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SOL (MSHA) V. ALAMO CEMENT
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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 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 DENYING THE RESPONDENT'S MOTION
FOR MODIFICATION OF 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 Proceeding

This proceeding concerns an Application for Temporary Reinstatement filed by MSHA pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, and Commission Rule 29, 29 C.F.R. 2700.44(a), seeking the temporary reinstatement of the complainant Yale E. Hennessee to his job as an electrician at the respondent's 1604 Quarry and Plant. Mr. Hennessee was discharged by the respondent on April 22, 1986, for insubordination because of his alleged refusal to perform a job assignment. Mr. Hennessee claims that his refusal to perform the work in question was based on his belief that the work task in question could not be done safely. MSHA has since filed a discrimination complaint on Mr. Hennessee's behalf claiming that his work refusal was protected activity and that his discharge constitutes a violation of the Act.

A Temporary Reinstatement hearing was held on October 23, 1986, and on Novemer 6, 1986, I issued a decision finding that MSHA's complaint was not frivolous, and respondent was ordered to immediately reinstate Mr. Hennessee pending further adjudication of the merits of the discrimination complaint.

The respondent appealed my reinstatement order to the Commission, and while that appeal was pending, filed a request for modification of my order, and MSHA filed an opposition to the request. Since the matter was on appeal, no dispositive ruling was made with respect to the request.

On December 8, 1986, the Commission issued its decision affirming my reinstatement order, and remanded the matter for further adjudication. The respondent's pending request for modification of my order is now ripe for disposition.

Discussion

As part of its Application for Temporary Reinstatement, MSHA included an affidavit from Wilbert B. Forbes, Chief of Special Investigations, Metal and Non-metal Division, Arlington, Virginia, which states in pertinent part as follows:

> On December 4, 1984, Applicant was severly injured during the performance of his duties at Respondent's mine sustaining multiple broken bones in his right foot and severe damage to his left knee;
>
> As a result of the December 4, 1984, injuries Applicant was unable to work for 49 days and assigned to light duty for an additional 30 or more days;
>
> Applicant is permanently disabled as a result of his 1984 injuries and requires further surgery on his knee.

The question of Mr. Hennessee's prior injuries was first raised by Mr. Hennessee when he testified that "the company had always been good to me" and that when he was injured and in the hospital, company president Hopper visited him in the hospital (Tr. 53Ä54). When MSHA's counsel pursued the matter further, respondent's counsel interposed an objection on the ground of relevance (Tr. 56).

MSHA's counsel proffered that notwithstanding his prior injuries and disability, Mr. Hennessee is still capable of

performing full-time the duties of electrician, and has in fact so performed. Counsel also indicated that Mr. Hennessee's prior injury may have played some part in his refusal to remove the motor in question, and that this chore would have been more difficult for him than for someone who had not suffered an injury (Tr. 57Ä58).

The respondent's objection was overruled, and counsel interposed a continuing objection to any testimony concerning Mr. Hennessee's prior injuries (Tr. 58).

The coloquy concerning Mr. Hennessee's prior injuries is reflected as follows at (Tr. 56Ä58):

Q. Did you ever refuse any overtime?

A. No, sir.

Q. Did you ever refuse to perform a job at Alamo Cement?

A. No, sir.

Q. Had you ever refused to do anything at Alamo Cement?

A. No, sir.

Q. When you were injured--when did that occur?

MR. THOMAS: Objection; relevance.

JUDGE KOUTRAS: I noticed that in the affidavit. What is the relevance of his prior injury and condition? As a matter of fact, I was intrigued by the statement in the affidavit in support of the application for reinstatement which alluded to the fact that--(Perusing document.)

It says, "As a result of Mr. Hennessee's injuries, he is permanently disabled."

MR. MONCRIEF: Partially disabled, I believe.

JUDGE KOUTRAS: Well, this says permanently disabled. I was intrigued how a man who was permanently disabled in 1984 was working in an

area of the mine where he is required to take down motors and all that sort of thing.

MR. MONCRIEF: I was going to follow that, Your Honor, for the fact that I think it does have some relevance.

JUDGE KOUTRAS: Make a proffer. What is the relevance?

MR. MONCRIEF: The proffer is simply that in '84--I think it was December of '84, Mr. Hennessee was severely injured and, as a result, suffers a permanent partial disability, a disability well known to the company. Notwithstanding that disability, Mr. Hennessee still performs and is capable of performing full-time the duties of electrician, including, as we have just heard, lowering a motor down a steep incline covered with marble-like material to the dome area, but that, in addition to that, in his condition, certainly, there may have been some--his injury may have played some part in his refusal to carry that--or attempt to drag that motor back out.

JUDGE KOUTRAS: But not down.

MR. MONCRIEF: He described, I think, the manner in which they took the motor down, and the difficulties. And I simply wanted, as part of the record, to have it known--

JUDGE KOUTRAS: All right. So you have already done that now. You made a--

MR. MONCRIEF: That was my proffer.

JUDGE KOUTRAS: You made an argument that he was injured in '84; he is partially disabled, and the company is aware of it and, notwithstanding those injuries, he still can perform his duties and is able to perform his duties, et cetera, et cetera.

MR. MONCRIEF: Yes, sir. And I think, too, Your Honor, there is a point that, because of

his condition, this attempting to retrieve this motor to carry it up--this heavy motor up the ramp--would have been a bit more difficult for him than for someone who had not suffered an injury.

JUDGE KOUTRAS: Did he tell that to--

MR. MONCRIEF: No, I don't believe he did; however, it was a fact well known to the company--his condition.

JUDGE KOUTRAS: All right.

MR. MONCRIEF: That would be my proffer, if you want to accept it.

JUDGE KOUTRAS: That is all right. Go ahead. Continue.

MR. MONCRIEF: Okay.

JUDGE KOUTRAS: Overruled.

You made an objection as to relevance?

MR. THOMAS: Yes, sir. And we would continue that objection.

JUDGE KOUTRAS: Fine.

Mr. Hennessee testified as follows with respect to his injuries and the effect of those injuries on his ability to perform his duties (Tr. 59Ä61):

BY MR. MONCRIEF:

Q. Briefly describe the nature of your injuries.

A. I had torn ligaments and cartilage in my left knee, and my right foot was crushed. I have a pin in my second toe on my right foot.

Q. Are either of these conditions continuing or causing any difficulty at the present?

A. Yes, they do.

JUDGE KOUTRAS: You said yes?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: What difficulties?

THE WITNENSS: I have to wear a pad in my right shoe to keep my toes from curling up. After working a lot of long hours, my left leg will swell up, and my knee is tender at all times when it gets twisted or anything.

JUDGE KOUTRAS: All right.

BY MR. MONCRIEF:

Q. Was your knee essentially in the same condition on the 17th of April?

A. Basically, yes.

Q. When the injury occurred or the injuries occurred, how long were you off work?

A. Ten weeks.

Q. When you returned to work, to what assignment did you return?

A. I returned to light-duty shop work.

Q. For how long?

A. I am going to say about two months.

Q. So sometime in '85 did you eventually return to your normal duties?

A. Yes, I did.

Q. On the day of the 17th of April did the condition of your knee in any way enter into your consideration or deliberations as to whether to take that motor back up the ramp?

MR. THOMAS. Objection; leading.

JUDGE KOUTRAS: Yes. You are leading him a little bit.

MR. MONCRIEF: Yes, sir.

BY MR. MONCRIEF:

Q. What, if any part, did you knee play in your determination?

MR. THOMAS: Objection; leading.

JUDGE KOUTRAS: Overruled. I will let you answer it. Go ahead.

THE WITNESS: The condition of my knee and my foot ever since the accident is something I think about no matter what I am doing.

JUDGE KOUTRAS: Well--okay.

THE WITNESS: Do you understand this, Judge? If I am walking down the street and I see a slippery spot on the sidewalk I naturally walk around it.

JUDGE KOUTRAS: All right.

THE WITNESS: The same thing at the plant; there are some areas where I am very careful when I walk there.

And, at (Tr. 63Ä64):

Q. Mr. Hennessee, at the time on the 17th, was the company aware of the extent or the degree of your injury to your knee and foot?

A. I am sure they were.

Q. Why?

A. Most of the guys in the maintenance department used to call me Hopalong.

Q. Why?

A. I limp at times; sometimes worse than others.

Respondent's counsel pursued the matter further on cross-examination as follows at (Tr. 68Ä69):

MR. THOMAS:

Q. Mr. Hennessee, since you talked about it on direct examination, I want to explore a little bit with you this injury matter.

Now, in your statement that you wrote on April 20, 1986, you made no mention of your injury, did you?

A. No.

Q. Okay. And when you spoke with Mr. Galindo and Mr. Pratt on the night of April 17, you made no mention of your injury, did you?

A. No, I didn't.

Q. In fact, the very first mention that you made of your injury, to the knowledge of anyone with the company, was today in this courtroom. Isn't that a fact?

A. Well, I think they all knew about my injury.

Q. I am going to ask you to answer my question, Mr. Hennessee. I will try to give you--and be as precise as I can, and if you need to explain things, you can explain things later.

What I want to know and what I want you to answer is, between the date of your altercation at the plant and today, did you mention to anyone in the company that your injury was a consideration in what happened?

A. I don't believe so.

Respondent's Request for Modification

The respondent requests that my reinstatement order be modified to require Mr. Hennessee to undergo and pass a physical examination of his left knee and right foot as a condition precedent to his temporarily resuming employment. Respondent

requests that Mr. Hennessee be required to submit to such an examination by the respondent's physician, and that should he desire that his own physician also examine him, respondent states that it will pay the cost.

In support of its request, the respondent states that it had no knowledge of the continuing extent and severity of Mr. Hennessee's injuries until the reinstatement hearing. Respondent asserts that requiring Mr. Hennessee to undergo and pass a physical examination as a condition to his temporary reinstatement is necessary in order to assure that he is physically qualified to perform the duties of his position, to protect his safety and the safety of individuals who might be assigned to work with him, and to protect the respondent from potential liability in future workers' compensation or other claims.

In a letter dated November 14, 1986, to MSHA's Assistant Secretary, the respondent states that its request is in no way related to an effort to avoid compliance with the reinstatement order. Respondent states further that it only desires to insure that Mr. Hennessee is physically fit to perform the duties of his position, and believes that its request is reasonable and consistent with the requirements of safety which are present in all mining activities.

MSHA's Opposition

In response and opposition to the respondent's request for modification of the order of reinstatement, MSHA points out that when Mr. Hennessee's prior injuries were referred to during the reinstatement hearing, the respondent interposed an objection on the ground of relevance, and continued its objection to any further references to those injuries.

MSHA states that following the issuance of the reinstatement order, the respondent reinstated Mr. Hennessee on the evening shift, and he worked on November 10, 11, and 12, 1986. MSHA asserts that the issue of his physical capacity was raised for the first time on the morning of November 10, 1986, when upon reporting for work the evening of November 10 or 11, Mr. Hennessee was presented a statement for his signature stating for the first time the respondent's insistence on an examination by the respondent's physician prior to the evening shift of November 14, 1986. In support of this assertion, MSHA has included a statement dated November 11, 1986, by Plant Manager Ed Pierce which states in pertinent part as follows:

> Yale E. Hennessee was temporarily reinstated with Alamo Cement Company on November 10, 1986, by order of Mine Safety and Health (MSHA) of the United States Department of Labor. His first scheduled shift was the 10:00 p.m. to 6:00 a.m. shift on this date.
>
> * * * * * * * * *
>
> Alamo Cement is a non-union plant. Employees are to do what any supervisor asks them and no employee would be asked to do anything unsafe. Even though Mr. Hennessee is an electrician, because of our non-union status, he was told at times he would be required to do other jobs (i.e., motor painting, electric room sweeping, shoveling, etc.).
>
> Before reporting to work Friday, November 14, 1986, Mr. Hennessee is to have a physical by his doctor and the Company's doctor and give the results of these physicals to Alamo Cement on or before November 14, 1986. Mr. Hennessee was told that the Company would make an appointment with their doctor for him and let him know the time of the appointment.

MSHA states that thereafter, in the afternoon of November 13, respondent told Mr. Hennessee not to report to work that evening unless he had an examination by its physician. Respondent was advised at that time that Mr. Hennessee would be examined by his own physician. MSHA has included a statement by Mr. Hennessee's physician, Orthopaedic Surgeon Richard F. Cape, dated November 17, 1986, stating that Mr. Hennessee may return to work as of that date with no physical activity restrictions.

As a result of the respondent's unreasonable insistence that Mr. Hennessee submit to a physical examination by its physician as a condition to reinstatement, MSHA states that its special investigator issued two section 104(a) citations and a section 104(b) order on November 13, 1986. The following morning the respondent agreed to pay Mr. Hennessee from the previous evenings shift on November 13, through November 18, provided he was examined by his physician in the interim. On the basis of this "retroactive ersatz compliance" with the reinstatement order, the citations and order were vacated on November 14, 1986.

MSHA states that on the afternoon of November 17, the respondent informed Mr. Hennessee that he was to report for an examination by its physician at 2:30 p.m. the following day and not to report for work otherwise. Upon reporting for work at 2:00 p.m. on November 19, accompanied by MSHA's special investigator, Mr. Hennessee was again terminated from his employment. As a result of this termination, MSHA's special investigator issued two section 104(a) citations and a section 104(b) order on November 19, 1986.

MSHA argues that no legitimate reason exists for requiring an examination of Mr. Hennessee by the respondent's physician, and that if the respondent had any basis for concern as to the safety or well being of Mr. Hennessee prior to November 10, it should have investigated the matter and presented it for consideration during the reinstatement hearing. Were there any basis for concern after November 10, MSHA asserts that it must have been eliminated on November 18, when the respondent received the certification of Mr. Hennessee's physician, the same physician upon whose certification the respondent relied in February 1985 when he returned to work after his injury. MSHA points out that the respondent does not suggest that its physician is capable or appropriate to the task of meaningfully examining Mr. Hennessee's knee or foot.

MSHA states that the respondent has long known of Mr. Hennessee's injury because he received it on the job and it is the subject of continuing litigation between them. MSHA points out that despite his injury, Mr. Hennessee has fully and capably performed his work duties until his discharge in April, 1986. Moreover, during the 3 days in which Mr. Hennessee worked after his reinstatement, he fully performed his duties, and prior to returning to work in 1985, he received his orthopedic surgeon's clearance, and was again examined and cleared for work by his doctor on November 17, 1986.

MSHA concludes that there is no basis to require Mr. Hennessee to undergo a physical examination by the respondent's physician as a condition to his reinstatement. MSHA maintains that Mr. Hennessee's knee remains in as good or better condition that it did on the day of his discharge in April, 1986, and that the respondent previously accepted him back to work after the 1984 injury.

MSHA concludes further that having lost at the temporary reinstatement hearing, the respondent now seeks to find refuge from that order by interposing, solely on Mr. Hennessee,

special demands which create hardships for him. MSHA maintains that it would not knowingly seeking reinstatement of a individual incapable of performing the functions for which his reinstatement is sought, and that this has not occurred in this case. MSHA contends that both Mr. Hennessee and MSHA have been reasonable and accommodating and have addressed the concerns expressed by the respondent.

Findings and Conclusions

The respondent does not contend that it had no prior knowledge of Mr. Hennessee's prior injury. I believe it has raised the issue, albeit belatedly, because of Mr. Hennessee's admission that his prior injury continues to cause him difficulty, and his admission that he wears a shoe pad to keep his toes from curling up, that his leg swells up when he works long hours, and that his knee is tender at all times, particularly when twisted.

The fact that the respondent was aware of Mr. Hennessee's prior injury, and that some of his fellow workers refer to him as "Hopalong" because he limps at times, does not establish that the respondent was aware of Mr. Hennessee's asserted present difficulties with his leg and knee. Given the fact that there is no evidence that the respondent knew that Mr. Hennessee wears a shoe pad, or that his leg is subject to swelling and his knee is always tender when twisted, and his admission that he did not mention his prior injury to company management when he discussed the incident of April 17 with them, and did not contend at that time that his injury played a role in his work refusal, I cannot conclude that the respondent's belated raising of this issue is other than bona fide.

As correctly argued by MSHA, the respondent did not make an issue of Mr. Hennessee's prior knee and leg condition during the hearing, and in fact interposed a continuing objection to any testimony in this regard and took the position that it was irrelevant.

Mr. Hennessee testified that the condition of his knee at the time of the April 17, 1986, incident which gave use to his discharge was basically the same as it was when he returned to work after his injury in 1984. Although he was off the job for 10 weeks because of his injury, and was assigned to light duty shop work for 2 months after his return, he stated that sometime in 1985, he returned to his normal duties as an electrician, and there is no evidence that his physical condition has interferred with his work.

Although Mr. Hennesse admitted that he wears a pad in his right shoe to keep his toes from curling up, that his leg swells when he works long hours, and that his knee becomes tender when it is twisted, there is no evidence or testimony to establish that his prior injury has in any way interferred with the performance of his electrician's duties, or that he is unable to perform those duties safely. Further, there is no evidence that Mr. Hennessee has ever complained about his knee or foot condition, that he has ever refused any job assignment because of his condition, or that the respondent was required to make any special accomodation to him because of his condition, other than to assign him light duties until he could fully perform his normal electrician's duties. Indeed, once he was returned to his normal duties, there is no evidence that his prior injuries interferred with his ability to do his job. Further, there is no indication that he was unable to perform his duties during the 3 days that he was reinstated in compliance with my temporary reinstatement order.

With regard to Mr. Hennessee's general competency to do his job, MSHA Special Investigator Paul Belanger testified that his investigation of Mr. Hennessee's discrimination complaint disclosed no adverse information concerning his work performance. Mr. Belanger testified that there was no evidence of any prior adverse personnel actions against Mr. Hennessee, or any unfavorable comments concerning his workmanship, conduct, or his ability to get along with others. Mr. Belanger concluded that Mr. Hennessee was a good employee (Tr. 137Ä138). Plant manager Ed Pierce confirmed that Mr. Hennessee was a good employee (Tr. 204).

Mr. Hennessee testified that the respondent went to some expense to send him to a GE factory training school in January, 1986, to learn about an automated computer system for a new section of the plant. He also confirmed that he often responded to calls by the respondent for his services in the evenings when the job required it, and that he never refused to work overtime or to do his work (Tr. 54Ä56).

In a prior temporary reinstatement case which I decided on March 18, 1986, I denied MSHA's request for temporary reinstatement of a miner pending a hearing of the merits of his complaint, Secretary of Labor, MSHA ex rel Johnnie Lee Jackson v. Turner Brothers, Inc., Docket No. CENT 86Ä36ÄD, 8 FMSHRC 368 (March 1986).

In the Jackson case, the facts disclosed that he was discharged from his job as a bulldozer operator after he

suffered injuries when a high wall fell on his machine while he was operating it. He was discharged for allegedly causing the accident, which not only resulted in injuries to his back and neck, but also damaged the machine. Although the doctor who treated Mr. Jackson for his injuries submitted a statement that he was able to return to work after the accident with no restrictions, he also noted that as a result of his injuries, Mr. Jackson was temporarily and totally disabled and that his injuries predisposed him to reoccurring exacerbation of symptoms and reinjury related to the accident. In a second statement, the same doctor was of the opinion that Mr. Jackson would require periodic care for the rest of his life and would probably experience chronic reoccurring symptoms as a result of his injuries.

In addition to the medical information concerning Mr. Jackson's injuries, the evidence adduced during the reinstatment hearing reflected that he suffered from "tennitis or ringing of the ears," and possible hearing loss as a result of loud equipment noise, and that this information was not made available to the doctors who cleared him for return to work. Further, the evidence established that Mr. Jackson had in the past voluntarily exposed himself to unsafe work conditions and had been admonished by the mine operator for failure to use his seat belt or to wear a hard hat while operating his equipment.

My decision denying temporary reinstatement in the Jackson case was based on the totality of all of the evidence adduced during the reinstatement hearing which reflected his then present physical condition, including his doctor's contradictory medical statements, the fact that he was suffering possible hearing loss, a condition not known prior to the hearing, and the fact that his prior work record reflected his own lack of care and disregard for the requirement that he wear a hard hat and use his seat belt while operating his equipment. I also considered the fact that to reinstate Mr. Jackson to his prior job operating a piece of equipment which had to be maneuvered back and forth while not always on level ground presented "a clear and present danger" or potential for further injuries.

In my view, the facts presented in the instant case are distinguishable from those presented in the Jackson case. There is no evidence that Mr. Hennessee has had any past difficulty in doing any job assigned to him. The evidence establishes that he has been a good employee and has never been disciplined or charged with any safety violations. Further, his prior injuries were not recent, and he was welcomed back

after a period of recuperation and assigned light duties before being permitted to perform his normal job as an electrician. In all candor, I believe that the question of Mr. Hennessee's prior injuries were brought out by MSHA in an attempt to support a possible later claim that they somehow impacted on his refusal to perform the job task for which he was fired. However, this is an issue which is yet to be determined on the merits of the discrimination complaint.

On the facts of Mr. Hennessee's case in its present posture, and after careful review and consideration of all of the testimony and evidence of record, including an unrebutted statement from his orthopedic surgeon that he is able to perform his normal electrician's duties without physical restrictions, I cannot conclude that his temporary reinstatement pending the adjudication of the merits of his complaint will adversely affect his safety or the safety of his fellow workers, or that his temporary reinstatmeent should be conditioned on his passing a physical by a company doctor.

As indicated earlier, Mr. Hennessee's physical condition was raised by MSHA as part of its complaint, and by its counsel during the course of the hearing. In my view, aside from the respondent's liability concern, the only possible concern with Mr. Hennessee's physical ability to his job as an electrician may be presented in connection with any "non-electrician" duties which may be assigned to him. During the reinstatement hearing, Plant Manager Ed Pierce confirmed that the plant is non-union and that everyone, including electricians, are expected to do cleanup work (Tr. 216). Although Mr. Hennessee stated that he was never expected to do any work other than "technical work" during the period of his employment with the respondent, he conceded that management had never specifically told him that, and he further conceded that he never refused to do any job assignment, and that company rules required that anyone working on equipment clean up and remove any debris (Tr. 74Ä75). Further, although Mr. Hennessee confirmed that his prior accident is something that he thinks about when he is at work or away from work, and that he is careful when he walks around, he candidly admitted that he would "take a risk" in order to get the job done" (Tr. 60Ä61).

Mr. Pierce's statement of November 1, 1986, reflects that as a non-union employee, Mr. Hennessee would at times be expected and required to perform non-electrical work such as painting, sweeping, shoveling, etc. Under these circumstances, I believe it is reasonable to conclude that these additional duties are likely to include physical labor which may or may not further aggravate Mr. Hennessee's existing knee and foot

condition. However, I am not convinced that the respondent's policy of assigning other work to its employees is something new. The record here supports a conclusion that Mr. Hennessee has always been expected to perform duties not specifically related to those of an electrician and that he has done so willingly and without incident or complaint. Under the circumstances, I am not convinced that the performance of these additional duties will expose Mr. Hennessee to further injury, nor am I convinced that the respondent has established by any credible evidence that as a condition of reinstatement, Mr. Hennessee should be forced to undergo a physical by a company doctor. I express no view as to whether or not the respondent's existing personnel policies or rules require its employees to be examined by a company doctor in the event the respondent, as an employer, has reasonable or legitimate grounds to believe that an employee cannot physically perform his job. My jurisdiction is limited to the facts presented in the context of a temporary reinstatement proceeding under the Act.

ORDER

In view of the foregoing findings and conclusions, the respondent's request for modification of my temporary reinstatement order to require Mr. Hennessee to undergo a physical by a company doctor as a condition precedent to his temporary reinstatement pending an adjudication of his discrimination complaint on the merits IS DENIED. My previous Decision and Order of November 6, 1986, is therefore REAFFIRMED, and the respondent IS ORDERED to immediately reinstate Mr. Hennessee temporarily to his electrician's position in compliance with that Order.

George A. Koutras
Administrative Law Judge