FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 18, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
On behalf of CURTIS STAHL,	:	PROCEEDING
Applicant	:	
	:	Docket No. WEST 2000-145-DM
v.	:	WE MD 98-18
	:	
A & K EARTH MOVERS INC.,	:	Bella Vista Pit
Respondent	:	Mine ID No. 26-02046

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Applicant;
Richard L. Elmore, Esq., Hale, Lane, Peek, Dennison, Howard & Anderson, Reno, Nevada, for Respondent.

Before: Judge Hodgdon

This case is before me on an Application for Temporary Reinstatement brought by the Secretary of Labor, on behalf of Curtis Stahl, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Stahl as an employee of the Respondent, A & K Earthmovers, Inc., pending a decision on a discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA) against the company.[1] A hearing was held on the application on February 15, 2000, in Sparks, Nevada. For the reasons set forth below, I grant the application and order Mr. Stahl's temporary reinstatement.

Summary of the Evidence

On July 27, 1998, Stahl filed a discrimination complaint with MSHA stating that he had been discharged from A & K on July 15, 1998, and alleging that the discharge was the result of his making safety complaints. Specifically, he set out the following as his Summary of Discriminatory Action:

[1] It does not appear that the Secretary has yet filed a Complaint of Discrimination with the Commission. In view of this decision, and in fairness to both parties, the complaint should be filed as soon as possible.

June 24, 1988 [*sic*] At 7:15 am, I phoned Joe Hess and told him I needed another fuel truck driver because David Chickering (702)425-8042 hadn't showed [*sic*] up for work. At 8:30 am, I checked out **unit #627** and determined that both the park brake and the service brakes were completely wore [*sic*] out. At 9:00 am, David's father showed up on the job site and informed me that David was in jail and he had no idea when he would get out. At 9:15 am, I phoned Joe Hess and told him what I had learned about David and the brakes.

On June 26, 1998 Fuel truck **unit #627** was written up on a "required maintenance form" by the new fuel truck driver named Eleuterio Jacinto (702)324-6125 indicating that **unit # 627** had no park brake and no service brakes. He also stopped the lead maintenance mechanic named Kevin ????? (702)972-4487 down by the water tank near the crusher. After thoroughly inspecting the brakes, Kevin confirmed that they were completely wore [*sic*] out. He said he would inform his boss (the maintenance supervisor) Brian Wade about it and get it fixed.

On June 29-30 & July 1-2-3 Eleuterio Jacinto continued writing up the problem with the brakes and he was fired July 6, 1998.

July 1st, 2nd, 3rd Acting as foreman in charge of Bella Vista Pit and the person responsible for the safety of all persons on the property, I personally had verbal conversations with the maintenance supervisor (Brian Wade) about the problem with the brakes on **unit #627**. He indicated he knew all about the brake problem. He told me he could not work on it now because they were to [*sic*] busy but he would get to it when he could.

July 6, 1998 I spoke to Brian Wade in front of the office and told him the brakes on **unit #627** are worse now than when M.S.H.A. wrote a citation on it just three weeks ago and asked him if he could please get them repaired. He said he would get to it as soon as he could.

July 7, 1998 I spoke to Kevin ???? and asked him if he knew when they were going to fix the brakes and he asked me if I had done something to upset Brian because he had no intention of fixing it for me. So I said "I'm going to Red Tag it then", and that's what I did.

> **July 15, 1998** I was terminated. Upon asking why, Joe Hess said: (you allowed both generators to run out of fuel last week and we just don't need any more trouble around here.) [*sic*]

(Comp Ex. 1 at 9.)

Stahl was the only witness called by the Secretary. He testified that he was hired as the Crusher Foreman in October 1996. His testimony was essentially a reiteration of his statement set out above. He said that: "I feel like I was terminated because of the incident with the 627 fuel truck and when I red-tagged it." (Tr. 32.)

The company presented five witnesses: Melvin E. Borden, Safety Director; F. Joseph Hess, Crushing Superintendent and Head of Asphalt Operations; Kelly Bart Hiatt, Vice President and General Manager; James Busch, Equipment Manager; and Bryan Wade, Field Mechanic Supervisor. The company's case can be summed up as follows: (1) Stahl did not communicate any safety complaints to his superiors; (2) There was no reason to continue using the 627 fuel truck after its brakes were determined to be deficient, since there was another fuel truck available to fuel the generators; (3) Bryan Wade specifically told Stahl to park the 627 truck and he would fix it when he could; (4) If there were any safety violations, they were Stahl's in requiring, or permitting, his drivers to continue to operate an unsafe truck; (5) Stahl was terminated for reasons having nothing to do with his alleged protected activity; and (6) The decision to terminate Stahl was made a week prior to his first alleged safety complaint.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination with Commission Rule 45, 29 C.F.R. § 2700.45.

Rule 45(d), 29 C.F.R. § 2700.45(d), states that:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

Thus, "[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987) *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (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 624-25 (1978). In addition to requiring that a complaint appear to have merit, the Commission and the courts have also equated "not frivolously brought" to a "reasonable cause to believe" and "not insubstantial." *Jim Walter Resources, Inc.*, 920 F.2d at 747 & n.9; *Secretary of Labor on behalf of Price*, 9 FMSHRC at 1306.

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (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 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

In this case, the Complainant has testified that he engaged in protected activity by complaining on several occasions to his superiors about the defective brakes on fuel truck 627 and there is no dispute that his discharge by the company was an adverse action. Other than his opinion, however, he has presented no evidence that his discharge was motivated by his engaging in protected activity. Nevertheless, as the Commission has frequently acknowledged, it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Secretary on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.* Here, Stahl testified that the company had knowledge of his complaints and there was a coincidence in time, eight days, between this activity and his discharge.

Thus, if Stahl's claims are found to be credible, he would be entitled to relief under the Act. I find that his testimony was not inherently incredible and no evidence was presented that he was altogether unworthy of belief. The conflicts between Stahl's testimony and the Respondent's are the types of conflicts in testimony that arise in every case. However, it is "not the judge's duty . . . to resolve . . . conflict[s] in testimony at this preliminary stage of the

proceedings." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

A & K's evidence indicates that it may well have a valid defense to Stahl's complaint, but, as set out above, the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Complainant establishes that his complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.* 920 F.2d at 744. Consequently, the focus of the hearing is clearly on the evidence presented by the Complainant and the evidence presented by the Respondent is relevant, at this stage, only to the extent it demonstrates that the claim is frivolous. The company has not presented any evidence that things could not have happened the way the Complainant alleges that they did, that he had stated to witnesses that his claim was "made up" or anything of a similar nature.

Finally, in a temporary reinstatement proceeding, Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered. *Jim Walter Resources, Inc*., 920 F.2d at 748 n.11.

Accordingly, finding that Stahl's complaint is not entirely without merit, I conclude that his discrimination complaint has not been frivolously brought.

Order

Curtis Stahl's Application for Temporary Reinstatement is **GRANTED**. A & K Earthmovers, Inc., is **ORDERED TO REINSTATE** Mr. Stahl to the position that he held on July 15, 1998, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.

T. Todd Hodgdon
Administrative Law Judge

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