FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 8, 1997

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA)	:	
on behalf of RONALD MAXEY,	:	Docket No. KENT 97-256-D
Complainant	:	BARB CD 97-07
v.	:	
	:	Mine No. 68
LEECO, INCORPORATED,	:	Mine ID No. 15-17497
Respondent	:	

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Inc., Lexington, Kentucky, on behalf of Ronald Maxey;
Marco Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, on behalf of Leeco, Incorporated.

Before: Judge Melick

DECISION

This case is before me upon the application for temporary reinstatement filed by the Secretary of Labor, pursuant to Section 105(c), of the Federal Mine Safety Health Act of 1997, 30 U.S.C. ' 801 et. seq., the "Act", and Commission Rule 45, 29 C.F.R. Section 2700.45. The Secretary seeks an order temporarily reinstating Ronald Maxey to his former position as railrunner operator for Respondent, Leeco, Incorporated (Leeco), at its No. 68 Mine pending a final hearing and disposition on the merits of the related discrimination proceeding (Docket No. KENT 97-257-D).

Under Section 105(c)(2) of the Act, the Secretary is required to file an application for the temporary reinstatement of a miner when he finds that the underlying discrimination complaint has not been "frivolously brought." Under Commission Rule 45(d), 29 C.F.R. Section 2700.45(d), the issues in a temporary reinstatement hearing are limited to whether the miner=s complaint was frivolously brought. The Secretary has the burden of proving that the complaint was not frivolous. Under this Rule, the Respondent also had the 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 was frivolously brought. By providing for an evidentiary hearing comporting with due process standards at which witnesses may testify under oath and documents

may be presented, it may be presumed that the Secretary=s decision regarding temporary reinstatement must be viewed at the completion of this evidentiary hearing.

The Eleventh Circuit Court of Appeals in *Jim Walter Resources, Inc., v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990), concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, that Court equated "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit." 920 F.2d 738, at 747.

In her application for temporary reinstatement, the Secretary alleges as follows:

> On February 11, 1997, Maxey was discharged from his employment with Respondent, Leeco, Inc. This discharge occurred as a result of safety complaints made by Maxey to representatives of the Mine Safety and Health Administration on February 5, 1997, with regard to unsafe conditions at Respondent=s No. 68 Mine. These conditions included no brakes or lights on the railrunners and one man trip, railrunners sticking on point, no track communication, sanders not functioning on railrunners due to water on the track, no jacks or bars on the railrunners, overcrowded mantrips, switches installed incorrectly on the track and railrunners colliding with each other because of no lights or brakes. As a result of these complaints, an inspection was conducted by several MSHA personnel on February 7 and 9, 1997, and several citations were issued with regard to the unsafe conditions alleged by Mr. Maxey. When Mr. Maxey returned to work on February 11, 1997, he was fired.

At expedited hearings held July 2, 1997, in Manchester, Kentucky, senior MSHA Special Investigator, Ronnie Brock, testified that on February 5, 1997, he talked to Maxey by telephone. Maxey was then in another MSHA office with MSHA Special Investigator Maurice Mullins. Brock testified that Maxey claimed that he had been suspended because he made safety complaints to the operator. Brock then explained to Maxey his right to file a "105(c)" complaint. Maxey declined, stating that he would wait. Brock told Maxey that he was nevertheless obligated to send an inspector to the mine based upon the violations Maxey reported and Maxey pleaded with Brock not to send an inspector fearing he would be fired. Brock documented the conversation and told Mullins to obtain the details of the violations from Maxey.

Don Baker, a regular MSHA inspector at the Leeco No. 68 Mine, who was familiar with Maxey, received a telephone call from Maxey on the evening of February 4, in which Maxey reported that he was having trouble with the company and needed to talk. Baker met with Maxey the next day at the MSHA office and, based on what he said, referred Maxey to Special Investigator Maurice Mullins, who was also then present in the MSHA office. On February 6, Baker=s supervisor gave him a checklist of items to be inspected at the No. 68 Mine. A copy of this list, based on Maxey=s complaints, is in evidence as Government Exhibit No. 5. Baker was

told to maintain confidentiality.

Early in the morning of February 7, Baker and MSHA engineer Scott Whitaker proceeded to the No. 68 Mine to conduct the inspection. Meeting initially with second shift mine foreman Ricky Campbell, Baker stated that he was continuing his regular inspection and would be looking at, among other things, the escapeway. Baker did not immediately inspect the rail equipment, the subject of Maxey=s complaints, but proceeded first to the escapeway. He then proceeded to the track entry to deal with the issues in Maxey=s complaint. As a result of his inspection on February 7, Baker issued one citation and four notices-to-provide-safeguards relating to the rail equipment. (Government Exhibits No. 6 and 7). Baker had never previously issued this many safeguards at one time and, indeed, had only once before issued a safeguard at the subject mine.
Baker returned to the mine on February 9, and issued two additional citations for violations on the rail equipment. Baker testified that he did not give Leeco the list of safety problems furnished by Maxey nor did he tell anyone that he was present because of Maxey=s complaint.

Maxey testified that he had worked for Leeco for sixteen years prior to his suspension and had been a railrunner for the previous ten years. He had been railrunner at the subject mine for one and one half years. He explained that it is an underground mine with three sections. His job was to haul supplies to the head drives and to the working sections. He worked the 6:00 a.m. to 3:00 p.m. day shift, primarily in the 003 Section. At the time of his discharge, Vic Lewis was his supervisor.

According to Maxey, on February 4, 1997, he arrived at work around 6:00 a.m. and met with Lewis. Maxey acknowledged that on the previous day he was supposed to have taken "eight-by-eight's" to the section to be used for track support. Maxey reportedly responded that he had not done so, claiming he had not had time because he and Lewis had built a cement-block wall the day before. According to Maxey, Lewis then responded, "then you need to go to 004 Section so you=ll know what coal mining is about" (Tr. 75-76). Maxey apparently refused to go to the section and Lewis then told him to report to mine superintendents Amon Tracey or Everett Kelley. When Tracey later arrived, Maxey reported that Lewis had sent him to meet with him. Tracey conferred with Lewis and returned saying, "it sounds like to me that you quit," and told Maxey to get off mine property (Tr. 78).

Maxey denied to Lewis that he quit but, as he was leaving the mine property he ran into Talmadge Mosley, Leeco=s President. Mosley intervened with Tracey and, 20 or 30 minutes later, Maxey was called back and told that, rather than be fired he would only be suspended for five days. According to Maxey, Tracey then told him to return on February 11, to operate the "lo-lo," maintaining cables and shoveling loose coal at the belt. Tracey then asked Maxey if he had any written warnings and Maxey purportedly responded that he "didn=t think so" (Tr. 81).

That same day Maxey called MSHA Inspector Baker and followed up with a visit the next day. He reportedly told Baker that he was suspended because of the complaints he made to mine officials regarding the condition of the hoist and the railrunners. He subsequently met with

Special Investigator Mullins and provided him with a checklist of items (Government Exhibit No. 5).

Maxey thereafter returned to work on February 11, at about 5:40 a.m. No one from Leeco had contacted him after his February 4 suspension. As he was dressing for work, Lewis told him to see Tracey. According to Maxey, Tracey told him that, after reviewing his records and in light of his refusal to work he had decided to terminate him. Maxey maintains that he was shown three written warnings, one each in 1984, 1985 and 1987, and that he told Tracey that these were ten years old. Tracey apparently did not respond. Maxey testified that on February 4th, he did not recall that he had these earlier warnings, although he did remember when shown them on February 11.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination on the merits under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) rev=d on grounds, sub nom. *Consolidation Coal Co. v. Marshall*, 663 F2d 1211 (3rd Cir.1981); and *Secretary on behalf of Robinette v. United Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). At a trial on the merits, the operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively at a trial on the merits by proving that it would have taken the adverse action in any event on the basis of the miner=s unprotected activity alone. *Pasula, supra; Robinette, supra*. See also *Eastern Assoc. 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). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

It is undisputed in this case that Maxey engaged in protected activity by reporting safety complaints to MSHA on February 4 and 5, 1997, and that he suffered adverse action (discharge) on February 11, 1997. As noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981) rev=d on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator=s knowledge of the miner=s protected activity is "probably the single most important aspect of the circumstantial case."

The most striking evidence of unlawful motivation in this case is the close proximity

in time between Maxey=s safety complaints to MSHA on February 4 and 5, 1997, (followed by the inspections on February 7 and 9, 1997, during which an MSHA inspector issued Leeco four safeguard notices and three citations pertaining to rail equipment) and the subsequent termination of Maxey upon his return to work on February 11, 1997. It may reasonably be inferred in this case that Mine Superintendent Amon Tracey had good reason to believe that Maxey was the cause of the MSHA investigation resulting in the issuance of the safeguards and citations. Maxey was the supplyman operating rail equipment in the cited track area, he was suspended on February 4, and the inspections on February 7 and 9, were focused upon the rail equipment operating in the same area. In addition, the number of safeguards issued by the inspector was unusually high. Tracey himself acknowledged, moreover, that 80 percent of the time he would know about citations the day following their issuance and he did not deny that he had knowledge of the subject citations and safeguards prior to Maxey=s dismissal (Tr. 289). It is also reasonable to infer that Tracey would have been hostile toward Maxey if he had believed Maxey initiated the MSHA inspections. Leeco was liable for civil penalties for the citations and it may be inferred that compliance with the four additional safeguards would have resulted in additional expense and detraction from production.

Under the circumstances, I have no difficulty in concluding that not only has the Secretary established that the complaint of Ronald Maxey in this case was not frivolously brought, but that she has established a *prima facie* case of discrimination. Whether that *prima facie* case can be rebutted or whether the Respondent can affirmatively defend within the *Pasula-Robinette* framework are questions to be deferred for trial on the merits of the discrimination case.

ORDER

The Secretary=s application for temporary reinstatement of Ronald Maxey **IS GRANTED** and it is accordingly **ORDERED** that Leeco, Incorporated immediately reinstate Mr. Maxey to the position he held immediately prior to his discharge or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him.

Gary Melick
Administrative Law Judge

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