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SOL (MSHA) v. COBRA MINING
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Federal Mine Safety and Health Review Commission
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SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
AMOS HICKS,
COMPLAINANT

v.

COBRA MINING, INC.,
JERRY K. LESTER AND
CARTER MESSER,
RESPONDENTS

DISCRIMINATION PROCEEDING

Docket No. VA 89-72-D
MSHA Case No. NORT CD-89-18

DECISION ON REMAND

Before: Judge Weisberger

In a decision in this matter, (Amos Hicks v. Cobra Mining, Inc., Docket No. VA 89-72-D, 13 FMSHRC _____, April 1, 1991), the Commission, pursuant to Complainant's petition for discretionary review, vacated and remanded my decision which had been issued March 22, 1990. The bases for the Commission's decision are set forth in its analysis of two issues presented in this case i.e., the timing of Complainant's (Hick's) complaints, and Respondent's affirmative defense.

I. The Timing of Hick's Complaints.

On remand, the Commission directed me to reconsider all areas of Hick's complaints as motivating factors in his discharge. The Commission further directed me to reconsider this issue in light of the principles expressed in Secretary o.b.o. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510, (November 1981), rev.d on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983), and Donovan v. Stafford Construction Co., 732 F.2d 954 (D.C. Cir. 1984).

In Chacon, the Commission listed various indicia of discriminatory intent including "coincidence in time between the protected activity and the adverse action" (3 FMSHRC 2510). In this connection, the D.C. Circuit Court of Appeals in Stafford, supra, took notice of the fact that 2 weeks had elapsed between

the alleged protected activity and the adverse action and held that "[T]he fact that the company's adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive." (732 F.2d at 960).

Upon reconsideration I find, for the reasons previously stated in my initial decision, that a week before his discharge, Hicks had complained to Sutherland about the failure to use safety jacks. I do not accept Hick's testimony that he complained to Sutherland about loose rock 2 days before he was fired. As stated in my previous decision, neither Ray nor Lester, who rode the mantrip along with Hicks, corroborated his testimony that he had made a complaint about the loose rocks 2 days before he was fired. Both Hicks and Sutherland essentially indicated that an incident had occurred when Hicks, who had complained to Sutherland about loose rock, was told by the latter to get off a mantrip and pull the rock down. Hicks did not specifically indicate when this occurred, but Sutherland said in essence that it was about a month before Hicks was fired. I conclude that the firing of Hicks occurred approximately a month after he complained to Sutherland about loose rock.

Hicks indicated on direct examination that he complained about improper ventilation a week before he was fired. I do not accord much weight to this testimony because, upon cross-examination, it was elicited that in his responses to interrogatories taken on October 16, he did not say that he had made such complaints a week before he was fired. Also, although Ray indicated she heard Hicks complain about ventilation to Sutherland a couple of times, she did not pinpoint when these complaints were made.

The Commission further indicated that an error was made in assessing Complainant's prima facie case by adhering to ". . . an overly restrictive time frame in deciding whether certain of Hicks' complaints were "within close proximity to his discharge."' (13 FMSHRC, supra, slip op., at 9). In addition, the Commission found error in assessing complaints about safety jacks, loose rock, ventilation, and riding in the scoop bucket, in isolation with regard to proximity in time between the complaint and the adverse action and that "under the circumstances, it would have been appropriate to consider the complaints as a whole in order to establish whether a pattern of protected conduct existed that might have provided sufficient motivation for the May 11, 1989, discharge." (13 FMSHRC, supra, slip op., at 9).

Being guided by the Commission's directives, I note that Hick's complaints about jacks were made a week before his discharge, and complaints about loose rock were made approximately a month before the discharge. Further, Sutherland indicated that Hicks had complained about rocks one or two times,

and Ray indicated that he had made complaints 2 to 3 times a week. Payne indicated that Hicks made such complaints "several times" (Tr. 140). Ray in corroborating the testimony of Hicks that he had complained about ventilation problems to Sutherland, indicated that he made such complaints "a couple of times" (Tr. 204). In this connection, further, it is significant to note that with regard to complaints about the safety of riding in the scoop, Hicks indicated that he made such complaints whenever he rode the scoop, which was up to five times a week, and indicated that he complained on a "consistent" basis (Tr. 201). Ray indicated that she heard Hicks making these complaints to Sutherland more than just a couple of times. Sutherland acknowledged Hick's complaints in this regard, and did not rebut the testimony of Hicks and Ray with regard to the numerous times these complaints were made.

Hence, upon reconsideration, I take into account the totality of the circumstances presented herein, i.e., the fact that complaints were made about jacks a week before Hicks was fired, the fact that complaints were made about loose rock about a month before complainant was fired, and the fact that numerous complaints were made about the loose rock, ventilation, and the riding in the scoop bucket. I find that due to the proximity of complaints to the adverse action, and the repetitive nature of these complaints, there was a pattern of protected conduct that did establish that the firing of complainant was motivated in some part, by the safety complaints that he had made.

II. Respondent's Affirmative Defense

In its decision, the Commission directed that an evaluation of Respondent's affirmative defense be made in terms of the criteria set forth in Bradley v, Belva Coal Co., 4 FMSHRC 982 (June 1983), and Secretary o.b.o. John Cooley v. Ottawa Silica Corp., 6 FMSHRC 516.

In Bradley, supra, the Commission set forth general principles for evaluating an operator's affirmative defense, and indicated that proof that the operator would have disciplined the miner in any event but for the unprotected activity alone, can be established by showing "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner or personnel rules or practices forbidding the conduct in question." (4 FMSHRC at 993).

The Commission in its decision (13 FMSHRC, supra, slip op., at 10), referred to certain factors set forth in Cooley for determining whether the use of profanity "in and of itself," was grounds for dismissal as follows: "Had there been previous disputes with the miner involving profanity? Had anyone ever been discharged or otherwise disciplined for profanity? Was

there a company policy prohibiting swearing, either generally or at a supervisor?"

In its decision, the Commission, in indicating that it was unable to determine "at this state," whether substantial evidence supports my initial conclusion that Hick's use of profanity warranted discharge in any event, commented as follows: "This is particularly true in view of the testimony as to widespread use of profanity in Cobra's No. 1 Mine, management's general tolerance of that profanity, and the lack of discipline meted out to Hicks for an earlier incident of profanity . . . . " (13 FMSHRC; supra, slip op., at 11).

Upon reconsideration, considering these comments by the Commission, I give considerable weight to the fact that the record herein contains corroborated testimony that swearing was a common occurrence, and that some of it was directed at supervisors. Further, I note that the record does not indicate that there was any published oral or written policy prohibiting swearing either in general or directed to a supervisor. Also, I take cognizance of the fact that Sutherland indicated that in a prior incident Hicks directed an obscene comment to him, and he "shrugged it off" (Tr. 272).

The Commission further directed me to resolve the conflicting testimonies of Hicks, Douglas Lester and Sutherland with regard to whether the use of profanity by Hicks occurred in the process of defying Sutherland's order to return to work as Sutherland testified, or whether it was made after he had already boarded his shuttle car and had started back to the face as Hicks and Lester testified. I find the version testified to by Hicks to be credible in light of the fact that it was corroborated by Lester.

The Commission, (13 FMSHRC, supra, Slip op., at 10), indicated that my original finding that complainant's discharge for use of profanity was not pretextual because Sutherland had previously fired Ray for swearing, "needs to be explained further." The Commission elaborated as follows: "First, the record discloses that Ray's discharge was quickly rescinded on the instructions of Payne. Second, the Ray incident could also be viewed as an aberration rather than as a precedent in support of the adverse action taken against Hicks. Given the context of wide spread use of profanity in the No. 1 Mine, the severe disciplinary action taken against both Ray and Hicks could be viewed as disparate treatment insofar as swearing was neither prohibited nor, apparently, discouraged."

In light of the Commission's concerns, and its evaluation of the record, I am constrained to conclude, upon reconsideration, that reliance upon Ray's discharge for swearing as evidence that complainant's discharge was not pretextual, is unwarranted given

the fact that Ray's discharge was rescinded and given evidence of widespread use of profanity in the mine at question. Hence, upon reconsideration, and addressing myself to the concerns raised by the Commission in its decision, I conclude that respondent has not established that it would have dismissed Hicks based on the unprotected activity i.e., swearing, alone. Hence, I conclude that respondent has not rebutted complainant's prima facie case.

ORDER

1. Complainant shall file a statement within 20 days of this Decision indicating the specific relief requested. This statement shall show the amount he claims as back pay, if any, and interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984). The statement shall also show the amount he requests for attorney's fees and necessary legal expenses if any. The statements shall be served on Respondent who shall have 20 days from the date service is attempted to reply thereto.

2. This decision is not final until a further order is issued with respect to Complainant's relief and the amount of Complainant's entitlement to back pay and attorney's fees.

Avram Weisberger
Administrative Law Judge