FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 1, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LEONARD M. BERNARDYN, Complainant	:	DISCRIMINATION PROCEEDINGS Docket Nos. PENN 99-129-D PENN 99-158-D
v.	:	
READING ANTHRACITE COMPANY, Respondent	:	Wadesville Pit Mine ID 36-01977

PARTIAL DECISION ON REMAND

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, Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

This case is before me based on a decision issued in this matter by the Commission, 23 FMSHRC 924 (2001), which vacated my decision of August 1, 2000, 22 FMSHRC 951, and remanded the matter to me for further analysis of whether the discharged miner, Leonard Bernardyn, had suffered any disparate treatment, as that concept was analyzed in Secretary of Labor on behalf of Cooley v. Iowa Silica Co. 6 FMSHRC 516 (1984).[1] A summary of the facts in this case are set forth in the Commission's decision is as follows:

> Bernardyn had worked for Reading for nineteen years, including working as a haulage truck driver at Reading's Pit 33, a coal mine in Wadesville, Pennsylvania, for approximately four and a half to five years before his discharge. 22 FMSHRC at 299. Around 7:00 a.m. on November 10, 1998, Bernardyn began driving his 190-ton Titan haulage truck on his usual route. *Id*. Overall, the road has a grade

[1]Reading does not dispute my initial finding that the Secretary had established a prima facie case as set forth in the case of the Secretary of Labor on behalf of Robinette v. United Castle Coal Co. 3 FMSHRC 803, 817-18 (April 1998).

of approximately 8%, and parts of it are as steep as 10.3%. *Id*. When Bernardyn began driving, the weather was foggy and misty, and slippery road conditions caused Bernardyn to drive slower than usual. *Id.*

After prompting from Reading's general manager Frank Derrick, who had seen the Titan driving slowly, mine superintendent Stanley Wapinski stopped Bernardyn and asked him why he told Bernardyn to drive faster. *Id*. Approximately 20 minutes later, Derrick again noticed a Titan truck driving slowly and asked Wapinski whether it was the same truck. *Id*. When Wapinski answered yes and identified Bernardyn as the driver, Derrick told him to remove Bernardyn from the haulage run. T. Tr. at 85-86. Wapinski met Bernardyn at the pit and told him he was holding things up, and directed him to meet Wapinski at the dump after his current run. 22 FMSHRC at 299.

After the second conversation with Wapinski, Bernardyn used the C.B. radio in his truck to call Thomas Dodds, the United Mine Workers of America ("UMWA") safety committeeman. *Id*. Dodds was driving a truck on the same shift as Bernardyn. *Id*. Bernardyn told Dodds he was being asked to drive at a higher speed than he believed was safe given the poor road conditions. *Id*. During his 8-10 minute complaint to Dodds, Bernardyn repeatedly cursed and, referring to Wapinski, said "I'll get the little f----r." *Id*. Derrick overheard Bernardyn's complaints and profanity on the C.B. radio, but he testified that "it never crossed my mind to pick up the CB and tell him to stop." T. Tr. 116. Derrick fired Bernardyn after he had dumped the load in his truck, assertedly for profanity and threatening a supervisor over the C.B. radio. 22 FMSHRC at 299-300.

Within 30 minutes after Bernardyn's termination, road conditions worsened, and a layer of ice had formed on the road. *Id*. At 300 n.2. After a foreman's truck slid down the haulage road, the road was shut down due to the slippery conditions. *Id*. 23 FMSHRC, supra, at 924-295 (footnotes omitted.)

In essence, in my prior decision, I found that Reading had established an affirmative defense, which had not been refuted by the Secretary who had asserted that Bernardyn had been the victim of disparate treatment. On remand, the Commission directed me, to apply Commission precedent as established in Cooley, supra, at 521 and Hicks v. Cobra Mining Inc., 13 FMSHRC 523 (532-33) (1991), wherein, in the context of analyzing whether a discharged miner was disparately treated in the context of using offensive language "... the Commission has looked to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and how the operator treated other miners who had cursed". 23 FMSHRC at 929-930. Specifically, the Commission, Id., at 930 directed me to reconsider my determination that Bernardyn did not suffer disparate treatment and discrimination under Section 105(c), according to the following principles:

(1) Complainant's Prior Use of Profanity.

In *Bernardyn I.*, 22 FMSHRC 298 (March 2000), the Commission, at 303, found that "the record does not contain any evidence of prior difficulties Reading may have had with Bernardyn swearing". Hence, this finding becomes the law of the case regarding an analysis of Bernardyn's prior use of profanity as one of the Cooley, supra, factors, and hence, becomes the law of the case in this remanded decision.

(2) Disciplinary Policy on Cursing

In its decision, the Commission concluded that substantial evidence supported my initial finding that Reading's 1987 Disciplinary Policy was in effect at the time Bernardyn was discharged, and that there was no provision in Reading's 1987 Code of Conduct"establishing either cursing or threatening language as an offense warranting immediate termination". 23 FMSHRC, supra, at 931. The Commission, after analyzing Reading's 1987 policy, found that Reading "... had no established practice for disciplining workers for cursing in the absence of accompanying insubordinate acts, or of treating cursing as conduct warranting immediate discharge." *Id.* The Commission, then went on to conclude that "Reading violated its policy in terminating Bernardyn." *Id.* At 932. These findings become the law of the case in this remanded proceeding.

(3) Treatment of Similarly situated miners.

a. Use of C.B. Radio.

Critical to my initial decision and decision on remand, was a finding that Bernardyn's use of profanity was distinguished from use of profanity by other miners, first of all, because it was broadcast over a C.B. radio. However, the Commission, *Id.* at 933, concluded that, to the contrary, "... substantial evidence does not support the judge's finding that Bernardyn's broadcast of his cursing over the C.B. Radio materially distinguished his cursing episode from previous cursing incidents." This conclusion becomes the law of the case in this remand decision.

b. Duration of Cursing.

The second critical element which provided the basis for my decision that Bernardyn's use of profanity was distinguished from previous incidents, consisted of my finding that Bernardyn had cursed 8 to 10 minutes over the CB. In contrast, the Commission referred to Commission precedent, as establishing "that it is not the duration of various single incidents that is most relevant to disparate treatment analysis, but whether there was a prior problem with misconduct involving the complainant." In addition, the Commission found that the record established "that Reading could have terminated Bernardyn's outburst at any time." *Id.* Further, critical to my decision that Bernardyn was not subject to disparate treatment was my finding that whereas other individuals made a profane remark only once, Bernardyn used profanity nonstop for approximately 8 to 10 minutes. In contrast, the Commission found that substantial evidence

does not support this finding. *Id.* The Commission found that another miner who had received at least two warnings for three separate incidents of verbal abuse was not terminated, and that, in contrast, Bernardyn had no such history of cursing. These findings now become the law of the case.

Bernardyn's Threat.

The third finding that was critical to my decision that Bernardyn's conduct was more egregious and not in the same category of other miners who had used profanity, was a finding that Bernardyn had threatened his supervisor. In contrast, the Commission, *Id.,* concluded that "substantial evidence does not support the judge's finding that Bernardyn threatened his supervisor." In conclusion, the Commission, *Id.,* at 935, held as follows:

> In light of our determination that Bernardyn's use of the C.B. radio and the duration of the cursing incident do not meaningfully distinguish Bernardyn from other Reading employees who were not terminated for cursing, we conclude that substantial evidence does not support the judge's finding that Bernardyn was not similarly situated to these employees. Consequently, as to the third *Cooley*, we conclude that substantial evidence fails to support the judge's finding that Reading did not treat Bernardyn more harshly than similarly situated employees.

These conclusions of the Commission become the law of the case.

Conclusion

In light of the Commission's findings and conclusions regarding Bernardyn's prior use of profanity, disciplinary policy on cursing, and treatment of similarly situated miners, I am constrained to conclude that under the law of the case, as set forth by the Commission, the Secretary has established that Bernardyn was subject to disparate treatment, and that accordingly Reading's affirmative defense is defeated. Thus, I am constrained to conclude that the Secretary has established that Bernardyn was discharged in violation of Section 105(c) of the Act.

Order

It is Ordered that:

(1) The parties shall, within 10 days of this decision, confer to discuss settlement regarding all elements of the specific relief requested by the Secretary on behalf of the Complainant, including the amount claimed as back pay, if any, along with interest to be calculated in accordance with the formula in the Secretary on behalf of Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).

(2) Within 10 days of the date of this decision, the parties shall confer and attempt to

reach a settlement, either regarding the amount of the civil penalty sought by the Secretary from the Respondent, or agree to a set of stipulations regarding the various factors set forth in Section 110(i) of the Act.

(3) If the parties reach a settlement regarding the matters set forth in either paragraphs (1) or (2) of this Order, then such a settlement shall be filed no later than 10 days from the date of this Decision.

(4) Should the parties not reach any settlement with regard to any of the matters set forth in paragraphs (1) and (2) of this Order, then the Secretary shall convene a conference call with counsel for the Respondent and the undersigned, to take place at either 10:30 a.m. or 2:30 p.m. during the week of February 11, 2002, in order to set a date for an evidentiary hearing to resolve any outstanding issues regarding the scope of relief to be awarded Complainant, or the factors set forth in Section 110(i) of the Act.

(5) This Decision is not final until a further order is issued with respect to Complainant's relief and the amount of Complainant's entitlement to back pay, if any, and the amount of civil penalty to be assessed against Respondent.

Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

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