FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 5, 1995

SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF LONNIE BOWLING, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 95-603-D MSHA Case No. BARB CD 95-11
v.	:	Darby Fork Mine
MOUNTAIN TOP TRUCKING COMPANY AND MAYES TRUCKING COMPANY, INC., Respondents	:	
SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF WALTER JACKSON, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 95-612-D MSHA Case No. BARB CD 95-13
v.	:	Darby Fork Mine
MOUNTAIN TOP TRUCKING COMPANY AND MAYES TRUCKING COMPANY, INC., Respondents	:	
SECRETARY OF LABOR, MINE AND SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DAVID FAGAN, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 95-614-D MSHA Case No. BARB CD 95-14
v.	:	Darby Fork Mine
MOUNTAIN TOP TRUCKING COMPANY AND MAYES TRUCKING COMPANY, INC., Respondents	:	

ORDER GRANTING SECRETARY'S MOTION TO AMEND
AND

DECISION[1]

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Edward M. Dooley, Esq., Harrogate, Tennessee, for the respondents.

Before: Judge Feldman

On August 10 and August 15, 1995, Edward M. Dooley filed notices of appearance on behalf of Anthony Curtis Mayes (Tony Mayes), Elmo Mayes and Mountain Top Trucking, Inc. (Mountain Top). These consolidated temporary reinstatement proceedings were heard on August 23 and August 24, 1995, in Pineville, Kentucky, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. ' 815(c). This statutory provision prohibits operators from discharging or otherwise discriminating against a miner who has filed a complaint alleging safety or health violations or who has 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 miners pending the full resolution of the merits of their complaints. At trial, the Secretary moved to withdraw the temporary reinstatement application filed on behalf of Walter Jackson. (Tr. 42-43).

At the hearing, the Secretary asserted that Mayes Trucking Company, Inc. (Mayes Trucking), is the successor to Mountain Top. Tony Mayes is the President of Mayes Trucking. Consequently, despite Dooley's objections, at the hearing the Secretary was granted leave to move to amend the subject discrimination complaints to add Mayes Trucking as a respondent.

The pertinent motion to amend was filed by the Secretary on September 13, 1995. On September 15, 1995, I issued an Order

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[1] For the reasons stated herein, the caption in these matters has been amended to reflect that Elmo Mayes, William David Riley and Anthony Curtis Mayes have been deleted as parties, and, Mayes Trucking Company, Inc., has been added as a party as the successor to Mountain Top Trucking Company.

requesting Mayes Trucking to show cause, within ten days, why it should not be added as a party given the fact that Dooley has appeared in these proceedings on behalf of its President, Tony Mayes.[2]

On September 29, 1995, Dooley filed an opposition to the Secretary=s motion to amend. Dooley=s opposition was not filed on behalf of Mayes Trucking despite Dooley's representation of its Corporate President, Tony Mayes. Dooley=s opposition, which was filed on behalf of Tony Mayes as an individual, was based on the assertion the Secretary had failed to state sufficient grounds for his motion to amend. Mayes Trucking Company, Inc., failed to file an opposition or otherwise respond to my September 15, 1995, order to show cause.

Dooley is without standing to oppose Mayes Trucking's inclusion as Dooley has repeatedly stated that he does not represent Mayes Trucking in these matters. Even if Dooley had standing, his opposition is without merit. The Secretary has clearly based his motion on the successorship issue. Moreover, Mayes Trucking failed to oppose its addition as a party to this proceeding. Consequently, I view the Secretary=s motion as unopposed.

Finally, Mayes Trucking is neither legally prejudiced nor otherwise surprised by its inclusion in these proceedings as its President was represented by counsel throughout these matters. Moreover, there is no substantive difference in the Secretary=s

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[2] Commission Rule 45(e), 29 C.F.R. ' 2700.45(c), provides that decisions in temporary reinstatement matters should be issued within 7 days following the close of the hearing unless the presiding judge finds extraordinary circumstances that warrant an extension of time. Mayes Tucking Company, Inc.'s objection to its inclusion as a party, as well as the successorship issue discussed herein, required additional time for motions and briefing that justified an extension of the 7 day period for issuance of a decision.

cases against Tony Mayes as a sole proprietor and the Secretary=s prosecution against the corporate entity controlled by Mayes. Accordingly, the Secretary=s motion to add Mayes Trucking Company, Inc., as a party **IS GRANTED**.

Procedural Framework

The scope of these proceedings is governed by the provisions of section 105(c) of the Act and Commission Rule 44(c), 29 C.F.R. ' 2700.44(c), that limit the issue to whether the subject discrimination complaints have been Afrivolously 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 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.

Thus, the Afrivolously 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 of Appeals, in *J. Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), has 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 (citations omitted).
>
> . . . 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 . . . a decision on the merits in the employer=s favor. *Id.* at 748, n.11.

Consequently, 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 exceeds the Constitutional requirements of due process. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

Preliminary Findings of Fact

Mountain Top is incorporated in the State of West Virginia. Its corporate officers are Tommy C. Bays, President, and his son, Tommy Bays, Jr. Mayes Trucking is also incorporated in the State of West Virginia. Tony Mayes is the corporate President and his wife, Mary Mayes, is the Secretary. Mountain Top and Mayes Trucking leased their haulage trucks from Tony=s father, Elmo Mayes. From 1991 until 1993 Mountain Top hauled coal in Mount Carbon, West Virginia from the Cypress Mine at Armstrong Creek. Mayes Trucking also hauled coal from Cypress= mine site during this period.

On July 12, 1993, Mountain Top contracted with Lone Mountain Processing, Inc., (Lone Mountain) to haul coal from Lone Mountain=s Darby Fork and Huff Creek mines in Harlan County, Kentucky, to Lone Mountain=s processing plant in Lee County, Virginia. Mountain Top continued to lease its trucks from Elmo Mayes. Mountain Top operated approximately 30 trucks to haul Lone Mountain=s coal. Helen Mayes, Elmo=s wife, signed and issued the pay checks for Mountain Top=s employees.

The haulage route from the Darby Fork mine site is on State Road 38 to a county highway, a distance of approximately three to five miles, to Lone Mountain=s narrow private haulage road that winds up and over a mountain across state lines down to Lone Mountain=s processing prep plant near St. Charles, Virginia. The length of the haulage road is approximately seven to ten miles. Thus, the total length of the one-way haulage trip is approximately ten to fifteen miles. The average round trip takes

approximately an hour and 15 minutes to an hour and 30 minutes. (Tr. 284, 361).

Lone Mountain was dissatisfied with Mountain Top=s haulage production. Consequently, Mountain Top=s contract was extended for only six months on October 12, 1994. However, the contract was not renewed and expired on April 12, 1995. On or about April 12, 1995, Mayes Trucking took over the contractual rights and obligations that Mountain Top had with Lone Mountain. Mayes Trucking continued to operate the same trucks formerly leased from Elmo Mayes by Mountain Top and continued to employ Mountain Top=s truck drivers. Mayes Trucking also employed William David Riley, who had been Mountain Top=s truck foreman, as its own truck foreman.

Riley testified, prior to April 1995, when Mayes Trucking succeeded Mountain Top, Mountain Top=s normal workday began at approximately 5:00 a.m. when the truck drivers would arrive and prepare to load for their first trip to the processing plant. The truck drivers would make repeated trips to and from the processing plant until approximately 5:00 p.m. Thus, the normal workday was approximately 12 hours. The truck drivers were paid $13.00 per load and $6.00 per hour during any down periods when trucks were being repaired.

Riley further stated that, the extracted coal from Darby Fork started to accumulate in February and March 1995 due to severe winter snow storms that interfered with haulage operations. Thus, truck drivers were required to work until 9:00 or 10:00 p.m. during an interim period in March 1995 to haul the backlog of coal.

Bowling=s Complaint

Lonnie Ray Bowling was hired by Mountain Top on August 17, 1994. Bowling testified, when he was initially hired, he normally finished work at 4:00 or 5:00 p.m. However, as the winter weather became more severe he was required to work until the 9:00 p.m. scale cut-off which would sometimes require him to drive until past 10:00 p.m. on his last return trip to the mine site. During this period Bowling testified that he worked 80 to 85 hours per week and he estimated that he exceeded ten hours of driving each day.

Bowling testified he had complained to Riley about the long working hours. (Tr. 287). On March 7, 1995, at approximately 5:30 p.m., after Bowling had worked over 12 hours, Bowling and fellow truck driver Darrell Ball spoke to Riley and Elmo Mayes.

They expressed their concerns that it was unsafe to work such long hours. They informed Riley and Elmo Mayes that they had contacted the Department of Transportation and were advised it was illegal to drive a truck more than ten hours per day.[3] Bowling and Ball were told that if they could not work the required hours, they should Ago to the house@ and find another job. (Tr. 289). Bowling=s testimony was essentially corroborated by Ball and Riley. Bowling left and did not return to work.

On March 9, 1995, Bowling filed a discrimination complaint with the Mine Safety and Health Administration under section 105(c) of the Act. Bowling testified he received a telephone call from Tony Mayes on March 16, 1995, during which Mayes asked him to return to work. Bowling testified he returned to work the following day on Friday, March 17, 1995. He refused to drive the truck assigned to him because it had a missing nut and bolt on a rear wheel. Bowling estimated he stayed from 5:00 a.m. until approximately 8:00 a.m. when he went home. Bowling returned to work on Monday morning March 20, 1995, but found the truck still had not been repaired. Bowling tagged the truck out of service and left at approximately 9:00 a.m. Bowling testified that when he returned on Tuesday, March 22, 1995, he observed someone leaving with a load of coal with his truck. Riley asked Bowling to wait until the truck came back at which time he could have the truck to begin hauling. Bowling felt this was what Athey do just

[3] The Secretary contends the respondents are subject to the provisions of Department of Transportation (DOT) regulation 49 C.F.R. ' 395.1 that prohibit truck drivers from driving more than ten hours per day. Whether, the respondents' coal shuttle operations are subject to this regulation, and if so, whether the respondents have violated this regulation, in the absence of evidence of a pertinent DOT determination, is beyond the scope of these proceedings. However, the question of whether Bowling's DOT complaint is protected under section 105(c) of the Act is a relevant issue in these matters.

to get back at you.@ (Tr. 303). Bowling left work and never returned.

Riley disputes the dates and critical elements of Bowling=s account. Riley states Bowling returned to work on Thursday, March 23 at 5:00 a.m. Bowling was assigned truck 139 but refused to drive it. Riley states Bowling stated that he would wait on MSHA=s ruling on his discrimination complaint and that Bowling immediately left to return home. On Monday, March 27 Bowling called Riley to ask if he could return to work. Bowling arrived at work shortly thereafter but found a broken stud on the rear axle of truck 139. Since the truck mechanics were busy working on another truck, Bowling left shortly after arriving for work. Bowling returned to work on Tuesday, March 28 at 5:06 a.m. Bowling asked if there was anything for him to drive. Bowling was told by Riley to wait to see if all the drivers showed up for work. Bowling refused to wait and left. Bowling was called the next day about why he was not at work. Bowling stated he had to talk to the MSHA investigator and never returned to work. Company payroll records reflect Bowling was paid $9.00 for 90 minutes down time the week ending March 31, 1995, while he waited for an available truck. (Tr. 548, 558; Resp. Ex 5).

Fagan=s Complaint

David Timothy Fagan was employed by Mountain Top Trucking from October 1993 until he was terminated on October 10, 1994. At the time he was terminated, Fagan testified he usually worked from 4:00 a.m. until 6:00 or 7:00 p.m. However, Fagan=s testimony is inconsistent with the testimony of Bowling, Ball and Riley that shifts of more than 12 hours did not begin until after the severe weather in the winter of 1995. Fagan reportedly complained of long working hours. However, these complaints are inconsistent with his testimony that he routinely started work at 4:00 a.m. every morning in order to Aget a load up on everybody.@ (Tr. 357).

Fagan also testified that he communicated several complaints to Riley and Tony Mayes about general working conditions. For example, Fagan complained about the poor condition of State Road 38 with respect to holes in the road; the rough and bumpy road conditions on Lone Mountain=s haulage road; dust on the roads; and no truck air conditioning to filter the dust.

Approximately two weeks before he was terminated, Fagan told Tony Mayes one afternoon at approximately 12:00 noon that he was Ajust too tired@ and that he felt he was unsafe to drive anymore

that day and that he wanted to go home. (Tr. 400-401). Fagan stated Mayes told him to go home and get some rest. (Tr. 402).

On Friday, September 30, 1994, one week prior to Fagan=s last day of work, Fagan had hauled six loads of coal by 1:00 p.m. Since there was no more coal to haul, and Fagan was not getting paid the $6.00 per hour he felt he was entitled to for waiting for more coal, Fagan parked his truck and went Ahome to stay awake.@ (Tr. 403). Fagan provided no testimony to explain what, if any, effect his leaving early on September 30, 1994, had on his ultimate discharge on October 10, 1994. In fact, company records completed by Fagan reflect finishing work early on September 30 was not an isolated event. Fagan finished work between 1:00 p.m. and 3:00 p.m. during the entire week of September 30 through October 7, 1994. (Tr. 431-434; Resp. Ex 1).

Fagan had a history of three truck mishaps. In January 1994, Fagan=s truck skidded off the haulage road into a ditch during a snow storm. In May or June 1994, Fagan drove into the rear of another truck on State Road 38. Finally, Riley testified on Friday, October 7, 1994, Fagan drove around a curve on the haulage road and hit the side of the cliff with his truck in order to avoid hitting the grader. (Tr. 520-522). Although Fagan denied hitting the mountain side, he admitted to a close call with a water truck on his last day of work, Friday, October 7, 1994. (Tr. 437).

As a result of Fagan=s October 7, 1994, driving mishap on the haulage road, Tommy Bays told Riley that Fagan would have to be terminated. The following workday, on Monday, October 10, 1994, Fagan reported to work and was told by Riley that he was no longer needed.

Fagan filed his discrimination complaint on March 14, 1995, after being encouraged to do so by Darrell Ball. (Tr. 424). Fagan=s discrimination complaint states:

> I feel like I was discriminated against due to being fired for complaining about operating a coal truck unsafely. I was ordered to operate a coal truck for approximately 14 hours per day in unsafe weather conditions.
>
> In recourse, I request, my job back with back pay, regulated working hours, regulated breaks and lunch breaks. I also request one of the new trucks, and to be able to park on the Kentucky side of the mountain

instead of driving approximately 20 miles to the Virginia side to park my personal vehicle and for Lone Mountain Processing to maintain the haul road.

At the hearing, Fagan summarized the substance of his work related complaint as follows:

> It was [the] hours --- it was hours and the road conditions are (sic), you know, sometimes --- my eyes just got so sore and you just can hardly stand it sometimes. I mean, a ten-hour day or eight hours a day for driving. It takes a toll on ---. (Tr. 453).

Further Findings and Conclusions

a. Bowling

As noted above, the not frivolously brought standard imposes a considerably lesser burden of proof on the Secretary in a temporary reinstatement case than that required in a full hearing on the merits of a discrimination complaint. Thus, in order to prevail, the Secretary need only show that an applicant for temporary reinstatement engaged in activity arguably protected by the Act, and, that such activity is not so far removed from the alleged discriminatory action in time and circumstance as to render the complaint frivolous.

With respect to Bowling, refusal to perform work is protected under section 105(c) if it results from a reasonable, good faith belief that to perform the assigned work would expose the miner to a safety hazard. *Secretary of Labor on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev on other* grounds, 663 F.2d 1211 (3rd Cir. 1981); *Secretary of Labor on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 302 (April 1981); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982 (June 1982). Here, Riley, the respondent's foreman, conceded there was a significant change in the conditions of employment in February and March 1995. At that time, the usual workday was extended from 5:00 p.m. until as late as 9:00 or 10:00 p.m., in order to haul the extracted coal that had accumulated due to haulage interruptions caused by snow storms. (TR. 573-575). Thus, the Secretary has established a reasonable cause to believe that Bowling's work refusal was protected by the Act.

Similarly, consistent with *Pasula* and *Robinette*, a miner has an absolute right to make safety related complaints about mine conditions which he believes present a hazard to his health and

safety, and, the Act prohibits retaliation by mine management against such a complaining miner. Clearly, Bowling=s complaints to The Department of Transportation and The Mine Safety and Health Administration constitute protected activity.

Although Bowling was called back to work by Tony Mayes, the Secretary asserts Mountain Top=s alleged reluctance to provide Bowling with a suitable haulage truck upon his return to work was tantamount to a constructive discharge. A constructive discharge occurs when a miner who engaged in protected activity would reasonably be compelled to resign because he was forced to endure harassment or other intolerable conditions. *See*, *e.g.*, *Simpson v. FMSHRC*, 842 F.2d 639, 642 (D.C. Cir. 1988).

Whether the Secretary can prevail on the issue of constructive discharge must be resolved in a subsequent discrimination hearing on the full merits of Bowling=s complaint. However, reporting for work on three occasions without the availability of a haulage truck presents an arguable contention that Bowling was the victim of a constructive discharge. In this regard, it is noteworthy that the respondents failed to call Tony Mayes to testify about Bowling's rehiring and the circumstances surrounding his subsequent departure. Thus, the Secretary=s assertion that Bowling was constructively discharged cannot be deemed frivolous or otherwise lacking in merit. Accordingly, the Secretary=s application for Bowling=s temporary reinstatement will be granted.

b. Fagan

Section 105(c)(2) of the Act provides that a miner who believes that he has been discriminated against may, within 60 days after such violation occurs, file a complaint with the Secretary. Fagan alleges his October 10, 1994, discharge was discriminatorily motivated. Fagan=s March 14, 1995, complaint was filed with MSHA approximately 90 days beyond the 60 day filing period contemplated by the statute. Thus, the respondents assert Fagan=s complaint should be dismissed as untimely.

It is well settled that the filing periods provided in section 105(c) of the Act, such as the 60-day time period for the filing of a complaint with the Secretary, are not jurisdictional. *Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327 (August 1987), *rev=d on other grounds*, 866 F.2d 1433 (D.C. Cir. 1989). Rather, the timeliness of discrimination complaints must be determined on a case by case basis by examining whether the delay in filing deprives a respondent of a meaningful opportunity to defend.

See Roy Farmer v. Island Creek Coal Company, 13 FMSHRC 1226, 1231 (August 1991), *citing Donald R. Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986).

In this case, Fagan=s three month delay in filing his complaint is excusable because there is no showing that he was aware of the 60 day filing requirement. Moreover, the respondents have failed to demonstrate any cognizable legal prejudice in defending their positions as a result of Fagan=s filing delay. *See Walter A. Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (January 1984) (where 30 day filing delay was excused); *Cf. Joseph W. Herman v. Imco Services*, 4 FMSHRC 2135, 2139 (December 1982) (where an 11 month delay was not excused due to unavailability of relevant evidence and missing witnesses). Consequently, the respondents= request to dismiss Fagan=s complaint as untimely is denied.

Turning to the merits of Fagan=s application for temporary reinstatement, I note that Fagan=s complaint is significantly different from the circumstances in Bowling=s complaint. Bowling had no history of losing control of his truck. Moreover, Fagan was discharged on October 10, 1994, long before Bowling's complaints concerning the extended work hours caused by severe winter weather.

Thus, unlike Bowling's complaint, the central issue is whether Fagan=s expressed concerns regarding working his normal (10 to 12 hour) shift because he was too tired to operate his truck safely is protected under the Act, and, if so, whether Fagan=s October 10, 1994, discharge was motivated by his expressed concerns. *See James Eldridge v. Sunfire Coal Company*, 5 FMSHRC 408 (ALJ Koutras, March 1993); *Cf. Paula Price v. Monterey Coal Company*, 12 FMSHRC 1505, 1519 (August 1990) (concurring opinion of Commissioner Doyle that problems idiosyncratic to the miner are not protected regardless of the seriousness of the hazard). A related issue is whether Fagan=s alleged complaints about conditions inherent to his employment (*i.e.*, a dusty, bumpy, narrow and steep haulage road) are entitled to statutory protection. *See Price*, *supra*.

Regardless of whether any of Fagan=s alleged complaints are protected, the respondents contend Fagan was terminated on October 10, 1994, after his third unsafe driving incident, when he lost control and nearly missed the grader on the haulage road on October 7, 1994. Although Riley testified this incident was reported by Gary Neal, Lone Mountain=s grader operator, the

respondents failed to call Neal as a witness. (Tr. 521). In addition, as noted above, the respondents failed to call Tony Mayes to refute alleged complaints made to him by Fagan.

Thus, while Fagan=s complaint differs from Bowling=s complaint in important respects, the Secretary has presented the minimum amount of evidence to satisfy the low threshold Afrivolously brought@ standard. While the Secretary=s legal theories concerning the protective nature of the alleged complaints and the alleged discriminatory motive of Mountain Top in discharging Fagan may raise serious issues and may not be sustained at trial, the current record is adequate to warrant Fagan=s temporary reinstatement.

The Successor Issue

The Secretary asserts that Mayes Trucking is liable for the reinstatement of Bowling and Fagan as the successor corporation of Mountain Top. The Commission's successorship standards in discrimination cases are well settled and were initially enunciated under the former Federal Mine Safety and Health Act of 1969 in *Munsey v. Smitty Baker Coal Company, Inc.*, 2 FMSHRC 3463 (December 1980), *aff'd in relevant part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir.), *cert. den. sub nom. Smitty Baker Coal Co. v. FMSHRC*, 464 U.S. 851 (1983), and readopted under the current 1977 Mine Act in *Secretary on behalf of James Corbin et al. v. Sugartree Corp., Terco, Inc., and Randal Lawson*, 9 FMSHRC 394, 397-399 (March 1987), *aff'd sub nom. Terco Inc. v. FMSHRC*, 839 F.2d 236, 239 (6th Cir. 1987). *See also Secretary on behalf of Keene v. Mullins*, 888 F.2d 1448, 1453 (D.C. Cir. 1989). Under this standard, the successor operator may be found liable for, and responsible for remedying, it's predecessor's discriminatory conduct. The indicia of successorship are:

> (1) whether the purported successor company had notice of the underlying charge of possible discrimination; (2) the ability of the purported successor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the purported successor uses the same plant; (5) whether the purported successor employs the same work force; (6) whether the purported successor uses the same supervisory personnel; (7) whether the same job exists under substantially the same working conditions; (8) whether the purported successor uses the same machinery, equipment and methods of production; and

(9) whether the purported successor produces the same product. *See Terco*, 839 F.2d at 239; *Mullins*, 888 F.2d at 1454.

In the instant case there is compelling evidence of successorship. With regard to notice of the underlying allegations of discrimination, Tony Mayes, President of Mayes Trucking, clearly had managerial authority in Mountain Top. In fact, Tony Mayes recalled Bowling to work for Mountain Top in March 1995, before Mountain Top's contract with Lone Mountain had expired. Turning to the other criteria of successorship: (1) Mayes Trucking employs Riley, the same truck foreman; (2) to supervise the same drivers; (3) to drive the same trucks; (4) to haul coal from the same mine site to the same processing plant; (5) over the same route; precisely as Mountain Top had done. Thus, Mayes Trucking is indeed the successor of Mountain Top Trucking, and, clearly has the wherewithal to provide relief to Bowling and Fagan. Consequently, Mountain Top and Mayes Trucking are jointly and severally liable for their temporary reinstatement.

Although the successor criteria establishes Mayes Trucking and Mountain Top Trucking as proper parties, the Secretary has failed to demonstrate that the complainants were employed by Elmo Mayes, Riley or Tony Mayes, individually, or that these individuals are successors to Mountain Top. In addition, the evidence does not reflect that these individuals are in a position to provide the reinstatement relief requested. Accordingly, Elmo Mayes, Riley and Tony Mayes **ARE DISMISSED** as parties in these temporary reinstatement proceedings. The Secretary should address whether these individuals are proper parties in the related discrimination proceedings that involve proposed civil penalties for the alleged discriminatory acts.

ORDER

Accordingly, the Secretary=s motion to amend his applications for the temporary reinstatement of Bowling and Fagan to include Mayes Trucking Company, Inc., as a party as the successor to Mountain Top Trucking, Inc., **IS GRANTED**. Elmo Mayes, William David Riley, and Anthony Curtis Mayes **ARE DISMISSED** as parties to these temporary reinstatement proceedings.

IT IS ORDERED that Mayes Trucking Company, Inc., as the successor of Mountain Top Trucking, immediately reinstate

Lonnie Bowling and David Fagan to their former positions as coal haulage truck drivers at the same rate of pay and with the same work hours as the other truck drivers at the Darby Fork mine site.

IT IS FURTHER ORDERED that the Secretary=s motion to withdraw the temporary reinstatement application of Walter Jackson **IS GRANTED**. Accordingly, Jackson=s application for reinstatement **IS DISMISSED** without prejudice to the Secretary=s prosecution of Jackson=s discrimination complaint.

In view of the significant legal issues and defenses presented at the temporary reinstatement hearing, a full hearing on the merits of the subject discrimination complaints will be scheduled shortly in the vicinity of Pineville, Kentucky. The hearing date and location will be designated in a subsequent order.

Jerold Feldman
Administrative Law Judge

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