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SOL (MSHA) V. LESLIE COAL MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF ARLIE RAMEY,
COMPLAINANT

Complaint of Discharge,
Discrimination or Interference

Docket No. KENT 80-3-D

Leslie Mine

v.

LESLIE COAL MINING COMPANY,
RESPONDENT

DECISION

Appearances: Darryl A. Stewart, Attorney, Office of the Solicitor,
U.S. Department of Labor, for Complainant
John M. Stephens, Esq., Pikeville, Kentucky,
for Respondent

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued April 29, 1980, a hearing in the above-entitled proceeding was held on June 24 and 25, 1980, in Pikeville, Kentucky, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977.

After completion of introduction of evidence by the parties, I rendered the bench decision which is reproduced below (Tr. 385-398):

This hearing involves a discrimination complaint filed in Docket No. KENT 80-3-D on October 1, 1979, by the Secretary of labor on behalf of Arlie Ramey against Leslie Coal Mining Company alleging that Mr. Ramey was discharged or discriminated against on March 16, 1979, when he was suspended with intent to discharge.

The issue raised by the filing of the complaint is whether Mr. Ramey was discriminated against, discharged, or interfered with in any way under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 so as to be entitled to the affirmative relief provided for under section 105(c)(2) of the Act.

I shall make some findings of fact on which my decision will be based. These facts will be set forth in numbered paragraphs as follows:

(1) Leslie Coal Mining Company is the operator of the Leslie Mine involved in this proceeding and is subject to the provisions of the Federal Mine Safety and Health Act of 1977.

(2) The complainant in this proceeding, Mr. Arlie Ramey, had been operating a continuous-mining machine in the Leslie Mine for approximately 1 year when, on March 16, 1979, he was given a suspension notice with intent to discharge by his section foreman who was Mr. Clyde E. Dickenson. The suspension occurred about 11:30 p.m. toward the end of the night shift which ran from 4:00 p.m. to midnight.

(3) The circumstances leading to Mr. Ramey's suspension were that Mr. Ramey took a cut of coal from the crosscut to the left of the face of the No. 1 entry. When Mr. Ramey started to clean up the loose coal after pulling out of the crosscut, Mr. Dickenson asked Mr. Ramey to disregard the cleanup of the crosscut and to begin cutting in the face of the No. 1 entry. Mr. Ramey refused to cut in the face of the No. 1 entry because such cutting would have been in violation of Leslie's roof-control plan, Exhibit No. 2, page 13, which requires at least two rows of bolts or straps in a crosscut before any work is done in by such crosscut, and also because Mr. Ramey did not think proper ventilation could be provided. Mr. Ramey requested that Mr. Dickenson call for a safety committeeman to check the unsafe condition and Mr. Dickenson advised Mr. Ramey that he was going to suspend Mr. Ramey with intent to discharge him.

(4) Mr. Ramey's helper in operating the continuous-mining machine was Mr. Richard Adkins. His testimony corroborated Mr. Ramey's statement that Mr. Ramey was ordered by Mr. Dickenson to cut the face of the No. 1 entry and that Mr. Ramey had refused to do so. Mr. Adkins agreed that it would have been unsafe to cut the No. 1 entry until the crosscut to the left of the No. 1 entry had been supported. Also Mr. Adkins said that he would not have wanted to assist in cutting in the face of the No. 1 entry until after some draw rock, which had fallen in the crosscut between the Nos. 1 and 2 entries, had been cleaned up and the roof had been properly supported. Mr. Adkins was of the opinion that cutting in the face of the No. 1 entry would have required him to handle the cable in the crosscut and he did not want to be so exposed until the crosscut had been made safe by proper roof bolting.

(5) Prior to Mr. Ramey's refusal to cut in the face of the No. 1 entry, Mr. Dickenson had asked Mr. Ramey to clean up some draw rock which had fallen in the crosscut between the Nos. 1 and 2 entries. The crosscut had been supported on the end next to the No.

1 entry but had not been supported at all on the end next to the No. 2 entry. Mr. Ramey suggested that

cleaning of the draw rock in the crosscut of the No. 2 entry would place Mr. Ramey in the dust resulting from such cleanup and Mr. Ramey recommended that he be permitted to clean up the draw rock by coming into the crosscut from the No. 1 entry. Mr. Dickenson agreed with Mr. Ramey's alternate cleanup plan, but when Mr. Ramey trammed the continuous-mining machine from the No. 2 entry to the No. 1 entry, Mr. Dickenson changed his mind about the need for Mr. Ramey to clean up the draw rock in the crosscut and instead asked Mr. Ramey to take a cut of coal from the crosscut to the left of the No. 1 entry as described in finding No. 3 above.

(6) Mr. Bruce Mahon was a ventilation man at the beginning of the 4:00 to 12:00 shift on March 16, 1979, but about halfway through the shift, or about 8:00 p.m., Mr. Terry Reed, one of the men who operated a roof-bolting machine, became ill and Mr. Mahon was asked to work as a roof bolter for the remainder of the shift. About 11:00 or 11:15 p.m. Mr. Mahon and the other roof bolter, Mr. Nathan Williams, were asked by Mr. Dickenson to set some safety jacks in the crosscut on the end next to the No. 2 entry. They placed six safety jacks in the crosscut, as far into the crosscut as they could reach, to set the jacks without going out from under supported roof which then existed in the No. 2 entry.

(7) Mr. Dickenson was standing in the crosscut between the Nos. 1 and 2 entries in the end of the crosscut nearest the No. 1 entry when he asked Mr. Mahon and Mr. Williams to set the safety jacks. A few seconds after Mr. Dickenson asked Mr. Mahon and Mr. Williams to set the safety jacks, Mr. Dickenson testified that Mr. Ramey walked into view at the end of the crosscut nearest the No. 2 entry. At that time Mr. Dickenson stated that he asked Mr. Ramey to assist Mr. Williams and Mr. Mahon in setting the safety jacks. Mr. Dickenson stated that Mr. Ramey refused to assist in setting the safety jacks in the crosscut. Mr. Mahon testified that it only took a few minutes to set the jacks and therefore Mr. Mahon would have been present in the No. 2 entry when Mr. Dickenson allegedly asked Mr. Ramey to set the jacks. Yet Mr. Mahon did not hear Mr. Dickenson ask Mr. Ramey to assist in setting the jacks and Mr. Mahon said he did not even know where Mr. Ramey was at the time the safety jacks were set.

(8) Mr. John Brown was safety committeeman on the 4:00 to 12:00 shift. While Mr. Brown and Mr. Ramey were in the bathhouse, Mr. Ramey told Mr. Brown that he had been suspended with intent to discharge because he had refused to take a cut out of an entry in violation of the roof-control plan. Mr. Brown returned to the No. 4 section with Mr. Dickenson and Mr. Brown testified that the break to the left of the No. 1 entry had been cut

but had not been supported and that warning reflectors
had

not been erected; that there were no markings at the face of the No. 1 heading to show the operator of the continuous-mining machine where to make the next cut; that six safety jacks had been set in the crosscut between Nos. 1 and 2 entries; that the distance of unsupported roof in that crosscut was 22 feet from the end of the No. 2 entry to the point of last supports extending into the crosscut from the No. 1 entry; and that draw rock about 15 inches thick lay on the floor of the crosscut -- the portion of the crosscut where the 22 feet of unsupported roof existed.

(9) Mr. Evans, who is Leslie's safety director, testified that an inspection made on August 8, 1979, by two MSHA inspectors, in response to safety complaints made to the union by Mr. Ramey, failed to reveal any violation of Leslie's ventilation plan. It appears that Mr. Ramey's complaint in that instance was based on statements made by other people and it appears that Mr. Ramey may have decided after that instance to base his complaints on his own firsthand knowledge about safety problems.

(10) Mr. Vaughan's testimony shows the appearance of the mine on Monday, March 19, 1979, on the first working shift following Mr. Ramey's suspension. Now I think Mr. Vaughan's testimony refutes any of the claims made by Mr. Ramey as to the occurrences in the mine on March 16, 1979. Mr. Vaughan's testimony did corroborate Mr. Ramey's statement that it would have been a violation of the roof-control plan for Mr. Ramey to have cut in the face of the No. 1 entry prior to installation of supports in the crosscut to the left of the No. 1 entry.

(11) Mr. Bellamy on Monday, March 19, 1979, the next production shift following Mr. Ramey's suspension on March 16, 1979, substituted for Mr. Opauski, the regular section foreman on the day shift in the No. 4 section. Mr. Bellamy encountered no problems in having the draw rock cleaned up in the crosscut between No. 1 and 2 entries and having the roof supported in that crosscut or in having the crosscut to the left of No. 1 entry supported or in having additional cutting done by the continuous-mining machine in both the crosscut and at the face of the No. 1 entry, after proper roof supports had been installed in each place.

The foregoing findings of fact have required me to make some credibility determinations. As the findings show, I have elected to accept Mr. Ramey's version as being more credible than Mr. Dickenson's version for several reasons. I shall give those also in numbered paragraphs and they are given not necessarily in the order of their importance.

(1) Mr. Dickenson had only been working in the No. 4 section 3 or 4 days at the time of his problem with Mr. Ramey. Mr. Dickenson was hazy about nearly all of the details of the events which occurred on the 4:00 to 12:00 shift on March 16, 1979. If Mr. Dickenson had not heard all the other witnesses' testimony before he testified it is difficult to conclude that he would recall any facts about the events which occurred prior to the last hour of the shift.

(2) Although Mr. Dickenson said that Mr. Ramey stopped working around 11:00 p.m. and said he was going to clean up or clean off the continuous-mining machine and would not do any more work that night, Mr. Dickenson could not recall if Mr. Ramey did in fact clean off the machine. And Mr. Dickenson gave no explanation for his claim that Mr. Ramey walked to the No. 2 entry at the end of the shift so as to be near the end of the crosscut from which draw rock needed to be removed.

(3) The record shows that Mr. Ramey was knowledgeable about the roof-control plan and the ventilation plan and that he had an excellent reputation up to the evening shift of March 16, 1979. Mr. Dickenson had not found Mr. Ramey hard to get along with on the previous 3 days of Mr. Dickenson's work as section foreman of the No. 4 section. Mr. Dickenson did not know if there was a cleanup plan for the continuous-mining machine under which they were cleaned daily or weekly or at the beginning or end of each shift.

(4) Although Mr. Dickenson said he would not have ordered Mr. Ramey to cut at the face of the No. 1 entry after Mr. Ramey had made the cut in the crosscut to the left of the No. 1 entry, because such an order would have been to ask Mr. Ramey to violate the roof-control plan, it is a fact that Mr. Dickenson agreed he had asked Mr. Ramey to clean up the draw rock at the end of the crosscut next to the No. 2 entry where Mr. Ramey would have been situated so as to be forced to breathe the dust coming from the cutting of the draw rock. Such a mistake about ventilation shows lack of familiarity with procedures on the No. 4 section and supports Mr. Ramey's claim that Mr. Dickenson had asked Mr. Ramey to cut at the face of the No. 1 entry immediately after Mr. Ramey had cut in the crosscut to the left of the No. 1 entry.

(5) The reason given by Mr. Dickenson for suspending Mr. Ramey lacks a logical connection to the facts which were alleged by Mr. Dickenson. Specifically, Mr. Dickenson stated that he had called Mr. Senters and requested that a safety committeeman be sent to the No. 4 section. Under the UMWA wage agreement, Exhibit B, Mr. Ramey had a right to refuse to work in that crosscut where he believed it was unsafe to

work. Although Mr. Ramey denies that he refused to clean up the draw rock if he approached it from the No. 1 entry so that Mr. Ramey wouldn't be directly in the path of the dust, under Mr. Dickenson's version of the facts, Mr. Dickenson would have been ordering Mr. Ramey to set safety jacks in the crosscut whose hazardous nature had been the reason that Mr. Ramey had asked for a safety committeeman to be sent to the section. That is when Mr. Dickenson says that he suspended Mr. Ramey for unsatisfactory work and refusing a safety directive. His reference to unsatisfactory work was explained as being the same as Mr. Ramey's alleged refusal to set the safety jacks.

(6) Since the roof bolters were able to set all six safety jacks within a matter of a very few minutes, there was no real reason for Mr. Dickenson to ask Mr. Ramey to assist the roof bolters because the safety jacks would have been set in the crosscut before Mr. Ramey could have been ordered to assist the roof bolters, and certainly before Mr. Ramey would have had time to refuse to set safety jacks. Moreover, in light of Mr. Ramey's demonstrated knowledge of mining procedures, it is highly unlikely that Mr. Ramey would have refused to set the safety jacks without reminding Mr. Dickenson that the crosscut was the subject of his request for a safety committeeman and that he was not required to work in the very place where the danger, about which he was complaining, existed.

(7) Mr. Dickenson had advised the miners on the No. 4 section that it was his intention to produce 10 cuts on a shift if possible, as he wanted to be known as a section foreman with a reputation as a large producer. That statement would not by itself be significant if Mr. Dickenson had not testified that he had gone to work for Leslie Coal Mining Company because he had heard that Leslie was expanding its personnel and that there was an excellent opportunity at the Leslie Mine for promotion. But if Mr. Dickenson's actions on March 16, 1979, are interpreted in light of his motive for going to work for Leslie, it is logical for him to have been very concerned about starting the crosscut to the left of the No. 1 entry because he had been asked by Mr. Senters, the general mine foreman on the second shift, to start that particular crosscut toward the No. 5 section. It is also logical to think that Mr. Dickenson would not have wanted to waste production time in cleaning up that crosscut to the left of the No. 2 entry when much more coal than that could be obtained by having Mr. Ramey cut at the face of the No. 1 heading.

(8) Mr. Senters' statement in Exhibit 5 shows that Mr. Dickenson was uncertain about how to deal with minor problems or it would not have been necessary for him to call

Mr. Senters to the No. 4 section toward the early part of the shift on March 16, 1979, to learn how to cope with draw rock which had fallen from the unsupported roof in the crosscut between the Nos. 1 and 2 entries.

(9) Since Mr. Dickenson had made errors during his shift about which end of the crosscut should be used for cleaning in the crosscut from a ventilation standpoint and had asked Mr. Ramey to violate the roof-control plan by going in by an unsupported crosscut for the purpose of cutting the No. 1 heading, Mr. Dickenson no doubt concluded that he would not be placed in a favorable light when the safety committeeman requested by Mr. Ramey made an appearance. He felt that some basis should be shown for taking action against Mr. Ramey. Therefore, Mr. Dickenson used the alleged instruction to Mr. Ramey to install safety jacks as a basis for giving Mr. Ramey a suspension notice with intent to discharge.

On the basis of the findings of fact set forth above and the explanation as to my reasons for my credibility determination I find that Leslie Coal Mining Company discriminated against Mr. Ramey by suspending him with intent to discharge on March 16, 1979, under section 105(c)(1) of the Act.

Having found that this violation occurred, Mr. Ramey is entitled to the relief which he requested in his complaint and which Mr. Stewart has requested today. The stipulations of the parties in this case indicated that Mr. Ramey was not paid for a period of time during which he would have earned a gross salary of \$1,715.58. The decision or the order accompanying this decision will require Leslie Coal Mining Company to reimburse Mr. Ramey for that amount plus interest at eight percent. The order will also require that there be removed from Mr. Ramey's personnel file all references to his suspension on March 16, 1979. Mr. Ramey does not ask for reinstatement to his former position.

I have dealt with everything that's important in this proceeding except Mr. Stewart's request that I assess a civil penalty. Section 105(c)(3) provides as follows: "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and 110(a)." Section 110(a), to which section 105(c)(3) refers, provides:

"The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of the mandatory health or safety standard may constitute a

separate offense."

It is my belief that when Congress indicated in section 105(c)(3) that a violation of paragraph 105(c)(1) would be subject to the provisions of sections 108 and 110(a), that Congress envisioned that the Secretary would initiate a proceeding for the assessment of a civil penalty for a violation of section 105(c)(1) in the same manner as the Secretary initiates civil penalty proceedings for violations of the mandatory health and safety standards or some other provision of the Act. Therefore, I decline to follow Mr. Stewart's recommendation that a penalty be assessed solely on an oral request by the Secretary that such a penalty be imposed. It has been my practice to consolidate civil penalty issues with all efforts by a coal company to get review of a citation or order written by an MSHA inspector, but I always wait until I receive the proposal or petition for assessment of civil penalty from the Secretary of Labor before I assess such a penalty.

The evidence in this proceeding and in fact the findings that I have already made in this decision will be an adequate basis for the assessment of a civil penalty when and if a petition for assessment of civil penalty is received by the Commission, and when that petition has been routed to me for disposition based on the record in this proceeding.

WHEREFORE, it is ordered:

(A) Leslie Coal Mining Company, having discharged Mr. Arlie Ramey in violation of section 105(c)(1) of the Act, shall, within 15 days from the date of this decision, reimburse Mr. Ramey for lost wages in the gross amount of \$1,715.58 with interest at the rate of 8 percent per annum.

(B) Leslie Coal Mining Company shall, within 15 days from the date of this decision, remove from Mr. Ramey's personnel file all references to his unlawful discharge on March 16, 1979.

(C) The assessment of a civil penalty for the violation of section 105(c)(1) will be assessed, based on the findings in this decision, after a Petition for Assessment of Civil Penalty seeking assessment of such a penalty has been filed by the Secretary and after the case containing that Petition has been assigned to me.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)