FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 31, 1997

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-704-D
ON BEHALF OF KENNETH H.	:	
HANNAH, PHILIP J. PAYNE	:	
AND FLOYD MEZO,	:	MSHA Case No. VINC CD 94-07
Complainants	:	Rend Lake Mine
v.	:	I.D. No. 11-00601
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor,
U.S. Dept. of Labor, Chicago, Illinois, for the
Complainants;
Elizabeth Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the
Respondent;
David J. Hardy, Esq., Jackson and Kelly, Charleston, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me upon remand by the Commission on December 10, 1997, for the specific and limited purpose of the "computation of a backpay award and assessment of a civil penalty" against the Consolidation Coal Company (Consol).[1] Following remand, the Secretary, by proposed Amended Complaint, requested a single civil penalty of $3,000 for the three violations of Section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," found by the Commission.[2] Consol has objected to the proposed amendment. I find that, in any event, there is no need for any amendment of the complaint in order to properly dispose of the issues on remand.

[1] The parties had previously agreed to the amount of backpay and interest and those amounts were incorporated in a Partial Decision issued February 5, 1997. At oral argument held February 27, 1997, it was disclosed that Consol had not yet actually made these payments. Accordingly an Order addressing continuing interest charges accompanies this decision.

[2] The Commission found that each of the three Complainants was suspended in violation

First, I find that Consol waived any objection to the Secretary=s non-compliance with Commission Rule 44(a) by its failure to have filed a timely objection at the initial hearings.[3] Since the Commission has specifically directed the undersigned to assess a civil penalty, *de novo*, the Secretary=s motion to amend and proposed amendment is, for this additional reason, unnecessary and the issue is accordingly moot. In issuing its specific remand order it may be presumed that the Commission, too, found that the Secretary=s non-compliance with Rule 44(a) had been waived by Consol.

Section 110(i) provides in part as follows:

> In assessing civil monetary penalties, 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 violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

At oral argument held by teleconference on

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of the Act. In accordance with Section 110(a) of the Act a civil penalty must therefore be assessed for each of the three violations. The Secretary=s position at oral argument, that only one violation occurred and only one civil penalty should be assessed, is inconsistent with this statutory mandate.

[3] Commission Rule 44(a) provides as follows:

A discrimination complaint filed by the Secretary shall propose a civil penalty of a specific amount for the alleged violation of Section 105(c) of the Act, 30 U.S.C. 815(c). The petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in Section 110(i) of the Act. 30 U.S.C. 820(i).

February 27, 1997, the Secretary acknowledged that there is no record evidence as to four of the six criteria.[4] Accordingly, the penalty in this case must necessarily be based upon the only two criteria for which there is record evidence, i.e. whether the operator was negligent and the gravity of the violations. In regard to the former issue, the Secretary acknowledges that Consol=s actions were not egregious and that it was only "moderately negligent" (Oral Argument Tr. 6,27). The Secretary nevertheless maintains that a moderate level of negligence is appropriate because Consol administered an excessive degree of punishment to the three complainants who, she maintains, were "good workers" (Oral Argument Tr. 8,13.) The Secretary also acknowledged however that employees refusing to comply with lawful work orders may appropriately be suspended or dismissed and, presumably, such discipline would therefore not be excessive.

In this case I find that the operator acted in good faith in disciplining the Complainants for what it perceived in a good faith and reasonable belief to have been an unprotected work refusal. In addition no clear legal precedent governed the precise facts and Consol=s position in this regard was upheld by the decisions of the arbitrator and administrative law judge. At worst, Consol=s decision may be considered as an error in judgment as to whether the Complainants continued to entertain a reasonable and good faith belief in the claimed hazardous condition. Moreover Consol made its decision only after it was confirmed by the State inspector that such condition was not in violation of State law nor hazardous and only after this information was communicated to the Complainants.

It should also be noted in considering the operator=s good faith and reasonableness that Consol officials along with some of the mine examiners themselves had, several weeks before this incident, been advised by the same State inspector that this same practice/condition was neither in violation of State law nor hazardous. Finally, the record shows that Consol officials, most notably Mr. Moore, were prudent and cautious in attempting to allay the Complainant=s fears. It appears that Consol=s shortcoming was its decision not to insist that the State inspector come to the mine site in person (even though he was available to communicate with the Complainants by telephone).

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[4] Namely, the operator=s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, the effect on the operator=s ability to continue in business and the demonstrated good faith in attempting to achieve rapid compliance after notification of a violation.

The Secretary also maintains that the alleged hazard underlying the work refusals appears to have been a violation of federal regulations governing ventilation plans. However the question of whether the alleged hazard, which was not a violation of Illinois law, was a violation of any federal regulation was not an issue litigated in this case. Moreover there is no basis from the record in this case to conclude that any federal regulation had been violated and accordingly no inference of operator negligence can properly be drawn as here suggested by the Secretary.

Finally, the Secretary maintains that operator negligence may be determined from the fact that the Commission has found that the miners exercised a reasonable good faith belief in refusing to work in the face of what they perceived to be hazardous conditions. While negligence may be inferred if clear legal precedent governed the precise factual situation presented thereby leading to the inference that Consol officials should have known that the disciplinary action they were taking was in violation of Section 105(c) of the Act, such was not the case herein. Consol=s decision was clearly a close judgment call. It cannot therefore be inferred that Consol should have known that in disciplining the Complainants it was in violation of Section 105(c) of the Act. Under the circumstances I find that Consol is chargeable with but little negligence for the violations of Section 105(c) found by the Commission.

The Secretary further argues that the gravity of the violations was high in that these acts of discrimination would have a chilling effect on the future exercise by miners of their rights to refuse work and to report unsafe or unhealthful conditions. A Commission majority in *Secretary v. Tanglewood Energy, Inc.*, 18 FMSHRC 1320 at 1320-7321 (August 1996), recently held that determinations of whether a chilling effect resulted from a Section 105(c) violation should not be presumed but rather should be made on a case-by-case basis considering both objective and subjective evidence. In this case the Secretary has cited no evidence that could support such a finding. In searching the record I, likewise, find no objective or subjective evidence of a chilling effect. The Secretary has failed to sustain her burden of proving her allegations of high gravity.

Under the circumstances I find that a civil penalty of $10 is appropriate for each of the three violations found by the Commission.

The Secretary has additionally requested an order directing that a certain notice be posted at the subject mine and the expungement of Complainants= "employment records of any and all references to the discipline issued . . . including, but not limited to, records pertaining to the arbitration action and the
Section 105(c) action brought pursuant to the Mine Act". These requests are clearly beyond the scope of the Commission=s specific remand order and I am therefore without jurisdiction to rule on them. I note, however, that both requests are for appropriate remedies customarily granted in cases such as this and upon subsequent remand I would grant the requests. The Complainants= employment records should be expunged of references to discipline issued as a result of actions found protected under the Act. This would clearly include the decision of the arbitrator (Operator=s Exhibit No. 1) which was based upon the same "work refusal" which is also the basis for the instant cases. I would therefore assume the parties would reach agreement on these issues without the need for further Commission intervention.

ORDER

Consolidation Coal Company is directed to pay: (1) civil penalties totaling $30 to the Secretary of Labor within 30 days of the date of this decision and (2) the agreed upon back pay to each of the Complainants plus interest to the date of actual payment.

Gary Melick
Administrative Law Judge

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