

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 26, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of WYMAN OWENS, Complainant v.	:	TEMPORARY REINSTATEMENT PROCEEDINGS Docket No. SE 2002-114-D BIRM CD 2002-04
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of GARY WATSON, Complainant v.	:	Docket No. SE 2002-115-D BIRM CD 2002-05
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of HENRY JOHNSON, Complainant v.	:	Docket No. SE 2002-116-D BIRM CD 2002-07
DRUMMOND COMPANY, INC., Respondent.	:	Mine ID 01-02901 Shoal Creek Mine

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: MaryBeth Bernui, Esq., Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants.
Harry Hopkins, Esq., Olgetree, Deskins, Mash, Smoak & Stewart, PC, Birmingham, Alabama, for the Respondent.

Before: Judge Weisberger

1. Introduction

On May 9, 2002, May 16, 2002, and May 20, 2002, Gloy Wyman Owens, Gary Lee Watson and Henry S. Johnson, each respectively, filed a Discrimination Complaint with the Mine Safety and Health Administration, alleging in each case, that they were discharged by Drummond Company on March 20, 2002.

Owens alleged that he and eighteen other employees were terminated for alleged involvement in a theft ring; that nine of the other employees who had been “accused of equal or more severe things” were brought back to work; that two more of the other employees were allowed to resign and receive full retirement benefits, and that he was unjustly terminated because he was a member of the union safety committee.

Watson alleged that he was discharged for theft of property, but that he believed “... the decision to fire me was in retaliation for my entering stuff in the fire boss book.”

Johnson alleged that he was fired for alleged theft of company property but believed “... the decision to discharge me was in retaliation for entering stuff in the fire boss book and/or shutting down areas.”

On June 13, 2002, the Secretary served Drummond with Applications for Temporary Reinstatement on behalf of Owens, Watson, and Johnson and filed these with the Commission on June 17, 2002,¹ alleging, in essence, that the Complaints filed by Owens, Watson, and Johnson, were not frivolous. On June 27, 2002, during a telephone conference call with counsel for both parties, initiated by the undersigned, the parties agreed to discuss settlement, and if settlement could not be reached they agreed on a trial date of July 22, 2002.² In a subsequent conference call the parties agreed to have the trial rescheduled to July 10 and 11, 2002. On June 28, 2002, the Secretary advised that counsel were not able to reach a settlement. A hearing in these cases was held on July 10 and 11, 2002, in Birmingham, Alabama.

After the parties rested, the Secretary presented an oral argument. Drummond filed a Memorandum in Opposition to Complainants Request for Temporary Reinstatement (sic), and also presented an oral reply to the Secretary’s argument.

At the conclusion of the hearing a bench decision was issued which, with the exception of corrections of grammar and style, is set forth below:

II. The Secretary’s Witnesses

¹The Applications, which are assigned separate docket numbers, SE 2002-114-D, 115-D, and 116-D, are **hereby consolidated**.

²On July 3, 2002 a Request for Hearing was received by the Commission.

a. Gloy Wyman Owens [testified that he] worked for Drummond for over 25 years. He worked at [the] Shoal Creek [Mine] from January 1994 through March 22, 2002, when he was terminated.

He was a full-time Health and Safety Committee person for the United Mine Workers Union. However, his salary was paid by Drummond, except when he performed work duties off the site of the mine at issue.

For the last three years [until he was terminated], he worked the 3 p.m. to 11 a.m. shift Monday through Saturday, and occasionally on Sunday.

The Health and Safety Committee consists of three persons including Owens. His duties include checking if there are violation or accidents, accompanying MSHA inspectors on their inspections, [and] discussing with employees regarding the conditions in the mine on the shift that the employees have just come off.

Owens indicated that if any problems are reported to him, he then inspects for hazardous conditions. Owens indicated that if a miner asks him to look at a condition, he then looks at it. If Owens finds that a condition is hazardous, he then makes contact with whoever is in charge, such as a supervisor or a foreman to report the condition. Owens indicated that if any of these individuals asks him to give his recommendation as to what to do to abate or correct the condition, he then gives his opinion. Owens testified that if the condition is then not abated, he then shuts the mine down and notifies proper management officials in order to explain [the condition].

In February 2001, drilling had occurred for an overcast. According to Owens, there was not [sufficient] air in the area to ventilate [it]. He contacted the immediate foreman, Mary Lewis, who told him that he was told to do so, and Owens in response said that he (Lewis) could not do it. Owens then shut the mine down until the ventilation was approved. Owens then called the mine shift foreman, Doug Altizer, explained the situation, and Altizer then told Lewis to get the air to the area. The situation was corrected, and the mine was reopened.

In late 2001 [Owens] had to shut down the section, but was unable to remember the details. He indicated that he has met with officials at Drummond regarding safety issues. According to Owens, in March 2001 he met with [different levels] of individuals five or six times regarding a petition for modification relating to the use of a 24,000 volt Miner. Among these officials were Ken McCoy, the director of operations; Rich Painter, the mine manager; and Dickie Estep, the director of health and safety. Owens stated that he conveyed to Drummond that they had to agree to various stipulations, or otherwise the union would oppose the petition for

modification. He also indicated that at these meetings at times there were differences of opinion.

In June 2001, the safety committee had a petition presented regarding the use of truss-bolts. This was presented to McCoy, Painter, and Estep. Owens indicated that they knew that the usage of this equipment would weaken roof support and so stated that position at these meetings. He indicated, however, that the parties tried to maintain respect for the other side, and there was not any cursing.

In July 2001 a petition was re-submitted by Drummond to modify from a 35 foot cut to a 40 foot cut. According to Owens, at a meeting with Painter and Estep, he, along with two other union members, opposed the petition and said that they would not be able to get proper air in the face. Subsequently the petition was granted for a 40 foot cut, but was not implemented.

In March 2002, Drummond asked for a waiver from the State of Alabama to use a backup fan should another fan not be operative. Owens opposed this petition to the owl shift foreman, Tom Sheback.

Owens indicated that, [along with the safety director at the mine], he normally meets with MSHA inspectors once a month after their inspections, and the citations and violations are discussed. He indicated that over the last six months prior to his termination, the union did not support Drummond's request to have the citations vacated. [I]n the last year prior to his termination on [only] one occasion he agreed with Drummond that two citations should be combined.

At a Stakeholder's meeting with MSHA officials Owens indicated that he disagreed with McCoy, who in his speech, advocated more of a role for management. Owens stated that at the time, when disagreeing with McCoy, he indicated that rates of citations, accidents, and severity of citations had not been decreasing.

On March 27, 2002, Owens met with management officials regarding a letter he had received relating to an intent to discharge him because of stolen property. At such a meeting he was told by a Mr. [Eller] that he had taken a battery or batteries, either automobile or marine. In response, Owens said that he did not receive any such items from Terry Clark, and on only one occasion did he take batteries from Clark, who worked at the warehouse, because the safety department had ordered batteries. [These batteries] which were then put in a locker, were the size of a nine-volt battery, [and not the size of an automobile or marine battery]³

He gave his opinion that he was discharged due to his past record relating to

³This underlined phrase we inadvertently omitted from the bench decision

his safety positions and positions taken against the company. On cross-examination none of the essentials of his testimony were impeached.

b. Gary Lee Watson has worked for Drummond since 1985 and at the Shoal Creek facility since March 1994. He served as a fireboss since 1995, a job that he bid on.⁴ [Watson] indicated that as a fireboss his responsibility is to perform a preshift examination which involves walking the belt lines and walkways, and inspecting for dangerous conditions. He indicated that there are four separate routes, and the firebosses rotate inspection these routes on a monthly basis. Any dangerous conditions are noted in the fireboss book which is kept in the foreman's office. According to Watson, if a condition is noted as being hazardous, it is to be addressed immediately. [I]t is the practice for a foreman to also sign the fireboss book.

[Watson] indicated that if a conditions found in the preshift examination, he then would call a foreman or an assistant foreman. [I]f [they are] not present, he then would call the communication office. In addition, Watson would make a note of it in the fireboss book.

In the period between January and March 2002, he had noted icing on a slope walkway which is part of an escape way. In addition, he reported this condition to the supervisor, and roped off the area. It was then de-iced the next shift. Leonard Woodby, the mine foreman, told Watson on the same day that he had sent men over to de-ice and they had told him that they did not have any problem fixing it.

In the month of February 2002, Watson noted water accumulations more than twenty-four inches deep and roped the area off and reported the condition to the foreman.

In the year 2001, he [had] noted problems with air changes while men were underground. He said this occurred two or three times. [Watson testified that] at a safety meeting at which Dickie Estep, Don Hendrickson, and Leonard Woodby were present, he said that if this happens again, they will have to act.

Also in 2001, he noted a dangerous [roof] condition and discussed it with management who told him that it would be taken care of. He also noted accumulations of water and mud in Route No. 2, reported these to management, and noted them in the fireboss book.

[Watson] indicated that in discussing safety conditions with management, that management did not always agree with him. He said that several times over the last

⁴The day shift has five firebosses; the evening shift has five firebosses; the owl shift has four firebosses; and over the weekend there are five firebosses.

eight years management officials told him that what he had termed to be hazardous should have been put in the comment section of the fireboss book

On March 21, 2002, Watson was advised by management that he was being suspended for theft of property. He said that management told him that he had taken five gallons of gas, a bag of Quickrete cement, cleaning supplies, a pick, an ax, a shovel, a pre-made sandwich, and a soft drink.

Watson indicated that he told the management officials that he had obtained company gas only one occasion and in an emergency situation and with the approval of his supervisor, Gus Humphreys, who, [on March 21, 2002] was no longer employed by Drummond. Watson explained that on the day in question he was at the hospital visiting his father who was in serious condition, and called Humphreys because he was going to be late. According to Watson, Humphreys told him to get to work as quick as possible. Watson, [stated that] he ran out of gas as he entered the property, and coasted into the parking lot. He then told Humphreys that he had arrived but had run out of gas, and Humphreys told him to call the supply house to have them give him some gas. Watson then spoke with Nick Phillips in the supply office and informed him that Humphreys had said it was okay. Watson testified that Phillips then talked with Humphreys who told him it was okay. Watson then asked Phillips for just enough gas to get to a gas station. But he did not see Phillips actually put the gas in his car.

Regarding the Quickrete, according to Watson, this term came up in a conversation with employees at the supply office as he, along with one of the employees, were in the process of [discussing the] building of water gardens. According to Watson, when Quickrete was discussed as the building tool for the garden, [Watson] told Teddy Clark that he (Watson) had used creek rock instead, as it was more aesthetic. Specially, Watson [testified] that he did not take any Quickrete and [had] told that to management.

Watson indicated that in addition to fireboss duties, he is also required to clean the portable trailer bathrooms on a regular basis each shift. In that connection he would order supplies which would then be unloaded on a dock. Watson told Humphreys that instead he would get the supplies himself from the warehouse. He then put these supplies in a truck to take back to the parking lot, where he unloaded the supplies to be used at the portable trailer bathrooms. Those supplies that were not used were stored in a locker in the women's bathroom. He said that he did not steal any cleaning supplies.

According to Watson, he did obtain a pick, ax, and shovel from the supply office. [However, he did pick up these items] on a number of occasions at the request of Humphreys who [had] asked him to pick up these supplies for him. [Watson]

indicated that he did not steal either an ax, shovel, or a pick.

He stated that he did not deny taking pre-made sandwiches and soft drinks, but stated that it was a common practice for persons to take these items which were stored for the use of overtime people. He indicated that he had seen approximately 25 people obtaining these sandwiches and soft drinks from such a source.

Watson gave his opinion that he was fired from Drummond because of his activities as a fireboss for eight years and the confrontations that occurred during those times. He indicated that the biggest arguments had to do with whether conditions should be noted as hazardous or just placed as comments [in the fireboss book]. He also indicated that John Redmill, a mine foreman, who was not in that position on March 20, 2002, had cursed him all the time.

On cross-examination he stated that he agreed with Terry Clark who had stated that he (Watson) had the run of the warehouse and was able to get what he wanted.

On cross-examination the essence of his testimony [on] direct examination was not impeached.

c. Henry Johnson had worked for Drummond since 1975 or 1976, and worked at Shoal Creek since June 1995, until he was discharged in March 2002. He worked as an outby utility man, but served as a fireboss four to five days a week during the 11 p.m. [to] 7 a.m. owl shift. He indicated that if he found a hazardous condition, he would call his immediate supervisor or the assistant, or mine foreman, or the company operator. He indicated that he would shut down an area of the mine if necessary.

On an occasion he noted a bad leak in a fire line which had to be replaced, as this line would be used to put out fires as it was located in the escape way. [On] another occasion he observed water at the level of his knees which he indicated as being more than 16 inches, and spoke to the assistant foreman Tom Sheback about this condition. On another occasion he noted that ice had extended nine hundred feet in the escapeway path, and there were huge icicles [hanging] from the roof. He notified the mine foreman.

He indicated that every other night there were instances of spillage of coal and rollers turning in coal. [H]e [then] shut down the line and called the foreman.

In the year 2001, on occasions, he [had] noted excess water, [and] mud in the returns, and spoke to management officials about these conditions. On another

occasion he found an excess of Methane, shut the mine down, and pulled the men out. He notified the company operator, mine foreman, and the company safety man. On another occasion he had observed rollers with sparks, excessive coal on the belt, unsupported rib pins, and pins coming out of the ribs. [He] told Sheback and Woodby about these conditions. Johnson indicated that in the period between January 2002 and March 2002 when he had noted conditions in the fireboss book, Robert Payne, a foreman, told him that other firebosses on his shift had not seen these conditions.

According to Johnson, if he observes a hazardous condition and it still exists the next time he makes his examination, he notes it again and continues to talk to someone in the safety department. Johnson indicated that on an occasion [when] he had to shut down the main belt due to gas and the problems were corrected the next day, he was told by a member of management, "Don't you ever shut down my damn belt."

On March 20, 2002, Johnson was notified by the company that it intended to terminate him. He stated that he was told that on two separate occasions he had purchased one pill for which he paid three dollars. Johnson said that it was a Lortab 5. Johnson was told he also had stolen soap, paper towels, garbage bags, Windex, a car battery, a No. 9 spray, a wire brush, and brought 40 dollars worth of marijuana to Terry Clark. Johnson indicated that none of these allegations are true except for [an] incident involving two pills.

Johnson indicated that Humphreys, who had fractured a bone, asked him for some pain pills, and Johnson provided with a Lorcet 10 for which he had a prescription. [A]ccording to Johnson, he brought [the prescription] to the second meeting with management to show to management. Johnson testified that he did not give or sell Terry Clark any Lortabs. He testified that he did not ever steal soap, paper towels, garbage, Windex, or Spray No. 9 from the mine. He also denied ever selling 40 dollars worth of marijuana to Terry Clark. When asked whether he ever stole a wire brush or a battery from the company, his answer was, "No."

He stated that in his opinion he was fired because of his activities as a fireboss and some harassment over the years.

On cross-examination, he indicated that Humphreys had not provided him with any Lortabs. Indicated that he did not give Humphries ten to twelve Lortabs. He indicated that as fireboss he did what he was paid to do, and that each fireboss does his own area. Also on cross-examination he was asked whether he had purchased goods from Terry Clark by paying for them with Lortabs and his answer was no. He then was asked whether he had purchased goods from Terry Clark by paying for them with Lorcet and his answer was no. The essential parts of his

testimony were not impeached on cross-examination.

III. Drummond's Witnesses

a. Kenneth [Ray] McCoy, who was Drummond's director of human resources, testified for Drummond. [He said] his responsibilities include safety and hiring. He indicated that at various meetings he attended with the Union Safety Committee that Owens was no more vocal than the other two Union Safety Committee members. He said that on occasion there were differences in approach between the company and the union which were resolved in a civil manner; but most of the time there was agreement.

He stated that at a Stakeholder Meeting he attended he made a presentation arguing that MSHA needed to change as the industry had changed since 1977. He did not say that Owens had made any comments to him regarding his (McCoy's) speech.

McCoy testified that he has closed down the Shoal Creek mine on occasion. He stated that if there are rollers turning in coal, he has told the staff either to fix the condition or close the mine. He indicated that if he sees such a condition, he then closes down the mine, and indeed has done so in order to avoid a fire. He said that ice on a walkway or slope is a significant slipping hazard. According to McCoy, if he finds such a condition, he either washes it if the temperature allows, or puts sand on it.

He said that in late summer 2001 the company received a report of a missing coal belt or belts worth more than \$35,000. He then contacted the president of Drummond, Mike Zervos, and hired an investigative agency to do surveillance. The agency informed McCoy that theft had been occurring mainly on the second and third shift. It was decided that areas should be staked out for a month and video cameras set up. The stakeout continued for a month and was terminated on December 2, 2001, when the investigative personnel were discovered by employees and the surveillance ended. [On] that day the investigator's car had been broken into, and a video camera and tapes were stolen.

According to McCoy, some tapes did remain, which he observed. In addition, the company received an anonymous call which provided details as to materials stolen. The second time this caller provided his or her name. The informant then met with the Drummond security man, Tim Mosko. [McCoy said that] the informant had extensive knowledge of drug use and selling of drugs, and theft by numerous individuals. [According to McCoy] the informant stated that in his apartment he had a significant amount of Drummond's equipment which another employee had stolen. The police subsequently investigated Terry Clark, a supply clerk, who was not a

union member, and was arrested. Clark was then terminated by McCoy.

In late January 2002, McCoy hired another agency and David Frizell, [from] this agency came to the site to investigate. McCoy did not direct Frizell to any particular employee to investigate. [O]n a weekly basis from the second week of February to March 20, 2002, McCoy met with various union officials to inform them that the Company knew that there [were] serious theft, drug, and alcohol abuse [problems] on company property, and that [there] was an ongoing investigation.

On or about March 20, 2002, 18 represented employees were terminated pursuant to this investigation; and seven management and unrepresented employees resigned or were terminated; two union represented employees resigned; [and] the following employees who had been terminated were reinstated pursuant to a union grievance procedure without back pay: Ray Wallace, Terry Short, Mike Alexander, Johnny Cooley, Rick Marquis, B.G. Evans, Earl Cagle, Marlin Strickland, and Mike Williams.

McCoy indicated that statements that Terry Clark had made to Frizell which were then given to him (McCoy) played a major part in the decision to terminate the individuals who were terminated. McCoy indicated that in the middle of February, Frizell had told him that Terry Clark was reliable. McCoy had also received from Frizell, on March 14, 2002, and on March 21, 2002, documentary summar[ies] of Frizell's investigation. These documents contain the name of each individual who had been investigated; the various allegations against each individual; witnesses, if any; and "additional evidence," if any. McCoy indicated that Drummond decided to believe Clark.

McCoy noted that Teddy Clark, Terry Clark's twin, had also provided Drummond with information. Initially Drummond believed his testimony. However, based on Frizell's recommendation that his ([Teddy] Clark's) story was not consistent, Drummond decided not to use the information provided by him.

On cross-examination, McCoy indicated that Terry Clark had not been with Drummond for a long period of time, and was terminated on December 11, 2002. There was no impeachment on cross-examination of the essential parts of McCoy's testimony.

b. David Paul Frizell, Jr., an experienced investigator, (see Defendant's Exhibits 39 and 40) commenced an investigation of Drummond on February 11. He indicated that no one from Drummond directed him to investigate any particular employee. A total of 17 employees were interviewed, 10 of whom had worked at the warehouse. In addition, Frizell conferred with the informant.

In the course of the investigation [Frizell] met with Terry Clark five or six times spending a total of fifteen hours with Clark. In March 2002 he told the following individuals that in his opinion Clark was credible: Curt Jones, Ken McCoy, Mike Zervos, Dean Hubble, Mike Tracey, David Muncher, Richard Painter, and Ed Sellers.

Frizell testified that his opinion of [Terry] Clark was formed in the course of the investigation, and based on his (Frizell's) experience and background. He testified that his opinion was based on the following factors which he also explained to the individuals mentioned above: that he found [Terry] Clark to be truthful, [and] without malice or fabrication; that [Terry] Clark was highly consistent each time they spoke; that there was a high consistency within numerous statements; that [Terry] Clark made full admission without minimizing or rationalizing his involvement; that he made statements against his own interest; that there was a high percentage of corroboration between [Terry] Clark's statements and what other elements of the investigation disclosed, particularly the admission of others; that [Terry] Clark was always careful to provide caveats between his facts and his opinion; [and] that his statements did not contain any major or significant discrepancies or disparity with other facts gathered in the investigation from other sources.

IV. Drummond's Position

Essentially it is [Drummond's] position in this matter that it placed a good faith reliance on the reports of Frizell, [regarding] the statements of [Terry] Clark; that it would be most unreasonable for Drummond to have spent the resources and time for the purpose of going after three miners; that it is unreasonable to allow firebosses to do what they are paid to do on behalf of the company and then become untouchable while others do not receive the same treatment. Drummond also cites the fact that 22 employees, a significant number, were terminated as a result of [Terry]Clark's testimony.

V. Discussion

The issue in this case is not whether or not the Secretary has established a prima facie case. The issue is not whether Drummond's evidence indicated that the Company does not have a prima facie case; i.e., that the discharge of the three complainants in this case was not motivated in any way by protected activities. Nor is this case about the establishment of Drummond's affirmative defense based on any good faith action on its part. Rather, this case involves the narrow issue as to whether or not the complaints filed by the individuals were frivolously brought.

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 phrase ‘not frivolously brought’ is not defined in the Mine Act. In *Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000), the Commission noted that “ [t]he Mine Act’s legislative history defines the ‘not frivolously brought’ standard as indicating that a miner’s complaint’s appears to have merit”. S. Rep. 95-181, at 36 (1977) reprinted in Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624.”

The Eleventh Circuit Court of Appeals in *Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990), concluded that ‘not frivolously brought’ is indistinguishable from the ‘reasonable cause to believe’ standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, the Court equated ‘reasonable cause to believe’ with a criteria of ‘not insubstantial or frivolous’ and ‘not clearly without merit.’ 920 F.2d 738 at 747. (See also, *Centralia Mining Co.*, supra).

Drummond relies on two Commission cases that really don’t apply to the case at bar. The first case is *Secretary on behalf of Ronald A. Markovich v. Minnesota Ore Operations*, 18 FMSHRC 1349 (1996). In *Minnesota Ore Operations*, supra the Commission, in a two to two split decision, affirmed a decision by former Commission Judge Arthur Amcham 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 Amcham 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.

Drummond also relies on *Centralia*, supra. The facts in *Centralia*, supra are not at all similar to those presented herein. In *Centralia*, supra, the only issue before the trial judge, and hence before the Commission, was whether or not the complainant voluntarily quit his job, or had been discharged. Indeed the parties had stipulated that the individual involved had engaged in protected activity, and that the sole issue for hearing was whether there was a colorable claim that the complainant

had been discharged. [Therefore] the decision in *Centralia, supra*, is not pertinent to the case at bar. In contrast to *Centralia, supra*, in the case at bar there is not any dispute that Owens, Watson, and Johnson were discharged.⁵

I note there are some inconsistencies in the record; first of all, some difference in the testimony between McCoy and Owens regarding conversations, [and] statements made at the Stakeholder Meeting; [and] some question regarding disparate treatment of the individual complainants. I note that credibility issues arise in most discrimination cases. This does not per se establish that the Complaint[s] [were] without merit. I also note in this case that [Drummond's] motivation is based on facts related to it by [Terry] Clark. It is significant to note that [Terry] Clark was not called to testify by the Company, nor did Counsel represent that he was unavailable.⁶

In summary, the testimony of all three individuals who had filed Complaints with MSHA contained details of protected activities, disagreements with management over the exercise of some of these protected activities, and all were terminated.

Within the above case law that I set forth above, I find the Secretary has met its burden in this case; in that, it has been established that the Complaints [have] not been frivolously brought.

VI. Relief

With regard to relief, the parties stipulated that should it be found that the applications for temporary reinstatement be granted – and I am so finding – that the parties agree to the following relief: (I am quoting from Paragraph two of the document entitled Waiver and Stipulation Executed 11 July, 2002, which was filed earlier.) ‘Those miners reinstated by the Administrative Law Judge’s order granting temporary reinstatement will be entitled to back wages and all other benefits to which they are otherwise entitled under the Federal Mine Safety and Health Act, beginning and accruing on the eighth day following the close of the temporary reinstatement hearing in this case, these back wages to be paid and any benefits accruing recognized on the next regular payday for the effective miner or miners.’”

⁵The underlined text was inadvertently omitted from the bench decision.

⁶The underlined phrase was inadvertently omitted from the bench decision, but is part of the rationale for the decision.

ORDER

It is **Ordered** that the Applications for Temporary Reinstatement are **Granted**, and subject to the terms set forth above (VI, infra), agreed to by the parties.

Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

MaryBethBernui, Esq., Thomas A Grooms, Esq., Office of the Solicitor, U.S. Department of Labor,
2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

Harry Hopkins, Esq., Olgetree, Deskins, Mash, Smoak & Stewart, PC, 1900 Southtrust Tower, 420
N. 20th Street, Birmingham, Alabama, 35203-3204

/sc