FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 16 2002

SECRETARY OF LABOR, on behalf of RANDY LEE BENNETT, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEST 2002-292-DM
v.	:	SC-MD-02-06
SMASAL AGGREGATES, Respondent	:	Cole Camp Sand & Gravel
	:	Mine ID 23-02198

DECISION

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Complainant;
Michael R. Roderman, Roderman Safety Associates, Inc., Salem, Missouri, for the Respondent.

Before: Judge Feldman

This matter, heard on April 2, 2002, in Springfield, Missouri, 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 Smasal Aggregates on behalf of Randy Lee Bennett. 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 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. Smasal Aggregates has stipulated that it is a mine operator subject to the jurisdiction of the Mine Act.

I. Procedural Framework

As a general proposition, in order to prevail, a complainant has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, a complainant must demonstrate that he participated in safety related activity protected by the 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 (October 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 Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

A mine operator may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. An operator may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d 738, 750 (11th Cir. 1990), *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

Unlike a trial on the merits in 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 44(c), 29 C.F.R. § 2700.44(c), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 44(c) 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 [her] application for temporary reinstatement the Secretary may limit [her] 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.

In its decision in *Jim Walter Resources* The United States Court of Appeals 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).

The Court further stated:

> . . . Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor.

Id. at 748, n.11 (emphasis in original).

Although the focus here is extremely limited, the Supreme Court has articulated that the narrow scope of these temporary reinstatement proceedings, as well as the minimal statutory standard of proof required by the Secretary under section 105(c)(2) of the Act, far exceed the Constitutional requirements of due process. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

II. Statement of the Case

Consistent with the above discussion concerning the "not frivolously brought" standard of proof, the issues presently before me are whether protected activity in fact occurred, and, if so, whether the protected activity was reasonably contemporaneous with the adverse action complained of. In this case, the protected activity relied upon by the Secretary is the safety related complaint Bennett filed with the Mine Safety and Health Administration (MSHA) on January 17, 2002. (Tr. 230). The Secretary alleges the adverse action that gives rise to her application for reinstatement is Bennett's alleged termination on January 18, 2002, by Leo Michael Smasal (Mike Smasal), President of Smasal Aggregates, allegedly motivated by Bennett's MSHA complaint.

It is undisputed that Bennett's January 17, 2002, MSHA complaint was protected activity. However, Smasal Aggregates contends that Bennett was not fired. Rather, Smasal Aggregates insists that Bennett voluntarily quit his employment on the morning of January 17, 2002, before he complained to MSHA, when he elected to go home, rather than drive his haulage truck more slowly, after he was repeatedly warned about his driving on January 15, January 16 and January 17, 2002. Thus, the ultimate issue to be resolved in this limited proceeding is whether Bennett's claims that he did not quit his job on January 17, 2002, and, that he was fired on January 18, 2002, after filing a complaint with MSHA, are frivolous.

III. Findings of Fact

Randy Lee Bennett has been employed by several operators in the mining industry since 1996. Bennett's duties have included driving haulage trucks and operating backhoes and front-end loaders. Bennett was hired by Smasal Aggregates as a haulage truck driver in July 2000. Smasal Aggregates operates a limestone quarry. Smasal Aggregates also operates the Cole Camp Sand and Gravel facility where portable sand and gravel is extracted and crushed into concrete sand. Although the Smasal Aggregates' limestone quarry and the Cole Camp Sand and Gravel operation have been assigned different MSHA mine I.D. numbers, both facilities are co-located on the same property. Bennett was employed by Smasal Aggregates but also performed work at the Cole Camp Sand and Gravel facility.

Bennett was recalled to resume work on Tuesday, January 8, 2002, by Mike Smasal after a brief temporary layoff. Bennett was given the option of operating the bobcat that is used to clean under the crusher, or operating the haulage truck. Bennett chose to drive the haul truck because it had a heater. Bennett was assigned to drive truck No. 44, a 35-ton Euclid. At all times relevant to this proceeding, Bennett was the only haulage truck driver assigned to transport limestone and gravel material within the quarry facilities. Bennett testified he drove his truck in fourth gear at speeds between 15 to 20 miles per hour fully loaded. (Tr. 46). Smasal testified a safe truck speed was between five and ten miles per hour. (Tr. 150).

Bennett's haulage route consisted of driving into the lime pit where lime material was loaded into his haul truck by Connie Thornburg, the lime pit loader operator. Bennett then drove the extracted lime material approximately ½ mile to the crusher where he backed the truck up a ramp so that the material could be dumped from the truck into a hopper.

After unloading his truck, Bennett drove down the hopper ramp approximately 400 yards to the opposite end of the crusher where fine ¼ inch rock and limestone material exits the crusher on a conveyor belt. Bennett's truck was then loaded with material from the belt by Charlie Birch, the beltline front-end loader operator.

Bennett then drove approximately ¼ mile to the asphalt rock pile where he unload the material from the belt. Bennett would then make another round trip from the beltline, where Charlie Birch would fill another load, and then back to the asphalt rock pile. From the asphalt rock pile, Bennett would drive back to Connie Thornburg at the lime pit to begin another cycle of transporting limestone and crushed rock material. In other words, Bennett received two truck loads of material at the beltline for every truck load of limestone material he obtained at the lime pit. Bennett estimated that he completed three round-trip cycles per hour, averaging approximately 24 cycles per eight hour workday.

On the morning of January 8, 2002, after turning the ignition of the Euclid No. 44 truck, Bennett heard a loss of air pressure when he released the parking brake. Bennett reported the problem to mechanic Matt Castle and mine foreman Darrell Siercks. Bennett testified Castle and Siercks told him the parking brake had been disconnected because it wasn't working properly. Castle told Bennett he would repair the parking brake when he got a chance. (Tr. 44-45). Bennett further testified that Castle and Siercks told him not to worry about it because the service brakes worked well because new rear brakes recently had been installed.

Bennett testified he did not refuse to drive the truck because he had to "feed [his] kids and make [his] mortgage." (Tr. 40). Bennett drove his truck from Tuesday, January 8 through Friday, January 11, 2002, without incident. Bennett described an incident that reportedly occurred on Monday, January 14, 2002, when his Euclid truck lurched forward while on the asphalt rock pile despite the fact that he was firmly depressing the service brake pedal. Bennett testified that he did not report this incident to Mile Smasal. (Tr. 48-49). Moreover, as noted below, an MSHA inspection conducted on January 18, 2002, revealed the service brakes were not defective.

Bennett admits that he was repeatedly warned about driving too fast on January 15, 16 and 17, 2002. Mike Smasal testified that on the morning of Tuesday, January 15, 2002, Superintendent Larry Castle cautioned Bennett because Bennett was driving at excessive speeds in the vicinity of the crusher. When Smasal arrived at work on Wednesday, January 16, 2002, Larry Castle informed Smasal that he complained to Bennett about his driving the previous day. Matt Castle also told Smasal that he had cautioned Bennett to drive slower the previous day. Upon receiving these complaints, at approximately 11:00 a.m. on January 16 Smasal contacted Connie Thornburg at the lime pit by radio and instructed Thornburg to tell Bennett to slow down. Thornburg testified that, consistent with Smasal's instructions, he told Bennett that Smasal wanted him to drive more slowly. (Tr. 199). Bennett was again warned by Matt Castle at 4:00 P.M. on January 16 to slow down.

Despite the warnings given to Bennett on January 15 and January 16, on the morning of Thursday, January 17, 2002, Smasal personally observed Bennett driving too quickly and he saw Bennett's truck slide around a corner of the quarry road. Smasal stated that he attempted, to no avail, to flag Bennett down to warn him to slow down. Unable to stop Bennett, at approximately 10:00 a.m. Smasal contacted Connie Thornburg at the lime pit by radio and instructed Thornburg to tell Bennett "to slow the truck down or park it and go home if he could not do so." (Tr. 145). Thornburg testified that he communicated Smasal's ultimatum to Bennett. (Tr. 200). Bennett testified he was "frustrated" over the repeated warnings he had received because he had tried to slow down by driving in third rather than fourth gear. Thornburg testified Bennett said, "'F-it; I'll go home,' and he didn't return to the pit, so I just took it that he went home." (Tr. 201). Bennett parked his truck at approximately 10:30 a.m. Before leaving the mine facility Bennett completed a pre-operation inspection report dated January 17, 2002, reflecting the condition of the brakes on truck #44 as "None[,] No Parking Brake." (Comp. Ex. 1).

After leaving the quarry, Bennett went to Mike Letourneau's house. Letourneau is Bennett's friend, and he was a former supervisor at Smasal Aggregates. Latourneau also is the husband of Diane Latourneau, Mike Smasal's secretary.

After leaving Latourneau's house, at approximately 2:00 p.m. on January 17, 2002, Bennett telephoned MSHA's Rolla, Missouri field office to report several alleged hazardous conditions at Smasal Aggregates. Namely, Bennett complained about the #44 haul truck's parking brake and service brake. Bennett also complained about a missing crusher guard, equipment not being tagged out-of-service, and a wire from a generator that was exposed to truck traffic.

Bennett did not report to work on Friday, January 18, 2002. Bennett asked his wife, Christina, to telephone Smasal Aggregates to tell them he was not reporting for work. Bennett went to Kansas City to look for a job.

At approximately 8:00 a.m. on January 18, Christina Bennett called Diane Latourneau to tell her that her husband was going to Kansas City and that he would not be reporting to work. (Tr. 185). Christina asked Latourneau if she could take her husband's paycheck home so that Bennett could pick it up at her house rather than go to the quarry. Christina testified she asked Latourneau to take her husband's paycheck because he would not be able to return from Kansas City before the quarry closed. (Tr.88-89). Bennett testified he wanted to pick his paycheck up at the Latourneau's house because it was located closer to his home than the quarry. (61-62). Latourneau told Christina that she would ask Mike Smasal if she could take Bennett's check home.

At approximately 8:00 a.m. on January 18, at the same time Bennett apparently was en route to Kansas City in search of another job, MSHA Inspector Rodney Lee Rice arrived at Smasal Aggregates in response to Bennett's complaint. During his inspection, Rice initially was accompanied by Darrell Siercks and later joined by Mike Smasal. Rice inspected the #44 haul truck that had been driven by Bennett. Rice's inspection confirmed that the parking brake had been disconnected. However, Rice determined that the service brakes were not defective. In fact, Rice observed that the rear brakes locked before the front brakes and he determined that a new set of rear brakes recently had been installed. Rice did not find any guarding violations. There is no evidence that any of Bennett's other complaints were confirmed during Rice's inspection. Rice testified that it was obvious to Smasal that Bennett was the source of the complaint because Bennett had driven truck #44 and he did not report to work. Smasal admits he knew Bennett had complained to MSHA. (Tr. 171).

At approximately 2:00 p.m. Christina again telephoned Latourneau who told her Bennett's "final paycheck" would be sent by certified mail. Christina told Loutourneau that her husband would telephone Smasal later in the day. (Tr. 186).

At approximately 3:00 p.m., Smasal received a telephone call from Bennett. Bennett's version of the telephone conversation is markedly different from Smasal's recollection of the telephone conversation. Bennett alleges Smasal told him "'I'm firing you - - or you quit'" because he walked off the job and because he complained to MSHA. (Tr. 64). Bennett testified that he told Smasal that he had not quit. (Tr. 62-64).

Contrary to Bennett's testimony, Smasal testified that the primary purpose of Bennett's call was to inquire about his paycheck. Smasal stated he told Bennett he should have slowed his truck down instead of quitting and going home at which time Bennett asked if his unemployment would be contested. When Bennett was told that he could not get unemployment because he had quit, Smasal testified Bennett became disturbed and threatened to make Smasal's life difficult. (159-61).

On January 25, 2002, Bennett filed the subject discrimination complaint with MSHA. In his complaint Bennett asserts he was terminated on January 18, 2002, because he "complained about safety."

IV. Further Findings and Conclusions

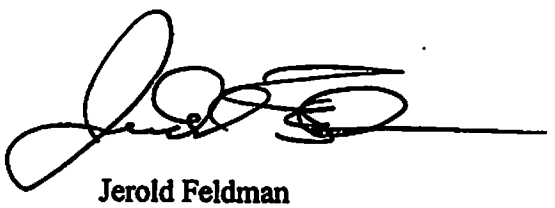
As noted, the scope of this temporary reinstatement proceeding is extremely limited. Specifically, the Secretary is not presently obliged to demonstrate that Bennett's complaint is meritorious. Rather, the Secretary need only show that Bennett's claim is not frivolous.

It is undisputed that Smasal Aggregates was aware of Bennett's alleged protected activity, *i.e.*, his January 17, 2002, MSHA complaint. However, Bennett's January 17, 2002, MSHA complaint is protected activity for the purposes of his complaint only if Bennett had not already severed his employment relationship with Smasal Aggregates by walking off the job. In this regard, the present record contains contradictory evidence concerning whether Bennett's actions on January 17 and January 18, 2002, provide an adequate basis for concluding that Bennett quit his job as Smasal Aggregates contends, or, whether Bennett was fired.

Nevertheless, it is not the judge's duty to resolve conflicts in testimony at this preliminary stage of this discrimination matter. *Secretary on behalf of Earl Charles Albu v. Chicopee Coal Company*, Inc., 21 FMSHRC 717, 719 (July 1999). I need only determine whether Bennett's claim that he was fired is non-frivolous, not whether there is sufficient evidence to justify Bennett's permanent reinstatement. *Id.* At this preliminary stage of this discrimination proceeding I conclude that the Secretary has satisfied her very minimal burden of demonstrating that Bennett should be temporarily reinstated.

ORDER

In view of the above, Smasal Aggregates **IS DIRECTED** to immediately reinstate Randy Lee Bennett to the haulage truck driver position he held on January 17, 2002, or to a substantially similar position, at the same rate of pay and benefits Bennett formerly received. In ordering reinstatement, I am expressing no inclination regarding the ultimate outcome of Bennett's underlying discrimination complaint. The Secretary should endeavor to complete, as soon as is practicable, its investigation in this matter so that Bennett's discrimination complaint may progress to a full evidentiary hearing on the merits.



Jerold Feldman
Administrative Law Judge

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