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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 BOBBY G. KEENE, COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. VA 86-34-D NORT CD 86-8
v.	No. 4 Mine
S & M COAL CO., INC., JEWELL SMOKELESS COAL CORPORATION, PRESTIGE COAL COMPANY, INC., TOLBERT P. MULLINS, AND SHIRLEY A. MULLINS, RESPONDENTS	

DECISION

Appearances: Carol Feinberg, Esq., and Jonathan Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant;
Daniel Bieger, Esq., and Gay Leonard, Esq., Copeland, Molinary and Bieger, Abingdon, Virginia, for S & M Coal Co., Inc., Prestige Coal Co., Inc., Tolbert P. Mullins and Shirley A. Mullins; Joseph Bowman, Esq., for Jewell Smokeless Coal Corporation.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Bobby Keene 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 Mr. Keene was discharged from S & M Coal Company, Incorporated (S & M) on February 13, 1986, in violation of section 105(c)(1) of the

Act.(FOOTNOTE 1) The Secretary further alleges in this case that Tolbert Mullins, part owner and president of S & M, was a "person" under section 105(c)(1) also responsible for the unlawful discharge of (and unlawful failure to rehire) Mr. Keene. The Secretary also alleges that Prestige Coal Corporation (Prestige) is a successor-in-interest to S & M and as such is jointly and severally liable for costs, damages and the reinstatement of Mr. Keene. (FOOTNOTE 2)

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove by a preponderance of the evidence that Mr. Keene was engaged in an activity protected by that section and that the discriminatory action taken against him was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir.1983) and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula case. A miner's "work refusal" is protected under section 105(c) of the Act if the

miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir.1982); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

The evidence shows that Bobby Keene was a state-certified electrical repairman and maintenance foreman with underground mining experience dating from 1974. He began working for the Mullins Coal Company in 1984 as an electrician responsible for maintaining electrical equipment and the electrical "books" and was transferred by Tolbert Mullins to S & M as an electrician in the latter part of 1985.

While at S & M, Keene became concerned because there was "too much bridging going on". As described by Keene, "bridging" is the utilization of a piece of wire on any electrical equipment to bypass its safety features. Anyone touching equipment that has been "bridged-out" can be electrocuted under certain conditions.

According to Keene, about two weeks before February 13, 1986, he was asked by Mine Superintendant Monroe Nichols to "bridge" the transformer and he refused. Around the same time Nichols also asked him to "bridge" the ground fault system and again Keene refused. Keene also complained to both Nichols and Section Foreman Jerry Looney around this time about "bridging-out" the ground system to the miner. According to Keene, Nichols responded that he would "bridge-out" whenever and whatever he wanted so long as he was superintendant.

On his way into the mine at the commencement of the day shift on February 13, 1986, Keene was telling the workcrew on the mantrip in effect that the "bridging" would have to stop. Later he told Nichols that if the "bridging" was not stopped then that Friday (the next day) would probably be his last shift. Around 10:30 that morning the continuous miner "tripped". Keene repaired the problem but as they began running coal, the breaker again "tripped" and the power was cut. The breaker would not reset this time and Keene told Section Foreman Looney that there was trouble in the ground monitor system of the miner cable. According to Keene, Looney then told him "to bridge the cable at the transformer" and when Keene refused stating that it would be unsafe for the miner operator, Looney gave him the choice of either "bridging" the cable or getting his "bucket" and leaving for home. Keene decided to leave and on the way out ran into Superintendant Nichols. Keene says he told Nichols that Looney fired him because he refused to "bridge-out" the cable. Keene also reportedly told Nichols that he was going to talk

to the "Federals" about it. Keene explained at hearing that there was a "big risk" of electrial shock and electrocution to operate the miner with a "bridged-out" cable.

Keene's testimony was corroborated in essential respects by three other miners. Michael Sayers worked the day shift operating the shuttle car. He observed that during the first two months of 1986 the continuous miner broke down almost daily because of the cable. According to Sayers if the cable could not be fixed either Bobby Keene or Jerry Looney would "bridge it out." He had heard both Looney and Nichols tell Keene to "bridge-out" the system. He also heard Keene complain while on the mantrip into the mine that he was tired of "bridging-out" the cables and that he was afraid somebody was going to get hurt or killed. According to Sayers, Looney only replied that "we've got to run coal somehow, someway". On February 13, Sayers heard Keene say that he had been fired for "bridging" the cable and Superintendant Monroe responded that "well something has got to give around here". According to Sayers both Looney and Nichols continued to "bridge-out" the miner after Keene left the mine.

Matney was day shift miner operator at the No. 4 mine. He too had heard Keene complain about "bridging-out" the cables and specifically heard him say that if the practice was not stopped "someone is going to get killed." According to Matney it was standard practice to "bridge-out" the cable if it could not be fixed within a few minutes. During the day shift on February 13, 1986 Matney heard Looney tell Keene to either "bridge-out" the cable or get his bucket and walk. Keene left the mine and only a few minutes later they were again running coal. Nichols and Looney continued to "bridge-out" the equipment.

Jimmy Sexton was hired on February 17, 1986 as a shuttle car operator. He observed that when the continuous miner broke down it was standard practice at the mine for Looney or Nichols to "bridge-it-out."

Keene's testimony is further corroborated by Looney himself. Looney acknowledged that he said to Keene "let's bridge it out" just before telling Keene that if he did not like the way the mine was operated he could leave. Looney also acknowledged that he was not then a certified electrician and that he knew that "bridging-out" the miner could result in fatal electrial shock.

Of the remaining witnesses testifying on behalf of the Respondent only George Lester was present during this exchange between Keene and Looney. It is apparent however

that even Lester failed to hear critical parts of the exchange. For example while Looney admitted that he said to Keene "let's bridge-out the monitor", Lester purportedly did not hear that statement. Lester's testimony at hearing also conflicts with a prehearing interview and his credibility suffers accordingly.

I find additional material support to the Complainant's case in the testimony of both of Respondent's witnesses, Monroe Nichols and Jerry Looney. Both admitted that they had "bridged-out" electrical equipment, a procedure they knew to be in violation of federal regulatory standards and hazardous. Indeed the evidence in this case is uncontradicted that Keene was in effect told to perform an illegal and dangerous procedure or be fired. Keene clearly entertained a good faith and reasonable belief that the procedure of "bridging" was hazardous to himself or to anyone coming into contact with the "bridged-out" miner. Consolidation Coal Co. v. FMSHRC et. al., 795 F.2d 364 (4th Cir.1986). I also find that since the dangers inherent in such a procedure were obvious and admittedly known to both Looney and Nichols there was no need to further "communicate" the nature of the hazard to them. See Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982). Keene's departure from the mine immediately after being given the choice of performing a procedure known to be illegal and likely to have fatal consequences to himself or others or getting his bucket and walking was accordingly a discharge in violation of the Act. Robinette, supra.

The Complainant in this case also alleges that Tolbert Mullins is individually liable as a "person" unlawfully discriminating against him under section 105(c)(1). See footnote 1, supra. According to Keene, on February 26, 1986, he telephoned Mr. Mullins at the request of the MSHA investigator in efforts to settle the case. Keene says that during the course of this conversation Mullins told him that he could have his job back but only as an electrician. Moreover in response to Keene's concerns about the illegal practice at S & M of "bridging-out" electrical equipment Mullins purportedly responded that Keene would not have to report the practice in the electrical inspection books. (FOOTNOTE 3) This conversational exchange is not disputed and accordingly I accept Keene's

testimony in this regard. This evidence clearly supports a finding that Mullins, as an individual, was a "person" discriminating against Keene in violation of the Act in his refusal to reemploy Keene except under illegal and dangerous conditions. See Munsey v. Smitty Baker Coal Company, Inc., et al, 2 FMSHRC 3463 (1980).

Finally the Complainant argues that Prestige Coal Company Inc., (Prestige) is a successor-in-interest to S & M Coal Company and accordingly under the criteria set forth in the Munsey decision is jointly and severally liable for costs, damages and reinstatement in this case. In Munsey the Commission applied the factors used by the Federal Courts in EEOC v. McMillan Blowdell Containers, Inc., 503 F.2d 1086, 1094 (6th Cir.1974) for determining such liability. These factors are: (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether it uses the same or substantially the same work force (6) whether it uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether it uses the same machinery, equipment, and methods of production, and (9) whether it produces the same product.

In this case there is no dispute that Prestige continues to produce the same product as S & M i.e., coal. It is also apparent from the record that Tolbert Mullins as president and part owner of both S & M and Prestige (and therefore as agent for both companies) was in a position to have notice on behalf of Prestige of the charges by the Complainant in this case. It is also established that S & M is not able to provide adequate relief to the Complainant in this case. It is no longer in business and has no liquid assets. Moreover its only unpledged assets consist of old mining equipment having but little value as parts and scrap metal and having limited marketability.

Of the eight employees presently working at Prestige only two formerly worked for S & M. However one of the two employees, Monroe Nichols, was a supervisor at S & M and is a supervisor at Prestige. The Prestige mine is a surface mine and S & M was an underground mine. Accordingly the machinery, equipment and methods of production differ. The specific jobs at Prestige are also different but many of the skills are transferrable. Within this framework I find on balance that indeed Prestige is a successor-in-interest to S & M and accordingly is jointly and severally liable for costs, damages, reinstatement and civil penalties.

Civil Penalty

I find the acts of discrimination by S & M and Tolbert Mullins to be particularily serious in this case because of the direct impact they had on the safety of miners. Here the practice of bridging-out safety features on electrical equipment continued unabated after the discharge of Mr. Keene and after his discharge it was highly unlikely that anyone else would have protested the dangerous practice. In additon Mr. Mullins and the other S & M officials knew that they were requiring Keene to perform illegal and dangerous acts. Their discharge (and refusal to take back) Keene for refusing to perform such tasks was therefore willful. In assessing a penalty herein I have considered that S & M is no longer in business. I have also considered its history of violations and the fact that it was a small operation. The violative conditions of course have not been abated since Keene has not been reinstated nor has he been reimbursed for lost wages, costs, and interest.

ORDER

In light of the stipulations entered in this case S & M Coal Company, Inc. and Prestige Coal Company are ordered, jointly and severally to pay to Bobby Keene within 30 days of the date of this decision, costs amounting to $654.18, backpay of $3,082.16 and interest to be computed in accordance with the formula set forth in Secretary ex rel. Bailey, v. Arkansas Carbona Company, 5 FMSHRC 2024 (1983). It is further ordered that Tolbert Mullins jointly and severally with the aforementioned Respondents, pay the said costs of $654.18 and $2,089.75 of said backpay (inasmuch as his chargeable act of discrimination occurred on February 26, 1986) within 30 days of the date o this decision. It is further ordered that Prestige Coal Co., immediately provide employment to Bobby Keene in a capacity commensurate with his skills and at no less pay than he was receiving at the time of his discharge from S & M Coal Company, Inc. on February 13, 1986. It is further ordered that S & M Coal Company, Inc., Prestige Coal Company, and Tolbert Mullins, jointly and severally pay a civil penalty of $1,000 within 30 days of the date of this decision.

Gary Melick
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 in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other 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 safety or health violation in a coal or other mine . . . or because such miner . . . has instituted or caused to be

instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

~FOOTNOTE_TWO

2 At hearing the Secretary, with Mr. Keene's consent, moved to dismiss Jewell Smokeless Coal Corporation as a Party/Respondent in light of the settlement agreement filed herein. At the close of hearing the Secretary also agreed to the dismissal of Shirley Mullins as a Party/Respondent. There was no objection to what were redeemed to be requests to withdraw pleadings under Commission Rule 11, 29 C.F.R. 2700.11, and the requests were granted.

~FOOTNOTE_THREE

3 It is undisputed that Keene as a certified electrician would be legally required to report such violative conditions in the electrical inspection books.