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SOL (MSHA) V. READING ANTHRACITE
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF WILLIAM KACZMARCZYK, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. PENN 94-417-D WILK CD 94-01 Ellangowan Refuse Bank No. 45
v.	:	
READING ANTHRACITE COMPANY, Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Complainant;
Martin J. Cerullo, Esq., Frumkin, Shralow & Cerullo, P. C., Pottsville, Pennsylvania, for Respondent.

Before: Judge Amchan

Factual Background

William Kaczmarczyk began working for Respondent, Reading Anthracite Company, in December 1976 (Tr. 21-22). He became an electrician with the company in 1985, working at the St. Nicholas Breaker and the Ellangowan Refuse Bank (Tr. 23-25). In October 1989, Kaczmarczyk injured his back while moving a 300-pound motor with a bar (Tr. 43). He was on workers' compensation from October 1989 to January 1992, except for a 4 1/2 week period in February 1991, when he unsuccessfully tried to return to work (Tr. 46-49). On January 8, 1992, after undergoing a cervical spinal fusion four months earlier, Kaczmarczyk returned to work on light duty (Tr. 49).

Complainant worked on light duty from January 8, 1992 until October 15, 1993, when he was placed back on workers' compensation status (Tr. 52-53). During this period, he had two

7-day absences due to recurrence of back pain in July and November 1992, and a number of shorter absences (Tr. 54-56, 133-34).

Kaczmarczyk is the treasurer of Local 7226 of the United Mine Workers of America (UMW or UMWA). He is also a mine committeeman and safetyman for his local, which represents Respondent's employees at the St. Nicholas Breaker (Tr. 33-35). Another UMWA local, # 807, represents employees at the Ellangowan refuse bank (Tr. 34).(FOOTNOTE 1)

Complainant served as employee walkaround representative for an MSHA electrical inspection that was conducted on October 4, 12, and 14, 1993, at the Ellangowan Refuse Bank (Tr. 105-08). On the last day of the inspection, Respondent's safety director, David Wolfe, questioned the need for Mr. Kaczmarczyk's presence during the inspection since Michael Ploxa, President of Local 807, was also serving as a walkaround representative (Tr. 107-13, 268-69).

The next day, October 15, 1993, Complainant was informed that he was being put back on workers' compensation (Tr. 52-53, 122-23). He alleges that this was done in retaliation for his activities as walkaround representative during the October 1993 inspection, which resulted in nine citations being issued to Respondent (Exhibit B to the Secretary of Labor's Application for Temporary Reinstatement).

Respondent contends that Complainant's return to workers' compensation status was non-retaliatory. Safety Director, David Wolfe, testified that an October 12, 1993, telephone call from nurse Andrea Antolick, informing him that Complainant refused to perform the activities of a functional capacity evaluation (FCE) on September 30, 1993, precipitated a decision on October 14, to return Kaczmarczyk to compensation status (Tr. 254-55, 311-16) (FOOTNOTE 2). Respondent also contends that recurring reports from supervisors that Mr. Kaczmarczyk was not performing assigned duties led to this decision (Tr. 350).

FOOTNOTE 1

Complainant performed electrical work at Ellangowan (Tr. 27-28). Local 807 does not represent any electricians (Tr. 173).

FOOTNOTE 2

A later report, not in Respondent's possession on October 15, 1993, stated that Mr. Kaczmarczyk completed 2 hours of testing. He did not complete the evaluation because he requested that testing be terminated due to increased pain and blurred vision (Tr. 314-15, Exh. R-11).

Evaluation of the Evidence

Pursuant to the procedural rules of the Commission, 29 C.F.R. 2700.45(d), the issue in a temporary reinstatement hearing is limited to whether the miner's complaint was frivolously brought. The Secretary of Labor has the burden of proving that the complaint was not frivolous. Although section 105(c)(2) of the Statute and the Commission's rules indicate that it is frivolousness of the miner's complaint that is scrutinized in a temporary reinstatement proceeding, the legislative history of the Act and relevant case law indicates that it is the Secretary's decision to seek temporary reinstatement that is to be examined. Senate Report 95-181, 95th Cong., 1st Sess. (1977) at 36; Jim Walter Resources, Inc. v. Federal Mine Safety and Health Review Commission, 920 F.2d 738, 747 (11th Cir. 1990).

The legislative history of the Act provides that the Secretary shall seek temporary reinstatement "[u]pon determining that the complaint appears to have merit." The Eleventh Circuit in Jim Walter Resources, Inc. v. FMSHRC, supra, concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act 920 F.2d 738, at 747. Further, that court equates "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit" 920 F.2d 738, at 747 and n. 9. I am ordering the temporary reinstatement of Mr. Kaczmarczyk because I conclude that the Secretary's decision is not frivolous and that it is possible, although far from certain, that the Secretary could prevail in a discrimination proceeding.

The timing of Mr. Kaczmarczyk's return to worker compensation status, one day after his protected activities as an employee walkaround representative does provide some basis for concluding that the two events are related. Donovan v. Stafford Construction Co., 732 F.2d 954, 960 (D. C. Cir. 1984); Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2511 (November 1981). However, the nexus between these two events is rather weak. Although the October 1993 MSHA electrical inspection was initiated by an employee complaint, Kaczmarczyk did not file the complaint (Tr. 97-98, 178). (FOOTNOTE 3)

FOOTNOTE 3

Although Foreman Vince Devine asked Kaczmarczyk who made the complaint that led to the October inspection, Kaczmarczyk told Devine it was not him (Tr. 100-105). There is no reason to believe Devine suspected it was Kaczmarczyk who complained about the presence of water near electrical components in the steam genny house (Tr. 16-17, 178-79). Devine was present during the inspection in which this concern was raised and Kaczmarczyk was not (Tr. 97, Secretary's exhibit 2).

Additionally, there is nothing in this record to suggest that anything that Mr. Kaczmarczyk did as walkaround representative on October 4, 12, and 14, 1993, aroused Respondent's ire. Although Respondent received nine citations as a result of this inspection, there is no indication that Complainant's conduct as a walkaround representative was responsible for any of these citations or that his acts or omissions as an employee of Respondent were in any way contributing factors to the citations (Tr. 277, 301). In summary, there is virtually nothing in the record to indicate that Respondent would have any reason to retaliate against Complainant for his role in the October 1993 inspection.

Nevertheless, there is sufficient evidence suggesting generalized animus towards Kaczmarczyk's safety activities to meet the "not frivolous" standard in drawing a connection between these activities and his return to workers' compensation status. Mr. Wolfe was not happy to see Kaczmarczyk participating in the inspection on October 14, 1993, and challenged the necessity of his presence. In view of the fact that Michael Ploxa, President of UMWA Local 807, was also acting as employee walkaround representative, and the fact that other electricians were available, Wolfe considered Kaczmarczyk's participation unnecessary (Tr. 175-76, 308).

Moreover, despite Respondent's contention that the October 1993 citations gave it no reason to retaliate against Mr. Kaczmarczyk, the record does provide a basis for inferring that the cumulative effect of MSHA inspections at the mine did create a degree of animus towards Complainant, which was perhaps rekindled by the October 1993 citations. Respondent contends that MSHA inspections and citations are common occurrences at its mine and that the October 1993 inspection was nothing out of the ordinary (Tr. 258-260).

Nevertheless, something about Respondent's MSHA experience was clearly bothering Safety Director Wolfe when he participated in a grievance proceeding with Kaczmarczyk on October 18, 1993, concerning the latter's return to worker's compensation status. It is uncontroverted that Wolfe and Kaczmarczyk got into a heated argument over the reasons for this personnel action. It is also undisputed that during this argument Wolfe went into another room, obtained a stack of MSHA citations issued to Respondent and threw, or placed them on the table (Tr. 128-29, 191-93, 274-75, 283-93).

According to Kaczmarczyk and Jay Berger, the UMWA district representative at the grievance proceeding, Wolfe said something to the effect that these citations were another reason why Kaczmarczyk was being placed on compensation (Tr. 128-29, 191-93). Wolfe's testimony is that the citations he placed on the table were issued in August 1992 and were largely the fault of

Mr. Kaczmarczyk (Tr. 274-278). Wolfe testified that he put the citations on the table "out of frustration (Tr. 275)," and to emphasize that Respondent would not get as many citations as it was receiving if all its employees were capable of doing their jobs (Tr. 274-75) (FOOTNOTE 4).

At a minimum, the record in this regard is inconsistent with Respondent's contention that it received the October 1993 citations with an air of equanimity (FOOTNOTE 5). The anger displayed at the October 18, 1993 grievance meeting with regard to MSHA activity, coupled with Mr. Wolfe's lack of enthusiasm for Mr. Kaczmarczyk's presence at the inspection of October 14, makes it impossible to reject out of hand the Secretary of Labor's assertions of safety-related animus towards Complainant.

Evidence tending to rebut retaliation

Given the evidence above, I find that it is conceivable that the Secretary of Labor could establish a prima facie case of retaliation in a discrimination proceeding. In such a proceeding the Secretary would have to establish 1) that Mr. Kaczmarczyk engaged in protected activity, and 2) that his return to workers' compensation was motivated in part by the protected activity. Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981)(FOOTNOTE 6) .

A mine operator may rebut the prima facie case by showing that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. The operator

FOOTNOTE 4
If Wolfe said, as Kaczmarczyk and Berger testified, that citations were part of the reason Kaczmarczyk was returned to workers' compensation, it is difficult to understand how the August 1992 citations would have led Respondent to effectuate this transfer 14 months later. Even accepting Wolfe's version, it is hard to grasp how August 1992 citations would be in any way relevant to Kaczmarczyk's ability to perform light duty work in October 1993.

FOOTNOTE 5
The October 1993 inspection was apparently the first time Respondent received as many as nine citations from an MSHA electrical inspection (Tr. 186).

FOOTNOTE 6
Although Respondent may not be required to provide light duty work to its employees, and may be entitled to transfer its employees from light duty to workers' compensation for a variety of reasons, Section 105(c) of the Federal Mine Safety and Health Act prohibits such a transfer if it is done in retaliation for activities protected by the Act.

may also defend by proving that it would have taken the adverse action for the unprotected activities alone.

Respondent's position is that Mr. Kaczmarczyk's return to compensation status was the result of a non-discriminatory application of its light-duty program. The decision to return Complainant to compensation was made by General Manager Frank Derrick, in consultation with Safety Manager David Wolfe (Tr. 338, 344, 349-50).

While both Wolfe and Derrick point to a number of instances in which Kaczmarczyk was unable to do work assigned to him while on light duty, they are able to conclusively establish only one which occurred in the two and a half months prior to the decision to return him to compensation (Tr. 66-67, 75-76, 203, 238, 322). The record indicates that Complainant had been unable to do job assignments throughout his 21 months on light duty and does not conclusively establish non-retaliatory reasons for which the company made an issue of Kaczmarczyk's restricted abilities in October 1993. Indeed, the record indicates that Complainant was unable to do much more work in 1992 and during the previous winter than in the fall of 1993 (Tr. 222-23).

Safety Director Wolfe does explain the timing of Complainant's return to compensation status as being due to the receipt of information on October 12, 1993, that Kaczmarczyk refused to take a functional capacity examination (FCE) on September 30, 1993 (Tr. 253-55, Exh. R-10). This is an event that may ultimately provide a basis for concluding that the Respondent transferred complainant to compensation status for non-retaliatory reasons. However, I conclude that the evidence in this regard is not so overwhelming that it makes the Secretary's case "frivolous."

First of all, Mr. Derrick's testimony indicates that Kaczmarczyk's alleged refusal to take the FCE had little to do with Respondent's decision to put him back on workers' compensation (Tr. 349-50). Derrick characterized that information as "coincidental" to his decision (Tr. 350). Secondly, the Secretary has raised a legitimate issue regarding the extremely rapid response of Mr. Wolfe to this information (Tr. 311-316).

The record shows that Mr. Wolfe received a call from nurse Antolick on October 12, reporting that Kaczmarczyk had refused to take the test (Tr. 311). Although Wolfe knew that Antolick had no first hand information regarding the FCE on September 30, he took her account at face value without checking the facts with either Complainant or the persons who actually administered the test (Tr. 312-16). Similarly, although Antolick suggested a meeting with Mr. Wolfe, the safety director acted upon the October 12 phone call without such a meeting (Tr. 313).

Given the proximity in time to Complainant's protected activities, the Secretary's counsel's posed the following question which is not satisfactorily answered by Respondent. "What was the hurry after 21 months of him being on light-duty work? (Tr. 313)" The absence of a fully satisfactory answer contributes to my conclusion that the Secretary's decision to seek temporary reinstatement is "not frivolous."

Conclusion

Having concluded that the Secretary of Labor has met his burden of proving that his decision to seek temporary reinstatement is "not frivolous," I reiterate that the record at this point indicates that Complainant's discrimination case is not well-supported. The evidence of animus towards Complainant's protected activities, although present, is very weak. There is considerable support for the proposition that Respondent's light-duty program was administered in a non-discriminatory way in Kaczmarczyk's case (Tr. 246, 264-66, 336-37, 354-57).

Moreover, General Manager Derrick's testimony that Complainant was put back on compensation because he was doing less than he was capable of doing is corroborated by other evidence in this record (Tr. 346-47, Exhs. R-6, R-10, R-11). One issue that the Secretary must address in the discrimination proceeding on this complaint is the duration of Respondent's obligation to keep Mr. Kaczmarczyk on light duty, if I rule in his favor.

In light of the relative weakness of the Secretary's case, I order temporary reinstatement with the condition that the Secretary either file a discrimination complaint within 60 days of this decision or provide compelling evidence why it is unable to do so. Given the state of this record, it would be inequitable to require Respondent to temporarily reinstate Complainant for an indefinite period.

Finally, as the purpose of temporary reinstatement is to render the complainant financially secure during the pendency of his discrimination case, Respondent may satisfy this order through the means of "economic reinstatement," Senate Report 95-181, 95th Cong., 1st Sess. (1977) at 37, reprinted in the Legislative History of the Federal Mine Safety and Health Act of 1977, at page 625. Mr. Kaczmarczyk's position, including financial compensation and benefits, must be no worse than it would be had he not been placed on compensation status on October 18, 1993 (FOOTNOTE 7).

FOOTNOTE 7

Respondent could not, for example, recall Complainant to work and require him to perform tasks which he is incapable of doing.

ORDER

I hereby ORDER Respondent to reinstate William Kaczmarczyk immediately. The Secretary of Labor is ordered to file a discrimination complaint within 60 days of this decision.

Arthur J. Amchan
Administrative Law Judge
703-756-6210

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