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SOL (MSHA) V. METTIKI COAL  
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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
ON BEHALF OF  
WILLIAM E. FITZWATER, III,  
APPLICANT

Complaint of Discrimination  
and Application for Temporary  
Reinstatement

v.

Docket No: YORK 82-23-D  
MORG CD 82-23

METTIKI COAL CORPORATION,  
RESPONDENT

Mettiki General Mine

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, Philadelphia, PA 19104, for the Applicant Barbara Krause, Esq., and Michael T. Heenan, Esq., Smith, Heenan, Althen & Zanolli, 1110 Vermont Ave., NW., Washington, D.C., for the Respondent

Before: Judge Moore

I have heard a number of discrimination cases and I can not recall any where the government has presented such a devastating prima facie case. In August of 1981 Mr. William Fitzwater and others made safety complaints to MSHA. Mr. Fitzwater did so indirectly by informing his father and brother with the successful expectation that one of them would call MSHA's hot-line. Transcripts of the hot-line recordings during that time period concerning this Mettiki mine were received in evidence as government exhibit No. 5. An objection to the admissibility was taken under advisement, but the objection is overruled.

Shortly thereafter the supervisors held a series of closed door meetings at which George Kutchman the mine superintendent stated that he knew the Fitzwaters and Tichnells were making these complaints and he wanted to get rid of them. He wanted them harrassed and even considered at one point laying off a number of miners and then rehiring everybody except the Fitzwaters and Tichnells. Two former supervisors and two present supervisors testified at the trial and three of them stated that Mr. Kutchman had said that he was out to get the Fitzwaters. The other supervisor who testified, Mr. Visniski, was for some reason not questioned concerning the closed door meetings.

One of the reasons that former preparation plant foreman Chapman left Mettiki Coal Company was that he thought they were being unfairly harsh and mistreating some of the miners including Mr. Fitzwater. Two welders, Mr. Tichnell and Mr. King both testified they were reprimanded and criticized for bringing up safety matters at a safety meeting. Miners who brought up safety matters were considered trouble makers.

I will not summarize the testimony of each witness, but the testimony of Randy Chapman and Ted Uphold is of such a nature that I think that at the risk of some repetition, it is necessary that their testimony be emphasized. Randy Chapman was once the preparation plant foreman and as stated, one of the reasons he left the Mettiki mine was his concern about the mistreatment of Mr. Fitzwater. He stated that he kept a diary and the diary was in the courtroom and shown to counsel. After refreshing his memory by looking at the diary, he stated that on August 25, 1981 George Kutchman the superintendent said "we have got to get rid of the Fitzwaters and Tichnells." They were troublemakers according to Mr. Kutchman. The foremen were told to harass them when they could and only to talk to them when they were alone. He said "we could get in trouble if there were witnesses." Regardless of the quality of the work they did, the foremen were told to make these miners redo it. Mike Burch and Ernie Uphole were present and were told by Mr. Kutchman not to breathe a word to anyone else because they could get in trouble if anyone found out. Mr. Chapman said that on August 27, 1981, Rich Visniski told Mr. Burch to harass Fitzwater. At an August 28, 1981 meeting between George Kutchman, Ted Uphold, Mike Burch, Rich Visniski, Ernie Uphole and Randy Chapman, George Visniski said someone had called in safety complaints to MSHA and he knew Fitzwater and Tichnell reported it. They had to be fired or some of the supervisors might lose their jobs. And then there came a time when George Kutchman said that he did not want Fitzwater harassed at that particular time because MSHA inspectors were on the scene. At another meeting, according to the testimony of Mr. Chapman and his diary, on August 31, 1981, with most of the supervisors present, there was a discussion about laying off as many as twenty miners and gradually hiring other men back but leaving the Fitzwaters and Tichnells out. It was stated that they had to get rid of William Fitzwater and his brother Ralph. One of the suggestions was that the Fitzwaters be placed in a position where they were working alone in a quiet area, hoping they might catch them asleep. (Tr. 186-187).

As to cleaning under the breaker screens, one of the matters that will be discussed later, Chapman said that it was always done when the rotary breaker was not in operation and that it was never a practice to clean under the screen while the rotary breaker was operating. He thought it would be unsafe to do so because of the noise, dust and the hazard of falling rocks.

Ted Uphold was the other former foreman who testified for the government in this case. He was present at one of the 1981 supervisor's meetings when George Kutchman (Sr.) mentioned the Fitzwaters and said that he wanted them fired. He discussed the coming trial in this matter with Mr. Rich Visniski and according to him, Mr. Visniski stated that he would testify as he needed to. Mr. Uphold told him that if he was subpoenaed he would tell the whole truth concerning the meeting and what Kutchman said about the Fitzwaters. Mr. Uphold was terminated after 4-1/2 years as a foreman on September 27, one week prior to the trial in Cumberland.

Foreman Mike Burch also testified, but he testified as the only witness for respondent. While he differed in many respects from the version of the actual details of the firing and other matters with the other witnesses, when questioned as to whether he heard George Kutchman say that the Fitzwaters were trouble makers and would have to be fired, he admitted that he had heard that; he qualified it somewhat by saying that he thought it had to do with dealings other than working at the mine. But there has been no dispute or denial by any witness of the matters set forth by Mr. Chapman and Mr. Uphold in their testimony. I find that the company was looking for an excuse to fire Mr. Fitzwater (all three of them in fact) and that the reason Mr. Kutchman wanted to get rid of the Fitzwater's was because of safety complaints.

For some reason the real hard questions were not asked while Mr. Burch and Mr. Visniski were on the stand. I suspect, that insofar as Mr. Burch is concerned, the government did not think his testimony had been damaging and therefor did not choose to pursue the matter. I think government counsel was correct in this assumption. As to Mr. Visniski, I wonder why he was called as a witness if he was not going to be put to the test as to why he upbraided and reprimanded the two welders, Mr. King and Mr. Tishnell for bringing up safety matters at a safety meeting as had been alleged. The particular matter that was involved in one of these reprimands was a request that a discrete frequency be available for the walkie-talkies used between the engineer and a man on the rear car when the train was backing into an area where other cars were parked or when they were trying to connect other cars. According to the testimony of Mr. Tichnell and Mr. King, they were accused of being rowdy for bringing up this safety complaint. Mr. Burch did recall the complaint. Mr. Visniski was not questioned about the matter.

Joint exhibits 1, 2 and 3 are photographs of the rotary breaker building from two angles and a picture of the lower end or bottom of the grizzly and shaker screen. The latter picture shows some accumulation of debris near two doors or gates in the screen assembly. The exhibit does not purport to show conditions as they were at the time of Mr. Fitzwater's firing but it is the area and the debris that had accumulated was similar but more extensive.

The rotary breaker receives coal from three silos and the operator of the rotary breaker chooses which silos he wishes to draw coal from. The coal is fed in at the top of the breaker, goes through the grizzly and shaker screen, and then to the rotary breaker and then is dumped on a conveyor belt where it goes to some other part of the preparation plant. The operator's main station is in a control room where he has gauges that indicate to him the extent of the coal in each of the three silos he is drawing from. One of his duties is to make sure that none of the silos gets too full because if the depth exceeds around sixty feet in any silo there would be an automatic shutting of a gate which would cause coal spillage. When the levels in the three silos are low, however, the operator can leave the control room for short periods of

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time. When the breaker building is in operation, it is noisy and dusty. Also there is a hazard from falling rocks as testified to by Mr. Fitzwater, former preparation plant superintendent Mr. Chapman, Mr. Tichnell and electrician Harvey. One rock had fallen from the shaker and had hit with sufficient force to shear the door off an electrical box that was attached to one of the girders. On the deck where the grizzlies were, there was another hazard in that the upper end of the grizzlies and shaker boxes were held in place by cables which could, and had, broken. When such cables broke the grizzly would not fall all the way to the floor but it would fall approximately a foot and they weigh 5 or 6 tons each. Both former preparation plant superintendent Chapman and William Fitzwater thought it was hazardous to clean under the grizzlies while the preparation plant was in operation. Accordingly, it was Mr. Fitzwater's practice, and when Mr. Chapman was superintendent it was the entire plant's practice, to clean only when the rotary breaker was not in operation.

Mr. Fitzwater testified that he always used a mask (sometimes referred to as a filter) when working outside the control room when the rotary breaker was in operation. Foreman Burch denied that it was hazardous to be on the rig when it is in operation and says that he has seen Mr. Fitzwater on the rig while the breaker was in operation and that Mr. Fitzwater did not have a dust mask. He only sees Mr. Fitzwater out of the control room about twelve times a year, however. But for all of his time as breaker operator Mr. Fitzwater had not been cleaning and had not been asked to clean under the grizzlies while the machine was in operation.

The automotive dust respirator No. 06983 distributed by the Automotive Trades Division of the 3-M Company is the mask ordinarily used by Mr. Fitzwater. It is both MSHA and NIOSH approved (see Government Exhibit 4). The masks that foreman Burch delivered to Mr. Fitzwater were designated 8500 non-toxic particle mask and are also manufactured and distributed by the 3-M Company.

The box that the 8500 comes in does not contain any statements that it is approved by NIOSH or MSHA. (See Government exhibit 3). Mr. Fitzwater was unfamiliar with the 8500 mask and during a preshift conference with his counterpart on the previous shift, Mr. Decker, Mr. Decker pointed out that the 8500 was not MSHA approved, and not near as thick as the 06983 or the Dust-Foe 88 which he, himself, wore. When Mr. Decker was getting ready to leave the breaker he left three of the 06983 masks in the general locker but forgot to say anything to Mr. Fitzwater about it, and Mr. Fitzwater had no way of knowing they were there. (FOOTNOTE 1) I accept foreman Burch's statement that he did not deliberately deliver

the wrong type of filter to Mr. Fitzwater. Mr. Fitzwater had requested the filters on April 15 and sometime shortly thereafter foreman Burch delivered them. But the two boxes are very similar and I find that the mistake was not deliberate. It was made, however. The only masks that Mr. Fitzwater thought were available to him were the non-approved 8500's.

On April 20, 1982 Mr. Burch came by and told Mr. Fitzwater to clean under the grizzly. Mr. Fitzwater testified that he had every intention of doing so at the end of the shift. He did not get a chance to do so, however, because he was told to run late, and in fact the 9,000 tons run through the breaker on April 20 was a record high for Mr. Fitzwater. He had no time to clean after the run was over. On the 21st he had no down-time on the rotary breaker and ran late again because he was told to. On the next day, April 22, 1982, Mike Burch came by and looked at the breaker building and wanted to know why Fitzwater had not cleaned the material that had accumulated under the grizzlies. When Mr. Fitzwater explained that he had not had any down-time in two days Burch said that he wanted the area cleaned while the rotary breaker was in operation. Mr. Fitzwater responded that if he was going to have to clean while the rotary breaker was in operation, he wanted a proper dust mask. He did not mention the safety hazard that he thought existed because it was his opinion that a miner who had complained about safety, a Mr. Arnott, had been fired because of it, and because his own father after making safety complaints had been assigned outside shovelling work in the winter where the temperatures were sometimes as low as 30 degrees below zero. That was his stated reason for not mentioning safety, but mentioning only the fact that he wanted a properly approved mask. Mr. Burch reminded Mr. Fitzwater that he was refusing a work assignment, and Mr. Fitzwater responded that he was not refusing, that he just wanted the proper mask before performing the task. The details of the events following are not important, but when Mr. Fitzwater left the mine property he was not sure of whether he had actually been permanently fired or temporarily suspended. After a few telephone calls he found out that he had been fired. This experience is somewhat similar to what happened to his brother who had been accused of sleeping on the job. His brother, who at the time was under medication testified that he became dizzy and sat down on a panel box when of the supervisors came by and accused him of being asleep. A fellow miner who was a witness to the fact that Fitzwater was not asleep he did not want to get involved in a dispute with the foreman. When Mr. Ralph Fitzwater was fired it was similar to his brother's firing in that he left the property not knowing whether he was suspended or fired. He later got written notice that he was fired.

While it was not explained in detail how it happened, the father was somehow laid off; so the direction of Mr. George Kutchman had been complied with to the extent that the foremen had now gotten rid of the Fitzwaters.

The breaker has since been fitted with some type of guard that eliminates the hazard from falling rocks when the machine is

in operation. I find however, that as of the time when this case arose, it was hazardous to work in the area that Mr. Fitzwater had been assigned to clean while

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the breaker building was in operation. Since he did not voice that hazard however, even though the failure to voice the hazard was motivated by a fear of reprisal, I am not sure that a refusal to work in the hazardous area was a protected activity. Certainly refusal to go in to a dusty area without a proper mask is a protected activity. I find that Mr. Fitzwater was discharged because he made safety complaints and because he was engaged in a protected activity of refusing to work in a dusty area without an approved(FOOTNOTE 2) dust mask.

He is entitled to reinstatement to his former position with back pay and benefits plus interest. He is also entitled to reasonable expenses in connection with prosecution of this case. See the Commission decision in Secy. ex. rel MICHEL ET AL v. NORTHERN COAL CO. 4 FMSHRC 126, 143.

The Commission has before it the question of whether it is proper to assess a penalty in a discrimination case in which the 3 CFR 100 procedures have been bypassed. Until the Commission decides to the contrary, I am not going to assess such penalties.

All proposed findings inconsistent with the above are rejected.

PENDING A FINAL ORDER

The Secretary shall have 15 days from the date of this decision to submit a proposed order granting relief for the violation found above, with service of a copy on Respondent. Respondent shall have 15 days from receipt to reply to the proposed order.

Charles C. Moore, Jr.  
Administrative Law Judge

FOOTNOTES START HERE-

1 I fail to see how anyone could agree with respondent's proposed finding to the effect that Mr. Fitzwater "had every reason to know" the filters were there.

2 See 30 CFR. Part II