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F. G. BRADLEY v. BELVA COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

FREDERICK G. BRADLEY,
COMPLAINANT
v.
BELVA COAL COMPANY
RESPONDENT

Complaint of Discharge,
Discrimination or Interference

Docket No. WEVA 80-708-D
MSHA Case No. HOPE CD 80-68

Belva Coal Mine

SUPPLEMENTAL DECISION AND ORDER

On February 11, 1981, I issued a decision finding that Respondent had unlawfully discriminated against Complainant in violation of   105(c) of the 1977 Mine Act, 30 U.S.C.   815(c). The parties were unable to agree on the relief due, so further submissions were ordered. The monetary award herein covers the period June 12, 1980 through April 10, 1981.

Since the initial decision, the Commission has issued Secretary of Labor ex rel. Robinette v. United Castle Coal Co., Docket No. VA 79-141-D (April 3, 1981), which further sharpens the contours of   105(c). It is now plain that the Pasula (FN.1) analysis should be applied to every discrimination case. For the sake of clarity, then, I will summarize the manner in which the Pasula tests have been applied to the evidence in this case.

The Weight to be Accorded the Decision of the West Virginia Coal Mine Safety Board of Appeals

During the course of these proceedings, Respondent moved for summary decision based on a decision adverse to Complainant issued by the West Virginia Coal Mine Safety Board of Appeals. Complainant's cause of action before that tribunal was essentially the same cause of action he has presented here. The motion was denied, for the reasons set forth in my order of January 12, 1981. However, the transcript of the hearing before the Board and the Board's decision were admitted as evidence at the hearing.

The weight to be given this evidence is controlled by the factors outlined in Pasula, supra, at 2795. Based on these factors, I find that the Board's decision is entitled to no weight, because there are essentially no reasons to explain it. Without knowing how the Board evaluated the testimony or applied the law, I think any deference to its decision would be unjustifiable.

The Pasula Analysis

1. Did Bradley Engage in Protected Activity?

Four witnesses testified that Bradley often complained to his superiors about unsafe practices in the mine. On June 11 and 12, 1980, a Federal inspector visited the mine and issued a number of citations and orders. In particular, he directed Respondent to remove the damaged portion of a trailing cable and install a permanent splice. The cable was tagged but was not locked out. Complainant began to hang the cable so a scoop could pass. Larry Davis then told Complainant not to hang the cable and simply to allow the scoop to run over it. Complainant refused to comply with this order.

The controlling standard is whether Complainant had a good faith, reasonable belief that there was a hazardous condition and whether he reacted in a reasonable manner to that belief. Robinette, supra, at 10. Complainant honestly believed that running over the cable was hazardous. This belief was reasonable since the cable was damaged and could have been further damaged by the scoop. Although the cable was tagged and de-energized, it was still connected to a power source and a mining machine. If it became energized accidentally, it could have seriously harmed anyone touching it. The risk of harm would be significantly increased by further damage to the cable. Complainant reacted reasonably by refusing to so increase the risk. His refusal led to only a modest delay in the performance of his duties while he hung the cable.

2. Was the Discharge Motivated in Part by the Protected Activity?

Respondent was clearly aware of Complainant's protected activity. Since the discharge followed so closely on his refusal to allow the scoop to run over the cable, such refusal unquestionably figured in the decision to discharge.

3. Was the Discharge Motivated in Part by Unprotected Activity?

Respondent introduced evidence that Complainant did not comply with an order to bring a tape measure and argues that this precipitated the discharge. It is clear, however, that this, in itself, is not a case of egregious misconduct, and that discharge was a totally disproportionate sanction.

4. Would Bradley have been Discharged for the Unprotected Activity Alone?

The testimony suggests that personality differences played a significant role in the decision to discharge. The only specific acts of misconduct alleged by Respondent, however, were the refusal to have the scoop run over the cable and the refusal to bring a tape measure. I conclude from all the testimony that the refusal to let the scoop run over the cable was the key event. This act of defiance and the substantial burdens placed on company personnel by the Federal inspector became intertwined in Larry Davis's mind. Complainant's discharge finally expressed the

dissatisfaction and resentment which had been building against him for months. I find that the isolated refusal to get a tape measure, under the circumstances, would not have provoked the discharge by itself.

Monetary Award

The parties were unable to agree on the amount due under paragraphs 2 and 4 of my order of February 11, 1981. They have supplied argument and documentation to support their positions and, having considered them, I make the following rulings on each item.

The back pay provisions of 105(c), like the corresponding provisions of Title VII of the Civil Rights Act, appear to be modeled on 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c). Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 41 (1975). Questions arising under it should therefore be resolved by reference to NLRB precedent. Id. The general rule is that back pay is the difference between what the employee would have earned but for the wrongful discharge and his actual interim earnings. OCAW v. NLRB, 547 F.2d 598 (D.C. Cir. 1976). In practice, this means gross pay minus net interim earnings equals the award. Respondent, of course, is responsible for complying with applicable state and Federal laws on withholding. Cf. Social Security Board v. Nierotko, 327 U.S. 358 (1946).

Complainant claims gross back pay of $ 25358.82. Respondent's computations show that $ 25450 is due. Respondent's figure is better documented and will be accepted. Complainant asserts that he earned $ 1850 while employed elsewhere during the period. Respondent places the figure at $ 5800.

Respondent has proved net earnings of $ 1300.12 from Uniajax Mining. Uniajax also paid a $ 2000 "cash advancement" to Complainant. Complainant asserts that the latter was monthly salary and subject to withholding, so the net received was $ 1300.12. Respondent also contends that Complainant earned $ 1800 at Misty Coal. However, Respondent does not specify whether this is net or gross pay. Therefore, only the $ 600 actually received by Complainant will be deducted. Total interim earnings were $ 3200.24.

Unemployment and other public benefits received by Complainant, states Respondent, amount to $ 8099. But these benefits, unlike interim earnings, may be recoverable under state law. If Complainant has perpetrated a fraud on the State of West Virginia, as Respondent alleges, it is a problem for that state, not this Commission, to correct. In any event, the weight of authority persuades me that public benefits should not be deducted from a back pay award. Wilson and Rummel v. Laurel Shaft Const. Co., 2 FMSHRC 2623 (September 12, 1980); Neal v. Boich, 3 FMSHRC 443, 453 (February 12, 1981); NLRB v. Pan Scape Corp., 607 F.2d 198 (7th Cir. 1979); Marshall v. Goodyear Tire and Rubber Co., 554 F.2d 730 (5th Cir. 1977). The benefits received by Complainant will not be deducted.

Complainant claims reimbursement of $ 90 for the transcript of the hearing before the West Virginia Board. I deny his claim for this expense but award $ 60.60, the cost of the transcript in the Commission hearing, and court costs of $ 18.90.

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Respondent argues that Complainant did not "incur" any attorneys fees within the meaning of 105(c)(3) and therefore attorneys fees should not be awarded. I cannot adopt this construction of the statute. In awarding attorneys fees to successful complainants, Congress intended that the costs of litigation not prevent them from vindicating their rights. The Seventh Circuit, applying the Civil Rights Attorneys Fees Awards Act of 1976, squarely faced the question whether publicly funded legal clinics could recover attorneys fees:

> It is true that the prospect of attorneys fees does not discourage the litigant from bringing suit when the legal representation is provided without charge. But the entity providing the free legal services will be so discouraged, and an award of attorneys fees encourages it to bring public-minded suits when so requested by litigants who are unable to pay. Thus an award of attorneys fees to the organization providing free legal services indirectly serves the same purpose as an award directly to a fee paying litigant.

Mary and Crystal v. Ramsden, 635 F.2d 590, 602 (7th Cir. 1980), quoting, Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).

Counsel for Complainant claims fees in the amount of $ 1485, 24 3/4 hours at $ 60 per hour. Although the time spent is challenged by Respondent, counsel has not provided any documentation of the hours spent. The hearing took approximately 7 hours, and I conclude that an additional 14 hours were necessarily spent on the case and will award $ 1260 as attorneys fees.

The total amount of the award is $ 23589.26. The figure was derived as follows:

Gross back pay due	$ 25450.00
Interim earnings	3200.24
Subtotal	22249.76
Transcript	$ 60.60
Court costs	18.90
Attorneys fees	1260.00
Subtotal	1339.50
Total	23589.26

ORDER

Respondent shall pay to counsel for Complainant the sum of $ 22249.76 within 30 days of the date of this order, less amounts withheld pursuant to state and Federal law. Respondent shall also pay to counsel for Complainant

the sum derived by applying a rate of 12 per cent(FN.2) interest to the net back pay award after withholding, and $ 1339.50 for costs and fees. Counsel for Complainant shall retain $ 1339.50 and shall disburse the balance to Complainant.

James A. Broderick
Chief Administrative Law Judge

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~FOOTNOTE_ONE

1 Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 14, 1980).

~FOOTNOTE_TWO

2 This is the current adjusted prime rate used by the Internal Revenue Service for underpayments and overpayments of tax. Rev. Ruling 79-366. The NLRB also uses this figure to compute interest on back pay awards. Florida Steel Corp., 231 N.L.R.B. No. 117, 1977-78 CCH NLRB Para. 18,484.