

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 11, 2005

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), on :
behalf of WILFREDO MORALES :
 :
 : Docket No. SE 2005-71-DM
v. :
 :
ARENERO RAFAEL COLON, INC. :

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. § 815(c)(2) (2000). On March 1, 2005, the Commission received from Arenero Rafael Colon, Inc. (“Arenero”) a petition for review of Administrative Law Judge David Barbour’s February 24, 2005 order temporarily reinstating Wilfredo Morales (“Morales”) pursuant to section 105(c)(2) of the Act. 27 FMSHRC 160, 167 (Feb. 2005). *See also* 29 C.F.R. § 2700.45. On March 8, the Commission received the Secretary of Labor’s opposition to Arenero’s petition. For the reasons that follow, we grant the petition for review and affirm the judge’s order requiring the temporary reinstatement of Morales.

Morales was a miner employed by Arenero as a heavy equipment operator until his discharge on July 6, 2004. On November 15, 2004, he filed a discrimination complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”) pursuant to section 105(c) of the Mine Act. Following an investigation, the Secretary of Labor determined that the discrimination complaint filed by Morales was not frivolously brought. On February 4, 2005, the Secretary filed an application for the temporary reinstatement of Morales. On February 15, 2005, an evidentiary hearing on the Secretary’s application was held. On February 24, 2005, the judge issued his decision in which he temporarily reinstated Morales, concluding that the complaint was not frivolously brought.

Arenero operates a sand processing facility in San Lorenzo, Puerto Rico. 27 FMSHRC at 160. Once sand is extracted, it is loaded onto haulage trucks which are driven to the facility’s processing plant. *Id.* To reach the plant, haulage drivers must descend a slope of approximately

15 degrees. *Id.* There are drops on both sides of the slope, and where the drops are located, the road is bermed with sand. *Id.*

On the morning of Thursday, July 1, 2004, Morales arrived at the mine to drive a haulage truck. *Id.* at 162. He and three haulage truck drivers who were contract employees went to the sand extraction area. *Id.* However, because it had rained the night before and the road was wet and slippery, the drivers were reluctant to drive back down the slope with loaded trucks because, according to Morales, they did not think it was safe. *Id.* at 161-62. Morales testified that in order for the haulage trucks to drive safely on the road, either the bulldozer needed to scrape the wet material from the sloped part of the road or the drivers needed to wait until the road was dried by the sun. *Id.* at 162; Tr. 23. On that day, however, according to Morales, the bulldozer broke down and could not scrape the wet material from the road. 27 FMSHRC at 162.

While the drivers waited for the mechanic to repair the bulldozer, supervisor Ruben Roman went to the extraction area to check on why the trucks had not arrived at the sand plant. *Id.* He stated that because the drivers had been able to travel to the top of the slope safely, the road was in good enough condition to travel down. *Id.*

Subsequently, German Colon, the plant manager and treasurer of the mine, traveled to the top of the slope. *Id.* at 163. When the drivers told him they were not hauling sand to the plant because the road was “not okay,” he replied that it was in good condition because their vehicles had gone up the slope safely. *Id.* Shortly thereafter, the drivers began hauling sand to the plant because they were concerned that Colon would fire them if they continued to refuse to drive. *Id.* at 164. By then, the sun had dried the road, making it safe to travel. *Id.*

Morales worked on Friday, July 2 and Saturday, July 3, 2004. On Saturday, Roman told him not to bring his truck to work on July 6, and that Colon wanted to meet with him. *Id.* On July 6, Colon met with Morales and discharged him. *Id.* Although there is conflicting testimony regarding the reasons articulated for the discharge, both Morales and Colon testified that Morales was fired, at least in part, for “insubordination.” *Id.*; Tr. 41, 143-44.¹

Under section 105(c)(2) of the Mine Act, “if the Secretary finds that [a discrimination] 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.” 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the “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.” *See Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). The Commission applies the substantial evidence standard in reviewing the judge’s determination regarding

¹ Colon testified that he also told Morales he was discharging him because his truck did not have an automated load cover, and because Morales’s work performance was poor. 27 FMSHRC at 164.

whether the complaint was frivolously brought. *Sec’y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

The only issue before us is whether substantial evidence supports the judge’s determination that Morales’s discrimination complaint was not frivolously brought. After careful review of the pleadings and record evidence, we conclude that the judge’s determination that the complaint was not frivolously brought is supported by substantial evidence and is consistent with applicable law. We intimate no view as to the ultimate merits of this case.

Accordingly, we affirm the judge’s decision temporarily reinstating Morales.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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