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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
ROGER LEE WAYNE, SR.,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 87-89-D

MORG CD 86-13

v.

Ireland Mine

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Complainant;
Michael R. Peelish, Esq., Consolidation Coal
Company, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Complaint filed by the Secretary of Labor on February 9, 1987, on behalf of Roger Lee Wayne, Sr., alleging discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 185(c) (the Act). The United Mine Workers of America filed a Notice of Intervention on February 12, 1987. Consolidation Coal Company (Respondent) filed, on February 25, 1987, its Answer and a Motion to Dismiss on the ground that the complaint was untimely filed. An Order was entered denying Respondent's Motion to Dismiss on March 17, 1987.

The Complainant filed a Motion for Leave to Amend Complaint on March 23, 1987. This motion was not opposed. Complainant's Amended Complaint seeks an Order assessing a civil penalty against Respondent in the amount of \$300 to \$500.

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Pursuant to notice, this case was scheduled for trial for June 9, 1987. Respondent filed a Motion for Continuance of the trial on June 2, 1987. This Motion was not opposed and pursuant to notice the case was rescheduled for August 4, 1987, in Wheeling, West Virginia. At the hearing, David Wolfe, Roger Lee Wayne, Sr., David Miller, Leo Connor, and Billy Wise testified for the Complainant. Hestel B. Riggle, Jr., and George Carter testified for the Respondent. Respondent filed its Posthearing Brief on October 27, 1987. Petitioner filed its proposed Findings of Fact and Memorandum on October 28, 1987.

Stipulations

At the hearing, the following stipulations were entered into:

. . . [T]hat the Federal Mine Safety and Health Administrative Law Judge has jurisdiction over the matter; the size of the operator, Consolidation Coal Mine as reflected on the proposed Complainant's Exhibit Number 82 was 37,808,900 and the size of the mine at the Ireland Mill was 1,962,774 tons; that the proposed assessment of the specific penalty is \$3,500.00 and will not affect the operator's ability to stay in business. . . [T]hat the complaint in this matter was timely filed; that Roger Wayne, Complainant, is an employee of the Ireland Mine and that Consolidation Coal Company operates in this case. (Tr. 3)

. . . [T]hat the Committeemen or Safety Committeeman who was on the shift of an MSHA Inspector present as possible inspection conferences as defined by the Act would be the first choice as the authorized representative of the miners on that shift. (sic)

. . . [T]hat it is the responsibility of the safety committeeman to communicate to the other miners, to other members of the Union, safety problems at the mine, results of any conferences or communications with the Federal Mine Safety and Health Administration, and the results of inspections. (sic) (Tr. 100-101).

Findings of Fact

The ventilation plans at the Respondent's Ireland Mine are reviewed every 6 months by MSHA Inspectors and Respondent. Prior to the review, MSHA conducts an on-site inspection to determine if the mine conditions are suitable to the plan and if the mine is adequately ventilated. MSHA Inspector David Wolfe conducted an on-site ventilation inspection on March 3, 4, 5, and 6. Subsequently, Wolfe contacted Respondent's superintendent of mines

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to arrange for a review of the ventilation plan on March 25, 1986. According to Wolfe, in general, in a 6 month review of the ventilation plan MSHA officials meet with Respondent's personnel and miners to review the compliance record of Respondent in the past 6 months, review revisions of the ventilation plan proposed by Respondent, and discuss comments by those present as to the plan.

Roger Lee Wayne, Sr., a first class mechanic employed by Respondent, was a member of the safety committee in March 1986. Hestel Riggle told Wayne on March 24, 1986, that the following day there would be a ventilation plan review meeting. Wayne informed Riggle that he would probably go with him to the meeting as he (Wayne) was working the day shift. Prior to the commencement of the day shift at 8:00 a.m., on March 25, 1986, according to Riggle, Wayne informed him that he was to be the Union Representative at the meeting at 9:00. Riggle told Wayne to go to his work section and that if he was needed at the meeting he will be called.

When Wolfe met with Respondent's representatives on the morning of March 25, 1986, to conduct a 6 month review of the ventilation plan, David Shreve of the United Mine Workers of America was present, along with David Miller and Leo Conner, both miner members of the safety committee, and both of whom were not on the day shift. Also in attendance was Billy Wise, another miner and member of the safety committee, who according to the uncontradicted testimony of Miller was not on the day shift.

Riggle asked Wolfe if a walkaround was needed and Wolfe said that one was not needed at the meeting, as the miners had sufficient representatives. Miller requested of George Carter, Respondent's Supervisor of Industrial and Employee Relations, that Wayne attend the meeting as he was the designated representative of the miners. Wolfe said that a representative was not necessary at the meeting as the meeting was not an inspection. Carter told Miller that Wayne could be brought out to the meeting on Union business. Miller insisted that Wayne be called and the dispatcher notified Wayne to go to the meeting. Subsequently, Respondent asked that the meeting be postponed for a day so they could have a corporate representative inasmuch as Shreve from the UMWA was present. Miller requested a postponement of 10 days to allow the safety committee to study the revision to the ventilation plan. The meeting was then adjourned, and when Wayne arrived, he was told by Carter that he was on Union business and could not go back to the mine.

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Issues

The issues are whether the Respondent discriminated against Wayne, in violation of Section 105(c) of the Act, and, if so, what is the appropriate relief to be awarded Wayne, and what are the appropriate civil penalties to be assessed against the Respondent for such discrimination.

Laws

Section 105(c)(1) of the Act provides, in essence, that no person shall in any matter discriminate against or cause discrimination against, or otherwise interfere with the exercise of the statutory rights of any miner or representative of miners because of the exercise by such miner of any statutory right afforded by the Act. In essence, Section 103(f) of the Act, provides that ". . . a representative authorized by his miner shall be given an opportunity to . . . participate in pre-or post-inspection conferences held at the mine."

Discussion

Complainant and Respondent are protected by, and subject to, the provisions of the Mine Safety Act, and specifically Section 105(c) of the Act. I have jurisdiction to decide this case.

The Commission, in a recent decision, *Goff v. Youghiogheny & Ohio Coal Company*, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, *Goff, Supra*, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Pasula*, 2 FMSHRC at 2797-2800; *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. See also *Donovan v. Stafford Constr. 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).

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Protected Activities

Wolfe's uncontradicted testimony established that, in general, a 6 month review of Respondent's ventilation plan, is preceded by an on-site inspection to see if the mine is being properly ventilated. Indeed, Wolfe conducted such an inspection on March 3, 4, 5, and 6, 1986. According to the uncontradicted testimony of Wolfe, the 6 month meeting to review the ventilation plan is held to review the compliance record of the Respondent and review revisions proposed by Respondent to the ventilation plan. Accordingly, I find that the meeting scheduled for March 25, 1986, was a "post-inspection conference," within the purview of Section 103(f) of the Act, inasmuch as it is likely that conditions observed in the on-site inspection of March 3, 4, 5, and 6, would have been discussed. It is also clear, based upon the testimony of Wolfe, that miner attendance and participation at this meeting is critical to further safety at the mine, as the latter would have an opportunity to discuss the revision to the ventilation plan, and then to inform other miners of these changes.

Based upon all the above, I conclude that Wayne's participation in the March 25 conference, as an authorized representative of the miners, is to be considered a protected activity within the purview of Section 105(c) of the Act.

In essence, the uncontradicted evidence presented by Complainant establishes that Wayne, on March 25, 1986, was a safety committeeman, and that Miller had requested that the latter, as the designated representative of the miners, be present at the March 25 conference concerning the revision of the ventilation Plan. Further, I note that the Parties at the hearing stipulated that the safety committeeman who was on the shift at the time of a post inspection conference would be the first choice as the authorized representative of the miners on that shift. I thus conclude that, although three other safety committeemen were already present at the conference, that Wayne, was the "authorized" representative within the purview of Section 103(f) of the Act, as he was working on the shift during which the conference occurred.

In this connection, I find that there is no relevance to the comments that MSHA Inspector David Wolfe made at the March 25 conference that, in essence, a "walkaround" was not required by him and that the miners were already represented by the three safety committeemen who were present.

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Adverse Action

Respondent, in essence, argues that it had no legal obligation to provide Wayne with an opportunity to attend the March 25, 1986 conference. In this connection, Respondent maintains that it reasonably relied upon the statements by Wolfe that a walkaround was not needed inasmuch as the miners already had three safety committeemen present. However, the critical issue is not Respondent's good faith in asserting that it had no obligation to allow Wayne to participate in the meeting, but rather, its actions against Wayne, when confronted with the request that he attend the meeting. Respondent argues, in essence, that Miller, in asking for Wayne to be present at the meeting, placed the latter on Union business, and thus Wayne did not suffer any loss of pay. Wolfe testified that Miller initially requested of Respondent that Wayne be placed on Union business (Tr. 23, 24). However, I accept Miller's version, as it was essentially corroborated by Riggle and Carter (Tr. 141, 158), that George Carter, Respondent's Supervisor of Industrial and Employee Relations told him that Miller would not be brought out of the mine unless he went on Union business (Tr. 105, 106).

Miller then insisted that Wayne be brought out of the mine to attend the meeting. When Wayne arrived the conference had been adjourned, but Carter told Wayne that he could not go back to the mine as he was on Union business. This had the effect of causing Wayne to lose his pay for the balance of the day. Accordingly, it is clear that Respondent's refusal to allow Wayne to return to the mine after the March 25 conference had been adjourned, constitutes an adverse action.

Motivation

The record tends to support a conclusion that Respondent did not have any improper motive in concluding, in essence, that it did not have any obligation to have Wayne attend the March 25 conference, as it relied upon the comments by Wolfe that such attendance was not necessary. However, once the conference was adjourned, there does not appear to be any basis for Carter's action in refusing to allow Wayne to return to the mine, other than to punish him for attempting to attend the meeting. Accordingly, it is concluded that Respondent's action in not allowing Wayne to return to the mine, was motivated solely by Wayne's asserting his rights under Section 105(c) and attempting to attend the March 25 conference. Accordingly, it is concluded that Respondent did violate Section 105(c) of the Act, as it did commit an act of discrimination against Wayne within the purview of Section 105(c) of the Act.

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In assessing a penalty to be imposed against Respondent, I have considered the size of Respondent's mining operation as stipulated to by the Parties. I have also taken into account the gravity of the violation committed wherein. Also, although it might be concluded that Respondent acted in good faith in initially refusing to permit Complainant to attend the March 25 conference, I find that the adverse action committed by Carter against Wayne in not allowing him to return to the mine, was intentional. Based on these factors, I find that a penalty of \$300 is appropriate.

ORDER

It is ORDERED that.

1. Respondent shall, within 15 days from the date of this Decision, post a copy of this Decision at the Ireland Mine where notices to miners are normally placed, and shall keep it posted there for a period of 60 days.

2. Respondent, shall within 15 days from the date of this Decision, pay Complainant for the 6 1/2 hours he would have worked on March 25, 1986, had he not been refused permission to return to work.

3. Respondent shall pay a penalty of \$300 within 30 days of this Decision.

Avram Weisberger
Administrative Law Judge