

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

March 10, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
	:	PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-88-D
on behalf of Raymond Ramon,	:	MSHA Case No. PIKE CD-99-04
Complainant	:	
v.	:	Mine No. 10
	:	Mine ID No. 15-17977
EAGLE COAL COMPANY, INC.,	:	
Respondent	:	

## **ORDER OF TEMPORARY REINSTATEMENT**

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Complainant;  
Michael J. Schmitt, Esq., Wells, Porter, Schmitt & Jones, Paintsville, Kentucky, on behalf of Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act,” and Commission Rule 45, 29 C.F.R. § 2700.45, upon the application of the Secretary of Labor to temporarily reinstate Raymond Roman to his former position with the Eagle Coal Company Inc., (Eagle). The Secretary alleges in her application that Mr. Roman had been employed by Eagle as a continuous miner operator and that on or about August 7, 1999, he was constructively discharged because representatives of Eagle believed he had been cooperating with the Secretary’s investigation under Section 110(c) of the Act. The Secretary seeks to have Roman temporarily reinstated to the position he held immediately before his constructive discharge or to a similar position at the same rate of pay and with the same or equivalent duties.

Section 105(c)(1) of the Act prohibits discrimination against miners for exercising any protected right under the Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the Act” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as result of their participation.” S. Rep. No. 181, 9<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 9<sup>th</sup> Cong.

2<sup>nd</sup> Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought. *Secretary of Labor 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 (11<sup>th</sup> Cir. 1990). It is "not the judge's duty . . . to resolve . . . conflict[s] in testimony at this preliminary stage of proceedings." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). At a temporary reinstatement hearing the judge must determine "whether the evidence mustered" by the miner to date establishes that his complaint is nonfrivolous," not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources*, 920 F.2d at 747.

The "not frivolously brought" standard contained in section 105(c)(2) of the Act has been equated with a "reasonable cause to believe standard." See *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with "not insubstantial" and "not clearly without merit." *Jim Walter Resources*, 920 F.2d at 747. The legislative history of the Mine Act defines the "not frivolously brought standard" as whether a miner's complaint "appears to have merit." S. Rep. No. 181, 9<sup>th</sup> Cong., 1<sup>st</sup> Sess. 36-37 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 9<sup>th</sup> Cong., 2<sup>nd</sup> Sess. *Legislative History of the Federal Mine Safety and Health Act of 1977* at 624-25 (1978).

At hearings held March 6, 2000, Mr. Roman testified that he first began working in coal mines in 1993. He last worked at the Eagle No. 10 Mine on August 7, 1999, as a continuous miner operator. Over the previous two years there had been what Roman characterized as excessive dust at the face - - so much so that he was unable to see. As a result, Roman and, at other times, two other miners complained to Foreman Tony Armstrong and asked that a curtain be hung to remedy the problem. According to Roman the curtain was never hung and the operator in fact never complied with the requirements to hang curtains.

Roman also maintains that after he acknowledged to Eagle officials that he had met with an investigator for the Mine Safety and Health Administration (MSHA) he was harassed. He was purportedly told by Armstrong not to tell the truth to the MSHA investigator about the company's failure to use dust pumps. Armstrong purportedly reminded Roman two or three times a week that he did not want to go to jail, presumably for dust sampling violations.

Roman claims he was also harassed by management because, when the continuous miner was down for repairs, he was required to perform such undesirable tasks as shoveling the belt and picking up garbage. Before his complaint about excessive dust and before the operator learned of his meeting with the MSHA investigator he claims he was permitted to assist in repairing the continuous miner rather than shovel the belt or pick up garbage.

Finally, on August 7, 1999, Roman observed, after the "breaker" kept "knocking out," that there was a wire on the cat head presumably illegally and unsafely jumping the circuit

breaker. Testifying that he was tired of the unsafe conditions and presumably believing, based on past experience, that it would be futile to complain, he decided to quit. As he left the mine he told only the outside man, Earl Cook, that he was quitting.

A miner's work refusal is protected by the Act under conditions he reasonably and in good faith believes to be hazardous. See *Miller v. FMSHRC*, 687 F.2d 194, 195-96 (7<sup>th</sup> Cir. 1982). While the miner must ordinarily communicate his reasons for a work refusal to the operator, that is not critical when such notice would be futile. *Secretary v. Northern Coal Co.* 4 FMSHRC 126, 133 (1982). A constructive discharge is protected under the Act if conditions faced by the miner are so intolerable that a reasonable person would feel compelled to resign. *Simpson v. FMSHRC*, 842 F.2d 453, 463 (D.C. Cir. 1988). Recognizing that it is not the judge's duty to resolve the conflicts in testimony at this preliminary stage of proceedings and noting that the Secretary's theories of liability herein are "not clearly without merit," I find, based on the evidence presented, that the Secretary's application for temporary reinstatement is not frivolously brought.

### **ORDER**

Eagle Coal Company, Inc., is hereby ordered to immediately reinstate Raymond Roman to the position of continuous miner operator or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him before his departure from Eagle Coal Company, Inc., on August 7, 1999.

Gary Melick  
Administrative Law Judge

Distribution: (Certified Mail)

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