

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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FALLS CHURCH, VIRGINIA 22041

FEB 1 1984

EDDIE LEE SHARP, : DISCRIMINATION COMPLAINT  
Complainant :  
 : Docket No: 'WEVA 82-399-D  
 : MSHA Case No: CD 82-27  
 v. :  
 : Stone Run Mine No. 6  
MAGIC SEWELL COAL COMPANY, :  
Respondent :

DECISION

Appearances: Eddie Lee Sharp, **Elkins**, West Virginia,  
Complainant:  
John L. Henning, Esq., **Elkins**, West Virginia,  
for Respondent;

Before: Judge Moore

This discrimination case was heard in **Elkins**, West Virginia on November 29, 1983. The record was left open for the purpose of allowing Magic **Sewell** Coal Company to file some sort of documentation, i.e. affidavit of an officer or tax return to show that the company has no assets or income. No such documentation has been forthcoming. The only evidence as to the company's financial condition wa's presented by Mr. Fry, the safety director, who is neither an officer or an owner of the company.

In the early morning hours of August 5, 1982, Mr. Eddie Lee Sharp left his continuous mining machine at the face, announced he was not feeling well and crawled out of the mine. The safety director Mr. Fry had been underground and either crawled or rode the belt out at about the same time that Mr. Sharp left the mine.

On the surface Mr. Fry and Mr. Sharp had a conversation in which Mr. Sharp said something to the effect that the lack of visibility caused by the dusty conditions in the mine had made him too nervous to operate the mining machine close to other miners. Mr. Sharp did not return to work during the remainder of the shift. On the next day, August 6, when Mr. Sharp returned to the mine at the beginning of his shift, he was not allowed to work.

The first question is whether Mr. Sharp was fired laid off or whether he quit. Although the term "laid off" was used at times in the various conversations, no "lay off"

in the normal sense of the term occurred. Regardless of what the slip that Mr. Sharp received may have said, he was either fired or he quit.

None of the people involved in this matter said "I quit" or "you're fired". All of the respondent's witnesses, Superintendent Crowder, safety director Fry, who Mr. Crowder thought owned the mine, and foreman Wolfe all testified at one point, that they thought that Mr. Sharp had quit. When being cross-examined by Mr. Sharp, Mr. Fry said (Tr. 201) "when you came out of the mine, Eddie, I really thought you had quit." But back at Tr. 199 he said "When I called Crowder [Superintendent] I told him, I talked to him at length, and told him that I thought that you were not capable of operating that miner. Now, that's the only thing that I said to him". That conversation is certainly inconsistent with the notion that Mr. Sharp had quit and left. Foreman Wolfe assumed he had quit because he left without saying anything but both Mr. Sharp and Mr. Fry testified **that** before he left the face area Mr. Sharp said he was not feeling well and going outside.

I found Mr. Crowder's testimony rambling and laced with hyperbole to such an extent I could not tell when he was just overstating a matter or really meant it. At one point he said he worked twentyfour hours a day three or four days in a row. (Tr. 96). He stated that Mr. Sharp never mined any coal with the continuous mining machine, that he would just never reach the coal (Tr. 81). Then he changed it to saying that Mr. Sharp would only mine coal five out of ten times. He testified positively that he had pulled Mr. Sharp's time card out of the clock but on cross-examination he merely thought he had, because that was what he would usually do (Tr. 130, 131). Referring to Mr. Sharp, he testified "I didn't fire him, I just let him go." (Tr. 84). I find that Mr. Sharp was fired, but even if he wasn't the result would be the same. If Mr. Sharp was engaged in a protected activity and, for that reason, was not allowed to continue or resume his employment at Magic Sewell then he should prevail regardless of whether or not Mr. Crowder thought he had quit.

Mr. Sharp and other miners had constantly complained of the dusty conditions of the mine and the lack of water and rock dust. Three former employees of Magic Sewell testified as to the dangerous conditions at that mine. One witness and his entire crew had been fired because they refused to work without a foreman. Another miner quit after one hour. Mr. **Hinchman** was hired to run the continuous miner. His testimony at Tr. 55 was:

A. Well, when I got on the miner, I went to run the miner, I couldn't see to run the miner, let alone run the miner.

Q. You couldn't see to run it, what do you mean?

A. Well, the dust. There wasn't no water on the miner, there wasn't no air at the face. And, I shut the miner off and the boss was sitting behind me. I asked him about it and he said, "It's been run like this and it's going to be run like this tonight." I says, "Okay." I says, "Get on it because I'm going home."

Mr. Fry and Mr. Crowder had the attitude that it was up to the miners to see that the line curtain was properly hung and that the place was rock dusted if necessary or that water was used. Mr. Crowder seemed to be confused as to the difference between respirable dust and combustible dust and Mr. Fry was confused about when rock dust is required. He did not know-the meaning of the term "to wet" as defined in 30 C.F.R. 75.402-1. I find the mine was sufficiently dusty when the continuous miner was operating to require more air and water than was provided. In fact, the federal inspectors required the use of water on the miner after this case was investigated. (Tr. 175). And any areas that were not "too wet" should have been rock dusted.

I find that Mr. Sharp was unlawfully discriminated against because of his protected activity of complaining about the dangerous conditions in the mine and refusing to work under such conditions. As to a remedy, however, I can not order that Mr. Sharp be re-instated to a job that no longer exists. As to lost wages and expenses. Mr. Sharp is ordered to present to me, within 30 days, a document showing how much he would have earned between the time he was fired and the time the mine was closed, less any wages that he earned during that period. Mr. Sharp should include any travel or other expenses incurred in the course of prosecuting this action.

Respondent may, within 15 days after receiving Mr. Sharp's document make any objections thereto it wishes and may at the same time present evidence of its financial condition. I will then render a final order unless it becomes obvious further testimony is needed.

*Charles C. Moore, Jr.*

Charles C. Moore, Jr.  
Administrative Law Judge

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