FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 26, 1996

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on	:	
behalf of IRINEO G. BELTRAN,	:	Docket No. CENT 96-40-DM
Complainant	:	MSHA Case No. SC MD 95-02
v.	:	
	:	Chino Mines
TERRAZAS, INCORPORATED,	:	Mine I.D. No. 29-00708
Respondent	:	

DECISION AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Complainant;
Matthew P. Holt, Esq., Sager, Curran, Sturges & Tepper, Las Cruces, New Mexico, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrimination and an application for temporary reinstatement filed by MSHA on behalf of the complainant, Irineo G. Beltran, formerly employed by the respondent as a laborer. The complaint was filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801*et seq.*, following an MSHA investigation, and MSHA seeks the temporary reinstatement of Mr. Beltran pending further consideration of his complaint.

The complaint and supporting affidavit alleges that the respondent discriminated against Mr. Beltran by unjustly terminating him on or about March 21, 1995, for refusing to work in unsafe conditions, namely, his alleged refusal to operate an unsafe sweeper used for cleaning the mine parking lots. In

this regard, the supporting affidavit executed by MSHA's Acting District Manager for the South Central District states, in relevant part, as follows:

> *** The investigation determined that Mr. Beltran was discharged on March 21, 1995, when he refused to operate an unsafe sweeper used for cleaning parking lots. The continued operation of the sweeper could have resulted in serious injury to the complainant or another employee because its defects made it difficult to control and it could have run into another vehicle or employee.

The relief requested by MSHA includes (1) a finding that the respondent unlawfully discriminated against the complainant by discharging him for engaging in protected activity, (2) an appropriate civil penalty assessment against the respondent pursuant to section 110(i) of the Act for the alleged violation of section 105(c)(1), and (3) the temporary reinstatement of Mr. Beltran to his laborer's position, at the prevailing wage rate and with the same or equivalent duties as assigned to him immediately prior to his discharge.

The respondent filed a timely answer to the complaint contesting Mr. Beltran's reinstatement and denying that he was terminated. The respondent asserted that Mr. Beltran "chose to leave of his own free will" after being told "to do a better job on the project that he was involved with at the time, or else to go ahead and go home." Respondent concluded that "Mr. Beltran's choice was to leave his work site rather than to do a better job." The respondent further asserted that the Gehl sweeper in question was not cited by MSHA, and was inspected by one of its inspectors and found to be "fine and safely operable."

A hearing was conducted in Truth or Consequences, New Mexico, and the parties appeared and presented testimony, evidence, and arguments on the record in support of their respective positions. At the conclusion of the hearing, I issued a bench decision concluding that the complaint filed by MSHA was not frivolous and that Mr. Beltran should be temporarily reinstated pending a further hearing on the merits of his complaint.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(1), (2) and (3).

3. Commission Rules, 29 C.F.R. § 2700.1, et seq. particularly Rule 45, 29 C.F.R. § 2700.45, Temporary reinstatement proceedings, which states, in relevant part, as follows:

> 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. 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 witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

Stipulations

The parties stipulated that the presiding judge has jurisdiction in this matter, and that the respondent is covered by the Act. The respondent agreed that it is an independent contractor performing cleaning operations at the parking lot of the subject mine, and that for the purposes of this proceeding, it is a covered employer (Tr. 8-9).

Issue

The issue presented is whether or not the petitioner's discrimination complaint filed against the respondent has been frivolously brought.

Discussion

Mr. Beltran's signed initial complaint, dated April 10, 1995, and filed by mail with MSHA's Albuquerque, New Mexico field

office on April 14, 1995, states that he was discharged by the respondent on March 21, 1995, from his $6.75 per hour laborer's job. His verbatim complaint states as follows:

> On March 21st 1995 at 12:20 p.m. I was on lunch break. I was setting inside unit #5 pickup truck, Cruz Terrazas came to the truck where I was eating lunch in a very angry mode, and ask me what kind of shit I was doing. I ask him why? He replied that kind of shit you are doing is no good. I told him I could not do any better because the sweaper was no good. I told him this sweaper is not so safe to do the job. Cruz then left. In about 2 minutes he returned, was still very angry and approached me again. He was saying to me to do a better job than that or get the fuck out. He was so close to my face I could feel spit hitting my face. I told Cruz this sweaper is not safe and I will not continue to operate it. Cruz told Carlos Miranda, another employee, to get me out of the mine. He repeated very angry over and over get him out get him out. I feel I should get back and be payed (sic) for all the time and money I have spent on gas looking for work.

A supporting statement by laborer Carlos Miranda, included as part of Mr. Beltran's complaint, states as follows:

> On March the 21st at 12:20 p.m. I Carlos Miranda was having lunch with Mr. Irineo Beltran. When Cruz Terrazas was telling Mr. Beltran he had to do a better job then what he was doing or to get the fuck out of the mine. Mr. Beltran told Cruz he could not do any better because the sweeper was no good and not safe to work with. Cruz was very angry with Mr. Beltran because he want him to do a better job. Mr. Belrtan explained the conditions of the sweeper, but Cruz told me in a very angry voice to get this man out of the mine. Over and over. He was right in Mr. Beltran face. Mr. Beltran walked away.

At this stage of the proceeding, the only issue is whether or not the petitioner's complaint has been frivolously brought and whether Mr. Beltran should be temporarily reinstated pending a further hearing on the merits of his complaint. Any findings and conclusions with respect to the ultimate issue of alleged discrimination, including any remedial sanctions and remedies, will be made after a hearing on the merits has been concluded. See: Secretary v. Thunder Basin Coal Company, 15 FMSHRC 2425 (December 1993); and Secretary v. Jim Walter Resources Inc., 9 FMSHRC 1305, 1306 (August 1987), aff'd Jim Walter Resources Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990), where the court

stated, as follows, at 920 F.2d 747:

> 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.' See Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir. 1975) cert denied, 426 U.S. 934, 96 S. Ct. 2646, 49 L.Ed 2d 385 (1976).

At the hearing, the petitioner presented the testimony of adverse witness Cruz Terrazas, the respondent's vice-president, Judy Peters, the MSHA special investigator who conducted an investigation of Mr. Beltran's complaint, Mr. Beltran, and Carlos Miranda.

The respondent relied on the testimony of Mr. Terrazas, Anthony Maynes, formerly employed by the respondent in March, 1995, as an operator/laborer, and now employed by the Phelps Dodge Mining Company, and Jesus Perez, employed by the respondent as a site superintendent, and who was the project supervisor for the work being performed by the respondent at the Phelps Dodge Chino Mine in March 1995.

Cruz Terrazas, respondent's vice-president, testified that the respondent is an independent contractor and that on March 21, 1995, it was performing contractual cleanup work at the Chino Mine, a copper mine located in Santa Rita and operated by the Phelps Dodge Company. He stated that Mr. Beltran was employed as a laborer and had worked for his company "on and off" for more than two years.

Mr. Terrazas stated that on March 21,1995, Mr. Beltran was assigned to operate the Gehl sweeper to clean the mine parking lot area. He considered Mr. Beltran to be a trained equipment operator, but did not know who trained him, and he was not aware of any training records for Mr. Beltran at that time.

Mr. Terrazas stated that his job foreman and Mr. Beltran's supervisor at the work site on March 21, 1995, was Jesus Perez, and that he (Terrazas) went from job site to job site to check out the work. There were two Gehl sweepers and seven other sweepers at the site on March 21, and he did not know if maintenance records were maintained at that time. Mr. Terrazas stated that he considered Mr. Beltran to be a "complainer" who always found someone else, or the equipment, to be at fault. He stated that he was unaware of any employees who were fired in 1995 (Tr. 10-18).

Mr. Terrazas stated that he could not recall testifying at Mr. Beltran's unemployment claim hearing that the sweeper in question had two uneven tires. He believed that the sweeper operated by Mr. Beltran on March 21, had the same sized tires and that the sweeper mechanism was an attachment that was new. He was not aware that the sweeper had a pin missing or that it leaked hydraulic oil. He stated that the sweeper was approximately one year old (Tr. 27-28).

Mr. Terrazas identified complainant's Exhibit No. 1 as a copy of a discharge slip stating that Mr. Beltran was discharged on March 21, 1995, and he confirmed that Sammie Vigil, whose signature appears on the slip, is one of his superintendents. Mr. Terrazas was of the opinion that Mr. Beltran quit his job (Tr. 28-30).

Mr. Terrazas denied that he has a bad temper, but admitted that he is impatient. He confirmed that he and Mr. Beltran were arguing at the time of the March 21 incident. He stated that 22 people were assigned to clean the mine site that day, and that the parking areas consisted of approximately one acre. He stated that he told Mr. Beltran that he wanted the job done and gave him the option of using a broom and shovel, rather than the sweeper, to get the job done.

On cross-examination, Mr. Terrazas stated that he had a contractual obligation to complete the mine clean up job by the next day, March 22, and to remove all of his equipment by one o'clock. He stated that other employees were using brooms and shovels to clean up, and he did not believe that this was unsafe. He stated that no one informed him that there was anything wrong with the sweeper, and Mr. Beltran simply told him that it was an old piece of junk that was "not worth a shit." He further stated that Mr. Beltran said nothing about any missing

pins, hydraulic leaks, or uneven wheels (Tr. 35-39).

Mr. Terrazas stated that the sweeper and the machine to which it is attached operate at one speed, and that if it is operated too fast, it will not pick up all of the dirt and will leave it in rows on the ground. He stated that he told Mr. Beltran to slow down while operating the machine and that he assigned someone else to operate it after Mr. Beltran quit and left the work site at noon on March 21 (Tr. 39-40).

Mr. Terrazas stated that no one advised him that there was a problem with the sweeper machine and that MSHA inspected it after the complaint was filed and that it was not "red-tagged" as unsafe. He denied that Mr. Beltran was discharged for safety reasons or out of retaliation for making safety complaints (Tr. 42-45).

Mr. Terrazas stated that he visited the work site on March 20, but did not recall how long he was there and could not recall seeing anyone there. He was at the site the next day, March 21, for approximately 45 minutes and recalled that he spoke with Mr. Beltran for ten to fifteen minutes. He stated that Mr. Beltran did not want to hear anything else and kept repeating that the sweeper machine "was a piece of shit" and that he was upset and angry. Mr. Terrazas stated that his employees were not afraid to complain to him, but that all complaints were to go to their foremen (Tr. 46-49). Mr. Terrazas denied that his employees were afraid to complaint to him out of fear of being fired (Tr. 51).

In response to bench questions concerning the company separation form stating that Mr. Beltran was discharged, Mr. Terrazas stated that the superintendent who signed it assumed that Mr. Beltran had been fired because Mr. Beltran told everyone that this was the case and the form had already been filled out (Tr. 52-53).

Judy Peters, MSHA Supervisory Safety and Health Inspector, confirmed that she conducted the investigation of Mr. Beltran's complaint and initially contacted and interviewed Mr. Beltran and Mr. Miranda. She also interviewed Superintendent Virgil, Mr. Terrazas, and other company personnel who provided her with the respondent's defense. She stated that she determined that an act of discrimination occurred after considering the five elements necessary to make that determination, namely that Mr. Beltran was a miner working at a mine location; that he was involved in protected activity by operating a piece of machinery at a mining operation and made a safety complaint; and that an adverse action of discharge had been taken against him. She also considered the respondent's defense and concluded that there "was the nexus, which is a connection between all of these acts" (Tr. 60-62).

Ms. Peters stated that after she concluded that a case of discrimination occurred, her recommendation and file was forwarded to MSHA's District Manger, and then to MSHA Headquarters in Arlington, Virginia, where the Solicitor's Office decides whether to pursue the case further (Tr. 62-63).

Ms. Peters explained her investigative contacts and interviews, including interviews with Mr. Terrazas and Mr. Beltran, and she confirmed that she either took their statements personally, or was present and transcribing their statements taken by a fellow inspector (Tr. 66-67).

On cross-examination, Ms. Peters declined to make the investigative file available to the respondent's counsel or to reveal the names of any miner witnesses she may have interviewed, and objections posed by counsel were overruled (Tr. 68-73). She confirmed that her conclusions regarding the complaint were made after she completed the investigation and after she spoke with Mr. Terrazas (Tr. 74). She confirmed that she did not inspect the sweeper in question, and responded as follows to questions about Mr. Beltran's belief that the sweeper was unsafe (Tr. 74-75):

> Q. If there was nothing wrong with the Gehl sweeper, and if Mr. Beltran believed there was nothing wrong with the Gehl sweeper, do you believe he would be protected in the event that someone took action against him because he said the equipment was a piece of shit?
>
> A. All the complainant has to have is a sincere belief that the piece of equipment is unsafe to operate and could cause him or any other individual harm.

Q. I don’t think you answered my question.

A. Well, rephrase the question, please.

Q. If, in fact, there wasn’t anything wrong with the equipment, and if, in fact, Mr. Beltran did not believe there was anything wrong with the equipment, would he be protected if he made complaints about it?

MR. BURFORD: I think its’s been asked and answered.

JUDGE KOUTRAS: Well, he’d be protected, counsel , but he probably wouldn’t prevail in his discrimination case. I think that’s the answer, wouldn’t you agree?

THE WITNESS: Yes, sir.

Ms. Peters stated that she evaluated whether or not Mr. Beltran sincerely believed the sweeper was unsafe by the statements made by Anthony Maynes and Carlos Miranda. Mr. Maynes stated that Mr. Beltran said that someone was going to get hurt on the sweeper (Tr. 76).

Ms. Peters stated that she was not provided with any information that Mr. Beltran had ever been reprimanded, and she was unaware of his state unemployment compensation claim until after her investigation (Tr. 77).

In response to bench questions, Ms. Peters stated that an MSHA inspector went to the work site the week the complaint was filed to inspect the Gehl sweeper in question. However, the only one he found was being repaired in the shop and could not be inspected, and a second one could not be found (Tr. 83-84). No determination was made as to which sweeper Mr. Beltran may have been operating on March 21, 1995, because there was some confusion as to the sweeper serial number and Mr. Beltran was not present to point it out (Tr. 84).

Ms. Peters stated that when she interviewed Mr. Beltran he described in detail several things that were wrong with the sweeper, including a missing pin, lack of reflectors, an inoperable back-up alarm, and difficulty in controlling the directional machine hydraulic controls, and he expressed his fear that the missing pin might cause him to overturn and that he had to use both hands to control the hydraulic controls (Tr. 85). When asked why Mr. Beltran did not provide these details in his initial complaint, Ms. Peters responded, "the fact that he said is was unsafe was enough for us to pursue it" (Tr. 85). She confirmed that the MSHA complaint form was filled out by Mr. Beltran and mailed to the district office (Tr. 86-89).

Ms. Peters stated that Mr. Maynes confirmed that Mr. Beltran said someone would get hurt on the machine and Mr. Miranda said that Mr. Beltran was trying to tell Mr. Terrazas that the machine was unsafe, but that Mr. Terrazas would not listen to him. Mr. Miranda told her about the equipment defects, and two people told her the braking system was not working properly (Tr. 90-91). Ms. Peters stated that she determined that Mr. Maynes and Mr. Miranda were present on March 21, when Mr. Terrazas and Mr. Beltran had their discussions and that they both told her that Mr. Beltran stated that the machine was unsafe. Ms. Peters stated that based on these statements, she concluded that there was enough to move forward with the complaint (Tr. 96). She further explained (Tr. 101-102):

> THE WITNESS: Correct. Two witnesses said that he did say -- one said he said someone was going to get hurt on it, and the other one said he said it was unsafe.
>
> JUDGE KOUTRAS: These witnesses said he said that to Terrazas or he said that to the two witnesses?
>
> THE WITNESS: He said that to Terrazas.
>
> JUDGE KOUTRAS: To Terrazas?
>
> THE WITNESS: They witnessed the altercation.
>
> JUDGE KOUTRAS: Both of these people indicate to you that Mr. Beltran specifically told Mr. Terrazas that this piece of equipment, in addition to what else he said here, is, someone is going to get killed and its unsafe?
>
> THE WITNESS: Somebody is going to be hurt.

JUDGE KOUTRAS: Somebody is going to get hurt.

THE WITNESS: Right. And the individual that said that also said that he didn't understand a lot of Spanish, and he couldn't understand everything that was being said, but he did understand that he said someone was going to get hurt, because for most of the conversation, evidently, Terrazas and Beltran were speaking in Spanish.

Ms. Peters stated that Mr. Terrazas did not state to her that he fired Mr. Beltran for complaining about safety, but did say that "he gave him a choice" (Tr. 104).

Irineo Beltran, the complainant, testified that he has worked for the respondent for two or three years. He stated that he operated the Gehl sweeper on March 20, 1995, and inspected it before using it. He found that it was low on hydraulic fuel, had no front or rear reflectors, no backup alarm, no safety belt, and the left front tire was flat. He reported these conditions to Jesus Perez, the general foreman, and Mr. Perez told him to call the mechanic to start the machine and that Mr. Perez would send someone to take care of the flat tire. Mr. Beltran operated the machine, and inflated the tire three times during the course of cleaning up that day with the sweeper (Tr. 107-111).

Mr. Beltran stated that the next day, March 21, 1995, while eating his lunch in his truck, Cruz Terrazas confronted him about the work that he was performing and told him "to get the fuck out" if he could not do a better job. Mr. Beltran stated that he told Mr. Terrazas that the equipment was not safe and offered to prove it to him, but that Mr. Terrazas replied, "I don't want to hear nothing you say" (Tr. 111). Mr. Terrazas then instructed Carlos Miranda to escort him from the property, told someone in the security office that he had fired him, and Mr. Beltran left the property (Tr. 113).

Mr. Beltran testified about his prior experience and training operating similar equipment, and he explained that the sweeper flat tire was changed, but the new tire was too big. When asked if this created a safety problem, he responded as follows (Tr. 114-115):

Q. Does that create a safety problem?

A. I feel that's not safe to do the work because, if you run it too fast, you can turn over or you can hurt somebody.

Q. What about --

JUDGE KOUTRAS: Excuse me. What if you didn't run it too fast?

THE WITNESS: If you run it too fast with the big large tire and one small tire on the right side, you can turn over.

JUDGE KOUTRAS: What does too fast mean? Why would you run it too fast?

THE WITNESS: I never ran it too fast.

JUDGE KOUTRAS: If you didn't run it too fast, would there be a problem?

THE WITNESS: No.

Mr. Beltran further stated that the sweeper attachment had one bolt missing and one bolt was four inches too high, and with an uneven front tire, "it's impossible for you to do the work" (Tr. 115). He confirmed that he informed Mr. Perez about the sweeper conditions on March 20, but that Mr. Perez "didn't pay too much attention to me." Mr. Terrazas was not present at that time, but that he tried to tell him about the sweeper conditions on March 21, "but he didn't listen to me, he just walked away and said I don't want to hear nothing about the equipment because I bought that equipment brand new and I'm pretty sure it will work" (Tr. 117).

Mr. Beltran explained the problem of operating the sweeper with no reflectors and low hydraulic oil. He stated that he was supposed to be doing other work on March 20 and 21, that he was

not a sweeper operator, but was "forced to do the job in the sweeper without training or qualifications. He stated that he had not previously used such a sweeper (Tr. 118).

On cross-examination, Mr. Beltran testified about his prior experience operating equipment similar to the Gehl sweeper. He denied ever being laid off by the respondent (Tr. 121-122). He also denied any prior reprimands or disciplinary actions against him (Tr. 124-125). He explained that he could have done a better job with another sweeper, but the one he was operating "was unsafe to work" (Tr. 129). He concluded that he had operated the sweeper 15 hours on Monday and Tuesday, before Mr. Terrazas spoke with him, but denied that the sweeper was ever safe and stated that he operated it because he was told to (Tr. 130). He maintained that Mr. Terrazas fired him because he got mad when he told him the equipment was unsafe, and became angrier when he told him the equipment was no good (Tr. 132).

Mr. Beltran confirmed that Mr. Miranda and Mr. Maynes were present during his encounter with Mr. Terrazas, but that Mr. Maynes was 75 to 80 feet away and did not hear their conversations (Tr. 133). Mr. Beltran stated that on March 21, he never refuse to work or state that he was not going to do the job (Tr. 134).

In response to bench questions, Mr. Beltran stated that on March 20 and 21, he was competent to operate the Gehl sweeper and had previously operated one similar to that machine to transport barrels (photographic Exhibit R-5). He further stated that he had not previously operated the sweeper in question in this case, but had operated others in better shape and good condition (Tr. 138-140). He conceded that he operated the sweeper that he considered was unsafe, but did so because the general foreman told him he did not have the time to take care of it and that he was to go ahead and do the job with the machine (Tr. 141). He did not consider parking the sweeper because he believed he would be fired and needed the job (Tr. 142-143).

Carlos Miranda, formerly employed by the respondent as a laborer, testified that he was present at the job site on March 20 and 21, 1995, and heard Mr. Beltran tell Mr. Perez about the condition of the sweeper on March 20. He also heard the conversation between Mr. Beltran and Mr. Terrazas on March 21. Mr. Terrazas told Mr. Beltran that he was not doing a good job and Mr. Beltran told Mr. Terrazas that the machine was not working properly (Tr. 146). Mr. Terrazas then told Mr. Beltran that "he was going to run him off," and told Mr. Miranda three times to remove Mr. Beltran from the property (Tr. 147).

Mr. Miranda described the condition of the sweeper in

question and stated that he told Mr. Beltran that he could not use it on March 21 because "it wasn't safe to work on the machine" (Tr. 149, 154). He confirmed that Mr. Maynes was present, "but fairly far away," and that he (Miranda) was closer and heard all of the conversation between Mr. Terrazas and Mr. Beltran, but did not understand when they spoke English (Tr. 147, 150).

Anthony Maynes, currently employed by Phelps Dodge Mining Company, and previously employed by the respondent as an operator/laborer on March 21, 1995, testified that he was operating a scraper with a bucket that day scraping up dirt. Two Gehl sweepers were being operated that day, and Mr. Beltran was operating one of them. Mr. Maynes observed no problem with the operation of that sweeper, and Mr. Beltran did not complain to him about any problems with the machine (Tr. 172-174).

Mr. Maynes stated that he operated the sweeper that Mr. Beltran had operated before he left the mine, and he operated it with no problems after slowing it down and taking his time. He noted no defects with the machine, and did not believe it was unsafe for him or anyone else to use it, and he never told anyone that he believed the sweeper was unsafe (Tr. 175). He stated that he told Ms. Peters that he never had any problems with the sweeper, and did not tell her that it was unsafe. He confirmed that he had no conversation with Mr. Beltran concerning the sweeper and did not remember Mr. Beltran say that it was unsafe (Tr. 176).

On cross-examination, Mr. Maynes confirmed that during his interview with Ms. Peters she took his statement and he read, initialed, and signed each page, and he recalled that he told Ms. Peters that Mr. Beltran stated that the machine "was junk and stuff," and that "it was unsafe because it was junk" (Tr. 178).

Mr. Maynes stated that he only heard some of the conversation between Mr. Terrazas and Mr. Beltran, "because I was further back," and that "a lot of it was in Spanish, and I don't speak Spanish" (Tr. 180). He did not remember hearing Mr. Terrazas tell Mr. Beltran to either leave or he could stay, and also heard Mr. Terrazas ask Mr. Miranda to give Mr. Beltran a ride to the gate (Tr. 180).

Mr. Maynes confirmed that he was trained in the operation of the Gehl sweeper as part of his safety training, and that he could report safety problems to Mr. Perez, or anyone else at the job site (Tr. 181).

Jesus Perez, respondent's superintendent, testified that he supervised the cleaning project on March 20 and 21, and he told Mr. Beltran that he needed to operate the sweeper slower to avoid

leaving lines of dirt behind him. He stated that Mr. Beltran operated the sweeper on March 20, and again on March 21, until noon, and never informed him about any safety problems (Tr. 182-186).

Mr. Perez stated that he was not present on March 21, when Mr. Terrazas spoke with Mr. Beltran, but he did speak with Mr. Beltran before he left the mine and Mr. Beltran told him that he "wasn't going to put up with any more shit," and left the job site. Mr. Perez stated that Mr. Beltran mentioned that he would "get even; that he wasn't going to be treated the way he was treated" and indicated that he might write up a grievance against Mr. Terrazas (Tr. 187-188).

Mr. Perez stated that some of the foremen believed that Mr. Beltran was hard to work with and they had problems with his work (Tr. 190-193; Exhibits R-6 and R-7). Mr. Perez stated that Mr. Terrazas never said anything to him that would lead him to believe that Mr. Beltran was terminated for complaining about any safety issue, and he had no reason to believe that the termination was for reasons other than Mr. Beltran's unwillingness or inability to do the quality of work that was expected of him (Tr. 194).

On cross-examination, Mr. Perez stated that he did not recognize Inspector Peters, but did recall giving a statement to an MSHA inspector stating that he would hire Mr. Beltran back (Tr. 195). He explained the operation of the Gehl sweeper and confirmed that there were seven or eight other cleanup jobs that Mr. Beltran could have performed on March 21, if he had refused to work on the sweeper. He did not offer Mr. Beltran any of this

work. He did not believe that two written supervisory complaints against Mr. Beltran over a two-year period was excessive, and he did not record any other complaints (Tr. 199-200).

Mr. Perez agreed that a Gehl sweeper with different sized tires, a lack of hydraulic fluid, missing or loose attachment bolts, and missing reflectors would cause a safety problem and create a hazard for the operator or other people (Tr. 201).

In response to bench questions concerning the discharge slip reflecting Mr. Beltran's discharge (Exhibit C-1), Mr. Perez stated that he and project superintendent Virgil had the authority to fire employees. However, Mr. Perez did not believe that anyone fired Mr. Beltran and stated that Mr. Virgil "just wrote the paper," but he had no idea why he did so and only saw the discharge slip "after the fact" and did not try to correct it (Tr. 213-214).

MSHA argues that based on the affidavit of its acting district manager and the testimony of its witnesses at the hearing, it is clear that it has established a prima facie showing that the complaint was not frivolous. Recognizing that a difference of opinion may exist as to the merits of the complaint, MSHA concludes that it has established that it had a good faith belief that the case merits a hearing on the permanent reinstatement of Mr. Beltran.

The respondent argued that the "real issue" is whether or not the Secretary reasonably believes he should have gone forward with the case, and that this requires credibility findings by the Secretary and more than simply filing a supportive affidavit (Tr. 162-169).

The respondent further argued that there is no evidence to support any conclusion that Mr. Beltran used the word "unsafe" in describing the condition of the sweeper to Mr. Terrazas on March 21, 1995, or that Mr. Terrazas retaliated against Mr. Beltran by discharging him for complaining that there was something unsafe about the operation of the machine. The respondent maintains that Mr. Beltran "was terminated because he didn't do a good job and didn't have an acceptable excuse" (Tr. 203-205). In this regard, I take note of the fact that Mr. Terrazas testified that Mr. Beltran voluntarily quit his job and was not discharged. In any event, the thrust of the respondent's arguments concerning the "frivolously brought" issue is that the Secretary had no probable cause to go forward with a case of discrimination, and that the nexus of the alleged discriminatory conduct is lacking (Tr. 204-205).

I take note of the fact that the respondent's position

that Mr. Beltran voluntarily quit his job is contradicted by its own testimony and assertion that he was discharged for cause for doing a poor job. With regard to the respondent's assertion that Mr. Beltran did not specifically or directly articulate any safety complaint to the respondent, I note that he has a limited education, with a poor command of the English language. I find that his testimony, and the testimony of Mr. Miranda, is consistent with Mr. Beltran's initial complaint that he considered the condition of the sweeper in question to be unsafe to do the job to which he was assigned. I also note that Mr. Beltran's testimony that Mr. Terrazas would not give him an opportunity to explain the condition of the sweeper is supported to a degree by Mr. Terrazas's testimony (Tr. 47), where he confirmed that he was angry and that all Mr. Beltran wanted to talk about was the condition of the equipment.

After consideration of the arguments presented, I stated my agreement with MSHA's position in support of the request for the temporary reinstatement of Mr. Beltran pending a hearing on the merits of the complaint of discrimination, and concluded that MSHA has carried its burden of establishing that the complaint was not frivolously brought. My bench ruling in this regard was based on my review of the initial complaint and supporting affidavit, my in camera review of MSHA's investigative file, and the testimony of the witnesses who testified at the hearing (Tr. 211).

I conclude and find that MSHA has made a sufficient showing of the elements of the complaint pursuant to section 105(c) of the Act, and my oral bench ruling in this regard is re-affirmed. The question of who will ultimately prevail in this case will be decided after a trial of the merits of the complaint.

ORDER

In view of the foregoing, MSHA's request for the temporary reinstatement of Irineo G. Beltran **IS GRANTED**, and the respondent **IS ORDERED** to reinstate Mr. Beltran to the position of laborer which he held on March 21, 1995, or to a similar position, at the same rate of pay and with the same or equivalent duties. The reinstatement shall be made within fifteen (15) days of the date of this decision.

The parties **ARE FURTHER ORDERED** to communicate with each other for the purpose of agreeing to a convenient trial date for a hearing on the merits of the complaint, and they are to communicate this to me by telephone, fax, letter, or conference call within the fifteen day period.

George A. Koutras
Administrative Law Judge

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