

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

February 19, 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 97-257-D
on behalf of RONALD MAXEY,	:	BARB CD 97-07
Complainant	:	
v.	:	
	:	Mine No. 68
LEECO, INCORPORATED,	:	Mine ID No. 15-17497
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Inc., Lexington, Kentucky, on behalf of Ronald Maxey;
Marco Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, on behalf of Leeco, Incorporated.

Before: Judge Melick

On January 15, 1998, a decision was issued in this matter finding that Ronald Maxey was discharged by the Respondent, Leeco, Inc., in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et. seq.*, the "Act." In that decision the Secretary was directed to file a brief addressing each of the criteria set forth under Section 110(i) of the Act in support of her proposed civil penalty of \$20,000.00. In addition, the parties were directed to confer with respect to relevant costs and damages.

Section 110(i) of the Act provides that in assessing a civil penalty "the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." It has been stipulated that the operator herein is large in size. No evidence has been submitted to show the effect of the proposed penalty on the operator's ability to continue in business but it has been stipulated that a "reasonable penalty" would not affect the operator's ability to continue in business. The Secretary observes that the history of violations at the subject mine for the two years prior to February 10, 1997, consists of 87 violations with a payment of \$20,017.00 in civil penalties. The Secretary also observes that the operator was charged with

violating Section 105(c) of the Act on June 26, 1996, and for which the Secretary proposed a penalty of \$8,000.00 was paid in full. The Secretary notes that the violation herein was committed against Mr. Maxey only eight months later.

In the decision in this case issued January 15, 1998, it was determined that Respondent intentionally discharged Maxey on February 11, for making safety complaints to MSHA and for causing inspections to be conducted on February 7 and 9, resulting in several citations and notices-to-provide-safeguards. It was also found in that decision that Respondent had created a fictional account of its discharge of Maxey in an attempt to cover up its unlawful discharge of him. Under these circumstances, it is clear that Maxey's discharge was the result of willful and intentional conduct and not merely negligence.

With the respect to the issue of gravity the Secretary argues in her brief as follows:

With regard to the gravity of the violation, the Secretary equates the injury suffered by Maxey to a serious injury received in a mining accident. Maxey simply exercised his right under the Act to report safety violations at Leeco's No. 68 mine to MSHA. In return for exercising his legal right, he was discharged, humiliated, forced to seek work elsewhere, suffered through appeals of his unemployment compensation claims, and has had to endure countless hours of deposition and trial testimony. He was a member of a small community who had to endure the embarrassment and humiliation of being wrongfully discharged from his position from February 1997 and is only now being recognized as the victim of an operator who has been shown to have little regard for the safety of its employees. While Maxey was out looking for work and wondering how he was going to meet his monthly financial obligations, Amon Tracey, Everett Kelly and Talmadge Moseley continued to draw their salary from Leeco, even though it was their decision to disregard the law that caused Maxey to lose his job in the first place.

While I do not necessarily agree with the Secretary's contentions and I note that some of her arguments may be based upon matters beyond the record herein, I nevertheless conclude that the violation was serious. It may reasonably be inferred that the actions against Mr. Maxey would have had a grave impact on those miners contemplating the reporting of health and safety hazards.

Finally, the Secretary argues that Respondent showed lack of good faith in attempting to achieve rapid compliance after being notified of the violation herein. She notes that when confronted with the Secretary's complaint of violating Section 105(c), rather than reinstate Maxey, Respondent conspired to create a fictional account to avoid responsibility for his unlawful discharge. The Secretary's position is correct on this issue and under all the circumstances, I find that a civil penalty of \$20,000.00 is appropriate. In reaching this conclusion I have not disregarded the arguments in Respondent's brief. I do not, however, find those arguments to be persuasive.

ORDER

Respondent Leeco, Inc., is hereby directed to pay a civil penalty of \$20,000.00, within 30 days of the date of this decision. The Respondent is further directed to permanently reinstate the Complainant, Ronald Maxey, and to pay to Mr. Maxey damages of \$16,037.26, plus interest to the date of payment, within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Mary Beth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Tony Opegard, Esq., Mine Safety Project of the ARDF of Kentucky, Inc., 630 Maxwellton Court, Lexington, KY 40508 (Certified Mail)

Marco M. Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, 1700 Lexington Financial Center, 250 West Main Street, Lexington, KY 40507 (Certified Mail)

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