

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 19, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. PENN 99-129-D
of LEONARD M. BERNARDYN,	:	
Petitioner	:	WILK CD 99-01
v.	:	
	:	Wadesville Pit
READING ANTHRACITE COMPANY,	:	Mine ID 36-01977
Respondent	:	

## DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant;  
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

### Introduction

On November 12, 1998, Leonard M. Bernardyn filed a Discrimination Complaint with the Mine Safety and Health Administration (MSHA) alleging that he was discharged by Reading Anthracite Company (Reading) on November 10, 1998, after he informed Reading's superintendent that his haul truck was unsafe to travel at a normal pace because of slippery conditions.

On March 4, 1999, the Secretary filed an Application for Temporary Reinstatement alleging, in essence, that the Complaint of Discrimination filed by Bernardyn was not frivolous. On March 8, 1999, in a telephone conference call, initiated by the undersigned with counsel for both parties, counsel for Reading advised that Reading was requesting a hearing. After discussion, the parties agreed that the hearing should be scheduled to commence on March 16, 1999. The matter was heard in Harrisburg, Pennsylvania, on March 16, 1999.

At the conclusion of the hearing, the parties presented oral arguments. After considering the oral arguments, and the evidence of record, a bench decision was rendered. The decision, aside from minor corrections, not relating to matters of substance is set forth below.

### I. The Secretary's Witnesses

Leonard Bernardyn, a truck driver at the pit in question, testified that at the start of the shift on November 10, 1998, the weather was misty and the road was starting to get slick. In general, the drivers of trucks are not informed by the company as to the maximum speed at which the trucks are to be driven. Bernardyn indicated that on the morning of November 10, he felt that if he were to go at his normal speed he would go in circles. He indicated that he was stopped by Stanley Wapinski, the general superintendent at Reading, who told him that he was going slow. Bernardyn told Wapinski that it was getting slippery, and Wapinski informed him to get moving. Shortly thereafter, Bernardyn was stopped again by Wapinski who told him that he was holding everything up, and directed him to park.

Bernardyn utilized a CB radio that was in his truck to attempt to contact a union representative, a co-worker, Thomas Dodds. Bernardyn broadcasted over the CB radio that he has being harassed and was asked to drive faster than warranted by the road conditions. Bernardyn conceded that he did use curse words at the time.

After Bernardyn stopped the truck, Frank Derrick, the general manager, informed him that he was fired. According to Bernardyn, Derrick did not tell him that he was being fired for cursing, or for using threatening language.

Thomas Dodds, another truck driver, confirmed that on the morning at issue the roads were slick. He also confirmed Bernardyn's testimony with regard to what Bernardyn communicated over the CB radio. Dodds indicated that generally miners on the site at issue do not use curse words on the CB radio.

Thomas Goodman, a retired Reading employee and former truck driver, confirmed that the roads were slick on the morning at issue. Goodman testified that at approximately 8:00 a.m., the truck that he was driving began to slide. He also essentially confirmed Bernardyn's testimony as to what Bernardyn had said over the CB radio.

### II. Reading's Witnesses

Frank Derrick, the general manager testified that at approximately 7:00 a.m., on the date at issue he observed a Titan truck being driven very slowly. He stated that other trucks that he observed were driving normally. He indicated that he radioed Wapinski and asked him to investigate why that particular truck was driving slow. Wapinski indicated that he would do it.

At approximately 7:30 a.m., Derrick observed that there were two trucks right behind a Titan truck. Derrick radioed Wapinski and asked him to investigate and to let him know if the Titan was the same truck that had been observed earlier. According to Derrick, Wapinski stopped the truck and told him that it was the same truck and that the driver was Bernardyn. Derrick stated, in essence, that he decided that Bernardyn should be taken off the route that he was driving, and be put in another driving position. He indicated this was not considered to be disciplinary action. Derrick testified that he heard Bernardyn talking on the CB radio, located in his office, using expletives describing Wapinski on numerous times over a 10 minute span. According to Derrick, a number of employees chimed in the conversation on the CB radio.

Derrick went down to the pit area after he had concluded that he had had enough, and that Bernardyn should not be cursing. Derrick entered the pit area intending to discharge Bernardyn for cursing. According to Derrick, when he encountered Bernardyn, Bernardyn again used expletives, and Derrick told him that he ought to be ashamed of himself and that he had never heard anyone curse as bad as Bernardyn had done when he had cursed Wapinski for 10 minutes. Derrick then informed Bernardyn that he was being fired. According to Derrick, after Bernardyn had parked his truck in the designated area, he informed him again that he was being terminated for cursing Wapinski.

Ronald Shellhammer, Reading's maintenance superintendent, confirmed that he heard Bernardyn use expletives in describing Wapinski and also heard him say "I'll get that little s---." According to Shellhammer, he drove Bernardyn out of the pit as directed by Derrick and Bernardyn told him that he could not believe that he got fired for cursing on the radio.

Stanley Wapinski testified that at about 7:00 a.m., on November 10, he was called on the radio by Derrick and informed that a Titan truck was holding up other trucks. He then flagged the truck down and spoke to its driver, Bernardyn, and informed him that the boss said that he had been holding up two trucks and asked him if he was having any problems. Bernardyn stated that he felt that the road was a little slippery, and Wapinski informed him to "pick it up where and when you can."

Subsequently, Wapinski was called by Derrick who told him that the Titan was again holding up the traffic. Wapinski came up to Bernardyn and told him that he had received another call from the boss that he was holding up some trucks, Wapinski then told Bernardyn to take the truck and park it. Wapinski then went to the trailer and confirmed the testimony of Derrick regarding Bernardyn's use of expletives over the CB radio.

### III. Discussion

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. § 1700.45(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.

The Eleventh Circuit Court of Appeals in *Jim Walter Resources, Inc., v. FMSHRC*,

920 F.2d 738, 747 (11<sup>th</sup> Cir. 1990), concluded that *A*not frivolously brought@is indistinguishable from the *A*reasonable cause to believe@standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, the Court equated *A*reasonable cause to believe@with a criteria of *A*not insubstantial or frivolous@and *A*not clearly without merit.@ 920 F.2d 738 at 747.

In applying the above law, I conclude that the issue presented is not whether Bernardyn was discriminated against, but rather whether his Complaint was not clearly without merit. I find that the Secretary has met the burden of establishing that the Complaint was not without merit.

In support of Bernardyn's claim as set forth in his Complaint, testimony was adduced that Bernardyn, in essence, told Wapinski that he was not driving faster due to weather conditions. This was not contradicted by Wapinski. Shortly thereafter, Bernardyn was terminated, a coincidence in time similarly not disputed. The conflicts in the testimony between Bernardyn's version of his discussions with Derrick, i.e., that Derrick did not tell him why he was fired, and Reading's witnesses who testified that Bernardyn was told that he was fired for cursing raise credibility issues which arise in most discrimination cases, and which do not, per se, establish that the Complaint was clearly without merit or was frivolous.

Reading has referred to the case of the *Secretary of Labor on behalf of Ronald A. Markovich v. Minnesota Ore Operations* 18 FMSHRC 1349 (1996). In *Minnesota Ore Operations* the Commission, in a two to two split decision, affirmed a decision by former Commission Judge Arthur Amchan denying an application for temporary reinstatement. Under Commission rules, a two to two split decision has the effect of leaving standing the decision of the trial Judge, and affirming that decision. However, a two to two split decision has very little, if any, precedential value. The decision of Judge Amchan in *Minnesota Ore* 18 FMSHRC 1250 is similarly not dispositive. A decision of a fellow Judge is not binding, and I choose not to follow it regarding any particulars that are inconsistent with my decision herein.

For all the above reasons, I conclude that the Complaint filed with the Mine Safety and Health Administration was not frivolously brought.

### **ORDER**

It is **ORDERED** that the Application for Temporary Reinstatement is **GRANTED**, and that Reading is **ORDERED** to **REINSTATE** Bernardyn to his former position that he held on November 10, 1998, or to a similar position at the same rate of pay and benefits immediately upon receipt of this Decision.

Avram Weisberger  
Administrative Law Judge

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