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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF: DAVID PASULA, WILLIAM KALOZ, RALPH PALMER, JAMES COLBERT, BRYAN PLUTE, LAWRENCE CARDEN, COMPLAINANTS	Applications for Review of Discrimination Docket Nos. PITT 78-458 PITT 79-36 PITT 79-35 Montour No. 10 Mine

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

DECISION

Appearances: Eddie Jenkins, Esq., Robert Cohen, Esq., Office of the Solicitor, Department of Labor, for Complainants;
Kenneth J. Yablonski, Esq., United Mine Workers of America, for Complainants;
Anthony J. Polito, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Respondent;
Karl Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Administrative Law Judge Charles C. Moore, Jr.

These consolidated actions were brought by MSHA on behalf of David Pasula and those members of his working crew that were idled on two separate occasions. David Pasula alleges discrimination in that he was fired and the other workers alleged discrimination in that they were deprived of two half-shifts of work and payment because of a complaint of a safety violation. Pasula, the continuous miner operator, had been previously reinstated pursuant to an order issued by Acting Chief Administrative Law Judge Broderick, but he was not actually reinstated as a continuous miner operator. He was paid at the rate appropriate for a continuous miner operator, however.

On May 31, 1978, David Pasula was on a crew working the 12 midnight to 8 a.m. shift. When he got to his continuous miner he found the methane monitor on the machine inoperative and so informed a mechanic and his section foreman. The mechanic decided that an entire module was necessary, and the section foreman telephoned the shift foreman to see if such a module was available.

The shift foreman inquired and learned that the part which the mechanic said was necessary would not be available until the next morning. The exact sequence of events following is not clear, but, the shift foreman was at the face area and did request that David Pasula operate the continuous miner without a methane monitor for a period of time. David Pasula may have been willing to operate the machine for a time, but not as long a time as the shift foreman desired (until 8 a.m.). There was testimony that some Federal inspectors do not consider it a violation to operate a continuous miner without a methane monitor for short periods of time as long as the required 20-minute methane checks are made. Regardless of the exact communications, Mr. Pasula did not operate the continuous miner as requested and as a result, his crew could not produce coal in the the 1 West section. The assistant master mechanic, who might have been able to repair the machine (I say this because the next day a mechanic did repair the machine in about half an hour without replacing the module), was in the 1 Northeast section working on a continuous miner which had been partly buried by a roof fall.

Mr. Pasula and the other complainants in his crew were sent home and paid for 4 hours even though they did not work quite that long. It is the contention of these crew members that there was other work to do in the mine which they could have been assigned to do, and that they were sent home after 4 hours only because Mr. Pasula refused to operate the continuous miner without a methane monitor. They thus contend that they were deprived of 4 hours of pay on May 31, 1978.

Subsequent to the crew's midnight departure from the 1 West section, the chief mechanic and other mechanics fixed the other continuous miner in 1 Northeast section by replacing a number of the gears and then extracting the miner from beneath the rock fall area. When the Pasula crew arrived for their next shift on June 1, 1978, starting at midnight, they were assigned to the 1 Northeast section where the continuous miner had been under a roof fall during their previous shift. During the repair of that continuous miner, new gears had been mixed with old gears and as a result, the machine was extra noisy because the gears did not mesh properly. It was the testimony of all of the knowledgeable people that addressed the subject that gear meshing noises of this sort do reduce in volume as the machine is operated. Repairs on the miner had been completed on the shift previous to Mr. Pasula's and the machine was used in mining for several hours during that previous shift.

The machine was so noisy, however, that the operator (who had a hearing loss) shut it off when the shuttle cars were not in position to load coal, whereas his usual procedure is to let the machine idle while the shuttle cars are not in the area.

Pasula noted the loudness of the machine but nevertheless, operated it for about an hour and a half before he decided he had had enough. He stated that he had a headache, that his ears hurt and he was nervous and that when he attempted to complain to the section foreman, he found the section foreman asleep in the dinner hole. This was later denied by the section foreman. I find it unnecessary to determine whether the section foreman was asleep or not because it is clear that Mr. Pasula thought he was or he would not have phoned the shift foreman directly instead of talking first to the section foreman. No one has suggested an ulterior motive on Mr. Pasula's part regarding this direct contact with the shift foreman, and no one has suggested a reason why he should invent the story that the section foreman was asleep.

Mr. Pasula told the shift foreman about the noise the machine was making, told him about his headache, nervousness and hurting ears and requested that a noise level test be made on the machine before he operated it further. After that conversation, the shift foreman telephoned the mine manager to inquire as to whether they were required to make a noise level test in the circumstances, and he was informed that the law did not require such a test.

Subsequently, the assistant master mechanic, the shift foreman, a member of the safety committee, and the section foreman met at an intersection near the face where the continuous miner was located. At the time, Mr. Pasula and his helper were doing some other work that had been assigned and were not present when one of the mechanics started the machine so that the others could listen to it run. Even though he had not heard the machine running at the face with all motors running, the safety committeeman had already agreed with management that the machine was not too loud to operate before Mr. Pasula and his helper returned to the scene. When Mr. Pasula heard this, he became very upset. Harsh words were spoken and Mr. Pasula continued to demand that a noise level reading be taken on the machine. Management refused to comply. Mr. Pasula then said he would not operate the machine and that nobody was going to operate it.

There is some question as to whether anybody ever asked the helper to run the machine, but it does not matter because he would not have run it in any event. He so testified and it is a general longstanding mine custom that when one miner will not operate a piece of equipment, another one will not. The section was then shut down and the miners on that particular crew were taken from the mine. All, except Mr. Pasula, were paid for 4 hours of work and he was paid for 3-1/2 hours, the difference being that he had refused to run the machine and was therefore not paid for the last half hour. At one

point during the discussions, Mr. Pasula said he wanted to call a Federal inspector to take a noise level reading. He was told he could not use any phone on mine property for that purpose. Before leaving the mine, Mr. Pasula did ask for other work, but was told that with the miner down and, with no production, there would not be any other work.

Mr. Pasula was subsequently fired and he filed a grievance under the union contract. This resulted in an arbitration proceeding before David L. Beckman, Esq., and his written decision in the matter was received in evidence as Consol Exhibit No. 10. A copy of that decision was also attached as Exhibit A to Respondent's answer to the complaint.

As to the weight that should be given to the decision of the arbitrator by me, the cases cited in the briefs indicate that it is a matter of discretion. In exercising that discretion, according to the cases, I should consider the qualifications of the arbitrator and the type of hearing that was held. From the information submitted during the trial it appears that the arbitrator was a well-qualified attorney and that the testimony before him was under oath.

Mr. Beckman, of course, had to rely on the evidence presented to him and I have no idea as to what that evidence was. I have noted some findings in his opinion that are inconsistent with the evidence presented to me and with my knowledge of the regulations involved. He may have been told otherwise, but the statement on page 13 of the opinion to the effect that an inspector has no authority to shut down a machine because of a noise violation is incorrect. While several of the witnesses indicated their understanding that noise violations would not result in closure, there is no question but that if a noise violation, like any other violation, is unabated, and if the inspector does not consider a further extension of time justified, a withdrawal order will be issued. And such orders have been issued. The implication that noise violations are not serious enough to close a mine is not correct. Also, it appears that Mr. Beckman's reliance on the inspector who tested the noise level of the machine may have been misplaced. The machine had been running for approximately 2 hours after Mr. Pasula and his crew left the mine by the time the noise level test was made by the inspector. The purpose of allowing the machine to idle during that time was to let the gears mesh and reduce the noise level on the machine. Assuming that the idling of the machine had the effect that it was designed to have, i.e., reduce the noise level, and despite the inspector's possible testimony before Mr. Beckman and his statement in writing which he presented to Respondent, the machine was still too noisy for anyone to legally operate for an 8-hour shift.

The machine in question was producing 93 decibels with only the pump motor running and was producing 103 decibels with the pump motor

and the conveyor running and while mining coal. The limit for an 8-hour shift is 90 decibels. It would have, therefore, been illegal to require an operator to sit in this machine and idle the engine for an 8-hour shift. While evidence was introduced as to how much time, during an 8-hour shift, a mining machine is actually cutting coal, tramming, idling, or off, such evidence was inconclusive. This is especially true since Consolidation Coal, the proponent of the study, was of the erroneous opinion that it was standard practice to shut the machine off while awaiting a shuttle car.

I cannot imagine what prompted the inspector to imply, if not state, that a machine producing 93 decibels could not be involved in a violation of the standard. As previously stated, it certainly would be a violation if one miner were to idle the machine for 8 hours. It would clearly be a violation if any miner operated the machine cutting coal at 103 decibels for an hour and a half because that would be a violation even if the machine only produced 102 decibels.(FOOTNOTE 1) The inspector did not appear before me to explain his evaluation of the machine, and in the absence of any such explanation, I will not accept his statement that the machine was in compliance with the noise standard, because that compliance obviously depends on how long a particular miner is exposed to either the 102 or 93 decibel levels. I therefore agree with the contention in MSHA's reply brief that Consol Exhibit No. 12 does not show that the continuous miner was in compliance with the noise standard.

Arbitrator Beckman's decision, despite differences pointed out above, generally agrees with the facts as I have found them here. His decision was based on the wording of the union contract, however, and not on the language of section 105(c) of the Federal Mine Safety and Health Act of 1977. Under the union contract, if a miner thinks that his health or safety is in jeopardy (the wording is similar to the description of an imminent danger under the Federal law) he is entitled to have a member of the safety committee examine the situation. If management and the safety committee member agree that there is no hazard involved, then the miner is supposed to go back to work. At least that is the way the contract was interpreted by Mr. Beckman and according to Consol's reply brief filed on February 2, 1979, that decision has been affirmed. The Federal provision states "No person shall discharge or in any manner discriminate against * * * a miner * * * because such miner * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent * * * of an alleged danger or safety or health violation * * *." (Emphasis added.)

Arbitrator Beckman concludes that David Pasula was fired because of his refusal to operate a continuous miner and because of his past

record. That past record is referred to on page 14 of Mr. Beckman's decision and includes four items. The first was for insubordination on December 22, 1976, which resulted in a verbal warning. Details are not contained in the file. The second on January 27, 1977, concerned a confrontation with a mine pay clerk and a written warning was issued to Mr. Pasula. The confrontation involved work that Mr. Pasula had done and not been paid for. I think the pay clerk should have received the written warning. The third item on March 22, 1977, concerned a charge of altering a medical form and there was an arbitrator's decision which was introduced in evidence as Consol Exhibit No. 3. There are three lines obliterated on page 3 of the exhibit and two lines obliterated on page 4. So, I must assume that whatever was said in these five lines, it was something Consol did not care to include in the record. Whatever that material was, I do not see how it could rehabilitate that decision in view of the evidence that was presented at the hearing in the instant case. The evidence that was presented to me indicated that Mr. Pasula had done nothing wrong, but I have no idea what evidence was presented before Arbitrator Pollock. In any event, the arbitrator was presented with the question of whether or not Mr. Pasula altered medical forms. Instead of deciding that question either on the evidence or if necessary by assigning the burden of proof, the arbitrator proceeded to strike a balance somewhere in between. He found Mr. Pasula somewhat guilty, but not altogether guilty and therefore modified the penalty imposed by the company. Consol Exhibit No. 3 does not indicate that Mr. Pasula was wrong in connection with the medical records event. The doctor who failed to fill out the proper forms may have deserved a suspension, but not Mr. Pasula. As to the fourth charge mentioned by Mr. Beckman, interference with management, which resulted in a 3-day suspension for Mr. Pasula, the evidence indicates that on that occasion there was a labor dispute and that Mr. Pasula and his fellow workers complied with the directions of the safety committeeman. But, on June 1, 1978, when Mr. Pasula chose to ignore the advice of the safety committeeman, he was fired. I find the entire record of Mr. Pasula's so-called past misconduct, contrived and unconvincing. I therefore, completely disagree with Mr. Beckman's decision in this regard.

It is the position of MSHA and the union, that Consolidation Coal Company's actions have shown that whenever a section is shut down because of a safety complaint by a miner, then the miners will be sent home for the second half of the shift, but if it is for some other reason, the miners will be given other work for the remainder of the shift. I find that no such pattern has been established. If, on May 31, 1978, the section had been shut down because the continuous miner was inoperative due to a faulty methane monitor, the fact that the miners were sent home, rather than being given other work to do, would not establish discrimination. Certainly the fact that they were paid for 4 hours of work, but not required to actually stay in the mine for that 4-hour period would indicate that there was no vindictiveness on the part of management.

But, the section was not shut down because of the faulty methane monitor. It was shut down because of David Pasula's refusal to run the machine without that necessary piece of equipment. Despite his equivocation, evasiveness and nonresponsiveness, I find that Shift Foreman Neal did try to get Mr. Pasula to run the machine for the remainder of the shift without an operable methane monitor. On Mr. Pasula's refusal, the section was closed and the miners were sent home. Several mechanics, including the assistant master mechanic, were working on a continuous miner which had been buried in another section, and I have no doubt that they, or at least the assistant master mechanic could have fixed the methane monitor in a short period of time. The fact that there were other pieces of equipment in the section with discrepancies is not important because if it had been important, Mr. Neal would not have asked Mr. Pasula to operate the machine without the methane monitor. Mr. Bigley, the assistant master mechanic, said he could not leave the other section with the mechanics working on the partially buried continuous mining machine, because of the danger in that other section. He was somewhat over-dramatic as though he thought that his presence would somehow keep the roof from falling on these other mechanics, but if he really thought they were in danger, and if management had been interested in keeping Mr. Pasula's section open, all of the mechanics could have come over to the 1 West section, fixed the methane monitor, repaired whatever discrepancies existed, and then gone back to their half-buried continuous miner. The fact that management chose not to pursue this course of action is a further factor indicating that they were punishing Mr. Pasula and his crew for his refusal to operate the continuous miner illegally for an 8-hour period.

I find that all miners working in the 1 West section on May 31, 1978, in Mr. Pasula's crew who were idled and unpaid for half of that shift and who are also Complainants in these proceedings, are entitled to be paid for the second half of the shift.

As to the incident on June 1, 1978, which resulted in the firing of Mr. Pasula, I have already indicated what I think of Mr. Pasula's past record of disciplinary actions. Inasmuch as the abusive language used by Mr. Pasula was directed towards Mr. Cushey, a fellow miner, and not towards supervisory personnel, that language could not reasonably be a part of the justification for his discharge. This leaves only Mr. Pasula's insubordination in refusing to operate the continuous miner as a possible justification for the action taken by the company. The company argues that Mr. Pasula's refusal to allow anyone else to operate the continuous miner was a dispositive factor. It was apparently when Mr. Cushey, the safety committeemen, suggested that Mr. Fisher operate the machine that Mr. Pasula said that the machine was down and nobody was going to operate it. But as stated earlier, according to mine custom, Mr. Fisher would not have operated

the machine in any event. Also, the company seems to be taking inconsistent positions regarding Mr. Pasula's authority. On the one hand, the company says he shut down the machine and refused to allow anybody to operate it by an oral statement, and on the other hand, the company is saying that he had no authority to do so. There was no evidence that any foreman told the miners that Mr. Pasula lacked authority to shut down the machine. On the contrary, their actions seemed to concede that he did have that authority.

It must be remembered, that when Mr. Pasula refused to run the continuous miner, it was not a flat refusal. He refused to run it until or unless a noise level test was made, and he demanded that such a test be made. He even informed his superiors that he knew how to make the test himself if they would provide the apparatus. And while I have indicated earlier that the machine could have well been producing enough noise to justify a notice of violation, it does not really matter. The Act protects a miner who is disciplined because he alleges a violation, whether a violation exists or not. There is no doubt in my mind that Mr. Pasula was discharged because he was complaining about the noisy machine and demanding that a noise level test be made. Management's evidence indicated to me that it does not take noise violations too seriously. The refusal of management to allow Mr. Pasula to use a phone on mine property to call in a Federal inspector for the purpose of taking a noise level test adds nothing to management's attempt to show a good faith discharge of Mr. Pasula.

I think management had had enough of Mr. Pasula and his health or safety complaints and decided to get rid of him. The other miners on the crew just happen to be caught up in the same situation, but the fact remains that they were punished i.e. discriminated against, because of Mr. Pasula's complaint. They and Mr. Pasula are thus entitled to pay for a full shift on June 1, 1978. This ruling of course applies only to miners who are complainants in these proceedings. Mr. Pasula is entitled to remain in his position as a continuous miner operator and is entitled to actually operate the equipment rather than merely being paid as a continuous miner operator.

ORDER

It is therefore ordered that Consolidation Coal Company pay to the complainants herein the difference between what they were actually paid for work on May 31, 1978, and June 1, 1978, and the appropriate pay for working two entire shifts. It is further ordered that Mr. Pasula be actually reinstated in his former job as a continuous miner operator. This order is to be complied with within 30 days and the

previously issued temporary reinstatement order will remain in effect until the instant order becomes a final and enforceable order of the Federal Mine Safety and Health Review Commission.

Charles C. Moore, Jr.
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE

1. See 30 CFR 70.510.