FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 28, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **WILLIAM C. ALLEN** Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. CENT 2001-366-D
	:	SC MD 01-11
v.	:	
PEA RIDGE IRON ORE COMPANY, INC., Respondent	:	
	:	Mine: Pea Ridge Iron Ore Co.
	:	Mine ID 23-00454

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me upon application, filed by the Secretary on August 2, 2001, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2), for an order requiring Pea Ridge Iron Ore Company, Inc. ("Pea Ridge") to temporarily reinstate William Allen to his former position as a long hole drill operator/blaster at its mine, or to a similar position at the same rate of pay, with the same or equivalent duties. Section 105(c)(2) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The application is supported by declaration of Ronald M. Mesa, Mine Safety and Health Administration ("MSHA") special investigator assigned to the Dallas, Texas District Office, and a copy of the discrimination complaint filed by Allen with MSHA on February 27, 2001.[1] The application alleges that Allen was terminated from employment by Pea Ridge because of safety concerns Allen had raised with MSHA inspectors during an escapeways inspection of the mine.

Pea Ridge elected not to request a hearing and on August 27, 2001, filed its Opposition

[1] Allen's Discrimination Complaint names Thomas Gallagher, director of personnel, as the management official responsible for the adverse action, and alleges that Allen was terminated on January 29, 2001, for refusing to submit to drug testing without benefit of legal counsel, on the heels of having reported, "among other things, the poor condition of the middle incline between 2475 level and 2370 level." Allen's Complaint also alleges that mine operations supervisor Jeff Sumpter had observed Allen's conversation with the MSHA inspectors on January 24, 2001.

to the application, with declarations of Pea Ridge employees Thomas Gallagher (with attachments), Jeff Sumpter, Jim Reed, Jr., and Dennis Lafferty, therein denying that Pea Ridge had discriminated against Allen and asserting that Allen was discharged for violating the company's drug policy. The Secretary filed her Response, with supplemental declaration of Special Investigator Mesa, on August 31, 2001. Pea Ridge filed its Reply on September 10, 2001.

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rule 45(c), 29 C.F.R. §2700.45(c), which limits the inquiry to a "not frivolously brought" standard by providing that "If no hearing is requested, the Judge assigned the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement."

It is well settled that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court explained the standard as follows:

> 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).*
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> 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 the 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*).

Ruling

The Mine Act accords to miners protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. §815(c). The Commission has consistently held a miner seeking to establish a *prima facie* case of discrimination to proving that he engaged in activity protected by the Act and, that he suffered adverse action as a result of the protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Company.*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds, sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Coal Company,* 3 FMSHRC 803, 817-18 (April 1981). In a temporary reinstatement proceeding, however, an applicant is not required to prove a *prima facie* case of discrimination, as is the ultimate burden in prevailing on the merits of the complaint, although it is useful to consider the elements of a *prima facie* case in determining whether the non-frivolous test has been satisfied.

The Secretary's allegations are based, in part, on Investigator Mesa's investigation of Allen's discrimination claims. In Mesa's Declaration of July 30, 2001, he made the following findings upon which he based his conclusion that Pea Ridge had discriminated against Allen:

> 1) on or about January 24, 2001, Mr. Allen spoke with MSHA inspectors at the mine conducting an escape ways inspection and told them that particular parts of the mine were not safe and that he had given up reporting safety concerns to management as his concerns were never addressed;
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> 2) on or about January 29, 2001, Allen's first day back to work after speaking with the MSHA inspectors, Pea Ridge asked Mr. Allen to submit to a drug test. When Mr. Allen refused to submit, because he was not able to consult with an attorney on that day, Pea Ridge terminated Mr. Allen; and
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> 3) this was Pea Ridge's first instance of requiring a drug test once an employee passed a pre-employment drug screening.

By supplemental declaration, Mesa provided additional information respecting his investigation by summarizing interviews with several Pea Ridge employees. Mesa referenced an interview with hourly "employee A," who reported to Mesa a general rumor in the mine that superintendent Larry Tucker believed that Allen had pointed MSHA inspectors to some of the underground violations that had resulted in issuance of citations and orders during the escapeways inspection. This rumor, Mesa stated, was corroborated by "Employee B," who told Mesa that Pea Ridge employees were very upset by the citations it had received during the regular and escapeways inspections. According to Mesa, both employees told him that they were unaware of drug usage on the job by Allen. Mesa stated that "Employee C" reported having seen Allen talking frequently with MSHA inspector Rodney Rice during the regular inspection which took place between November 2000 and January 2001, prior to the escapeways inspection between January and February 2001. "Employee D," Mesa asserted, told the

investigator that he had repeatedly asked Pea Ridge for a written copy of its drug policy, which he had never received, and that he had never known Allen to use drugs. Mesa states that "Employee E" told him that Pea Ridge would sometimes request that he report to work while he was off and drinking alcohol, despite the fact that he would make his supervisor aware that he had been drinking. Furthermore, Mesa asserts that Pea Ridge management officials Thomas Gallagher (employee relations director), Larry Tucker (mine superintendent), and James Sumpter (mine operations supervisor) refused his requests for interviews. Hourly employee Jim Reed refused as well, but did speak to the investigator informally. According to Mesa, Reed stated that he had never seen nor heard of Allen using marijuana and that he, Reed, had not made any allegation of Allen using drugs to Gallagher. In summary, based on these interviews, Mesa found that Allen had a reputation of reporting safety concerns, and that there was a rumor that Allen was responsible for some of the citations and orders issued to Pea Ridge by MSHA . In addition, he also found that, while Pea Ridge had discussed implementing its drug policy during several employee meetings, there was no written policy and the employees did not understand what the policy was with any certainty. Mesa concluded, therefore, that Allen's complaint of discriminatory discharge was not frivolously brought.

Pea Ridge's Opposition, supported by declarations of Gallagher, Sumpter, Reed and Lafferty, seeks to establish that Allen has only shown temporal proximity between his protected activity and his termination, which is insufficient to establish that his complaint was not frivolously brought. Pea Ridge asserts that in regularly scheduled monthly meetings from September through December 2000, employees, including Allen, were made aware of the company's intention to respond on an "incident or accident" basis to information that caused a reasonable suspicion of drug usage on the part of an employee, by requiring submission of the suspect to a drug test. According to Pea Ridge, on January 25, 2001, two non-supervisory employees, independently provided Gallagher with information that caused him to suspect employees Allen and Roger Sohn of reporting to work under the influence of drugs. Gallagher attested to Jim Reed (mechanic lead man) having reported his belief that Sohn came to work "doped up" and rumors that Allen also worked under the influence of drugs. Gallagher also attested to Dennis Lafferty (production lead man) reporting drug problems underground and alluding to Allen's work area as smelling of marijuana. It is this information, Pea Ridge asserts, that motivated Gallagher to require Allen and Sohn to be drug tested, and the sole reason for both terminations was their refusal, despite notice that the consequence of refusal was termination. Pea Ridge also maintained that employees regularly and routinely conversed with MSHA inspectors and that, prior to Allen's termination, neither Jeff Sumpter nor any other management official had reported Allen's alleged conversations with MSHA inspectors during the January 24, 2001, escapeways inspection or during any prior inspections.

Because Pea Ridge has waived its right to a hearing on the Secretary's application, while I have considered Pea Ridge's Opposition, my review must accept as true the events, as alleged by the Secretary. Indeed, what is in dispute is Pea Ridge's motivation for terminating Allen, rather than the facts giving rise to the controversy. Allen has not only shown that he engaged in protected activity during the escapeways inspection, but has also raised the possibility that he had a reputation of complaining to MSHA inspectors during previous inspections. Allen has also shown that he suffered adverse action, and he has put into question his termination by challenging the legitimacy of the drug test required by Pea Ridge. Pea Ridge, by establishing

that management was aware that miners routinely conversed with MSHA inspectors, has put into question the actual extent of Gallagher's knowledge and, while Gallagher was the deciding official in Allen's termination, whether other management officials had any input in that decision. While Pea Ridge's termination of Roger Sohn is relevant to a construction of Pea Ridge's motivation in terminating Allen, the circumstances surrounding Sohn's termination are distinguishable from Allen's because there is no allegation that Sohn engaged in protected activity. Furthermore, the evidence of exactly who reported Allen's alleged on-the-job drug usage and whether it was reasonable to require him to take a drug test is in dispute.

The temporal proximity between the protected activity and Allen's termination, in combination with circumstantial evidence of management's awareness of miners' candid conversations with MSHA inspectors, rumor that management believed Allen to have tipped off MSHA inspectors during a prior inspection, and complaints about Allen's on-the-job drug usage cast in shadow, are sufficient to meet the non-frivolous test. While, on the merits of the complaint, the Secretary bears the ultimate burden of proving pretext by a preponderance of the evidence, the allegations, as set forth in the Secretary's application, are not clearly lacking in merit and, therefore, satisfy the lesser threshold in this proceeding, of being not frivolously brought.

ORDER

For the reasons set forth above, the Application for Temporary Reinstatement is **GRANTED**. It is **ORDERED** that Pea Ridge Ore Company, Inc., **REINSTATE** William C. Allen to the position that he held immediately prior to his termination from employment on January 29, 2001, at the same rate of pay and benefits, or to a similar position at the same rate of pay and benefits, with the same or equivalent duties, effective August 30, 2001.

Jacqueline R. Bulluck
Administrative Law Judge

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