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LONNIE JONES V. D & R
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LONNIE JONES, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 83-257-D(A)
D & R CONTRACTORS, RESPONDENT	MSHA Case No. BARB CD 83-19

DECISION

Appearances: Jeffrey A. Armstrong, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Barbourville, Kentucky, for Complainant;
Larry E. Conley, Esq., Williamsburg, Kentucky, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Lonnie Jones under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", alleging that he was discharged from the partnership known as D & R Contractors on April 25, 1983, in violation of section 105(c)(1) of the Act.1 Mr. Jones had charged in his initial complaint before this Commission that he had been unlawfully discharged on that date as an employee of Mingo Coal Co., Inc. However, by decision dated March 8, 1984, it was held that Jones had not been employed by Mingo Coal Company, and that no representative or agent of Mingo Coal Company was involved in the discharge of Jones from D & R Contractors. That complaint was accordingly dismissed. Lonnie Jones v. Mingo Coal Co., Inc., 6 FMSHRC 632. (FOOTNOTE 1)

In order for the Complainant to establish in this case a prima facie violation of section 105(c)(1) of the Act, he must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge or removal from D & R Contractors was motivated in any part by that protected activity. Secretary, ex rel David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), reversed on other grounds, sub nom Consolidation Coal Company v. Secretary, 663 F.2d 1211 (3rd. Cir.1981). See also NLRB v. Transportation Management Corporation, 76 L.Ed.2d 667 (1983), affirming burden-of-proof allocations similar to those in the Pasula case, and Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983).

In this case, Mr. Jones has alternatively asserted that he was discharged on the afternoon of April 25, 1983, because he had refused to continue working overtime after working a 10-hour shift. At hearing, Jones alleged that he arrived at the Mingo coal mine for work at about 7:15 on the morning of the 25th and worked until approximately 5:00 p.m. with only a one-half hour break for lunch. He further alleged that he had a headache and the flu that day and was therefore not feeling well. He thus claims that when the "foreman", Ron Perkins, approached him that afternoon about working overtime, he declined believing it would be hazardous. Jones claims that when he was discharged later that afternoon by Perkins, that action was based upon his refusal to work any additional overtime, a work refusal protected by the Act. 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). See also Eldridge v. Sunfire Coal Company, 5 FMSHRC 408 (1983).

Timeliness of Filing.

It is not disputed that Lonnie Jones was removed from D & R Contractors on April 25, 1983, and that he filed his complaint of unlawful discrimination with the Federal Mine Safety and Health Administration (MSHA) on May 10, 1983, alleging that both Mingo Coal Company and D & R Contractors violated his section 105(c) rights. By letter dated June 13, 1983, MSHA notified Mr. Jones of its determination that a violation of the Act had not occurred. Allowing 5 days for mailing of the above letter, it may be presumed in the absence of any contrary evidence that Mr. Jones received notice of the determination on June 18, 1983. Jones did not, however, seek to join D & R Contractors in his complaint before this Commission until August 22, 1983, (FOOTNOTE 2)

some 35 days beyond the 30 day filing deadline set forth in section 105(c)(3) of the Act. D & R Contractors thereafter opposed the motion for joinder on the grounds that it was not timely filed.

I find, however, for the reasons set forth below that the delay in joining D & R Contractors was excusable. The delay, consisting of only 35 days, was brief and no legal prejudice has been demonstrated. I note, moreover, that D & R Contractors was cited in the initial complaint to MSHA filed by Mr. Jones and that it was therefore then given notice of action contemplated against it under section 105(c) of the Act. Accordingly, D & R Contractors would be expected at that time to have begun preparation of its defense of this matter including the preservation of evidence.

I also find that Jones could reasonably have been confused as to the proper entity to proceed against. As a layman of limited education, it is understandable that he may have been confused as to the legal niceties of his employment relationship. Until Mingo Coal Company filed its initial responsive pleading asserting as one of its defenses that Jones was a partner of D & R Contractors and that that entity was entirely responsible for any violations under the Act, it is understandable that Jones may not initially have joined D & R Contractors in this proceeding. It is also significant that the referenced pleading of Mingo Coal Company was itself filed untimely on August 17, 1983, and that the motion for joinder was filed only 5 days thereafter, on August 22, 1983. Within this framework, the motion for joinder of D & R Contractors, filed some 35 days beyond the deadline set forth in section 105(c)(3) of the Act, is deemed to have been timely filed.2

The Merits.

The issue on the merits is whether Mr. Jones' refusal to continue to work overtime under the circumstances herein was an activity protected by section 105(c) of the Act and, if so, was his removal from the partnership D & R Contractors motivated in any part by that protected activity. Whether the activity was protected depends on whether Jones entertained a "reasonable, good faith belief that a hazard" existed at the time he refused to continue working overtime. Robinette, supra, at page 810. In Robinette, the Commission defined the good faith requirement as an "honest belief that a hazard exists." In explaining the "reasonableness" portion of the test, the Commission rejected the adoption of a stringent rule requiring "objective, ascertainable evidence" to corroborate the validity of the miners' fear. Robinette, at p. 811. The Commission held that the "reasonableness" test may be met through evidence establishing "that the miners' honest perception was a reasonable one under the circumstances." See also Secretary on behalf of Pratt v. River Hurricane Coal Company, 5 FMSHRC 1529 (1983) and Haro v. Magma Copper Co., 4 FMSHRC 1935 (1982). On the facts of this particular case, I do indeed find that Mr. Jones entertained a good faith, reasonable belief that to continue working in his condition would have been unsafe.

It is not disputed that Jones had worked from 7:15 on the morning of April 25, until about 5:00 p.m. that day with only a one-half hour break for lunch. Furthermore, it is not disputed that during the course of that almost 10-hour work shift, Jones was performing a variety of strenuous physical tasks in the difficult environment of a 26-inch seam of "low coal." These activities included setting timbers, dragging water pumps, shoveling coal from the ribs, hauling a 75 pound coal drill and its cable, untangling the cable, pushing a 60 pound box of dynamite, drilling and blasting, rock dusting with 50 pound bags of rock dust, and setting ventilation curtains. Jones maintains that by 5:00 p.m., he was so tired he could "hardly get around" and his ability to concentrate was "not too good." The dangers existing for miners and particularly for a shot firer handling explosives under such conditions are obvious.

As the shot firer, Jones was also exposed to blasting powder. It is not disputed that continued exposure to the chemicals in blasting powder may induce headaches and that Jones had such a headache. Jones also felt "lousy" that day because he was still recovering from the flu. The duplicate certificate in evidence shows that on April 14, 1983, Jones had in fact been treated for the flu by R.D. Pitman, M.D.

Accordingly, when Perkins asked Jones to continue working overtime after the mining crew had already completed a

10-hour shift, Jones refused and purportedly told Perkins that he was too tired and that "somebody might get hurt bad." Indeed, Perkins himself conceded at hearing that the crew could have safely worked only 9 or 10 hours on the day at issue and acknowledged that when he asked Jones to continue working overtime, Jones had already worked a 10-hour shift. Within this framework of evidence, it is apparent that Mr. Jones entertained a reasonable good faith belief that to continue working overtime under the conditions presented did indeed pose a safety hazard to himself and to the other miners working with him. His refusal to continue working overtime therefore constituted a protected activity within the scope of section 105(c)(1) of the Act.

In his posthearing brief, Perkins does not appear to dispute that Jones' refusal to continue working overtime was based on a reasonable good faith belief of a safety hazard, but claims that Jones failed to testify or present any other evidence that he communicated to Perkins or to any of the other partners that his work refusal was based on a matter of safety. In Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 (1982); the Commission stated that "[w]here reasonably possible a miner refusing to work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." The purpose of the rule is to assist in "weeding out work refusals infected by bad faith." Secretary on behalf of Dunmire and Estle, supra, at p. 134. Accordingly, when the bona fides of a work refusal is not challenged, as it is not in this case, and where the representative of the operator acknowledges the existence of the safety hazard at issue, as Perkins did in this case, the communication requirement is superfluous.

In any event, contrary to the Respondent's allegations, the Complainant did in fact testify that in response to Perkin's request to continue working overtime he said "Buddy . . . I can't. I'm too tired. I might forget something around here. Somebody might get hurt bad" (Tr. 119). I find this testimony to be credible. There is, first of all, a credible factual basis to support Jones contention that after the 10-hour work shift he was suffering fatigue and a headache and that he was still recovering from the flu when Perkins asked him to work additional overtime. Perkins himself acknowledged that 9 or 10 hours was "a good day's work" and indicated that to go beyond that might be unsafe. In addition, the working relationship among the "partners" was such that it would reasonably be expected that Jones would not have simply refused to work without offering some explanation. Under the circumstances, even though I find

that it is not necessary for the Complainant to have met the requirements of the communication rule, I find that he has nevertheless met those requirements in this case.

The Complainant must also show in setting forth a prima facie case that his discharge was motivated in any part by the protected activity. It may reasonably be inferred from the timing of Jones' discharge only minutes after his refusal to continue working overtime, that it was indeed motivated by the protected activity. See Secretary on behalf of Anderson v. Stafford Construction Co., et al., No. 83-1566, D.C.Cir. April 20, 1984. There is no question that Ron Perkins, the person who discharged Jones, knew of Jones' protected activity and it may also reasonably be inferred that Perkins was hostile toward that protected activity because it had a direct negative impact on his earnings.

There was, moreover, no credible "non-protected" reason advanced for Jones' discharge. Perkins testified that he fired Jones because of his bad work habits, because Jones wanted only to do the job of "tamping" and would not volunteer to do anything else and because Jones would grumble about working. In spite of these alleged serious deficiencies, however, Perkins had laid off two other miners only a short time before Jones' discharge. There is, moreover, no evidence that Perkins had previously warned Jones of these allegedly bad habits or discussed these problems with the other "partners" before the April 25th removal. Perkins' claims are indeed devoid of any corroboration and I find them to be without credibility. It is clear that Jones' discharge was motivated entirely by his protected activity. Accordingly, I find that Mr. Jones was discharged by D & R Contractors in violation of section 105(c)(1) of the Act.

ORDER

1. The parties are hereby ordered to confer regarding the possibility of settlement concerning reinstatement, costs, damages, and attorneys' fees in this case and to report to the undersigned in writing on or before May 25, 1984, concerning the results of such discussions.

2. In the event the parties are unable to reach a settlement of these matters, they are to submit to the undersigned on or before May 25, 1984, a statement of undisputed facts relating to the issues of reinstatement, costs, damages, and attorneys' fees, and to indicate the specific matters remaining in dispute.

3. This decision is not a final disposition of this case and no final disposition will be rendered until such time as the issues of reinstatement, damages, costs, and attorneys' fees are resolved.

Gary Melick
Assistant Chief Administrative Law Judge

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~FOOTNOTE_ONE

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 afford by this Act."

~FOOTNOTE_TWO

2 This determination of timeliness overrules a previous determination made at hearing. The decision at hearing was made on the erroneous miscalculation that the delay in filing the motion for joinder of D & R Contractors had been filed some 14 months late. When the error was discovered by the undersigned, D & R Contractors was given opportunity to present additional evidence and to cross-examine witnesses who had appeared at the hearings in this case. It is noted that counsel for D & R Contractors was present throughout the hearings and that D & R Contractors waived the opportunity to present additional evidence and/or to cross-examine witnesses.