FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

May 18, 2010

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on behalf	:	
of CHRISTOPHER L. ABEYTA,	:	Docket No. CENT 2010-584-D
Complainant	:	Denv-CD 2010-08
v.	:	
	:	
SAN JUAN COAL COMPANY,	:	MINE ID 29-02170
AND ITS SUCCESSORS	:	San Juan Mine 1
Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Applicant;
Brian K. Nichols, Esq., Modrall Sperling Roehl Harris & Sisk, P.A., Albuquerque, New Mexico, for Respondent.

Before: Judge Hodgdon

This case is before me on an Application for Temporary Reinstatement brought by the Secretary of Labor, on behalf of Christopher L. Abeyta, under section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Abeyta as an employee of the Respondent, San Juan Coal Company, pending final disposition of the discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA) against the company.[1] A hearing on the application was held on April 21, 2010, in Farmington, New Mexico. For the reasons set forth below, I grant the application and order Mr. Abeyta's temporary reinstatement.

Summary of the Evidence

On March 2, 2010, Abeyta filed a discrimination complaint with MSHA stating that he had been discharged from San Juan on February 23, 2010, and alleging that the discharge was

[1] It does not appear that the Secretary has completed investigation of Mr. Abeyta's complaint. Accordingly, there is no Complaint of Discrimination before the Commission.

"retaliation for issuing complaint to MSHA on Feb. 11, 2010 . . . ." (Govt. Ex. 1.) At the hearing, he testified that he began working for San Juan as an Electrical Projects Engineer on September 8, 2009. (Tr. 43, 45.)

Abeyta further testified that at a February 8, 2010, meeting with Chuck Wilson, his immediate supervisor, Marilyn King, a Labor Relations Advisor from Human Resources, and Steve Pierro, the Belt Coordinator, he informed them of a problem with "arcing" at the power centers and the "inappropriate" use of capacitors on the long wall. (Tr. 60-61.) At the end of the meeting, it was determined that Abeyta would be "[h]eld out of service pending further investigation." (Tr. 66, Govt. Ex. 8.) Abeyta was subsequently informed that he was to attend another meeting at the company's Farmington office on February 11. (Tr. 68.) As a consequence, he sent an e-mail to Marilyn King on February 10, which stated:

> I am still waiting for a meeting agenda for tomorrow's meeting.
> I also informed you of my concerns for the lack of safety, professionalism and harassment of Chuck Wilson and Mike Fidel, not only to me but to the whole department.
> The resolution I have requested is to work for someone who has electrical engineering competence and has the company's interest of safety and professionalism.
> As I'm sure you are aware we are in one of the most dangerous occupation [*sic*] and safety should be our primary goal not production. We are subject to spontaneous combustion in our underground coal mine. There has been a history of arcing in our underground switch houses and power centers. I gave you a copy of a root cause analysis for PC-20 with my recommendation with feedback from SMC. This is just one major example of Chuck Wilson's disregard for safety by doing nothing. As recent as last saturday [*sic*] night a mechanic smelled something burning around East Mains SW-4, SW-4 had been arcing. If my recommendations had been implemented we would have detected this and not potentially start our mine on fire.
> Chuck is also having the apprentices doing inspections and having Ed Neff sign them off. If audited by MSHA do you believed Ed can be in so many places at once?
> We as a company need to review what Chuck has been aware of and has chose [*sic*] to do nothing for the High Voltage monthly breaker checks for the last year. MSHA could potentially shut us down by us not doing this as per our requirements of permissibility.
> Another example of the disregard for safety by Chuck Wilson is the inappropriate use of the capacitor banks for the long wall. I have this documented with recommendations which were

> presented to Chuck.
> These are very serious safety issues described above and need to be included in our agenda when we meet.
> Please reply back with the agenda of tomorrow's meeting. If you need more time to present an agenda please reschedule tomorrow's meeting, it is imperative that the next meeting we will be addressing all the appropriate issues to include recommendations of the ERP requirements of Mine Radio and miner location and GVB CH4 flows and control.
> If you do not take action to resolve these issues I no longer want to work for BHP and want a severance package thru [*sic*] July 2010.

(Govt. Ex. 3.) (Paragraphs not indented in original.)

Abeyta sent another e-mail to King that night. It stated:

> It is 10:00 PM and I haven't received a meeting agenda for tomorrows [*sic*] meeting to assure all my concerns are going to be addressed. At this point I don't feel comfortable to meet with BHP without legal council [*sic*] present. I will let you know when I have chosen my legal council [*sic*]. I received a call this evening at home and was told today that Chuck Wilson stated he terminated me for insubordination. I would caution Chuck for legalities for Defamation of Character [*sic*].
> I would advise someone from legal to contact me to discuss.

(Govt. Ex. 4.) Abeyta did not attend the February 11 meeting. (Tr. 69.) He did, however, file a 103(g) complaint, 30 U.S.C. § 813(g), with MSHA on that date.[2] (Tr. 84, Govt. Ex. 1.)

Abeyta did attend a meeting with Chuck Wilson, Mike Fidel and Marilyn King on February 12, 2010. He testified that he again brought up the four safety concerns set out in his e-mail to Marilyn King and brought up an additional safety concern "about the accumulation of coal dust inside of the load centers." (Tr. 71.) He said he also informed them that he had filed a complaint with MSHA. (Tr. 84-85.)

On February 23, 2010, Abeyta was terminated by San Juan. The reasons for his termination, set out in his letter of termination, were given as follows:

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[2] Section 103(g)(1) provides, in pertinent part, that: "Whenever . . . a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

Effective immediately you are terminated for the following infractions of San Juan Coal Company's (SJCC) General Rules of Conduct (GRC), provided to you during your employment orientation.

GRC Basic Principles #1and 2 and GRC rule #10 –

You admitted to seeing combustible material inside an electrical load center, left the material in the center and did not report the material's presence for several days or longer. This is a knowing violation of safety rules, which are part of your job duties.

GRC Basic Principle #1 and 2 and GRC rule #3 –

On numerous occasions you failed to perform your job duties and responsibilities by refusing to perform specific job assignments and violating your immediate supervisor's instructions, Chuck Wilson. These multiple, and in some cases on-going, infractions date at least to November, 2009. Perhaps the most egregious example is your failure to perform tasks necessary for the Emergency Response Plan. You also refused to perform a written job plan related to this job duty.

GRC Basic Principle #2 and GRC rule #1 and 3

On February 4, 2010, you were found working without wearing your hearing aids while having a conversation with certain persons. As such, you were not fit for duty and failed to perform your job duties. Alternatively, you made an excuse to, or lied to, Mr. Wilson for failing to follow his direction.

GRC Basic Principle #2 and GRC Rule #6 and 17

On February 4, 2010, you left the work site without attending a meeting scheduled by your supervisor and then refused to return to work to attend that scheduled meeting.

On February 11, 2010, you did not report to work on a scheduled work day and on that day failed to attend a meeting to discuss these infractions.

GRC Basic Principle #3

On several occasions you alleged serious misconduct by co-workers, including Chuck Wilson. You raised these allegations to other SJCC employees, including myself. As described in the Code of Business Conduct, also provided to you at your

> employment orientation, SJCC would not, and may not, discipline an employee for raising bona fide concerns about misconduct or safety issues. However, you raised many serious allegations without any investigation yourself. Your allegations, upon investigation, are without any factual basis. The number of allegations you raised, the manner in which you did so, and the lack of any factual basis, leads me to conclude that you are not treating your co-workers with the dignity and fairness required as a condition of your employment.

(Govt. Ex. 11.)

The company presented four witnesses, Jimmy Stewart, the MSHA Investigator investigating Abeyta's complaint; Steve Pierro, Conveyance Coordinator; Charles Wilson, Electrical Coordinator; and Mike Fidel, Maintenance Manager. In addition, I sustained an objection to the testimony of Steven Ellsbury as being irrelevant. (Tr. 208-09.) The company's position can be summed up as follows: (1) Abeyta's safety concerns were frivolous in that they had no basis in fact; (2) All but one of Abeyta's safety complaints occurred in the fall of 2009, but he did not report them until February 2010, because he was saving them as a defense against being disciplined;[3] (3) Some of the safety complaints were very serious, and if true, it was unconscionable for an electrical engineer to wait four months before reporting them; (4) Most of Abeyta's complaints were not observed by him, but were based on hearsay; and (5) Abeyta should not be returned to work because he was a danger to the mine.

Findings of Fact and Conclusions of 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 immediate reinstatement of the miner pending final order on the complaint." When the operator contests temporary reinstatement, the Commission has established a procedure for making this determination with Commission Rule 45, 29 C.F.R. § 2700.45.

Rule 45(d), 29 C.F.R. § 2700.45(d), states that:

> The scope of a hearing on an application for temporary

[3] Steve Pierro testified that when Abeyta was given a disciplinary notice at the February 8 meeting, Abeyta responded by saying, "I told you not to go this way, and if you are going to go this way, then basically you're going to regret it. And then he started talking about problems with one of the power centers underground." (Tr. 180.) Abeyta denied making such a statement. (Tr. 105.)

> 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.

With regard to the hearing, in its most recent decision on temporary reinstatement, the Commission stated that it

> has repeatedly recognized that 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." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990).

Sec'y of Labor on behalf of Lige Williamson v. Cam Mining, LLC, 31 FMSHRC 1085, 1088 (Oct. 2009).

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). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Jim Walter Resources, Inc.*, 920 F.2d at 747 & n.9; *Secretary of Labor on behalf of Price*, 9 FMSHRC at 1306.

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In this case, Abeyta testified that he made safety complaints to Chuck Wilson, and possibly Mike Fidel, in October and November of 2009, (Tr. 97-99), as well as making them on February 8, 11 and 12, 2010. He was terminated on February 23 and his termination letter referred to his making safety allegations, which the company concluded were unfounded. Thus,

if Abeyta's claims are found to be credible, he has established that he engaged in protected activity, by making safety complaints, and that he was terminated in close proximity to making those complaints. There is no doubt that the company had knowledge of the protected activity as it was referred to in the termination letter.

San Juan's evidence indicates that it may have a valid defense to Abeyta's complaint, but, as set out above, the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Complainant establishes that his 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. Consequently, the focus of the hearing is clearly on the evidence presented by the Complainant and the evidence presented by the Respondent is relevant only to the extent it demonstrates that the claim is frivolous. In deciding the case, it is "not the judge's duty . . . to resolve conflict[s] in testimony" or to make "credibility determinations in evaluating the Secretary's" case. *Cam Mining*, 31 FMSHRC at 1089*; Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

The evidence does not demonstrate that Abeyta's testimony was inherently incredible. Indeed, to find in San Juan's favor would require me to make credibility findings and to resolve conflicts in the testimony. The main thrust of its case is that Abeyta's complaints were unfounded and frivolous. The Commission held in *Cam Mining*: "Whether [the Complainant] was correct in his belief that the continuous miners were operating simultaneously is irrelevant to whether he made the safety complaint to his supervisor." 31 FMSHRC at 1089 n.2. Likewise, whether Abeyta was correct in his belief that safety violations had occurred is irrelevant to whether he made safety complaints to his supervisors.

Finally, in a temporary reinstatement proceeding, Congress intended that the benefit of the doubt should 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 the employer retains the services of the employee until a final decision on the merits is rendered. *Jim Walter Resources, Inc.*, 920 F.2d at 748 n.11. Finally, if San Juan believes that the Complainant is a danger to the mine, there are ways to solve that problem within the context of this decision. However, making a determination as to whether he is a danger or not is clearly beyond the purview of this proceeding.

Accordingly, finding that Abeyta's complaint is not without merit, I conclude that his discrimination complaint has not been frivolously brought.

Order

Christopher L. Abeyta's Application for Temporary Reinstatement is **GRANTED**. San Juan Coal Company is **ORDERED TO REINSTATE** Mr. Abeyta to the position that he held on February 23, 2010, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**. In addition, San Juan is **ORDERED TO PAY** Mr. Abeyta his pay and benefits retroactive to **APRIL 28, 2010.**[4]

T. Todd Hodgdon
Senior Administrative Law Judge

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[4] Under normal circumstances this decision would have been issued on April 28, 2010, in accordance with Commission Rule 45(e), 29 U.S.C. § 2700.45(e). However, on April 27, the parties advised that a settlement was being negotiated and requested that the decision not be issued. In a telephone conference call between the parties and the judge on May 18, 2010, counsel for the Secretary advised that a written agreement had not been entered into and that Mr. Abeyta no longer wished to settle the case. Over the opposition of counsel for the Respondent, who wanted the oral agreement enforced, the Secretary requested that a decision on temporary reinstatement be issued. I find that as the agreement had not been reduced to writing, there was no agreement, and, in any event, that enforcement of an oral agreement is beyond the scope of my authority.