FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 1997

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
On behalf of	:	PROCEEDING
JERRY MICHAEL CAUDILL	:	
Complainant	:	Docket No. KENT 98-48-D
v.	:	BARB CD 98-04
	:	BARB CD 98-05
LEECO, INC.,	:	BARB CD 98-06
Respondent	:	BARB CD 98-09
	:	
	:	Mine No. 68
	:	Mine ID 15-17497

ORDER GRANTING TEMPORARY REINSTATEMENT

On November 14, 1997, the Secretary of Labor filed an application for an order requiring Leeco, Inc. (Leeco) to reinstate temporarily Jerry Michael Caudill to his former position as a maintenance foreman at Leeco=s Mine No. 68, or to a similar position at the same rate of pay. The application was supported by the declaration of Ronnie L. Brock, Supervisory Special Investigator for the Secretary=s Mine Safety and Health Administration (MSHA), and by copies of the complaints of discrimination filed by Caudill with MSHA. In the application, the Secretary alleged that Caudill, who was employed by Leeco as an electrician/repairman, was suspended and subsequently discharged as a result of being designated as a miners= representative and carrying out duties pursuant to that designation.

Leeco responded that Caudill in fact was a maintenance foreman at the mine but, jurisdictional matters aside, Leeco denied the rest of the Secretary=s allegations. Leeco=s response was supported by the affidavit of Amon Tracey, general superintendent of Mine No. 68. Leeco requested that no hearing be held on the Secretary=s application.

Commission Rule 45(c) states, AIf no hearing is requested, the Judge assigned to 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@ (29 C.F.R ' 2700.45(c)).

THE MINE ACT, THE SECRETARY=S APPLICATION, CAUDILL=S COMPLAINTS AND LEECO=S RESPONSE

The Mine Act specifically protects any miner or representative of miners from discharge or other discrimination because the miner or representative has exercised any statutory right under the Act (30 U.S.C. ' 815(c)). The Commission long has held that a miner seeking to establish a prima facie case of discrimination must prove he or she engaged in protected activity C that is, in a right protected under the Act C and suffered adverse action as a result (Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev=d on other grounds, sub nom. Consolidation Coal Co, v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); and Secretary on behalf of Robinette v. United Coal Co., 3 FMSRHC 803, 817-18 (April 1981)).

The Secretary alleges that Caudill was designated as a miners= representative on October 3, 1997. The Secretary also charges between October 3 and October 24, 1997, Caudill was subjected to threats, harassments, demotion and a cut in pay because of his designation, and that on October 29, he was discharged for the same reason.

Brock=s declaration amplifies the Secretary=s allegations. He states his review of the investigative file of Caudill=s complaints revealed, among other things, that on or about October 7, Caudill=s designation as miners= representative was posted on the mine bulletin board; that around October 7, Caudill=s pay was cut from $17.55 per hour to $17.30 per hour with no explanation; that on or about the same time Caudill was impliedly threatened with retaliation against his son (who also worked for Leeco) and that Caudill=s son subsequently was laid off; that on October 18, another miner, Tom Brown, was brought to the mine and given Caudill=s job title (second shift maintenance foreman); that on October 20, Brown began acting as though he were supervisor instead of Caudill, and on October 20, Caudill was told Brown was his supervisor; that on October 20, Leeco officials presented Caudill with forms to sign to give up his rights as miners= representative; that on October 23, Caudill was warned in writing he had failed to check in before going underground and that the company had received a citation as a result, an allegation Caudill denied; that on October 24, Caudill was suspended for five days and then was discharged on October 29, allegedly for failing to conduct a required methane check and for cursing an employee who inquired why the test was not conducted.[1]

[1] Brock=s declaration is based on MSHA=s investigation of a series of four discrimination complaints filed by Caudill between October 23, 1997, and November 5, 1997. In the first complaint Caudill specifically alleged he was threatened, harassed, and demoted Abecause of [his] designation as the representative of miners@ (Exh. B 2 (Complaint filed October 23, 1997)). In the second complaint he alleged that on October 23, he was given a warning for a violation he did not commit C a violation of the federal regulation requiring miners to sign in before going underground C and that in a separate incident he was the subject of oral harassment by Leeco=s safety director (Exh. B 4 (complaint filed October 24, 1997)). In the third complaint he alleged he was suspended on October 24, because he was a miners= representative and because he had filed two previous discrimination complaints (Exh. B 6 (Complaint filed October 27, 1997)). In the fourth complaint, he alleged his pay was cut from $17.55 per hour to

$17.30 per hour because of complaints he made about the company=s failure to make safety repairs on equipment (Exh B 8 (Complaint filed November 5, 1997)).

Leeco=s response relies on Tracey=s affidavit in which he insisted he discharged Caudill because he failed to take a required methane test prior to lighting an acetylene torch underground, that he orally abused and threatened a miner who questioned him about his failure, and that Tracey Adid not want to risk the health and safety of miners . . . by continuing to employ a foreman who had blatantly disregarded the safety of the miners working under him by refusing to take methane examinations required by law@ (Response, Affidavit 2).

Tracey also stated he attended over 20 interviews of Leeco employees conducted by MSHA during its investigation of Caudill=s complaints. During these interviews there was no testimony about a foreman making threatening comments about Caudill=s son, or about any superintendent circulating a petition asking Caudill be removed as a miners= representative. In addition, according to Tracey, there was no testimony that Caudill was demoted for anything related to his status as a miners= representative, or that Caudill was coerced in any way to sign a form relinquishing his rights as a miners= representative. Further, no one stated Caudill was denied access to methane detection equipment or exempted from complying with the regulations requiring methane examinations. Finally, Tracy maintained the cut in Caudill=s pay was an Ainadvertent error@ unrelated to Caudill=s designation as a miners= representative (Response, Affidavit 2-4).

RULING

The Act states that a complainant shall be immediately reinstated if it is determined the complaint Ais not frivolously brought@ (30 U.S.C. ' 815(c)). Echoing the Act, Commission rule 45(c) directs a judge to order a complainant=s immediate reinstatement if the judge concludes the miner=s complaint was Anot frivolously brought@ (29 C.F.R. ' 2700.45(c)). As I have noted, where no hearing is requested, the same rule requires the judge to review the Secretary=s application and to make a determination as to whether the complaint was not frivolously brought Abased on the contents of the application@ (29 C.F.R. ' 2700.45(c)).

The applicable standard for the review requires the Secretary=s legal theory, as well as the Secretary=s factual assertions, to be not frivolous. This means the judge must conclude the Secretary=s assertions could, if found to be true, support a violation of section 105(c), and that there is a Areasonable cause to believe the assertions@ or, to put it another way, that the assertions are Anot clearly without merit@ (see Jim Walter Resources, Inc. v. FMSHRC, 920 F2d 738, 747 (11th Cir. 1990)).

Certainly, a miners= representative has a right under the Act to exercise his or her duties as a representative free from harassment or intimidation of any kind. Indeed, the Act places so much importance on the contributions a representative can make to the improvement of the safety and health of the working environment, it specifically protects the representative from retaliation for his or her participation (30 U.S.C. ' 815(c)(2)). The Secretary=s theory of discrimination is that Caudill was threatened, harassed, received a cut in pay, was demoted, and then terminated because of his status as a miners= representative and because of the exercise of his responsibilities as a representative. While the theory ultimately may or may not be sustained, it is far from

frivolous. Proof of any such treatment because of any such causes would constitute a prima facie case of discrimination.

Further, a review of the Secretary=s application easily establishes the complaint was not frivolously brought. When a hearing is waived, such a review must accept and treat as fact the events alleged in the application. In other words, for the purpose of this ruling, I must assume Caudill was designated the miners= representative on October 3, 1997, a designation of which Leeco certainly was aware, and that within the next 26 days, his pay was reduced, he was demoted, suspended, and terminated. The Commission has observed that although direct evidence of discriminatory motivation is rarely encountered, circumstantial evidence of such intent may be considered. Among the indicia of intent are knowledge of the protected activity and coincidence of time between the protected activity and the adverse action (see Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981) rev=d on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F2d 869 D.C. Cir. 1983)). Leeco=s knowledge of Caudill=s designation and the subsequent chronology of adverse action is sufficient to establish reasonable cause to believe the Secretary=s assertion of discrimination and to conclude the assertion is not clearly without merit. Accordingly, the application is **GRANTED**.

It is worth emphasizing that granting the application has no bearing upon the ultimate sufficiency and credibility of the Secretary=s and Leeco=s assertions and defenses if the Secretary or Caudill subsequently bring a complaint of discrimination. Then, the assertions and defenses will be subject to the tests of trial at which the burden will be upon the complainant to prove her or his case by a preponderance of the evidence and at which the full range of procedural protections will be available to Leeco. Proof by a preponderance of the evidence is not now required because the statutory provision for temporary reinstatement represents Congress=s judgment that in situations where miners have lost jobs for alleged discriminatory reasons, a different, and lower, standard of proof is needed to facilitate reinstatement.

However, Congress also has recognized that an operator should not bear indefinitely the burden of reinstatement without having the merits upon which it is based subjected to the traditional standard of proof as determined through the full administrative hearing process. For this reason, the Act and the Commission=s implementing regulations set forth time limits within which complaints of discrimination must be investigated and filed (30 U.S.C. ' 815(c)(2), ' 815(c)(3); 29 C.F.R. ' 2700.40, ' 2700.41). When temporary reinstatement is awarded, fairness requires these limits be strictly observed.

ORDER

For the reasons set forth above, the parties are **ORDERED** as follows:

Leeco **WILL** immediately reinstate Caudill to the position he held at the time of his designation as miners= representative on October 3, 1997, and at the

correct rate of pay for that position, or to a similar position at the same rate of pay and with the same or equivalent duties.

The Secretary **WILL,** pursuant to the Act and the Commission=s regulations, on or before Tuesday, February 3, 1998, make a written determination whether or not a violation of section 105(c) of the Act has occurred, and if she determines a violation has occurred, file a complaint within 30 days of the written determination. If she determines a violation has not occurred, and Caudill wishes to pursue a complaint under section 105(c)(3) of the Act (30 U.S.C. ' 815(c)(3)), Caudill **WILL** file a complaint within 30 days of receipt of the Secretary=s notification.

If a complaint is not filed within 30 days of the Secretary=s written notification or its receipt, Caudill=s temporary reinstatement will **TERMINATE**

David Barbour
Administrative Law Judge

Distribution:

MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

Marco M. Rajkovish, Jr., Esq., Wyatt, Tarrant & Combs, Lexington Financial Center, Suite 1700, 250 W. Main St., Lexington, KY 40507 (Certified Mail)

Mr. Jerry M. Caudill, General Delivery, Daisy, KY 41733 (Certified Mail)

Tony Oppegard, Esq., Mine Safety Project/ARDF of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508 (Certified Mail)