FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

September 8, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA),	:	TEMPORARY REINSTATEMENT PROCEEDING
on behalf of MARK GRAY,	:	Docket No. KENT 2009-1429-D
Complainant	:	BARB CD 2009-13
v.	:	
NORTH FORK COAL CORPORATION,	:	Mine ID 15-18340
Respondent	:	No. 4 Mine

DECISION AND ORDER GRANTING APPLICATION FOR TEMPORARY REINSTATEMENT

Appearances: Derek Baxter, Esq., and Matthew Babington, Esq., Office of the Solicitor , U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary;
Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, on behalf of Mark Gray;
Steven M. Hodges, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". North Fork Coal Corporation (North Fork) has requested a hearing on the Secretary's application for temporary reinstatement of Mark Gray filed August 13, 2009, pursuant to Commission Rule 45, 29 C.F.R. § 2700.45. Expedited hearings were thereafter held in Wise, Virginia.

Commission Rule 45(d), 29 C.F.R. § 2700.45(d) limits the scope of these proceedings as follows:

> 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 Commission has further held that it is "not the judge's duty . . . to resolve . . . conflict[s] in testimony at this preliminary stage of proceedings." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). At a temporary reinstatement hearing the judge must determine whether the evidence mustered by the miner to date establishes that his complaint is nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. *Jim Walter Resources Inc.* 920 F.2d 738 at 744 (11th Cir. 1990). The Circuit Court further stated that the "not frivolously brought" standard is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, it is equated with a criteria of "not insubstantial or frivolous" and "not clearly without merit." *Jim Walter Resources Inc.,* 920 F.2d at 745.

In his report to the Department of Labor's Mine Safety and Health Administration (MSHA) filed June 15, 2009, Mr. Gray stated as follows:

I feel I was terminated because I refused to roof bolt an entire cut-through of about 60 feet plus in depth. I also made safety complaints. I want my job back plus all benefits due me.

At hearings Mr. Gray testified that he has been a miner since 1981 and a roof bolter operator for 16 or 17 years. He began working for North Fork in 2007 as a roof bolter. He worked with a partner, Chris Sheeks, on a double headed Fletcher roof bolter. Sheeks would work one side of the bolter while Gray operated the other. In a statement to MSHA investigator Guy Fain, Jr., on July 31, 2009, Gray explained that section foreman Tom Cornett had arrived at the mine only about two months before his discharge on May 15, 2009. Before that, his foreman, known as "Moondog", had complained to Gray that the mine ventilation curtains were not being hung by Gray. According to Gray, Moondog would tell Gray to shut down the roof bolter and hang curtains. After Cornett took over as foreman, he "seemed to get mad" when Gray shut down the bolter to hang ventilation curtains.

Gray explained that, while working on the roof bolter he would often find methane readings in the .9% to 1% range and would therefore stop roof bolting and hang ventilation curtains, presumably to reduce the methane concentrations. According to Gray, Foreman Cornett, when observing this activity, expressed his dissatisfaction with Gray (presumably for holding up production by not working on the roof bolter) by just walking off "like he was upset" and by no longer talking to him (Tr. 28).

Gray also testified at hearings that sometime in April 2009, he was roof bolting in the 01

section where normal cuts were 30 feet deep. His foreman, Tom Cornett, then asked him to bolt a deep cut of about 55 feet and he did. After bolting the deep cut he told Cornett that he would not bolt another one like that. Gray testified that it was illegal to take such deep cuts as it was not permitted in the roof control plan and that it was not safe. It had a "raggedy " top with mixed sandstone and slate which would not bond together. "It would fall out on me". According to Gray, three days later he was asked to take another deep cut of about 55 feet and he refused. Gray testified that it was not safe to do so with the "raggedy" top and that it was in violation of the mine roof control plan. According to Gray, after this exchange with Cornett their interactions changed and Cornett "wouldn't talk to me like he used to, or anything".

According to Gray, about a week later, on May 15, 2009, he was fired by second shift supervisor, Robert Estevez. Estevez purportedly told him only that he had been "complained about" and when asked who reported on him, Estevez replied only "well it don't matter, you know, I'm gonna believe my section foreman before I would you". Gray testified that Estevez gave him no written notice nor any further explanation as to why he was discharged. Gray maintained that no one in management had ever complained about his work and that he had never received any verbal or written warnings.

Considering the testimony and statements of Mr. Gray it is apparent that he engaged in protected activity when he told his foremen that he had to hang ventilation curtains and that he made protected safety complaints and engaged in a protected work refusal in refusing to roof bolt what he perceived to have been a dangerous deep cut, one which was well in excess of the 40-foot cuts permitted by the mine's roof control plan. A work refusal is protected under the Act under conditions the miner reasonably and in good faith believes to be hazardous. See *Miller v. FMSHRC*, 687 F.2d 194, 195-196 (7th Cir. 1982). It is also apparent from the testimony of Mr. Gray that he communicated his reasons for the work refusal to his foreman. Gray's discharge on May 15, 2009, was the adverse action. In addition there is evidence that the adverse action was motivated by the protected activity. There is evidence that Gray's foreman had knowledge of the protected activity and that he showed hostility towards the protected activity by demonstrating anger about that activity. In addition, these was close proximity in time- -only one week and two weeks- -between the protected activity and the adverse action. Finally, there is evidence that Gray was given no reason for his discharge. See *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981); rev'd on other grounds *sub. nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

While the Respondent presented a number of witnesses and witness statements to contradict the testimony of Mr. Gray and which could at a trial on the merits reflect upon the credibility of his testimony, as previously noted, it is not the judge's position to resolve conflicts in testimony at this preliminary stage of proceedings. At a temporary reinstatement proceeding the judge must determine only "whether the evidence mustered" by the miner to date establishes that his complaint is non-frivolous," not whether there is sufficient evidence of discrimination to justify permanent

reinstatement. *Jim Walter Resources Inc.,* 920 F.2d at 744.

Under the circumstances, and within this framework of law, I have no difficulty in concluding that the complaint of Mark Gray in this case was not frivolously brought. Whether the Secretary can establish a *prima facie* case of discrimination and whether the Respondent could affirmatively defend such a case are questions to be deferred for trial on the merits of any subsequent discrimination case.

ORDER

North Fork Coal Corporation is hereby ordered forthwith to temporarily reinstate Complainant Mark Gray to the position he held as of the date prior to his discharge on May 15, 2009, (or to an equivalent position) at the same rate of pay, with the same hours and with the same benefits as he had as of the date prior to his discharge.

Gary Melick
Administrative Law Judge
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