

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 9, 2003

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of JOSEPH M. ONDREAKO,	:	Docket No. WEST 2003-403-DM
Applicant	:	MSHA No. RM MD 03-11
	:	
v.	:	Bingham Canyon Mine
	:	
KENNECOTT UTAH COPPER CORP.,	:	Mine I.D. 42-00149
Respondent	:	

DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: John Rainwater, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Applicant;
James M. Elegante, Esq., and Jan Smith, Esq., Kennecott Utah Copper Corp., Magna, Utah, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Joseph M. Ondreako against Kennecott Utah Copper Corporation (“Kennecott”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the “Mine Act”). The application was filed on or about September 2, 2003 and Kennecott requested a hearing within 10 days of receipt of the application. The application alleges that Kennecott discriminated against Ondreako when, on May 8, 2003, Kennecott demoted Ondreako from shovel operator to dozer operator after he made safety complaints to mine management. The application further alleges that Kennecott discriminated against Ondreako when Kennecott laid Ondreako off, effective July 5, 2003, as a result of safety complaints he made to management and to MSHA. The application states that the Secretary has determined that the underlying discrimination complaint filed by Ondreako was not frivolously brought. A hearing in this temporary reinstatement proceeding was held in Salt Lake City, Utah, on October 2, 2003. For the reasons set forth below, I find that the applicant established that Ondreako’s discrimination complaint was not frivolously brought.

II. SUMMARY OF THE EVIDENCE

On or about July 9, 2003, Ondreako filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"). Ondreako was the only witness called by the Secretary in this temporary reinstatement proceeding. Ondreako testified that he worked as a heavy equipment operator for Newmont Gold Company for about ten years prior to working for Kennecott. He began working for Kennecott at the Bingham Canyon Mine in November 1999 as a haul truck driver. This mine is a very large, open-pit copper mine. After about six months, he started working in "roads and dumps," operating dozers, track hoes, and other heavy equipment building roads and sloping banks. About 18 months later, he became a shovel operator trainee. At Newmont, Ondreako had operated hydraulic shovels, but Kennecott used large P & H shovels powered with electricity through trailing cables. Because there were no current openings for shovel operators, Ondreako returned to roads and dumps after he completed his training, but he would operate shovels when called upon. Sometime in 2002, Kennecott purchased a hydraulic shovel and needed an experienced operator. Ondreako became a shovel operator and began operating both types of shovels. The job title for shovel operators later changed to "advanced operator."

In late March 2003, Ondreako was operating the hydraulic shovel along the Carr Fork Road. (Tr. 20-22). Ondreako was working at night and there was snow in the area. He was concerned that the benches above the area in which he was digging were full of rock. He estimated that there were at least 100,000 tons of material above him on the benches. He believed that, if any rock started falling, the benches were too full to catch the falling material and that this condition created a hazard. He called Mark O'Driscoll on the mine radio to express his concerns. O'Driscoll, who was a supervisor, looked at the area and told Ondreako that everything would be fine and to keep on working. *Id.* Ondreako continued digging in the area.

On April 4, 2003, Ondreako was operating the hydraulic shovel in the Carr Fork area while it was raining and snowing. (Tr. 22-24). The material he was digging was wet and thick. He believed that it contained limestone because of the way it was adhering. Visibility was poor. As he was working, a boulder fell from the area above him and hit the shovel. Some of the falling material hit the windshield. He called Anthony Hoffman, an operations supervisor, to complain about the unsafe conditions. Hoffman told him to keep working and that he would get back to him after the production meeting. Their conversations were over the mine radio. Using the radio, Ondreako warned others that, because of the wet conditions, "the highwalls would be moving." (Tr. 24).

On April 26, 2003, Ondreako was operating the #52 electric shovel on the 4940 bench near the bottom of the pit. (Tr. 27-30). He was assigned to shovel and load previously blasted ore-bearing rock into haul trucks. The other two electric shovels were loading ore-bearing rock from an area that produced material that tended to plug up the crusher. As a consequence, mine management wanted Ondreako to load as much ore-bearing rock as possible so that the crusher could keep operating. If the rock he was loading was mixed with the rock that the other shovels

were loading, the crusher would not get plugged up. As Ondreako loaded out the rock, the area in which he was working became horseshoe-shaped which limited his visibility along the face and prevented the haul trucks from being in a good location for loading. (Tr. 30). Ondreako decided that he needed to reposition his shovel to operate more effectively and safely. Ondreako wanted to reposition his shovel so that the front of the shovel would be parallel to the line of rock that he was loading; this is called “squaring the face.” Ondreako asked Allen Pearson on the radio for permission to square the face. Pearson, the dispatch supervisor, told him to keep working because the rock he was loading was needed at the crusher. (Tr. 31). Ondreako kept on working but he was concerned that he would soon be working in a narrow slot. Ondreako heard Pearson say to Hoffman on the radio, “Did you copy that? Joe needs to move.” (Tr. 32). To which Hoffman replied, “Joe, go ahead and stay there. I’ll be right down and I’ll get with you.” *Id.* Ondreako kept working without repositioning.

When Hoffman arrived at the shovel, he told Ondreako to keep loading, at least until after the 11:30 a.m. production meeting. (Tr. 33). Ondreako testified that the material that he was loading was sitting higher than normal. The benches were 50 feet high, but because of the nature of the rock in that particular area the material was about 75 feet high in some places after blasting. (Tr. 34-35). The rock was like aggregate, but some large boulders were also present. Dust was kicked up as he worked. At one point he noticed a large boulder sitting up on top of the material above the shovel. (Tr. 35). It is the shovel operator’s responsibility to manage large boulders so that they do not fall and damage the shovel or cause injury to the shovel operator. It was not clear at the hearing exactly what options the shovel operator is required to consider, but Ondreako testified that one option was to block the boulder with the bucket on the shovel. Ondreako testified that he was keeping an eye on the boulder when he saw it start to move as he was swinging the shovel toward the haul truck. (Tr. 36). He dumped the load on the ground and started to swing back toward the boulder to block it. Because the shovel is large, changing directions takes time and the boulder hit the right side boarding ladder on the shovel before he could block it with the bucket. *Id.* Ondreako testified that the boulder gave the shovel a jolt and caused about \$1,700 in damage. (Tr. 37).

Ondreako called Hoffman to tell him about the incident. Ondreako was tested for drugs and alcohol, the results of which were negative. When Ondreako returned to work the following work day, he was sent home without pay pending an investigation. (Tr. 39). Ondreako believes that whenever there is an accident, a team is formed to investigate and the implicated miner is a member of the team. *Id.* Ondreako testified that he was told by Hoffman on May 3, 2003, that the investigation had been completed and that he was being demoted to a lower paying position that did not involve operating shovels. (Tr. 39; Ex. G-1). Ondreako was surprised that the investigation had been completed without any significant input from him. His union, the Operating Engineers, filed a grievance on his behalf.

On May 12, 2003, Ondreako called the local MSHA office about the boulder incident on the #52 shovel and the previous events, described above, concerning the hydraulic shovel.

(Tr. 42-43). MSHA officials told Ondreako that he should consider filing a discrimination complaint. On May 23, 2003, MSHA inspected the area around the Carr Fork Road as a result of another call from Ondreako. (Tr. 44). MSHA issued two citations, one alleging a violation of section 56.3130 for allowing the benches to overfill with rock, creating a hazard to those working below, and another alleging a violation of 56.3200 for failing to barricade the area until the hazardous ground conditions were corrected. (Ex. R-33).

In early June 2003, Ondreako was operating a grader in the bottom of the pit. He testified that spilled rock was “literally scattered across the road and deep enough to where I had to pull multiple windrows across the road.” (Tr. 45). Ondreako believed that this condition created a hazard to vehicles driving through the area, particularly at night. (Tr. 46). It appears that the spillage occurred when shovel operators either overfilled haul trucks or spilled material as they were loading the haul trucks. When Ondreako talked about it with Hoffman, Hoffman told the shovel operators to “load ‘em up” and said “we have people who love to chase spillage.” (Tr. 45). Ondreako testified that other miners complained about the spillage. Ondreako talked to the local MSHA office about this issue on June 16, but no citations were issued.

On June 23, 2003, there was a step-two hearing on his demotion from his advanced operator position. Ondreako testified that at this hearing, he stated that he could not accept responsibility for the incident and that he objected to his exclusion from the investigation. (Tr. 49-50). He believed that management took control of his environment when he was denied permission to move and that the boulder was unforeseen. (Ex. R-18 p. 4). He testified that management told him that they could have terminated him for this incident but that they were willing to pay him for the wages he lost during his suspension. These back wages were paid to Ondreako, but his demotion remained in place. On June 25, 2003, Ondreako was advised that he was being laid off along with 119 other Kennecott employees. (Tr. 51). He was given a letter explaining the layoff the next day. (Ex. G-2).

Kennecott produced evidence to show that the mine-wide layoff and Ondreako’s safety complaints were two separate and unrelated events. Kim Moulton, Kennecott’s employee relations director, testified that the price of copper was at its lowest level since the Great Depression. (Tr. 94). As a consequence, Kennecott had to increase its efficiency to remain competitive. It engaged a consulting company to study its operations.* Some of the consultant’s recommendations included more outsourcing, better use of technology, increasing employees’ skills through training, and reducing the workforce. (Tr. 97). Many of these recommendations have been put into place. For example, the number of hourly job classifications has been reduced from 172 to 11. (Tr. 99). At the same time that Kennecott was putting more emphasis on efficiency, its collective bargaining agreement with its unions expired, effective October 1, 2002. When its “best and final offer” was rejected by the unions, it declared an impasse and

* This case involves the Bingham Canyon Mine, but Kennecott also operates other facilities in the area including a concentrator and a smelter. Kennecott’s undertakings to improve efficiency were applied across the board to all its facilities.

implemented its final offer as the collective bargaining agreement. Apparently, the National Labor Relations Board approved Kennecott's actions. (Tr. 98-99).

A committee of Kennecott's upper-level supervisors and managers was given the task of developing a "fair and objective method of ranking employee qualifications to meet the requirements of the organization." (Tr. 103-06; Ex. R-23). Although seniority was used in the rankings, it was only one of many factors that the committee decided to consider. After the committee determined what factors are important to Kennecott, the committee developed a "Qualifications Assessment" worksheet ("rating form") to be used when ranking employees. (Tr. 109-15; Ex. R-24). This form has seven qualification categories, as follows: (1) Safety-Personal Safety Plan and Participation; (2) Safety-Incident Rate; (3) Work Output-Effectiveness; (4) Performance Effectiveness-Working with Others (Team Skills); (5) Performance Effectiveness-Adaptability; (6) Work Experience-Number of and Quality of Industrial Experiences; and (7) Technical Skills-Demonstration of Skills Needed to Complete Job Assignments. *Id.* Within each category there are five short statements, each with a box next to it that can be checked.

These forms were given to front line supervisors with instructions to rate employees. (Tr. 125). They rated each employee by checking the box next to the statement in each category that most closely matched the employee being rated. These front line supervisors did not participate in the development of these forms; they were not told that the information provided would be used in future layoffs, and they were not given the scoring formula. In addition, these supervisors were told not to discuss the ratings or employees with other supervisors but that they were to complete the forms independently. Kennecott plans to have every employee rated on a quarterly basis. Each employee was rated by at least three supervisors who were familiar with the employee's work. Ondreako was rated by John Simonson, Team Leader Mine Operations; Dave Lanham, Operations Supervisor; and Allen Pearson, Dispatch Supervisor. (Ex. R-28). Each employee was given an average score using a computer spreadsheet. (Exs. R-25 & R-30). Ondreako received a score of 2.1271, which ranked him at number 404 out of 410 mine operations employees. (Tr. 128-29; Ex. R-30). Later that June, when Kennecott determined that it needed only 371 employees in mine operations, it sent a layoff notice to everyone ranked 372 or below, including Ondreako. *Id.* About 39 mine operations employees were laid off. Each of these employees is subject to recall if more employees are needed in mine operations. (Tr. 130-31). Kennecott contends that this objective method of ranking employees did not take into consideration Ondreako's complaints about safety and that, as a consequence, the application for temporary reinstatement should be dismissed.

Moulton testified that Ondreako has a history of disciplinary problems that contributed to his low ranking. (Tr. 63-81; Ex. R-6). He was given a verbal warning for working unsafely on May 21, 2001; he was given a written warning for refusing to follow a supervisor's instructions on September 16, 2001; he was given a one-day suspension for committing an unsafe act by running over the trailing cable with his shovel on October 24, 2001; and he was given a three-day suspension and was demoted for the events described above that occurred on May 3, 2003. *Id.*

Moulton testified that Ondreako has exhibited “high risk behavior” that is not typical of Kennecott employees. (Tr. 90-92).

Tom Lohrenz, a human resources representative for Kennecott, testified that he was present at Ondreako’s second step grievance that occurred on June 24, 2003, and that he took detailed notes at that meeting. (Tr. 147-49; Ex. R-18). He testified that Ondreako specifically stated that safety was not an issue at the time Hoffman came to his work area on April 26, 2003 and told him to keep operating the shovel without squaring the face. (Tr. 148; Ex. R-18 at 5). At this grievance, Hoffman stated that Ondreako told him that he could safely load that day. (Ex. R-18 at 2-3). At the hearing in the present case, Hoffman testified that he did not participate in Ondreako’s rating. (Tr. 156). He also testified that when he went to Ondreako’s work area on April 26, 2003, he told him that he needed to keep working so that the crusher did not get plugged up. (Tr. 156-57). Ondreako did not raise any safety concerns with him and Ondreako told him at the second step grievance that safety was not an issue. (Tr. 159). Hoffman stated that Ondreako could have been terminated for allowing the boulder to damage the shovel.

Ben Stacy, Mine Operations Superintendent, testified that he told the front line supervisors how to fill out the rating forms. He instructed them to (1) fill out the forms individually without discussing them with others; (2) review safety and discipline files before completing; and (3) use “demonstrations of behavior” when filling out subjective parts of the forms. (Tr. 165). Stacy stated that he accompanied the MSHA inspectors on the May 23, 2003, inspection and the citations were issued to him. He testified that he had no idea that the citations were issued as a result of Ondreako’s complaint about the conditions to MSHA. (Tr. 170-72).

Mr. O’Driscoll testified that Ondreako complained about safety conditions in January 2003 but he could not remember any complaints in March or April of that year. (Tr. 152). O’Driscoll did not care that Ondreako had expressed concerns about safety and never disciplined him. He did not participate in the rating of Ondreako. Mr. Simonson testified that he was not Ondreako’s supervisor but that they were on the same team and that he had worked with him. He testified that he did not know that Ondreako had complained to MSHA when he rated him. (Tr. 175-76). Mr. Pearson testified he is the individual who must give approval if a shovel operator wants to reposition his shovel. He usually gives such permission unless there is a particular operational need for the shovel to remain in place. He was not aware that Ondreako had called MSHA when he filled out his rating form and that such complaints would not matter. (Tr. 182). Lanham was also unaware that Ondreako had raised safety complaints with MSHA when he filled out his rating form. (Tr. 188).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c)(2) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] 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.*”).

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination “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 the immediate reinstatement of the miner pending final order on the complaint.” The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides 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 scope of a temporary reinstatement proceeding 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 (Aug. 1987), *aff’d sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). Courts and the Commission have equated the “not frivolously brought” standard contained in section 105(c)(2) of the Mine Act with the “reasonable cause to believe standard” at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with “not insubstantial.” *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” (*Legis. Hist.* at 624-25).

Mr. Ondreako testified that he engaged in protected activity when he complained to management about the condition of the benches near the Carr Fork Road in March 2003 and when he complained to MSHA about these conditions in May 2003. He also alleges that he engaged in other protected activity, as detailed above. He testified that he was laid off soon thereafter and believes that these events are related. Kennecott’s witnesses testified that Ondreako’s layoff was part of a mine-wide reduction in force that was totally unrelated to his protected activity. The Commission has frequently acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The applicant relies on the proximity in time between his protected activity and his layoff and Kennecott’s knowledge of his safety complaints to management. Kennecott relies on the fact that it was undergoing a comprehensive reorganization of its operations that required a significant reduction in force. It contends that Ondreako’s inclusion in the reduction in force occurred solely as the result of the application of the company’s fair and objective ranking system of its employees.

Although Kennecott’s evidence shows that it may be able to present a convincing defense to Ondreako’s complaint in the underlying discrimination case, the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the applicant

establishes that the discrimination complaint is not frivolous. It is not the judge's duty to resolve conflicts in testimony at this preliminary stage of the discrimination case. *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). The judge should also not consider the probability that the applicant will succeed on the merits of the discrimination complaint or try to balance the harm to the respective parties.

I find that the applicant showed that the underlying discrimination complaint was not frivolously brought. Kennecott did not establish "that things could not have happened the way the [applicant] alleges that they did. . . ." *Sec'y of Labor on behalf of Stahl v. A & K Earth Movers Inc.*, 22 FMSHRC 233, 237 (Feb. 2000); *aff'd* 22 FMSHRC 323 (March 2000). Kennecott relies on the three rating forms that rated Ondreako quite poorly when compared to other employees. (Ex. R-28). I do not doubt that Kennecott attempted to develop these forms to be as objective as possible. Kennecott argues that the front line supervisors who performed the employee ratings did not know that they would be used during a reduction in force. Moreover, it also argues that these supervisors were not told how the rating forms would be scored. Nevertheless, anyone looking at the form could easily determine how to rate an employee highly or poorly. In every category, the descriptive sentences that are to be checked explicitly indicate whether the supervisor believes that the rated individual is a good employee. For example, under "Work Output," the supervisor can check "Disruptive/Negative attitude toward work assignments" at the low end, "Highly motivated employee" at the high end, or three other choices in between. *Id.* It would be easy to figure out how to give an employee that is complaining about safety conditions a poor score under this system.

Under one of the safety categories, two of the supervisors that rated Ondreako checked the sentence that reads, in part, "considers possible unsafe conditions but relies on supervision to remedy." Although I make no finding in this regard, a supervisor might check this sentence if an employee complains to management about safety conditions. The front line supervisors who performed the ratings were given little or no training on what to consider when filling out the forms. As stated above, they were simply told to independently check the appropriate sentence based on the employee's "demonstrations of behavior." Thus, it would have been possible for a supervisor who rated Ondreako to consider the safety complaints that he made to management in this and in other sections of the rating form. Ondreako made these complaints over the mine's radio system so the supervisors who rated him could have easily known about his complaints. Given the close proximity in time between his complaints and his layoff, the Secretary established that the complaint is not frivolous.

Kennecott also relies on Ondreako's statements at the second step grievance hearing that the incident involving the boulder on April 26, 2003, did not involve a safety issue. It should be noted, however, that Ondreako also advised management at this hearing that he would take the entire matter to MSHA to investigate the safety program because Kennecott's investigation of the incident was not accurate. (Ex. R-18 at 6). Ondreako also complained that other miners who had damaged the #52 shovel were not disciplined. *Id.* at 4. As stated above, conflicts in evidence should not be resolved at this preliminary stage of the discrimination proceeding.

Kennecott also argues that Ondreako was not terminated from his employment but that he was laid off due to lack of work and that he is subject to recall. I find that this layoff constitutes a termination for purposes of the Mine Act because Ondreako is no longer working at the mine or being paid for his services. Kennecott also argues that, because Ondreako was let go as a result of a layoff, there is no position available for him at the mine and the company will be forced to lay off the next person up the rating list if it is ordered to reinstate Ondreako. (Tr. 132-33). This argument could be made any time an application for temporary reinstatement is granted following a layoff. It is important to remember that this proceeding involves the *temporary* reinstatement of Ondreako and, if he does not prevail on the underlying discrimination case, the order of temporary reinstatement will be lifted. When a miner's complaint is determined not to be frivolous, the employer must reinstate the miner regardless of whether it is economically beneficial for the employer to do so. In enacting this provision, Congress determined that the employer must run the risk of paying a discharged miner whose claim may ultimately fail, rather than requiring a miner, who may prevail, to go through the discrimination proceeding without income. For this reason, it is incumbent on the Secretary to complete her investigation of her underlying discrimination complaint as quickly as possible.

III. ORDER

For the reasons set forth above, Kennecott Utah Copper Corporation is hereby **ORDERED** to immediately reinstate Joseph M. Ondreako to the position he held immediately prior to the layoff that was effective July 5, 2003, at the same rate of pay and benefits for that position, or to a similar position with the same or equivalent duties, at the same rate of pay and benefits. The Secretary **SHALL COMPLETE** as quickly as possible her investigation of the underlying discrimination complaint.

Richard W. Manning
Administrative Law Judge

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