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February 22, 2010

SECRETARY OF LABOR, MSHA, on behalf of JOSE A. CHAPARRO Complainant,	: :	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	Docket No. SE 2010-295-DM
COMUNIDAD AGRICOLA BIANCHI, INC., Respondent,	: :	Mine ID 54-00350 CAB Aggregate

DECISION AND ORDER REINSTATING JOSE A. CHAPARRO

Appearances: Allison L. Bowles, Esq., Marc G. Sheris, Esq., U.S. Department of Labor, New York, New York, on behalf of the Complainant
Rafael Sanchez-Hernandez, Esq., San Juan, Puerto, Rico, on behalf of the Respondent

Before: Judge Barbour

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Jose A. Chaparro pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). Chaparro filed a complaint with the Secretary's Mine Safety and Health Administration (MSHA) alleging that his August 15, 2009, layoff was motivated by his protected activity. The Secretary contends that Chaparro's complaint was not frivolous, and she seeks an order requiring Comunidad Agricola Bianchi ("CAB") to reinstate Chaparro to his former position pending the completion of an investigation and final decision on the merits of Chaparro's discrimination complaint. A hearing on the application was held in San Juan, Puerto Rico, on February 2, 2010.[1] For the reasons that follow, I grant the application and

[1]The hearing was not conducted within the time specified by the Commission's Rules, 29 C.F.R. § 2700.45(c), because counsels were unavailable for trial in January. It was held on the first day all the lawyers could be present, with the understanding that should I order Chaparro's reinstatement, his employment would be regarded as beginning on the date the order would have been issued had the case been conducted as required. *See* Notice of Hearing (January 6, 2010.) In like manner, because of weather considerations and the undersigned's travel schedule, this decision and order was not issued within the time required by the Commission's rules, and I intend the retroactive nature of the order also to cure this defect.

order Chaparro's temporary reinstatement.[2]

THE EVIDENCE

CAB Aggregate is a sand processing facility located in the Commonwealth of Puerto Rico. Among other things, the facility includes a drag line, sand screening equipment and conveyor belts. It also includes a shop area where equipment is maintained and repaired. Jose Chaparro was first hired by CAB in 2008 to work as an equipment operator at the facility. When he was hired, Chaparro signed a contract that specified the company could suspend him without cause during the first 90 days of his employment.[3] After Chaparro worked for approximately five weeks, the company's administrator, Reynat Jimenez, concluded that Chaparro's job performance was unsatisfactory. As a result, the company invoked the probationary contract and suspended Chaparro. Jimenez testified, and Chaparro did not deny, that following his suspension, Chaparro repeatedly called CAB management personnel and requested that he be given another chance. Chaparro told company officials that he wanted to come back and that he would work in any capacity.

In 2009, Jimenez decided to give Chaparro another chance. As a result, CAB rehired Chaparro on June 1, 2009, this time as a maintenance worker. Chaparro's duties included servicing equipment both on-site and at the shop. He cleaned the shop floors and collected oil. When he was rehired, Chaparro again signed a probationary contract. The contract was dated June 1, 2009. As before, the company retained the right to fire Chaparro for any reason during the first 90 days of his employment.

Jimenez, who was one of Chaparro's supervisors during his second employment, maintained that there were again problems with Chaparro's job performance. Jimenez described Chaparro's work as poor in all respects. Jimenez testified that in carrying out his maintenance duties, Chaparro was a danger to himself and to others.[4] In fact, Jimenez went so far as to

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[2]Prior to the hearing, the Secretary filed a motion in limine seeking to bar the company from presenting evidence to establish a testimonial conflict or an affirmative or rebuttal defense. I denied the motion, not because I disagreed with the Secretary's legal position which stressed the limited scope of the hearing, but because I believed a better, more inclusive record would result from hearing the case in the usual manner, that is, from the company's witnesses being subjected to objections to individual questions and without the company being bound by prior restraints in presenting its evidence.

[3]The contract was referred to by the parties as a "probationary contract." In addition, throughout the course of the hearing, witnesses and lawyers used the word "suspend" and "suspension" as synonyms for being terminated, fired, or laid off.

[4]For example, Jimenez complained that Chaparro would not follow instructions and would not wear gloves or a hard hat.

describe Chaparro's work performance as "extremely dangerous."

Because of Chaparro's alleged poor performance, Jimenez raised the issue of whether the company should again fire Chaparro. Jimenez and CAB's president spoke early in August, and they decided Chaparro should again be suspended pursuant to the provisional contract. However, Chaparro had injured his hand and was receiving workmen's compensation. Puerto Rican law forbade firing a worker while he or she was in that status. In addition, according to Jimenez, if the company waited until August 14 to act, Chaparro not only would be off workmen's compensation, he would receive pay for a full work period because the pay period ended on August 14.

On Friday, August 14, Chaparro reported for work at the sand processing facility. However, he had to leave work early to see a doctor about his hand. Jimenez wanted to speak with Chaparro in person, but because he had left the facility, Jimenez called Chaparro to tell him he was being suspended. Chaparro did not answer the telephone. On Sunday, August 16, Jimenez called again and left a message for Chaparro that he was suspended as of August 14.

For his part, Chaparro agreed that he was hired in 2008 as an equipment operator and that he was suspended before he worked 90 days. He also agreed that he was rehired on June 1, 2009, and was suspended a second time on August 14.[5] However, he maintained he was not fired because of his unsatisfactory and unsafe job performance; rather, he was let go because he cooperated, and was continuing to cooperate, with MSHA in its investigation of an earlier accident at the mine, one involving Chaparro.

According to Chaparro, after he was hired in June, he was working at the sand screen when a bucket came down and pinched him between the funnel at the top of the screen and the bucket. MSHA inspector Isaac Villahermosa was assigned to investigate the accident. On August 14, Villahermosa went to the mine to interview Chaparro. Jimenez knew when and why Villahermosa was coming to the mine, but he did not try to prevent Chaparro from meeting with Villahermosa.

Villahermosa arrived and began the interview with Chaparro. He spoke with Chaparro for no more than 30 minutes when Chaparro left to see his doctor about his hand.[6] Before he left, Chaparro and Villahermosa agreed to continue the interview on Monday, August 17.

According to Chaparro, on either Saturday, August 15, or Sunday, August 16, he was called by Jimenez and told that he was being suspended until further notice. On Monday,

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[5]Although Chaparro was formally advised he was suspended after August 14, the parties appear to agree that the effective date of the suspension was the 14th, and it is certain that August 14 was the last date Chaparro did any work for CAB.

[6]There is no allegation that Chaparro's hand injury was related to the June accident.

August 17, Chaparro returned to the facility, where he was told that Jimenez wanted to see him and that Villahermosa wanted to talk to him. It was agreed that he should speak with Jimenez first and that he should then meet with Villahermosa alone and in the company's on-site office.

At the meeting with Jimenez, Chaparro again was told that he was fired.[7] Because he no longer worked for CAB, Chaparro and Villahermosa decided to continue their conversation at a fast food restaurant rather than at the mine office. They left the facility. Their resultant off-site conversation lasted about two hours.[8]

According to Chaparro, around November 20, 2009, Villahermosa called and asked if Chaparro had filed a discrimination complaint with MSHA. Chaparro maintained this was the first time anyone had informed him of his right to do so. Shortly thereafter, on November 24, 2009, Chaparro filed a complaint with the agency, asserting he was discharged on August 14 so that he would not "talk about what went on at the sand plant." *See* Application for Temporary Reinstatement, Exh. B at 6. The Secretary's application for temporary reinstatement followed.

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 the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission 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 complaint was frivolously brought. The burden of proof is upon the Secretary to establish that the complaint was not frivolously brought. In support of [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant. The respondent shall have an opportunity to examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was not frivolously

[7]Chaparro's termination was entirely oral. It does not appear that he ever was given a written notice that he was suspended.

[8]While it is clear that when Chaparro and Villahermosa met the second time both knew Chaparro had been fired, Chaparro maintained Villahermosa did not advise him of his rights under section 105(c)(2) of the Act.

brought.

As the above makes clear, and as I noted at the hearing, the scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987); *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 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 Federal Mine Safety and Health Act of 1977, at 6240625 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applied in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (February 2000).

While an application 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 meets the non-frivolous test. Under section 105(c) of the Act, a complaining miner bears the burden of establishing: (1) that he or she engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Paula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom.; Consolidation Coal Co. v. Marshall*, 773 F.2d 1211 (3rd. Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Sec'y of Labor on behalf of 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).

Here, the Secretary has established that Chaparro engaged in protected activity. Chaparro participated in MSHA's investigation of allegedly unsafe conditions when he spoke with Villahermosa on August 14, 2009, regarding the accident at the facility. Speaking with an MSHA inspector about conditions at a facility where the complainant works is protected under the Act. Therefore, she established the first part of a *prima facie* case of discrimination.

The next step is to establish an unlawful motive for adverse action of which the miner complains. To do this, the Secretary had to show that Jimenez's notification to Chaparro that he was laid off was at least in part designed to punish him for participation in MSHA's investigation of conditions at CAB's facility. The Commission has frequently acknowledged the difficulty of establishing "a motivational nexus between protected activity and that adverse action that is the subject of the complaint." *See, e.g., Sec'y on behalf of Baier v. Durango Gravel*, 21 FMSHRC
953 (September 1999). Consequently, the Commission has held that, "(1) knowledge of 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 indications of discriminatory intent. *Id.* at 957.

In seeking reinstatement for Chaparro, the Secretary does not need to establish a *prima facie* case of discrimination in order to establish the complaint was not frivolously brought. It is sufficient to show protected activity (something she did) and to show that a non-frivolous issue existed as to whether Chaparro's termination was at least in part motivated by Chaparro's discussion with Villahermosa on August 14.

The Secretary has established that Chaparro's supervisor knew of Chaparro's protected activity and that Chaparro was laid off shortly after her engaged in the activity. The coincidence in time between the protected activity and Chaparro's termination can be a basis on which to infer an illegal motive on CAB's part. *Durango Gravel*, 21 FMSHRC at 957. Whether it is the actual motive or a part of the actual motive need not be decided at this point. By establishing that Chaparro engaged in protected activity, that Jimenez knew of the activity, and that Chaparro was terminated almost immediately thereafter, the Secretary has established that Chaparro's complaint was "not frivolously brought."[9]

ORDER

For these reasons, CAB **IS ORDERED** to reinstate Chaparro to the position he held on August 14, 2009, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled. Chaparro's reinstatement will be deemed effective as of January 14, 2010, the date this decision and the order would have been issued had the case been heard according to the Commission's rules, and Chaparro will be entitled to back pay and benefits from that date until the date his reinstatement is effective.

Chaparro's reinstatement is not open-ended. It will end upon a final order on Chaparro's complaint. 30 U.S.C. § 815 (c)(2). Therefore, it is incumbent on the Secretary to determine promptly whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act based on Chaparro's November 24, 2009, complaint to MSHA. Accordingly, the

[9]The "not frivolously brought" standard has been described as setting a "low" burden of proof. In practice, the standard means that all the Secretary must do to prevail is establish protected activity and one of the circumstantial indicatives of motive. When the pretrial pleadings support finding that protected activity occurred and that a nexus in time exists between the activity and the adverse action, it is questionable whether a hearing is ever required. Yet, Commission Rule 45(b) states that if the respondent requests a hearing, the hearing "*shall* be held." One might well ask, to what effect? Perhaps the Commission should revisit the rule.

Secretary **IS ORDERED** to advise counsel for CAB and me of her decision by **March 24, 2010**, and, if a decision has not been made by that date, to advise us no later than **April 24, 2010**. If a decision is not made by April 24, I will entertain a motion to terminate the reinstatement for failure to diligently comply with the law. Surely, five months is adequate time within which to decide whether or not to go forward.

David F. Barbour
Administrative Law Judge

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