

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 8, 2014

SECRETARY OF LABOR, MSHA,
on behalf of KENNETH P. LEAR, JR.,
Complainant

v.

KENAMERICAN RESOURCES, INC.,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2014-708-D
MADI-CD 2014-22

Mine: Paradise #9
Mine ID 15-17741

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant,
R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, PC, St. Louis, Missouri, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor on behalf of Kenneth P. Lear, Jr., pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, Kenamerican Resources, Incorporated, to reinstate Lear as an employee, pending completion of a formal investigation and final order on the complaint of discrimination he has filed with the Secretary’s Mine Safety and Health Administration (“MSHA”). A hearing on the application was held in Madisonville, Kentucky, on August 29, 2014.¹ For the reasons set forth below, I grant the application and order Lear’s temporary reinstatement.

¹ The hearing was held on the Friday before the Labor Day weekend and the transcript was not received until Tuesday, September 2, 2014, which left limited time within which to issue this decision within the time specified in Commission rules. 29 C.F.R. § 2700.45(e)(1). Under these circumstances, I deem it necessary to extend the time for issuance of the decision one work day.

Findings of Fact and Conclusions of Law

Overview

Kenamerican operates the Paradise #9 mine, a large underground coal mine, located in Muhlenberg County, Kentucky. Lear worked as a belt mechanic, performing maintenance and repairs on conveyor belts and repositioning belts as needed in the development of the mine. He worked the day shift, 7:00 a.m. to 3:00 p.m., and generally worked six days a week, Monday through Saturday. Miners that are scheduled to work are required to appear in time to dress and go underground and, if not, they are to call in to the mine's dispatch office before their scheduled reporting time and report that they will be late or will not be working. If their absence is not excused, they receive an "occurrence" which can lead to disciplinary action. Under Kenamerican policy, as explained in its employee handbook, a miner who does not appear, or call in, for two successive days, is considered to have resigned. A miner who walks off the job is also considered to have resigned.

Lear failed to call in or appear for his shift on Saturday, April 26, 2014. When he reported for work on Monday, April 28, he had a confrontation with Jeffery Todd Mackey, the belt coordinator. Lear claims that Mackey gave him a work assignment that would have created a hazardous condition, disruption of mine ventilation currents, which he refused to perform. Mackey then questioned him about his failure to appear on April 26. The exchange became heated, and Lear eventually left the mine and went home. He did not call in to the mine's dispatcher or report for work on Tuesday, April 29, and did not call in on Wednesday, April 30. He came to the mine on the morning of April 30, spoke to Ron Winebarger, Kenamerican's human resources manager, and was told that his employment had been terminated.

On June 11, 2014, Lear went to MSHA's District 10, Madisonville, Kentucky, field office and filed a complaint alleging that he had been discriminated against when he was discharged. He identified Mackey and Winebarger as the persons responsible for the discriminatory action, which was described in the complaint as follows:

I had been instructed to work in unsafe conditions on numerous occasions, I finally told them no and lost my temper. We had heated words and I was later fired. I am requesting my job back and loss[sic] pay and benefits restored to me.

The Secretary investigated the complaint and, on August 11, 2014, filed an Application for Temporary Reinstatement on Lear's behalf. Kenamerican timely requested a hearing.

The Witnesses

Kenneth Lear

Lear was the sole witness called by the Secretary. He had worked as a belt mechanic at the Paradise #9 mine for five years, and reported to his foreman, Jason Durham. One of the major tasks performed by belt mechanics was moving belt head drives to other locations in the

mine. It is a lengthy process that requires breaking down, or disassembling, the major components of the drive, and using a scoop to transport or drag them to the new location. Most of the head drive moves were done by Lear and Durham on the day shift.

Moving a belt head drive often required travel through locations served by different ventilation air currents, i.e., intake, neutral or return. Equipment moves between such areas involved passing through an airlock – two sets of doors that separated the different air flows. The approach set of doors would be opened, the equipment would be driven into the space between the doors, those doors would be closed, the second set of doors would be opened, and the equipment would be driven out into the new area. Lear testified that smaller parts of the head drive could be moved through the airlock successfully. However, the major component could not, because it was too large. The scoop would reach the second set of airlock doors before the towed piece of equipment cleared the first set of doors. Tr. 16. If both sets of doors were opened simultaneously, ventilation air currents would short circuit, disrupting ventilation to the working sections, exposing three crews of miners to respirable dust and potential accumulations of methane. James Nichols, a Kenamerican safety official, was present one day when Lear was about to open a second set of doors while the first set remained open. Nichols told him that “if you value your job, don’t open those doors.” Tr. 17. He added that, if he caught Lear opening both sets of doors, he would be fired. Tr. 17.

Lear confirmed that there were alternative ways to move a belt head drive. It could be pushed into the airlock and pulled out by a different piece of equipment, or it could be dragged all the way out to the bottom mine entrance and then taken in through the intake airway. However, he had been told that he couldn’t drag the drive out and back in the intake, and that when he suggested pushing the drive into the airlock, was told that there was not enough manpower or equipment to do it that way. Tr. 41-42. He testified that, subsequent to the Nichols incident, he had moved drives through an airlock with both sets of doors open, while a foreman monitored the location of safety personnel with his “text pager” to assure that they were not in the area.² Tr. 42-43, 57.

As noted above, miners in the belt department, including Lear, worked six days a week, Monday through Saturday. According to Lear, as an outby worker, he “couldn’t get a weekend off - couldn’t buy one.” Tr. 54. Occasionally, Lear and Durham worked out a “switch,” to allow them to take Saturday off, e.g., by doubling up a weekday shift, or working Sunday. Tr. 53-54. Lear had applied for and been approved to take vacation days on Thursday, April 24, 2014, and Friday, April 25, 2014. He was scheduled to work on Saturday, April 26, but did not report that day, and did not call in to advise that he would not be coming in. Tr. 39, 54.

On Monday, April 28, Lear reported for work at his regular time, a little before 6:00 a.m. He encountered Mackey outside the bathhouse/office building. He testified that the confrontation began when Mackey instructed him to move a belt drive to the #1 unit. Tr. 14.

² Underground miners are required to wear a disk-shaped electronic tag that allows their location in the mine to be tracked. Through use of a text pager the location of a particular person can be determined. Tr. 20-21.

Lear had broken the belt drive down the previous week. Tr. 41. Lear asked him which scoop to use, and Mackey replied "I don't know, you figure it out." Tr. 19. They had "other words," and Lear told Mackey that "federal (an MSHA inspector) is underground, safety (Nichols) is underground, I can't go through them doors." Tr. 19-20. Mackey told him to "look them up on your text pager, see where they're at, and then go do your job." Tr. 20. After Lear had made clear that he would not move the belt drive. Mackey asked him where he was on Saturday, when he was supposed to have worked. Lear, who was angry, responded that he was "at the f-ing house." Tr. 21-22. Mackey pressed the issue, and Lear told him to do his job - "give me an [occurrence] and leave me alone." Tr. 24. In the course of the exchange, Lear told Mackey that they could "settle it right here," and that he would "kick [Mackey's] midget m-f-ing ass." He made numerous threats to get into a fight with Mackey. Tr. 36.

Lear turned away, stepped into the section foremen's office briefly, came back out and had another exchange with Mackey, who then left the area. While in the foremen's office, Lear asked James Pendergraff, a shift foreman, if he had any work for him. Pendergraff told him he couldn't give him anything, that he had to talk to Jeffrey Rideout, the production coordinator at the time. Tr. 24. Lear asked Rideout if he had work, and told him he wanted to leave the belt department. Rideout, who had heard part of the exchange between Lear and Mackey, responded that Lear couldn't speak to management that way, and that he had nothing for him. Tr. 25. Lear went back outside and had a few more words with Mackey. Mackey and William Piper, another miner who was in the area, left the scene. Lear, who then had nothing to do, went to the locker room, talked briefly with some miners there, put up his tool belt and hard hat and went home. Tr. 28.

Lear described a heated exchange between he and Mackey, during which Mackey raised his voice, pointed a finger in his face and got in his face. However, he conceded that Mackey, who was a Baptist preacher, did not cuss or swear. Tr. 21, 35. Rather, he described Mackey as a "smartaleck" who had a condescending manner that aggravated him. "He treats you like your stupid when you're working for him. He's the smart one, you're the dumb one, and you're going to do what he says or you're going to have a problem with Todd Mackey." Tr. 53.

Lear stated that there were two persons in the area of the confrontation, and that Rideout stuck his head out the door of the mine foremen's office briefly. He also stated that Piper was present when Mackey and he discussed the work assignment. He denied that another miner, Jeffery Sullivan, who he considered a friend, was there, stating that he was in the bathhouse. Tr. 37. He spoke with Sullivan when he went to the locker room. Sullivan asked what he was doing and urged him not to leave. Lear replied that he was going home. Tr. 44. Lear denied telling Sullivan or Piper that he was quitting his job. Tr. 44. He also did not recall talking to Pendergraff more than once on the 28th, and did not believe that he told him that he'd had enough, and was quitting. Tr. 43.

Lear did not report for work on Tuesday, April 29, and did not call in to the dispatch office to report that he would not be coming in. Tr. 45, 48, 50. Lear testified that he placed two calls to the mine on April 29, in an effort to speak to Winebarger. He was connected to

Winebarger's phone, but Winebarger did not answer. The calls were transferred to Winebarger's voicemail, but Lear did not leave a message on either occasion. Tr. 28-29, 49. Lear did not report for his regular shift assignment on Wednesday, April 30, and did not call the dispatcher to so advise. Tr. 29, 48. He did travel to the mine on the morning of April 30, to speak to Winebarger. He wasn't sure what time it was, but thought it may have been around the time his shift would have started. Tr. 50. As he was walking toward the office, he met Pendergraff, who told him not to take things out of his locker, that he would go with him to talk to Winebarger and try to save his job. Tr. 47. However, he stated that Pendergraff "went his way. I went mine." Tr. 47. When he spoke to Winebarger, he asked about his job, and indicated that he wanted another assignment. Tr. 30. Winebarger told him that the mine superintendent had heard of the conflict and that Lear was to be fired. Tr. 30. Lear apologized for what happened, turned in his tools and safety equipment, took his property, and left the mine. Tr. 30-31.

Lear later filed a claim for unemployment compensation. He testified that he told the State agency that the confrontation with Mackey was about his being absent on that Saturday. Tr. 52. However, he also stated that the work assignment was part of it, but, that the "referee" didn't understand what an airlock door was, said that it didn't pertain to their case, and that they didn't want to hear what he had to say. Tr. 54.

Jeffery Todd Mackey

Mackey is the belt coordinator at Kenamerican, and has worked there for 10 years. The belt mechanics report to belt foremen, who report to him. If the belt foremen aren't around, he tells the men what to do. The belt department works weekends, basically six days per week, including every Saturday. Lear was scheduled to work on Saturday, April 26, but did not appear and did not call in. Tr. 75. On Monday, April 28, he encountered Lear outside the bathhouse/section foremen's office, greeted him, engaged him in general conversation, and asked him where he was on Saturday. Tr. 77. He was getting ready to do time sheets, and wanted to clarify Lear's status on Saturday. He had not yet spoken to Durham, Lear's belt foreman, and did not know whether Durham and Lear had worked out an alternative work schedule. Tr. 77-78. Lear got mad, and responded that he had "told you all a month ago that I ain't working every Saturday." Tr. 79. Mackey said, "OK, I need to know what to put on the time sheet," and started walking toward his office. Lear went toward the bathhouse. When he reached the top step, he stated, "I don't have to put up with this mess – I'll tell you what, I can take care of this right now – I'll stomp your midget [ass] right here." Tr. 80. He went into the building for a minute, then came back out and said, "Let's take care of this right here. I ain't puttin up with this. I'm tired of your f-ing mouth." Tr. 80. Mackey asked him "what's wrong with you?" Lear replied that he "ain't putting up with this," and went into the bathhouse. Tr. 80. Mackey stated that he did not give a work assignment to Lear, and had not gotten to that part of his job yet. Tr. 77, 82. He did his time sheet, and prepared to go underground.

Two miners, Sullivan and Piper came up to him and said, "You need to talk to Kenny – he's quitting." He replied that he couldn't help that, Lear was grown man, and he couldn't stop him. Tr. 82-83. Mackey denied raising his voice during his interaction with Lear, and professed that he was upset at losing him, because he was "probably the best belt man I had." Tr. 87. He

had seen Lear get angry before, with other miners, and express frustration with work. He usually got over it pretty quick, and Mackey had been able to talk him out of leaving. Tr. 94-95.

Mackey confirmed that Nichols had caught Lear in the process of opening both sets of doors of an airlock. He also confirmed that opening both sets of doors would probably disrupt the mine's ventilation system. Tr. 84-85. He denied holding airlock doors open while equipment was driven through, or ordering miners to do so. Tr. 85-86. Mackey testified that, if the head drive was broken down properly, all of the components could be moved through an airlock with a scoop, without requiring that both sets of doors be opened at the same time. He also explained that there were alternative means to move a head drive, it could be pushed into the airlock, and then pulled out the other side by a different piece of equipment. It could also be dragged out to the bottom entrance of the mine and back in the intake air current. Tr. 85-86, 92.

Jeffery Sullivan

Sullivan is a belt mechanic who worked for Mackey. He likes Lear "very much" and considers him a friend. Tr. 59-60. He noticed something going on outside the bathhouse between Lear and Mackey, and walked up to observe. Tr. 64-65. When he was about 10 feet away, he heard Mackey ask Lear where he was on Saturday. Lear said he wasn't working every Saturday, and he was tired of it. Lear asked Rideout if he had another job for him, and Rideout said he didn't. Lear then stated, "If they ain't got nothing else better for me to do, I don't want to be here." Tr. 60. While he wasn't sure of the exact words, he recalled that Lear told Rideout, "I quit," after he said he didn't have any work for him. Tr. 61. He had some conversation with Lear, along the line that he hated to see him go, but did not recall what was said. Tr. 62. He did not see Mackey get into Lear's face or stick a finger in his face, and has never witnessed Mackey yelling or cursing at employees, pointing fingers in their faces or getting into their faces. Tr. 62. He did not overhear any discussion between Lear and Mackey about job assignments. Tr. 61-62.

James Pendergraff

Pendergraff is a shift foreman, who has worked at Kenamerican for over 19 years. He testified that he did not witness the confrontation between Lear and Mackey on April 28. He saw Lear walking toward the parking lot. He was surprised, because he had already checked Lear in as a person working underground that day, and asked him, "What are you doing?" Tr. 109-10. Lear responded, "I've had enough. I quit. I'm out of here. I quit." Tr. 111. Pendergraff did not respond, and Lear left the mine site. He denied talking with Lear earlier on the 28th, or that Lear asked him if he had another job he could do. Tr. 112..

Jeffrey Rideout

Rideout, has worked at Kenamerican for eight years, and was its production coordinator at the time. He was in the section foremen's office on the morning of the 28th, and heard "clamoring" going on, "arguing back and forth." Tr. 67. Lear came in, abruptly turned, and went back out. As he turned, he said, "I'll tell you what I can do. I can kick your midget f-ing ass." Tr. 67. The words were directed at Mackey, and it appeared that he was trying to initiate a fight.

Tr. 68. Mackey was outside. He replied, "What, Bud, what are you upset about?" Tr. 68. Mackey did not seem to be upset, and his voice was not raised compared to Lear's. Tr. 70. Rideout thought things were calming down. Lear came into the office a little later, and said to Rideout, "Do you have anything for me? I can't work for that m-f-er." Rideout responded, "No, Kenny, you cannot talk to a manager at this coal mines like that. And, no, I don't have anything for you." Tr. 69. Rideout went about his business, and had no further involvement.

Ronald Winebarger

Winebarger is Kenamerican's human resources manager. He generally comes into work early, and walks around outside the bathhouse/office area, in an effort to make himself available to the men. Tr. 101. He did not witness the April 28th confrontation between Lear and Mackey. He explained that under Kenamerican's policy, as explained in its employee handbook, a person who walks off the job is considered to have resigned. In addition, a person who fails for two consecutive days to report for work, or call in to the mine's dispatcher prior to the start of his shift, is considered to have resigned. Tr. 98-99. He was at work on April 29. There are a number of ways for callers to leave messages for him, including voicemail and paper notes recorded by office staff. Callers can also obtain his cell phone number from the dispatch office. He was not aware of any attempts by Lear to call him, or leave a message, on April 29.

At the beginning of the day on Wednesday, May 30, Winebarger contacted Kenamerican's corporate office and advised that Lear was "terminated." Tr. 107. "Because he was a second day no call, no show. So I immediately - e-mailed the corporate people and told them that he was no longer employed, he had resigned his position." Tr. 107. Lear came to his office about 8:00 a.m. Winebarger had not seen Lear at the mine earlier that day. Tr. 101. Lear said, "Well, I guess I've messed up, haven't I?" Winebarger replied, "Yeah, Kenny, you know you messed up." He said, "Well, I just wanted to see what I could do as far as, you know, maybe going back to work." Winebarger said, "Well, Kenny, you resigned your job. I mean, you walked off the job. You quit." Tr. 101. Lear "sort of acknowledged" that with his body language. Winebarger asked why Lear waited until Wednesday to come in, and he replied that he was "too mad" and needed "time to cool down." Tr. 102.

The Applicable Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), states:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was 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 was frivolously brought.

“The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Sec’y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The “not frivolously brought” standard has been equated to the “reasonable cause to believe” standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec’y of Labor on behalf of Bussanich v. Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity; (2) that he suffered adverse action; and (3) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

Protected Activity

A miner’s ability to complain about safety issues is a fundamental right afforded and protected by the Act. Complaints made to an operator or its agent of “an alleged danger or safety or health violation,” is specifically described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). In addition, the Commission and the courts have recognized that, although not explicitly stated in the Act, a miner’s refusal to work in conditions that he reasonably believes in good faith to be hazardous is also activity protected under the Act. *See Bryce Dolan*, 22 FMSHRC 171, 176-77 (Feb. 2000), and cases cited therein.

The Secretary presented evidence, testimony by Lear, that he refused to perform an assigned task that he believed would have created a hazardous condition, i.e., disruption of ventilation on the working sections which would have exposed three crews of miners to excessive dust and the potential accumulation of methane. There does not appear to be a dispute that opening both sets of airlock doors at the same time would disrupt ventilation of the mine. While there is a dispute as to whether it was necessary to simultaneously open both sets of doors to move the belt head drive through the airlock, Mackey confirmed that there had been a prior

incident where the safety department had taken issue with Lear's attempt to do so. There was also evidence, through Lear, that simultaneous opening of both sets of airlock doors was not an infrequent practice associated with movement of belt head drives.

There is a direct conflict in the evidence as to whether or not Lear was given an assignment to move the head drive, prompting his concerns about safety and his exposure to possible disciplinary action. Lear testified that he was given the assignment, and Mackey testified that no such assignment was given. Other witnesses to portions of their exchange did not hear a discussion of work assignments. However, those witnesses did not claim to have witnessed the entire encounter. Lear identified one individual who he claimed was present when the work assignment was given. However, that person was not called as a witness. Whether or not he had been interviewed in MSHA's preliminary investigation of Lear's complaint is unknown.

It is well-established that the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.*, 920 F.2d at 744. "It is 'not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings.'" *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC.*, 31 FMSHRC 1085, 1088 (Oct. 2009) (quoting *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999)). See also *Sec'y of Labor on behalf of Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011) (resolving conflicts in the testimony, and making credibility determinations in evaluating the Secretary's prima facie case, are simply not appropriate at this stage in the proceeding).

The Secretary presented evidence that Lear engaged in protected activity. That evidence is sufficient to establish that this element of Lear's discrimination complaint is not frivolous. Resolving the testimonial conflict in this proceeding would be inappropriate and contrary to established precedent, which counsel for Kenamerican recognized at the close of the hearing. Tr. 118.

Adverse Action

Kenamerican contends that it is clear that Lear resigned, that there is no colorable claim that he was discharged, and that temporary reinstatement must be denied, citing *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153 (Feb. 2000). Whether Bussanich had quit, or had been terminated was hotly contested. However, Bussanich had done several things subsequent to his departure that were consistent with his having quit his job. He deposited his final pay and vacation pay checks; voluntarily participated in a telephonic exit interview; made several calls about obtaining the proceeds of his 401(k) account; signed and returned an exit interview check list without protest; and accepted the proceeds of his 401(k) account which he needed to satisfy outstanding business obligations. On the "unusual facts" of that case, three Commissioners affirmed the ALJ's determination that there was no colorable claim that Bussanich had been discharged, i.e., that he had suffered adverse action. Two

Commissioners dissented, believing that evidentiary conflicts on that issue should not have been resolved at the temporary reinstatement stage of proceedings. As discussed below, the facts of this case are significantly different than those in *Bussanich*.

It is not entirely clear how or why Lear's employment with Kenamerican was terminated. Lear testified that Winebarger told him that the mine superintendent had heard about the "conflict" and directed that he be terminated. It would not be unusual for a miner who admittedly cursed and threatened a supervisor to be discharged. While Winebarger did not assert that Lear was discharged for disciplinary reasons, there were no employment records introduced that purported to specify the reason that Lear's employment ended. If Lear was discharged, a host of issues might have to be explored, including, whether his conduct was provoked by his being directed to perform an unsafe work assignment, and whether his discharge was consistent with company policy and treatment of other similarly situated employees. See *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924 (Sept. 2001).

Winebarger testified that Lear had been terminated by the time he saw him around 8:00 a.m. on Wednesday, April 30, because, pursuant to the two-day, no call, no show policy, he was considered to have resigned. Lear had not reported for work or timely called in to the dispatch office on Tuesday, the 29th, although he did claim to have placed two calls to Winebarger's office. He did not call the dispatcher's office prior to the start of his shift on April 30. He came to the mine that morning, but wasn't sure of the time. Winebarger did not see him until about 8:00 a.m., one hour after his shift would have started. There was no evidence as to how strictly Kenamerican's aforementioned policy has been applied, or whether its application to Lear was consistent with past practice.³

When Winebarger explained to Lear why he was no longer employed, his primary reference was to the other prong of Kenamerican's "assumed resignation" policy, i.e., that Lear had resigned because he had "walked off the job. You quit." Tr. 101. Winebarger did not explain why, if Lear's employment had been terminated for that reason, he waited two days, until April 30, to "immediately" contact the corporate office. Lear left the mine site on Monday, April 28, and there is no evidence that Kenamerican took any action that indicated that Lear was considered to have resigned as of that time. If so, issues of constructive discharge and provocation might have to be addressed.

Lear is alleged to have told several people that he "quit." He denied using that term, and his actions were arguably inconsistent with an intention to quit. When he left, angrily, on April 28, he returned his tools and other equipment to his locker. He did not return his tools and personal protective equipment to Kenamerican or remove his personal property until after speaking with Winebarger on April 30. His appearance at Winebarger's office to inquire about his job status and see if he could get a different assignment was also arguably inconsistent with an intention to quit, although it could also be construed as evidencing a change of heart.

³ In *Bussanich*, the ALJ also considered whether Centralia discriminatorily failed to rehire the miner who had quit his job. Winebarger testified that Kenamerican can rehire miners who have resigned. It does not appear that such an option was discussed with Lear.

As with Lear's claim of having engaged in protected activity, there is conflicting evidence on whether he voluntarily left his job, or whether his employment was terminated against his wishes. The evidence establishes a colorable issue that Lear suffered adverse action.

Nexus Between Protected Activity and Adverse Action

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.*

Here, the alleged adverse action, whether it was discharge, constructive discharge, or termination, closely followed Lear's claimed protected activity. There is a more than ample nexus between the claimed protected activity and the adverse action to raise a colorable issue that it was motivated, at least in part, by the protected activity.

Conclusion

Every element of Lear's discrimination complaint is contested by Kenamerican. It introduced substantial evidence that Lear did not engage in protected activity, that he did not suffer adverse action, and that his employment was terminated for a legitimate non-discriminatory reason. It may eventually prevail on any or all of those issues. At this stage of the proceedings, however, they cannot be finally resolved.

The legislative history of the Mine Act indicates that section 105(c)'s prohibition against discrimination is to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation, and that Congress clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Congress intended that the benefit of the doubt be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision, since he retains the services of the employee until a final decision on the merits is rendered. *Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer and Sons Company*, 35 FMSHRC 811, 814 (Apr. 2013), citing *Jim Walter Resources*, 920 F.2d at 748, n.11.

The U.S. Court of Appeals for the Eleventh Circuit has described the test for whether the Secretary has established that a claim of discrimination was not frivolous as follows:

If the evidence produced by the Secretary viewed in the light most favorable to the claimants, together with all inferences that can be made in favor of claimants, would reasonably support a

finding that claimants had established a prima facie case, the claim cannot be said to be frivolous.

Drummond Company, Inc. v. FMSHRC and Secretary of Labor on behalf of Owens, (11th Circuit No. 02-14394, May 9, 2003) (unpublished opinion at 6).


The temporary reinstatement provision of the Mine Act is heavily weighted in favor of the miner, who can be restored to his job, often in areas where employment opportunities are limited, pending the investigation and resolution of his discrimination complaint. If the Secretary determines that the claim lacks merit, an order of temporary reinstatement is promptly vacated. If the Secretary determines to pursue a formal complaint of discrimination before the Commission, the “temporary” relief could extend for years while the discrimination case proceeds through decision at the ALJ level, and potential appeals to the Commission and/or the courts.⁴

Here the protected activity claimed by Lear, his refusal to perform a task that would have resulted in a hazardous condition, is supported only by his testimony. Substantial evidence, testimony by other witnesses, and excerpts from records of the proceedings on his unemployment compensation claim, weigh against his testimony. There may be, as in *Bussanich*, cases where a claimant’s testimony may not be sufficient to establish that the claim is not frivolous. Here, there are “loose ends” that justify granting of the application, although arguably not by a wide margin. Completion of the Secretary’s investigation of the complaint should clarify areas of ambiguity and allow an informed determination of whether to initiate a formal claim of discrimination on Lear’s behalf. Under section 105(c)(3) of the Act, the Secretary’s determination is to be made on or before September 9, 2014.

I find that the Secretary has established that Lear’s claim of discrimination is not frivolous.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. Kenamerican Resources, Inc., is **ORDERED to reinstate** Lear to the position that he held prior to April 30, 2014, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.



Michael E. Zielinski
Senior Administrative Law Judge

⁴ See, e.g., *Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1187 (Sept. 2009) (ALJ) (Application for Temporary Reinstatement denied); *rev’d temporary reinstatement ordered*, 31 FMSHRC 1085 (Oct. 2009); *Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 33 FMSHRC 1980 (Aug. 2011) (ALJ) (Complaint of Discrimination dismissed).

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