

CCASE:
RICKY HAYS V. LEECO
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
FALLS CHURCH, VA
April 16, 1990

RICKY HAYS, Complainant v.	DISCRIMINATION PROCEEDING Docket No. KENT 90-59-D MSHA Case No. BARB CD 89-32
LEECO, INC., Respondent	No. 62 Mine

ORDER DENYING MOTION TO VACATE ORDER GRANTING
MOTION TO PERMIT ENTRY UPON DESIGNATED LAND

This matter is scheduled for a hearing in Pikeville, Kentucky, on Tuesday, May 8, 1990. The parties have engaged in pretrial discovery, including the scheduling of depositions. On April 13, 1990, complainant's counsel filed a motion seeking an order permitting the complainant, his counsel, and an expert witness to enter the respondent's underground mine for the purpose of inspecting, measuring, and possibly photographing the continuous haulage system. The complainant claims that he was discharged because he had not serviced a grease fitting on the No. 1 bridge of said haulage system. He contends that the respondent required its electricians to service the equipment while it is in operation, in violation of Federal law, and that his failure to service the equipment was based on his belief that it would be unsafe to do so.

In support of the motion, complainant's counsel stated that he was unfamiliar with the continuous haulage system and has been informed by Long Airdox, the manufacturer, that there are no such systems available for inspection in Kentucky other than in underground mines. Counsel asserted that the inspection of the system is fundamental to a thorough preparation of his case, and that counsel and the expert witness are willing to receive the necessary training before entering the mine, and are willing to inspect the system during a non-production shift. Counsel stated further that after contacting the respondent's counsel seeking permission to enter the mine, he was informed that the respondent would not permit any entry into its mine without a court order.

On April 6, 1990, I issued an order granting the complainant's motion to permit entry into the respondent's mine. The order was issued before the expiration of the available 10-day period for a response pursuant to commission Rule 10, 29 C.F.R. 2700.10. The respondent's counsel has now filed a

motion to vacate my order and to deny the complainant's motion to permit entry to the mine. In support of his motion, counsel states that no order should have issued until on or after April 12, 1990, and he seeks leave to file his response and objections to the complainant's motion. With regard to the merits of the complainant's motion to permit entry to the mine, counsel advances the following arguments in support of his objections:

1. The respondent has already provided to the complainant's attorney the name of the manufacturer and the model numbers of the equipment in question, and complainant's counsel should be able to obtain photographs, diagrams, specifications, etc., sufficient for a determination as to the safety of greasing the equipment in question. Further, if the complainant has retained an "expert" on this matter, such expert, as a prerequisite of his being permitted to give opinion testimony, should already be familiar with the equipment in question.

2. The discovery requested by the complainant poses an undue burden upon the respondent. If the complainant's motion were granted, the respondent would be required to designate personnel to escort the complainant's attorneys and expert witness into the mine, at the cost of several man hours. It would also appear that the respondent is expected to provide safety training and orientation to the attorneys and experts. Further, the inexperience of the attorneys and experts as to the hazards presented in an underground coal mine, even during a nonproduction shift, poses a threat of harm not only to the attorneys and experts but to the employees at the mine as well.

On April 11, 1990, I held a telephone conference with counsel for the parties and heard further arguments with respect to the motion, including the complainant's response to the respondent's objections, which were subsequently reduced to writing and filed with me on April 13, 1990. Complainant's counsel has reasserted his need for an on-site inspection of the continuous haulage system, which he believes is crucial to his case. Counsel states that he intends to depose two of the respondent's key witnesses who are "intimately familiar" with the system, and in order to adequately prepare for the taking of their depositions, as well as the trial of the case on the merits of the complaint, it is essential that he be permitted to examine the system in place at the respondent's mine. Counsel further states that he has travelled underground, has completed a 40-hour inexperienced miner's safety training course required by the State of Kentucky, and that during the requested mine visit, the

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complainant and his representatives would be accompanied at all times by the respondent's agents.

Conclusion

After careful consideration of the further arguments advanced by the parties, including the respondent's objections, I conclude and find that the complainant has established a reasonable basis for his request to enter the mine under the conditions stated in his motions, and that on balance, they outweigh the arguments advanced by the respondent. Under the circumstances, and upon further consideration of my prior ruling and order of April 6, 1990, IT IS AFFIRMED, and the respondent's objections ARE DENIED.

ORDER

The respondent IS ORDERED to permit the complainant, his attorneys, and expert witness to enter the mine for the purpose of inspecting, measuring, and possibly photographing the continuous haulage system in question. Counsel for the parties are expected to agree to a mutually convenient time for the mine visit, taking into account the safety of the inspection party, and with the least amount of disruption to the respondent's mining operations.

In view of the proximity of the scheduled hearing, and the complainant's established need for inspecting the haulage system prior to the anticipated taking of the depositions of respondent's witnesses, respondent is expected to expeditiously comply with this order.

George A. Koutras
Administrative Law Judge

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