FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

May 17, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION,	:	DISCRIMINATION PROCEEDING
on behalf of PAUL KIRK,	:	Docket No. SE 2023-0007-DM
Complainant,	:	MSHA No. SE MD 2022-06
v.	:	
CEMEX CONSTRUCTION MATERIALS FLORIDA, LLC,	:	Brooksville South Cement Plant
	:	Mine ID 08-01287
Respondent.	:	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

This discrimination proceeding is before me pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2). The case is currently set for hearing on May 23–24, 2023, in Tampa, Florida. On April 28, 2023, Respondent filed a Motion for Summary Decision. Thereafter, on May 3, 2023, the Secretary filed a Motion to Extend Deadline to Respond to Respondent's Motion for Summary Decision, which I granted, briefly extending the deadline to file a response to May 15, 2023. On May 12, 2023, Respondent filed a Supplement to Respondent's Motion for Summary Decision stating that Paul Kirk voluntarily resigned his employment from CEMEX that same day due to his disability retirement through the U.S. Department of Veterans Affairs. (Suppl. at 1.) CEMEX asserts that the requested relief in this matter is now moot. (*Id.*) The Secretary timely filed a response—which she entitles Response in Opposition to Respondent's Motion for Partial Summary Decision—on May 15, 2023.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Kirk's Complaint

Respondent Cemex Construction Materials Florida, LLC operates the Brooksville South Cement Plant, an aboveground mine in Hernando County, Florida that mines materials to produce cement which uses a kiln in the process. (Compl. at 2.) On October 12, 2022, the Secretary of Labor on behalf of Paul Kirk filed a complaint alleging CEMEX Construction engaged in discrimination and interference in violation of 105(c)(1) of the Mine Act. (Compl. at 1.) On May 25, 2022, Kirk voiced concerns to his supervisors that hot dust was spilling from the "dog box" associated with the kiln. (Compl. at 2–3.) First, Kirk texted David Singer with his concerns, followed by Marcello Leal, Chris Walls, and Carlos Uruchurtu. (Compl. at 3.) Kirk and Carlos Uruchurtu exchanged text messages about the kiln, and Kirk understood from the

messages that the kiln would be shut down. (Compl. at 3.) The Secretary alleges that Kirk was informed that the kiln was still operating at the morning meeting the next day. (Compl. at 3.) Kirk expressed his concerns about the kiln at a meeting between Uruchurtu and two contractors. (Compl. at 3.) Uruchurtu told Kirk to leave the meeting, but Kirk did not do so due to the "urgency of the issue." (Compl. at 3.) The kiln was shut down later in the morning on May 26, 2022, and restarted on Saturday, May 28, 2022. (Compl. at 3.)

During the night of May 26, 2022, MSHA received a complaint about hot dust leaking from the kiln and the safety hazards posed by hot dust spilling out while a miner is operating the loader. (Compl. at 4.) MSHA visited the plant on May 29, 2022, and issued two citations for the "excessive hot dust filling the dog box and miners being subjected to injury while attempting to remove the dust using the front-end loader" and because "barricades were not used to warn of the high temperature dust, subjecting miners accessing the area to severe burn injuries." (Compl. at 4.) MSHA received two additional complaints regarding the kiln on the early morning of May 30, 2022. The MSHA inspector viewed the kiln and observed "excessive hot dust in the dog box being removed by workers using the front-end loader, exposing them to hazardous conditions," which resulted in an additional citation. (Compl. at 4.) The Secretary alleges that CEMEX management "suspected that Kirk was involved with the MSHA complaints." (Compl. at 4.)

The Secretary alleges that CEMEX discriminated against Kirk in violation of 30 U.S.C. Section 815(c) "for his protected activity of raising safety concerns to Uruchurtu by issuing a verbal warning regarding alleged insubordination," "based on its beliefs he engaged in the protected activity of making safety complaints to MSHA by issuing a verbal warning regarding alleged insubordination," and "interfered with Kirk's statutorily protected right to raise safety concerns with MSHA and Plant management by issuing a verbal warning regarding alleged insubordination." (Compl. at 5.) Therefore, the Secretary requests declaratory judgements that CEMEX unlawfully discriminated against Kirk and interfered with his statutorily protected rights. (Compl. at 5.) The Secretary also requests orders requiring all members of CEMEX's management team to participate in a training course on protected rights and an order assessing an appropriate civil monetary penalty. (Compl. at 6.)

B. Respondent's Motion for Summary Decision and the Secretary's Response

In its Motion for Summary Decision CEMEX argues, among other things, primarily: (1) Complainant did not engage in good faith protected activity, but even if he did, (2) the adverse action imposed by CEMEX was not motivated in any part by Kirk's engagement in protected activity. (Mot. Mem. at 5.) CEMEX attaches several documents including portions of deposition testimony from Kirk, as well as Uruchurtu. The Secretary in her Response in Opposition to Respondent's Motion for Partial Summary Decision argues many disputed material facts exist and that Respondent's motion should be construed as a partial motion for summary decision because Respondent failed to move for a decision on, or even meaningfully address, the interference claim. (Sec'y Resp. at 1–2.) The Secretary further asserts many of CEMEX's factual assertions lack any citation to supporting record evidence in violation of 29 C.F.R. § 2700.67(c). The Secretary attaches several documents including the deposition of Carlos Uruchurtu, the deposition of Kirk, Respondent's answers to Interrogatories, and copies of the original citations.

II. PRINCIPLES OF LAW

A. Summary Decision

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981).

The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id*. at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences to be drawn from the underlying facts" are viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Commission Judges should not grant motions for summary decision "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

B. Protections under Section 105(c) of the Mine Act

Section 105(c)(1) of the Mine Act[1] bars discrimination against or interference with miners asserting a protected right. For discrimination claims, the Commission applies the *Pasula-Robinette* framework in which a complainant must establish a prima facie case showing the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by the protected activity. *Driessen v. Nev. Goldfields*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817–18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

The Commission has no settled legal test for claims of interference. *See Monongalia Cty. Coal Co.*, 40 FMSHRC 679, 680–81 (June 2017). Several Commission Judges have applied the Secretary's two-prong test, which asks first whether the alleged interfering actions reasonably can be viewed as "tending to interfere with the exercise of protected rights," and, second, whether the interfering person can "justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights." *See, e.g.*,

[1] "No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [this Act]." 30 U.S.C. § 815(c)(1).

Armstrong Coal Co., 39 FMSHRC 1072, 1089 (May 2017) (ALJ) (applying Secretary's proposed test for interference), *appeal dismissed per settlement stipulation*, 40 FMSHRC 973, 974 (July 2018). Some Commissioners, however, would replace the second prong of the test with a requirement that the complainant demonstrate the interfering actions were motivated by animus to the exercise of protected rights. *Monongalia Cty. Coal Co.*, 40 FMSHRC at 708–29.

III. DISCUSSION AND ANALYSIS

A. Disputed Facts for Protected Activity Under Section 105(c)

The parties dispute material facts related to Kirk's discrimination claim. In particular, the parties dispute facts related to the condition of the kiln, notification of the shutdown of the kiln, and Kirk's knowledge of the kiln's condition and purported shutdown. Respondent CEMEX asserts that on May 26, 2023, the kiln's "condition[] vastly improved that morning." (Mot. Mem. at 11.) Yet other evidence, including Uruchurtu's deposition, suggest part of the kiln failed that morning causing dust to leak from the dog box. (Mot. Mem. at 3; Sec'y Ex. A Uruchurtu Dep. 54:20–23; Sec'y Ex. B Kirk Dep. 62:21–63:7.) Therefore, the condition of the kiln on the morning of May 26, 2023, is disputed. This is material because the kiln's condition may have affected Kirk's understanding of the urgency and degree of the alleged safety hazard.

In its motion CEMEX also argues that plant management was aware of the issues with the kiln and actively addressed the issue. (Mot. Mem. at 11.) Yet the Secretary points to Kirk's deposition testimony that suggests Ekstrom was trying to avoid shutting down the kiln. (Sec'y Resp. at 5; Sec'y Ex. B Kirk Dep. 64:14–18.) Therefore, material facts surrounding CEMEX management's attitude toward the kiln's shut-down and the steps management was taking to shut down the kiln are in dispute.

CEMEX argues that "Uruchurtu instructed the production manager, Marcelo Leal, to direct Jacob Ekstrom, the Superintendent of the K-1 kiln, to begin the shut-down process" at 6:42 a.m. on May 26. (Mot. Mem. at 6; Mot. Ex. 3 at CEMEX000497.) Yet, the Secretary points to a text message that states, "stop the kiln as soon as you are ready," and notes the lack of evidence that notification to shut down the kiln was given at this time. (Sec'y Resp. at 3.) Therefore, the timing, manner, and occurrence of the instruction to shut down the kiln are in dispute, which are material facts in this case.

CEMEX claims that Kirk made the complaints after being told by Ekstrom that the order to shut down the kiln had been given. (Mot. Mem. at 5–7; Sec'y Resp. at 5–6; *see* Mot. Ex. 4 Kirk Dep. 62:14–18.) Yet the Secretary alleges and points to evidence suggesting Kirk did not know the order to shut down the kiln had been given. (Sec'y Resp. at 5–6; Sec'y Ex. B Kirk Dep. 62:14–18.) Therefore, Kirk's knowledge regarding the kiln's shut down is in dispute, which is material in this case.

CEMEX alleges Uruchurtu explained to Kirk in their meeting after the safety complaints were made, that Uruchurtu was working to troubleshoot the issue with the kiln and the specific steps Uruchurtu had taken to resolve the issue; yet, the Secretary disputes this fact, and Uruchurtu, in his deposition, could not remember saying this and did not understand what Kirk

was saying when Kirk interrupted his meeting. (Mot. Ex. 3 at CEMEX000579–580; Mot. Mem. at 7; Sec'y Ex. A Uruchurtu Dep. 82:15–16, 98:13–18; Sec'y Resp. at 6.)

CEMEX also argues that Kirk did not raise the "issue of an immediate danger to the employees of the plant" due to the kiln at the shift-change meeting. (Mot. Mem. at 5.) However, Kirk indicates in his deposition testimony "we talked about the kiln and the dusting" and "[t]hat they were still running, dusting and all that stuff" and further stated "[y]ou know, there's a lot of huge safety concerns." Therefore, whether and to what extent the safety of the kiln may have been discussed at the shift-change meeting is a material fact in dispute. (Sec'y Ex. B Kirk Dep. 62:13–24, 63:1–7; Sec'y Resp. at 5.)

B. Kirk's Claim is not Moot

CEMEX filed a Supplement to Respondent's Motion for Summary Decision reporting that Kirk voluntarily resigned his employment with CEMEX, effective May 12, 2023. CEMEX asserts that due to Kirk's resignation, he "no longer [has] a legally cognizable interest in the outcome," making this matter moot. (Suppl. at 1); *Mid-Continent Res., Inc.*, 12 FMSHRC 949 (May 1990). However, the Secretary notes, "[s]hould Kirk's disability status change or he seek further employment for any reason, removal of the discipline from his file and/or a neutral employment reference would provide a benefit for future job applications." (Sec'y Resp. at 16–17.) CEMEX's citation to the Administrative Law Judge case *Sonney v. Alamo Cement Company* is misplaced because the miner there **"**ha[d] already received assurances that his personnel record ha[d] been cleansed and that Alamo [would] not provide negative employment recommendations"). *Sonney v. Alamo Cement Co., Ltd.,* 29 FMSHRC 310, 315 (2007) (ALJ). That is not the case here with Kirk and CEMEX.

C. Interference Claim

The Secretary notes that CEMEX does not meaningfully address Complainant's interference claim in its motion. Thus, the Secretary argues that, if I were to grant CEMEX's motion, I should construe it only as a motion for partial summary decision because the interference claim still survives. (Sec'y Resp. at 16–17.) Because Respondent bears the burden of proving there are no material facts in dispute, I cannot rule in favor of CEMEX on the interference claim, given that it did not argue explicitly regarding the interference claim. Moreover, I determine many of the disputed material facts discussed above are also relevant to the interference claim and, therefore, summary decision on this issue is not appropriate.

D. Conclusion

When viewed in the light most favorable to the Secretary, I therefore determine that several genuine issues of material fact exist in this section 105(c) proceeding. Given this determination, I conclude that CEMEX is not entitled to summary decision as a matter of law under Commission Procedural Rule 67(b). 29 C.F.R. § 2700.67(b).

IV. ORDER

Respondent's Motion for Summary Decision is **DENIED**. The hearing will be held as previously scheduled on May 23–24, 2023, in Tampa, Florida.

Alan G. Paez
Administrative Law Judge
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