

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

September 12, 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-143-D
on behalf of PHILLIP DALTON,	:	MSHA Case No. HOPE CD 94-13
	:	
on behalf of DANIEL DAVIS,	:	Docket No. WEVA 95-144-D
	:	MSHA Case No. HOPE CD-94-14
on behalf of HAROLD MARCUM,	:	Docket No. WEVA 95-145-D
	:	MSHA Case No. HOPE CD 94-14
	:	
on behalf of HENRY SMITH,	:	Docket No. WEVA 95-146-D
Complainants	:	MSHA Case No. HOPE CD 94-15
v.	:	
	:	Tug Valley Coal Processing Co.
W.R. MOLLOHAN, INC.,	:	Mine I.D. No. 46-05890
Respondent	:	

DECISIONS

Appearances: Elizabeth S. Lopes, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants; Joseph M. Price, Esq., Sean Harter, Esq., Robinson & McElwee, Charleston, West Virginia, for the Respondent.

Before: Judge Koutras

These proceedings concern discrimination complaints filed by MSHA on behalf of the complainants pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainants allege that they were discharged from their employment with the respondent for complaining about safety hazards at the coal processing plant site where they were working as painters and sandblasters. The respondent denied any discrimination and asserted that the complainants were terminated for legitimate non-discriminatory reasons. MSHA subsequently amended the complaints seeking civil penalty assessments against the respondent for the alleged discrimination. A hearing was held in Charleston, West Virginia, and the parties appeared and participated fully therein.

Issues

The issues presented include: (1) whether the respondent discriminated against the complainants by terminating their employment for engaging in protected activities, (2) the appropriate remedies to be applied on behalf of the complainants, and (3) the imposition of appropriate civil penalty assessments to be assessed against the respondent for the alleged discriminatory conduct.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. ' 2700.1, et seq.

MSHA's Testimony and Evidence

Complainant Henry Smith testified that he has been employed as a painter and sandblaster for approximately 25 years. He is a member of Local Union 813, serves as a job steward, and is hired for jobs through a union agent out of the union business hall. Mr. Smith stated that he was hired by the respondent on July 27, 1994, and began work the next day at the Tug Valley Coal Processing Company on a painting and sandblasting job that the respondent was performing under contract with the mine operator.

Mr. Smith stated that he complained about the lack of safety lines and belts while he was working 60 to 70 feet off the ground, and the absence of choker connectors for the high pressure sandblasting hoses that he worked with. He stated that he communicated his safety concerns daily to respondent's foreman, Mr. Pauley, but continued working after Mr. Pauley assured him that he would take corrective action. However, on July 31, 1994, he informed Mr. Pauley that he would no longer perform any work and would "shut the job down" because Mr. Pauley had not corrected the conditions. Mr. Smith stated that he asked Mr. Pauley for other work, but was informed that there was none available. Mr. Smith then left the work site and was next scheduled to work on August 3, 1994, and he informed Mr. Pauley that he would return to work if his safety concerns were taken care of.

Mr. Smith stated that after he was informed by his union business agent that he had received a letter from the respondent informing him that the respondent would no longer hire him and the other complainants (Exhibit C-14), they returned to the mine site on August 3, 1994, with MSHA inspectors and filed a section

103(g) safety complaint requesting an MSHA investigation of their safety complaints (Exhibit C-1).

Mr. Smith further testified about additional jobs that he acquired subsequent to his termination by the respondent and copies of his earnings are a part of the record (Exhibit C-3). He also indicated that he was unemployed from approximately September 20, 1994 to October 28, 1994.

On cross-examination, Mr. Smith stated that he received no unemployment compensation subsequent to his termination because his benefits were exhausted. He confirmed that he filed no safety complaints with MSHA until after he was informed that he had been terminated by the respondent. He further testified about certain work that he performed at the plant site on August 3, 1994, and confirmed that Mr. Pauley provided him with a hard hat, safety glasses, and a safety belt and lanyard at that time. However, Mr. Smith claimed that the lanyard was insufficient because it restricted his movements and he could not readily attach it to anything that would allow him to do his job while keeping him secure.

Mr. Smith stated that he discussed his safety requests further with Mr. Pauley on August 3, 1994, and that complainants Dalton and Davis were present. He did not believe that complainant Marcum was present at that time. He further stated that he again discussed the absence of hose chokers with Mr. Pauley and believed that 75 to 100 chokers were required to be installed on all of the hoses to prevent them from rupturing under high pressure. Mr. Smith reiterated that he informed Mr. Pauley that he was shutting the job down for safety reasons and Mr. Pauley informed him that he had no other work available.

Discussion

At the conclusion of Mr. Smith's testimony and during a recess while awaiting the testimony of MSHA's next witness, the parties were afforded an opportunity to resume their settlement discussions which were previously initiated and discontinued without resolution. The parties informed the presiding judge that after further discussions, including consultations with respondent's management and the complainants, and with their approval, the parties reached a proposed settlement of all of the complaints.

The parties presented the proposed settlement on the record. The respondent agreed to pay the complainants back wages totaling \$8,500. Complainants Phillip Dalton, Daniel Davis, and Henry Smith will be paid \$2,275 each, and complainant Harold

Marcum will be paid \$1,675. In addition, the respondent agreed to pay a total of \$800 in civil penalty assessments to MSHA, prorated at \$200 for each of the alleged violations of section 105(c) of the Act, in settlement of the cases. In consideration of all of these settlement payments, the parties agreed that these matters may be dismissed. Each party will bear its own litigation costs.

After careful consideration of the pleadings filed in these proceedings, the arguments presented in support of the proposed settlement, and pursuant to Commission Rule 31, 29 C.F.R. ' 2700.31, the settlement was approved from the bench. In approving the settlement, I took into consideration the fact that the respondent has paid \$8,057 in civil penalty assessments to MSHA in settlement of citations and orders that were issued on August 3, 1994, as a result of the section 103(g) complaint, and the fact that the respondent's contract to perform further work at the Tug Valley Processing Plant was terminated by the mine owner as a result of the safety complaints and citations that were issued. Under all of these circumstances, I conclude and find that the settlement of the instant complaints satisfies the deterrent intent of the Mine Act and is in the public interest. Accordingly, my bench decision is herein re-affirmed, and the settlements in question **ARE APPROVED**.

ORDER

In view of the foregoing, **IT IS ORDERED** as follows:

1. The respondent shall pay \$2,275 to each of the complainants, Phillip Dalton, Daniel Davis, and Henry Smith in satisfaction of their claims in these proceedings.
2. The respondent shall pay \$1,675 to complainant Harold Marcum in satisfaction of his claim in these proceedings.
3. The respondent shall pay a civil penalty assessment of \$800 to MSHA in satisfaction of the alleged violations in these proceedings.
4. The respondent shall comply forthwith with the terms of the settlement agreement. All of the aforementioned payments shall be made by the respondent within thirty (30) days of the date of these decisions and orders, and upon full compliance with the agreement, these matters

ARE DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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