

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
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February 24, 2005

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of WILFREDO MORALES,	:	Docket No. SE 2005-71-DM
Petitioner	:	SE-MD 2005-01
	:	
v.	:	
	:	
ARENERO RAFAEL COLON, INC.	:	Arenero Rafael Colon
Respondent	:	Mine ID 54-00150

**ORDER TEMPORARILY REINSTATING
WILFREDO MORALES**

This matter is before me on an application for temporary reinstatement filed by the Secretary of Labor (Secretary) on behalf of Wilfredo Morales pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. §815(c)(2)). The Secretary seeks an order requiring the Respondent (Arenero Rafael Colon, Inc. (Arenero)) to reinstate Mr. Morales as an employee pending a decision on the merits of the discrimination complaint Mr. Morales filed with the Secretary’s Mine Safety and Health Administration (MSHA) on November 15, 2004. A hearing on the application was conducted in San Juan, Puerto Rico. At the conclusion of the hearing counsels orally summarized their arguments. For the reasons that follow, I grant the application, and I order that Mr. Morales be reinstated on a temporary basis.

THE EVIDENCE

I. The Arenero Facility

Arenero operates a sand processing facility located in San Lorenzo, Puerto Rico. At the facility sand is extracted, processed, and shipped to purchasers. Once the sand is extracted, it is loaded onto haulage trucks by a front end loader (loader). The trucks are driven to the facility’s processing plant. At issue in this matter is the condition of a part of the road connecting the sand extraction site to the plant.

The extraction area is at a higher elevation than the plant. To reach the plant haulage, truck drivers must descend a slope of approximately 15 degrees. Drops exist on both sides of the slope, and where they exist, the road is bermed with sand. There is a small pond at the bottom right-hand side of the slope (as one proceeds down). The area at the top of the slope, including

the extraction and loading area, is level. The area at the bottom of the slope, including the route the road takes to the processing plant, also generally is level (see Resp. Exh. 5).¹

Haulage trucks first enter the facility below the slope. Therefore, at the start of the workday they must travel up-slope to be loaded. Normally, it takes approximately 20 minutes for a loaded truck to drive from the extraction area to the plant. Once loaded, the trucks weigh between 60,000 pounds and 120,000 pounds, depending on their type.

II. Morales and Arenero

Wilfredo Morales was dismissed by Arenero on July 6, 2004, at which time he had worked for Arenero for approximately four years and seven months as a heavy equipment operator. Morales operated several different types of equipment, including an excavator, a loader, a bulldozer and a haulage truck. At the time of his dismissal, Morales was operating a haulage truck. While others driving haulage trucks at the facility were employees of a contractor, Morales was an employee of Arenero. Although the truck he drove was owned by his son, Morales's wages were paid by the company.

Mr. Morales was supervised by Ruben Roman, who described Morales as a good employee, one who arrived on time, who was available when needed and who followed instructions. However, according to Mr. Colon, there was another side to Mr. Morales as an employee, in that when operating a loader, he was slow to load trucks and, as a result, his productivity was low. Colon testified that he and Roman spoke with Morales "many times" about this aspect of his job performance (Tr.168-169).²

III. Events of July 1, 2004

On the night of June 30, the hourly precipitation data of the National Oceanic and Atmospheric Administration (NOAA) shows that between the hours of 11:00 p.m. and 12:00 a.m., .2 inches of rain fell at NOAA's San Lorenzo weather station, which is located in the

¹ The road and land adjacent to it were best described by Arenero's Treasurer and Plant Manager, German Colon. Mr. Colon, who holds a BA in science and engineering, estimated the angle of the slope at 15 degrees and the length of the road on the slope as 40 to 50 meters. He described the pond as 15 feet wide and 15 to 20 feet long. In addition, Mr. Morales described the width of the road as approximately 12 feet. This was not disputed by Arenero's witnesses.

² Mr. Colon could not recall the dates when the discussions took place, and he agreed Arenero never expressed its job performance concerns to Morales in writing (Tr.169).

vicinity of the mine (Resp. Exh. 3 at 19).³ Between the hours of 12:01 a.m. and 4:00 a.m. an additional .7 inches of rain was recorded (Id. at 22).

Morales arrived at the mine around 7:00 a.m. He was joined by three other haulage truck drivers who were employed by Arenero's haulage contractor. Morales and the other drivers proceeded up the road to the sand extraction area. However, because the road was wet and slippery, the drivers did not want to travel back down the slope with loaded trucks. According to Morales, the drivers did not think it was safe. Morales noted that his truck would be loaded, that he would be descending the slope in first gear and that he would have to brake on the way down. Therefore, he feared that his truck might slip off the road and/or overturn, and that he might be injured or worse.

Morales asserted that for the haulage trucks to use the road safely, either the bulldozer had to scrape the wet material from the sloped part of the road or the drivers had to wait until the sun dried the road (Tr. 23). However, according to Morales, there was a problem on July 1. The bulldozer broke down and could not scrape the wet material from the road.

Meanwhile, Morales's supervisor, Mr. Roman, who was working in the plant area, received a call from the bulldozer operator, who told Roman that the bulldozer could not be operated because the belts on the bulldozer were broken and needed to be replaced. Roman called the company's contract mechanic, Rudolfo Ramos, and advised him of the problem. Ramos testified that he heard from Roman between 7:45 a.m. and 8:00 a.m. Ramos told Roman he would come to the facility. According to Ramos, he arrived at the mine between 9:30 a.m. and 10:00 a.m. It took him about two hours to repair the bulldozer, which was back in operation between 11:45 a.m. and 12:00 p.m.

While Ramos was on his way to the mine, Mr. Roman noticed no trucks were arriving at the plant. He decided to find out why. He traveled up the slope to the flat ground near the excavation area where the trucks were located. Roman testified that when he reached the area, the three contract drivers were together and Morales was some distance away. Roman asked one of the contract drivers, "El Gordo," why the drivers were not hauling sand to the plant (Tr. 115-116).⁴ (According to Roman, as he spoke, Morales moved closer to the group.) El Gordo told Roman that the road was slippery and the owner of the contracting firm did not want to put his employees at risk by traveling down the road. Roman, who had worked for 10 to 11 years in the aggregate industry, told El Gordo that since the drivers had traveled to the top of the slope safely,

³ Copies of the NOAA records were offered by Arenero to establish, among other things, the amount of rain occurring at the mine on various dates. The copies were offered as true and accurate replications of official NOAA documents, and I accepted them as such. I also accept the information set forth on the copies as accurate and factual.

⁴ El Gordo was the driver's nickname. Roman did not know the driver's full name (Tr. 116).

the road was in good enough condition to travel down. Although El Gordo and the other drivers did not respond to what Roman said, Roman believed Morales heard the end of the conversation because Morales had moved even closer to the group. Mr. Roman left the area believing the drivers would start hauling sand to the plant.⁵

German Colon was the next person to visit the drivers. According to Mr. Colon, he was at the plant, and he noticed no trucks were arriving. He wanted to know why, so he traveled to the top of the slope. On his way to the top he found the road was clear. Colon stated when he reached the contract drivers he asked them why they were not hauling sand to the plant, and they responded that the road was “not okay” (Tr. 134). Colon replied in essentially the same way Roman had, telling the drivers the road was in good condition as shown by the fact their vehicles had traveled up the slope without incident.

Colon stated that Morales was parked about 25 meters from the contract drivers. Colon testified he approached Morales and told him to let it be the first and the last time he did something like this, and Morales asked him what he had done (Tr. 135).

According to Colon, he then left the area and a short time later all of the drivers, including Morales, began hauling sand to the plant. (The company’s delivery records show the first contract employee arrived at the plant at 9:30 a.m. (Resp. Exh. 2 at 7).)⁶

Mr. Morales stated that during the course of Colon’s visit, he told Colon he was not hauling sand because the road was muddy, the bulldozer was broken and he could not go down the slope (Tr. 37).⁷ Colon did not respond. Morales also stated he told the other drivers what

⁵ Morales’s testimony regarding Roman’s visit to the drivers was less detailed than Roman’s and differed from it in several respects. Morales stated that Roman arrived around 9:00 a.m., that he asked the drivers why they were not working, that all of the drivers stated they did not want to kill themselves and that Roman left without responding (Tr. 30-31). When asked whether he had made a safety complaint to Roman, Morales was adamant that the drivers had done so (Tr. 35).

⁶ Morales described Colon’s visit somewhat differently, Morales stated Colon arrived and asked why the trucks were not operating. In Morales’s version, Colon told the drivers they had to “load up” or “go” (Tr. 33; see also Tr. 37-38). Colon left, but came back a short time later and said to Morales, “[D]on’t do this again. If you do this again you go to hell together with your truck” (Tr. 34). Later in his testimony, Morales quoted Colon as stating, “Don’t ever do this to me again; otherwise you’ll have to get the hell out of here together with your truck” (Tr. 38).

⁷ In the complaint he lodged with MSHA, Morales did not specifically indicate he complained about unsafe conditions either to Roman or Colon. However, he stated in the complaint that Colon “told us angrily that we must load the trucks and it did not matter the

Colon had said to him, and that he asked the other drivers as well as the excavator operator what he had done (Tr. 38).

After Colon was gone, the drivers, including Morales, loaded their trucks and proceeded to drive to the plant. Morales testified they did so because they believed Colon would “kick us out” if they continued their refusal (Tr. 39). By that time the sun had dried the road so that it was safe to travel, and Morales worked the rest of the day.

IV. The Events of July 2 and July 3, 2004

On Friday, July 2, 2004, and on Saturday, July 3, Morales worked normal work days. However, around 4:00 p.m. on Saturday, Roman told Morales not to bring his truck to work on July 6, that Colon wanted to speak with him. Roman did not say why.

V. The Events of July 6, 2004

Around 1:00 p.m. on July 6, Mr. Morales went to see Mr. Colon as Roman had directed. Morales and Colon testified about their resulting conversation. According to Morales, Colon told him he would have to leave and make money somewhere else (Tr. 41). Morales asked why, and Colon said because of Morales’s “insubordination” (*Id.*). Morales did not ask what Morales meant, and Colon did not explain.

Colon testified he told Morales he was being dismissed for insubordination in that he refused to haul sand without reason (Tr. 144). In addition, Colon stated he also told Morales he was being dismissed because his truck did not have an automated load cover and because Morales’s work performance was poor (Tr. 143-144).⁸

After the conversation, Morales left the mine and has not worked since for Arenero.⁹

condition of the road,” a statement which, if true, inferentially indicates Colon understood the drivers’ refusal to haul was based on their belief the road was unsafe.

⁸ Colon explained that Commonwealth environmental regulations require covered loads on haulage trucks and that neither the trucks of the contractor nor the truck Morales drove were equipped with automated load covers. Rather, covers on the contractor’s trucks and on the truck Morales used had to be manually installed, a procedure requiring the drivers to climb on the trucks’ beds. In Colon’s view, this procedure endangered the drivers. Colon also explained that Morales’s poor work performance consisted of his low productivity, something he and Roman had orally warned Morales about prior to July 1 (Tr. 168-169).

⁹ The termination of Morales was not the only change in employment at the mine. Colon also contracted with a new haulage company.

THE LAW

Section 105(c) of the Mine 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 a result of their participation” (S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 623 (1978) (Legis. Hist.)).

As I explained at the hearing, in ruling on an application for temporary reinstatement the issue before the judge is limited to a determination as to whether the miner’s complaint “is frivolously brought” (Sec. of Labor on behalf of Price v. Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. 1990)). It is “not the judge’s duty . . . to resolve . . . conflict[s] in testimony” (Sec. on behalf of Albu v. Chicopee Coal Co., Inc., 21 FMSHRC 717, 719 (July 1999)), rather, the question is whether the evidence establishes the complaint is non-frivolous (see Tr. 6-8).

The Courts have equated the “not frivolously brought” standard with a “reasonable cause to believe” standard (Brock v. Roadway Express, Inc., 481 U.S. 252 (1987)). The Courts also have equated it with finding the complaint is “not insubstantial” and “not clearly without merit” (Jim Walter Resources, 920 F.2d at 747). In addition, the legislative history of the Act defines the “not frivolously brought standard” as whether the complaint “appears to have merit” (Legis. Hist. at 624-625).

I. The “Not Frivolously Brought Standard” and a Prima Facie Case

I conclude that Morales’s complaint was not frivolously brought. It has been held repeatedly that to establish a prima facie case of discrimination, a complainant must show that he or she engaged in protected activity and that the adverse action complained of was motivated in any part by that activity (see Dykhoff v. U.S. Borax, Inc., 22 FMSHRC 1194, 1198 (October, 2000); Driessen v. Nevada Goldfields, Inc., 20 FMSHRC 324, 328 (April, 1998); Sec. on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (October, 1980), rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April, 1981)). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity (see Robinette, 3 FMSHRC at 818, n. 20). To meet the standard that is at issue in an application for temporary reinstatement, the complainant need only establish a prima facie case, something Morales has done.

II. Protected Activity

Mr. Morales's assertion that he refused to haul sand on the morning on July 1 because he believed the road was not safe is established by the record and is protected. While there is a dispute as to whether Morales actually complained about the condition of the road either to Roman or Colon, I need not resolve the controversy because there is no dispute that Roman understood the drivers were refusing to haul sand because the road was slippery and because they believed hauling under the existing conditions was dangerous. Roman testified El Gordo told him so.

Roman knew that Morales, although physically some distance from the other drivers during Roman's conversation with El Gordo, was involved in the same work refusal as the other drivers, and it is reasonable to conclude Roman understood Morales was refusing to work for the same reason.

Moreover, I find that Colon too understood Morales was not hauling sand because of the condition of the road. Like Roman, Colon responded to the drivers' complaint the road was "not okay" by assuring them since they had reached the top of the slope without problems, it was safe to proceed down. Once again, Morales physically was some distance from the other drivers, but, like Roman, Mr. Colon understood Morales was involved in the same work refusal, and it is reasonable to conclude Colon understood Mr. Morales was refusing to work for the same reason as the other drivers. (Communication of a perceived hazard "must be evaluated not only in terms of the specific words used, but also in terms of the circumstances within which the words are used" (Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066, 1074 (July 1986), aff'd mem., 829 F.2d 31 (3rd Cir. 1987 (table cite))).

I further find that Morales established his good faith belief the road was hazardous (See Robinette, 3 FMSHRC at 809-812; Sec. on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983)). A good faith belief "simply means an honest belief that a hazard exists" (Robinette, 3 FMSHRC at 810). There is nothing in the record to indicate Morales's belief in the unsafe condition of the road was other than honest. Almost an inch of rain had fallen the night of June 30-July 1. Obviously, the road was wet. It is true that Arenero offered testimony that on the morning of July 1 and prior to Roman's and Colon's visits, the bulldozer was used to clean the path and that after it broke down, the loader finished the job (see Tr. 83-90 (Testimony of Serafin Martinez)). Morales, on the other hand, stated his belief that the bulldozer was not used and that he did not know whether or not the loader was used. In fact, both the bulldozer and the loader may have been used and the slope may indeed have been safe to travel. However, if so, neither Roman nor Colon responded to the drivers' concerns with this information. Rather, they offered the drivers a non sequitur, telling them since they had made it to the top of the slope without incident, they would make it down the same way. Clearly, Roman's and Colon's opinion did not take account of the fact that on the way down the slope the drivers would face substantially different conditions, in that their trucks would be fully loaded and they would need to brake. Nor was it unreasonable for the drivers, including Morales, to think the sand berms on both sides of the slope would not prevent their fully loaded trucks from over traveling the road.

Once the safety complaint was communicated, Roman and Colon had a duty to address the perceived danger in a manner that reasonably should have resolved the miners' fears (Gilbert v. FMSHRC, 866 F.2d 1433, 1441 (D.C. Cir. 1989); Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 230 (February 1984), aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985); Sec. on behalf of Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1534 (September 1983)). Roman's and Colon's responses did not meet this requirement. The drivers were not told why the road was safe given the conditions they believed they would face if they used it (See e.g., Hogan and Ventura, 8 FMSHRC at 1074)).

III. Motivation of Adverse Action

Colon testified that at least one of the reasons for Morales's dismissal was his failure to haul sand on the morning of July 1, that is, for his "insubordination." Thus, while Colon testified there were other reasons as well, Morales was dismissed in part at least for his protected activity. Having established he engaged in protected activity and was dismissed at least in part because of that activity, Mr. Morales is entitled to the relief he seeks.

Order

Based on the above, I find that the Secretary has met her burden of establishing that Mr. Morales's complaint was not "insubstantial" or "clearly without merit" in that she has made a sufficient showing of the elements of a prima facie case. This stated, it is not certain that Morales will be able to prevail in the discrimination proceeding. For one thing, the company's assertions it dismissed Morales for reasons that are not protected by the Mine Act will need to be more fully evaluated.

The purpose of temporary reinstatement is to render the complainant financially secure during the pendency of his discrimination case. In enacting the "not frivolously brought" standard, Congress intended that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding" (Jim Walter Resources, Corp., 920 F.2d at 748 n. 11). However, it would be inequitable to require Arenero to reinstate Morales for an indefinite period. At the hearing, counsel for the Secretary stated that the Secretary had completed her investigation of Morales's complaint (Tr. 192-193). Accordingly, I expect the Secretary to proceed expeditiously with her decision regarding the filing of a complaint and, should she decide to go forward, to file it no later than April 1, 2005. Once a complaint is filed, I will promptly schedule a hearing.

In view of the foregoing, Arenero is **ORDERED** to **REINSTATE** Wilfredo Morales to the position he held prior to his discharge on July 6, 2004, and to do so at the same rate of compensation and benefits and with the same work hours, including overtime.

David F. Barbour
Administrative Law Judge
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