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SOL (MSHA) V. TUNAR BROS.
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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
JOHNNIE LEE JACKSON,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. CENT 86-36-D
MSHA Case No. MADI 85-17

Rogers No. 2 Mine

v.

TURNER BROTHERS, INC.,
RESPONDENT

DECISION AND ORDER DENYING TEMPORARY REINSTATEMENT

Appearances: Frederick W. Moncrief, Esq., Office of the
Solicitor, U.S. Department of Labor,
Arlington, Virginia, for Complainant;
Robert Petrick, Esq., General Counsel, Mark
Secret, Assistant General Counsel, Turner
Brothers, Inc., Muskogee, Oklahoma, for
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns an Application for Temporary Reinstatement filed by MSHA on January 22, 1986, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, and Commission Rule 29 C.F.R. 2700.44(a), seeking the temporary reinstatement of the complainant Johnnie Lee Jackson to his position of bulldozer operator at the respondent's Rogers No. 2 Mine. MSHA has concluded that the complaint of discrimination filed by Mr. Jackson is not frivolous. In support of this conclusion, MSHA included an affidavit executed by Michael Yanak, Jr., Technical Compliance specialist, Office of Technical Compliance and Investigation, MSHA, Arlington, Virginia, a copy of the complainant's complaint executed September 23, 1985, and a prior statement executed by him on September 18, 1985.

The respondent filed a response to the request for temporary reinstatement on January 28, 1986, and requested a hearing pursuant to the Court's decision in Southern Ohio Coal Company, et al., v. Donovan et al., 774 F.2d 693 (6th Cir.1985). A hearing was convened in Muskogee, Oklahoma, on February 5, 1986, and the parties appeared and participated fully therein.

Issue

The issue presented in this proceeding is whether or not the complainant is entitled to temporary reinstatement pending the adjudication of the merits of his claim that he was unlawfully discharged for making safety complaints to mine management.

MSHA's Testimony and Evidence

Complainant Johnnie Lee Jackson testified that he was discharged by the respondent on September 9, 1985. At the time of his discharge he was employed as a DÄ10 bulldozer operator, and he had been employed by the respondent for 4 1/2 years. He stated that he had operated the bulldozer for approximately a year and a half and that he has 10 years of experience as a bulldozer operator (Tr. 25Ä26).

Mr. Jackson stated that he believed he was discharged because the respondent wanted to get rid of him for making safety complaints about his bulldozer. He stated that he was discharged by mine superintendent Ronald Sisney, and he asserted that Mr. Sisney gave him no reason for the discharge. Mr. Sisney simply told him that Robert Turner, the mine owner told him to fire him and that if he didn't, Mr. Turner would fire Mr. Sisney (Tr. 27Ä28).

Mr. Jackson stated that immediately prior to his discharge the left wall of the rock overburden which had been shot caved in on his bulldozer and came through the door of his machine. He was in the process of "slot pushing" the overburden with his machine. The overburden was being pushed into the pit and he was pushing or cutting 22 foot wide cuts while taking the overburden down to the coal layer. He described the procedure and the work being performed immediately prior to the accident.

Mr. Jackson stated that after the material caved in on his machine he had to climb over the rock in order to get out of his machine. After getting out of his machine, he waited for approximately 10 minutes, and mine operator Robert Turner was the first person to appear at the scene (Tr. 29Ä36).

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Mr. Jackson stated that immediately before the slide, he had backed up his machine to the highwall and put the blade down. He then observed some movement of rocks and pebbles on the 45 to 50 foot highwall and knew that the wall was going to slide in on him. He pulled up his blade and started to move out, but a portion of the wall slid and fell in on the left side of his machine. A large rock came through the left door of the machine, and other rocks landed on the machine at the left track and hood, and one rock came through the window on the driver's side of the machine. He climbed out and over the rock from the left side of the machine. He could not get out of the right side because the right door latch would not work and he could not get the door open (Tr. 38).

Mr. Jackson stated that the right door of his machine could not be opened, and he asserted that it had been in this condition for "a couple of weeks." He stated that he had complained about the condition of the door daily to Mr. Sisney and to the dirt foreman, Terry Beck. When he complained to Mr. Sisney, Mr. Sisney simply told him to use the left door. Mr. Jackson believed that the condition of the door was unsafe because he could be trapped in the machine in the event of an emergency (Tr. 39-41).

Mr. Jackson described how he got out of his machine after the rock slide, and he stated that he sustained injuries to the lower right side of his back and to his neck between the shoulder blades, and that glass got into his eyes (Tr. 42). He received medical treatment for his injuries, and a doctor advised him that he had a 10 percent disability because of his injuries (Tr. 43).

Mr. Jackson stated that the accident was not avoidable, and that while in his machine he was watching the highwall, which was his normal practice. He stated that the highwall "looked good" prior to the accident, and "it looked like a good solid wall" (Tr. 44). In his opinion, there was nothing he could have done to foresee the accident, and he confirmed that it had never happened to him in the past.

Mr. Jackson stated that he was aware of the fact that the respondent has fired other employees for causing accidents and for being involved in accidents which they did not cause. He was also aware of individuals who have commented that they were either involved in accidents or caused accidents but were not fired (Tr. 46). He has never seen any written company policy stating that causing or creating an accident would result in a discharge (Tr. 47).

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Mr. Jackson denied that he did anything to cause the rock to fall on his machine, and he was not aware that the respondent made an investigation of the accident (Tr. 48). However, he was told that the machine door glass was knocked out, a precleaner breather knocked off, and that the door frame was bent. He was told that the machine was out of service for about an hour and a half or two hours (Tr. 49).

Mr. Jackson stated that he constantly complained about the slick tracks on his machine, but he indicated that any safety concern over this condition would depend on where the machine was operating. The slick tracks would be a safety problem if the machine were operating on a hill because there would be no traction. However, while "slot pushing" on level ground, the slick tracks would not present a safety hazard. He operated his machine with slick tracks for approximately a month and a half, but the respondent took care of the problem and replaced the tracks. The tracks on his machine were replaced approximately 2 or 3 weeks before the accident (Tr. 49-53).

Mr. Jackson stated that he also constantly complained about the rear-view mirrors being knocked off of the end-dump machine he was operating (Tr. 54). He confirmed that the mirrors are knocked off trucks at least once a month by the end loaders, and he conceded that this was "normal wear and tear" (Tr. 56). He confirmed that the respondent eventually would replace the mirrors, but only after his repeated complaints (Tr. 58).

Mr. Jackson confirmed that he knew he had a right to refuse to operate unsafe equipment, and he conceded that he would operate a piece of equipment which he knew to be unsafe because he had to work to support his family. He also confirmed that while he never refused to operate a piece of equipment which lacked a rear view mirror, he engaged in heated arguments over the condition. He conceded that on one occasion a foreman took a truck out of service until the rear view mirror was replaced (Tr. 60).

Mr. Jackson stated that he also complained about the D-clutch brakes on the 992 loaders, but that "nobody ever seemed to care whether they was working right or not." He believed that he would have been fired had he refused to operate equipment which he considered to be unsafe because "there's too many people out there that would run it" (Tr. 60).

On cross-examination, Mr. Jackson stated that he is physically able to go back to work. He confirmed that he sustained injuries to his back, side, and his neck as a result of the accident. He denied that he has any permanent eye impairment, but confirmed that he had to see a doctor to remove glass from his eye. He also confirmed that when he returned to the mine to pick up his pay checks he did not inform Mr. Sisney, Mr. Beck, or Mr. Turner that he had suffered any injuries as a result of the accident (Tr. 62).

Mr. Jackson stated that he was not presently experiencing any discomfort to his neck, back, or side as a result of his injuries. He confirmed that he did suffer back and eye injuries as a result of the accident. He also confirmed that he has filed a workmen's compensation claim because of ear damage "because of the overall period of running the machinery." He stated that his doctor advised him that his hearing is being impaired because of the large machinery noise to which he is exposed. When asked whether he will continue to be exposed to loud noise if he operated bulldozers and heavy equipment, he responded "that's what I do for a living" (Tr. 64). He also stated that his doctor advised him to get better ear protection. He conceded that he "sometimes" wore ear protection but could not remember whether he was wearing earplugs while operating his machine at the time of the accident (Tr. 65).

Mr. Jackson denied that he was ever stopped in the operation of his equipment by his foreman or supervisor and told to wear his hard hat or to cease operating the machine with his doors open. He admitted that he was told to wear his seat belt, and to wear his hard hat while on the job (Tr. 66).

Respondent's counsel produced a medical report from Mr. Jackson's doctor dated November 21, 1985, stating that Mr. Jackson has a 10 percent partial disability and that he is released from treatment. Counsel pointed out that the report does not state that Mr. Jackson is physically able to go back to work, and in fact states that "he will probably experience chronic reoccurring symptoms" (Tr. 71, exhibit RÄ3), and Mr. Jackson acknowledged the report (Tr. 75).

Respondent's counsel produced a state workmen's compensation claim filed by Mr. Jackson on September 12, 1985, based on his back and eye injuries, and "nerves and ulcer" conditions, and Mr. Jackson acknowledged that the claim is still pending and that he is represented by an attorney in that matter (Tr. 72Ä73; exhibit RÄ1).

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Respondent's counsel produced a state workmen's compensation claim filed January 10, 1986, filed by Mr. Jackson claiming a hearing loss as a result of working for the respondent, and that he will continue to do so. Mr. Jackson acknowledged that he filed it (Tr. 74; exhibit RÄ2).

MSHA's counsel produced a February 3, 1986, statement from Mr. Jackson's doctor certifying that he has recovered sufficiently to be able to return to regular work without restrictions and by agreement of the parties it was made a part of the record as exhibit RXÄ4 (Tr. 76Ä78).

Mr. Jackson explained the "slot dozing" procedures he followed while operating his bulldozer, and he stated that he would not have been there if the highwall appeared unsafe. He also explained the condition of the wall as it appeared to him before the accident occurred (Tr. 78Ä83).

Mr. Jackson confirmed that Mr. Sisney, Mr. Beck, and Mr. Turner were the only individuals present during the period immediately after the accident and his discharge, and that none of them gave him any verbal reasons for his termination (Tr. 84).

Mr. Jackson stated that he was positive that his prior complaints concerning the right door of the DÄ10 bulldozer being inoperable for 2 weeks referred to the same bulldozer he was operating at the time of the accident. He denied that Mr. Sisney exited from the right door of the bulldozer after retrieving and giving him his personal belongings from the bulldozer involved in the accident. He claimed that Mr. Sisney exited out over the top of the rock, and that Mr. Sisney tried to get in through the right door but could not (Tr. 85).

Mr. Jackson stated that he previously operated bulldozer 817, which was an older machine, but was subsequently given a new dozer 529 approximately a month or a month and a half prior to the accident. He confirmed that the new machine had been completely rebuilt and that new tracks were installed approximately 2 to 3 weeks prior to the accident (Tr. 86).

Mr. Jackson stated that the bulldozer he was operating at the time of the accident was completely enclosed with glass, had a center mirror, and had a seat which enabled him to see to the front, back, and side (Tr. 87).

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Mr. Jackson acknowledged his statement to MSHA, made on September 18, 1985, and he confirmed that no one from mine management stated that he was being fired for making safety complaints (Tr. 88). When asked why this statement does not include an allegation that he was fired for making safety complaints, Mr. Jackson responded as follows (Tr. 89-90):

THE WITNESS: No. I always knew they wanted to fire me because I complained too much.

THE COURT: Well, if the accident hadn't happened, would they have fired you?

THE WITNESS: First chance they got.

THE COURT: You mean to tell me that for four and a half years they couldn't find an excuse to fire you if they wanted to fire you?

THE WITNESS: No, they could have fired me.

THE COURT: But they didn't.

THE WITNESS: No, they didn't.

THE COURT: You say they were using this as some kind of an excuse, the accident as some kind of an excuse?

THE WITNESS: I would say so.

Mr. Jackson confirmed that he had an ulcer condition prior to his employment with the respondent, and he acknowledged that he missed some work as a result of this condition, but continued his employment with the respondent (Tr. 91). He also acknowledged that he had some financial problems and that the respondent loaned him money to assist him in resolving these problems and kept him employed regardless of garnishment and tax levies filed against him (Tr. 91). He also acknowledged that when he requested to work overtime, the respondent allowed him to do so (Tr. 91).

In response to further questions, Mr. Jackson identified exhibits CÄ1 and CÄ2 as releases from the doctors who treated his back and neck injuries and his ulcer condition indicating that he was able to return to work. He confirmed that he obtained the statements on February 3, 1986, prior to the hearing, and that he did so at the request of MSHA's counsel (Tr. 93). He denied that any doctor has advised him that he

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is incapable of performing the job of bulldozer operator, and confirmed that he discussed the matter with two doctors treating him for his hearing condition. He stated that these doctors advised him that he was able to return to work but advised him to obtain better hearing protection (Tr. 94).

Mr. Jackson stated that the respondent provided him with earplugs, but that they disintegrated when they are washed, and that he was unable to get new earplugs every day because they were not available (Tr. 95).

When asked to explain why he omitted any reference to slick bulldozer tracks when he filed his two prior statements with MSHA, Mr. Jackson respondent "I just forgot about it" (Tr. 98). He also stated that he complained about other matters, but did not include them in his prior statements. He conceded that when he complained about the slick tracks and rear-view mirrors, the respondent corrected the conditions (Tr. 99).

In response to further questions concerning his termination and safety complaints, Mr. Jackson stated as follows (Tr. 101-106):

THE COURT: Well, was it the company's position that it was your fault?

THE WITNESS: Was it the company's position to say it was my fault?

THE COURT: Yes. This accident, when the rocks came in on your dozer, did the company take the position that you were the one that put yourself in that situation and that you were the one that could have avoided the accident but you didn't avoid it and that, therefore, that's what they were firing you for.

THE WITNESS: I guess that's probably the way they looked at it.

THE COURT: And no one told you that?

THE WITNESS: No, no one told me that. I mean, no one, no, they didn't.

THE COURT: The gentleman that said that you were fired, Ron Sisney, didn't he tell you why he was firing you?

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THE WITNESS: No. Ron Sisney said -- I asked him, I said, "Why are you firing me?" He said, "Rob told me to either fire you or he's going to fire me."

THE COURT: You didn't ask why?

THE WITNESS: Yeah, I asked why, but nobody answered me.

THE COURT: Did Mr. Turner talk to you at the time you were fired?

THE WITNESS: At the time I was fired, no. He talked to me later on, up at the pickup. Ron took me to my car probably -- Rob followed us up there, and I talked to him up there.

THE COURT: Did you ask Mr. Turner then why you were being fired?

THE WITNESS: I asked him for another chance. I was wanting my job back. I knew they had done fired me.

THE COURT: But nothing came up during that conversation that would give you any idea as to why they fired you?

THE WITNESS: No. They done said they fired me, and I was begging for my job back, is what I was doing.

THE COURT: Do you have any idea why they fired you? What did you believe? What did you speculate? You must have had -- something must have gone through your mind as to "why they are doing this to me."

THE WITNESS: They wanted to get rid of me.

THE COURT: For what reason?

THE WITNESS: Cause I complained a lot, complained a lot, and it looked like the dozer was tore up, I guess you could say. I really can't say, you know. It's my opinion.

* * * * *

THE COURT: Did you ever see any MSHA inspectors out at the Turner property, mine inspectors doing inspections?

THE WITNESS: Inspectors, yes. I've seen a number of inspectors out there. As far as knowing whether they were MSHA and all this, I really don't know.

THE COURT: Did you ever complain to any MSHA inspectors about any safety complaints? Ever make any complaints to them?

THE WITNESS: No.

* * * * *

THE COURT: Okay. Had you ever had any problems at Turner Brothers before during your employment; ever received any warnings, reprimands, or anything like that?

THE WITNESS: Never received no reprimands, no, sir.

THE COURT: Do you know any other employees at Turner Brothers that have ever been fired for making complaints?

THE WITNESS: No, sir.

Mr. Jackson stated that his ulcer condition which caused him to miss 4 days of work occurred a year and a half ago, and that his financial difficulties took place approximately a year ago (Tr. 107).

Mr. Jackson stated that his September 18, 1985, statement to MSHA contains his signature, but that he did not write it out. He stated that he could not remember who wrote it out (Tr. 110), but respondent's counsel asserted that he was informed by MSHA's counsel that Mr. Jackson's wife wrote out the statement (Tr. 122).

Mr. Jackson stated that he has not been employed since his discharge, and that his present source of income consists of \$122 a month from the Veterans' administration. He confirmed that he has received a \$1,700 payment on his 10 percent

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disability claim, and respondent's counsel confirmed that the respondent made the payment to Mr. Jackson and that the workmen's compensation carrier will be billed for the payment. Counsel also confirmed that the payment was made pursuant to the workmen's Compensation Court claim for temporary total disability. The question of permanent disability compensation is still pending. The temporary benefits are in connection with Mr. Jackson's back and eye injuries. Mr. Jackson confirmed that he is in contact with his lawyers regarding these claims, and respondent's counsel stated that he is still awaiting medical evaluations from Mr. Jackson's attorney regarding his loss of hearing condition and that the matter will be heard in court within the next 3 or 4 weeks (Tr. 246Ä249).

Allen G. Howell testified that he is an MSHA District 10 senior special investigator, and he confirmed that he conducted an investigation of Mr. Jackson's complaint after obtaining his prior two statements on approximately September 28, 1985. Mr. Howell stated that he interviewed four complainant witnesses, three respondent witnesses, and three doctors. He identified the respondent's witnesses as Mr. Turner, Mr. Beck, and Mr. Sisney (Tr. 129Ä131). Mr. Howell stated as follows with respect to the result of his interviews, (Tr. 131Ä133):

Q. Whom did you interview for the respondent?

A. I interviewed Mr. Turner, Mr. Beck, and Mr. Sisney.

Q. Were you present this morning for Mr. Jackson's testimony?

A. Yes, I was.

Q. Did you hear him testify that he had been fired for making safety complaints?

A. Yes, I did.

Q. Did he tell you that he had been fired for making safety complaints?

A. Yes, he did.

Q. In the course of your investigation, did you uncover any evidence to support the allegation that he had made safety complaints?

A. Yes, I did.

Q. More specifically, did any of respondent's witnesses concur in his claim to have made safety complaints?

A. Yes, they did.

Q. Would you tell us what they said?

A. There was some inconsistency but, basically, that Mr. Jackson had made safety complaints on occasion to management. Some people said -- one of the statements was "a few times," and another one was "constantly." One of the statement was, too, that most of the complaints were founded, that there was a legitimate complaint. The other one was that 75 to 80 percent of the time his complaints was not founded, that he just didn't want to work on the machine.

A. Did you find support among the complainant's witnesses for the claimed safety complaints?

A. Yes, I did.

And, at (Tr. 136-139):

Q. What was the reason stated for the discharge of Mr. Jackson?

A. By who?

Q. By the respondent.

A. The accident.

Q. And what specifically, with respect to the accident, was the basis for the discharge?

A. The respondent contends that if anyone at the mines is involved in an accident which causes property damage to their equipment and/or delay, that that person would be discharged.

* * * * *

Q. (By Mr. Moncrief) Now, was it simply the fact that Mr. Jackson was involved in an accident?

A. That he caused damage to the machines. It may be any accident. I'm saying that the conclusion I drew from the interviews was that, if a person was involved in an accident that damaged the company's property or it was his fault, that the person was discharged.

Q. That's your conclusion.

A. That's my conclusion. That's what I thought I was asked.

Q. Now, you mentioned -- well, possibly you were. I should be more careful. You mentioned the matter of fault. Were you told -- well, what were you told specifically by the three members of mine management was the company policy with respect to property damage?

A. I can't say specifically. I can tell you in general. Without reading their statements, I wouldn't want to try to quote anyone.

Q. Did it require culpability or negligence or fault?

A. Yes, that would be one of their guidelines, in my opinion.

Q. Did anyone say that simply being involved in an accident would be enough, anyone from management?

A. I don't think in that words, no.

Q. Okay. This was stated to you as a policy, did you say?

A. Right.

Q. To the best of your knowledge, was this policy ever reduced to writing?

MR. PETRICK: I will so stipulate that it was not.

THE COURT: All right.

Q. (By Mr. Moncrief) It's been stipulated that there was no written statement of this policy. Can you testify from your interview with the three men that you have cited, whether their statements of this policy were consistent?

A. Yes. It was.

Q. The statement was consistent?

A. Are we talking about the respondent's witnesses?

Q. Yes.

A. Yes, their statements in regards to the policy for discharge, as far as their statements was consistent, that if the person was involved in an accident that they felt was his fault and was avoidable, it would entail a discharge.

With regard to the results of his investigation concerning the accident, Mr. Howell testified at follows (Tr. 144Ä147).

Q. Okay. Did you question any of these witnesses as to the cause of the accident?

A. Yes, I did.

Q. Did you get an understanding as to what caused the accident?

A. From the complainant's witnesses I've talked to, there was no abnormal mining conditions at the mines. They hadn't had any real problems with mining in that area. There was no damaged high walls or unsafe areas that anybody was aware of, and the mining was proceeding in a normal manner at the time the accident occurred.

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Q. Did you find from these witnesses any -- or these individuals, did you find any indication that the fall was the result of Mr. Jackson's negligence?

A. No. To the contrary, everyone said that -- the complainant's witnesses all stated that they didn't think that he could have been aware of it prior to it falling.

Q. What was the version of the accident given you by the respondent's witnesses?

A. That Mr. Jackson was operating in the manner in which he would normally be operating. I guess to elaborate on both their statements of management is that the responsibility is up to the operator to ensure the security of the machine and his safety while in the slot. It's his judgment to do that. On the other side when talking to the complainant's witnesses, the thing that I based my conclusions on was as to whether or not they was observing anything unusual and had taken any unusual, any extra steps, and they all stated that they hadn't, but then Mr. Jackson was the only one in that slot.

Q. Did any of the people you spoke to for the respondent assess the blame for the accident?

A. Could you rephrase that? I didn't really understand.

Q. Did anyone say that Mr. Jackson was at fault in the accident that occurred?

A. Yes. Are you talking about the respondent's witnesses?

Q. Yes.

A. Yes.

Q. What did they say?

A. I think that -- not in regards to the accident. I think the main contention of Mr. Beck was that he attempted to move the dozer after

the rock had fallen on it, causing further damage; and the contention of Mr. Turner and Mr. Sisney is that he should have been more careful in observance of the high wall in the mining area to prevent an accident before it occurred.

Q. Had any of the respondent's witnesses observed the accident?

A. No, one was an eye witness to the accident.

Q. (By Mr. Moncrief) Who fired Mr. Jackson, according to your investigation?

A. Mr. Sisney.

Q. Okay. Do you know what knowledge he had when he made the decision, or announced the decision to fire Mr. Jackson, with respect to the accident and its cause?

A. Mr. Sisney said it was his decision. He told Mr. Jackson when he was taking him back to his vehicle in the truck. Conversations other than that was -- I would rather read a quote or let them tell themselves.

Q. What I'm asking you is: did he state what his decision to fire Mr. Jackson was based on?

A. The fact that he had an accident that had caused damage to the machine, and it was avoidable; it could have been an avoidable accident.

On cross-examination, Mr. Howell identified the statements he took from Mr. Beck, Mr. Sisney, and Mr. Turner during his investigation of the complaint (Exhibits RÄ6 through RÄ8). Mr. Howell confirmed that he did not ask for my information from the respondent regarding any employees who were negligent and involved in accidents but were still employed by the respondent (Tr. 178). He also confirmed that the respondent had no knowledge of Mr. Jackson's injuries until after he returned to the mine after the accident and so informed management (Tr. 181).

Respondent's Testimony and Evidence

Joseph Haberland testified that he is employed by the respondent as a DÄ10 bulldozer operator, and he confirmed that in August and September 1985, he operated DÄ10 dozer No. 529. He stated that the machine had been out of service due to a fire, but that it was completely rebuilt and assigned to him. He operated the dozer on a 4Äday, 12Ähour a day shift, and Mr. Jackson would operate it for the next 4Äday shift.

Mr. Haberland stated that he operated the dozer on the 4Äday shift immediately before the shift on which Mr. Jackson was terminated, and that both doors worked properly and he had no occasion to make any safety complaint concerning the inability of the right-hand door to be opened and closed. He confirmed that he operated the machine with the doors open and that most of the time when he arrived on his shift the doors were closed (Tr. 207Ä209).

On cross-examination, Mr. Haberland denied that he ever told Mr. Jackson that the right door of the machine would not work, and he denied that he was aware of any MSHA investigation or that he ever spoke with Inspector Howell. He confirmed that Mr. Sisney called him the morning of the hearing and asked him to come. He also confirmed that Mr. Sisney did not ask him about the door, and he did not know why he was asked to appear at the hearing (Tr. 210Ä212).

Mr. Haberland confirmed that he and Mr. Jackson operated the same DÄ10 dozer, but denied Mr. Jackson ever discussed the condition of the right door with him. He stated that when he next operated the machine after Mr. Jackson's discharge, the glass was out of the left door, the door was dented, and the heat shield was bent. However, the right hand door was still operating properly (Tr. 214Ä215). He stated that Mr. Jackson operated the machine with the doors closed and the air conditioning on, while he operated it with the doors opened and the doors swing open and latched back (Tr. 216).

Robert A. Turner, testified that he is the secretary of the corporate operator Turner Brothers, Incorporated, and that he holds a B.S. degree in civil engineering from the University of Missouri and has worked in construction and mining all of his life. He explained the "slot dozing" method of mining used at the mine, including the safety precautions expected of a dozer operator while performing his duties. He stated that the machine operator has the responsibility to watch and maintain the slopes, and when he is out

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of his machine he is supposed "to inspect the area and see that everything is fine" (Tr. 217-221).

Mr. Turner stated that he was the first person to arrive at the scene of Mr. Jackson's accident. When he arrived, Mr. Jackson was standing on the bank waiting for someone to come by, and Mr. Turner looked at the machine and saw two rocks that had slid approximately 12 to 15 feet up on the machine. Material was under the rocks, and they had fallen on the machine (Tr. 221-222).

Mr. Turner stated that in his opinion the rocks came off the slope because it had not been properly maintained, and he confirmed that "slot dozing" has taken place at the mine with D-10 dozers since 1981. He gave the following reasons for Mr. Jackson's discharge (Tr. 223-224):

Q. Would you tell us the reason, or reasons, for the termination of Mr. Jackson?

A. Mr. Jackson was terminated for not doing his prescribed duties as a D-10 operator and that he had to maintain the slopes of his slot so that material would not fall on him. There was no evidence that he had ever been up on top of the slot immediately to the left of him and tried to maintain or look for rocks to protect himself.

Q. You mean in the whole time that he was cutting that slot, he had not been up on top of there?

A. There was no dozer tracks. There had not been any work with the dozer to prevent anything.

Q. Did you look for those dozer tracks?

A. Yes.

Q. You did not observe any?

A. There was none there.

Q. Was there any other reason that Mr. Jackson was terminated other than what you just said?

A. No, sir.

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Q. Did the question of any safety violations even come up while you were there?

A. No.

Q. You did talk with Mr. Jackson at the time, did you not?

A. He asked me if he could have another chance.

Q. Is that the extent of the conversation you had with him?

A. And I said that he'd had his chances.

Q. Any other conversation?

A. No, sir.

On cross-examination, Mr. Turner stated that when he was interviewed by Mr. Howell, he did not tell him about the matters he has testified to in this hearing because Mr. Howell did not ask. He confirmed that he did not advise Mr. Howell that Mr. Jackson had caused the damage to the dozer because Mr. Howell asked specific questions and he answered them. Mr. Turner denied that he fired Mr. Jackson or ordered him fired (Tr. 226).

Mr. Turner stated that after Mr. Sisney arrived on the scene he looked the machine over, took Mr. Jackson's lunch box out of it, and then took him to his car and fired him (Tr. 226). Mr. Turner stated that he did not know whether Mr. Sisney looked for any dozer tracks on the slope, but that "he looked the whole area over" (Tr. 227). He also stated as follows (Tr. 227-228):

Q. So you don't know whether Mr. Sisney saw what you say is evidence to indicate that Mr. Jackson had not been maintaining the shot wall?

A. Mr. Sisney looked the whole area over.

Q. Do you know whether he looked for the dozer tracks?

A. No, sir.

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Q. But you did not tell Mr. Sisney to fire Mr. Jackson?

A. No.

Q. And the way you know that Mr. Jackson was responsible for the damage to his dozer was that there were no dozer tracks on the shot wall, top.

A. And the way the rock was laying on the dozer, that because of the angle of repose and the way it was up as high as it was on the dozer, it had to fall out of the face and on to the dozer.

Q. Has it ever happened that a properly maintained shot wall has fallen?

A. I wasn't aware of any there.

Q. Does it ever happen?

A. Not if it's properly maintained and the operator looks for rocks and does his job.

Q. When is it that the operator is supposed to go up and lay down these tracks on the shot wall?

A. Well, if he is digging through the area where -- if you listened to what I said, there was different stratas of rocks, and there's one layer in there where this rock came out of that is normally blocky and hard to get through, and it is a problem, and if they -- when a guy works through that, he should, he goes by it for two or three hours while working, backing up his slope, maintaining his slope, and all that, and if he is doing his job and observing the wall, he should notice those.

Mr. Turner stated Mr. Jackson had worked the slot most of the morning prior to the accident for approximately 3 hours, and except for the time that he is out of the machine, he is supposed "to keep an eye peeled to the wall" as he is operating. He would have had to observe the slope

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wall while operating the machine because in order to bring the slope down, he had to back by it constantly. Mr. Turner concluded that Mr. Jackson simply ignored a danger to himself and his equipment for some significant period of time (Tr. 230).

In response to further questions, Mr. Turner stated that Mr. Jackson never complained to him about safety matters, his equipment being inoperative, or problems with any of his equipment. He also stated that no complaints by Mr. Jackson ever came into his attention (Tr. 230).

Mr. Turner stated that he had previously observed Mr. Jackson operating his dozer, but that he was not his supervisor. Mr. Sisney supervised Mr. Jackson and Mr. Sisney advised him that he had to constantly motivate Mr. Jackson and had to remind him to use his seat belts, and to operate the machine properly while stacking materials with the dozer (Tr. 231).

Mr. Turner stated that his company policy calls for the immediate termination of an employee who causes an accident resulting in damage or injuries. An employee not at fault would not be terminated. The policy is verbally communicated to employees and it is not in writing or in the form of policy directives. He confirmed that employees are trained according to MSHA regulations. Equipment operators are constantly trained by company superintendents and foremen, and they are expected to do what they are trained to do (Tr. 232).

Mr. Turner stated that his company has about 300 employees. Payroll and training records are maintained at each mine. He confirmed that Mr. Jackson's discharge was not reduced to writing, and that employee discharges are not in writing because "we just don't need the paperwork" and "we've always done things kind of out of the seat of our pocket" (Tr. 234).

Mr. Turner stated that he believed Mr. Jackson knew Mr. Sisney discharged him for "tearing up a piece of equipment" because "it didn't take 20 minutes from the time that we knew that it happened for us to make up our mind and for Mr. Jackson to be terminated." Mr. Turner stated that Mr. Sisney fired Mr. Jackson because he is the superintendent and does the hiring and firing (Tr. 235).

Mr. Turner stated that after arriving at the scene of the accident and looking around, he concluded that Mr. Jackson was at fault. After Mr. Sisney arrived, they walked around

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the machine and discussed the accident in question. He and Mr. Sisney did not collectively decide that Mr. Jackson was at fault, and that Mr. Sisney made his own judgment in this regard. Had Mr. Sisney decided not to discharge Mr. Jackson, Mr. Turner stated "I would have stood behind him" (Tr. 236).

Mr. Turner stated that other employees were fired for damaging company equipment. He stated that Charles Fraum was discharged at the Welch Mine for backing a truck into another truck and that MSHA investigated the matter. Randy Willis was discharged at the Claremore Mine for backing up a 992 into a pickup, and another employee at Claremore (first name Darell) was fired for backing a 992 into a truck (Tr. 237).

Ronald L. Sisney testified that he is employed by the respondent as the superintendent of the Claremore Mine. He stated that after Mr. Jackson's accident he crawled into the left side of the machine over the rock to look at the damage and to remove Mr. Jackson's dinner bucket and water jug. He exited the machine through the right door, and while the door was jammed or hard to open, the door latch was operable (Tr. 237-239).

With regard to Mr. Jackson's termination, Mr. Sisney stated as follows (Tr. 239-240):

Q. Okay. Now, with regard to the termination of Mr. Jackson, did you have a conversation with him before terminating him or at the time of termination?

A. Yes, I did.

Q. Where was this?

A. On top of the high wall behind the dozer.

Q. Did the conversation continue in your pickup truck?

A. Yes, it did.

Q. Did you advise Mr. Jackson as to why he was being terminated?

A. Yes, I did.

Q. Would you tell us, give us all the reasons you gave him for terminating him?

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A. Best I can remember the way I said it was, I'm firing you because you didn't maintain the slopes on that cut and let the rock come down on your tractor.

Q. Was there ever any mention of any complaints, safety violations, or anything, at that time?

A. Not at that time, no.

Q. When did you first hear about it?

A. About the --

Q. Complaint of safety violations.

A. It was after the investigation, or at the time of the investigation.

Q. By Mr. Howell?

A. By Mr. Howell.

Q. Did the safety violations or the complaints of Mr. Jackson in whatever manner have anything to do with his termination?

A. No, none at all.

Q. Was there any other reason, other than the fact that you felt at that time that he was negligent, for terminating him?

A. At that particular time, that was the only reason I terminated him.

In response to further questions, Mr. Sisney stated that he could not recall Mr. Jackson ever complaining to him about the door on his machine. He confirmed that Mr. Jackson did complain at different times about safety concerns such as the lights on his machine or cracked glass. Mr. Sisney stated that he acknowledged the complaints and tried to fix the items in question. Although he received a lot of complaints from Mr. Jackson, as well as others, he did not consider him to be a chronic safety complainer. Mr. Sisney considered most of Mr. Jackson's complaints to be legitimate, while some were not. Mr. Sisney denied that his decision to discharge

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Mr. Jackson had anything to do with his safety complaints, and that he could not remember discussing these complaints with Mr. Jackson at the time he fired him (Tr. 240-242).

Mr. Sisney could not recall telling Mr. Jackson that if he didn't fire him, that someone else would have fired him (Sisney). He also denied that Mr. Turner influenced his decision to fire Mr. Jackson, and he could offer no explanation as to why the discharge was not reduced to writing (Tr. 242).

Mr. Sisney stated that he viewed the accident area about an hour and a half prior to the accident, and he concluded that the rock which struck the machine should have been removed while Mr. Jackson was cutting the slot. He agreed that Mr. Jackson could have concluded that the rock would not dislodge. Mr. Jackson simply told him that the rock "just fell in, just slid in" (Tr. 245). Mr. Sisney believed the accident could have been prevented.

The parties stipulated that the prior statements made by Mr. Sisney, Mr. Turner, and Mr. Beck to MSHA investigator Howell during his investigation may be incorporated by reference in this proceeding (Tr. 245; exhibit R6 through R8).

Arguments Presented by the Parties

During the course of the hearing, MSHA's counsel contended that Mr. Jackson was discharged because of his safety complaints, and that the respondent reacted and retaliated against him by discharging him. With regard to MSHA's support for its application for temporary reinstatement, counsel asserted that Mr. Yanak's supporting affidavit was based on the facts then known to the Secretary, including a summary of the statements made to special investigator Howell during his investigation of the complaint (Tr. 14-16).

Respondent's counsel took the position that Mr. Jackson was not discharged for making safety complaints, and that he was discharged for causing an accident which was his fault. Counsel asserted that the accident resulted in property damage to the respondent's equipment, and that the discharge was consistent with company policy (Tr. 16-17).

MSHA's counsel asserted that in order to support Mr. Jackson's temporary reinstatement, all that is required to be established is that the complaint has merit, and he does not have to establish that he will ultimately prevail on the merits of his complaint (Tr. 17).

Respondent's counsel agreed that the complainant must establish that his claim of discrimination has merit. However, counsel further asserted that any temporary reinstatement order must be in accord with the standard provided under the Federal Rules of Civil Procedures for temporary court orders issued pursuant to Federal Statutes. Counsel suggested that the standard to be applied in this case is whether or not the complainant can establish that there is a reasonable likelihood of success on the merits of his case (Tr. 19).

MSHA's counsel disagreed with the respondent's argument, and he asserted that the term "frivolously brought" should be applied in the context of whether the complainant acted frivolously in filing his complaint and not whether the complaint itself is frivolous. In the instant case, counsel asserted that the complaint has a degree of merit which establishes that it is not frivolous, but well justified and meritorious (Tr. 22-23).

At the close of MSHA's case, the respondent moved that the application for temporary reinstatement be denied on the ground that the evidence presented in support of the application is insufficient to support the complainant's temporary reinstatement (Tr. 187).

Respondent also asserted that there are compelling medical reasons for denying the complainant's temporary reinstatement. Counsel pointed out that Mr. Jackson has not demonstrated that he is physically fit and able to perform his job without subjecting the respondent to liability for additional and future injuries with respect to Mr. Jackson's hearing situation and his back, neck, body, and stomach conditions. Counsel asserted that Mr. Jackson's doctor has rated him 10 percent disabled and has also indicated in his work release report that Mr. Jackson is subject to injury in some greater degree than would normally be expected of an employee (Tr. 188). He also confirmed that Mr. Jackson's claim for permanent disability is still pending.

MSHA's counsel conceded Mr. Jackson's 10 percent permanent disability, but asserted that with the exception of his ear doctor, his other doctors have released him for work without limitation. Counsel also conceded that Mr. Jackson's disability may subject him to pain from time to time, but asserted that it would not incapacitate him or more likely subject him to injury (Tr. 190).

In response to the motion to dismiss, MSHA's counsel asserted that the testimony of Mr. Jackson and Inspector

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Howell establish that Mr. Jackson was a frequent complainer about safety matters, and that he specifically complained about the unsafe condition of the right door of his bulldozer everyday for a week before his termination.

MSHA's counsel asserted that the facts related to the rock fall demonstrate that this was an unsafe condition and that Mr. Jackson was fired immediately following the accident by individuals who saw or knew anything but that there was a bulldozer with rocks on it.

MSHA's counsel did not dispute the fact that the respondent has a policy that culpable employees will be discharged in the event of property damage. However, counsel contended that this policy is followed as a matter of convenience in order to permit the respondent to terminate employees when there is only an inference of negligence on the employee's part. Counsel argued that the respondent has stated no basis for the determination that Mr. Jackson had any culpability in the damage to the bulldozer.

MSHA's counsel conceded that Mr. Jackson has a 10 percent disability as a result of the injuries sustained by the accident. However, counsel took the position that the fact that Mr. Jackson may have state workmen's compensation claims pending in connection with his loss of hearing, and certain back and eye injuries stemming from the accident, this is no basis for concluding that he is not physically able to return to the work he was performing prior to his discharge (Tr. 67-69). However, counsel stated that "the question of ear protection and the like is something that may be worth delving into" (Tr. 67). He then suggested that Mr. Jackson may be willing to go back to work wearing ear protection, and assuming he were to "undertake whatever risk is involved, perhaps he should be allowed to do so" (Tr. 68). Counsel also asserted that "Mr. Jackson didn't say he had no compunction about operating in unsafe conditions, equipment, and was quite willing to do so" (Tr. 69).

MSHA's counsel recognized that in the event the respondent can establish that it would have fired Mr. Jackson based on a reasonable belief that his negligence caused the accident which resulted in damage to the bulldozer, regardless of any protected activity, the issue of supervening motivation would have to be resolved. However, counsel maintained that the evidence produced here does not provide a basis for concluding that Mr. Jackson was culpable, and that MSHA has met its burden (Tr. 190-193). Counsel suggested that its possible that the respondent's conclusion that Mr. Jackson was

culpable may simply be a convenient basis on which to discharge a person who has made substantial safety complaints and who, operating a piece of equipment which was unsafe, was almost killed on company property (Tr. 195).

The respondent's motion to dismiss was taken under advisement (Tr. 197).

Findings and Conclusions

Although I cannot conclude from all of the evidence and testimony adduced during the reinstatement hearing that Mr. Jackson's claim of discrimination is frivolous or totally lacking in merit, I do conclude and find that the respondent has established that there is a serious question concerning Mr. Jackson's physical condition and ability to perform the duties of a bulldozer operator if he were to be temporarily reinstated pending the adjudication of the merits of his claim. I also conclude and find from the documentary evidence presented by the respondent that the temporary reinstatement of Mr. Jackson at this time will place him in a working environment where there is a real potential for further injury and exacerbation of his prior injuries and claimed existing loss of hearing.

In support of its argument that Mr. Jackson is physically unable to fully perform his job, the respondent has presented documentary evidence consisting of doctor's statements and reports, and compensation claims filed by Mr. Jackson before a state workers compensation court. Mr. Jackson has apparently retained counsel to represent him in those proceedings, and as of the reinstatement hearing, the claims were still pending for adjudication. MSHA's evidence to the contrary consists of two recently obtained statements that Mr. Jackson is free to return to work. For the reasons which follow, I have given greater weight to the statements produced by the respondent, and little weight to the "work release" forms produce by MSHA. I believe it is obvious that these forms, one of which deals with an ulcer condition, were obtained in an effort to summarily convince me that Mr. Jackson is physically able to return to work.

There is no evidence that the doctors who executed the work releases obtained by Mr. Jackson at the request of MSHA's counsel a day or so before the reinstatement hearing were even aware of his claimed loss of hearing due to equipment noise exposure, and MSHA's counsel conceded that the doctor's were probably unaware of the condition when they signed the release statements. A copy of Mr. Jackson's claim filed with the

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worker's compensation court on January 21, 1986, (exhibit RÄ2), a week or so before the hearing, reflects that he suffers from "tennitis or ringing in the ears" as a result of loud equipment noises. In response to a question on the claim form regarding any pre-existing disabilities, Mr. Jackson answered in the affirmative and indicated that his compensation case for injuries to his "back and various parts of body" is still pending in court.

One of the work releases dated February 3, 1986, is from the doctor who treated Mr. Jackson for an ulcer condition, and a second one is from the chiropractor who treated him for his neck, shoulder and back injuries. I note that the "return to work" slip (exhibit CÄ1) signed by this doctor states that Mr. Jackson is able to return to work on November 5, 1985, with no restrictions. This is in direct conflict with this same doctor's discharge report of November 5, 1985, a copy of which was filed with the state workers compensation court on January 14, 1986 (exhibit RÄ4). That report states in pertinent part as follows:

Mr. Jackson has suffered a severe injury of the supportive ligaments of the cervical thoracic spine, which predispose this patient to reoccurring exacerbation of symptoms and reinjury. %y(3)5C Mr. Jackson has remained temporarily and totally disabled for employment as a result of his injury which occurred on 09Ä09Ä85.

In a letter dated November 21, 1985, from the same chiropractor to Mr. Jackson's attorney, the doctor stated in pertinent part as follows:

It is my professional opinion, from the examination findings, and this patient's severity of symptoms, that he will require periodic care for the rest of his life as a result of these injuries. He probably will experience chronic reoccurring symptoms. %y(3)5C Mr. Jackson has 10 percent permanent impairment of the whole man as the result of the injuries he sustained on the job on 09Ä09Ä85.

The testimony and evidence adduced in this case with respect to the procedure of "slot dozing" reflects that a dozer operator is constantly maneuvering his machine back and forth while cutting into the overburden, and the machine is not always on level ground. It maneuvers over grades and

slopes while controlling the materials, and the operator is obviously subjected to constant jostling, particularly if his seat belt is not fastened. In this case, the evidence establishes that at the time of the accident. Mr. Jackson was operating his machine alone and was not under observation. As a matter of fact, after the accident, he had to crawl out of his machine and wait for someone to arrive on the scene. Under these circumstances, and given Mr. Jackson's physical disability and prior injuries, I conclude that temporary reinstatement to his prior job will expose him to a real potential for further injury.

The fact that Mr. Jackson may be willing to assume the risk of further aggravating his loss of hearing, or to risk further injury to his back and neck, is no reason to discount his injuries and disabilities. Aside from Mr. Jackson's physical well being, the respondent has a right to protect itself against further liability in the event that Mr. Jackson is reinjured. Simply because Mr. Jackson may be willing to place himself in further jeopardy, or is willing to work under conditions which he knows are unsafe, is no justification for granting temporary reinstatement.

Mr. Jackson has candidly admitted that he has in the past exposed himself to unsafe work conditions, but continued to work because of his opinion that he would lose his job if he did otherwise. Respondent presented testimony that Mr. Jackson has been cautioned in the past about the use of seat belts and wearing his hard hat on the job. Under these circumstances, I believe one may reasonably assume that in the event Mr. Jackson were to be temporarily reinstated, he will again take further risks which may lead to disastrous results. Even if Mr. Jackson did not take such risks, given his disability and injuries as reflected in the medical documentation adduced during the hearing, the potential for further injury while operating a bulldozer is real and present and cannot be discounted.

Although I recognize that Mr. Jackson is not presently gainfully employed, in the event he prevails on the merits of his discrimination complaint, he will be entitled to be made whole and to receive back-pay. However, I cannot in good conscience disregard the consequences which may result from his temporary reinstatement at this time, nor can I disregard the attendant potential liability to the respondent for reinstating an employee with known physical conditions or impairments which resulted from injuries suffered in the course of his prior employment.

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In view of the foregoing, MSHA's request for the temporary reinstatement of Mr. Jackson IS DENIED. A hearing on the merits of the discrimination complaint will be docketed in the near future, and the parties will be notified accordingly.

George A. Koutras
Administrative Law Judge