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SOL (MSHA) v. SANDY FORK MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF JOHN A GILBERT,
COMPLAINANT

v.

SANDY FORK MINING COMPANY, INC.,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 86-76-D

MSHA Case No. BARB CD 85-61

No. 12 Mine

DECISION AND ORDER

Before: Judge Melick

This case is before me on remand by the Commission on June 28, 1990, following the decision of the Federal Court of Appeals, District of Columbia Circuit, in Gilbert v. FMSHRC, 866 F.2d 1433 (1989). By decision dated November 8, 1990, I subsequently held that, based upon the Circuit Court's specific findings, I was constrained to find that Mr. Gilbert was discharged in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, the "Act." Mr. Gilbert subsequently agreed to a settlement of costs and damages in his individual complaint under Section 105(c)(3) of the Act and that case was thereafter dismissed. (See Docket No. KENT 86-49-D). The Secretary does not oppose that disposition of Mr. Gilbert's section 105(c) claim but seeks in this case, in addition, a civil penalty of \$2,000 from the Respondent for Gilbert's unlawful discharge.

Evaluation of the relevant criteria under section 110(i) of the Act is necessary to determine an appropriate civil penalty. I do not find negligence in this case because Respondent had no notice that its conduct would constitute a violation of section 105(c), and it took no direct adverse action against the Complainant. I am satisfied from the record herein that Respondent had no intent to act against Gilbert in violation of section 105(c) and indeed both myself as the trial judge and a unanimous Federal Mine Safety and Health Review Commission initially concluded that Respondent did not violate section 105(c). It was not until the United States Court of Appeals for the District of Columbia Circuit effectively expanded existing law that Respondent's actions were deemed subject to a finding of discrimination. Prior Commission decisions had established that

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there was no legal obligation for a mine operator to verbally articulate, or otherwise demonstrate in advance, what specific action was being taken to remedy hazardous conditions unless the operator intended to insist that a miner return to work under those conditions. See Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co., Inc., 5 FMSHRC 1529, 1534 (1983); Secretary of Labor on behalf of Hogan & Ventura & UMWA v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (1986). Only now can it be said that there may exist a newly delineated legal obligation for mine operators to explain to employees in detail anticipated remedial actions no matter when asked.

In addition, the evidence shows that Respondent never forced Gilbert to work under conditions which he believed to be hazardous. Essentially, according to the Court of Appeals, this case involves a failure of communication on the part of the company, and more particularly a failure to give adequate future assurances. Respondent also ceased operations in February of 1988, no longer employs any miners, and produces no coal. There is no evidence of any prior violations of section 105(c) at this mine.

Finally, it is not disputed that once the decision finding a violation of Section 105(c) was entered, the Respondent worked in good faith with the Complainant to negotiate a fair resolution of remaining issues, including compensation for costs and damages. Indeed these negotiations recently resulted in a settlement agreeable to Mr. Gilbert.

ORDER

The Stay Order issued February 7, 1991 is hereby lifted. Under the unique circumstances of this case I hereby order Sandy Fork Mining Company, Inc. to pay a token civil penalty of \$1.00 within 30 days of the date of this decision. This is the final disposition of these proceedings before this judge.

Gary Melick
Administrative Law Judge