

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 5, 1995

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| SECRETARY OF LABOR, | : | TEMPORARY REINSTATEMENT |
| MINE SAFETY AND HEALTH | : | PROCEEDING |
| ADMINISTRATION (MSHA), | : | |
| On behalf of Frank Scott, | : | Docket No. KENT 96-52-D |
| Complainant | : | BARB CD 95-21 |
| v. | : | |
| | : | Mine No. 68 |
| LEECO, INCORPORATED, | : | |
| Respondent | : | |

DECISION

On November 13, 1995, the Secretary of Labor (Secretary) filed an application for an order requiring Respondent (Leeco, Inc.) to reinstate temporarily Complainant (Frank Scott) to the position he held immediately prior to June 12, 1995, or to a similar position at the same rate of pay and with the same or equivalent duties. The application was supported by the affidavit of Ronnie Brock, Supervisory Special Investigator of the Mine Safety and Health Administration (MSHA), and by a copy of the complaint of discrimination filed by the Secretary on behalf of Scott.

On November 17, 1995, counsel for Leeco requested a hearing on the application. On November 20, 1995, Tony Opegard entered his appearance as counsel for Scott.

Pursuant to a telephone conversation between the parties, it was agreed that the matter would be heard on November 28, 1995, in Hazard, Kentucky.

Prior to the presentation of testimony, I summarized the pleadings and reminded counsels that the issue to be decided was narrow -- namely, whether Scott's complaint of discrimination was not frivolously brought, as that term is used in section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (Mine Act) (30 U.S.C. ' 815(c)(2)). In other words, if the complaint is clearly without merit, fraudulent or pretextual, it is frivolous and the Secretary's application for temporary reinstatement must be denied.

THE TESTIMONY

THE SECRETARY'S WITNESS

FRANK SCOTT

The Secretary presented his case through the testimony of Scott, who stated that he is a miner of 13 years experience, with five years of experience as an electrician. Leeco's No. 68 Mine is an underground coal mine consisting of two sections. Scott testified that he began work at the mine on March 27, 1995. According to Scott, he was forced to quit working for Leeco on June 12, 1995. The last day he actually worked for the company was June 10.

On that date, he was scheduled to work his usual shift -- the afternoon shift (3:00 p.m. - 11:30 p.m.). He arrived at the mine around 2:30 p.m. The mine was not in production because the belt was being moved. Scott stated that he was advised by David Smith, the maintenance foreman and a supervisor of Scott, that one of his jobs that day would be to install a AY box.@ (Scott explained that a AY box@ is similar to an electrical junction box and that its purpose is to direct the current that enters the mine to the two separate sections.) Scott proceeded underground and went to the AY box.@ The power was off while he worked on the box. After power was restored, Scott was asked to check the equipment on one of the sections to make certain it was running correctly. Scott looked at his watch. It was approximately 4:00 p.m. The main mine fan was on. Scott determined that the equipment was functioning properly and he went to the belt head where he tried to advise Smith by telephone that the equipment was operating properly. It was now about 4:30 p.m. He could not reach Smith, so he walked to where the section foremen Rob Collett, who was working, to tell him he could not contact Smith. Scott claimed that three or four minutes later Smith yelled at him over the speaker telephone and stated that all of the power had gone off at the mine and that it should be on in 15 minutes.

Smith then directed Scott to work on repairing a hydraulic drill that was inoperable. Scott testified that he worked on the drill for approximately five minutes and could not get it to operate properly. Scott spoke with Smith again on the telephone and Smith told him to work on repairing the continuous mining machine, which had broken down the previous day. In order to fix it, Scott needed to weld a part on it. Scott claimed that Smith was anxious to have the machine repaired because production was supposed to be resumed at 12:01 a.m. on June 11.

The machine was at the face so scoop operator Tinsley Hubbard transported Scott there. Hubbard remained with Scott. The repair work required that Scott weld part of the continuous

mining machine. While working on the machine, Scott was asked by Hubbard if he thought they would have to work all night with the mine fan off. Scott stated he could tell that the main mine fan was not working because the smoke from the welding stayed in the air, and he could not feel any air current. Scott believed it took him approximately one hour to complete the necessary welding. Hubbard was with him during this time.

Scott and Hubbard then traveled to the belt head where Collett and Tim Kilburn were working. He asked them how much longer he and Hubbard would have to stay underground when the fan was off. (Scott claimed he did not know the Secretary's regulations prohibit miners from remaining underground for more than 15 minutes when the fan has stopped (30 C.F.R. '75.313(c)(1)).) According to Scott, Collett and Kilburn just looked at him, hung their heads, and said nothing.

Scott was then told by Kilburn to move the belt head cable. Scott and Hubbard moved the cable and Scott stated that Hubbard again asked him how long they would have to work with the fan off. Scott knew the fan was still off because he got hot moving the cable, something that never had happened before.

It was around 7:00 p.m. and Scott and Hubbard went to the overcast to eat dinner. Scott could not hear the air whizzing through the overcast, an indication that the fan still was not functioning. Other miners were eating at the overcast (James Scalf and Randal Young). They asked if they would have to work all night with the fan off and Scott said he did not know.

After dinner Scott continued to move cable. He finished the task around 8:30 p.m. Scott stated that at this point Kilburn left the mine to get more J hooks to hang cable. Five or ten minutes later Scott heard the AY box begin to hum and air being whizzed through the overcast. The power and the fan were back on. Kilburn returned and Scott asked him how the power had been restored. Kilburn stated that he did it.

Around 9:25 p.m., Scott heard Smith and Kilburn speaking to each other over the pager telephone. Scott could decipher what they were saying. A short time later Kilburn told Scott that Smith wanted him to stay into the next shift to build a spillboard and install a guard on the belt head. Scott testified that he stayed until around 11:00 p.m. but could not get the spillboard built because a scoop that was necessary to bring supplies was not operable. Its battery was low. Scott got a battery charger and hooked it up to the scoop. He did not believe he could do any more work that night so he left the mine

around 1:00 a.m.

The next day, June 11, was a Sunday. Scott discussed with his wife the fact that he had stayed underground with the fan off. Scott testified that he knew he was not supposed to work for an extended period when the fan was not operating. However, he did not leave the mine before 1:00 a.m., because he feared he would be fired.

He also stated he discussed with his wife two other work practices he believed were hazardous that he had been required to do three or four times previously -- one was the practice of hanging high voltage power lines (i.e., lines carrying 12,470 volts) while the power was on and the other was the practice of working on belt equipment guards while the belt was operating. (Scott did not know the specific dates when he was asked previously to hang energized high voltage cable, but it was during the months of April, May and June. In addition, he did not know the specific dates when he was asked to work on guards while the belts were running.) Scott stated that after talking with his wife, he resolved not to perform any more unsafe work.

On June 12, Scott returned to the mine around 3:00 p.m. In the changing room he encountered Smith who asked Scott to come and speak with him in a back room. Scott changed his clothes and met with Smith. Scott testified that Smith wanted to know why the spillboards had not been installed on June 10. Scott explained that the scoop was Adown.@ Smith handed Scott a written work order for June 12 (Gov. Exh. 1). It listed four jobs, included cutting part of a guard off of a belt tail piece.

Scott maintained that Scott orally instructed him to hang a high voltage line. Scott replied that he did not want to hang high voltage cable while the power was on and did not want to work on guards while the belts were running. In addition, he asked Smith about working underground on June 10, while the power was off.

According to Scott, Smith responded if he would not do the work, he should leave and not come back. Scott told Smith if that were the case, he quit. Scott maintained that as he was leaving the meeting with Smith he encountered Kilburn. He gave Kilburn the written work order and he told Kilburn he had quit working for Leeco because he had to work underground on June 10 for four hours while the fan was off and because he was asked to work on the tailpiece guard while the belt was running. He stated that at no point did he ask Smith to lay him off.

Scott testified that before June 12, he had no discussions with Smith regarding his general job performance and that he never was disciplined previously by Leeco.

LEECO'S WITNESSES

DAVID SMITH

Smith has been a maintenance foreman for Leeco for the last three years. He hired Scott. Scott's duties were to keep the equipment running at the mine. Smith testified that on June 10, the work that needed to be done at the mine was to set up the belt head drive and tailpiece in a neutral entry. On June 10, no specific work assignments were given to Scott. Usually, Smith orally advised Scott about what he was to do before Scott went underground. Smith recalled that Scott was supposed to try to fix the hydraulic drill and that he had spoken with Scott about this over the mine telephone. Also Scott was supposed to make sure the equipment was running properly.

Smith testified that he left the mine around 4:30 p.m. He went home and took his wife out to dinner. On his way back, he stopped at the mine around 9:30 p.m. or 10:00 p.m., to ask if the hydraulic drill had been fixed. Kilburn told him that it had been. There was no indication that the power had failed, and no one told Smith it had happened. He then left the mine.

Smith did not speak with Scott until June 12, when he asked Scott to see him after their encounter in the changing room. At the meeting, Smith testified that he asked Scott why he had not fixed the drill and why he had to be told to do things like fix the drill. He told Scott he should take more initiative and show a greater interest in his work. He then gave Scott the written work assignments for the day (Gov. Exh. 1).

According to Smith, Scott did not question him about any of the assignments, including the work on the belt guard. Rather, Scott's response was to ask to be laid off. When Smith told Scott he could not lay him off, Scott raised the subject of the fan being off. Smith testified that Scott stated something to the effect that he could get unemployment compensation because the fan had been off. (Smith maintained that this was the first he learned of the power failure.) Aside from the fan, Scott mentioned no other complaints to Smith. Nor did Scott complain to anyone else.

Smith knew of no instances when Scott was instructed to hang high voltage cable while it was energized, nor of any instances

when he was instructed to work on guards while belts were running.

According to Smith, about ten times prior to June 12 he had spoken previously with Scott about his job performance and about the need to do better work. He kept records of some of these conversations in his notebooks. He agreed that Scott never had been given a written warning concerning his job performance and never had been given time off as a disciplinary measure.

TIM KILBURN

Kilburn works as a second shift repairman at the mine. On June 10, the section shift miners were himself, Collett, Scalf, Young, Hubbard and Scott. Their primary job was to extend the belt line and set up the head drive using a battery powered scoop and the hydraulic drill. They also were working on the AY box@ and the power was off while this work was going on.

Kilburn went underground around 4:00 p.m. Kilburn understood Scott's duties were that of working on the belt line and repairing a continuous mining machine. Kilburn agreed with Scott that he had left the mine during the evening of June 10, but he maintained that he left to get materials for the spillboard Scott was supposed to install, not to restart the fan.

According to Kilburn, the fan could restart itself once power was restored.

Kilburn denied telling Scott he had restarted the fan. Kilburn also denied that he ever spoke with Scott on June 10 about the fan being off.

Kilburn stated that Scott never complained to him about any of the working conditions at the mine. Kilburn knew of no instance in which Scott was asked to hang energized high voltage cable. In any event, cable usually was hung on the third shift, not on the second. In addition, he knew of only one instance prior to June 12, in which Scott had worked installing belt guarding at the head drive. Kilburn worked with him and the power was not on while the work was being done. In Kilburn's view, Scott did not like to work overtime and on June 10, he told Kilburn he would quite if he had to work overtime that night.

The only thing Kilburn heard Scott ask Smith on June 12, was whether Smith could get Scott unemployment compensation, or words to that effect. Following the conversation, Scott handed his written work order to Kilburn. Item No. 4 of the order, that required part of the guard to be cut away, was completed by another miner after Scott quit, but only once the belt had been moved up and power had been cut off. Those were the same

circumstances in which Scott would have been expected to complete the task.

Before Scott left the mine on June 12, he again saw Kilburn. He told Kilburn that he had quit his job. He did not mention anything about why he quit. Rather, he told Kilburn that Smith had A[obscenity] with the wrong person. @

THE DISCRIMINATION COMPLAINT AND THE ANOT FRIVOLOUSLY BROUGHT@ STANDARD

The essence of Scott's complaint, as put forward by the Secretary on Scott's behalf, is that prior to June 10, 1995, he was asked to and did perform work at the mine that was hazardous. Specifically, this work was the hanging of energized high voltage power cables and working on mechanical equipment guards while belts were running. On June 10, he worked underground with the fan off for an extended period. On June 12, he was ordered by Smith to perform a task he believed to be hazardous, that he raised his fears to Smith. When his fears were not addressed he was forced to quit.

The standard for review requires that the Secretary's legal theory, as well as the Secretary's factual assertions, be not frivolous (see Jim Walter Resources, Inc. v. FMSHRC , 920 F.2d 738, 747 (11th Cir. 1990)). It is under established precedent that a miner has a right to complain about unsafe work conditions and practices and a right to refuse to work if the operator does not respond to a reasonable complaint (Gilbert v. FMSHRC, 866 F.2d. 1433, 1444 (D.C. Cir. 1989; see Secretary on behalf of Cooley v. Ottawa Silica Co., 6 FMSHRC 516, 519-21 (March 1984), aff'd ,780 F.2d 1022 (6th Cir. 1985); Price v. Monterey Coal Co., 12 FMSHRC 1505, 1514 (August 1990 (citations omitted).))

A constructive discharge is proven when a miner who engaged in a protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign (See, e.g., Simpson v. FMSRHC, 842 F.2d 453, 461-63 (D.C.Cir. 1988).)

Although the merits of the legal theory of constructive discharge may or may not be sustained at trial, it is certainly an arguable legal position, given the fact that the parties really do not dispute that the fan at the mine was off for a period of time on June 10, and given the fact that a miner who felt he or she had been made to work too long under those conditions reasonably might have complained about it. Moreover,

if, in fact, the Secretary could establish that Scott did complain about hanging energized high voltage cable and working on the mechanical equipment guards while belts were operating, the complaints could also have been reasonable under the circumstances and have required a reasonable response on Leeco's part. Moreover, the failure to respond in any way could well have compelled Scott's resignation. Given these possibilities, I cannot find that the Secretary's legal theory is not without merit.

Further, while there is stark disagreement about whether Scott ever was required to engage in hazardous work practices involving high voltage cables and guarding and, if so, whether he ever lodged complaints about them, the resolution of the disagreements require credibility determinations and factual findings appropriately made after a full trial of the issues, with testimony from all of those involved. Moreover, and as I have noted, it is agreed that there is at least some factual basis for Scott's assertions regarding the fan in that it did cease to function on June 10, while Scott was underground. Smith and Scott also agreed to the extent that at some point during their conversation of June 12, Scott raised the matter of the fan with Smith. Leeco argues that Scott's motivation was wholly pretextual. A determination regarding that contention also involves credibility determinations and, perhaps, other factual evidence and therefore warrants a trial of the issue.

For these reasons, I conclude that while there is conflicting testimony on almost all of the fundamental issues, it cannot be found that the theory behind Scott's discrimination complaint and the factual assertions associated with it are clearly fraudulent, clearly without merit or clearly pretextual.

Accordingly I conclude that Scott's complaint is not frivolously brought and that Scott is entitled to temporary reinstatement.

ORDER

Leeco is **ORDERED** to reinstate Frank Scott to the position he held on June 12, or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him.

David F. Barbour
Administrative Law Judge

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