

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041  
June 21, 1995

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. PENN 95-1-D  
on behalf of : MSHA Case WILK CD 94-01  
WILLIAM KACZMARCZYK, :  
Complainant : Ellangowan Refuse Bank  
: v.  
:   
READING ANTHRACITE COMPANY, :  
Respondent :

## DECISION ON THE SECRETARY OF LABOR'S MOTION TO ENFORCE THE ORDER OF TEMPORARY REINSTATEMENT

Appearances: Stephen D. Turow, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Complainant;  
Martin J. Cerullo, Esq., Cerullo, Datte &  
Wallbillich, P.C., Pottsville, Pennsylvania,  
for Respondent.

Before: Judge Amchan

### Background

On October 15, 1993, Complainant, William Kaczmarczyk, was transferred from a light duty position at Respondent's mine to workers compensation status. He filed a complaint with the U.S. Department of Labor alleging that this action was taken in retaliation for his activities as a walkaround representative during an MSHA inspection that was completed on October 14, 1993.

The Secretary filed an application for temporary reinstatement with the Commission. Respondent requested a hearing on this application and, on September 12, 1994, I ordered Complainant temporarily reinstated. In my order I stated that "Mr. Kaczmarczyk's position, including financial compensation and benefits, must be no worse than it would be had he not been placed on compensation status on October 18 (sic), 1993," 16 FMSHRC 1941, 1947.

I further stated, in a footnote, that, "[r]espondent could not, for example, recall Complainant to work and require him to perform tasks which he is incapable of doing," 16 FMSHRC 1941, 1974, n. 7. On April 26, 1995, prior to the issuance of my decision in the discrimination proceeding, the Secretary filed an emergency motion to enforce the temporary reinstatement order. That motion alleges that between April 17 and 20, 1995,

Complainant was assigned tasks that were beyond his physical limitations in violation of my September 12, 1994 order.

The motion further alleges that Mr. Kaczmarczyk left the mine site on April 20, 1995, because he was unable to continue to work due to the stress to which he was subjected by being repeatedly ordered to perform work that was beyond his physical capabilities (Secretary's motion page 4, paragraph No. 5). The Secretary contends that Respondent constructively suspended<sup>1</sup> Mr. Kaczmarczyk on April 20, 1995.

A hearing was held on the Secretary's motion on May 19, 1995, at which the undersigned and the parties concluded that I would retain jurisdiction over the Secretary's motion to enforce the temporary reinstatement order after issuance of my decision on the discrimination complaint. A decision on the liability portion of the discrimination complaint was issued on May 24, 1995. In that decision, I concluded that Complainant's October 15, 1993, transfer was discriminatory. The matter is pending before me on the questions of damages and the assessment of a civil penalty.

#### Findings of Fact

One of the buildings at Respondent's facility is a scale house. This is a two story structure, one above ground and one below ground. The lower level is adjacent to a rectangular area that lies beneath a large scale used to weigh loaded trucks before they leave Respondent's wet silt processing plant (Tr. 10-17, Sec. Exhs. EM-1, EM-2).

In early spring of 1995, Respondent decided to repair the scale. The week before April 17, Complainant accompanied a repairmen who went underneath the scale. They found several inches of water on the floor beneath the scale which they pumped out. They also found mud on the floor around the concrete pillars that support the steel rods of the weighing mechanism. At least one of these rods was broken (Tr. 37-48).

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<sup>1</sup>At the time the motion was filed Complainant was still off of work. He returned to work on May 1, 1995, after missing 6-1/2 days, for which he has not been paid (Tr. 146-47).

On the morning of April 17, 1995, Foreman David Kerstetter, acting upon instructions from Respondent's General Manager, Frank Derrick, ordered Complainant to clean the mud out from underneath the scale so that Respondent's repairman would have a clear accessway to the broken components (Tr. 214-19, 266-74). Complainant told Kerstetter that the task was beyond his physical capabilities (Tr. 52)<sup>2</sup>.

Kerstetter described that mud as a fine coating of 1 to 2 inches in thickness, covering parts of an area approximately 15 feet wide, and 25 to 30 feet in length (Tr. 270-75). Kaczmarczyk described the mud as being generally 2 to 4 inches in depth and covering an area 12 to 15 feet in width and 50 to 60 feet in length (Tr. 37-39, 48). The two men agree that the mud would have to be shoveled into 5-gallon buckets and carried up the stairs to ground level on numerous trips (Tr. 52-54, 274-75, 228 [Prior to April 20, General Manager Derrick envisioned the mud being brought outside in buckets]).

Upon Kaczmarczyk's refusal to perform the task, Kerstetter consulted General Manager Frank Derrick and Safety Director David Wolfe. Wolfe instructed him to tell Kaczmarczyk to do whatever he was capable of doing (Tr. 255-56).

On Wednesday, April 19, 1995, Kaczmarczyk and Robert Sabaday, another light duty employee, were assigned to clean up the mud below the scale (Tr. 66-67, 178). They pumped water out of the lower level of the scale house, cleaned the steps, and then attempted to clear mud from a passageway leading to the room

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<sup>2</sup>Kaczmarczyk's physical limitations are indicated in the Secretary's Exhibit No. 5 introduced at the Temporary Reinstatement Hearing. He underwent a cervical spinal fusion in late 1991, and also has lower back pain (See e.g., Exh. R-6). In January 1992, his physician indicated that occasional bending, squatting, stooping, kneeling, crouching, pushing, pulling, and handling are within Complainant's physical capabilities. Lifting and carrying up to 20 lbs are also within his limits. Other physical demands were not evaluated.

beneath the scale (Tr. 69-72). Sabaday tried to shovel the mud into buckets but found this too difficult (Tr. 183). He then shoveled a path through the mud, placing it in piles (Tr. 188). Kaczmarczyk used a broom to sweep the path behind him and also used a dryer on the path (Tr. 185).

Foreman Kerstetter visited this area twice on the morning of April 19. He admitted to Sabaday that he did not realize how much mud there was underneath the scale, and in the passageway leading to it (Tr. 187). Sabaday told Kerstetter that it was too difficult to carry the mud out in buckets (Tr. 187, 191); Kerstetter instructed the two miners to do what they were able to do (Tr. 187).

On Wednesday, after observing Complainant and Sabaday, Kerstetter informed Respondent's General Manager, Frank Derrick, that cleaning the mud from under the scale was a difficult job (Tr. 225). Respondent then abandoned its attempt to remove all the mud from under the scale (Tr. 158, 284), and decided to concentrate on clearing an area in front of the broken scale components (Tr. 284-85). Derrick decided that on Thursday, Respondent would have to accomplish this scaled-down task by means other than carrying the mud out from under the scale in buckets (Tr. 225-26).

Derrick decided to use a grade-all, a large construction vehicle, to clean the mud out from under the scale (Tr. 226). He instructed Kerstetter to assign Mr. Kaczmarczyk to clean papers and wood in the scale house office on the building's upper floor (Tr. 226-27). Mr. Sabaday was given an unrelated assignment for April 20.

On April 20, 1995, miner Paul Houser drove the grade-all to the scale. Kaczmarczyk guided Houser over the scale and Houser dug a hole alongside the scale with his equipment (Tr. 308). This hole was intended to facilitate the removal of mud and water from below the scale (Tr. 88-93).

Shortly thereafter Foreman Kerstetter arrived. Kerstetter told Kaczmarczyk to shovel the dirt left by Houser's machine off the scale. This dirt was 2 to 3 inches in height and extended the length of the scale, possibly a distance of 60 feet. Kaczmarczyk told Kerstetter that this task was also beyond his physical limits (Tr. 94-98). Houser cleaned the dirt off the scale with the grade-all (Tr. 313-14).

Kaczmarczyk then went down the steps to the lower level of the scale house to continue sweeping (Tr. 98-99). Kerstetter followed him and asked him to make a path to the scale components

with a shovel (Tr. 100). Kerstetter took a shovel and demonstrated to Kaczmarczyk how he thought this task should be accomplished (Tr. 101-104)<sup>3</sup>. Complainant took offense to this request and the manner in which it was made (Tr. 101-02). Kaczmarczyk told Kerstetter that Kerstetter was harassing him, and that he would file "charges" against him (Tr. 104-105).

Kerstetter left the area and Complainant called his wife (Tr. 105-07). He told her that because of the harassment he was subjected to he was unable to eat (Tr. 106-110). After another phone call, Complainant decided that he should leave

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<sup>3</sup>Kerstetter denies that he ordered Kaczmarczyk to shovel mud under the scale on April 20, 1995, and contends that he demonstrated how Complainant should shovel on April 19, not April 20 (Tr. 288-291). I credit Complainant's testimony on these matters over that of Foreman Kerstetter.

Although Kerstetter may not have ordered Kaczmarczyk to work underneath the scale, I find that he did join Complainant at the lower level of the scale house on April 20. After watching the grade-all, Kerstetter concluded that the mud could not be removed by this machine (Tr. 289). Having been told by Derrick to have a path cleaned underneath the scale and having no other means of accomplishing this task, I conclude that Kerstetter renewed his request of Complainant that he shovel a path through the mud.

As to the shoveling demonstration, I rely on the fact that Kerstetter admits to making such a demonstration (Tr. 291-93), that Kerstetter's contemporaneous log for April 19 mentions no such demonstration (Tr. 304), while Kaczmarczyk's contemporaneous notes for April 20 do mention the incident (Tr. 165-66). Additionally, Mr. Sabaday, who was with Kaczmarczyk and Kerstetter on April 19, recalls no such event (Tr. 201). Moreover, a demonstration of April 20 is consistent with a turn of events in which Kerstetter's only available means of making a path to the broken parts was to have Complainant make one with a shovel since Sabaday was no longer present to do the shoveling.

fn. 3 (continued)

Finally, I simply do not believe that Kaczmarczyk made up a story about discussing shoveling with Kerstetter on the lower level of the scale house on April 20. Something occurred precipitating Kaczmarczyk's departure from the mine site on that morning. I conclude that it is more likely that his departure was caused by a dispute over the mud beneath the scale, which was likely to recur, than over the dirt on top of the scale which would not likely be an issue in the future.

the worksite (Tr. 110, 172-74). He did not return until May 1, 1995.

Respondent violated the terms of the temporary reinstatement order on April 17 and April 19, 1995

I conclude that the assignment given to Kaczmarczyk on April 17 and 19, 1995, was beyond his physical capabilities and violated the temporary reinstatement order. Kerstetter's testimony that on April 19 Respondent abandoned the goal of cleaning the entire area beneath the scale (Tr. 284), and had decided to clean up only a 4-foot by 4-foot area, confirms Complainant's assertion that the task assigned on the 17th and the morning of the 19th was far more extensive (see Sabaday's testimony at Tr. 187-92, 199-200).

Mr. Kaczmarczyk is prohibited from doing repetitive bending and twisting, particularly while carrying weight such as wet mud on a shovel (Tr. 265). Mr. Sabaday's testimony confirms that the task, as originally assigned, was beyond Kaczmarczyk's physical capabilities (Tr. 187-191).

Up until Kerstetter talked to Sabaday on the morning of April 19, Respondent contemplated having the mud carried up to ground level and outside the scale house in 5-gallon buckets (Tr. 228). Although I credit Respondent's witnesses that they continually told Kaczmarczyk to do only what he could do, I conclude that such advice was essentially meaningless in the context in which it was given. There was no way that Complainant could reasonably expect to accomplish the task assigned by doing only what he was capable of doing.

General Manager Derrick instructed Kerstetter to have the mud cleaned up. Although Derrick testified there was no hurry (Tr. 216-17), the record does not indicate that anybody conveyed to Complainant that he had an infinite amount of time to accomplish this task. Indeed, Sabaday was given the impression that the area had to be cleaned right away so that the scale could be repaired (Tr. 199).

Thus, I conclude that Kaczmarczyk was fully justified in regarding the admonitions to just do what he could as a subterfuge to pressure him to do tasks beyond his restrictions. Moreover, it is doubtful that a person with Complainant's restrictions could have tolerated the extensive number of trips up the stairs of the scale house with small buckets of wet mud that were needed to accomplish the task as originally assigned.

Complainant was not constructively discharged

or suspended on April 20, 1995

On April 20, 1995, Kerstetter again asked and pressured Kaczmarczyk to shovel wet mud, albeit from a much smaller area than on the previous two days and possibly by pushing it out of the way, rather than by picking it up. He may also have suggested that Complainant shovel the mud in buckets because after Kerstetter realized the grade-all could not remove the mud from underneath the scale, he had no alternative means of accomplishing the task given to him by General Manager Derrick.

For purposes of this decision, I conclude it is unnecessary to determine exactly what Kerstetter told Kaczmarczyk to do on April 20. As on April 17 and 19, Complainant never performed any of the tasks to which he objected (Tr. 153). Moreover, he was never threatened with any form of discipline for not doing these tasks (Tr. 153). Although Mr. Kaczmarczyk has availed himself of his union's grievance procedure on several occasions, and has represented other miners in processing grievances, he did not file a grievance regarding his dispute with Respondent over his ability to clean the mud under the scale (148-50).

Complainant was clearly very upset by the events of April 17-20, 1995. He contends that he was so upset that he could not eat and left work on April 20, due to what he perceived was constant harassment.

The issue in the instant case is not whether Mr. Kaczmarczyk was sufficiently upset to leave work, but whether conditions were so intolerable that a reasonable miner would have felt compelled to leave work, Secretary on behalf of Clayton Nantz v. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2210 (November 1994); Simpson v. FMSHRC, 842 F.2d 453, 461-63 (D.C. Cir. 1988).

In analyzing the instant case, I have paid particular attention to a decision by the United States Court of Appeals for the Third Circuit in Clowes v. Allegheny Valley Hospital, 991 F.2d 1159 (3d Cir. 1993), cert. denied 114 S. Ct. 441, 126 L. Ed. 2d 374. I do so not only because of the analogous factual situation, but because the instant case also arises in the Third Circuit.

In Clowes the court reversed an award entered in a case arising under the Age Discrimination in Employment Act, finding insufficient evidence to establish constructive discharge. Clowes, a nurse for 30 years at Allegheny Valley Hospital, alleged that excessive supervision by a new and much younger supervisor caused her to become so depressed that she resigned. The court of appeals opined that unfair and unwarranted treatment

does not necessarily constitute a constructive discharge and that an employee's subjective perception does not control the resolution of a constructive discharge claim.

As in the instant case, Clowes was never threatened with discharge or any other adverse action. She never advised the hospital that she would resign if conditions did not change and never filed a grievance under her collective bargaining agreement.

As the court notes, such factors may not be necessary to establish a constructive discharge in all cases. However, in the instant case, I conclude that a reasonable miner in Mr. Kaczmarczyk's situation, who had not been threatened with discipline and who regularly avails himself of the grievance procedure, would not leave work on April 20, 1995, and refuse to return to work until May 1.

In reaching this conclusion, I am influenced by the fact that several less drastic alternatives were available to Complainant. He could have filed a grievance and continued to refuse to do work beyond his physical capabilities. Moreover, Complainant could have petitioned the undersigned for an order enforcing the temporary reinstatement order without leaving work.

Respondent requested that Complainant shovel mud on three days. Foreman Kerstetter may have been less than pleasant in responding to Kaczmarczyk's refusals to do so. However, Kerstetter did not stand over Complainant and continually berate him. At worst, he made an uncomplimentary remark and left the area in which Kaczmarczyk was working. I conclude that the working conditions to which Complainant was subjected were not intolerable.

In conclusion, I find that Respondent did violate the terms of the temporary reinstatement order by ordering Complainant to shovel mud under the scale on April 17 and 19, and bring it to ground level by carrying it up a flight of stairs in buckets. It may have also violated the terms of the order on April 20. However, conditions were not intolerable for a reasonable miner in Complainant's situation. Therefore, I conclude that Mr. Kaczmarczyk was not constructively suspended.

#### ORDER

Having found that Respondent did not constructively suspend Complainant on April 20, 1995, I find that Complainant is not entitled to any relief for the violations of the temporary reinstatement order that occurred.



Arthur J. Amchan  
Administrative Law Judge

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