FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 15, 1997

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-357-D
ON BEHALF OF SAMUEL KNOTTS,	:	MORG CD 94-03
Complainant	:	
v.	:	Coalbank Fork No. 12
	:	Mine ID 46-07062
TANGLEWOOD ENERGY, INC.,	:	
FERN COVE, INC.,	:	
RANDY BURKE AND RANDALL KEY,	:	
Respondents	:	

REMAND DECISION

Before: Judge Koutras

Statement of the Case

This discrimination proceeding concerns a challenge by the respondents to decisions by former Commission Judge Roy J. Maurer. After an evidentiary hearing on the merits of the complaint, Judge Maurer issued his decision finding that the respondents terminated the complainant=s employment on January 28, 1994, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. 17 FMSHRC 1044 (June 1995). Subsequently, Judge Maurer issued his decision on damages. 17 FMSHRC 1667 (September 1995). He found the respondents jointly and severally liable for the payment of damages as follows:

a. Samuel Knotts is entitled to back pay in the total amount of $20,760 less $3640 which he received in state unemployment benefits, or $17,120 net back pay.

b. Samuel Knotts is entitled to costs of $508.

c. Samuel Knotts is entitled to interest on the above two awards in the amount of $1,762.80.

d. The Secretary of Labor is entitled to a civil penalty in the amount of $1000 for the violation of the Mine Act.

In assessing a civil penalty of $1,000, for the violation, Judge Maurer rejected the

Secretary=s proposal for a $25,000, penalty, finding that such an amount was Aclearly unwarranted@ for the following reasons (17 FMSHRC 1668):

> * * * * This was a relatively close Amixed-motives@ case where the complainant prevailed by the thinnest of margins. The record also indicates that the respondents herein are experiencing serious financial difficulties in the coal mining business including several hundred thousand dollars in unpaid civil penalties. These difficulties, combined with the back pay, costs, and interest being awarded to the complainant herein, lead me to conclude that $1000 is an appropriate civil penalty pursuant to the criteria contained in section 110(i) of the Act. I also believe that the total monetary award to the complainant in this case is itself a serious disincentive against future violations of the discrimination provisions of the Mine Act by these respondents.

The Secretary and the respondents appealed Judge Maurer=s decisions to the Commission. The respondents argued that no adverse action was taken against the complainant, and that any individual liability may only be based on section 110(c) of the Act, which provides for civil penalties against corporate officers or agents for knowing violations. The respondents agreed with Judge Maurer=s penalty assessment of $1,000, and his deduction of unemployment compensation from the damages awarded the complainant.

The Secretary claimed that the question of individual liability is not an issue because it was not raised before the judge. The Secretary further contended that Judge Maurer failed to consider and properly apply the six statutory penalty criteria of section 110(i) of the Act when he assessed a $1,000 penalty for the violation, and that he improperly reduced the complainant=s backpay award by the amount of unemployment compensation he received.

On May 15, 1997, the Commission issued its decision and affirmed Judge Maurer=s finding that the corporate and individual respondents discriminated against the complainant in violation of section 105(c) of the Act. However, the Commission reversed the judge=s order deducting $3,640, in state unemployment benefits from the respondent=s back pay award. The Commission also vacated the judge=s civil penalty assessment of $1,000, on the ground that he only considered one of the six statutory penalty criteria found in section 110(i) of the Act, the operator=s ability to stay in business. The Commission remanded the matter for further consideration and findings of fact regarding the other five penalty criteria found in section 110(i) of the Act, and in view of Judge Maurer=s transfer to another agency, the matter was assigned to me for further adjudication. 19 FMSHRC 833 (May 1997).

In response to my order requiring the parties to discuss possible settlement or stipulations with respect to the Commission=s remand, the parties confirmed that they were unable to reach a settlement with respect to a mutually acceptable penalty assessment for the violation. However, the parties agreed that an additional hearing was not required and that the matter can be submitted for a decision on the existing record.

Discussion

In the decision below before Judge Maurer, the parties stipulated as follows at 17 FMSHRC 1044-45 (June 1995):

> 1. The subject mine was operated by Fern Cove, Inc., a successor in interest to Tanglewood Energy, Inc.
>
> 2. The assessed violation history report may be used in determining an appropriate civil penalty.
>
> 3. For purposes of the assessment of civil penalties the violation history of Tanglewood Energy, Inc. at the Coalbank Fork No. 12 Mine shall be considered to be the violation history of Fern Cove, Inc. and vice versa.
>
> 4. Fern Cove, Inc. and Tanglewood Energy, Inc. are jointly and severally liable for all civil penalties assessed against either by the Federal Mine Safety and Health Review Commission relative to the Coalbank Fork No. 12 Mine.

Judge Maurer found that Respondent Randy Burke is President of Fern Cove, Inc. and of TANGLEWOOD Energy, Inc. Respondent Randall Key is a part owner and officer of Fern Cove, Inc. and Vice-President of Tanglewood Energy, Inc. (17 FMSHRC 1047).

I have carefully reviewed and considered the entire record in this matter, including the posthearing arguments filed by the parties with respect to the merits of the case, as well as the remedial damages aspect of the case, when it was adjudicated by Judge Maurer. In accordance with the Commission=s remand instructions, my findings and conclusions with respect to the statutory penalty assessment criteria found in section 110(i) of the Act follow below.

History of Previous Violations

The Secretary submitted computer print-outs detailing the violation history for the No. 12 mine for the 24 month period immediately prior to the violation (January 28, 1992 through January 27, 1994), and for the 24 month period ending six months prior to the date of the violation here (July 28, 1991 through July 27, 1993). The Secretary states that this history shows 187 violations in 114 inspection days, and concludes that this is a relatively high number of violations.

The Secretary asserts that Arespondents egregious history of non-compliance@ is further shown by the fact that it paid only $572 of the $43,128, in penalties that were assessed for the aforementioned 24 month period. Further, the Secretary points out that the respondents have been sued by the United States to collect $281,664 in unpaid penalties that are the subject of final Commission orders. The Secretary concludes that this Ablatant disregard@ for the final orders of

the Commission justifies the penalty proposed in this matter.

Finally, the Secretary maintains that the most important element of the respondents= history of prior violations is that just two months prior to the violation in this case, the respondents were found to have discharged miner Perry Poddey for his protected activity of reporting safety violations. Secretary on behalf of Perry Poddey v. Tanglewood Energy, Inc., 15 FMSHRC 2401 (November 1993). The Secretary concludes that the respondents have Aa demonstrated record of illegally discharging employees who attempt to improve safety by reporting violations@.

The respondents do not dispute the accuracy of the listed past violations history. However, they point to particular Aproblems@ in explaining the 187 violations for Fern Cove during the period from January 28, 1992 through January 27, 1994. The respondents asserted that it would appear that there was a particular quarter in which a number of problems resulted in increased violations. The history prior to 1992 and in the first months of 1994 demonstrates that the mine has not had a consistent history of safety problems, although it appears that during 1993, especially from September through December, there were problems for a number of reasons, including financial problems and increased inspection scrutiny.

The respondents further argue that no record of any prior violation history has been submitted for the individual respondents. Further, with respect to Judge Amchan=s prior Poddey decision, the respondents conclude that it is apparent that the judge found that Tanglewood Energy, Inc., did not intend to violate the Act, although the termination of Poddey was safety related. Respondents contend that if the Poddey decision is considered as part of the history, it must be considered in its entirety.

I take note of the fact that prior to the Poddey case, there is no evidence of any past discrimination complaints filed against the respondents. Although I have taken this into consideration, I have also considered the overall general history for all past violations as noted in the record in this matter. See: Secretary ex rel Perry Poddey v. Tanglewood Energy, Inc., 18 FMSHRC 1315, 1322 (August 1996), and the cases cited therein.

For an operation of its size, I conclude and find that the respondent=s history of prior violations is not a good one, and I have taken this into consideration in the civil penalty assessed for the violation in this case. I reject the Secretary=s assertion that the failure by the respondents to pay prior final civil penalty assessment orders justifies its proposed penalty assessment of $25,000, for the violation in this case. See: Jim Walter Resources, Inc., 18 FMSHRC 841, 850 (June 1996), where the Commission held that the judge abused his discretion in basing his civil penalty assessment, in part, upon a mine operator=s delinquency in the payment of penalties. The Commission ruled that payment of past penalty assessments is not one of the six penalty assessment criteria set forth in section 110(i) of the Act. Further, I consider the past failure to pay penalties to be a debt collection matter best left to the Secretary and the Government. In this regard, I take note of Reich v. OSHRC, 102 F.3d 1203 (11th Cir. 1997), holding that the cessation

of business does not render civil penalty assessments for past violations moot.

The Commission has further ruled that although deterring future violations is an important purpose of civil penalties, and that deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria, deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered. See: Jim Walter Resources, 19 FMSHRC 498, 501 (March 1997).

With respect to the Secretary=s reliance on the prior Poddey case in support of its conclusion that it Arequires that a message be sent to these respondents and to others who would emulate them@, I take note of the fact that respondents Burke, Key, and Fern Cove. Inc., were not named as respondents in the Poddey case. Further, as discussed later in connection with the question of negligence, Judge Amchan rejected the Secretary=s proposed penalty assessment of $2,500 to $3,000, and assessed a penalty of $100, based on several mitigating circumstances, including a lack of intent by Tanglewood Energy, Inc. to discourage safety complaints or cooperation with MSHA and a lack of any prior retaliation or attempts to inhibit employees in exercising their rights.

In the Poddey case, the facts reflect that he was discharged for insubordinate conduct, including threatening his section foreman with bodily harm, and allegedly threatening to kill him after the discharge. Although Judge Amchan nonetheless found a violation, he did so after acknowledging the Adifficult and complicated@ issues presented, and his reinstatement order included an admonition to the complainant Poddey with respect to his future conduct. Under the circumstances, I do not view the Poddey case as a particularly aggravated or egregious example of discriminatory conduct on the part of the mine operator warranting any Aspecial message@, and I have given it little weight in assessing a penalty in this case.

I take note of the fact that on appeal of Judge Amchan=s Poddey decision, the Commission affirmed in result his finding of low negligence, affirmed his low gravity finding, reversed his deduction of unemployment compensation from Poddey=s backpay award, vacated his $100 civil penalty assessment, and remanded the case for assessment with further findings on the operator=s history of previous violations. 18 FMSHRC 1315 (August 1996). In vacating the $100 penalty assessment, the Commission took particular note of Judge Amchan=s Aterse finding@ that the mine operator had Aa relatively large number of previous violations@ and stated that this finding Adoes not provide the necessary foundation for our review of the appropriateness of the $100 penalty, which was a significant reduction of the $2,500 to $3,000 penalty proposed by the Secretary@. 18 FMSHRC 1322.

The remanded Poddey case was also assigned to me, and the parties subsequently settled the matter. They agreed that a $1,000 penalty assessment was appropriate given the Commission=s determinations concerning negligence, gravity, and the operator=s history of previous violations, and that the $4,000, unemployment compensation award received by Poddey should not be deducted from his backpay award. I approved the settlement and issued my

Remand Decision and Order on January 7, 1997. 19 FMSHRC 134 (January 1997).

Negligence

The Secretary maintains that there is no dispute in this case that the violation was intentional. In support of this conclusion, the Secretary notes Judge Maurer=s statement at 17 FMSHRC 1052 that AIt is stipulated in this record that the reason for the discharge was his (the complainant=s) conversation with Campbell@. The Secretary further states that the defense advanced by the respondents that the complainant=s discharge was based upon the length of the conversation not its content, and that it contained Agossip@ and other inflammatory language, was properly rejected as Aa feeble pretense.@ 17 FMSHRC 1053.

Although the respondents deny that the complainant was in fact fired for protected activity, they recognize that Judge Maurer found that they failed to meet the burden of proving that the discharge Awas also motivated by an unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone@. Respondents Key and Burke contend that they have consistently testified that the complainant was terminated because of the length of time which he spent talking, and that Key was disturbed by the slanderous nature of the complainant=s conversation, and would have terminated him regardless of any references to safety related questions such as morale. Under these circumstances, they conclude that the degree of negligence must be judged by the failure of Key to recognize that the complainant=s comments concerning morale and equipment were safety related and that such discussion was, therefore, protected activity. In other words, Key did not intend to violate the Act in failing to recognize that the safety related aspects of the conversation would make the conversation protected activity and the subsequent discharge of the complainant a violation under the Act. Likewise, Burke did not intend a violation of the Act in approving the discharge.

Respondent Burke concludes that the testimony is clear that Key made the decision to discharge the complainant, and that Burke=s approval of that decision was based on Key=s representation that the reason for the termination was that the complainant had not worked for a two-hour period while being paid by the company. Burke points out that he never heard the conversation between the complainant and Campbell.

The Secretary=s suggestion that the respondents stipulated that they discharged the complainant because of his conversation with mine engineer J. Randy Campbell is not totally accurate and is taken out of context. Stipulation No. 9, at pg. 1046, of Judge Maurer=s decision states as follows:

> Complainant Samuel Knotts was discharged because of respondents belief that he spoke with mine engineer J. Randy Campbell for over 2 hours on January 27, 1994.

In the absence of any additional Arecord@ support for Judge Maurer=s statement, I can only

conclude from the aforementioned stipulation that the respondents stipulated that they discharged the complainant for speaking with Mr. Campbell for over two hours, and not for simply carrying on a conversation with him. The thrust of the respondents= defense is that the complainant was discharged for interrupting his work and carrying on a lengthy conversation with Mr. Campbell that included Agossip@ and inflammatory language. Judge Maurer found that the conversation lasted 75 to 90 minutes and was Acondoned@ by respondent Key who could have interrupted the conversation and ordered the complainant back to work, but did not do so.

With respect to the content of the conversation, Judge Maurer found that certain portions of what the complainant was communicating to Mr. Campbell could indeed be characterized as Agossip@ and inflammatory language, and he concluded that these statements constituted unprotected activity. However, in the context of the Aoverall mining industry,@ the judge found that the statements were Apretty mild stuff compared to many other cases which come before the trial judges of this Commission@, and he concluded that the unprotected statements of the complainant could not reasonably have formed the basis for his discharge without more. On balance, the judge further found that the respondents did not meet their burden of proving their affirmative defense. 17 FMSHRC 1053-1054.

I find nothing to support the Secretary=s statement that the defense advanced by the respondents was Arejected as a feeble defense@. Indeed, in his decision of September 26, 1995, awarding damages in this case, Judge maurer stated that the case Awas a relatively close mixed-motives case where the complainant prevailed by the thinnest of margins@. 17 FMSHRC 1668.

The Secretary cites the prior Poddey case in which the respondent Tanglewood Energy, Inc., was found to have violated section 105(c) of the Act for discharging a miner for his protected activity of reporting safety violations. As a result of that case, the Secretary concludes that the respondents in the instant matter were well aware that discharging miners for making safety complaints was a violation of the Act, and that as a result of this prior case, the respondents have Aa demonstrated record of illegally discharging employees who attempt to improve safety by reporting violations@.

I take note of the fact that in the Poddey case, he was discharged for threatening his section foreman. Mr. Key and Mr. Burke were not named as individual respondents, and former Commission Judge Amchan found a violation of section 105(c) of the Act after concluding that Mr. Poddey=s threats were excusable because his behavior was spontaneous, impulsive, and inextricably related to his reporting a brake malfunction to a mechanic and the foreman, and then discussing the matter with an MSHA inspector. Judge Amchan found that the timing of Mr. Poddey=s discharge, a day after his discussion with the inspector, created an inference that his discharge was motivated in part by his protective activity, and that the respondent did not rebut this prima facie case of discrimination. In finding a violation, Judge Amchan ruled that Mr. Poddey=s insubordinate conduct, in inviting his foreman, Jeff Simmons to fight him off mine property, and later expressing a desire to kill Mr. Simmons after he was discharged did not justify forfeiture of Mr. Poddey=s rights under the Act. 15 FMSHRC 2401, 2414 (November 1993).

I take note of the fact that Judge Amchan rejected the Secretary=s proposal for a civil penalty assessment of $2,500 to $3,000, and assessed a penalty of $100 for the violation. In assessing this substantially reduced penalty, Judge Amchan remarked as follows at 15 FMSHRC 2415-2416:

> * * * * I find that a $100 penalty is appropriate using the criteria of gravity and negligence (which I view as a determination of fault in the discrimination context). Although I find that Mr. Simmons and Mr. Key unjustifiably placed blame or provoked the outburst that led to Mr. Poddey=s discharge, I find no evidence that they did so with the intention of generally discouraging safety complaints or cooperation with MSHA.
>
> There is no evidence in the record that Respondent had, on any previous occasions, retaliated against employees for exercising their rights under the Act, or tried to inhibit them from so doing. Morever, there is no indication that Respondent would have so retaliated but for the unusual circumstances of this case. Mr. Simmons= conduct appears to be motivated by the natural desire to avoid being saddled with responsibility for the citation, which he though was not his fault, and the long standing animosity between himself and Mr. Poddey.
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> Mr. Key=s conduct was also an understandable reaction to being cited for a condition he thought had been corrected, his understanding of the reason for the violation gained from Mr. Simmons, and his reaction to the behavior of Mr. Poddey towards Mr. Simmons. While I do not find sufficient evidence to conclude that either Mr. Simmons or Mr. Key sought to inhibit employees in exercising their rights under the Act, I believe Mr. Poddey=s discharge does tend to do just that. (See Tr. 39, 40, 51 -52). For that reason, I believe a $100 penalty is warranted.

In affirming his prior reinstatement of Mr. Poddey, Judge Amchan further stated as follows at 15 FMSHRC 2415-2416;

> * * * * Mr. Poddey is reinstated with the admonition that he will be expected to conduct himself with due respect to Respondent=s supervisory personnel, particularly Mr. Simmons. He must recognize that Respondent has a
>
> right to choose its supervisory personnel and that these supervisors have, with narrow exceptions provided by law, wide latitude as to what they may demand of an employee.

It seems clear to me that Judge Amchan, in the Poddey case, found strong mitigating circumstances in support of his low negligence finding. He found a lack of intent by Tanglewood

to discourage safety complaints or cooperation with MSHA, and a lack of intent by Mr. Key to inhibit employees in exercising their rights under the Act. He also admonished the complainant with respect to his future conduct upon reinstatement.

In affirming Judge Amchan=s low negligence finding, the Commission stated in relevant part as follows at 18 FMSHRC 1320:

> * * * * Although Key=s actions in discharging Poddey were intentional, there was mitigating circumstances that do not support a finding that such actions demonstrated an aggravated lack of care. Tanglewood discharged Poddey for what it perceived to be a threat, or at least insubordinate behavior, toward Simmons. * * * * Poddey confronted Simmons, yelling at him, accusing Simmons of lying when he told Key that Poddey had deliberately informed MSHA about the brake problem, and invited Simmons to fight Aoutside the gate.@ * * * * (citations omitted).

In the instant case, I find that the argument advanced by the respondents that the violation was the unintentional result of Mr. Key=s failure to recognize the clear distinction between the complainant=s unprotected statements and protected statements to be plausible and reasonable. After careful consideration of the entire record, I cannot conclude that the discharge of the complainant constituted an Aundisputed intentional violation@ of law amounting to egregious or aggravated conduct by the respondents amounting to a high degree of negligence. To the contrary, I conclude and find that the violation was the result of the failure by the respondents to exercise reasonable care to avoid a section 105(c) violation, and that this amounts to ordinary negligence.

Gravity

The Secretary argues that consideration should be given to the Achilling effect@ that the discrimination had on the complainant who engaged in protected safety activities and on the reporting of future safety problems. Citing the legislative history of the Act, the Secretary maintains that section 105(c) was enacted to Aprotect miners from the adverse chilling effect of loss of employment@. More broadly, the Secretary asserts that the legislative history establishes that Section 105(c) was intended to encourage miners to Aplay an active role in the enforcement@ of the Act, and to Aprotect [miners] against any possible discrimination,@ by giving miners Athe right to refuse to work without the fear of reprisal.@

The Secretary takes the position that a violation of section 105(c) must be presumed to create a Achilling effect@ on the protected safety activities of miners and that such a Achilling effect@ occurs by virtue of the very fact that a miner was punished for reporting safety problems. The Secretary asserts that the instant case presents a compelling example of the Achilling effect@ of violations of Section 105(c), in that there is ample testimony from both the complainant and MSHA inspectors about the effect that the prior Poddey discharge had on the miners (citing

Tr. 44-45, 114-119). The Secretary further states that the effect was such that the complainant was hesitant to make his safety complaints to Campbell and repeatedly expressed fear that he might be discharged for his actions (citing Tr. 114, 119).

The Secretary maintains that only the serious risks posed by the respondents= blatant disregard for safety were able to overcome the complainant=s concern for his livelihood. The Secretary concludes that given this environment, it is hard to overstate the effect that the complainant=s discharge must have had, coming as it did just one year after Poddey=s discharge and two months after the issuance of Judge Amchan=s finding of discrimination. This effect could only be exacerbated by the fact that the complainant himself testified on the Secretary=s behalf and provided important information at Poddey=s discrimination hearing.

The respondents argue that their actions did not directly place any employee in danger of any harm or create any direct safety hazard. Acknowledging that it may be possible that the termination of an employee for engaging in protected activity may have a Achilling effect@ on the actions of other miners, respondents maintain that there was no evidence in this case of such a Achilling effect@. In fact, respondents assert that none of the miners who testified in this case referred to any reference by Mr. Key to safety in any discussion concerning the reasons for the complainant=s termination (Doy Carpenter Volume 2, Page 37; Randy Young Volume 2, Page 48, 50 - neither of whom were employees of respondents at the time of their testimony) (Mike Chestnut Page 172). Respondents points out that the only witness who stated that there was a comment connecting the discharge with safety was the complainant himself (Volume 1, Page 164). Under the circumstances, the respondents conclude that the termination of the complainant was not believed by any employees except the complainant to have been connected to protected activity and the determination of the gravity of the offense should reflect that fact.

In Secretary ex rel Carroll Johnson and UMWA v. Jim Walter Resources, Inc., 18 FMSHRC 552, 558 (April 1996), the commission rejected the Secretary=s argument that a chilling effect should be presumed in every discrimination case, and it stated as follows at 17 FMSHRC 558-559:

> * * * *We also conclude, however, that subjective evidence of a chilling effect, e.g.., testimony of the complainant or other miners, is relevant to consideration of the gravity of a section 105(c) violation. Accordingly, we hold that both subjective and objective evidence should be considered in evaluating
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> whether a chilling effect resulted from adverse action. We agree with the Secretary that, in the event that a chilling effect is found, such a determination does not a fortiori mean the gravity of the violation is high-that is a fact-specific conclusion.

In the Poddey case, at 18 FMSHRC 1315, 1320, the Commission again rejected the

Secretary=s argument that a chilling effect on protected activities should be presumed for any violation of section 105(c), and reaffirmed its Caroll Johnson case holding that any chilling effect determination should be made on a case-by-case basis. The Commission found no evidence to support the Secretary=s Achilling effect@ argument, and affirmed Judge Amchan=s low gravity finding.

The Secretary has cited transcript pgs. 44-45, 114, and 119 in support of the assertion that there was Aample testimony from both the complainant and MSHA inspectors about the effect that the prior discriminatory discharge of Perry Poddey had on the miners@. Transcript reference pgs. 44-45, refers to the testimony of MSHA Inspector Kenneth W. Tinney at the January 19, 1995, hearing before Judge Maurer. Mr. Tinney was testifying about an inspection and citation that he issued two years earlier during the last quarter of 1992, and the first quarter of 1993. He stated as follows at (Tr. 44-45):

> Q. Did you speak to any miners about that problem while you were up there?
>
> A. Yes, sir. We tried. The crew was outside. And as we tried **C** we tried to interview all the miners that was outside and they basically refused to tell us anything about it. That was after the Perry Poddey discharge **C** was discharged. And they basically said, AWe=re not going to talk to you. We want to work here,@ and so on.
>
> Q. Did any of them specifically say that, that they wanted to keep their jobs?
>
> A. Every one of them that we tried to interview declined to answer. Because they wanted to work there was the opinion we got.
>
> Q. Was that a change from previous times when you had been there?
>
> A. Yes, Sir. The attitude changed after the Perry Poddey discharge. Whether Perry Poddey=s discharge was related to a protected activity or not didn=t matter to those guys. The men believed that he was discharged because of that and they would barely talk to us.

The record reflects that Tanglewood=s counsel characterized this testimony as Aclassic hearsay@ and stated that in the absence of the names of the miners who purportedly spoke to the inspector, and because of MSHA=s policy Aprotecting@ their names, he was unable to refute the inspector=s statements (Tr. 45-46). Judge Maurer recognized this evidentiary problem, and although he admitted the hearsay testimony, he stated that Ait can=t be tested every well so it=s not worth very much@ (Tr. 46).

I take note of the fact that when initially asked by MSHA=s counsel if he recalled what happened during the inspections in question, Inspector Tinney commented that Ait=s been two

years ago. The citations would be helpful to me@ (Tr. 37). I further note his contradictory response when asked if any of the miners specifically stated that they wanted to keep their jobs. He responded that all of the miners declined to answer, and that it was his opinion that they wanted to work.

On cross-examination, Inspector Tinney confirmed that miners other than Poddey and Knotts have told him about situations that have resulted in his issuing citations for violations. When reminded that he answered Ano@ to a similar question during the Poddey hearing, Mr. Tinney further explained his discussions with miners during his inspections, including discussions in the presence of mine management (Tr. 46-48). Mr. Tinney further testified that AI do get complaints continuously@, and has developed additional information from the miners so as to enable him to look into the matters further (Tr. 46-49). This testimony contradicts the Secretary=s assertion that miners were inhibited and intimidated by the actions of the respondents. It seems to me that they spoke freely with the inspector.

I agree with Judge Maurer=s bench comment that Inspector Tinney=s testimony Ais not worth much@. The testimony related to events that transpired two years earlier, the inspector needed to be refreshed by reviewing the citations that he issued, and there is no evidence that he took notes or otherwise documented his purported contacts with miners.

I find Mr. Tinney=s testimony regarding any adverse or Achilling effect@ on miners to be based on his unsubstantiated opinions, rather than on any reliable or credible testimony by miners. Indeed, except for the complainant, the Secretary called no other miner witness to testify about any Achilling effect.@ Although the Secretary did call three other inspectors, I have reviewed their testimony and find no support for the Secretary=s Achilling effect@ argument. Insofar as Mr. Tinney=s testimony is concerned, I find it unreliable and lacking in evidentiary credibility and I have given it very little weight.

The Secretary=s assertion that the complainant repeatedly expressed his fear that he might be discharged for his actions in speaking with Mr. Campbell is not well taken. The complainant testified that he informed Mr. Campbell at the beginning of their conversation that Ait would be possible they would fire me@, and that he also Atold him that again at the end of it, that I was a little worried about it@ (Tr. 149). That was the extent of his Achilling effect@ testimony.

Mr. Campbell=s testimony reflects that the complainant expressed this concern one time (Tr. 114), and he testified that the complainant=s statement Awas one of the first statements he made, so it was like up front@ (Tr. 133). Mr. Campbell characterized the complainant=s statement as Ageneral@ and that it was not made in regard to any safety comment (Tr. 133). Mr. Campbell, a self-employed surveyor who was hired by the property owners to survey the mine, testified that the purpose of his mine visit when he spoke with the complainant was to inquire about production projections, and that he did not inquire about any safety matters because that was not part of his purpose in going to the mine (Tr. 124).

The Secretary=s further assertion that the complainant was hesitant to make his safety complaints to Mr. Campbell is also not well taken. Mr. Campbell testified that his conversation with the complainant was Afree flowing@, and that the complainant spoke Afreely@ and expressed his opinions concerning the mining operation without being asked many questions (Tr. 131-133).

With regard to the question of the morale of the work force, the secretary=s suggestion that morale was low because of the Poddey discharge is not supported by Mr. Campbell=s testimony. He testified that the morale problem was the result of a miner/management conflict over vacations without pay, employee benefits, a new truck purchased by respondent Burke, and the use of Ajunk miners@ for spare parts (Tr. 111-112).

I find nothing in transcript reference page 119 in support of the Secretary=s Achilling effect@ argument. The reference to page 114 is the comment by Mr. Campbell that the complainant said AIf they heard this, they would probably fire him@. In the final analysis, I can only conclude that the Aample testimony@ suggested by the Secretary to support any Achilling effect@ argument consists of Mr. Campbell=s best recollection of the complainant=s self-serving statement that he would Aprobably be fired@ if management heard him tell Mr. Campbell about violations and inspector visits.

Although the complainant testified that he was Averbally reprimanded@ by his foreman for giving an inspector some information that resulted in a past training violation, I find no evidence that this had any Achilling@ effect on the complainant since he subsequently freely discussed this with an inspector (Tr. 140-143). With respect to the complainant=s testimony that respondent Key told him that he did not like the testimony he had given in the Poddey case, the complainant confirmed that Mr. Key never verbally abused him or otherwise threatened him in any way because of his prior testimony (Tr. 182-183). Further, given the testimony of Mr. Campbell that the complainant freely and voluntarily spoke with him about the conditions at the mine, apparently after his conversation with Mr. Key, and after the Poddey hearing, I cannot conclude that these events had any adverse Achilling effect@ on the complainant.

The respondents called three miner witnesses (Davis, Carpenter, and Young) to testify in their behalf. Carpenter and Young were no longer employed by the respondents when they testified, and they presented no evidence of feeling harassed, intimidated, or Achilled@ by the actions of the respondents.

Continuous miner operator Doyle Davis has worked at the No. 12 Mine for four and one-half years, and he testified that he has given information to MSHA inspectors that has resulted in the issuance of violations, and he has never felt discriminated against or reprimanded for doing so (Tr. 17-19).

In the Poddey case, at 18 FMSHRC 1321, the Commission observed that since Poddey

was discharged in part as a result of his heated confrontation with his foreman, the discharge would not Areasonably tend to discourage miners form engaging in protected activities@, citing Carroll Johnson, 18 FMSHRC at 558. I believe the same can be said of the instant case where, to a lesser degree, the complainant was discharged in part for spending a lot of his working time speaking with Mr. Campbell, indulging in company Agossip@ in the course of the conversation, and making negative and Ainflammatory@ comments about company management.

After careful review and consideration of the entire record in this case, I find no credible or probative evidence to support the Secretary=s assertion that the action taken by the respondents against the complainant in this case had any Achilling effect@ on the rights of the miners working at the mine, or on the complainant. Under the circumstances, the Secretary=s Achilling effect@ argument IS REJECTED. I conclude and find that on the facts of this case, the violation of section 105(c), by the respondents was a low gravity, non-serious violation.

Size of Business and Effect of Civil Penalty Assessments on the Respondent=s Ability to Continue in Business

The record reflects that the mining operations conducted by the respondents were relatively small operations. I conclude and find that respondents Tanglewood Energy, Inc., and Fern Cove, Inc., are small mine operators.

It is clear that the presiding judge is not bound by the proposed civil penalty assessment made by the Secretary. Rather, the amount of the penalty to be assessed is a de novo determination by the judge based on the six statutory criteria specified in section 110(i) of the Act, 30 U.S.C. 820(i), and the information relevant thereto developed in the course of the adjudicative hearing. Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff=d, 652 F.2d 59 (6th Cir. 1981); Sellersburg Stone Company, 5 FMSHRC 287, 292 (March 1983).

As a general rule, and in the absence of evidence that the imposition of civil penalty assessments will adversely affect a mine operator=s ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff=d 736 F.2d 1147 (7th Cir. 1984). Conversely, the size and documented financial condition of a mine operator is required to be considered in any determination as to whether or not the payment of civil penalties will adversely impact on a mine operator=s ability to continue in business.

The Secretary asserts that the financial information submitted by the respondent does not support their claim that the payment of the proposed penalty assessment of $25,000, will adversely affect their ability to continue in business. In support of this argument, the Secretary states that much relevant financial information appears to be missing from the submissions by the respondents and that the last year for which there are federal corporate tax returns is 1993. The Secretary further states that the only documents more recent than 1993, are unaudited and

unsigned balance sheets and income statements apparently prepared by respondent Burke=s wife, an officer of Tanglewood Energy, and not by an outside accountant.

The Secretary asserts that although Tanglewood=s State corporate report for 1992, and respondent Burke=s individual 1992 tax return show losses and negative equity for the last several years, they do not explain how these companies could nonetheless afford to make Agenerous payments@ to respondents Burke and Key during that time. As an example, the Secretary cites a 1993 consolidated corporate tax return for Fern Cove and Tanglewood, showing payments to Key and Burke of $102,012.00 each, and a 1991 return for Tanglewood showing a payment to Key of $110,735.00 and payments to Burke and his wife totaling $127,735.00. Since the corporations were able to make these substantial annual payments to their officers (the individual respondents), notwithstanding the alleged poor financial condition of their business, the Secretary concludes they that they can manage to pay a comparatively Amodest penalty@ of $25,000 in this case without affecting their ability to continue in business.

The Secretary concludes that the respondents have failed to meet their burden of showing that the proposed penalty is excessive. Further, the Secretary points out that the individual tax returns do not show what assets the individual respondent possess, and in the case of respondent Burke, his assets appear to be quite substantial in that his 1993 return reveals interest income of $8,778, and a capital gain of $13,637, but does not reveal the underlying source of that income.

Finally, the Secretary points out that the ability to remain in business is only one of six factors to be considered, and believes that in this case, any impact on the respondent=s ability to remain in business is more than outweighed by their Aatrocious@ violation history and should not mitigate the penalty in any way.

The respondents submit that based on the financial information filed in this case, any substantial penalty will have a severe and drastic effect on their ability to continue in business. Respondents assert that Tanglewood, Inc. is no longer in business, and Fern Cove, Inc., operated one small deep mine at a loss of $182,885.82 , for the first half of 1995 as set forth in its income statement. The respondents concluded that the ability of the operators to continue in business is questionable.

With regard to the individual corporate officers and respondents in this case, they assert that their tax returns are a matter of record, together with the corporate financial statements showing substantial loans by the officers to the corporations. The individual respondents maintain that substantial penalties against them would severely and unfairly penalize them for actions which they did not intend as violations of the Act in the first place. Accordingly, they submit that any substantial penalty would be inappropriate and an injustice. They further submit that their livelihood is already in danger with the poor prospects for Fern Cove, Inc. to continue in business, and that any substantial penalty will be unduly punitive.

By letter filed on June 27, 1997, counsel for the respondents states that none of the

respondents is presently engaged in the coal business, and that the corporate respondents ceased operations after the hearing. Counsel further states that respondent Burke left the mining business and is now engaged in the insurance business, and that respondent Key was involved in a subsequent mining operation, but has also ceased operation.

Respondent Burke testified that the number 12 mine was started in 1990, and the number six mine was started in 1988. The two mines were in the same coal seam, but were cut together in 1993. The number six mine was shut down permanently in 1993, for economic reasons when the property owners from whom they contracted to mine the coal filed chapter 11 bankruptcy. New management took over property, but it is in Chapter 7 bankruptcy which has caused the No. 12 mine to be idle. The corporate respondents are owed money from the bankruptcy, and they do not own the coal. The coal was mined by contract with the property owners, and the respondents were paid on a tonnage basis twice a month. Mr. Burke was in charge of the No. 6 mine, and Mr. Key was in charge of the No. 12 mine (Tr. 56-59). Mr. Burke further explained that the heirs and executor of the landowners leased the property to Phoenix Resources, and Phoenix Resources contracted with Tanglewood and Fern Cove to mine the coal (Tr. 81, 85).

Mr. Burke confirmed that he has not paid penalty assessments for violations issued in 1993 and up to January of 1994, because Awe haven=t had the financial capability to pay them@ (Tr. 88). He further stated that another mining venture Aup north@ was Aone of the worst business decisions I have ever made@ and that it operated at a loss every month except two, and it eventually ended in bankruptcy and he was not paid for all of the coal that he mined (Tr. 73, 89).

After careful review and consideration of the corporate tax returns and other financial information of record with respect to the financial condition of the corporate respondents in this case, I conclude and find that although they have suffered financial losses during the period from 1991 to mid-1995, they have also earned some income from the mining operations during these years, and as correctly stated by the Secretary, both corporate entities were able to make rather substantial payments to Burke and his wife, and to Key in 1991 and 1993. However, it would appear that Tanglewood, which had a net income of $19,598.61, in 1995 from the sale if equipment is no longer in business, and that Farm Cove, which showed a loss of $182,885.82, in 1995, is also no longer in business.

Considering the fact that the corporate respondents are small mine operators with rather serious financial difficulties, I find that the imposition of the full amount of the proposed $25,000 penalty assessment will impact adversely on their ability to continue in business. However, I am not persuaded that the financial state of the corporate respondents is such as to adversely impact on their ability to pay the civil penalties that I have assessed for the violation in question. The corporations appear to have some assets, including mining equipment.

With regard to the individual respondents Burke and Key, the financial information they have provided does not persuade me that they are unable to pay the civil penalties that I have assessed for the violation in question, and I concluded and find that payment of the penalties will

not adversely affect their personal assets or finances.

Good Faith Compliance

The record reflects that the complainant has been employed as an equipment operator for the West Virginia Department of Highways since he was terminated by the respondents (Tr. 136-137). He confirmed that while he asked for reinstatement to the Coalbank Mine in his original complaint, he no longer desires to be reinstated and wants to stay with his current job (Tr. 191-192).

The respondents= assertion that the good faith criterion is inappropriate for consideration in this case because Athere was no clear-cut violation to correct in the first place@ IS REJECTED. The respondents have been found to be in violation of section 105(c) of the Act, and liable for the resulting damages.

The Secretary=s suggestion that failure to pay the previously assessed penalties is a relevant consideration of the good faith compliance criterion found in section 110(i) of the Act has been rejected. Although prior violations are relevant to an operator=s compliance history, good faith compliance relates to the section 105(c) discrimination violation that has been affirmed in this case. To the extent that the complainant has apparently not been made whole in compliance with Judge Maurer=s damages award, I cannot conclude that the respondent=s have demonstrated good faith compliance in this case, but I have considered the fact that Judge Maurer=s damages decision was appealed by both parties.

Penalty Assessment

Based on the foregoing findings and conclusions with respect to the six statutory civil penalty assessment criteria found in section 110(i) of the Act, and in particular the small size of the respondent=s mining operations, and the low gravity and ordinary negligence associated with the violation, I cannot conclude that the proposed civil penalty assessment of $25,000, by the Secretary is warranted. Considering all of the section 110(i) criteria, including the poor compliance history of the corporate respondents, I conclude and find that a total civil penalty assessment of $3,000 allocated as shown below in my Order is fair and reasonable in this case.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Respondent Tanglewood Energy, Inc., shall pay a civil penalty assessment of $1,000 for the violation.

2. Respondent Fern Cover, Inc., shall pay a civil penalty assessment of $1,000 for the violation.

3. Respondent Randy Burke shall pay a civil penalty assessment of $500, for the violation.

4. Respondent Randall Key shall pay a civil penalty assessment of $500, for the violation.

5. Payments of all of the aforementioned penalties shall be made to MSHA within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

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