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SOL (MSHA) V. C & H MINING
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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 WAYNE KIZZIAH AND ROGER KIZZIAH, APPLICANT	DISCRIMINATION PROCEEDING Docket No. SE 92-350-D BARB CD 92-12 BARB CD 92-13

v.

C & H MINING COMPANY, INC.,
RESPONDENT

DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the Applicant;
James J. Jenkins, Esq., K. Scott Stapp, Esq., Phelps, Owens, Jenkins, Gibson and Fowler, Tuscaloosa, Alabama, for the Respondent.

Before: Judge Melick

This case is before me upon the request for hearing filed by C & H Mining Company, Inc. (C & H) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," and under Commission Rule 44(b), 29 C.F.R. 2700.44(b), to contest the Secretary of Labor's application for temporary reinstatement on behalf of miners Wayne Kizziah and Roger Kizziah.(FOOTNOTE 1)

These proceedings are governed by Commission Rule 44(c), 29 C.F.R. 2700.44(c). That rule provides as follows:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

This scheme of procedural protections, including the statutory standard of proof provided by section 105(c)(2) of the Act, to an employer in temporary reinstatement proceedings far exceeds the minimum requirements of due process as articulated by the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987). See JWR v. FMSHRC, 920 F.2d 738 (11th Cir. 1990).

The standard of review in these proceedings is therefore entirely different from that applicable to a trial on the merits of the complaint. As stated by the court in JWR, supra. at pg. 747.

> The legislative history of the Act defines the "not frivolously brought standard' as indicating whether a miner's "complaint appears to have merit' - an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the

> propriety of agency actions seeking temporary relief, the former 5th Circuit construed the "reasonable cause to believe' standard as meaning whether an agency's "theories of law and fact are not insubstantial or frivolous." See Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir 1975) cert denied, 426 U.S. 934, 96 S. Ct. 2646, 49 L.Ed 2d 385 (1976).

The evidence in this case shows that Wayne Kizziah and his brother Roger Kizziah had been employed by Respondent as truck drivers at its mine in Tuscaloosa County, Alabama. On September 24, 1991, William Dykes, a special investigator of the Mine Safety and Health Administration (MSHA), interviewed Wayne Kizziah during the course of an investigation into a discrimination complaint filed by Roger Lowery, a former employee of Respondent. During the course of this interview the fact that Wayne Kizziah had not received "task training" for the operation of end loaders was discussed. It is not disputed that before this time truck drivers at the C & H mine frequently operated the end-loaders on Sundays to load their own trucks.

Subsequently, MSHA Inspector Lonny Foster appeared at the C & H mine site and questioned Respondent's foreman David Walker regarding the operation of end-loaders on Sundays by truck drivers not having the necessary "task training." Foster was told by company officials that they no longer loaded trucks on Sundays. They also told him they had an idea who reported on them. Inspector Foster informed C & H officials that it would be subject to a citation if the truck drivers operated the end-loaders without first receiving task training.

It is undisputed that sometime after Special Investigator Dykes' interview with Wayne Kizziah, Herbert Hall, Jr., one of the company officials, stated to Roger Kizziah in the presence of Wayne and another driver, Jerry Leonard, that there would be no more Sunday loading and "[i]f they wanted to know why they wasn't going to get to load on Sunday anymore to ask [Wayne]." Hall then purportedly stated that he did not have time for training classes. Sunday work was indeed thereafter eliminated for all of the truck drivers. It is further undisputed that Respondent reduced the pay of Wayne and Roger Kizziah effective December 8, 1991, to an hourly rate of $5.00. Before this reduction in pay the Kizziahs had been compensated on 22 percent of the value of each load of coal they hauled plus $9.00 per hour for servicing the trucks and stockpiling coal. The remaining

truck drivers continued to be compensated under the latter plan and did not suffer the Kizziahs' reduction in pay. Indeed, the evidence shows that prior to the reduction the Kizziahs had gross earnings generally about $600 per week whereas during the first week of the pay cut, which included some overtime at the rate of $7.50 per hour, Wayne Kizziah grossed only $276.88 and Roger grossed only $295.63.

The evidence further shows that on December 17, 1991, the Kizziahs were given only one load to haul and sent home whereas most of the other drivers were given additional loads. On the next day, December 18, the Kizziahs reported to work at 6:30 a.m., and at that time learned that other truck drivers had already reported at 3:30 a.m. thereby providing longer work hours than the Kizziahs. The Kizziahs, in their own words, then "quit." According to Wayne Kizziah he quit because he "couldn't make it" under the lower pay scale. He testified subsequently that there were three reasons for his quitting, (1) the "humiliation in it" (presumably because he was not asked to begin work at 3:30 a.m. on December 18 as opposed to the regular startup time of 6:30 a.m.); (2) "the way they was taking us down" and (3) because he wanted a better job and to collect unemployment. Roger Kizziah testified that he quit with his brother on the morning of the 18th when he learned that other drivers had loaded-out earlier that morning. He explained that he would not work for a man who would treat him "worse than a dog."

The Secretary maintains that the Kizziahs' resignations constituted constructive discharges under the circumstances of the case. A constructive discharge occurs whenever a miner engaged in protected activity can show that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988) at 461-463. Whether or not a reduction in pay suffered by the Kizziahs in this case would be sufficient to predicate a finding of constructive discharge is another issue that must be finally resolved at another time. The standard of review in this proceeding is however whether the Secretary's legal theories, as well as her facts, are not frivolous. See JWR, supra, at page 747. The Secretary's legal theory on the question of constructive discharge, while it may not be sustained at a trial on the merits, is certainly an arguable position and cannot be deemed to be frivolous.

With respect to the application on behalf of Roger Kizziah, I note that the Secretary changed her theory of the alleged discrimination in closing argument having failed to produce any evidence at hearing that would support the initial complaint. In her closing arguments the Secretary maintained that the alleged discriminatory treatment sustained by Roger Kizziah was the result of retaliation by the Respondent against his brother's protected activity.

Miners may suffer discrimination under the Act where the mine operator has based its retaliatory action upon only suspicion that the complainant had engaged in protected activity whether or not he actually engaged in that activity. See Elias Moses v. Whitley Development Corp., 4 FMSHRC 1475 (1982). See also Anderson v. Consolidation Coal Co., 9 FMSHRC 413 (1987). In addition there is decisional support for the proposition that a miner is protected under section 105(c) from retaliation based on the protected activities of a relative. See Mackey and Clegg v. Consolidation Coal Co., 7 FMSHRC 977 (1985). Thus there is support for the legal theory that Roger Kizziah suffered discriminatory treatment because of suspicions or actual knowledge of protected activity by his brother Wayne. It cannot therefore be said that the Secretary's legal theory herein is frivolous.

Respondent's evidence at hearing is essentially in the nature of evidence appropriate at a trial on the merits of the discrimination complaints to either rebut a prima facie case of discrimination to show that the adverse action was not motivated in any part by protected activity and/or as an affirmative defense in an effort to prove that the operator was also motivated by the miners' unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. See Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980), reversed on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robbinette v. United Castle Coal Company, 3 FMSHRC 817-818 (1981), Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983).

Under the circumstances however the Secretary has indeed sustained her burden of proving that the complaints of discrimination by Roger and Wayne Kizziah herein were not frivolously brought and the applications must therefore be sustained.

ORDER

C & H Mining Company, Inc. is hereby directed to immediately reinstate Wayne Kizziah and Roger Kizziah to their former positions as truck drivers at the same rate of pay and the same hours as other drivers with equivalent experience. In light of the significant legal issues and the defenses presented at hearing the Secretary is urged to seek prompt disposition of the merits of the complaints herein. It is noted that complaints have already been pending for over seven months. Failure by the Secretary to take such prompt action may result in termination of this order.

Gary Melick
Administrative Law Judge
703-756-6261

FOOTNOTE START HERE-

1. The substantive statutory foundation for the discrimination complaint is set forth in section 105(c)(1) of the Act. That sections provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicants for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.