

CCASE:
AMOS HICKS V. COBRA MINING, J. LESTER & C MESSER
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January 13, 1992
AMOS HICKS

v . Docket No. VA 89-72-D

COBRA MINING, INC.
JERRY K. LESTER, and
CARTER MESSER

BEFORE: Ford, Chairman; Backley, Doyle, Holen and Nelson, Commissioners
DECISION

BY THE COMMISSION:

This matter, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "Mine Act" or "Act"), is before the Commission for a second time. The present proceeding stems from a pro se petition for discretionary review filed by Amos Hicks on September 9, 1991, seeking review of part of an August 7, 1991, decision issued by Commission Administrative Law Judge Avram Weisberger. 13 FMSHRC 1262. Mr. Hicks takes

issue with the amount of the damages awarded him in connection with his discriminatory discharge.

In a March 22, 1990, decision Judge Weisberger determined that Hicks had set forth a prima facie case of discrimination, but that the Respondents had established an affirmative defense to Hicks' case. 12 FMSHRC 563. Hicks petitioned for discretionary review of the decision, which was granted. On April 1, 1991, the Commission vacated the judge's decision and directed that the Respondents' affirmative defense be re-evaluated in light of applicable precedent. 13 FMSHRC 523. On June 4, 1991, the judge determined that Cobra Mining, Inc. ("Cobra"), Jerry Lester and Carl Messer had discriminatorily discharged Hicks in violation of section 105(c) of the Mine Act. 30 U.S.C. • 815(c). 13 FMSHRC 921. The factual background of Hicks' complaint of discrimination is set forth fully in our April 1, 1991, decision and need not be restated here.

The issue before us at this juncture is whether certain consequential damages found by the judge to have been caused by the discriminatory discharge were correctly calculated. The damages at issue are in connection with Hicks' loss of his pickup truck, which was repossessed and sold shortly after Hicks was discriminatorily discharged in May of 1989. Before the judge, Cobra and the individual Respondents argued that Hicks' loss of his truck could not be deemed compensable damages under the Mine Act. Citing the legislative history

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of the Act,(Footnote 1) the judge rejected Respondents' arguments and held, "it is respondent's obligation to put Complainant in the position he would be in if there had not been a discriminatory discharge in violation of the Act." 13 FMSHRC at 1263.

The Respondents have not controverted on review the judge's threshold finding that such damages are compensable under the statute. Indeed, Cobra and Messrs. Lester and Messer have filed no pleadings or responses on review. Accordingly, the sole issue before us is whether the judge correctly determined the amount of compensation owed to Hicks for the loss of his truck. For the reasons that follow, we vacate that portion of the judge's decision and remand the matter for further proceedings as indicated below.

Prior to the issuance of his remedial decision, the judge directed the parties to file statements regarding the amount of damages due Hicks. On June 21, 1991, the Secretary of Labor, on Hicks' behalf, filed a request for back pay, costs and consequential damages totalling \$17,107.17.(Footnote 2) Of the total damages sought, the Secretary designated \$9,861.07 as consequential damages associated with Hicks' loss of his 1988 Dodge Ram pickup truck, which, shortly after Hicks' discharge, was repossessed and sold by the bank through which he had financed its purchase. The amount sought was arrived at by adding the monthly payments Hicks had already made on the truck (\$4,818.80) and the amount Hicks still owed to the bank after the loan balance was adjusted to

1 The legislative history of section 105(c) of the Act provides in relevant part:

It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct, including, but not limited to, reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. Rep. No. 181, 95 Cong., 1st Sess., at 37 (1977), reprinted in 95 Cong., 2nd Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

2 Hicks was represented by the Secretary in the original proceeding, in which no discriminatory discharge was found. 12 FMSHRC 563 (March 1991).

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Secretary did not file a petition for discretionary review of that decision on Hicks' behalf, leaving Hicks to file his ultimately successful petition pro se. The Secretary re-entered the proceeding on remand and, in addition to

filing for the above-referenced damages, sought and obtained a civil penalty of \$1500.00 against Respondents for violation of section 105(c) of the Act. Upon the judge's reduction of the amount of consequential damages sought by the Secretary on Hicks' behalf, the Secretary once again did not file a petition for discretionary review, and Hicks filed his present petition pro se.

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reflect the repossession and sale of the vehicle (\$5,042.27).

The un rebutted evidence submitted by Hicks indicates that he purchased a new 1988 Dodge Ram pickup truck in February 1988, and financed the purchase through a loan totalling \$20,652.00. Hicks made 14 monthly payments of \$344.20 each on the loan through April 1989. After his discharge by Cobra in May 1989, Hicks made no further payments on the truck. At that time he had paid \$4,818.80 on the loan. The bank repossessed the truck in July of 1989, and thereafter sold it for \$7,400.00. In September of 1989, the bank advised Hicks that the proceeds of the sale and various offsetting charges associated with the repossession left him with a liability to the bank of \$5,042.27.

In his decision, the judge ordered payment of what he considered Hicks' "lost equity" in the truck, i.e., the total of the monthly payments Hicks had made prior to the repossession of the truck (\$4,818.80). As for the \$5,042.27 still owing to the bank and sought as damages by the Secretary, the judge held that this sum "constitutes complainant's obligation under the loan, and does not appear to be related to his having lost his employment." 13 FMSHRC at 1263.(Footnote 3)

The measure of recognizable consequential damages is generally calculated on the basis of the "fair market value" for property lost as a result of the illegal act. See, e.g., *Kenneth Wiggins v. Eastern Assoc. Coal Corp.*, 7 FMSHRC 1766, 1773 (November 1985). We conclude that neither the calculation of consequential damages proposed by the Secretary nor the actual determination of those damages made by the judge is appropriate.

The appropriate award to Hicks is an amount reflecting what he actually lost -- the fair market value of the truck at the time it was repossessed, less whatever net credits he received from the forced sale of the vehicle.

Such an approach would most closely reflect what Hicks might have realized had he voluntarily sold the vehicle at the time it was repossessed. The best means of determining Hicks' damages, therefore, is to first establish the fair market value the truck at the time of repossession, in light of such factors as its condition, equipment options and the depreciation it underwent during the 14 months that Hicks owned and operated it. Objective valuation of the truck can be derived from independent appraisal manuals, published for that purpose.

Accordingly, this matter is remanded to the judge for additional

3 The judge relied upon a decision in *Noland v. Luck Quarries, Inc.*, 2 FMSHRC 954 (April 1980), in which Commission Chief Administrative Law Judge

Paul Merlin, in order to make the complainant "whole," ordered the respondent to compensate the complainant for the lost equity in a truck that complainant was forced to sell after his discriminatory discharge. It does not appear, however, that the figure was arrived at simply by computing the amount already paid on the truck loan, which would, in most cases, include sums attributable to interest. Rather, it was arrived at by mutual agreement of the parties after the judge ordered them to negotiate an amount in light of such factors as "cost, down payment, refinancing, repairs and sales price." 2 FMSHRC at 961-63. ~53

consideration. The judge is directed to reopen the record to receive evidence on the value of the truck at the time of repossession. Once that amount is determined, it should be increased by \$142.44, an amount equal to the costs of the repossession charged to Hicks by the bank. In turn, that total amount should be reduced by \$7,400.00, the amount credited to Hicks' loan balance from the proceeds of the bank's forced sale of the truck. The remainder, if any, should then be added, with interest, to the damages already awarded for back pay, interest, and costs in the judge's August 7, 1991 order. For the foregoing reasons, we vacate the judge's decision with respect to the amount of damages awarded for the loss of Hicks' truck and remand the matter for further proceedings consistent with this decision.