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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION ON BEHALF OF
JOSEPH CULP,
COMPLAINANT

DISCRIMINATION PROCEEDING
Docket No. WEST 91-160-D
Dutch Creek Mine

v.

MID-CONTINENT RESOURCES, INC.
RESPONDENT

DECISION APPROVING SETTLEMENT

Before: Judge Cetti

This is a proceeding based on a complaint of discrimination filed under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act).

The complaint was based upon Complainant's employment termination resulting from Complainant's refusal to work underground at the Dutch Creek Mine because of his fear of a prolonged methane fire in the 211 Longwall tailgate return.

In an earlier litigated proceeding before me, the Complainant, Joseph C. Culp, was temporarily reinstated to his former position by my order of December 18, 1990. Subsequently, on January 25, 1991, substantially all miners including Mr. Culp were laid off at the Dutch Creek Mine. Mr. Culp accepted new employment for a different mining company in Western Pennsylvania on August 26, 1991, and no longer seeks permanent reinstatement at Mid-Continent Resources, Inc. (Mid-Continent) but does claim back pay from the time he was suspended without pay allegedly in violation of Section 105(c) on August 23, 1990, to the time he was temporarily reinstated pursuant to my order at the Dutch Creek Mine on December 19, 1990. Mr. Culp's monthly salary was \$3,468. During the time period of his discharge from late August 1990 until mid-December 1990, Mr. Culp received state employment benefits amounting to \$2,522. The total amount of back pay claimed by Mr. Culp in this proceeding was \$11,332.92 plus the legal rate of interest on such back pay.

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Mid-Continent asserts, in part, the following:

1. That Complainant's actions of August 22 and 23, 1990, constitute a voluntary termination of his employment status with Mid-Continent and that his work refusal was not made in good faith.

2. That the work refusal justification of Complainant was not reasonably predicated. None of the nearly 100 Mid-Continent employees active during the 211 longwall gob fire nor any MSHA inspectors or employees refused to enter the Dutch Creek Mine and perform tasks assigned to them during the course of the 211 longwall gob fire.

3. That given the occupational duties of Complainant and the tasks assigned and performed by him during the initial stages of the 211 longwall gob fire, outby pumping duties several hundred feet removed from the actual fire site, the work refusal of Complainant was not reasonably predicated.

4. That Complainant's concerns, if any and if in fact held in good faith, were not adequately communicated to invoke protection of the Federal Mine Safety and Health Act of 1977.

5. That the conditions surrounding the methane fire in the 211 longwall gob did not constitute what could be genuinely and in good faith regarded as a hazardous condition, particularly to persons engaged in outby occupations which placed them a significant distance from the fire location and the firefighting activities. Every underground activity conducted by Mid-Continent from and after August 16, 1990, and during the entire course of the 211 longwall gob fire, including the duties assigned Complainant, was specifically approved by MSHA and subject to its direct supervision and control.

6. That it is legally impossible for an unsafe activity to be conducted at a mine while under the control of MSHA such as this mine was by virtue of Section 103(k) and 107(a) orders and the massive physical presence of MSHA official inspectors and technicians.

The Secretary on behalf of the Complainant states that preparation for trial has revealed that since the time of my reinstatement order, Mid-Continent has ceased operation and is preparing to file bankruptcy. Mid-Continent is unable to pay the amounts due to Mr. Culp as calculated by the Secretary, and Mid-Continent has a very large secured debt that will leave nothing for unsecured creditors.

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Accordingly, Complainant and Respondent have agreed that the Secretary will reduce its request for monetary relief to the amount of \$2,000.00, contingent on Mid-Continent paying that sum prior to a final order in this case. Under the facts and circumstances in this case, the Secretary upon payment of the \$2,000.00 to Complainant withdraws its request for a civil penalty.

After careful review and consideration of the entire record including the arguments and submissions in support of the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable, appropriate and in the public interest. I am advised by the Secretary that the approved amount of \$2,000.00 has been paid to the Complainant. Accordingly, the settlement is APPROVED and Respondent having paid it, this proceeding is DISMISSED.

August F. Cetti
Administrative Law Judge