FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 15, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RAMON S. FRANCO, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEST 96-120-DM
v.	:	Phelps Dodge Morenci Mine
W.A. MORRIS SAND AND GRAVEL, INC., Respondent	:	

ORDER DENYING MOTIONS TO DISMISS
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Susanne Lewald, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Complainant;
Phil B. Hammond, Esq., Hammond, Natoli & Tobler, Phoenix, Arizona for Respondent.

Before: Judge Manning

On January 23, 1996, the Secretary of Labor filed an Application for Temporary Reinstatement ("Application") on behalf of Ramon S. Franco against W.A. Morris Sand and Gravel, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1988)("Mine Act").[1] Respondent opposed the Application and, in addition, filed motions to dismiss this proceeding on jurisdictional grounds. An evidentiary hearing was held on February 7, 1996, in Phoenix, Arizona, and briefs were filed on the jurisdictional issues on February 13, 1996. For the reasons set forth below, I deny Respondent's motions to dismiss and find that the Secretary of Labor has met his burden of establishing that the underlying discrimination proceeding was not frivolously brought.

I. FACTUAL BACKGROUND

Ramon S. Franco began working for W.A. Morris Sand and Gravel, Inc. ("W.A. Morris") on or about January 21, 1991, as a truck driver. He drove several different kinds of trucks, in-

[1] The complaint originally named Andrew J. Gilbert, Sr., doing business as W. A. Morris Sand and Gravel. When Respondent objected on the basis the it is an Arizona corporation, Complainant moved to amend its application to show W.A. Morris Sand and Gravel, Inc., as the Respondent. Respondent did not object to the motion and it was granted at the hearing.

cluding dump trucks, end-dump trucks and concrete mixers. (Tr. 13). W.A. Morris has its main office and other facilities in Safford, Arizona. W.A. Morris also has a concrete batch plant on property owned by Phelps Dodge Morenci, Inc. ("Phelps Dodge") near Morenci, Arizona. (Tr. 13, 54). Phelps Dodge operates a copper mine and related facilities on its Morenci property. Mr. Franco was frequently assigned to deliver concrete from the batch plant to various Phelps Dodge facilities. (Tr. 14-15).

On the days preceding January 24, 1995, Mr. Franco had been assigned to drive a concrete mixer to deliver concrete from the batch plant to Phelps Dodge's solvent extraction plant on its Morenci property. (Tr. 17-18, 114). On January 24, 1995, when Mr. Franco reported to work at the batch plant, Mr. Jack Gilbert, Jr., a supervisor with W.A. Morris, assigned him truck No. 158, a concrete mixer. (Tr. 16). In the previous days, Mr. Franco had been driving truck No. 159. (Tr. 57-58). Mr. Franco told Mr. Gilbert that he was not going to drive truck No. 158 because it was unsafe. (Tr. 18). Mr. Franco testified that he had driven that truck before and had problems with the chute dropping as the concrete was discharged from the mixer. (Tr. 18). He stated that the chute was equipped with booster wheels that were not staying up properly. (Tr. 19, 52-53, 74-76, 78-79). He believes that someone could be hurt or killed if it fell while someone was unloading the concrete. Id. Mr. Franco testified that this hazard would endanger the people unloading concrete from the truck but would not pose a risk to the driver of the truck while transporting the concrete to the construction site. (Tr. 52-53).

When Mr. Franco told Mr. Gilbert that he would not drive the truck he also stated that he would like to take his vacation until a safe truck was available. (Tr. 18, 20, 59-60). Mr. Franco testified that Mr. Gilbert replied that it would put the company "in a spot," but that it was "OK." (Tr. 20, 77). Mr. Franco then went to the Safford office to request vacation time. While he was there, Mr. Richard Clairage, a W.A. Morris management employee, told Mr. Franco that he may not be able to take vacation days because he heard over the company radio that he had been fired. Id. A few days later, Mr. Franco returned to the Safford office to pick up his pay check. (Tr. 23). Mr. Clairage handed him a check that included all of his vacation pay and advised Mr. Franco that he had been fired. Id.

Mr. Franco tried to contact Jack Gilbert, Sr., the president of W.A. Morris, to find out why he had been fired. Mr. Franco testified that a few days later Mr. Gilbert told him that he was fired because he refused to drive truck No. 158. (Tr. 24). Mr. Franco further testified that it is his understanding that another employee of W.A. Morris refused to drive truck No. 158 a few days earlier and he was not fired. (Tr. 20). Mr. Gilbert, Sr., testified that he fired Mr. Franco because he refused to drive the truck. (Tr. 118).

About a week after Mr. Franco spoke with Mr. Gilbert, Sr., he went to the state unemployment office to apply for unemployment compensation benefits. (Tr. 26). He also submitted to the unemployment compensation office several handwritten letters describing his version of the events that led to his dismissal

from W.A. Morris.[2] (Tr. 32-33; Ex. C-1). On April 10, 1995, Mr. Franco filed a complaint with the Arizona Attorney General's office alleging that he was discharged because of his national origin, age, and disability. (Tr. 38-39; Ex. C-2). The complaint states that Mr. Franco refused to drive the truck because he believed it to be unsafe. Id.

On July 10, 1995, Mr. Franco filed a discrimination complaint with MSHA. (Tr. 46-51; Ex. C-3). Mr. Franco testified that he first became aware that he could file a discrimination complaint with MSHA during an MSHA-approved training course he attended in June or July 1995 while employed by a different contractor at the Morenci Mine. (Tr. 45, 51, 77).

II. JURISDICTION

A. Ramon Franco was a miner.

Respondent contends that the Secretary is without jurisdiction under the Mine Act to enforce the temporary reinstatement provisions of section 105(c) because Mr. Franco did not work at a mine as that term is defined in section 3(h)(1) of the Mine Act. Respondent states that its "Morenci operation is located on real property which, although owned by Phelps Dodge, is not part of or appurtenant to any land from which minerals are extracted, any private way or road appurtenant to any land from which minerals are extracted, or any land, or other areas described in 30 U.S.C. § 802(h)(1), used in or resulting from the work of extracting minerals or to be used in the milling of such minerals." Motion to Dismiss at 2. In addition, Respondent maintains that the concrete in the mixer truck which Mr. Franco refused to drive was "destined for a flood control dam located approximately three mines upstream from Phelps Dodge's Morenci open pit copper mine." Id. It states that "the damsite was not used in, or to be used in, or the result of, the work of extracting minerals from their natural deposits nor was the damsite used in, or to be used in, the milling or the work of preparing minerals." Id. at 2-3. Respondent represents that the "dam acted solely as a flood prevention device, up stream of the minesite, used to retain water and prevent flooding of the actual minesite." Id. at 3.

Mr. Franco is not entitled to the protection of section 105(c) of the Mine Act unless he is a miner. A miner is defined as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). A coal or other mine is defined, in pertinent part, as: "(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, excavations ... structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds ... used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits...." 30 U.S.C. § 802(h)(1).

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[2] These letters were actually written by a friend based on Mr. Franco's description of the events. (Tr. 27-31, 61). He signed the letters but only read parts of them. Id.

The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978). This report also noted that the Committee included impoundments and retention dams in the definition because a dam collapsed at a mine in 1972 and MSHA's predecessor, the Bureau of Mines, was uncertain that it had jurisdiction over the dam. Id.

The issue is whether Mr. Franco was a miner. There is no question that Mr. Franco was working for W.A. Morris at the time he was discharged. Mr. Franco was assigned to drive truck No. 158, a concrete mixer, on January 24, 1995, and was to pick up concrete from W.A. Morris's Morenci batch plant, on the property of Phelps Dodge. Mr. Franco testified that he did not know where he was to deliver concrete on the day of his discharge. (Tr. 58). According to the motion, Mr. Franco was to deliver the concrete to a Phelps Dodge dam a few miles upstream from the open pit mine. Motion at 2; Brief at 10. The purpose of the dam was "to retain water and prevent flooding of the actual minesite." Motion to Dismiss at 3.[3]

MSHA Inspector Richard Cole testified that W.A. Morris's batch plant was not subject to MSHA jurisdiction despite the fact that it was located on Phelps Dodge's Morenci property. (Tr. 106). His testimony is consistent with a memorandum of understanding between MSHA and the Occupational Safety and Health Administration ("OSHA") which provides that asphalt and concrete batch plants are subject to OSHA rather than MSHA jurisdiction "whether or not located on mine property." 44 Fed. Reg. 22827 (April 17, 1979), amended, 48 Fed. Reg. 7521 (February 22, 1983). See also, W.J. Bokus Industries, Inc., 16 FMSHRC 704 (April 1994). This appears to be an exception to the general position of the Secretary that the Mine Act applies to all "working conditions on mine sites." Id.

Mr. Cole testified that he believes that a truck dispatched from the Morenci batch plant is subject to MSHA jurisdiction if it travels and delivers its load of concrete on the property of Phelps Dodge. (Tr. 114). He testified that if the load is delivered to the town of Morenci rather than to a facility on Phelps Dodge property, he believes that the truck would not be subject to MSHA jurisdiction. (Tr. 107, 114-115).

For the reasons discussed below, I find that Mr. Franco was a miner on the day of his discharge. I agree with Inspector Cole that the W.A. Morris's Morenci batch plant is not subject to MSHA

[3] Apparently, Phelps Dodge was concerned that this dam had weakened as a result of bad weather and that if it collapsed it would flood the pit. (Tr. 8).

jurisdiction. Normally, trucks dispatched from a batch plant would likewise not be subject to MSHA jurisdiction. If a truck delivers asphalt or concrete to a mine, however, the truck would be subject to MSHA jurisdiction while on mine property. This jurisdiction would attach even if the batch plant is not on mine property. Thus, if W.A. Morris delivered concrete to the Morenci Mine from a batch plant in the town of Morenci, the mixer trucks would be subject to MSHA jurisdiction while on mine property.

The record indicates that Phelps Dodge's Morenci property covers approximately 80 square miles. (Tr. 88). Much of this area may not be included within the definition of "coal or other mine" in section 2(h)(1) of the Mine Act. Nevertheless, I find that the area of the flood control dam is part of Phelps Dodge's Morenci Mine and is subject to Mine Act jurisdiction. First, the definition of coal or other mine includes retention dams used in the extraction of minerals. That term is not defined in the Mine Act. There is no dispute, however, that the dam in question was designed to retain water. I find that it is a retention dam as that term is used in the definition. The dam facilitated the mining of copper from the Morenci pit and was integrally related to the extraction of copper. As Respondent recognizes, the dam protected the open pit from flooding. Accordingly, I find that

the dam was part of the Phelps Dodge Morenci Mine and that Mr. Franco was a miner on the day of his discharge.[4]

In Otis Elevator Co. v. FMSHRC, 921 F.2d 1285 (D.C. Cir. 1990), the Court held that a company engaged in the business of providing elevator maintenance and repair services at a mine was a mine operator subject to the jurisdiction of the Mine Act. It specifically rejected the company's contention that Mine Act jurisdiction only attaches to independent contractors who operate, control, or supervise a mine.[5] 921 F.2d at 1289. In Lang Brothers, Inc., 14 FMSHRC 413 (September 1991) (published March 1992), the respondent had a contract to clean and plug gas wells at a coal mine site annually to ensure that natural gas did not seep through the wells into a mining area. In holding that the company was an independent contractor and therefore an "operator," the Commission stated:

> Lang's work at the well sites ... was integrally related to [the mine's] extraction of coal. The sole purpose of Lang's cleaning and plugging contract ... was to facilitate [the] extraction of ... coal.

14 FMSHRC at 418 (citation omitted). See also, Bulk Transportation, 13 FMSHRC 1354, 1357 (September 1991).

I find that W.A. Morris was an independent contractor and therefore an operator under section 2(d).[6] W.A. Morris performed work at the Morenci Mine including the dam that was "integrally related to" the extraction of copper. I recognize that a contractor's contact with a mine may be so infrequent or insubstantial that it should not be considered an operator. In this case, however, W.A. Morris had a continuing presence at the Morenci Mine. The fact that its activities subjected it to Mine Act

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[4] There is no dispute that Mr. Franco was at the batch plant when he refused to drive the truck and was discharged. One could argue that because the batch plant is not a coal or other mine, he was not a miner at the time of his work refusal and discharge. I reject such a narrow interpretation of the definition. I find that Mr. Franco was a miner despite the fact that he was not at a mine at the time of these events. His work activities would have taken him to a mine. Thus, if a hypothetical mine foreman called an employee at his home to assign him unsafe work at a mine and then discharged him for refusing to perform such work, the mine operator would not escape section 105(c) liability simply because the individual was not "working" at a mine at the time of the phone call.

[5] The term "operator" is defined to include "any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d).

[6] I limit my finding to the circumstances of this case because other parts of W. A. Morris operations may not be subject to Mine Act jurisdiction.

jurisdiction should not have come as a surprise. Indeed, W.A. Morris had provided MSHA training for Mr. Franco. (Ex. R-2).

In its brief, Respondent relies, in part, on the decisions of two administrative law judges to support its position that the dam is not a mine. First, in Randall Patsy v. Big "B" Mining Co., 17 FMSHRC 224 (February 1995), Judge Feldman held that an individual working at a mobile home campground owned by a mining company was not a miner because he was not working at a coal or other mine. I agree with the judge's analysis that an individual's status as a miner is determined by whether he works in a mine and not whether he is employed by a mine operator. In this case, I base my conclusion that Mr. Franco was a miner on the fact that he was working at a mine, not that he was employed by W.A. Morris. Other W.A. Morris employees may not be miners.

Second, in Kaiser Steel Corp., 3 FMSHRC 1052 (April 1981), former Commission Judge Boltz determined that a dam upstream from a mine that provided drinking water for a town and domestic water for a mine was not subject to Mine Act jurisdiction. The Secretary argued that MSHA had jurisdiction because the dam was owned, operated, and controlled by a mining company; it was close to the mine; and water was used at the mine and coal preparation facilities. 3 FMSHRC at 1057. Judge Boltz held that the dam was not subject to Mine Act jurisdiction because the Secretary failed to establish that water from the dam was used at the mine or the preparation plant. Id. To the extent that his decision holds that a dam is subject to MSHA jurisdiction only if the water from the dam is used at the mine, I disagree with his analysis. In the present case, the water is not used at the mine but is diverted around the mine for downstream users. Respondent's Brief at 9. The dam protected Phelps Dodge's open pit from flooding and is therefore an integral part of the mine subject to the jurisdiction of MSHA.

For the reasons discussed above, I find that the dam is subject to MSHA jurisdiction, W.A. Morris was an operator when providing services or construction at the dam, and Mr. Franco was a miner. Accordingly, Respondent's motion to dismiss this proceeding on this jurisdictional ground is **DENIED**.

B. Mr. Franco's late-filed complaint should be excused.

Respondent also contends that this case should be dismissed because Mr. Franco did not timely file his discrimination complaint with the Secretary. There is no dispute that Respondent discharged Mr. Franco on January 24, 1995, and that he did not file his discrimination complaint with MSHA until July 10, 1995, about 167 days after his discharge. Section 105(c)(2) of the Mine Act, provides that a "miner ... who believes he has been discharged ... by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary ... ." 30 U.S.C. § 815(c)(2). Respondent argues that this proceeding should be dismissed because Mr. Franco failed to comply with this 60-day requirement.

Commission case law makes clear that the 60-day time limit is not jurisdictional. An administrative law judge is required to review the facts "on a case-by-case basis, taking into account

the unique circumstances of each situation" in order to determine whether the miner's late filing should be excused. Hollis v. Consolidation Coal Co., 6 FMSHRC 21, 24 (January 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir 1984) (table). The Commission reached this conclusion based on the language of section 105(c), the legislative history of the Mine Act and the protective purposes of the Mine Act's anti-discrimination provisions. Id.

In this case, Mr. Franco filed his discrimination complaint about 107 days late. Based on the evidence in this case, I find that his late filing should be excused. As soon as he was discharged, Mr. Franco filed for unemployment compensation with the State of Arizona. His narrative description of the events was submitted to the state office on or before February 15, 1995. In this filing, he described the events that took place on the day of his discharge and stated his belief that the truck he was assigned to drive that morning was unsafe. In this filing, he also stated that he communicated his safety concerns to Andrew J. Gilbert, Jr., and he subsequently learned that he had been fired. In his filing he stated that he was "not sure what [he] did or said to get ... fired ... ." He suggested that he was terminated because he is Hispanic, over 50 years old, and is "handicapped." (Ex. C-1).

On April 10, 1995, Mr. Franco filed a complaint with the Civil Rights Division of the Arizona Attorney General's office alleging that he was discriminated against because of his national origin, age, and his disability. In his complaint he set forth facts that he believed resulted in his discharge, including that he "informed Gilbert that the truck was unsafe to operate ... and [he] would not drive it until it was repaired." (Ex. C-2).

Although the discrimination complaint Mr. Franco filed with MSHA sets forth his safety concerns in more detail than his unemployment compensation claim or his civil rights complaint, the description of the events of January 24 is essentially the same. The only significant differences are the legal theories he alleged in support of his claims.

At the hearing, Mr. Franco testified that he first became aware that he could file a discrimination complaint under the Mine Act during an MSHA approved training course he attended while employed by another contractor after his discharge by Respondent. He testified that he filed the MSHA complaint soon after he learned that he could do so. I credit his testimony in this regard.

The legislative history of the Mine Act states that an extension of the statutory time limit may be warranted where "the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he ... misunderstands his rights under the Act." Legislative History, at 624. In this case, Mr. Franco advised an Arizona agency within 60 days that he was discharged after he refused to drive a truck that he considered to be unsafe. He stated that other W.A. Morris employees had refused to drive unsafe trucks and were not terminated. He further stated that he did not know why he was discharged for

refusing to drive the truck, but noted that the other drivers who refused to drive unsafe trucks were not Hispanic, over 50 years old, or handicapped.

Thus, Mr. Franco brought his complaint to the attention of another agency with the 60-day period. Although he alleged different legal theories in the MSHA complaint, the factual predicate was the same. In addition, I note that Mr. Franco has only an eighth-grade education and, by his own admission, is not proficient at reading. (Tr. 52, 61). I find that he misunderstood his rights under the Mine Act and that once he learned of his rights at a training class, he filed his MSHA complaint expeditiously.

In Hollis, the administrative law judge did not credit the miner's claimed ignorance of his section 105(c) rights and he dismissed the discrimination proceeding because it was filed more than four months after the statutory deadline. The miner had pursued labor arbitration remedies and had filed complaints under civil rights and labor statutes. The judge determined that the miner, as the chairman of the local union safety committee, knew his rights under the Mine Act. In affirming the judge's decision, the Commission concluded that Congress did not intend that late-filed complaints be excused where "the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act." 6 FMSHRC at 25 (emphasis in original).

I find that Mr. Franco did not knowingly sleep on his rights when he sought unemployment compensation and invoked the aid of the Arizona Attorney General's Office. As stated above, he misunderstood his Mine Act rights and he filed his Mine Act complaint as soon as he learned of his right to do so. I also find that W.A. Morris was not unfairly prejudiced by Mr. Franco's late filed complaint. At the time Mr. Franco was discharged, Mr. Gilbert knew that Mr. Franco refused to operate truck No. 158 because he believed it was unsafe. W.A. Morris could have fully investigated his safety claim at that time.

In its brief, Respondent relies, in part, on the decision of Judge Maurer in William T. Sinnott v. Jim Walter Resources, Inc., 16 FMSHRC 2445 (December 1994) to support its case. In that case the complainant filed his MSHA about three years three months after the alleged discrimination. In addition, the complainant had a college degree in mine engineering and did not claim ignorance of the filing requirements of the Mine Act. He sought to be excused from the filing requirements because he did not know why he was discharged. Judge Maurer dismissed his discrimination complaint. That case is factually distinguishable from the present case. Mr. Franco has only an eight grade education, little prior mining experience and does claim ignorance of the time limits in the Mine Act. He filed his complaint with MSHA soon after he learned of his rights, which was only about three months after the alleged discrimination. Accordingly, the judge's analysis in Sinnott is not applicable to this case.

For the reasons discussed above, I find that the failure of Mr. Franco to file his MSHA discrimination complaint within 60 days should be excused. Accordingly, Respondent's motion to dismiss this complaint for that reason is **DENIED**.

C. Complainant's Application should not be dismissed because of technical deficiencies in service and filing.

Respondent also maintains that the case should be dismissed because it was not properly served with the Application and the Application was not properly filed with the Commission. Respondent contends that the Application was not served or filed by personal delivery or by certified mail, return receipt requested as required by 29 C.F.R. §§ 2700.5(d) and .7(c).

Complainant admits that he served and filed the Application by regular first class mail. He states that this mistake was clerical in nature and that Respondent suffered no harm or prejudice as a result. He further states that, in a telephone call made by Respondent's counsel to Complainant's counsel on January 23, 1996, Complainant's counsel was advised that the Application had been received.

The certificate of service states that the Application was served and filed on January 17, 1996. It was received by the Commission on January 23, 1996. I conclude that this proceeding should not be dismissed on the basis that the Application was served and filed by regular first class mail. There is no dispute that the Application was promptly received by Respondent and the Commission. Dismissal is a harsh sanction and Complainant's error was only a technical one.

Finally, Respondent contends that this Application should be dismissed because Complainant failed to attach to the Application a copy of Mr. Franco's complaint to the Secretary, as required by 29 C.F.R. § 2700.45(b). Complainant replied that he failed to attach a copy of Mr. Franco's complaint by mistake and that a copy was provided in accordance with my order of January 25, 1996.

I conclude that this proceeding should not be dismissed on this basis. The Complainant's error was a technical one and Respondent was able to fully participate in the hearing. Based on the foregoing, Respondent's motions to dismiss this proceeding are **DENIED**.

III. MR. FRANCO'S COMPLAINT WAS NOT FRIVOLOUSLY BROUGHT

The issue in this proceeding is whether Mr. Franco's complaint was frivolously brought. The Secretary of Labor has the burden of proof. This issue is entirely different from the issue in the underlying discrimination proceeding, WEST 96-121-DM. In Jim Walter Resources, Inc. v FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990), the Court concluded that the "not frivolously brought" standard is indistinguishable from the "reasonable cause to believe" standard under the "whistle-blower" provisions of the Surface Transportation Assistance Act. The court equated "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit." Id.

I conclude that Mr. Franco's complaint was not frivolously brought. As discussed above, Mr. Franco testified that he re-

fused to drive the truck because he believed it to be unsafe. He also testified that he told his supervisor that his refusal was based on his safety concerns. Mr. Gilbert, Sr., President of W.A. Morris, testified that Mr. Franco was discharged because he refused to drive the truck. The alleged hazard is that the chute that discharges the concrete from the mixer was defective and could fall and thereby injure or kill someone. It is not clear whether Mr. Franco believed that he was personally endangered because he testified that the hazard was present only when the concrete was unloaded. The record does not disclose whether Mr. Franco would have helped unload the concrete at the dam site.

It is well established that in order to establish a prima facie case in a discrimination case, a complainant must establish that he engaged in a protected activity and that the adverse action complained of was motivated in any part by that activity. In some circumstances a miner may refuse to work based on a reasonable, good faith belief that his work activity would endanger other miners. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364 (4th Cir. 1986).

Based on the above, I find that the Secretary has met his burden of establishing that Mr. Franco's complaint and the Sec-Secretary's decision to pursue the complaint were not "insubstantial or frivolous" or "clearly without merit." The Secretary made a sufficient showing of the elements of a prima facie case of discrimination. Of course, it is not certain that Complainant will be able to prevail in the discrimination proceeding. Respondent does not admit that it discharged Mr. Franco because of his safety complaint about the truck and has alleged that Mr. Franco was discharged for reasons that are not protected under the Mine Act.

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, 920 F.2d at 748 n. 11. Nevertheless, it would be inequitable to require Respondent to temporarily reinstate Mr. Franco for an indefinite period of time. Accordingly, I expect the parties to proceed with the discrimination case, WEST 96-121-DM, as expeditiously as possible. Respondent's answer is due on or before February 21, 1996. I will schedule a conference call soon after the answer is filed to discuss a hearing schedule.

IV. ORDER

W.A. Morris Sand and Gravel, Inc., is hereby **ORDERED** to immediately reinstate Ramon S. Franco to the position he held prior to his discharge at the same rate of compensation and with the same work hours, including overtime, as the other truck drivers at W.A. Morris. Mr. Franco's position must have substantially similar working conditions as his previous position.

Richard W. Manning
Administrative Law Judge

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