

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 16, 2002

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
On behalf of WILLIAM DENNY	:	Docket No. VA 2002-32-D
GRIFFITTS,	:	NORT CD 2002-07
Complainant	:	
v.	:	
	:	
COALFIELD SERVICES, INC.,	:	VP 8 Mine
Respondent	:	Mine ID 44-03795 R58

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary
Kurt J. Pomrenke, Esq., Coalfield Services, Inc., Bristol, Virginia, for the Respondent

Before: Judge Schroeder

Introduction

This matter is before me on the application filed by the Secretary on behalf of Mr. William Denny Griffiths, a miner previously employed by Coalfield Services, Incorporated, the Respondent. On March 26, 2002, the Respondent requested a hearing on the application. The hearing was held in Abingdon, Virginia on April 5, 2002. Testimony was received and oral arguments made. Because of the limited time available, post-hearing briefs were not submitted.

Background

This case arises under the “whistle blower” section of the Federal Mine Safety Act, section 105(c)(1). The law prohibits discrimination in employment on the basis of the exercise of any right assured by the Mine Safety Act, and has been specifically interpreted to include protection to persons that make reports or complaints of violations of safety requirements in the

operation of a mine subject to the jurisdiction of the Secretary. Secretary of Labor ex rel Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). When a person submits a complaint of discrimination under this section, the Secretary is required to perform an initial investigation. If the investigation establishes to the satisfaction of the Secretary that the complaint is “not frivolous”, or “not clearly without merit”, the Secretary is required to apply to the Commission for an order temporarily returning the complaint to the *status quo ante* any allegedly discriminatory action. Jim Walter Resources, Inc. v. FMSHRC, 920 F2d 738 (11th Cir. 1990) This order is limited in duration to permit the Secretary to complete a more thorough investigation of the alleged discrimination and to decide whether to pursue more permanent relief. This matter is not intended as a final determination of whether impermissible discrimination occurred but rather whether the complaint is deserving of the temporary relief sought by the Secretary in the application filed on March 26, 2002.

Factual Findings

At the hearing, the parties stipulated that the facts support the conclusion that the Commission has jurisdiction to consider this application for temporary reinstatement.

Prior to February 18, 2002, Mr. Griffiths had been employed by Coalfield Services for more than 14 years. His nominal occupation is welder, but the variety of construction and maintenance work done by his employer required him to perform a variety of functions. On February 18, 2002, Mr. Griffiths was a member of a small crew under the supervision of Mr. Mike Powers assigned to replace metal liner plates in a chute which carried coal from a production hoist to a conveyor belt to the processing plant. The plates are replaced periodically because of the wear caused by the sliding of coal. To perform this work Mr. Griffiths climbed up the inside of the chute to near the point coal is normally dumped into the chute. While Mr. Griffiths was in this exposed location, the production hoist was activated and one of the skips which carry coal to the chute entered the dump position. He observed a sheet of metal which appeared to be loose in the skip. It appeared to him that with very little more movement of the skip the metal sheet would be dumped into the chute and cause him serious injury, perhaps “cut his legs off.”

Mr. Powers later testified that the lining sheets in the skip were also in need of replacement and may have come partially unfastened from the frame. He was of the opinion that Mr. Griffiths was at no time in any actual danger. From the testimony as a whole I conclude Mr. Griffiths had a reasonable belief that his health and safety were in immediate and serious peril.

Mr. Griffiths exited the chute as quickly as possible and began to draw attention of those present to his belief that he had been placed in danger by the operation of the hoist without adequate communication and awareness of his exposure in the chute. His efforts to regain his

composure following this incident were unsuccessful. He went home after informing his supervisor, Mr. Powers. As Mr. Griffiths was leaving the job site, Mr. Powers asked him whether he would return the next day. Mr. Griffiths replied that he did not know when he would be back.

The following day, February 19, 2002, Mr. Griffiths made two telephone calls, one to the Safety Director of Coalfield Services, and one to the Human Resources Director. He advised the Safety Director of the danger he had been exposed to in the chute. He advised the Human Resources Director that he would not be in to work and did not know when he would be able to return to work.

On February 20, 2002, Mr. Griffiths went to work late and apparently did not call his supervisor to advise him of the late arrival. He did call the local MSHA Office and reported his concerns with the way the hoist was operated while he was in the chute to perform maintenance work. As a result of this call, the MSHA inspector normally responsible for this mine made a visit to the mine to inquire into the incident. The inspector, who testified at the hearing, did not identify the person responsible for the inspection. Mr. Powers, however, indicated he strongly suspected Mr. Griffiths had called MSHA. He questioned Mr. Griffiths about that possibility and Mr. Griffiths denied having made a call to MSHA.

Mr. Griffiths finished the work day on February 20, and worked his usual shift on both February 21 and February 22. After completing his shift on February 22, 2002, Mr. Griffiths received a notice of suspension with the intention to terminate. The notice was a formality required under a collective bargaining agreement with the UMW before a miner can be discharged. The notice of suspension listed two reasons for discharge; (1) failure to report for work, and (2) failure to follow company policy for notification of an absence from work. Company policy on notification apparently included telephone notification of specified company officials, including the Director of Human Resources.

On February 21, 2002, Coalfield Services had received a citation from the MSHA inspector for the incident involving Mr. Griffiths on February 18. The citation did not identify Mr. Griffiths as the complaining party.

Mr. Griffiths' termination became official on February 23, 2002.

Analysis

I easily conclude the Secretary has established the elements of a discriminatory discharge as tested under the "not frivolous" standard of Section 105(c). Mr. Griffiths exercised his right to raise safety concerns of a reasonable nature to both company management and to MSHA. He was discharged from his employment reasonably close in time to the exercise of this right. He was discharged under circumstances in which a reasonable inference can be drawn that management was aware of his exercise of this right.

Management response to the application for temporary reinstatement has two parts. First, Coalfield Services argues business justification in failing to follow company policy on notification of absence. This is embellished with unsupported references to prior similar violations of company policy. Second, Coalfield Services claims it could not have discriminated against Mr Griffiths since it did not know for certain that he had complained to MSHA until long after the discharge became effective.

Applying again the “not frivolous” standard to these objections, it is reasonably clear that Mr. Griffiths made a reasonable good faith effort to comply with company policy on notification of absence from work. He called the corporate office and spoke to one of the people authorized by company policy to receive such calls. While he was apparently vague on the period of intended absence he did put the company on notice that he would be absent for reasons related to the incident which he reported to the company as a safety concern. For the limited purpose of the application for temporary reinstatement, the company has not established a compelling defense on this point.

As to the time of knowledge on the part of Coalfield Services of the exercise of rights under the Mine Safety Act, these rights are not limited to reports to MSHA. It is clear under Commission precedent that a report to a supervisor or a report to a Safety Director is protected activity. Coalfield Services knew long before it composed a discharge notice that Mr. Griffiths had exercised these protected rights. Where an employee has exercised rights under the Mine Act, management has a heavy burden of showing an independent business justification for adverse action against the employee. Coalfield Services has not made a credible showing of business justification in this instance.

Order

For the reasons given above, the application for temporary reinstatement filed by the Secretary on behalf of William Denny Griffiths is granted, and the Respondent Coalfield Services, Inc., is directed to reinstate Mr. Griffiths in his prior position at his then rate of pay. Reinstatement is to be effective on the date of this order and to continue until the Secretary makes a final determination as to discrimination within the period afforded by the statute.

Irwin Schroeder
Administrative Law Judge

Distribution:

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

Kurt J. Pomrenke, Esq., Elliott, Lawson and Pomrenke, 110 Piedmont Ave., P.O. Box 8400, Bristol, Virginia 24203 (Certified Mail)

William D. Griffiths, P.O. Box 248, Saltville, VA 24370 (Certified Mail)

S. Scott Aker, President, Coalfield Services, Inc., 2942 Peppers Ferry Road, Wytheville, VA 24382 (Certified Mail)