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SOL (MSHA) V. JIM WALTER RESOURCES INC.
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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 ANDY BRACKNER, COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. SE 86-69-D BARB CD 85-41
v.	No. 7 Mine
JIM WALTER RESOURCES, INC., RESPONDENT	

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Complainant; R. Stanley Morrow, Esq., and Harold D. Rice, Esq., Birmingham, Alabama, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discriminated against in that he was transferred on March 22, 1985 to a less favorable job because of activities protected under the Federal Mine Safety and Health Act of 1977 (the Act). Respondent denied that it discriminated against Complainant. Both parties had pretrial discovery. Respondent moved to compel the production of certain documents. I denied the motion by an order issued August 5, 1986. Pursuant to notice, the case was heard in Birmingham, Alabama, on October 23, 1986. Anthony Brackner, Russell Weekly, Daryl Dewberry, and William Dykes testified on behalf of Complainant. Respondent did not call any witnesses. Both parties have filed post hearing briefs. Based on the entire record, and considering the contentions of the parties, I make this decision.

FINDINGS OF FACT

At all times pertinent to this decision, Respondent was the owner and operator of an underground coal mine in Tuscaloosa County, Alabama, known as the No. 7 Mine. Complainant Brackner was employed as a miner. He began working for Respondent in 1982 as an electrician, and worked primarily on continuous miner

sections. In January 1985, he was assigned to work as an electrician on the Number 1 Longwall to prepare him to work on the Number 2 Longwall which was being opened up. The longwall sections operate twenty four hours per day, 7 days a week, with shifts "swapping out at the face." The continuous miner sections operate 16 hours per day, 5 days a week, and the shifts change outside. For these reasons, overtime work is always available to miners working on the longwall, and rarely available to miners working on continuous miner sections.

On March 19, 1985, a methane ignition occurred on the Longwall Number 1 Section. No injury or property damage resulted. After the ignition was contained and extinguished, Complainant asked the section foreman whether he was going to report it to MSHA. 30 C.F.R. 50.10 requires that an unplanned ignition be immediately reported to MSHA. The section foreman replied that he was not going to report it. On the following day, Complainant told the UMWA Safety Committeeman about the ignition, and he reported it to MSHA. On March 22, 1985, MSHA conducted an investigation and issued two citations, one for failure to report the ignition, the other for failing to shut down the section to prevent the destruction of evidence. In the course of the investigation, Complainant was interviewed by MSHA inspectors at the beginning of his shift on March 22. When he left the interview, he was told by foreman Hugh Bonham to report to the Number 8 continuous miner section. Complainant asked why he was being transferred from the longwall, and Bonham replied that he was told to transfer him. Four or five days later, Complainant asked the Number 1 longwall maintenance foreman Eugene Foster why he was taken from the longwall, and was told that the order came from higher up. The next day Complainant asked James Kelly, maintenance supervisor over all the longwalls, about the transfer. Kelly said he knew nothing about it. When Complainant told Foster about Kelly's response, Foster shrugged his shoulders. A few days after Complainant's transfer, he was replaced on the longwall section by an electrician with less seniority than Complainant. The workload on the longwall section increased after Complainant's transfer.

Complainant worked on the continuous miner section from March 22, 1985 through May 19, 1985. He worked overtime only twice for a total of 2 1/4 hours. During the same period, the electricians who remained on the longwall worked 48, 46 and 50 1/2 hours of overtime during the week. For the seven weeks prior to his transfer, Complainant worked 67.25 weekend hours hours compared to 50 and 38 for the other electricians on the section. From March 22 through May 19, Complainant worked 48 hours of weekend overtime and 17 hours of doubletime. The three other electricians worked the following weekend overtime and

doubletime hours: Seagle 53OT and 19DT; Weekly 39 OT, 2 1/2 DT; Canon 47 1/2 OT, 12 DT.

On March 25, 1985, the electricians on the longwall section filed a grievance to have their classification changed from electrician to longwall mechanic. The grievance was settled May 13, 1985 by the reclassification of the electricians to longwall mechanics. On May 20, 1985 Complainant was awarded the job of longwall mechanic on the number 2 Longwall section by exercising his bid rights under the contract. (When they were classified as electricians, Respondent could transfer them to and from the continuous miner sections.) Complainant did not participate in the grievance and apparently had no right to participate since he was then working on the continuous miner section.

Under the terms of the National Bituminous Coal Wage Agreement of 1984, a miner may be awarded a job by bid only twice during the life of the contract, if the job carries the same or lower wage rate than the job he currently has. The job of electrician carries the same wage rate as that of longwall mechanic. Complainant's hourly rate of pay is $14.415; his overtime hourly rate (time and one half) is $21.6225 and his doubletime rate is $28.83.

ISSUES

1. Is Complainant's claim barred by time limitations?

2. Was Complainant transferred on March 22, 1985 because of activity protected under the Act?

3. Was the transfer adverse action?

4. If Complainant was discriminated against, to what remedies is he entitled?

5. If Complainant was discriminated against, what is the appropriate penalty?

CONCLUSIONS OF LAW

JURISDICTION

Complainant Andy Brackner and Respondent are protected by and subject to the provisions of the Act, Complainant as a miner, and Respondent as the operator of the subject mine. I have jurisdiction over the parties and subject matter of this proceeding.

TIME LIMITATIONS

At the outset of the hearing, Respondent moved to dismiss on the ground that the claim was time-barred. The alleged discrimination occurred on March 22, 1985. Complainant signed his complaint to MSHA on May 21, 1985. (The form indicates that it was filed on May 22, 1985). MSHA conducted an investigation which included interviews with prospective witnesses. MSHA notified Complainant on April 22, 1986 that in its opinion a violation occurred. The complaint was filed with the Review Commission on April 28, 1986.

Section 105(c)(2) of the Act provides that a miner who believes that he has been discriminated against may, within 60 days after such violation occurs, file a complaint with the Secretary. The complaint here was filed 61 days after the alleged discrimination. Complainant testified that he contacted his union representative, Daryl Dewberry, who advised him of his rights under section 105(c). Dewberry filled out his complaint, and, after Complainant signed it, Dewberry took it to the MSHA subdistrict office. The one day delay in filing shown here in my opinion is excused on the basis of Complainant's ignorance of the applicability of the law, and his bringing the matter to the attention of his union representative within the statutory period. See Herman v. Imco Services, 4 FMSHRC 2123 (1982); Schulte v. Lizza Industries, Inc., 6 FMSHRC 8 (1984); Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (1984).

The Act further provides that upon receipt of a complaint by a miner, the Secretary shall commence an investigation within 15 days, and if he determines that discrimination has occurred, shall immediately file a complaint with the Commission. It directs the Secretary to notify the miner within 90 days of the receipt of a complaint of his determination whether a violation has occurred. The Legislative History of the Act makes it clear that this time limitation is not jurisdictional and that Complainant should not be prejudiced by the failure of the Government to meet its time obligations. S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 624 (1978). However, the Commission has held that a long delay coupled with a showing of prejudice to the operator may subject the complaint to dismissal. Secretary/Hale v. 4-A Coal Company, Inc., 8 FMSHRC 905 (1986).

In the present case, the Secretary notified Complainant on April 22, 1986 that it was determined that discrimination had occurred. This was 11 months after the complaint was filed with MSHA. The question thus arises whether Respondent has

demonstrated "material legal prejudice attributable to the delay." Secretary/Hale v. 4-A Coal Company, Inc., supra. The evidence shows that many of the potential witnesses no longer are employed at the subject mine, including Douglas Herring, the union safety committeman to whom Complainant reported the ignition, and who called MSHA; Hugh Bonham, a Jim Walter supervisor, who told Complainant to go to the No. 8 Continuous Miner Section after the ignition investigation; Walter Daniels, the Safety Director at the subject mine, with whom Dewberry discussed Complainant's status and his possible filing of a section 105(c) complaint; Troy Miller, maintenance foreman on the evening shift who originally asked Complainant if he wanted to work on the Longwall Section. Respondent asserted that these people no longer work for Jim Walters, but has not established that they were not available for testimony and not subject to subpoena. Further, there is no evidence in the record as to when they left Jim Walter's employ. Therefore, I conclude that Respondent has not shown material legal prejudice attributable to the Secretary's delay in filing the complaint with the Commission.

DISCRIMINATION

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof in establishing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir.1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C.Cir.1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's Pasula-Robinette test).

PROTECTED ACTIVITY

I have found as a fact that Complainant reported an ignition problem to a union safety committeeman who reported it to MSHA. This followed the refusal of Respondent's foreman to make such a report. This is incontestably activity protected under the Act.

It directly relates to mine safety, and to "making a complaint under or related to this Act . . . " (Section 105(c)(1).

ADVERSE ACTION

Complainant was transferred from his job as an electrician on a longwall section to the job of electrician on a continuous miner section. Although the hourly pay rates are the same, the evidence clearly shows that the longwall job is more desirable and affords the opportunity to earn substantially more overtime pay. I conclude that the transfer was adverse action.

MOTIVATION

Direct evidence of a discriminatory motive is usually difficult to produce. However, the fact that "the adverse action . . . so closely followed the protected activity is itself evidence of an illicit motive". Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D.C.Cir.1984). The adverse action here immediately followed Complainant's interview by the MSHA inspectors. This fact together with the refusal of Complainant's supervisors to give him any reason for his transfer is evidence tending to establish that the protected activity was a factor in the adverse action. Complainant has therefore established a prima facie case of discrimination under section 105(c) of the Act. Pasula, supra. Respondent did not submit any evidence to rebut the prima facie case. Therefore, I conclude that Respondent violated section 105(c) of the Act on March 22, 1985 by transferring Complainant from the position of longwall section electrician to the position of miner section electrician.

REMEDY

Secretary's Exhibits 1 and 2 show the overtime hours worked by Complainant and the other electricians prior to his transfer, and the overtime hours worked by Complainant, and the longwall electricians after his transfer. I conclude that, as the attachment "A" to Complainant's brief argues, Complainant lost 42 3/4 hours of overtime during the week and 5 hours of time and one-half overtime and 2 hours of doubletime work on weekends during the period March 23, 1985 through May 19, 1985. He is entitled to receive back pay in those amounts with interest in accordance with the formula in Secretary/Bailey v. Arkansas-Carbona Company, 5 FMSHRC 2042 (1983). He is further entitled to have restored the contract bid right which he exercised to obtain the longwall mechanic position on May 20, 1985.

PENALTY

Respondent is a large operator. The violation of section 105(c) found herein was a serious and intentional violation. No mitigating factors were advanced by Respondent. I conclude that a penalty of $1000 is appropriate.

ORDER

Respondent is ORDERED to pay to Complainant, within 30 days of the date of this decision, the sum of $1,105.13 representing overtime pay of which he was deprived from March 23, 1985 through May 19, 1985, plus interest in the amount of $169.18 through December 31, 1986 and thereafter at the rate of 10% per annum. Respondent is FURTHER ORDERED, within 30 days of the date of this decision, to restore Complainant's contract bid right which he exercised on May 20, 1985. Respondent is FURTHER ORDERED to pay to MSHA, within 30 days of the date of this decision, the sum of $1000 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge