

CCASE:  
SOL (MSHA) V. ALAMO CEMENT  
DDATE:  
19861106  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF  
YALE E. HENNESSEE,  
COMPLAINANT

DISCRIMINATION PROCEEDING  
  
Docket No. CENT 86-151-DM  
MSHA Case No. MD 86-35  
  
1604 Quarry and Plant

v.

ALAMO CEMENT COMPANY,  
RESPONDENT

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Complainant;  
David M. Thomas and Robert S. Bambace, Esqs., Fulbright  
& Jaworski, Houston, Texas, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns an Application for Temporary Reinstatement filed by MSHA on September 10, 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 Yale E. Hennessee to his position as an electrician at the respondent's 1604 Quarry and Plant. MSHA has concluded that the complaint of discrimination filed by Mr. Hennessee is not frivolous. In support of this conclusion, MSHA has filed an affidavit executed by Wilbert B. Forbes, Chief of Special Investigations, Metal and Non-Metal Division, MSHA, Arlington, Virginia, a summary of the alleged discriminatory action, and a hand-written statement by Mr. Hennessee in support of his complaint.

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The respondent filed a request for a hearing pursuant to 29 C.F.R. 2700.44(b). By agreement of the parties, a hearing was scheduled for October 15, 1986, but it was cancelled because of certain budgetary constraints. It was subsequently rescheduled and held in San Antonio, Texas, on October 23, 1986, and the parties appeared and participated fully therein.

#### Issue

The issue presented in this proceeding is whether or not MSHA's complaint on behalf of Mr. Hennessee is frivolous.

#### MSHA's Testimony and Evidence

Yale E. Hennessee, confirmed that until his discharge on April 17, 1986, he was employed by the respondent as a instrumentation technician or electrician. In his opinion, he was discharged because "I refused to be bullied" into doing something which he believed was unsafe, namely, the removal of a motor from the bottom of clinker dome 2 which was littered with clinker and which presented a slip and fall hazard.

Mr. Hennessee stated that on the afternoon of April 17, 1986, production foreman Frank Garcia requested Damon Smith to repair a burned out motor on a feeder located at the No. 2 clinker dome. Mr. Smith asked him to assist in the repairs, and they took a replacement motor to the area with a hand truck. The motor was taken down a sloping concrete walkway or ramp tunnel which was sloped at approximately 30 degrees. The ramp had handrails on both sides, and Mr. Smith had one hand on the rail and one hand on the truck, as did Mr. Hennessee. The motor weighed approximately 100 to 110 pounds, and the ramp was littered with 8 to 10 inches of clinker ranging from "small marble" size to "golf ball" size.

Mr. Hennessee stated that while taking the motor down the ramp, he and Mr. Smith lost their balance several times because of the clinker, and had some difficulty in transporting the motor down the ramp because of the slippery footing. He stated that the belt had been buried the evening before with spillage, and that the normal practice is to clean up and remove the clinker from the belt.

Mr. Hennessee stated that after the burned out motor was changed out, he and Mr. Smith decided to leave the old motor in the dome and they placed it out of the way. They decided not to take it out because of the trouble they had in bringing it in, and they did not believe that they could have removed it safely. They also considered the fact that there were two other motors in the warehouse, and they did not

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believe it was necessary to immediately remove the burned out motor from the area. Mr. Hennessee stated that had the old motor been needed, he would have removed it.

Mr. Hennessee stated that after replacing the burned out motor, he left the dome area to remove his lock-out device from the motor breaker and that the slippery footing condition of the ramp still existed as he exited the area. Mr. Smith remained behind to replace the motor guard and to check out the motor rotation. Mr. Hennessee then called the control room and informed Foreman Homer Zapata that the motor had been repaired and that he should check the feeder belt flow. He did not inform Mr. Zapata that the burned out motor had not been removed.

Mr. Hennessee stated that at approximately 3:45 p.m., he and Mr. Smith were in the shop cleaning up. Their work shift ended at 4:30 p.m. Mr. Garcia came to the shop and informed them that the motor which they had installed was not operating properly, and that they had not replaced the guard or removed the old motor. Mr. Hennessee stated that Mr. Garcia was belligerent and accused them of not doing the job right. He also indicated that Mr. Garcia told them if they could not do the job right he no longer needed them and that they could "punch out." Mr. Hennessee stated that he attempted to explain the situation to Mr. Garcia but that he would not listen.

Mr. Hennessee stated that after the confrontation with Mr. Garcia, he and Mr. Smith went to see their supervisor Bob Pratt. Mr. Garcia and plant manager Ed Pierce were there, and Mr. Hennessee informed Mr. Pierce that he did not have to put up with Mr. Garcia's abuse and harrassment. He also informed Mr. Pierce that unless the dome walkway ramp was cleaned up, he would not remove the old motor. He also informed Mr. Pierce that the walkway ramp was unsafe. Mr. Pierce asked him to "cool off" and advised him that he would go to the dome ramp area to check it out.

Mr. Hennessee stated that Mr. Pierce and Mr. Garcia then left to check out the ramp. Upon their return, Mr. Pierce advised him that he and another employee had removed the burned out motor by carrying it out of the dome by means of a rag placed through the motor eyelet. Mr. Pierce also informed him that the ramp walkway was "totally cleaned" and safe.

Mr. Hennessee stated that Mr. Pratt then told him to go home and "cool off." Mr. Hennessee left the mine and took his tools with him. He did so because he believed his dismissal was "imminent." Mr. Hennessee stated that he advised

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Mr. Pratt that he did not remove the old motor because he believed it could not be removed safely.

Mr. Hennessee stated that he later spoke with Mr. Pratt, and he was asked to write a letter stating his position and to meet with Mr. Pratt on April 18, 1986, to discuss the matter further. Mr. Hennessee was then summoned to a meeting on April 22, 1986, and present were Mr. Pratt, Mr. Pierce, and personnel manager Galindo.

Mr. Hennessee stated that when he went to the April 22, meeting he assumed he would be reprimanded. In fact, he was terminated for insubordination because of his refusal to remove the burned out motor.

Mr. Hennessee confirmed that since his termination he has not had regular employment, but has done contract labor and sub-contracting work. He also confirmed that he felt some loyalty to the respondent because they took care of him when he was previously injured on the job. He also indicated that the respondent sent him for training at a G.E. school in Virginia, in January, 1986, and that he was always available and willing to work overtime, and responded to requests to work evenings to solve problems as required by the respondent.

On cross-examination, Mr. Hennessee conceded that in his April 20, 1986, statement to the respondent he did not mention his prior injury or that this was a consideration in his refusal to remove the motor from the dome area. He confirmed that he filed his discrimination complaint with MSHA on April 23, the day following his termination. He confirmed that he was angry on April 17, and that he was "carried away" and "let his mouth get away from him" over the incident with Mr. Garcia. He also confirmed that after his termination, he made up his mind to do what he could to save his job.

Mr. Hennessee reiterated that the dome walkway ramp area was unsafe when he went down with Mr. Smith with the motor, and that it was unsafe when he left the area after changing out the motor. He stated that he did not clean up the ramp area before taking the motor down because he had never been expected to do so in the past.

Mr. Hennessee confirmed that the plant is non-union, and that the respondent has rules requiring persons who perform work to clean up their work areas when the work is completed. He also confirmed that he did not request anyone to clean up the ramp area before he and Mr. Smith took in the replacement motor.

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Mr. Hennessee reiterated that Mr. Garcia was belligerent and accused him of failing to repair the motor, failing to replace the motor guard, and failing to remove the old motor. He confirmed that he advised Mr. Pratt that he would not work if he had to take abuse, and would instead quit. He confirmed that Mr. Pierce heard his comments in this regard.

Mr. Hennessee confirmed that he never returned to the ramp area on April 17, after he was told to go home, and could not have known that the area was unsafe. He also confirmed that his prior statement made no reference to running the hand-truck with the motor into the ramp wall, and that he had not notified anyone that he had left the burned out motor in the dome.

MSHA Inspector Paul Belanger confirmed that he conducted the investigation of Mr. Hennessee's complaint. He confirmed that he found no basis for concluding that Mr. Hennessee violated any company rules, and no one related to him that there were other times when equipment was left at work sites after the work was completed.

Mr. Belanger stated that when he inspected the walkway ramp area in question it was in good condition and safe. He confirmed that management personnel seemed to be aware of the fact that the ramp area had spillage problems. He stated that when he walked the ramp he made certain to hold onto the handrail. Although he observed some clinkers on the ramp and lost his footing, the ramp condition did not warrant the issuance of a citation.

Mr. Belanger confirmed that no one from mine management denied the existence of clinker spillage on the walkway ramp in question, nor did they deny Mr. Hennessee's assertions that he believed the condition of the ramp was unsafe. Mr. Belanger also confirmed that his investigation revealed that Mr. Hennessee was an exemplary employee and that he had never refused any work in the past, and had no prior personnel actions taken against him.

Mr. Belanger confirmed that the respondent was cooperative during his investigation and provided access to its employees.

Respondent's Testimony and Evidence

Frank Garcia, production superintendent, confirmed that on April 17, 1986, he assigned Damon Smith the task of changing out a burned out motor on the feeder in the Number 2 clinker dome. Mr. Smith said nothing to him about the condition of the ramp walkway. After completion of the work, Homer Zapata advised him that the walkway ramp had been swept and cleaned and that a "path" had been cleared of clinkers. Mr. Zapata also informed him that the motor guard had been left off, that the old motor had not been removed from the area, and that the feeder motor was still not working properly. Mr. Garcia then confronted Mr. Smith and Mr. Hennessee and told them "if they couldn't do the job right to punch out."

Mr. Garcia stated that he believed that the walkway ramp was safe on April 17, and that the old motor could be safely removed. He confirmed that he did not participate in the decision to terminate Mr. Hennessee from his employment with the respondent.

On cross-examination, Mr. Garcia stated that when he confronted Mr. Smith and Mr. Hennessee they said nothing to him about any safety concerns. He reiterated that the ramp had been cleaned and that there was a clear 3-foot wide "pathway" extending the length of the 4-foot wide ramp.

Mr. Garcia confirmed that when Mr. Pierce brought out the motor, he had to hold onto the walkway railing, and that he did so because he may have considered it unsafe. He expressed agreement with Mr. Pierce's statement of April 17, 1986, including the statement by Mr. Hennessee that he would still not remove the motor the day after it was removed by Mr. Pierce. Mr. Garcia stated that it was his opinion that the walkway ramp was not unsafe on April 17, and that not no slip hazard existed.

Ed Pierce, respondent's works manager, confirmed that he is in charge of all plant production. He stated that Mr. Hennessee was a good employee and that he spoke with him on April 17, at approximately 3:30 p.m. He stated that he encountered Mr. Garcia, Mr. Hennessee, and Mr. Smith at that time and that they were talking at the same time with regard to the motor repairs in question. Mr. Hennessee stated that "you can get someone to punch in for me in the morning," and Mr. Pierce asked him to quiet down. Mr. Garcia was complaining that Mr. Smith and Mr. Hennessee had not done their job of changing out the motor, and Mr. Smith insisted that they

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had. Mr. Hennessee stated that he and Mr. Smith did not remove the old motor because they believed it would have been unsafe to do so.

Mr. Pierce stated that he and Mr. Garcia proceeded to the ramp area, and Mr. Pierce observed that a "path" had been cleared on the ramp walkway, and he believed that it was safe. He and another employee brought out the old motor with no problems. Mr. Pierce confirmed that clinker was present under the hand rail on the left side of the ramp, and under the conveyor belt on the right side of the ramp.

Mr. Pierce stated that the motor guard was off, and that the new motor appeared to have been installed properly but was vibrating excessively. After removing the old motor from the area, he returned to the second floor break room, and continued his discussion with Mr. Hennessee. He informed Mr. Hennessee that he considered the ramp to be safe, and Mr. Hennessee informed him that even so, he would not go to the dome area the next day to remove the motor.

Mr. Pierce stated that the decision to terminate Mr. Hennessee was a "group decision" reached on April 21, 1986, by himself, Vice President Jim Gordon, President Hopper, and Mr. Galindo. Mr. Hennessee was informed of the decision on April 22, 1986, when he was issued the "warning" and termination notice (exhibit CÄ1). Mr. Pierce stated that Mr. Hennessee was terminated for insubordination because of his statement that he would not on the next day remove the motor from the clinker dome area in question. Mr. Pierce confirmed that Mr. Smith was not insubordinate, and no action was taken against him, and he is still employed with the respondent.

Gregory Fuentes, yard supervisor, stated that he was responsible for plant housekeeping. He confirmed that he was aware of the dispute of April 17, between Mr. Garcia, Mr. Hennessee, and Mr. Smith with regard to the replacement of the motor in the clinker dome. Mr. Fuentes stated that at 12 noon on that day he assigned contract employees Davis and Hickey to clean up and sweep the ramp walkway area in question. He stated that they finished this work at 3:00 p.m., and that he went to the area and confirmed that it had been cleaned up. Mr. Fuentes estimated that it took 2 hours to clean up the area. He stated that Mr. Davis and Mr. Hickey cleared a path down the ramp by sweeping the clinker under the belt, and that when the belt was rendered operational again the clinker would have been loaded on the belt and taken out of the area.



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By agreement and stipulation, of the parties, respondent's counsel proffered the testimony of electrical supervisor Robert Pratt, Foreman Homer Zapata, and supervisor Rene Chevera.

The parties stipulated that if called to testify, Mr. Pratt would confirm his discussions with Mr. Hennessee concerning the circumstances which prompted his encounter with Mr. Garcia, and Mr. Hennessee's reluctance to remove the burned out motor in question from the clinker dome, including Mr. Hennessee's statement that he would not remove the motor the day following the incident in question on April 17, 1986.

The parties stipulated that if called to testify, Mr. Chevera would confirm that he and Mr. Pierce removed the burned out motor in question after Mr. Hennessee's refusal to do so, and that the dome walkway ramp area was cleaned up and safe to travel.

The parties stipulated that if called to testify, Mr. Zapata would confirm that after being informed by Mr. Hennessee that he and Mr. Smith had completed the job of changing out the burned out motor, Mr. Zapata found that the old motor had not been removed from the work area, that the motor guard was not in place, and that the replacement motor was not operating properly.

#### Documentary Evidence

The following documents were tendered by the complainant, and received in evidence in this proceeding:

1. The Employee Warning Record and Termination Notice issued to Mr. Hennessee by the respondent terminating his employment on April 22, 1986, for "Insubordination." (Exhibit CÄ1).
2. A copy of a work order dated April 15, 1986). (Exhibit CÄ2).
3. Eight copies of Respondent's No. 1 Finish Mill Inspection/Checklists dated April 15, 16, 17, 1986. (Exhibit CÄ3).
4. Four copies of Respondent's Safety and Health Inspection Checklists dated April 15, 17, 18, 1986. (Exhibit CÄ4).

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5. April 17, 1986, statement by respondent's Works Manager Ed Pierce. (Exhibit CÄ5).

6. Statement incorporated in exhibit CÄ1, under "Company Remarks." (Exhibit CÄ6).

7. Copy of respondent's "Work Rules." (Exhibit CÄ7).

8. Copy of respondent's safety policy (exhibit RÄ1).

#### Findings and Conclusions

As stated earlier, the issue in this limited proceeding at this time is whether or not MSHA had made a reasonable and credible showing that the discrimination complaint filed on behalf of Mr. Hennessee is not frivolous.

Webster's New Collegiate Dictionary defines the term "frivolous" as "of little weight or importance." Black's Law Dictionary, Revised Fourth Edition, 1968, defines the term as follows:

- - - "lacking in legal sufficiency"
- - - "clearly insufficient on its face"
- - - A "frivolous appeal is one presenting no justiciable question and so readily recognizable as devoid of any merit on face of record that there is little prospect that it can ever succeed"

Mr. Hennessee's testimony regarding the existence of clinker spillage material on the walkway ramp at dome No. 2 on April 17, 1986, is corroborated by the respondent's inspection checklist reports (exhibits CÄ3 and CÄ4). In addition, in his statement of April 17, 1986, Mr. Pierce admitted that "there was some clinker in the walkway going to the bottom of the dome" (exhibit CÄ5). Although Mr. Pierce states that the walkway could be travelled safely, he qualified his statement by indicating that it could be safely travelled "if you used the handrails." The statement also reflects that when Mr. Pierce and Mr. Garcia returned to the dome to retrieve the old motor left by Mr. Smith and Mr. Hennessee, Mr. Pierce had to hold on to the handrail so that he would not slip on the clinker. Mr. Pierce's statement contains no assertion that the walkway had been cleaned or swept so as to leave any "pathway" clear of clinker.

Mr. Pierce testified that when he and Mr. Garcia returned to the dome area, he observed that a "path" had been cleared

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of clinker. However, he conceded that clinker material still existed under the handrails and the belt.

Although Mr. Garcia testified that the walkway ramp was clear of clinker, he indicated that a "pathway" 3 feet wide had been cleared, but he did not indicate that the entire width of the ramp had been swept or cleared of the clinker. He also indicated that Mr. Zapata informed him that the ramp had been swept clean, but that this information was given to him after the completion of the work by Mr. Smith and Mr. Hennessee.

Mr. Fuentes testified he assigned employees Davis and Hickey to clean the walkway at 12 noon, and that it took them 2 hours to do the work. He stated that the work was completed at 3:00 p.m., when Mr. Fuentes went to the area to confirm that the cleanup had been done. However, Mr. Fuentes confirmed that all of the clinker had not been removed from the ramp, and that only a "pathway" had been provided, and that the clinker had simply been swept under the belt and that it would be completely loaded out when the belt was again operational.

The respondent's safety inspection checklist for April 17, 1986, reflects that upon an inspection of the plant conducted between the hours of 2:00 p.m. and 10:00 p.m., a hazard existed on "ramp to dome No. 2 clinker spillage." The checklist report for April 18, 1986, reflects that an inspection conducted at 3:00 a.m., reflected tripping hazards under Dome No. 2 by the belt feeder, and that scattered clinker may have been present at that same location (exhibit CÄ4). Another report for the first shift on April 17, 1986, reflects spillage at the LÄ27 belt, and another report for the 10:00 p.m. shift reflects spills at the LÄ27 belt, and spillage at Dome No. 2 along the LÄ27 belt and catwalk (exhibit CÄ3).

Mr. Hennessee's testimony and his prior statements reflect a consistent belief on his part that his reluctance to remove the burned out motor after the completion of his repair work on April 17, 1986, was based on his belief that the existence of clinker material on the ramp walkway rendered the ramp unsafe to traverse with the motor. Further, Mr. Pierce's statement of April 17, 1986 (exhibit CÄ5), and his testimony, support Mr. Hennessee's contention that he communicated his safety concerns to Mr. Pierce as the reason why he was reluctant to initially remove the burned out motor from the dome after the completion of the job.

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Mr. Garcia's testimony that Mr. Smith said nothing to him about the condition of the ramp walkway is contradicted by Mr. Hennessee's statement to Inspector Belanger during an interview on May 1, 1986. A copy of the interview was reviewed by me in camera, and it contains a statement by Mr. Hennessee that Mr. Smith informed him that he told Mr. Garcia that the walkway was littered with clinker spillage, and that Mr. Smith wanted Mr. Garcia to be aware of this fact in the event that Mr. Hennessee and Smith were held responsible if they were to fall on the ramp.

Mr. Garcia's assertion that he was not made aware of any clinker on the ramp is also contradicted by the narrative "Company Remarks" portion of the warning and termination decision of April 22, 1986 (exhibit CÄ1). That statement reflects that Mr. Hennessee informed Mr. Garcia that he would not return to take the motor out of the dome because it was unsafe with spilled clinker on the ramp and that he had nearly fallen when he and Mr. Smith went down the ramp to install the new motor earlier.

After careful review of the testimony, evidence, and pleadings filed in this matter, I conclude and find that it raises a viable issue as to whether or not the incident which prompted Mr. Hennessee's termination, that is, his statement to Mr. Pierce that he would not go to the dome and remove the motor, justified his termination, or whether his refusal or reluctance was in any way prompted by his asserted belief that to retrieve the motor in the circumstances then presented, was the result of a reasonable belief on his part that to do so would expose him to an injury, hazard, or danger.

In view of the foregoing, I conclude and find that the complaint filed in this matter has merit and is not frivolous. Accordingly, I further conclude that pursuant to Commission Rule 44, 29 C.F.R. 2700.44(d), MSHA's application for the temporary reinstatement of Mr. Hennessee pending a final determination of his complaint on the merits should be granted.

#### ORDER

Respondent IS ORDERED to immediately reinstate Mr. Hennessee to his electrician's position at the prevailing wage rate for that position and with the same or equivalent duties as assigned to him immediately prior to his discharge.

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During the course of the hearing, MSHA's counsel stated that MSHA will soon file its discrimination complaint. The respondent will have a full opportunity to respond, and the parties will be afforded an opportunity to be heard on the merits of the complaint. They will be notified further as to the time and place of the hearing.

George A. Koutras  
Administrative Law Judge