FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 30, 1999

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION ON BEHALF	:	Docket No. WEVA 99-84-D
OF LEWIS FRANK BATES,	:	HOPE CD 99-12
Complainant	:	
v.	:	
	:	Lilly Branch Surface Mine
CHICOPEE COAL COMPANY	:	Mine ID 46-08723
INCORPORATED,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION ON BEHALF	:	Docket No. WEVA 99-85-D
OF EARL CHARLES ALBU,	:	HOPE CD 99-15
Complainant	:	
v.	:	Lilly Branch Surface Mine
	:	Mine ID 46-08723
CHICOPEE COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;
Forest H. Roles, Esq., Mark E. Heath, Esq., Heenan, Althen & Roles, Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

These consolidated matters, heard on June 2, 1999, in Charleston, West Virginia, are before me based on applications for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), on behalf of Lewis Frank Bates and Earl Charles Albu, a/k/a Chuck Albu. This statutory provision prohibits operators from discharging or otherwise discriminating against miners who have complained about alleged safety or health violations or who have otherwise engaged in safety related protected activity. Section 105(c)(2) of the Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of miners pending the full resolution of the merits of their complaints.

The scheduled hearing of these matters was delayed until June 2, 1999, due to a conflict

in the respondent's counsel's schedule. Consequently, the respondent agreed that any relief awarded in these proceedings would be retroactive to May 26, 1999. *See Notice of Hearing*, May 13, 1999.

Procedural Framework

The scope of these proceedings is governed by the provisions of section 105(c) of the Act and Commission Rule 44(c), 29 C.F.R. § 2700.44(c), that limit the issue to whether the subject discrimination complaints have been "frivolously brought." Rule 44(c) provides:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is 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 is frivolously brought.

Thus, the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court of Appeals, in *J. Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), has stated:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*.' 920 F.2d at 747 (emphasis in original) (citations omitted).
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> . . . Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. *Id.* at 748, n.11. (emphasis in original).
>
> Consequently, the Supreme Court has articulated that the narrow scope of these

temporary reinstatement proceedings, as well as the minimal statutory standard of proof required by the Secretary under section 105(c)(2) of the Act, far exceed the Constitutional requirements of due process. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

Consistent with the above discussion concerning the "not frivolously brought" standard of proof in temporary reinstatement proceedings, I noted in my opening statement at the hearing that the issues in this proceeding are whether protected activity in fact occurred, and, if so, whether the protected activity was reasonably contemporaneous with the adverse actions complained of, *i.e.*, the terminations of Bates and Albu. (Tr. 5-6).

I. The Bates Application for Reinstatement

At the hearing, the parties advised that they had reached a settlement agreement with respect to the temporary reinstatement of Lewis Frank Bates. Specifically, the respondent, Chicopee Coal Company, Inc., (Chicopee), agreed to economically reinstate Bates by reinstating Bates' medical benefits, and paying Bates the weekly salary he was earning immediately prior to his alleged January 25, 1999, discriminatory discharge.

II. The Albu Application for Reinstatement[1]

[1] At the hearing Chicopee claimed Albu's temporary reinstatement application should be dismissed because his underlying discrimination complaint was not filed within 60 days of his alleged January 26, 1999, discriminatory discharge as required by section 105(c)(2) of the Mine Act. Albu filed his complaint on April 21, 1999, approximately four weeks after the 60 day filing period had expired. Although Chicopee was advised to address its untimeliness assertion in its post-hearing brief, it failed to do so. Consequently, I assume Chicopee has withdrawn its untimeliness claim. In any event, the 60 day filing period in section 105(c)(2) is not jurisdictional, and Chicopee has failed to demonstrate it suffered any material prejudice as a result of Albu's delayed filing. *See, e.g, Secretary of Labor o/b/h of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986).

a. Findings of Fact

The Chicopee Coal Company Inc. (Chicopee), was formed in 1995. Paul Moran is Chicopee's President and Robert Warnick is its Vice President. Chicopee obtained its mining permit and started mining at Lilly Branch Surface Mine facility (Lilly Branch) on March 16, 1998. Chicopee's Lilly Branch operation consists of clearing abandoned, unclaimed highwalls, mining the area with highwall mining machines, and reclaiming the area upon completion of mining. In addition, Chicopee operates a preparation plant where coal is cleaned that is located 5.5 miles from the Lilly Branch site. In the mid summer of 1998, Chicopee borrowed 1.5 million dollars in cash and equipment from Vecellio and Grogan (Vecellio), an established company specializing in road building and mining in the State of West Virginia. Chicopee currently has approximately 55 employees. It also uses the services of approximately 30 contractor employees, including personnel employed by Vecellio.

Lewis Franklin Bates, a certified mine foreman, was hired on July 27, 1998, by Moran and Warnick to serve as Chicopee's superintendent. Bates was directly responsible for approximately 11 employees. Bates' duties included supervising the clearing crews that prepared areas for highwall mining, overseeing the maintenance of the haulage road, providing hazard training and ordering parts for the maintenance of equipment. Bates reported directly to Warnick. On occasion, he also reported to Moran.

Bates first met Albu in 1996 when they were fellow employees working for the Battle Ridge Company. At that time, Albu, who had been a surface miner for approximately 16 years, was a driller-blaster. Bates hired Albu to perform drilling and blasting for Chicopee in September 1998. When Bates was not drilling and blasting, he operated rock trucks, loaders and dozers. Bates testified that Albu did a fine job, that Albu never received any complaints about his work, and that Albu had no disciplinary problems.

In the fall of 1998, the haul road running to the deep mine site became soft due to heavy rain. At that time, Chicopee realized it needed additional financial assistance as well as help with haulage road construction. Consequently, Vecellio provided additional equipment and sent personnel to Lilly Branch to assist in road building construction and maintenance. Chicopee and Vecellio employees worked together performing road construction activities and operating the equipment. Vecellio sent it's superintendent, Dale McGrady, to oversee the road construction activities. As time went on, McGrady's supervisory activities increasingly overlapped and conflicted with the duties assigned to Bates.

Because the road required a hard surface of rock, Chicopee decided to blast additional rock from the mountain for use on the road. In January 1999, Chicopee leased a drill from Anderson Drilling Equipment for thirty days. Bates assigned Albu to operate the leased drill. Albu, Bates and Warnick testified that Albu's drilling and the resultant blasting was ineffective primarily because the drill used by Albu did not function properly. Consequently, at the suggestion of Vecellio, in January 1999 Chicopee contracted with Beckley Drilling to perform

the drilling and blasting activities.

Albu was disappointed over the loss of his drilling responsibilities to an outside contractor. Consequently, on January 15, 1999, Albu told Bates he was considering quitting because he was upset over Chicopee's decision to use a contractor for drilling and blasting. Richard Tincher, Chicopee's mechanic, testified that Albu told him on or about January 15, 1999, that, "he was going to quit, that this outfit didn't know what the hell they were doing . . . and he was going to whip Dale McGrady's goddamned ass." Although Tincher told Bates about Albu's remarks, Tincher testified he did not tell Warnick about Albu's statements until after Albu was discharged on January 26, 1999. (Tr. 201).

After Albu informed Bates of his intention to quit, Bates granted Albu's request to take the rest of the work day on January 15, 1999, off. Later that day, Bates discussed Albu's threat of quitting with Warnick. Warnick told Bates "the decision to move to an outside drilling company was made for financial reasons . . . if he [Albu] quit, he quit; but we don't blame him for the shooting and drilling problems." (Tr. 233). Warnick asked Bates to contact Albu to convince him to stay on the job. Bates contacted Albu, and Albu returned to work the next day on January 16, 1999.

On Sunday, January 24, 1999, Moran informed Bates that Vecellio's McGrady was taking over the supervisory responsibilities for the haulage road and the blasting areas. Bates was told he would be in charge of the contour preparation for the highwall miner. Bates, who had been performing the pre-shift examinations for the haulage road and blasting areas, was concerned because he no longer had control of these areas.

The following day, at 7:00 a.m.,on Monday, January 25, 1999, Bates held a meeting with Albu and approximately 12 other employees. Although McGrady attended the meeting, Warnick and Moran did not. Bates informed the employees that he was no longer responsible for the main haulage road, the cut-through, the box cut or blasting, and that McGrady was taking over those responsibilities. During the meeting Albu commented about the berm not being maintained along the haulage road. Tincher testified Albu also complained about the condition of the Vecellio's equipment, characterizing the equipment as "junk." Albu also complained to McGrady that Vecellio employees were not certified by the State of West Virginia to work at the mine. At the culmination of the meeting, Bates had the attendees sign a sheet of paper acknowledging their attendance at the meeting and acknowledging that Bates informed them of the change in his responsibilities.

Shortly after the January 25 meeting, Bates granted Albu's request to leave work early so that Albu could take care of personal business. Tincher and Warnick testified that when Albu left the mine site in his truck on January 25, 1999, they heard Albu on his C.B. radio angrily cursing Chicopee, its management, and Vecellio. After hearing Albu's statements over the C.B. radio, Warnick testified he believed Albu had quit. (Tr. 244). Later that day, Warnick met with Moran and they agreed that, if Albu returned to work, he should be laid off due to his cursing on the C.B. radio while leaving the job, and because his services were no longer needed. (Tr. 245).

After Albu had left the mine site on January 25, 1999, Bates was approached by Warnick

about the earlier meeting. Warnick, who had spoken to McGrady about the meeting, asked Bates to show him the paper the men had signed. Warnick examined the paper and told Bates he would speak to Moran about what should be done.

At approximately 11:00 a.m., two hours after speaking to Warnick, Moran spoke to Bates at the job site. Moran told Bates he was relieved of his duties because he had a bad attitude and because he was trying to take over the job. Moran also told Bates he was terminated because he could not get along with Vecellio.

Warnick testified that Albu had a history of complaining about Vecellio's presence at the mine, and about the condition and quality of the equipment. After Bates was terminated on January 25, 1999, Warnick told supervisor Gary Rutherford, to go ahead and lay off Albu if he returned to work on Tuesday, January 26, 1999. Despite the fact that the decision to terminate Albu occurred on the same day Albu had made safety related complaints at the meeting, Warnick claimed the decision to discharge Albu was based on the fact that his drilling services were no longer needed. However, Warnick's claim that there was no work for Albu on January 26, 1999, is inconsistent with Warnick's admitted desire to prevent Albu from quitting on January 15, 1999, after Albu became discouraged because drilling and blasting duties had been turned over to an outside contractor.

Albu returned to work on January 26, 1999, whereupon he was told by Rutherford that he was no longer needed. At that time, Albu testified Rutherford stated, "I just wish you hadn't said what you said yesterday morning." (Tr. 147).

On January 27, 1999, in apparent response to safety related complaints conveyed to the Mine Safety and Health Administration (MSHA), Inspectors James Haynes and Glen Counts conducted an inspection of Chicopee's Lilly Branch Surface Mine. Haynes had known Bates prior to Bates' employment at Chicopee. Haynes issued Citation No. 7176974 citing an alleged violation of the mandatory safety standard in 30 C.F.R. § 77.1605(k) that requires adequate berms on the outer bank of an elevated roadway. Counts issued Citation No. 7179004 citing an alleged violation of the mandatory safety standard in 30 C.F.R. § 77.1606(c), that prohibits use of defective equipment, for an inoperative low air brake pressure warning device on a Euclid haulage truck. Chicopee did not contest either citation and has paid the assessed civil penalties. The State of West Virginia also issued citations to Chicopee's contractors for employing men who had not received the requisite state certification.

b. Further Findings and Conclusions

Albu's temporary reinstatement application is based on his allegation that his discharge was motivated by his safety related complaints. It is axiomatic that miners have an absolute right to make good faith safety or health related complaints about mine practices or conditions when the miner believes such circumstances pose hazards. *Secretary of Labor ex rel. 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 (3d Cir. 1981); *Secretary of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981). A miner's right to voice safety related complaints is so fundamental that the Mine Act even protects complaints about conditions that do not pose an immediate hazard as long as the complaint does not involve a work refusal. *Secretary o.b.o. Ronny Boswell v. National Cement Company*, 16 FMSHRC 1595, 1599 (August 1994).

Communication of potential health or safety hazards, and responses thereto, are the means by which the Act's purposes are achieved. Once a reasonable, good faith concern is expressed by a miner, an operator, usually acting through on-the-scene management personnel, has an obligation to address the perceived danger. *Boswell v. National Cement Co.*, 14 FMSHRC 253, 258 (February 1992); *Secretary o.b.o. Pratt v. River Hurricane Coal Company, Inc.*, 5 FMSHRC 1529, 1534 (September 1983); *Secretary of Labor 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).

Although an operator is under no obligation to agree with a miner's concerns, an operator must address a miner's concern in a way that reasonably quells the miner's fears. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1441 (D.C. Cir. 1989). A miner's willingness to express safety and health related complaints should be encouraged rather than inhibited. Such protected complaints may not be the motivation for adverse action against the complainant by mine management personnel.

In order to evaluate whether Albu has satisfied the lesser burden of establishing the "not frivolously brought" standard, it is helpful to consider the framework for establishing a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Albu must establish that his expressed safety related concerns during the January 25, 1999, safety meeting constituted protected activity, and, that the adverse action complained of, in this case Albu's January 26, 1999, discharge, was motivated in some part by his protected activity. *See Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981); *Robinette* 3 FMSHRC at 817-18.

In a temporary reinstatement proceeding, Chicopee can establish that Albu's case has been "frivolously brought" by showing that Albu did not engage in the protected activity claimed. Chicopee has failed to challenge effectively the protected activity claimed by Albu that is related to Albu's attendance at the January 25, 1999, meeting. Although, Chicopee, in its post-hearing brief, asserts Warnick and Moran did not have knowledge of the safety complaints expressed by Albu when Albu was discharged on January 26, 1999, (*Chicopee Br.* at 13), it is clear that McGrady informed Warnick of the substance of the January 25, 1999, meeting prior to Albu's discharge. Moreover, Warnick testified Albu had a history of complaining about the condition of equipment.

Having failed to demonstrate that Albu did not engage in protected activity, or that Chicopee had no knowledge of Albu's protected activity, Chicopee can only defeat Albu's application for temporary reinstatement by showing that his protected activity was so far removed in time and circumstance from Albu's January 26, 1999, discharge as to render Albu's discrimination claim frivolous. Obviously, it cannot be said that Albu's application for temporary reinstatement based on his January 26, 1999, discharge, that occurred the very next day following his protected activity, has been frivolously brought.

Whether, Albu's discharge was motivated solely by the profane language allegedly used by Albu on his C.B. radio, or, whether Chicopee can affirmatively defend by claiming that it was justified in discharging Albu for profanity despite Albu's protected activity, goes beyond the scope of this temporary reinstatement proceeding. *See, e.g.*, *Pasula*, 2 FMSHRC at 2799-800; *Robinette*, 3 FMSHRC at 817-18; *Eastern Assoc. Coal Corp. v. United Castle Coal Co.*, 813 F.2d 639, 642 (4th Cir. 1987).

ORDER

In view of the above, consistent with the respondent's stipulation, **IT IS ORDERED** that Chicopee Coal Company, Inc., immediately compensate Earl Charles Albu, a/k/a Chuck Albu, for back pay and benefits from May 26, 1999, until the date of Albu's temporary reinstatement.

IT IS FURTHER ORDERED that Chicopee Coal Company, Inc., immediately reinstate Albu to the position that he held immediately prior to his January 26, 1999, discharge, or to a similar position, at the same rate of pay and benefits and with the same, or equivalent, duties assigned to him. Alternatively, Chicopee Coal Company, Inc., may immediately provide Albu with economic reinstatement, retroactive to May 26, 1999, and continuing during the pendency of the resolution of Albu's discrimination complaint. Economic reinstatement shall consist of the salary and benefits Albu earned immediately prior to his January 26, 1999, discharge.

IT IS FURTHER ORDERED, consistent with its settlement agreement, that, effective May 26, 1999, Chicopee Coal Company, Inc., economically reinstate Lewis Frank Bates to the salary and benefits he earned immediately prior to his January 25, 1999, discharge. Such economic reinstatement shall continue during the pendency of the resolution of Bates' discrimination complaint.

Jerold Feldman
Administrative Law Judge

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