FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 2010

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DOUGLAS A. PILON, Complainant v. ISP MINERALS, INC., Respondent.	: : : : : : : : : :	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2010-766-D NC-MD-10-03 Mine ID: Kremlin Plant

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Travis W. Gosselin, Esq., U.S. Department Of Labor, Office of the Solicitor, Chicago, Illinois, for the Complainant;
Brent I. Clark Esq. and Meagan Noel Newman, Esq., Seyfarth Shaw LLP, Chicago, Illinois, for the Respondent.

Before: Judge Rae

This matter, heard on June 28, 2010, in Green Bay, Wisconsin, is before me based on an application for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against ISP Minerals, Inc., on behalf of Douglas Pilon. This statutory provision prohibits operators from discharging or otherwise discriminating against miners who have complained about alleged safety or health violations, or who have engaged in other safety related protected activity. Section 105(c)(2) of the Mine Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner pending the full resolution of the merits of his discrimination complaint. The parties' briefs, filed on June 4, 2010, and June 14, 2010, have been considered. The Secretary found that the discrimination complaint was not frivolously brought and filed her petition on behalf of Pilon.

For the reasons that follow, **I GRANT** the application and order Douglas Pilon's temporary reinstatement.

Statement of the Case

This temporary reinstatement proceeding is analogous to a preliminary hearing. Unlike a discrimination complaint that is tried on the merits where the Secretary bears the burden of proof by the preponderance of the evidence, the scope in a temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Courts and the Commission have concluded that the "not frivolously brought" standard of section 105(c) is satisfied when there is a "reasonable cause to believe" that the discrimination complaint "appears to have merit." *Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000) (citations omitted).

The Secretary filed a Motion *in Limine* to exclude evidence that the Claimant made threats to mine employees as set forth in Respondent's responsive pleadings to the Petition for Reinstatement.[1] In his written motion, Respondent stated that the alleged threats were made "subsequent to his termination" and argued that a change in circumstances post-termination could make reinstatement inappropriate. I granted the motion by Order issued on June 25, 2010.

Respondent filed a Motion for Reconsideration and, in the alternative, certification for interlocutory review. In his written motion for reconsideration, counsel stated that the alleged threats were made at some unknown time but only made known to the investigator after termination. The motion was argued by counsel at the hearing on June 28, 2010. Respondent asserted that my ruling on the motion in limine was incorrect as a matter of law as it was based upon the timing of the threats being prior to termination. They also asserted that I abused my discretion when failing to consider changes in circumstances, particularly post-termination conditions, that may render temporary reinstatement inappropriate. This argument was asserted in the first written motion in which they stated that the threats were made after termination. Counsel cited three cases as controlling: *Secretary of Labor o/b/o Robert Gatlin v Kenamerican Resources, Inc.* 31 FMSHRC 1050 (October 8, 2009); *Chadrick Casebolt v. Falcon Coal Company, Inc.* 6 FMSHRC 485 (February 29, 1984); and, *Robert Simpson v. Kenta Energy, Inc. and Roy Dan Jackson,* 11 FMSHRC 770 (May 11, 1989). In the alternative, Respondent requested certification for interlocutory review under 29 C.F.R. § 2700.76. During the testimony, counsel attempted to introduce evidence of these threats made by the claimant now allegedly made prior to termination. I excluded this evidence.

I denied the request to reconsider my order on the motion *in limine* for the reasons set forth in my order of June 25, 2010, and further set forth my this decision. As stated in my order, citing *Secretary of Labor ex rel Pasula v Consolidation Coal Co.*, 2 FMSHRC 2796 (1980), that the employee engaged in various acts and/or omissions or that he deserved to be fired does not

[1] Respondent also moved to dismiss the petition for failure to state a claim upon which relief could be granted or otherwise depriving him of due process. I denied that motion by Order dated June 17, 2010.

overcome a finding of a causal connection between the protected activity (the safety complaint) and the termination. Whether he engaged in misconduct *during or after* this employment is not relevant to a finding that the complaint was not frivolously brought. (*emphasis added.*) Further, such evidence is only relevant on the merits of the discrimination complaint, not at a temporary reinstatement hearing. While counsel alleges differing accounts of when these alleged threats were made, he has misinterpreted the basis for my order as resting only upon the alleged threats being made after termination. Regardless of whether they were made, or when, they are not relevant to these proceedings. This evidence, in fact, invites the necessity for a resolution of conflicts in testimony or entertainment of rebuttal or affirmative defenses not properly before me at a preliminary stage of proceedings, *Secretary of Labor o/b/o Williamson v. CAM Mining LLC*, 31 FMSHRC ____, slip op at 7 (Oct. 2009). Furthermore, the cases counsel provided in support of his argument that a change in circumstances post-termination can render reinstatement inappropriate all involve one narrow issue of fact. That is, whether economic impossibility would render an order to reinstate inappropriate when the job to which the miner would be returned has been eliminated through a reduction in force or other similar economic crisis. These cases, are clearly off point and wholly inapplicable to this case. I further find that interlocutory review cannot be granted on a matter such as this prior to a hearing under 29 C.R.F. §2700.76 as Respondent seeks. The appropriate remedy available in temporary reinstatement proceedings is found at 29 C.F.R. § 2700.45(f).

Summary of the Evidence

The parties stipulated that ISP is an operator of a mine within the meaning of the Mine Act, that the Kremlin Plant is a mine subject to the jurisdiction of the Mine Act, that this matter comes under the jurisdiction of the Mine Act sections 105 and 113, that Douglas Pilon was a miner under the Mine Act at all relevant times, and that on February 25, 2010, an accident report was submitted on behalf of Douglas Pilon.

Mr. Pilon testified that he was fired from ISP Minerals after seven years of employment with the mine. (Tr. 12.) He worked as a kiln operator responsible for maintaining the machinery, controlling the temperature of the kiln and related other duties. (*Id.*) He was working 48 hours per week, eight of which was overtime. (Tr. 13.) His hourly rate was $23.50 per hour and he received time and one half for overtime prior to his discharge.[2] (*Id.*) On February 25, 2010, while he was checking the coolers, he walked across the catwalk and a puff of steam from a cooler blew in his face which he breathed in. (Ex. S-1; Tr. 14-15.) He believed the steam he inhaled was aluminum chloride vapor, which is a toxic gas. (*Id.*) His belief was based upon having been exposed to it in the past and suffering some injuries as a result and from the fact that the steam contained no oxygen; it was like ammonia. (*Id.*) He reported the accident that same day. (Ex. S-1; Tr. 15, 19.) The following day, he was presented with a written accident report (Secretary's Exhibit #1), prepared by Lee Schlais, foreman, dated February 26, 2010. (Ex. S-1; Tr. 15-16.) The accident

[2] In his discrimination complaint, Complainant reported he earned $22.54 per hour regular pay 40 hours per week and $33.81 per hour overtime, eight hours per week.

report later signed by Mark Coombs on March 8, 2010, indicates the determined cause of the incident was a raised slide in the air duct which pulled steam off cooler #6. (Ex. S-1.) It was noted on the report that #5 and #6 coolers had been kicking out for some time and that the employee was instructed, to wear protective gear, and to stay away from the discharge end of the cooler while it was running. "Especially" when it was using "chloride products." (*Id.*)

Mr. Pilon further testified that the report went from Lee Schlais to the supervisor, Mr. Hill. (Tr. 16.) The report was made on a Friday night. (Tr. 17.) He next reported for work on Monday night and on Tuesday, March 2, 2010, he was suspended without pay and thereafter terminated on March 15, 2010. (*Id.*; Tr. 18.) He was informed of his termination at a meeting at which Mr. Hill told him that he had demonstrated unacceptable performance. (Tr. 18.)

On cross- examination, Mr. Pilon testified that he did not receive medical treatment for the inhalation incident but believed that he had breathed in aluminum chloride based upon the nature of the gas and past experience. (Tr. 20-21.) He stated that he reported the incident because he believed that he would be in trouble if he did not do so. (Tr. 29.) He believed his report caused his termination. (*Id.*) Mr. Pilon identified Respondent's Exhibit R-1, page 1, as the letter presented to him upon his termination, on March 15, 2010. He also identified the letter, dated August 28, 2009, relating to a suspension for misconduct.[3] (Tr. 32-33, 40-41; Ex-R-1.)

Counsel for Respondent called Messrs. Dan Gedazlinski, Tyler Hill and Mark Coombs as witnesses to testify to various alleged acts of misconduct and/or poor performance exhibited by Mr. Pilon and to say that it was their decision to fire Mr. Pilon solely for misconduct, not for the filing of the accident report.[4] (*See* Tr. 50-59, 63-69, 70-75.) Mr. Coombs acknowledged that he signed the accident report on March 8, 2010. (Tr. 74.) Mr. Gedazlinski acknowledged that in the process of running the kiln and coloring the materials for roofing shingles, various chemicals, including chlorides are regularly used. (Tr. 48.)

Application of the Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that "if miners are to be encouraged to be active in matters of safety and health they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong. 1st Sess. 35 (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*

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[3]. Respondent did not offer previously marked exhibits R-1 pages 2, 4, 5, and 6 or R-2 through 4 to be entered into evidence and they are, therefore, not part of this record.

[4] Counsel for the Secretary objected to the testimony of these witnesses as being outside the scope of the temporary reinstatement hearing.

of 1977, at 623 (1978).

Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 45(d) provides:

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

29 C.F.R. § 2700.45(d)

In its decision in *Jim Walter Resources, Inc., v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court noted the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' - an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*.'

920 F.2d at 747 (emphasis in original) (citations omitted).

While the Secretary is not required to present a *prima facie* case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. As a general proposition, to demonstrate a *prima facie* case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in safety related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Secretary on behalf of*

David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinetter v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (Apr. 1981).

It is not the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses at the preliminary stage of the proceedings. *Secretary of Labor o/b/o Albu v. Chicopee Coal Co.,* 21 FMSHRC 717 (July 1999). It is sufficient to find the Complainant engaged in protected activity, the respondent had knowledge of that activity and there was a coincidence in time between the protected activity and adverse action. *CAM Mining LLC, supra.*

Respondent argues that: 1) there was no protected activity involved in this case and, 2) that the history of disciplinary action as recently as March 2, 2010, is relevant and admissible because it negates the "temporal proximity" nexus between any protected activity engaged in by the Claimant and his termination two working days later. The Respondent cites no controlling case law on point.[5]

The evidence at the hearing was clear that Mr. Pilon believed he inhaled noxious steam from the cooler while walking across the catwalk. Whether he suffered injuries necessitating medical treatment is immaterial. He knew from past experience that he was supposed to report such an incident and did so in a timely fashion. The report was reduced to an accident form by the foreman and signed off by Mr. Coombs, (Exhibit S-#1). The report prepared by management indicates that it was known for at least some period of time that two coolers were kicking out presenting a need to use a respirator and stay away from the discharge end of the coolers. Mr. Gedazlinski confirmed that use of chemicals such as chlorides was ususal to color the products in the kilns. I find that this evidence confirms the very real possibility that whatever Mr. Pilon inhaled was a dangerous substance and that he had good cause to believe so, thereby necessitating the filing of a safety report. Mr. Pilon was engaged in protected activity

I also find that the evidence of Mr. Pilon's alleged past employment violations is a matter left to a later proceeding on the merits of the discrimination complaint. In order to find that the past conduct was the sole role in the termination of Mr. Pilon, it would necessary to make evidentiary findings on the affirmative defenses and to resolve conflicts in testimony between the Secretary's witness and the Respondent's witnesses. This is not the role of the Administrative Law Judge at this stage of the proceedings. Additionally, making such a finding here would be tantamount to deciding the discrimination case in chief which is not before me and would deprive the Secretary of the right to conduct discovery and present witnesses to rebut the defenses raised by this evidence.

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[5] Respondent did not raise this issue in the Answer to the Petition and offered no relevant case law at the hearing in support of this argument.

In summary, all elements of the analytical framework discussed above are satisfied to the level required by the relevant statutes, rules and case law precedents. The Secretary has carried her burden of presenting substantial evidence to support a reasonable cause to believe that Pilon engaged in protected activity, and that there was a nexus between the protected activity and the adverse action of suspension and termination. I conclude that the complaint of discrimination is not frivolously brought.

ORDER

For the reasons set forth above, ISP Minerals, Inc. is **ORDERED** to immediately reinstate Douglas Pilon to the position he held on February 25, 2010, at the rate of pay of $22.54 per hour for 40 hours per week and $33.81 per hour for eight (8) hours of overtime per week with restoration of all benefits to which he was then entitled.

Mr. Pilon's reinstatement is not open-ended. It will end upon a final order on the underlying discrimination complaint case in chief, 30 U.S.C. §815(c)(2). Therefore, the Secretary must promptly determine whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent. Otherwise, I shall entertain a motion to terminate this Order.

Priscilla M. Rae
Administrative Law Judge

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