

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 29, 2005

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of JAY HEETLAND,	:	Docket No. CENT 2006-43-DM
Applicant	:	MSHA No. SC MD 2005-13
	:	
v.	:	Portable Plant #1/Palo Quarry
	:	
SMASAL AGGREGATES & ASPHALT, LLC,	:	Mine I.D. 23-02197
Respondent	:	

DECISION AND ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: Lydia Tzagoloff., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Applicant;
Robert C. Johnson, Esq., Husch & Eppensberger, Kansas City, Missouri, 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 Jay Heetland against Smasal Aggregates & Asphalt, LLC, (“Smasal Aggregates”) 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 November 4, 2005 and Smasal Aggregates requested a hearing within ten days of receipt of the application. The application alleges that Smasal Aggregates discriminated against Heetland when he was terminated from his employment on July 28, 2005, because he made safety complaints to company management about his working conditions on July 27 and 28, 2005. The application states that the Secretary has determined that the underlying discrimination complaint filed by Smasal was not frivolously brought. A hearing in this temporary reinstatement proceeding was held on November 22, 2005. For the reasons set forth below, I find that the applicant established that Heetland’s discrimination complaint was not frivolously brought.

II. SUMMARY OF THE EVIDENCE

On or about August 15, 2005, Heetland filed a complaint of discrimination with the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Heetland was the only witness who testified in this temporary reinstatement hearing. He testified that he started

working for Smasal Aggregates in April 2004 as an equipment operator. On July 26, 2005, Smasal Aggregates' employees started making preparations to clean off 10 to 12 feet of overburden on top of limestone that was to be mined. (Tr. 8). The area to be cleaned was near the edge of a highwall that dropped about 30 feet to the floor of the pit. The overburden consisted of loose, unconsolidated material which had been previously blasted. Heetland constructed eight foot high berms along the edge of the haul truck route being constructed to the area. He was concerned about the "tight conditions" in the area and expressed these concerns to another equipment operator.

On July 27, 2005, Heetland was assigned to operate a track hoe to scoop up overburden and dump the material into trucks. (Tr. 11). As Heetland started loading haul trucks, he became concerned about the working conditions. When Mike Smasal, owner/operator of Smasal Aggregates, came to the area, Heetland complained about these working conditions. Specifically, he complained that he was operating too close to the edge of the highwall and there was not sufficient room for the haul trucks and track hoe to safely operate. Mr. Smasal did not respond to his complaints but merely stated that the rock had to be removed. (Tr. 13).

The track hoe is an excavator that is mounted on caterpillar tracks. Heetland testified that, in operating the track hoe, he was required to reach out with the boom on the front of the track hoe, scoop up material, pivot the body of the track hoe, and dump the load into a waiting haul truck. (Tr. 12-13, 35-36). Because the material he was digging was blasted rock, it was loose and unconsolidated. Heetland testified that as he scooped up the material, it would roll out from under the track hoe. Heetland's track hoe was positioned facing the edge of the highwall with the tracks perpendicular to that edge. He had to extend the boom as far forward as possible so that the bucket could scoop up rock at the "very edge of the highwall." (Tr. 12). Heetland stated that as he removed the loose material with the bucket, rock rolled "back from out underneath [the] tracks [of the track hoe]." *Id.* As he worked, the front ends of the tracks would stick out 18 to 24 inches "into mid air over this probably 45-degree slant with a 30-foot drop-off underneath that." (Tr. 13). Heetland was concerned that, if his track hoe started sliding as rock rolled out from under the tracks, the track hoe could easily keep sliding down the loose rock toward the edge of the highwall. As he worked, the front of the tracks were sometimes about 20 feet from that edge and he believed that there would be nothing to stop the track hoe from falling 30 feet to the pit floor if the track hoe started sliding. (Tr. 27, 38, 41-45). He could sometimes feel the track hoe drop a few inches as the material under him settled. (Tr. 46-48).

The highwall rose 30 feet above the pit floor. Because the track hoe was on top of the overburden that was to be removed, Heetland stated that he was operating another 10 to 12 feet above that. Heetland estimated that, as he worked, the overburden that was adjacent to the edge of the highwall would become sloped at an angle of about 45 degrees. (Tr. 28). He believed that if the track hoe started sliding, the loose rock would act like "ice" and the track hoe would "shoot" right over it. (Tr. 29).

Heetland continued to work in spite of his concerns. (Tr. 14). When Mike Smasal returned later that day, Heetland told him that he did not like working so close to the edge of the highwall because it is unsafe. (Tr. 14). Smasal told Heetland that “we have just got to work through it.” (Tr. 15). Heetland testified that the haul trucks that he was loading also had to come close to the edge of the highwall. Near the end of the shift, Heetland talked to Mr. Smasal again about the unsafe working conditions. Heetland complained that there were too many big pieces of equipment operating in a confined area close to the edge of the highwall. At that time, Heetland was working near the outer wall of the mine where another highwall rose above the area where the miners were working. (Tr. 15). Heetland testified that Mike Smasal replied “just get over it . . . that’s what we pay you to do.” (Tr. 16). As Heetland was leaving the mine at the end of his shift, Mr. Smasal asked him if he had banged up the cage on the skid loader. Heetland replied that he had not operated the skid loader for several months.

When Heetland returned to work on July 28, he was assigned to operate the track hoe at the same location. Some words were exchanged between Heetland and Smasal. Apparently, Smasal told Heetland that he would be “swinging out over the edge again.” (Tr. 17). Heetland replied that Smasal should operate the track hoe if he thinks “it’s so safe and so easy.” (Tr. 18). Heetland operated the track hoe until about 11:00 a.m. that day. At that time the haul truck drivers had to back down the road toward him. He was concerned that if a truck’s brakes or transmission failed, it would run right into him and he would be “over the edge.” (Tr. 19). Heetland testified that he gathered the truck drivers and told them “we have got to figure out a safe way to do this.” *Id.* When Mike Smasal came down, he wanted to know why the men were not working. Heetland testified that he told Smasal that they were trying to figure out how to work safely because the overburden was not being removed in a safe manner. *Id.* When Smasal replied that “we have got to do this in a safe manner,” Heetland started laughing because he had been after Smasal about this for a day and a half. Smasal then told Heetland that “if you are going to have that kind of attitude, you just go home.” (Tr. 20). When Heetland asked if he could operate other equipment, Smasal told him to go home.

When Heetland arrived at his house, he left a message that he wanted to talk to Rick Miller, a superintendent with Smasal Aggregates. In the early afternoon, Miller arrived at Heetland’s house. Heetland testified that Miller told him that he would be better off if he worked somewhere else and he tried to talk him into quitting. (Tr. 22). When Heetland refused to quit, Miller told him that the company did not have a position for him anymore. When Heetland asked him why, he was told that he did not get along with management and he was too abusive to equipment. *Id.*

Heetland called MSHA on July 28 about the conditions described above. He filed his complaint of discrimination with MSHA in August 15, 2005. He did not ask for temporary reinstatement at that time because he did not want to work under the same conditions. (Tr. 26). When he heard that the crew was no longer working near the edge of the highwall, he asked MSHA to seek temporary reinstatement.

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).

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). Applicant relies on the proximity in time between safety complaints and his termination, Smasal Aggregates’ knowledge of his safety complaints, and the words that were spoken between Heetland and mine management. (Tr. 59-60). The Secretary contends that she established that the discrimination complaint was not frivolously brought.

Smasal Aggregates contends that the Applicant’s discrimination complaint is frivolous on the basic physical facts presented during the hearing. (Tr. 60). Heetland testified that he was often working near the outside perimeter wall as he was excavating “which means that the ability for his excavator to slide forward and into a lower level was virtually nil.” *Id.* Smasal Aggregates also maintains that Heetland’s complaint concerning the safety of the truck roadway

lacked merit because he does not have any direct knowledge of those conditions. His complaint also assumes that one of the haul trucks will suffer a mechanical failure and he presented no evidence that the trucks had any mechanical problems. Smasal Aggregates asks that this temporary reinstatement case be dismissed.

I find that the applicant established that the underlying discrimination complaint was not frivolously brought. Heetland's safety concerns about the position of his track hoe relative to the edge of the highwall were "not insubstantial" and they "appear to have merit." I find that the Secretary established that Heetland had an honest, good faith belief that his operation of the track hoe near the edge of the highwall on July 27 and 28 put him in serious danger. Whether there was no possibility of sliding when he was working immediately adjacent to the outside perimeter wall remains to be seen. Moreover, Heetland also had to work near the edge of the highwall when he was not adjacent to the outside perimeter wall. After Heetland continued to complain to management about his safety concerns, he was sent home and was told that the company no longer had a position for him. I base my decision in this case entirely on Heetland's evidence concerning the working conditions for the track hoe and I have not considered his testimony concerning safety hazards on the roadway used by the haul truck drivers.

III. ORDER

For the reasons set forth above, Smasal Aggregates & Asphalt, LLC, is hereby **ORDERED** to immediately reinstate Jay Heetland to the position he held prior to his termination from employment on July 28, 2005, 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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