FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 29, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, on behalf of	:	
DEWAYNE YORK,	:	Docket No. KENT 2000-255-D
Complainant	:	BARB-CD-2000-06
v.	:	
	:	
BR&D ENTERPRISES, INC,	:	Mine ID 15-18028
Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Joseph B. Luckett, Esq., Associate Regional Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant:
J. P. Cline, III, Esq., Middlesboro, Kentucky, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Dewayne York pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, BR&D Enterprises, Inc., (BR&D) to reinstate York as an employee pending completion of a formal investigation and final decision on the merits of a discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA). A hearing on the application was held in Pineville, Kentucky, on August 23, 2000. For the reasons set forth below, I grant the application and order Mr. York's temporary reinstatement.

Summary of the Evidence

Dewayne York had been employed by BR&D for approximately seven of his ten years as a miner. He worked at the #3 mine for 12-14 months prior to being terminated on May 25, 2000, and held the position of roof bolter operator on the #1 shift at the time of his discharge. By all accounts, York was a good worker and there were no complaints about his work performance.

York testified that from the time he started working at the #3 mine, BR&D followed a mining procedure that violated its approved roof control plan, in that miners would enter intersections that had not been properly supported. The work crew in a section of the mine consisted of twelve men, four of whom operated two roof bolting machines, or "pinners", referred to as the "intake" and "return" pinners. The power cables of the "intake" pinner ran along the right, or intake, side of the mine entries, and those of the "return" pinner ran along the left or "return" side. York and Charlie Price operated the "intake" pinner. After the continuous mining machine had driven an entry past where a crosscut would be made and the area had been bolted, the miner would then make a 32 foot deep cut at the face, back away from the face into the previously mined area and make another cut by turning right and starting the crosscut. While that area of the entry had been bolted, the newly created intersection was considered unsupported and BR&D's approved roof control plan specified that no miners were allowed to enter it until temporary supports, or two rows of bolts, had been installed in the newly created crosscut.[1] The intake pinner would normally bolt the crosscut, because its power cables ran along the right side of the entry and the return pinner would bolt the new cut at the face of the entry, its cables being hung along the left side of the entry.

York testified that, rather than wait for the intake pinner to install two rows of bolts in the crosscut, the return pinner and its crew would travel through the unsupported intersection to bolt the new cut at the face. York himself also entered the unsupported intersection to help hang the power cable for the return pinner. He testified that he tolerated this procedure until early April, 2000, when they encountered "draw rock"[2] presenting unstable roof conditions. At that time, he refused to continue with the procedure and insisted that two rows of bolts be placed in the opening of the crosscut before he and other miners entered the intersection. He claims that the return pinner was idle while the two rows of bolts were being installed in the crosscut and that production fell as a result. In addition to his complaints about violation of the roof control plan, which were also voiced by other bolter operators, he testified that he complained to his foreman, Jackie Jaggers, about excessive dust attributable to a failure to install line curtain and excessively wide and deep cuts made by the continuous miner. He acknowledged on cross examination that he did not attempt to bring his safety concerns to MSHA officials and did not speak directly to any other management officials about them.

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[1] The roof control plan provided that: "Openings that create an intersection will be supported by permanent supports or be supported with two rows of temporary supports on 5-foot centers across the opening before any work or travel in the intersection."

[2] Draw rock, or "draw slate" is "soft slate, shale, or rock approx. 2 in. (5.08 cm) to 2 ft. (0.61 m) in thickness, above the coal, and which falls with the coal or soon after the coal is removed." AMERICAN GEOLOGICAL INSTITUTE, A DICTIONARY OF MINING, MINERAL AND RELATED TERMS 168 (2d ed. 1996).

Jaggers testified that neither York nor any other miner had ever made such complaints to him and further denied that he had ever advised the mine superintendent or president of any such complaints. Randy Phelps, the mine superintendent testified that he had no knowledge of any complaints made by York and that he had never discussed complaints with Jagger or Stanley Ditty, the president and an owner of BR&D. Ditty testified that no-one had ever advised him that York or any other miner had made safety complaints.

On May 25, 2000, there was an unusually heavy rainstorm that caused flooding and power outages at the #3 mine and the adjacent #4 mine. York and the other miners arrived about 6:00 a.m., and waited at the mine site. York testified that it was his and the other miners' understanding from prior experience that they would not be paid until they actually started working. They tired of waiting and were repeatedly advised by management that the power would be restored in a few minutes, predictions that proved unfounded. By 9:00 a.m., the power had not been restored and some of the miners decided to leave the mine site. York left because of his belief that he was not being paid and the person that he rode with to the mine was leaving. They proceeded to the home of one of the miner's, where they could observe the road to the mine and see whether other miners also left. In all, some thirteen miners, including York, left the site.

Stanley Ditty testified that the purchaser of the mine's coal was in need of coal at that time and he was intent on producing coal that day as soon as power was restored.[3] He wanted the miners to stay at the site and communicated that desire to the superintendent, Phelps. He also testified that miners were not normally paid until they reached the coal face, but it was his long-standing practice to pay miners that stayed at a mine site at his request, at least from the time of the request.

On May 25, 2000, Ditty arrived at the mine site between 9:00 and 9:30 a.m. He determined, without consulting Phelps or Jaggers, that he would discipline the absent miners by suspending them until the following Tuesday, and began to call the homes of the miners who had left. He had a conversation with York's wife, Dejuana,[4] and later spoke with York himself. The specifics of the conversations are disputed. Ditty testified that he inquired about York's whereabouts and informed Mrs. York that her husband had left the mine and was being suspended, that she stated that he wasn't happy working at that mine, to which he responded that he was free to find another job. Mrs. York denied making any comment about her husband's happiness on the job and testified that Ditty did not tell her about a suspension, just that her husband had been fired.

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[3] Power was restored later that morning and coal was produced that day at the #3 mine. Coal was not produced that day at the #4 mine which was lower in elevation and more severely flooded. Some of the miners at the #4 mine had also left the site.

[4] Ditty testified that he called York's home and spoke to his wife. Mrs. York testified that she was at work that morning and received a call from her son, who advised that Ditty was looking for York. She then called the mine site and spoke to Ditty.

Ditty testified that York called him at the mine that morning.[5] Ditty asked why York had left the mine and was told that he didn't think he was being paid. Ditty questioned how York could believe that, asked him to cite an example, and told him he was suspending York and the other miners who had left the site. York protested the suspensions as unfair, then cursed Ditty and told him he would see him in court. York denied cursing Ditty and testified that he was told that he had been terminated and that the other miners who had left had been suspended, to which he responded that he would see Mr. Ditty in court. Ditty also denied that production could have been reduced as a result of York's claimed change in roof bolting procedures because he had excess roof bolting capacity, i.e. two roof bolters where other operators had only one, and that requiring the return pinner to wait while bolts were installed at the entrance of the crosscut would not have delayed other operations. He stated that he was advised, only in preparation for the hearing, that some miners indicated that they had followed the unlawful practice described by York, but did so in order to get longer breaks.

York filed a complaint of discrimination with MSHA on May 26, 2000, alleging that he had been discharged for making safety complaints.

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 established a procedure for making this determination. Commission Rule 45(d), 29 C.F.R. § 2700.45(d), states:

> The 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. 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 was frivolously brought.

[5] Mrs. York attempted to reach her husband by calling the wives of two miners who worked with York and was eventually successful in getting a message to him to call Mr. Ditty.

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987) *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Secretary on behalf of Bussanich v. Centralia Mining Company*, 22 FMSHRC 153, 157 (February, 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) 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 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Applicant here has presented sufficient evidence on each of the elements of a *prima facie* case to establish that his claim, on the record of this temporary reinstatement proceeding, is not frivolous.

York's testimony that he made numerous complaints to his foreman, though contradicted, would be sufficient to establish a *prima facie* case that he engaged in protected activity[6] and easily passes the lower threshold applicable here. It is undisputed that York suffered adverse action, i.e. he was terminated, while the other miners who had left the mine site received only suspensions. Recognizing that the asserted independent justification for the termination, York's cursing of Ditty, is also directly controverted, Respondent's primary argument in opposing temporary reinstatement is that the termination could not have been the product of unlawful motivation because York presented no direct evidence that Ditty had been informed that York had made safety complaints and that Respondent presented testimony establishing that he had not been so informed. However, there is enough circumstantial evidence on the issue of whether Ditty was aware of York's claimed protected activity to raise an issue as to unlawful motivation and meet the non-frivolous test. Ditty described himself as a "hands-on person" who was closely involved

[6] A complaint made to an operator or its agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act.

in the mining operations under his control. He monitored production reports and would have been aware of any reductions and the reasons therefore. If there was a fall-off in production as a result of changes in roof bolting procedures prompted by York's actions, it is highly likely that Ditty would have been familiar with all of the pertinent facts. Similarly, if York had made safety complaints, as he claims, there is a reasonable inference that mine managers, including Ditty, would have been aware of them.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Secretary on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.* As noted above, there is circumstantial evidence that Ditty would have been aware of any protected activity by York and the proximity in time of any such knowledge and the claimed adverse action is sufficient to raise an inference of unlawful motivation.

On the other hand, BR&D has presented credible evidence that York had not engaged in protected activity, that at the time of the termination Ditty had no knowledge of any protected activity by York, and, that there was an independent justification for the termination. These issues are hotly contested and cannot, and should not, be resolved at this stage of the proceedings. The investigation of York's complaint has not yet been concluded and no formal complaint of discrimination has been filed on his behalf. The purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Complainant establishes that his complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.*, 920 F.2d at 744. 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. *Id.* 920 F.2d at 748 n.11.

I find that York's complaint is not entirely without merit and conclude that his discrimination complaint has not been frivolously brought.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. BR&D Enterprises, Inc., is **ORDERED TO REINSTATE** Mr. York to the position that he held immediately prior to May 25, 2000, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

Michael E. Zielinski
Administrative Law Judge

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