

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N. W., SUITE 9500  
WASHINGTON, DC 20001**

May 27, 2011

SECRETARY OF LABOR, MSHA	:	TEMPORARY REINSTATEMENT
on behalf of LOUIE ALBERT	:	PROCEEDING
ROCCHETTI,	:	
Complainant	:	Docket No. VA 2011-338-D
	:	NORT-CD-2111-02
	:	
v.	:	
	:	
GMS MINE REPAIR & MAINTENANCE,	:	Buchanan No. 1
Respondent	:	

**DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT**

Appearances: A. Scott Hecker, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the complainant

Maria W. Hughes, Esq., JACKSON LEWIS, LLP, Pittsburgh, Pennsylvania, for the respondent

Before: Judge Koutras

This matter is before me on an application for Temporary Reinstatement filed by the Secretary on behalf of the complainant Louie Albert Rocchetti pursuant to Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1). A hearing was held in Beckley, West Virginia on May 16, 2011, and the parties appeared and participated fully therein.

The complainant filed his complaint with MSHA alleging that his discharge by the respondent on February 14, 2011, was motivated by his protected activity. The Secretary contends that the complaint is not frivolous and seeks an order requiring the respondent to temporarily reinstate the complainant to his former position, or a comparable position, within the same commuting area and at the same rate of pay and benefits he received prior to his discharge, pending a final commission order on the complaint.

The MSHA Discrimination Complaint Form 2000-123, filed by the complainant reflects that it was filed because he believed he was discharged for requesting to file an accident report. (Secretary's application, Exhibit B).

A copy of a sworn affidavit of MSHA Inspector David E. Smith, in support of the Secretary's temporary reinstatement application (Exhibit A), asserts that the complainant injured his right hand on February 4, 2011, while performing his normal work duties, and after attempting to report his accident for more than an hour, he left the mine to seek medical treatment. The persons allegedly responsible for the alleged discriminatory action are identified on the face of the form as Curtis Lusk, supervisor, and Adam Smith, coordinator.

The supportive affidavit asserts that the complainant's unsuccessful efforts to report his accident included speaking with various respondent (GMS) and mine operator (Consolidation Coal) management members, on-site, and leaving messages for Curtis Lusk, GMS job coordinator for the Buchanan Mine, Adam Smith, GMS safety coordinator based in Beckley, West Virginia, and Mike Hudson, his designated GMS crew leader.

The supportive affidavit further asserts the complainant filed a workers' compensation claim and on February 6, 2011, spoke with Messrs. Lusk, Smith, and Hudson concerning his attempts to file an accident report, his filing of the compensation claim, and his doctor's orders concerning his work.

#### Stipulations

The parties stipulated to Commission and ALJ jurisdiction; that GMS is a contractor performing services at Consolidation Coal Company's Buchanan Mine No. 1; that GMS is "a person" as defined by Section 3(f) of the Mine Act; and that Mr. Rocchetti was employed by GMS from July 29, 2011, and was discharged on February 14, 2011. (Tr. 7).

#### Pre-Hearing Order

On May 6, 2011, I granted the Secretary's Motion In Limine based on Commission Rule 45(d), 29 C.F.R. § 2700.45(d), and the supporting Commission case precedents cited therein concerning the limited scope of the hearing to determine whether an application for temporary reinstatement was frivolously brought. A copy of my ruling was served on the parties in advance of the hearing in this matter.

#### Complainant's Testimony

Miner Louie Rocchetti was employed by the respondent, GMS as a general laborer on July 29, 2011, until his discharge on February 14, 2011. GMS was a contractor providing services to the mine operator Consolidation Coal Company at its Buchanan No. 1 mine. Mr. Rocchetti testified that during a work break after helping to move 12 or 15 I-beams on the third shift on February 4, 2011, his hand tightened up and was swollen. At the end of the shift, he went to the hospital for treatment and a doctor's report indicated that he was treated for strains and was off work for two days, with light duty for five days. (Tr. 35, ALJ Exhibit 1). He also filed a workers' compensation claim at the hospital. (Tr. 79).

Mr. Rocchetti and fire boss John Smith discussed the filing of an accident report, and Mr.

Smith referred him to Consol foreman Steve Bell after his shift ended at 7:30 a.m. Mr. Rocchetti and Mr. Bell went to the GMS office and found a Consol accident reporting form.

However, day shift foreman Dave Lambert informed Mr. Bell that GMS had to use its own accident report forms. (Tr. 36-39). Mr. Rocchetti drove to the GMS office trailer to obtain a form but was unable to find one. He spoke to third shift crew man Daniel Adams who referred him to GMS supervisor Curtis Lusk and safety coordinator Adam Smith. Mr. Rocchetti called and left telephone messages for Mr. Lusk, Mr. Smith, and crew chief Mike Hudson informing them that he was going to the hospital. (Tr. 41-43, 65). Mr. Smith also called him at his home two days after his accident asking him about his workers' compensation claim and his hospital doctor's placing him two days off work and five limited duty days. (Tr. 75). Mr. Rocchetti requested a copy of the report from Mr. Adams, but Mr. Adams would not accept his request and rejected it because Mr. Rocchetti and Mr. Hudson did not work on the same shift. (Tr. 70, 84).

Mr. Rocchetti stated that after his accident Mr. Hudson eventually filled out an accident report and informed him that he gave it to Mr. Lusk. After several contacts with Mr. Lusk requesting a copy of the accident report, including two scheduled meetings which Mr. Lusk stated he forgot about, and one statement by Mr. Lusk that he would provide him with a copy, Mr. Lusk told him he needed to get the copy from Adam Smith. (Tr. 70, 86-88). Mr. Rocchetti confirmed that he has never received a copy of any accident report and was unable to report his accident because he could not obtain a reporting form that he had requested, and no one was made available to assist him in obtaining the form or give him a copy that may have been filled out. (Tr. 85, 90-91).

#### Respondent's Testimony

Randy Scott Smith, GMS vice-president for sales, explained company policy regarding accident reports as stated in its employee handbook. He stated that there is an 800 phone number for reporting an accident to the GMS office in Maryland and to leave a message for the mine safety coordinator. He stated that an attempt should be made to contact an immediate supervisor or safety director at the mine where the employee is working. (Tr. 94-96). He confirmed that he was not at the mine on February 4, 2010, was not involved with the accident, and had no knowledge of the content of any conversations related to Mr. Rocchetti's attempts to report his accident. (Tr. 97).

Mr. Smith stated that accident forms are available at the mine locations and that the safety coordinator is responsible to make sure they are accessible for everyone. The form itself is not posted, but the procedures are generally posted. Attempts are made to give copies of the form to all crew leaders. (Tr. 98-100).

Note: The GMS employee manual dated January 1, 2010, was produced and without objection two relevant paragraphs were recorded for the transcript by the official court reporter. (Tr. 100-101). Paragraph one states as follows:

Accidents and injuries, all work related injuries must be reported immediately after the occurrence to the GMS Oakland offices at (301) 334-8186 and an accident

report filled out. All injuries must be reported for insurance and MSHA purposes. Emergency medical attention will be provided as required.

Mr. Smith confirmed that the procedures for reporting of accidents varies from MSHA districts and Consol's requirements, and that the forms used by GMS and Consol overlap and are at times interchanged. (Tr. 95). He stated that procedures for reporting accidents are posted at the mine, but the form is not. Attempts are made to give every crew leader a supply of forms and it is the responsibility of the safety coordinator to make sure they are available to everyone. (Tr. 99).

Mr. Smith stated that Mr. Rocchetti's understanding of the handbook accident reporting procedures "was fairly accurate," and he confirmed that a miner should try and contact his immediate supervisor or a safety director in his area or mine management where he is working. (Tr. 96).

Mr. Smith stated that the policy manual does not explicitly direct the miner to report an accident, and while he guessed that it was general policy that a miner remain at the mine if he is injured to fill out a form, he did not know what is further posted at the mine site in this regard. (Tr. 102-103).

Respondent's counsel failed to produce or present testimony from GMS management members Curtis Lusk, a supervisor, and Adam Smith, the safety coordinator, who were named in the complaint filed by Mr. Rocchetti as the individuals who allegedly interfered with his efforts to report his accident, and whose alleged actions are directly related to the critical issue of whether the complaint filed by Mr. Rocchetti was frivolous or non-frivolous.

Counsel's theory of the case and the reasons for not presenting the testimony of the two critical witnesses was raised for the first time at the hearing during her opening statements, and at the conclusion of the Secretary's testimony and closing arguments. (Tr. 11-29, 108-109).

Although acknowledging her understanding of the limited and narrow scope of the hearing, as well as the motion granted regarding this issue, counsel asserted her intention to present evidence of events that would have tolled the respondent's ability to be reinstated with back pay because of a layoff and because there is no work being done at the mine of the type Mr. Rocchetti was performing prior to his discharge. (Tr. 10-11). She further stated that she intended to present testimony from her witness regarding the layoff. (Tr. 12-13).

I informed counsel that her arguments, raised for the first time, were premature and that the testimony that I will accept is strictly limited to whether or not Mr. Rocchetti's complaint that he was unable to file an accident report was frivolous, and the Secretary's objections expanding the scope of the hearing as proposed by respondent's counsel were granted, and the respondent's proffers were rejected. (Tr. 17, 20, 25). However, her objections were noted and she was permitted to file a brief preserving her legal argument for the record. (Tr. 106-110).

The parties filed post-hearing briefs on May 20, 2011. The Secretary re-states its hearing position that any evidence or argument regarding the availability of Mr. Rocchetti's reinstatement

relates to the respondent's affirmative defenses on the merits and is outside the limited bounds of the instant temporary reinstatement proceeding. The Secretary asserts further that the respondent may advance these arguments in the context of a merits proceeding after the parties have had sufficient time to evaluate the merits claim and complete full discovery on these issues, and that until such time as respondent can properly plead and prove such a defense, an order of temporary reinstatement must remain in effect.

The respondent's submission includes a Motion to Exclude Evidence Exceeding Order Granting Motion in Limine and Motion for Reopening of Hearing, with supporting memoranda. The Secretary filed a letter in response to the motions, pointing out that the fact that counsel for the respondent was confused or unprepared to address the "frivolously brought" issue should not bear on that determination. The Secretary pointed out that the respondent had significant time to familiarize itself with the Application and Motion in Limine and to educate itself as to the proper boundaries of a temporary reinstatement proceeding.

After careful consideration of the respondent's post-hearing motions, and the responses by the Secretary, the motions ARE DENIED, and my hearing rulings in this regard are RE-AFFIRMED.

With respect to Mr. Rocchetti's complaint, I conclude and find that his attempts to secure, complete, and file an accident report after he was injured at work were made in good faith and constituted protected activity within the intent and meaning of the Mine Act. The credible and un-rebutted testimony of Mr. Rocchetti clearly establishes that the respondent's management officials, namely safety coordinator Adam Smith, supervisor Curtis Lusk, and crew leader Mike Hudson were all aware of Mr. Rocchetti's injury for several days following that event as well as his efforts to obtain an accident form.

I further conclude and find that rather than reasonably accommodating and facilitating Mr. Rocchetti's attempts to obtain an accident form in order to fill it out and file it, respondent's management officials did the opposite. The credible and un-rebutted testimony of Mr. Rocchetti, in much detail, chronicle a series of telephone calls, conversations, both personal and by telephone, between Mr. Rocchetti and respondent's management officials, including its safety coordinator Adam Smith, on the day he was injured and after that event, all of which resulted in his failure to obtain an accident report form for filing. Indeed, he testified that as of the date of the hearing he had never been given a copy of any accident form related to his accident that had been filed, notwithstanding the statutory and regulatory requirement to file one. Under all of these circumstances, I conclude and find that Mr. Rocchetti's failed efforts and requests to obtain an accident report and to report his injury was a direct result of the non-responsive, evasive, and non-cooperative conduct by management to accommodate his requests.

The Secretary's arguments that the relatively short time period between Mr. Rocchetti's protected activity and his discharge; managements inquiries concerning his filing of a workers' compensation claim about his medical treatment; and his transfer from his usual work location to another one, for less pay, arguably demonstrates animus against Mr. Rocchetti, and his accident reporting efforts are persuasive.

Based on all of the aforementioned circumstances, I find that there is reasonable cause to believe that Mr. Rocchetti may have been discriminated against as alleged in his complaint, and conclude that the Application for Temporary Reinstatement has not been frivolously brought.

ORDER

The Application for Temporary Reinstatement IS GRANTED. The respondent IS ORDERED TO REINSTATE Mr. Rocchetti to the position that he held prior to his February 14, 2011, discharge, or to a similar position, at the same rate of pay and benefits, IMMEDIATELY ON RECEIPT OF THIS DECISION.

George A. Koutras  
Administrative Law Judge

Distribution: (Certified Mail)

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