

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 18, 1996

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. KENT 96-218-D
on behalf of STEVE BAKER : DENV-CD-95-20
Complainant :
v. : Mine #3
: :
CEDAR COAL COMPANY INC., :
Respondent :

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee, for
Complainant;
Phil A. Stalnaker, Esq., Pikeville, Kentucky, for
Respondent.

Before: Judge Hodgdon

This case is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), on behalf of Steve Baker, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c). The application seeks reinstatement of Mr. Baker as an employee of the Respondent, Cedar Coal Company, Inc., pending a decision on a Complaint of Discrimination Mr. Baker has filed concerning the company. For the reasons set forth below, I grant the application and order Mr. Baker's temporary reinstatement.

A hearing was held on the application on July 2, 1996, in Pikeville, Kentucky. In addition, the parties filed post-hearing briefs in the matter.

SUMMARY OF THE EVIDENCE

On November 20, 1995, Baker filed a discrimination complaint with MSHA alleging that he was discharged by Larry Phillips on November 9, 1995, because [he] refused to operate the loader in conditions [he] believed to be unsafe.@ Larry Phillips is president of Cedar Coal, an independent contractor providing coal hauling services for various mines.

Baker testified that he was hired by Cedar Coal as a truck driver in July 1995. He further testified that in September 1995 his job was changed to that of front-end loader operator, loading coal into Cedar Coal trucks at the Sheep Fork Energy No. 3 mine.

Baker related that November 9, 1995, was a cold, misty day, with a temperature, according to the radio, of 19 degrees Fahrenheit around 6:00 a.m. He stated that when he arrived at work about that time, the windows on the front-end loader were frosted over.

Baker further testified that neither the heater nor the defroster worked on the loader and that he attempted to scrape the frost off of the front windshield with a cassette tape case. He stated that he loaded three or four trucks, but after hitting the last truck several times because of obstructed vision, he called the scale operator on the CB radio and told him to tell Daniel McCoy, the supervisor, that he was parking the loader and refused to run it because it didn't have a heater or defroster.

Baker claimed that he then went over to the Sheep Fork Energy No. 4 mine, where McCoy was working, and told McCoy that he refused to run that loader without no heater or defroster like it was because it was unsafe.@ He stated that at McCoy's suggestion, he called Phillips at home to tell him why he would not operate the loader. Baker maintained that when he called Phillips, Phillips told him that he no longer needed him, that he was fired.

Daniel McCoy testified that he did not observe any frost when he arrived at work around 6:00 a.m. at the No. 4 mine. He further stated that Baker told him that he had a job offer of \$12.00 per hour near his home and that he was going to quit if the heater was not fixed. He did not recall Baker claiming that it was unsafe to operate the loader and he disagreed with Baker over the length of time that elapsed between Baker's call over the CB and his arrival at the No. 4 mine.

Curtis Thacker testified that he did not encounter any frost on arriving at work at the No. 4 mine. He stated that he replaced Baker as the loader operator about 9:00 a.m. He further testified that while there was fog on the inside of the windshield, which he was able to wipe off with a paper towel, there was no frost on the

outside. He concurred with Baker that neither the heater nor the defroster worked and that it was cold in the cab of the loader.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) of the Act, 30 U.S.C. ' 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.@ The Commission has provided for this procedure with Rule 45, 29 C.F.R. ' 2700.45.

Rule 45(d), 29 C.F.R. '2700.45(d) states that A[t]he scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought.@ Thus, the issue at hand is not to determine whether or not Baker was discriminated against, but rather to determine whether his complaint appears to have merit. *Jim Walter Resources v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990). I conclude that it does.

If true, Baker's claims, that he refused to operate the front-end loader because it was unsafe and that Phillips fired him in response to that refusal, clearly set out a cause of action under section 105(c). *John A. Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989); *Simpson v. Kenta Energy, Inc.*, 8 FMSHRC 1034, 1039 (July 1986), *rev'd on other grounds sub nom. Simpson v. FMSHRC*, 842 F.2d 453, 459 (D.C. Cir. 1988); *Pratt v. River Hurricane Coal Co., Inc.*, 5 FMSHRC 1529, 1533-34 (September 1983); *Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982); *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd. Cir. 1981).

Baker's testimony was not inherently incredible. Nor was any evidence presented that indicated that he was unworthy of belief. The conflicts with his testimony presented by the testimony of McCoy and Thacker raise credibility issues which normally arise in any case. By itself, their testimony does not demonstrate that his claim is frivolous or without merit.

In a temporary reinstatement proceeding, Congress intended that the benefit of the doubt should be with the employee rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered. *Jim Walter Resources* at 748 n.11. Accordingly, I conclude that Baker's discrimination complaint has not been

frivolously brought.

ORDER

Steve Baker's Application for Temporary Reinstatement is **GRANTED**. The Respondent is **ORDERED TO REINSTATE** Mr. Baker to the position of front-end loader operator which he held on November 9, 1995, or to a similar position, at the same rate of pay and benefits **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 80202-5716 (Certified Mail)

Phil A. Stalnaker, Esq., P.O. Box 1108, Pikeville, KY 41502-1108 (Certified Mail)

/mca