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LONNIE ROSS AND CHARLES GILBERT V. SHAMROCK COAL
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June 24, 1993

LONNIE ROSS and CHARLES GILBERT	:	
	:	
v.	:	Docket Nos. KENT 91-76-D
	:	KENT 91-77-D
SHAMROCK COAL COMPANY, INC.	:	

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

DECISION

BY: Holen, Chairman; Doyle and Nelson, Commissioners

In these consolidated discrimination proceedings, brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), Shamrock Coal Company ("Shamrock") has sought review of Administrative Law Judge William Fauver's decisions sustaining Lonnie Ross's and Charles Gilbert's discrimination complaints and awarding them damages. 13 FMSHRC 1475 (September 1991)(ALJ); 14 FMSHRC 229 (January 1992)(ALJ). The issues raised in Shamrock's petition for discretionary review are whether the judge erred in: (1) determining that Shamrock failed to establish an affirmative defense; (2) calculating complainants' gross backpay and interest awards; (3) failing to deduct unemployment compensation from these backpay awards; and (4) awarding reimbursement of tax penalties sustained by complainants as a result of early withdrawal of funds from their profit-sharing accounts.(Footnote 1) The Commission granted the petition and heard oral argument.

For the reasons set forth below, we affirm the judge's determination that Shamrock failed to establish an affirmative defense. We also summarily affirm his determination of lost wages and his award reimbursing complainants for the tax penalties. We remand for clarification and, if appropriate, recalculation of the judge's interest awards. Finally, we reverse the judge's determination that unemployment compensation should not be deducted from the backpay awards and remand for recalculation of those awards.

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1 In its brief on review, Shamrock addresses issues other than those raised in its petition for discretionary review. We consider only the issues raised in Shamrock's petition. 30 U.S.C. 823(d)(2)(A)(iii), (B) & (C); 29 C.F.R. 2700.70(f)(1993)

I.

Factual and Procedural Background

Shamrock operates the Greasy Creek No. 10 mine, an underground coal mine in Kentucky. Ross, Gilbert, and Mike Europa worked on a third shift maintenance crew that prepared a section for coal production on the following shift. Ross was the crew leader.

In carrying out their duties, Ross and Gilbert, who were not certified electricians, regularly performed electrical work without supervision. 13 FMSHRC at 1476. They complained about such work to their crew foremen, without result. 13 FMSHRC at 1477. In 1989, the mine began two ten-hour production shifts, leaving only four hours during non-production time for the maintenance crew to perform work previously requiring eight hours. Id. Ross and Gilbert complained to Foreman Ralph Bowling and to Mine Superintendent Don Smith about having too much work to do in the allotted time and requested assistance. Id. Bowling and Smith did not address their complaints. Id.

On July 18, 1990, before an inspection by the Department of Labor's Mine Safety and Health Administration ("MSHA"), Smith asked Ross to countersign a foreman's name to a preshift report. 13 FMSHRC at 1477. When Ross refused, Smith became angry and signed the foreman's name himself. Id. When Europa was on vacation, Bowling refused Ross and Gilbert's request for a replacement, stating that Ross would have to perform Europa's duties in addition to his own. 13 FMSHRC at 1478.

On July 26, 1990, Ross, Gilbert, and Dwayne Woods, a trainee, were required to move a power center, which involved moving three electrical cables. At approximately 6:00 a.m., Ross and Gilbert still had to move two cables, hook up the power center and connect the cables to make the section ready for the day shift at 7:00 a.m. 13 FMSHRC at 1478. Ross decided to move the cable by using a scoop. Id. Following Ross's orders, Gilbert helped Ross place the cable under the scoop's batteries and positioned the scoop's hydraulic jacks in an attempt to keep the weight of the batteries off the cable. 13 FMSHRC at 1478-79. Gilbert then drove the scoop. 13 FMSHRC at 1479.

Miners on the day shift discovered that one of the cables had been damaged. 13 FMSHRC at 1479. A mechanic quickly repaired the cable and no lost work time resulted. Tr. 630-31. When Smith heard about the incident, he ordered Bowling to determine what had occurred and, if the cables had been moved under scoop batteries, to fire the person responsible. 13 FMSHRC at 1479.

Upon questioning by Bowling on July 31, 1990, Gilbert admitted that he had moved the cables under the scoop batteries. 13 FMSHRC at 1479; Tr. 33-34. Bowling told Gilbert that he was fired. 13 FMSHRC at 1479. After Gilbert reported that Ross had told him to use the scoop batteries, Ross was questioned and stated that he would take the blame. 13 FMSHRC at 1479-80.

Following a private discussion between Smith and Bowling, Ross and Gilbert were given a two-week suspension without pay, instead of termination. 13 FMSHRC at 1480. Ross accepted the two-week suspension, but Gilbert stated that he did not believe that he should be suspended for two weeks and that he was "tired of getting jumped on ... by every boss ... and having to work like a dog and not having time to do [his] job...." 13 FMSHRC at 1480; Tr. 36. Gilbert stated that, if he had accumulated enough time that year to qualify for profit-sharing, the company could fire him. 13 FMSHRC at 1480. It was then determined that Gilbert had accrued enough time, but Bowling told Smith and Gilbert that the company could not fire one without firing the other. Id. Gilbert said that he would accept the two-week suspension because he did not want Ross to lose his job. Id. Smith became angry and told Bowling to fire both of them. 13 FMSHRC at 1480, 1487. Bowling did so. Ross and Gilbert subsequently withdrew the funds from their profit-sharing accounts.

Ross and Gilbert filed discrimination complaints with MSHA, pursuant to section 105(c)(2) of the Act, 30 U.S.C. 815(c)(2), alleging that they had been discriminatorily discharged. MSHA investigated the complaints and determined that no discrimination had occurred. Ross and Gilbert then filed their own complaints with the Commission, pursuant to section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and the matter was heard by Judge Fauver.

The judge determined that Ross and Gilbert established prima facie cases of discrimination. 13 FMSHRC at 1487. The judge found that their complaints regarding electrical work and not having enough time or assistance to perform their jobs, Ross's refusal to falsify the preshift examination report, and Gilbert's complaints on July 31 about excessive work pressures, constituted protected activities under the Act. 13 FMSHRC at 1484-86. He also found that Smith had developed an animus towards complainants because of their protected activities. 13 FMSHRC at 1487. The judge determined that their terminations were motivated, at least in part, by their protected activities, and that Shamrock failed to establish an affirmative defense to the complainants' prima facie case. 13 FMSHRC at 1486-88. Accordingly, the judge concluded that they had been discriminated against in violation of the Mine Act. He ordered Ross and Gilbert reinstated and awarded them monetary damages.

II.

Disposition of Issues

A. Affirmative Defense

On review, Shamrock does not challenge the judge's determination that the complainants established a prima facie case of discrimination. Shamrock argues that the judge erred in finding that it had not affirmatively defended and that Ross and Gilbert would have been discharged for their unprotected activity alone, i.e., for moving the cables under the scoop batteries. Shamrock contends that the judge ignored or overlooked evidence that other employees had been terminated for engaging in the same or similar conduct, that Ross and Gilbert had been warned not to place cables under scoop batteries, and that their conduct violated company policy.

The general principles for analyzing a discrimination case under the Mine Act are well settled. A miner alleging discrimination establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18.

Having found that Smith's decision to discharge Ross and Gilbert was "motivationally connected with their substantial protected activities," the judge evaluated whether the complainants would have been discharged, even if they had not engaged in protected activities, for the cable incident alone. He concluded that they would not have been discharged. 13 FMSHRC at 1487-88.

As the Commission noted in Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982), an operator may attempt to prove it would have disciplined a miner for unprotected activity alone by showing prior consistent discipline for similar infractions, the miner's unsatisfactory work record, prior warnings to the miner, and rules or practices prohibiting the conduct at issue. Here, there is no evidence that Shamrock had a consistent practice of disciplining miners for damaging electrical cable. Although one miner had been fired for negligently damaging a cable, another had not. Tr. 155, 252-53, 336. A third miner had been fired only after repeatedly damaging cable. Tr. 334-35. The judge discredited Smith's testimony that he did not know who had damaged the cable when he ordered Bowling to fire whoever was responsible; substantial evidence supports this finding. 13 FMSHRC at 1488; Tr. 146, 204-05, 513-14, 646-47.

As to the miners' work histories, the judge found that Bowling had promoted Ross two weeks before his termination and, at that time, stated that Ross was one of his best workers. 13 FMSHRC at 1477. Bowling testified that at the time of Ross's promotion, he felt that he would rather have Ross than any two other employees. Tr. 439. Ross and Gilbert were considered good employees, and neither had received any written reprimands during the nine years each had been employed by Shamrock. Tr. 249, 286, 315, 439.

Although the judge made no specific findings as to whether Ross and Gilbert had been warned not to move cables under scoop batteries, he found that they both knew that this was not a good or accepted practice. 13 FMSHRC at 1479. The judge also found, however, that Ross had seen foremen move cable under scoop batteries when they were hurried, as Ross and Gilbert were. Id. In addition, the judge found that Gilbert had engaged in the conduct at issue because he was following the orders of his crew leader, Ross, and that there

was no precedent at the mine for suspending or discharging a miner under such circumstances. 13 FMSHRC at 1479, 1488 n.4. Indeed, Smith acknowledged that Shamrock had initially offered Gilbert reinstatement after it learned that Gilbert had been following Ross's orders. Tr. 394.

Thus, contrary to Shamrock's assertions, the judge did not ignore evidence pertinent to Shamrock's affirmative defense. Applying the factors set forth in Bradley, we conclude that substantial evidence supports the judge's finding that Shamrock failed to establish an affirmative defense. Accordingly, we affirm the judge's conclusion that the discharges violated the Mine Act.

B. Gross backpay and interest

Shamrock argues that the judge miscalculated complainants' gross backpay and the interest thereon. Gross backpay is the sum a miner would have earned but for the discrimination, less his net interim earnings. Gross backpay encompasses not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package. See, e.g., Secretary on behalf of Dunmire & Estle v. Northern Coal Co., 4 FMSHRC 126, 142 (February 1982). The judge calculated Ross's and Gilbert's gross backpay by considering their hourly rate of pay, regular and overtime hours they averaged each week, and their usual bonuses. 14 FMSHRC at 229-30. Shamrock has offered no specific explanation of the asserted miscalculations nor has it set forth the basis of the alternative figures that it submits. We decline to overturn the judge's gross backpay determinations on the basis of Shamrock's unsupported assertion. Accordingly, we summarily affirm the judge's determinations of gross backpay.

In Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1504-05 (November 1988), the Commission abandoned use of the adjusted prime rate, originally adopted in Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2050-54 (December 1983), and announced that the short-term federal rate applicable to the underpayment of taxes would be used in calculating interest on backpay. The judge did not indicate in his supplemental decision the manner in which he calculated interest on Ross's and Gilbert's backpay awards but, in his decision on the merits, he cited Arkansas-Carbona and instructed the parties to attempt to stipulate the amount of interest due at the "IRS adjusted prime rate for each quarter." 13 FMSHRC at 1489 n.5. We remand the interest awards to the judge for clarification. If the judge applied the short-term federal rate applicable to the underpayment of taxes in accord with Clinchfield, we affirm the interest awards. If not, the judge should recalculate the interest awards.

C. Unemployment Compensation

Shamrock argues that the judge erred as a matter of law in not deducting complainants' unemployment compensation from gross backpay. The Commission recently decided in Clifford Meek v. Essroc Corp., 15 FMSHRC 606, 616-18 (April 1993), that, as a matter of agency policy, unemployment compensation, like interim earnings, should be deducted in determining backpay awards. Accordingly, we remand this matter to the judge so that he may determine

complainants' unemployment compensation benefits and deduct those amounts in determining their backpay awards.

D. Tax Penalties

The judge found that financial constraints resulting from their wrongful discharges caused Ross and Gilbert to withdraw funds from their profit-sharing accounts, and ordered Shamrock to reimburse them for the tax penalties resulting from early withdrawal. 14 FMSHRC at 230. Shamrock argues that the judge erred as a matter of law in so compensating Ross and Gilbert. Whether reimbursement for tax penalties should be included in backpay awards is an issue of first impression before the Commission and one committed to the Commission's discretion. Shamrock has failed, however, to advance any supporting argument upon which the judge's determination should be disturbed. Accordingly, without implying how we might rule on this issue in the future, we affirm the judge's award of tax penalties to Ross and Gilbert.

III.

Conclusion

For the reasons discussed above, we affirm the judge's conclusion that Shamrock failed to establish an affirmative defense. We also summarily affirm the judge's determination of gross backpay and his award of the tax penalties. We remand the interest awards to the judge for clarification and, if appropriate, recalculation. We reverse the judge's determination that unemployment compensation received by Ross and Gilbert should not be deducted when determining their backpay awards and remand for recalculation of the awards.

Arlene Holen, Chairman

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

Commissioner Backley, concurring in part and dissenting in part:

I concur with the majority's decision on all issues except for the majority's holding regarding unemployment compensation. For the reasons set forth in my dissent in Clifford Meek v. Essroc Corp., 15 FMSHRC 606, 621-26 (April 1993), I would affirm the judge's determination to not deduct unemployment compensation received from the backpay awards.

Richard V. Backley, Commissioner