

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

November 22, 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. PENN 95-1-D  
on behalf of : MSHA Case WILK CD 94-01  
WILLIAM KACZMARCZYK, :  
Complainant : Ellangowan Refuse Bank  
:  
READING ANTHRACITE COMPANY, :  
Respondent :

v.

## DECISION ON DAMAGES; ASSESSMENT OF CIVIL PENALTY

Appearances: Stephen D. Turow, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Complainant;  
Martin J. Cerullo, Esq., Cerullo, Datte &  
Wallbillich, P.C., Pottsville, Pennsylvania,  
for Respondent.

Before: Judge Amchan

### Background

On October 15, 1993, Complainant, William Kaczmarczyk, was transferred from a light duty position at Respondent's mine to workers compensation status. He filed a complaint with the U.S. Department of Labor alleging that this action was taken in retaliation for his activities as a walkaround representative during an MSHA inspection that was completed on October 14, 1993.

The Secretary of Labor filed a complaint with the Commission on Mr. Kaczmarczyk's behalf and an application for his temporary reinstatement to his light duty position. After a hearing on the application I found the complaint ~~not~~ frivolous and ordered Complainant temporarily reinstated on September 12, 1994.

On May 24, 1995, after a second hearing, I found that Complainant's transfer to light duty violated '105(c) of the Act. One month before that decision the Secretary filed a motion to enforce the temporary reinstatement order, alleging that Respondent had ~~A~~constructively suspended Complainant by repeatedly pressuring him to do tasks that were beyond his physical limitations between April 17, and 20, 1995<sup>1</sup>. After a third hearing, I ruled on June 21, 1995, that Respondent had violated the terms of the order, but that it had not ~~A~~constructively suspended Mr. Kaczmarczyk.

The May 24, 1995 decision on liability directed the parties to inform me within thirty days whether they could stipulate as to the amount of damages and an appropriate civil penalty. After an enlargement of that period, the parties advised that they could not reach agreement on these issues. Thereafter a fourth hearing was held on September 28, 1995, on the issue of damages. That hearing primarily concerned Mr. Kaczmarczyk's claim that he was unable to refinance his mortgage loan due to the discriminatory transfer to workers compensation. However, in its post-hearing brief, Complainant and the Secretary withdrew their claim in this regard.

#### Stipulated Damages

The parties have stipulated that Mr. Kaczmarczyk is entitled to the following amounts to compensate for economic loss suffered as the result of his discriminatory transfer:

Lost Compensation and Benefits, Lost Overtime and Workers= Compensation Payments: \$4,342.42 (Jt. Exh. DH-1 & DH-1A)<sup>2</sup>.

Interest: \$600 (Letter of Secretary's counsel dated November 13, 1995).

---

<sup>1</sup>The temporary reinstatement order stated that Respondent could not require Complainant to perform tasks that he was incapable of doing.

<sup>2</sup>Respondent has agreed to reimburse the unemployment compensation fund for the \$14,539.00 paid to Mr. Kaczmarczyk.

### Disputed Amounts

The Secretary contends that Complainant is also entitled to interest on the amount of unemployment compensation benefits received. I reiterate the holding of my order of August 16, 1995, that Mr. Kaczmarczyk is not entitled to such payments since he had the use of these funds while he was on workers compensation.

Complainant seeks \$156.00 for travel expenses incurred as the result of his search for alternative employment while he was on workers compensation. Respondent contends it should be required to reimburse him for \$87, because those expenses incurred in trips not required by its compensation carrier should be excluded.

I conclude that Complainant is entitled to the \$156 claimed because he would not have taken these trips but for the discriminatory transfer. Moreover, I believe Mr. Kaczmarczyk was not acting unreasonably in going beyond what was required of him in seeking alternative employment.

### Assessment of A Civil Penalty

The Secretary seeks assessment of an \$8,000 civil penalty for Respondent's violation of '105(c). However, the Commission assesses penalties without regard to the Secretary's proposal in accordance with six factors specified in section 110(i) of the Act. I assess a penalty of \$2,000.

The parties have stipulated with regard to three of the six statutory factors. They have agreed that MSHA properly considered Respondent's size and previous history of violations in proposing an \$8,000 penalty. The parties also stipulated that such a penalty would not affect Reading Anthracite's ability to stay in business. My assessment of the other three factors is as follows:

Gravity of the Violation: As Respondent points out, Mr. Kaczmarczyk suffered a rather modest economic loss as the result of his transfer on October 15, 1993. Indeed, much of

the money due him is for additional workers compensation benefits that he should have been paid even if the transfer had not occurred or had not been discriminatory.

Nevertheless, a section 105(c) violation is a serious matter, even if the economic loss to the miner is small. Such violations, if not discouraged, inhibit miners from exercising their rights under the Act, and are likely to adversely affect safety.

Ironically, the civil penalty may be somewhat more important in deterring violations of section 105(c) in cases where the economic loss to the miner is small than it is in cases where the loss is large. A large backpay award is itself a powerful deterrent. Thus, the rather modest economic loss suffered by Mr. Kaczmarczyk cuts both ways in assessing an appropriate civil penalty.

In assessing a lower penalty than that proposed by the Secretary I am influenced in large part by my conclusion that the nexus between Complainant's protected activity and his transfer was far from overwhelming. I concluded that such a nexus existed largely due to statements made by Safety Director David Wolfe during and after the October 1993 MSHA inspection. Complainant served as a walkaround representative. However, as previously noted, nothing Mr. Kaczmarczyk did during this inspection would suggest a reason for retaliation. There appears to be a considerable degree of animus towards Mr. Kaczmarczyk that may arise from other issues with management.

Negligence: Respondent did not accidentally transfer Mr. Kaczmarczyk to workers compensation, it did so intentionally.

Nevertheless, there is little in the record to suggest that Respondent intended to discourage Complainant, or other miners, from exercising their rights under the Act. Mr. Wolfe's statement that citations issued to Respondent were ~~A~~another reason~~@~~ for the transfer was made in the course of a heated exchange concerning other issues as well. I am not convinced that Wolfe sought to discourage the exercise of miners' rights under the Act.

Good Faith In Attempting to Achieve Rapid Compliance:  
Respondent did reinstate Complainant as ordered. However, over the course of four days in April 1995, Respondent repeatedly pressured him to do tasks beyond his physical limitations in contravention of the temporary reinstatement order.

On the other hand, Respondent believed, and I ultimately found, that Complainant was not justified in leaving work without permission on April 20, 1995, and staying home until May 1, 1995. Nevertheless, Respondent agreed to his reinstatement on May 1, 1995, without discipline. I believe this should be considered in assessing a civil penalty, as well as the violation of the temporary reinstatement order.

**ORDER**

Respondent is hereby ordered within thirty days of this decision to:

1. Pay to Mr. Kaczmarczyk the amount of damages specified herein;
2. Pay to the Secretary of Labor a \$2,000 civil penalty.

Arthur J. Amchan  
Administrative Law Judge

Distribution:

Stephen D. Turow, Esq., Office of the Solicitor,  
U.S. Department of Labor, 4015 Wilson Blvd., Suite 400,  
Arlington, VA 22203 (Certified Mail)

Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich,  
P.C., Second Street & Laurel Blvd., P.O. Box 450, Pottsville,  
PA 17901 (Certified Mail)

/lh