

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268
July 16, 1996

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 95-122-DM
on behalf of :
DAVID HOPKINS, : Sweetwater Mine
Complainant :
 : Mine I.D. 23-00458
v. :
 :
ASARCO, INCORPORATED, :
Respondent :

SUPPLEMENTAL DECISION AND FINAL ORDER

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado, for
the Secretary of Labor and David Hopkins;
Henry Chajet, Esq., and M. Shane Edgington, Esq.,
Patton and Boggs, Washington, D.C., and Denver,
Colorado, for Asarco, Inc.

Before: Judge Manning

This proceeding was brought by the Secretary of Labor on behalf of David Hopkins against Asarco, Inc. ("Asarco") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988)("Mine Act"). In a decision entered March 4, 1996, I found that Mr. Hopkins' discharge violated section 105(c) of the Mine Act. 18 FMSHRC 317 (March 1996). In the decision, I ordered the parties to confer for the purpose of reaching an agreement as to the appropriate amount of back pay and other reasonable, related economic losses. The parties were unable to agree on any of these matters. Each party submitted a written proposal setting forth its position on these issues. The proposals were somewhat ambiguous and, during a conference call, I asked the parties to file supplemental proposals on or before July 1, 1996. The Secretary filed a supplement but Asarco elected not to do so.

I. FINDINGS AND CONCLUSIONS

A. Back Pay

The Secretary states that Mr. Hopkins was unemployed for four months before he obtained another full time job. Asarco did not dispute this fact. His gross pay per week at Asarco was \$568.00. This amount was often increased by a shift differential and overtime. Including shift differentials and overtime, Hopkins' gross pay was \$10,470 during the four months preceding his discharge, May through August 1994. Accordingly, I find that he would have earned this amount during the four month period that he was unemployed. The total amount of gross back pay due Mr. Hopkins is **\$10,470.00**. Asarco shall withhold appropriate, lawful payroll deductions for Social Security, federal income taxes, medicare taxes, and state income taxes.

B. Bonus Pay

The Secretary states that Mr. Hopkins is entitled to bonus pay of \$1,750.00 because that is the amount the Secretary claims he received during the four months preceding his discharge. Asarco contends that he is not entitled to bonus pay, but states that he received an average bonus of \$288.00 per month during the four months preceding his discharge for a total of \$1,150.00. My examination of the payroll records reveals that Hopkins received \$1,396.00 in gross bonus pay during the four months prior to his charge. Accordingly, I find that Mr. Hopkins is entitled to bonus pay of **\$1,396.00**. Asarco shall withhold appropriate, lawful payroll deductions for Social Security, federal income taxes, medicare taxes, and state income taxes.

C. Vacation Pay

The Secretary states that Mr. Hopkins is entitled to four weeks of vacation pay, two weeks for 1994 and two weeks for 1995. The Secretary states that the total gross amount due is \$2,615.50. Asarco states that Mr. Hopkins is not entitled to any vacation pay because he could not have earned a year's vacation pay in the four months that he was unemployed. I find that Mr. Hopkins is entitled to two weeks vacation pay. Section 105(c) of

This figure is \$8.00 higher than that calculated by the Secretary due to differences in rounding techniques. The Secretary submitted Mr. Hopkins' payroll records for this period. All of my calculations in this case are based on these records and Mr. Hopkins' 1994 federal tax return. All of my calculations are shown on a worksheet that I hereby make a part of the official record in this case. I am sending a copy of this worksheet to the parties but I am not attaching it to this decision.

the Mine Act was designed, in part, "to put an employee into the financial position he would have been in but for the discrimination." Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982). Vacation pay may constitute a part of a back pay award. Northern Coal Co., 4 FMSHRC 126, 142-43 (February 1982). Accordingly, I find that he is entitled to two weeks vacation pay in the amount of **\$1,136.00**. Asarco shall withhold appropriate, lawful payroll deductions for Social Security, federal income taxes, medicare taxes, and state income taxes.

I find that he is not entitled to two weeks of vacation pay for calendar year 1995, however. The Secretary argues that he lost 1995 vacation time because his new employer would not allow him to take a two-week vacation in 1995. Mr. Hopkins was discharged in September 1994. I believe that the Secretary's request for 1995 vacation pay is misplaced. He had not accrued such leave at the time of his discharge and Asarco cannot be held responsible for the vacation leave policies of Hopkins' new employer.

D. Miscellaneous Expenses

The Secretary contends that Mr. Hopkins is entitled to **\$247.00** for miscellaneous expenses related to the prosecution of this proceeding and looking for a new job. Reimbursement of hearing expenses and other similar expenses "is an appropriate form of remedial relief." Northern Coal, 4 FMSHRC at 144. Accordingly, this request is granted.

The Secretary also requests that Mr. Hopkins be reimbursed for the pay he lost to attend his deposition and the hearing in this matter. Asarco contends that it should not be responsible for any compensation Mr. Hopkins may have lost as a result of attending his deposition or hearing. I disagree. I hold that he is entitled to **\$973.00** for this item, which the Secretary represents is the pay he lost for attending his deposition and the hearing. Asarco did not dispute this amount.

E. Interim Earnings

Mr. Hopkins obtained temporary employment before he started working for his current employer. According to his 1994 federal tax return, his gross earnings were \$2,510.00. This amount is to be subtracted from the back pay due.

F. Interest

Mr. Hopkins is entitled to interest on his back pay award. The Secretary asks for \$2,011.06 in interest. The Secretary used

gross back pay and gross bonus pay when making the interest calculation. In addition, the Secretary did not follow the formula for calculating interest that the Commission established in Arkansas-Carbona Co., 5 FMSHRC 2042, 2051-53 (December 1983) and modified in Clinchfield Coal Co., 10 FMSHRC 1493, 1504-06 (November 1988). I find that the interest calculation should be based on his net pay not his gross pay. It is not possible for me to determine exactly what his net pay will be since the parties were unable to agree on the amount of net back pay that Mr. Hopkins is due. Accordingly, I have calculated the interest based on Mr. Hopkins net pay during the four months preceding his termination based on my examination of the payroll records. Mr. Hopkins' net bonus pay is also included in the calculations. I calculated the interest using the method established by the Commission in the cases set forth above. My calculations are set forth on the worksheet. The total interest owed through July 31, 1996 is **\$1,040.00.**

G. Total Amount of Back Pay, Interest, and Expenses

1. Back pay = \$10,470.00 minus payroll deductions.
2. Bonus pay = \$1,396.00 minus payroll deductions.
3. Vacation pay = \$1,136.00 minus payroll deductions.
4. Miscellaneous expenses = \$1,220.
5. Interest through 7/31/96 = \$1,040.00.
6. Interim earnings of \$2,510.00 shall be subtracted from the amount due.

H. Reinstatement

At the hearing Mr. Hopkins was asked whether he would want to go back to work at the Sweetwater Mine if reinstatement was ordered. He replied: "I can't answer for sure. Quite possibly, I would go back." (Tr. 909). In my decision of March 4, 1996, I asked the parties to stipulate to the position and salary to which Mr. Hopkins should be reinstated, if he seeks reinstatement. 18 FMSHRC at 335. The parties did not reach an agreement.

In the Secretary's submission, counsel for the Secretary states that "Mr. Hopkins seeks reinstatement to his former position with ASARCO, including any pay raises, seniority, or other benefits that he would have received had his employment continued." (Secretary's Response to ALJ's Order at 1).

The time has come for Mr. Hopkins to determine whether he wants to be reinstated. He cannot wait to see whether his prospects are better with his present employer or with Asarco. If Mr. Hopkins wishes to be reinstated, he must notify the appropriate officials at Asarco's Sweetwater Mine as soon as possible, but no later than **August 16, 1996**. If Mr. Hopkins fails to provide such notification on or before August 16, 1996, he waives all rights to reinstatement.

I. Civil Penalty

The Secretary seeks a civil penalty of \$5,000.00. Asarco contends that the proposed penalty is excessive "in light of the good faith demonstrated by ASARCO here and the lack of a prior history of discrimination claims at the Sweetwater Mine." (Asarco's Reply at 3). Based on the record in this case and the penalty criteria at section 110(i) of the Mine Act I find that a civil penalty of \$800.00 is appropriate. The Sweetwater Mine has a history of 49 violations in the two years preceding Hopkins' discharge. It does not have a history of any violations of section 105(c) of the Mine Act. The mine produces about 1.3 millions tons a year and employs about 90 hourly workers and 9 salaried employees underground. (Tr. 774). Asarco is a large operator. The penalty is appropriate for the size of the business and will not affect its ability to stay in business.

In my decision on the merits, I made the following findings:

Asarco was diligent in attempting to discover why Hopkins was concerned about the high scaler. I credit Asarco's evidence that the Sweetwater Mine encourages miners to raise safety complaints and that management attempts to address these safety concerns. Indeed, the mine has never had a discrimination claim under the Mine Act prior to this case. In the particular facts of this case, however, I find that [mine management] did not address Hopkins' safety concerns "in a way that his fears reasonably should have been quelled."

18 FMSHRC at 326-27 (citation omitted). I find that Asarco's negligence was low and that the gravity of the violation was low. Based on the record, I also find that Asarco's discharge of Mr. Hopkins will not have a significant chilling effect on miners who wish to exercise their rights under the Mine Act at the Sweetwater Mine. See, Secretary on behalf of Johnson v. Jim Walter

Resources, Inc., 18 FMSHRC 552, 557-59 (April 1996). Several other miners did not consider the high scaler to be unsafe and were willing to operate it. Under the facts of this case, it is unlikely that miners will be reluctant to refuse to work in the face of hazardous conditions or reluctant to raise safety issues because of Mr. Hopkins' termination.

The good faith criterion is difficult to apply in the context of this case. Section 110(i) defines the criterion as "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation." A mine operator must abate a condition described in a citation or order issued under section 104 of the Mine Act whether or not he believes that the condition constitutes a violation. Thus, good faith is concerned with how quickly and seriously a mine operator tries to abate a condition after the citation is issued. In a discrimination case, there is no obligation on a mine operator to reinstate a discharged miner simply because the Secretary has brought an action under 105(c). In this case, the Secretary did not seek to have Mr. Hopkins temporarily reinstated. Thus, Asarco was not required to rapidly comply with the alleged violation. Nothing in the record convinces me that Asarco's contest of the discrimination complaint was frivolous or was filed in bad faith. Rather, Asarco believed, in good faith, that its discharge of Mr. Hopkins did not violate section 105(c) of the Mine Act. As stated above, Asarco was diligent in attempting to discover why Hopkins was concerned about the high scaler. Accordingly, I find that Asarco demonstrated good faith.

II. ORDER

A. On or before August 16, 1996, Respondent shall pay David Hopkins back pay, interest, and miscellaneous expenses to be computed in accordance with this decision, as summarized in section I.G., above. Respondent shall also make payments to the appropriate federal and state tax agencies of the withholdings specified above.

B. On or before August 16, 1996, David Hopkins shall notify appropriate officials of the Sweetwater Mine whether he wants to be reinstated to his former position at the mine. If reinstatement is sought, Respondent shall reinstate David Hopkins to the same seniority, pay, status, benefits, and job conditions that would apply to his employment had he not been discharged.

C. Respondent shall expunge from David Hopkins' personnel records all references to its discharge of him as a result of the events of September 8, 1994.

D. Respondent is ordered to pay a civil penalty of \$800.00 for the violation of section 105(c) of the Mine Act.

E. My decision of March 4, 1996, and this supplemental decision and order shall constitute my final disposition of this proceeding.

Richard W. Manning
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350 (Certified Mail)

M. Shane Edgington, Esq., PATTON BOGGS, 1660 Lincoln Street, Suite 1975, Denver, CO 80264 (Certified Mail)

RWM