

CCASE:
RONNY BOSWELL V. NATIONAL CEMENT
DDATE:
19930607
TTEXT:

June 7, 1993

RONNY BOSWELL	:	
	:	
v.	:	Docket No. SE 90-112-DM
	:	
NATIONAL CEMENT COMPANY	:	
	:	

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

DECISION

BY THE COMMISSION:

This discrimination proceeding, 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 a second time. Administrative Law Judge Roy J. Maurer sustained Ronny Boswell's discrimination complaint alleging that National Cement Company ("National Cement") had unlawfully disqualified him from his position as a utility laborer and reassigned him to a position as a payloader operator, but concluded that, although Boswell was entitled to reinstatement to his former position, he was not entitled to backpay. 13 FMSHRC 207 (February 1991)(ALJ). The Commission granted National Cement's petition for discretionary review, which challenged the judge's finding of unlawful discrimination. The Commission affirmed the judge's decision in part and vacated it in part, remanding the case to the judge to consider whether a particular incident involved protected activity by Boswell and whether National Cement had established an affirmative defense to Boswell's prima facie case of discrimination. 14 FMSHRC 253 (February 1992)("Boswell I").

On remand, the judge again sustained Boswell's discrimination complaint, but awarded Boswell backpay and interest, which he had not awarded in his earlier decision. 14 FMSHRC 541 (April 1992)(ALJ)("Boswell Remand"); 14 FMSHRC 1135 (July 1992) (ALJ). The Commission granted National Cement's petition for discretionary review of the judge's backpay award. For the reasons that follow, we conclude that Boswell's entitlement to backpay was not properly before the judge on remand, and we vacate his backpay award.

I.

Procedural History

The factual background of this matter is set forth in *Boswell I*, 14 FMSHRC at 253-55. In his first decision in this matter, the judge found that Boswell had engaged in several incidents of protected activity. 13 FMSHRC at 212-14. He also found that National Cement's disqualification of Boswell from his position as a utility laborer was motivated in major part by his protected activity and, thus, that he had been discriminated against in violation of the Mine Act. 13 FMSHRC at 213. The judge concluded that Boswell was entitled to reinstatement as a utility laborer and expungement from his personnel records of all derogatory information relating to his disqualification. 13 FMSHRC at 215. The judge determined, however, that Boswell was not entitled to backpay because his earnings as a payloader operator exceeded the pay of the miner who replaced him as a utility laborer. 13 FMSHRC at 214-15.

National Cement successfully petitioned for review of the judge's finding of unlawful discrimination. Boswell did not seek review of the judge's denial of backpay. On review, National Cement argued that certain of the judge's protected activity findings were in error, that Boswell's disqualification was not an adverse action, and that it would have transferred Boswell based on his unprotected activities alone.

The Commission affirmed the judge's findings of protected activity except as to a wheelbarrow incident involving a work refusal by Boswell. *Boswell I*, 14 FMSHRC at 258-60. The Commission also affirmed the judge's implicit finding that Boswell's disqualification was an adverse action, reasoning that the action was surrounded by indicia of discipline and, further, that Boswell was removed to a position with a lower rate of pay. 14 FMSHRC at 259-60. The Commission thus affirmed the judge's conclusion that Boswell had established a prima facie case of discrimination. 14 FMSHRC at 258-60. The Commission determined, however, that the judge had not considered National Cement's affirmative defense that it would have transferred Boswell in any event based on his unprotected activities alone. 14 FMSHRC at 260. The Commission remanded the proceeding to the judge to consider: (1) whether the wheelbarrow incident constituted a protected work refusal; and (2) whether National Cement had established that it would have disqualified Boswell for his unprotected activities alone. 14 FMSHRC at 261.

On remand, the judge determined that the wheelbarrow incident constituted a protected work refusal and that National Cement had failed to establish its affirmative defense. *Boswell Remand*, 14 FMSHRC at 544, 546-47. Noting the Commission's conclusion that Boswell's disqualification constituted an adverse action based, in part, on Boswell's reduced rate of pay, the judge held that Boswell was entitled to receive backpay. 14 FMSHRC at 547. In a supplemental decision, the judge awarded Boswell \$6,094.28 in backpay and interest. 14 FMSHRC at 1136-37.

National Cement sought review of the judge's finding that the wheelbarrow incident constituted protected activity and of his award of backpay.

The Commission declined to review the first issue but granted review of the second.

II.

Disposition of Issues

National Cement contends that the judge lacked jurisdiction on remand to reexamine the question of damages and that, in any event, substantial evidence does not support the backpay award. We agree that the judge lacked jurisdiction on remand to award backpay.

Section 113(d)(2) of the Mine Act provides that, if the Commission grants review, the scope of review is limited to the questions raised by the petition and to questions directed for review sua sponte by the Commission. 30 U.S.C. 823(d)(2). Following the judge's initial decision, Boswell did not petition the Commission for review of the judge's finding that he was not entitled to backpay. The issues raised in National Cement's petition were limited to the merits of Boswell's discrimination complaint. The Commission directed no issues for review on its own motion. 30 U.S.C. 823(d)(2)(B). Consequently, no damages issues were before the Commission in Boswell I and the judge's conclusion that no backpay was due became, in effect, a final decision. Thus, under the review structure of the Mine Act and the circumstances of this case, the judge lacked authority on remand to address issues pertaining to damages.

We note that a judge's jurisdiction on remand is limited to the issues specifically remanded by the Commission. See generally *Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir.), cert. denied, 364 U.S. 821 (1960); Secretary on behalf of *Mullins v. Consolidation Coal Co.*, 4 FMSHRC 1622, 1624 n.2 (September 1982). Here, the Commission directed the judge to answer two questions on remand relating to the merits of the discrimination complaint. The judge was not directed to reopen Boswell's entitlement to damages. It appears that the judge considered the backpay issue in an attempt to comply fully with the remand. See Tr. 6-9 (June 15, 1992). In so doing, however well intentioned, he exceeded his jurisdiction.

III.

Conclusion

For the foregoing reasons, we vacate the judge's supplemental damage award.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner