11. After the old mine had been previously cut into as described in Finding of Fact No. 7, the mine foreman, Mr. Holbrook went into the Smith-Elkhorn works twice weekly to examine the areas approached by the advancement of No. 8 Mine. He walked to within 3 breaks (180 feet) of the junction. There was water on the floor of the old mine but "it wasn't real deep." (Tr. II, 87). Neither Holbrook nor Brown told McCool and the other members of his crew that these inspections were made.

12. On June 13, 1980, mine operator McCool and his crew began work at 2:00 p.m. They serviced the miner and checked the face area. Water was coming out from the face and was standing on the mine floor. The ribs were soft. On the previous day as cuts were made the coal kept getting softer and more water was encountered.

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13. McCool then told section foreman Brown that he didn't want to cut into the face without drilling test holes because he was afraid of cutting into water and black damp in the old mine.

14. Brown then asked the miner helper, Donnie Dixon, if he would run the miner. Dixon said he was also afraid to cut the face.

15. Brown then told the entire crew to leave the mine. There was no discussion of the validity of the miner operators' fears and no offer of alternate work.

16. On the way out of the mine, the crew met MSHA inspectors coming in. Brown told them the crew was leaving because it had no cable to run the drill.

17. On June 19, 1980, when the crew returned to the mine, they were told by Holbrook that "if you was afraid to cut it yesterday, you would be afraid to cut it today and tomorrow." (Tr. I, 42). The crew was told to remain home until Monday, June 23, 1980.

18. On June 19, 1980, an MSHA inspector issued a citation for a violation of 30 C.F.R. 75.1701 for cutting within 60 feet of an abandoned inaccessible area, without drilling boreholes. This was in the area involved in the present proceeding.

19. The proposal for a penalty based on the above citation was dismissed by a Commission Administrative Law Judge on July 13, 1981, on the ground that the areas to which the mine was being driven were neither abandoned nor inaccessible since they had been inspected and ventilated. Secretary of Labor v. South East Coal Company, Inc., 3 FMSHRC 1766.

20. On June 19 and 20, 1980, the face area in question was advanced by other crews about three cuts. The old mine was not cut into. Test holes were drilled and a pump was set up to pump out the water coming from the old mine. The pump was continued for several months, pumping water intermittently.

21. When the crew returned to work on June 23, 1980, they cut coal in other headings after test holes were drilled.

ISSUES

1. Were miner operator McCool and miner helper Dixon engaged in activity protected under the Mine Act when they refused to perform work on June 18, 1980?

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2. If so, are they entitled to pay for the time lost from work on June 18 through 20, 1980?

3. If protected activity was involved, are the members of the crew who were sent home other than McCool and Dixon entitled to pay for the time lost from work June 18 through 20, 1980?

4. Did the Claimants who did not appear at the hearing abandon their cases?

5. Are the miners entitled to hearing expenses including lost pay for meeting with their attorney and for attending the hearing?

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1977, and the undersigned has jurisdiction over the parties and subject matter of this proceeding.

2. Mine Operator William J. McCool and his helper Donnie Dixon refused to perform work on June 18, 1980 because of a reasonable, good faith belief that it was hazardous.

DISCUSSION

Refusal to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, and if the belief is a reasonable one. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall ___ F.2d ___ (3rd Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981). McCool and Dixon explicitly based their refusal to work on safety reasons. Respondent does not challenge their good faith and the record contains no reason to doubt it. The reasonableness of their belief has to be determined on the basis of what they knew at the time of the work refusal. The fact that the work was objectively safe and was known to Respondent to be safe is not enough to withdraw the protection of the Act. McCool at least had reason to believe that cutting into the old mine might expose him and his co-workers to water inundation and bad air based upon two prior experiences. He did not absolutely refuse to work but asked that test boreholes be drilled before cutting. It seems clear from the record that Respondent did not communicate the fact that the old mine was being ventilated and regularly inspected by mine management. Therefore these facts cannot be used to judge the reasonableness of Complainant's work refusal.

3. McCool and Dixon were sent home because of the refusal to work described in Conclusion No. 2 and remained out of work and unpaid for the same reason on June 19 and June 20, 1980.

4, Therefore, McCool and Dixon are entitled to back pay for the wages lost June 18 through 20, 1980.

5. Although the other members of the crew did not specifically refuse to work because of safety fears or otherwise, they were all sent home for the 3 days because of McCool's and Dixon's safety related work refusal. I conclude that McCool and Dixon were acting on behalf of the entire crew and they are all protected from retaliation under the Act.

DISCUSSION

In two cases, the Commission has rejected the notion that an individual safety complaint by each involved miner is necessary to sustain a discrimination case. Under the 1969 Coal Act the Commission adopted the judge's ruling that "it would be unrealistic to expect each man to make his own individual complaint to his supervisor It may be inferred that the fears and concerns expressed by the applicants who testified were shared by many of the other applicants." Local 1110, United Mine Workers of America, et al. v. Consolidation Coal Co., 2 FMSHRC 2812 (1980). In the recent case of Secretary/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC ____ (1982), the Commission emphasized that the Act protected concerted activity and held that the communication of a refusal to work by one miner "may be deemed to be on behalf of all concerned even if not announced in such terms." Id, slip op. p. 9.

6. The failure of certain Complainants to appear at the hearing did not amount to an abandonment of their claims.

DISCUSSION

Respondent did not cite any authority for the proposition that by failing to appear at the hearing, certain of the Complainants abandoned their claims, and I am not aware of any such authority. Evidence was presented on Complainants behalf, from which I have concluded that they were discriminated against by Respondent. Their failure to appear at the hearing is irrelevant.

7. Complainants are entitled to reimbursement for incidental hearing expenses incurred in prosecuting their claims.

DISCUSSION

In Secretary/Dunmire and Estle v. Northern Coal Company, supra, the Commission held that the awarding of incidental, personal hearing expenses is an appropriate form of remedial relief.

8. Respondent has violated section 105(c) of the Mine Act by discriminating against the Complainants for exercising rights protected under the Act. The violation was moderately serious and was deliberate in the sense that it was intentionally done. There is no evidence as to the size of Respondent or whether a civil penalty will affect its ability to continue in business.

ORDER

Based on the above findings of fact and conclusions of law Respondent is ORDERED:

1. To reimburse Isaac A. Burton the sum of \$220 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980; to reimburse Isaac A. Burton the following hearing expenses: \$90 for pay lost November 30, 1981; \$24 travelling expenses (120 miles at .20 cents/mile) on November 30, 1981; \$90 for pay lost December 2, 1981; \$62 travelling expenses (310 miles at .20 cents/mile) December 2, 1981, or total hearing expenses of \$266 (interest need not be paid on hearing expenses if paid in accordance with this order).

2. To reimburse Alex Combs the sum of \$231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

3. To reimburse Curtis Day the sum of \$231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

4. To reimburse Donnie Dixon the sum of \$225 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

5. To reimburse Rex V. Fields the sum of \$220 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980; to reimburse Rex V. Fields the following hearing expenses: \$90 for pay lost November 30, 1981; \$22 travelling expenses (110 miles at .20 cents/mile) on November 30, 1981; \$90 for pay lost December 2, 1981; \$58.80 travelling expenses (294 miles at .20 cents/mile) December 2, 1981, or total hearing expenses of \$260.80 without interest.

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6. To reimburse Henry Heron the sum of \$231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

7. To reimburse Jack H. King the sum of \$220 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

8. To reimburse William J. McCool the sum of \$231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980; to reimburse William J. McCool the following hearing expenses: \$90 for pay lost November 30, 1981; \$28 travelling expenses (140 miles at .20 cents/mile) on November 30, 1981; \$90 for pay lost December 2, 1981; \$60 travelling expenses (300 miles at .20 cents/mile) December 2, 1981, or total hearing expenses of \$268 without interest.

9. To reimburse Eugene Spencer the sum of \$231 plus interest at the rate of 12 percent per annum from June 20, 1980 until paid, for wages lost June 18 - 20, 1980.

IT IS FURTHER ORDERED that Respondent pay to the Secretary of Labor, Mine Safety and Health Administration the sum of \$100 as a civil penalty for the violation of section 105(c)(1) of the Act found herein to have occurred.

IT IS FURTHER ORDERED that Respondent shall pay the above amounts within 30 days of the date of this order.

James A. Broderick
Administrative Law Judge