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SOL (MSHA) V. JOLENE
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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
SHELBY EPERSON,
COMPLAINANT

DISCRIMINATION PROCEEDINGS

Docket No. KENT 83-38-D

Jolene No. 1 Mine

v.

JOLENE, INC.,
RESPONDENT

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Complainant Bernard Pafunda, Esq., Deskins
and Pafunda, Pikeville, Kentucky, for Respondent

Before: Judge Melick

This case is before me upon the complaint of the Secretary of Labor, on behalf of Shelby Eperson under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", alleging that Jolene, Inc., (Jolene) discharged Mr. Eperson on September 4, 1982, in violation of section 105(c)(1) of the Act.(FOOTNOTE 1) Evidentiary hearings were held on the complaint in Prestonsburg, Kentucky.

~1651

In order for the Complainant to establish a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that Mr. Eperson engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom, Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd. Cir. 1981). See also NLRB v. Transportation Management Corp., ___ U.S. ___, 76 L. Ed. 2d 667, 103 S. Ct. ___ (1983), affirming burden of proof allocations similar to those in the Pasula case.

In this case, Mr. Eperson asserts that he refused to work at the Jolene No. 1 Mine on the morning of September 4, 1982, because the supervisory official who was expected to perform the required preshift safety examination and to direct the work of the miners appeared that morning in an intoxicated condition. Eperson alleges that it would have been unsafe to have relied upon a person in such condition to properly perform the preshift examination and to work with, and under the direction of, a man in such condition. A miner's exercise of the right to refuse work is a protected activity under the Act so long as the miner entertains a good faith, reasonable belief that to work under the conditions presented would be hazardous. Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981).

The operator does not dispute that a refusal to work for an intoxicated supervisor may be a protected activity but argues that since Shelby Eperson himself was supposed to be the foreman in charge on September 4th and indeed was the only certified foreman present, it was Eperson's responsibility to preshift the mine and to direct the work force that day. Eperson's failure to do so and his encouragement by example to other miners to leave the job that day was, according to the operator, non-protected grounds for discharge. There is accordingly no dispute that Eperson was discharged for his refusal to work on September 4th. The limited question before me is whether that work refusal was protected under section 105(c)(1) of the Act. Resolution of this issue depends on whether Eperson was responsible for preshifting the mine and was in charge of the workforce on the morning of September 4th. If Eperson indeed had those responsibilities, then his refusal to work that morning was not protected. If, on the other hand, an individual named Steve Bridgeman had those responsibilities, as it is alleged by the Complainant, and Bridgeman was in fact unable to safely fulfill those responsibilities because of intoxication and fatigue, then Eperson's work refusal may very well have been protected under the Act.

Shelby Eperson was initially hired by Jolene president Theodore Parker in June 1982 to be foreman for a new second shift at

~1652

the No. 1 Mine. Eperson then possessed state certification papers qualifying him to be employed as a foreman and/or electrician. The second shift was cancelled after a few weeks, however, for lack of work and Eperson was moved to the first shift but not as a foreman. According to Eperson, he then took orders from Steve Bridgeman who was acting as section foreman, though without state certification, and from mine superintendent James Comer. Eperson never performed any preshift examinations on the first shift and was never specifically asked to do so. This function was performed by Comer and/or Bridgeman. Moreover, although Jolene's president, Theodore Parker, claims that he once told Eperson that he would be in charge in Comer's absence, until September 4, 1982, Comer had never been absent and Eperson had in fact never acted as foreman on the first shift.

According to Eperson, on Friday, September 3, 1982, mine superintendent Comer told the work crew that he would be absent the next day. Bridgeman then purportedly told the crew they would start work the next day at 6:00 a.m. (FOOTNOTE 2) Eperson reported to the mine office at 5:45 the next morning. By 6:00 a.m., seven or eight men had arrived and were ready for work but the purported section foreman, Steve Bridgeman, had not shown up. A miner named Duffy apparently expressed doubts that Bridgeman and another miner, Chris Kukle, would show up at all. They had been drinking the night before and were so intoxicated, they had fallen off Duffy's porch as they left around 4:00 that morning. (FOOTNOTE 3) Some time after 6:00 a.m., one of the miners called Bridgeman, who reportedly said that he would show up later. Bridgeman still did not show up so at least six of the waiting miners then left, including Duffy, Cecil, Kukle, the belt drive man, and the shot fireman. By 7:10 a.m., Bridgeman had still not arrived so Eperson and the remaining miners also prepared to leave. Eperson had already removed his work clothes when Bridgeman finally arrived, followed by some of the other miners.

~1653

Eperson detected alcohol on Bridgeman's breath and saw that he had bloodshot eyes. He suggested to Bridgeman that he should not take the men into the mine in his condition and told him that if anyone got hurt working for him in that condition, somebody would go to jail. Eperson then refused to work, explaining to Dana Boyd that the mine had not been preshifted and he was afraid for the men's safety with Bridgeman in his apparently intoxicated condition. The remaining miners also refused to work for Bridgeman but Bridgeman nevertheless proceeded to order Eperson to operate the "G.D." loader. Eperson persisted in his refusal to work and during a heated exchange that followed, Bridgeman told Eperson that he did not like him, citing an incident a few weeks before in which Eperson had complained about Bridgeman's improper spacing of roof bolts.

Bridgeman testified that shortly after the men began leaving, he got a telephone call from Comer. He told Comer that "they were refusing to work with me because they said I was drunk." (FOOTNOTE 4) Comer, without speaking to Eperson, then told Bridgeman to send the men home. Bridgeman, too, then left the mine site and went to see Parker to explain why the men were not working that day.

On the following day, Sunday, February 5, Eperson went to Parker's houseboat to pick up his paycheck. Parker was absent, but Comer gave him his check and told him that Parker was letting him go "due to the cutbacks." According to Eperson, there had in fact been no cutbacks at the mine and, shortly after he was discharged, another certified electrician was hired to replace him.

According to Jolene President Parker, Eperson was fired because on Saturday, September 4th, he failed to preshift the mine and took the men off the job. Parker claims that he had planned in any event to discharge Eperson the following Tuesday because of an alleged 25 percent cut back in coal demand and that Eperson's acts only accelerated that decision. (FOOTNOTE 5) Parker maintains that Eperson had been told when he was first transferred to the

~1654

day shift that he would be the substitute foreman in Comer's absence and that, accordingly, when Comer was absent on September 4th, Eperson should have conducted the preshift inspection and taken the miners underground. In spite of this, Comer acknowledged that he did not place Eperson in charge on September 4th. Respondent also suggests that Steve Bridgeman could not legally have performed these functions because he was not then a certified foreman and asserts that Parker, Comer, and Bridgeman, as well as miners Dana Boyd and Bobby Dotson, all denied that Bridgeman was a foreman.

I find from the credible evidence, however, that Bridgeman in fact had been regularly acting as a foreman and had been regularly performing the preshift and on-shift examinations at the Jolene No. 1 mine even though he was not certified as a foreman and was not therefore legally authorized to do so.

Significantly, entries were made by Bridgeman in the preshift and on-shift report books for periods before September 4th and were signed by Bridgeman as "Preshift Mine Examiner", "Assistant Foreman", and "Assistant Mine Foreman". MSHA senior special investigator Charles Webb observed that only Bridgeman's signature appeared on the left hand pages when he first examined the preshift books on September 8, 1982, (thus indicating that Bridgeman alone had been conducting the foreman's job of preshifting the mine) and that superintendent Comer's signature had been subsequently added to the books as presented at hearing. I find the disinterested testimony of Webb to be especially worthy of reliance and conclude that indeed in many instances the mine superintendent had co-signed the preshift/on-shift books long after the inspections had been performed by Bridgeman to cover up the fact that Bridgeman in fact had been regularly performing the functions of a foreman.

It is also observed that, unlike non-management personnel at the mine, Bridgeman was paid a fixed salary with no extra pay for overtime work. In addition, it is significant that when Bridgeman finally showed up for work on the morning of September 4th, the men who had previously left the job site presumably because of his absence turned around and came back to the mine with him, obviously looking to him as the person in charge. One of Respondent's witnesses, Dana Boyd, also referred to Bridgeman as "the boss" and observed that Bridgeman had indeed on prior occasions preshifted the mine himself (Complainant's Ex. No. 6). Boyd also stated that when mine superintendent Comer called on the morning of September 4th questioning whether the men were going to work that day, he asked to speak to Bridgeman and not Eperson. In addition, it was Bridgeman and not Eperson who later that day went to Jolene President Parker to explain why the men had not worked that morning. Finally, Comer himself conceded that he did not direct Eperson to act as foreman on the day he refused to work.

Under the circumstances, it may reasonably be inferred that Bridgeman in fact had been regularly acting as a foreman prior to September 4 and in that capacity was regularly performing the preshift examinations. It may also be inferred, just as alleged by the Complainant, that Bridgeman and not Eperson was expected to perform the preshift inspection and to direct the miners as the supervisor in charge on September 4th. The self serving denials of this fact in the face of the convincing evidence to the contrary, lead me to conclude that the testimony of Respondent's witnesses (Parker, Comer, Bridgeman, Dotson, and Boyd) is less than credible not only with respect to this issue but also in all essential respects. The significant contradictions between the testimony of Jolene witness Dana Boyd and the admissions he made in his September 1982 statement to MSHA investigators very well illustrates the lack of credibility of these witnesses. It may reasonably be inferred that Boyd altered his testimony because of legitimate concerns for retaining his job with Jolene.

Under the circumstances, I find the Complainant's allegations entirely credible and I find that Mr. Eperson did indeed entertain a bona fide reasonable belief that Bridgeman was in charge of the work force on September 4th, that Bridgeman's functional capacities were then sufficiently diminished by alcohol and fatigue so that it would have been hazardous for the miners to have relied upon a preshift examination performed by him that day and that it would have been hazardous to have worked underground under his supervision. Robinette, supra.; supra, footnotes 3 and 4. Moreover, since Eperson admittedly told Bridgeman (who I have found was the acting foreman that day) of his belief in the safety hazard at issue and since this information was admittedly further communicated to Mine Superintendent Comer, the "communication" requirement stated in Secretary ex rel. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982), has clearly been met. Accordingly, I find that the Complainant has met his burden of proving that his discharge was motivated by a work refusal that was protected under the Act.

DAMAGES AND COSTS

It was stipulated at hearing that Mr. Eperson has already received the appropriate wages for the period November 19, 1982, through January 25, 1983, pursuant to an Order of Temporary Reinstatement. On January 25, 1983, Jolene ceased to operate the No. 1 Mine in Johnson County and moved to a new location with the same equipment and four miners (but not Eperson) to develop a new mine. Production of coal began on May 1, 1983, and at the time of hearing, fourteen miners (but not Eperson) were employed at the new mine. At hearing, Jolene agreed, pursuant to the Order

~1656

of Temporary Reinstatement, to again reinstate Mr. Eperson effective May 19, 1983, and to pay him \$1,000 toward prior lost wages. Damages for back wages must therefore be computed for the periods, September 6, 1983, through November 18, 1982, and January 26, 1983, through May 18, 1983.

Since it has also been stipulated that Mr. Eperson had been, prior to his discharge, working 40 hours per week at \$13 per hour, and 14 hours per week at \$19.50 per hour, his weekly gross wages during this period would have been \$793. It is reasonable to infer from the type of work performed in setting up electrical equipment in the new mine that Eperson would have continued to work during the development of the mine as the only certified electrician previously employed by Jolene, and that his wages would accordingly have continued at the same rate for the period January 26, 1983, through May 1, 1983, when coal production began. He is of course also entitled to continuing wages from May 1 through May 28, 1983, the day before his second reinstatement by Jolene. Accordingly, based on the information stipulated at hearing (and not upon unverified statements in the Secretary's brief), I find that Eperson is due gross back wages for 26 1/2 weeks of \$21,014.50, less \$1,000 already paid by Jolene and \$810 earned from interim part time employment. Mr. Eperson is also entitled to interest on the back wages computed at the rate of 12 percent per annum from the date such wages would ordinarily have been paid to the date those wages are actually paid. Jolene does not dispute that Mr. Eperson is also entitled to \$20 in expenses.

ORDER

Jolene, Inc. is hereby ordered: (1) if it has not already done so, to immediately reinstate Shelby Eperson to the same (or comparable) position he held at the time of his discharge on September 4, 1983; (2) to pay Shelby Eperson back wages of \$21,014.50; (3) to pay interest on the said back wages to be computed at the rate of 12 percent per annum from the date these amounts were due to the date actually paid; and (4) to pay Mr. Eperson's expenses of \$20. Prepaid back wages of \$1,000 and \$810 Eperson earned in alternative employment may be deducted from the total amount to

~1657

be paid. It is further ORDERED that the Secretary of Labor commence review of this case for consideration of assessment of civil penalties against Jolene, Inc.(FOOTNOTE 6)

Gary Melick
Assistant Chief Administrative Law Judge

~FOOTNOTE 1

Section 105(c)(1) of the Act provides in part as follows:

No person shall discharge * * * or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner * * * in any * * * mine subject to this Act 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 health violation in a * * * mine * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

~FOOTNOTE 2

In his statement dated September 29, 1982 (Complainant's Ex. No. 6), Jolene's witness, Dana Boyd, confirms that the miners were to begin work at 6:00 a.m. I find that the work was indeed to commence at that time.

~FOOTNOTE 3

Bridgeman admits that he had been out drinking beer until early in the morning, that he could not remember how many beers he had had, and that he did in fact stumble on Duffy's porch. He showed up late for work because he "overslept". He concedes, moreover, that "he just half remembers what happened the next day." Under the circumstances, I find that Bridgeman was indeed under the influence of alcohol on the morning of September 4th and that Eperson's perceptions of Bridgeman's condition and the events that morning are entitled to the greater weight.

~FOOTNOTE 4

It may reasonably be inferred from this admission that the other miners were also refusing to work for Bridgeman because they also thought he was too intoxicated. This evidence further demonstrates that Eperson's work refusal on these grounds was shared by the other miners and was accordingly reasonable and made in good faith. Robinette, supra.

~FOOTNOTE 5

This allegation is far from credible. Eperson was the only certified electrician at the mine and without him, important electrical repairs and inspections could not legally be made. The record shows, moreover, that another certified electrician was hired by Jolene within the month and that in fact there was

no production cutback.

~FOOTNOTE 6

I cannot at this time accept the amount of civil penalty proffered as settlement at hearing. Information necessary for review of the proposal under section 110(i) of the Act is not before me. In particular, before any such proposal can be considered, information concerning the operator's good faith abatement of the violation found in this case must be developed, including information about Mr. Eperson's reinstatement and the payment of amounts ordered due in this case. In any event, if the operator herein agrees to waive the Secretary's procedures under 30 CFR Part 100 as it appears it does, then the Secretary should file a separate Civil Penalty Proceeding with the Commission.