CCASE:
SOL (MSHA) V. CLEAN RITE SERVICE, INC.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 18, 1993

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ANITA DENICE SAMUELSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 92-420-D
	:	DENV CD 91-04
	:	Caballo Mine
v.	:	
CLEAN RITE SERVICES, INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Allen Van Tassel, Gillette, Wyoming, appearing pro se, for Respondent.

Before: Judge Morris

This case involves a discrimination complaint filed by the Secretary of Labor on behalf of Anita Denice Samuelson against Clean Rite Services, Inc. ("Clean Rite"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (the "Act").

A hearing was held in Gillette, Wyoming, on August 3, 1993.

The parties submitted their views in oral arguments.

The Secretary of Labor, as representative of the Mine Safety and Health Administration ("MSHA"), alleges Complainant Anita Denice Samuelson was employed as a janitor by Clean Rite at a surface mine and therefore was a "miner," as defined by Section 3(g) of the Act.

The Secretary further charges Clean Rite violated Section 115(b) of the Act in failing to reimburse Complainant for exercising her statutory rights under the Act. Further, the

Secretary charges Respondent thereby violated Section 105(c) of the Act.

The Secretary also seeks a civil penalty against Clean Rite for the violations.

Section 105(c)(1) of the Act provides:

> "(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

The credible evidence establishes the following:

FINDINGS OF FACT

1. ANITA DENICE SAMUELSON began working for Clean Rite as a janitor on June 23, 1991. She worked until July 16, 1991 earning $5.75 an hour. (Tr. 9-10, 23).

2. Ms. Samuelson worked at the Caballo Mine operated by the Carter Mining Company in Gillette, Wyoming. (Tr. 10).

3. In order to work at the mine, she had to take the MSHA class. She took the training after she started to work. (Tr. 10-11, 20).

4. The training took two days. She had two 10-hour training classes. (Tr. 11).

5. Ms. Samuelson was not paid by Clean Rite for the time spent in MSHA training. (Tr. 12, 15).

6. Ms. Samuelson had been hired by Mr. Van Tassel, president of Clean Rite. Her duties included cleaning at a surface coal mine eight to ten hours a day for five or six days a week. (Tr. 14).

7. She worked at the Caballo Mine before receiving required training for 20 hours. (Tr. 14).

8. A part of her training included a tour of the mine. She had no prior training or experience as a miner before starting work with Clean Rite. (Tr. 14, 16).

9. The place where she was trained was three or four miles from her home. (Tr. 15).

10. Mr. Van Tassel (Clean Rite) loaned the money to Ms. Samuelson as an advance to attend the MSHA class. Ms. Samuelson later repaid him for this advance. (Tr. 17).

11. DALE HOLLOPETER investigated this case for MSHA. (Tr. 19).

12. In MSHA's opinion Ms. Samuelson was subject to the provisions of Section 105(c) of the Act. (Tr. 20).

13. She is also required to have 24 hours of new miner training. (Tr. 21).

14. Ms. Samuelson did not receive the cost of the training. Other employees also stated they had not been paid by Clean Rite. (Tr. 21, 22).

15. Ms. Samuelson was entitled to $50 for the cost of the training. In addition, she was entitled to be paid for the 20 hours for classroom work. (Tr. 22, 23).

16. ALLEN VAN TASSEL testified that Clean Rite is in Chapter 7 bankruptcy. (Tr. 30).

17. When Ms. Samuelson worked for him, Clean Rite had a contract with the Caballo Mine to provide cleaning services to Carter Mine Company. (Tr. 36).

18. Clean Rite employees worked on the surface of this open-pit mine. Clean Rite also had an MSHA contractor I.D. number at the time. (Tr. 36).

DISCUSSION AND FURTHER FINDINGS

The evidence is uncontroverted that Ms. Samuelson was employed by Clean Rite to work in a surface coal mine. She had no prior mining experience and, after being employed, she was sub-

ject to the statutory right provided by Section 115(a) of the Act. The failure of Clean Rite to fulfill its obligations under Section 115(a) constituted a violation of Section 105(c) of the Act, since her activities were protected under the Mine Act.

In Emery Mining Corporation v. Secretary of Labor et al., 783 F.2d 155 (10th Cir. 1986) and Brock v. Peabody Coal Company, et al., 822 F.2d 1134 (D.C. Cir. 1987) the respective appellate courts held that certain unemployed miners were not "miners" within the meaning of the Act. However, the case at bar is factually different since Ms. Samuelson was working as an employee and technically was a "miner" when the discrimination occurred.

It follows that the Commission has jurisdiction over these matters and Ms. Samuelson was a "miner" within the meaning of the Act. It is, accordingly, appropriate to consider Complainant's damages.

Under Section 115(a)(2) (Footnote 1) Ms. Samuelson, as a new miner with no surface experience, is entitled to 24 house of training.

The record indicates she received 20 hours. Under Section 115(b) she is also entitled to her normal rate of compensation of $5.75 per hour or a total of $115.00.

In addition, under Section 115(b), (Footnote 2) she is entitled to be compensated for the additional costs she incurred in attending

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1 (2) New miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, hazard recognition, emergency proce- dures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;

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2 (b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the addi- tional costs they may incur in attending such training sessions.

such training sessions. On this record these additional costs include tuition for training and mileage cost.

Ms. Samuelson testified the school tuition was $150 but I credit the testimony of Messrs. Hallopeter and Van Tassell that the tuition was $50. These last two witnesses are more knowledgeable than Ms. Samuelson as to the school tuition since they frequently deal with these issues.

Additional costs include mileage from home to school and return. Two days at six miles per day involved a total of 12 miles. The mileage reimbursement to government employees at the time of this incident was 24 cents per mile or a total mileage reimbursement of $2.88.

Ms. Samuelson further seeks damages for an additional 14 hours because she was unable to work in certain portions of the mine because she had not secured her MSHA training. However, the evidence does not support Ms. Samuelson's claim as to these 14 hours. Ms. Samuelson agrees she didn't miss any hours of work because she didn't receive her mine tour in time or because of the training. (Tr. 27). In fact, she worked anyway, even though she wasn't qualified to enter certain areas of the mine. (Tr. 27). Further, she didn't recall any time when she wasn't able to work the full shift because she was not properly trained. (Tr. 28). In short, Ms. Samuelson failed to prove the 14-hour loss.

Ms. Samuelson's total damages are as follows:

Twenty hours at $5.75 or	$115.00
School tuition	50.00
Mileage at $0.24 a mile	2.88
	$167.88

Under Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988) the Commission directed that in discrimina- tion cases it would use the short-term Federal rate applicable to the underpayment of taxes as the rate for calculating interest for periods commencing after December 31, 1986.

I further conclude that the training expenses should have been paid a week after Ms. Samuelson began to work for Clean Rite. Accordingly, interest should begin to accrue from June 30, 1991. The interest on $167.88 from June 30, 1991, to the date of this decision (October 22, 1993) is $31.85. Accordingly, the total damages incurred by Complainant are $199.73.

CIVIL PENALTY

The Secretary also seeks a civil penalty against Clean Rite for violating the Mine Act.

The statutory criteria for assessing civil penalties are contained in Section 110(b) of the Act.

Considering the criteria, I note that the record shows Clean Rite is in bankruptcy proceedings. Since the operator is no longer in business, the assessment of a penalty will not affect its ability to continue in business.

There is evidence Clean Rite failed to pay other employees for MSHA training. As a result, its prior history must be con- sidered as adverse. Clean Rite was negligent since training courses are available from a local college. Mr. Van Tassel as-serts the difficulty here lies with the inability of his com- pany to secure competent workers. Basically, the workers are hired, take the training, and quit. I can understand Ms. Van Tassel's position; however, his suggestion that workers be hired and permitted to work for a period of time before training is required has not been adopted. It may not be adopted since such employees would be exposed to mining hazards without having had any training.

The gravity is high since the employee was working in a mine without prior training.

Prompt abatement was not an issue in this case.

Based on the statutory criteria, I conclude that a civil penalty of $250 is appropriate.

For the foregoing reasons I enter the following:

ORDER

1. The petition for discrimination herein is AFFIRMED.

2. Complainant Samuelson is awarded the total amount of $199.73 to be paid by Respondent.

3. A civil penalty of $250 is ASSESSED against Respondent.

John J. Morris
Administrative Law Judge

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