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LONNIE SMITH V. RECO & DILLARD
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LONNIE SMITH, COMPLAINANT — DISCRIMINATION PROCEEDINGS

Docket No. VA 86-7-D

v.

RECO, INC., RESPONDENT

DILLARD SMITH, COMPLAINANT — Docket No. VA 86-9-D

v.

RECO, INC., RESPONDENT

DECISION

Appearances: Hugh F. O'Donnell, Esq., Client Centered Legal Services of Southwest Virginia, Inc., Castlewood, Virginia, for Complainant Lonnie Smith; William B. Talty, Esq., Talty & Gillette, Tazewell, Virginia, for Complainant Dillard Smith; Robert B. Altizer, Esq., Gillespie, Hart, Altizer & Whitesell, Tazewell, Virginia, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainants Lonnie Smith and Dillard Smith, brothers, were employed by Respondent Reco, Inc. (Reco) from about 1977 until November 26, 1985. Each claims that on the latter date he was discharged because of activity protected under the Federal Mine Safety and Health Act (the Act). Because the two complaints arose out of the same incident or incidents, the two cases have been consolidated for the purposes of hearing and decision. Pursuant to notice, the cases were called for hearing on July 8, 1986 in Bluefield, West Virginia. Dillard Smith and Lonnie Smith testified for Complainants; Steve Williams and Don Bowman testified on behalf of Respondent. All parties were afforded the opportunity to file post hearing briefs. Respondent filed a brief; Complainants did not. I have considered the entire record and the contentions of the parties, and make the following decision.

FINDINGS OF FACT

1. On November 26, 1985, Respondent was in the business of selling and servicing mine batteries. Part of its business required it to go into underground coal mines to service batteries.

2. Complainants Dillard and Lonnie Smith were employed by Respondent beginning in 1977 or 1978. Their duties were to service and maintain mine batteries. Dillard Smith had prior experience working with mine batteries, but Lonnie Smith did not have such prior experience. Neither of them worked in underground coal mines prior to working for Respondent.

3. Both Dillard and Lonnie Smith were required at times to work repairing batteries in underground coal mines. During 1985, Dillard worked approximately 49 hours, and Lonnie worked approximately 50 hours in underground mines. Each performed more than 40 hours of underground work in the 6 months prior to the termination of their employment.

4. Dillard was paid $6.75 per hour as of November 26, 1985. Lonnie was paid $6.35 per hour. Each received an additional $2.00 per hour while working underground in coal mines. They each worked approximately 40 hours per week.

5. In November 1979, Dillard Smith received MSHA approved training for underground work and received a certificate upon completion of the course. He did not have any refresher training or any other training related to working underground after November 1979.

6. Lonnie Smith never received any training related to working in underground mines.

7. In June 1985, Dillard Smith asked Steve Williams his foreman, about refresher training for himself, and about training for Lonnie. Williams nodded but did not reply. Dillard had inquired at an MSHA office and was told that his training certificate had expired, and he needed 40 hours additional training.

8. On some occasions Dillard and Lonnie Smith were accompanied by mine personnel when they serviced batteries in underground mines. On other occasions they worked alone.

9. On November 26, 1985, Dillard and Lonnie Smith were working on batteries at Respondent's shop. At about 9:00 a.m., Steve Williams approached and told Dillard that he had a service call. Dillard asked if it was in an underground mine and

Williams said it was. Dillard told Williams that he was not going. Williams then said: "Change your clothes and you know where the door's at." (Tr. 31). Dillard changed from his work uniform, turned in his car keys and credit card and left the premises. Neither he nor Williams said anything further.

10. After Dillard left, Williams turned to Lonnie Smith. Lonnie said he was not going underground anymore. Williams told him to get his clothes and hit the door. Lonnie then left.

11. Dillard Smith applied for unemployment compensation after he left Reco. He drew benefits for 26 weeks. His health insurance policy was terminated on the day he left. He returned to the mine site on November 26, 1985 to get his paycheck. He was told by the office secretary that it had been mailed the previous day. He did not contact or attempt to contact any other Reco official concerning his termination. He told the office secretary to inform Jack Pyott, the company president, that he left because he did not want to go underground because his training had expired. Dillard began working for a janitorial service company about July 1, 1986. He is earning $3.35 per hour and works 30 hours per week.

12. Lonnie Smith was unemployed for 5 months after leaving Reco. He has worked since, setting up house trailers and earns $4.50 per hour. His health insurance was cancelled when he left Reco and in December, 1985 he and his family incurred medical bills totalling approximately $600.

13. Lonnie Smith never complained to Reco about his lack of training. He did not tell anyone at Reco why he refused to go underground.

14. On November 26, 1985, Reco decided to terminate its mine battery sales and service business. The decision followed a discussion with the State of Virginia Labor Department officials concerning a list of health and safety violations cited following an August, 1985 inspection. The State officials agreed not to issue citations if Reco terminated its mine battery business within a week. The company agreed and the business was terminated December 6, 1985.

15. Respondent continued in business after December 6, 1985 solely to sell its spare parts inventory and make deliveries on repairs completed prior to December 6. Foreman Steve Williams was laid off December 18, 1985, as was the office secretary. One other employee remained until March, 1986 helping to clean the building, trying to get it ready for sale or lease. At the time of the hearing, the only people on Reco's payroll were

Don Bowman, ViceÄPresidentÄGeneral Manager and a person who cleans the office, working about 2 hours a week.

ISSUES

1. Whether Complainants were miners and Respondent an operator under the Federal Mine Safety and Health Act?

2. Whether Complainants were discharged because of activity protected under the Act?

3. If so, to what relief are Complainants entitled?

CONCLUSIONS OF LAW

A. Jurisdiction

1. Respondent was an "operator" to the extent that it performed services at coal mines and, as such, was subject to the provisions of the Mine Safety and Health Act.

Section 3(d) of the Act defines operator as "any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

2. Complainants were "miners" to the extent that they worked in coal mines. (Section 3(g) of the Act.) Whenever Complainants went to coal mines to service batteries, they were miners, and were protected by the Act.

3. Insofar as Respondent was an operator and Complainants were miners, I have jurisdiction over them and the subject matter of this proceeding. Respondent's entire business involved the sales and servicing of mine batteries for coal mines. Although most of its work was performed at its own facilities, the work it did at the mine sites was not "rare and remote" as was that of the electric power company in Old Dominion Power Company v. Donovan, 772 F.2d 92 (4th Cir.1985). When Respondent's employees went into underground coal mines, they were subject to the same hazards as miners who produced coal. They are entitled to the same protection under the Mine Act.

B. Protected Activity

1. Complainants' refusal to perform underground work because they had not received mandatory health and safety training was activity protected under the Act.

A miner has the right under section 105(c) of the Act to refuse to work, if he has a good faith, reasonable belief that it is hazardous. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 633 F.2d 1211 (3rd Cir.1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981); Simpson v. Kenta Energy, Inc., 8 FMSHRC 1034 (1986).

Section 115 of the Act requires each operator to have a health and safety training program which must provide as a minimum that miners with no underground experience receive no less than 40 hours of training if they are to work underground, and all miners shall receive no less than 8 hours of refresher training every 12 months. Complainants' refusal to work underground without the required training was therefore reasonable, and there is no evidence that it was other than in good faith.

I do not determine in this proceeding whether Respondent is responsible for providing the requisite training for its employees. Respondent contends that if a violation occurred, it is that of the mine operator, not Respondent. But in either case, training was not provided, and Complainants were justified in their refusal to work underground without it. See Secretary/Robinette, supra.

C. Adverse Action

1. Complainants were discharged because of their refusal to work underground.

Respondent contends that Complainants were not discharged, but voluntarily quit. I accept the testimony of Complainants as to what they were told by their foreman Steve Williams and conclude that they were discharged.

D. Communication of Safety Concerns

1. Complainants did not communicate their safety concerns to the operator.

Where reasonably possible, a miner refusing work must ordinarily communicate or attempt to communicate to some representative of the operator his belief that a safety or health hazard exists. Secretary/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982); Simpson v. Kenta Energy, Inc., supra.

It was clearly reasonably possible for Complainants to tell Williams that they refused to work underground because they lacked training. They did not do so. Dillard Smith's request for training some months previously cannot be converted into a notification of safety concerns at the time of the work refusal. The fact that Respondent was aware of blatant safety violations does not, according to the Commission, excuse the failure to communicate. Simpson v. Kenta Energy, Inc., supra.

Dillard Smith did communicate his safety concerns to the office secretary the day after his discharge and asked her to tell the company president, Jack Pyott. Mr. Pyott was present during the hearing, but did not testify. I assume that the message was given him. Is this adequate communication? Respondent has already decided to cease operations, so it would not have been possible for it to "address the perceived danger." Simpson, supra. I conclude that under the circumstances of this case, the communication of safety concerns to the operator on the day after the miners' discharge did not satisfy the Dunmire and Estle and Simpson test.

2. Therefore, Complainants were not discharged for activity protected under the Act and no violation of section 105(c) has been established.

ORDER

Based on the above findings of fact and conclusions of law, the complaints of Dillard Smith and Lonnie Smith, and these proceedings are DISMISSED.

James A. Broderick
Administrative Law Judge