

## **Adverse Actions in Mining: Michael K. McNary v. Alcoa World Alumina, LLC, CENT 2015-279-DM (March 28, 2017)**



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In this case the Federal Mine Safety and Health Review Commission (Commission) considered an appeal of an Administrative Law Judge's decision granting summary judgment to Alcoa World Alumina (Alcoa) relating to a complaint filed by Michael K. McNary (McNary) alleging interference with his statutory rights in violation of Section 105(c)(1)<sup>1</sup> of the Mine Act.<sup>2</sup> The ALJ below dismissed the case because McNary failed to present evidence of adverse action in support of the interference claim. The Commission granted McNary's petition for discretionary review and held oral argument in the case.

McNary was a miners' representative at Alcoa's Bayer Alumina Plant and also managed pumps in the digestion department of the plant. In this capacity McNary, while walking his work route, noticed hot slurry blowing out of a valve on a pump. At some point McNary's supervisor arrived at the scene and was assisting miners donning protective gear so they could close the valve to contain the hot slurry.

During this same time period McNary requested one of the miners to summon the health and safety manager to the area. McNary then left the area for several moments to check on a second pump and when he returned he saw two miners attempting to close the pump that was emitting the hot slurry. McNary's interference

complaint arose out of a conversation he had with his supervisor relating to the miners attempt to close the pump as well as McNary's request to call the health and safety manager to the area.

During the conversation McNary's supervisor allegedly told him he should not have called anyone because it was his department and he directed the workforce. McNary responded that he was an "MSHA rep" and was concerned for the safety of the miners in the area and he was not happy the supervisor directed the miners into the hot slurry. The supervisor went on to inform McNary that he "shouldn't be involved in these matters." According to McNary, his supervisor then threatened to remove him from his position as an MSHA representative, remove him from the department, and also remove him from the plant.

Following McNary's filing of the complaint Alcoa filed a motion for summary decision arguing that McNary failed to establish an adverse action by Alcoa in response to his protected activity. The ALJ below granted Alcoa's motion for summary decision concluding that McNary failed to present evidence of any adverse action that would dissuade a reasonable miner from engaging in protected activity. McNary subsequently filed a petition for discretionary review with the Commission which was granted.

On review the Commission concluded the ALJ erred in entering summary decision in favor of Alcoa. The Commission found the ALJ was correct in establishing the standard for summary decision but he erred entering summary decision in favor of Alcoa because he viewed some of the underlying facts in a light favorable to Alcoa, rather than to the opposing party, McNary. As an example, the ALJ viewed the supervisor's statements to McNary in a light most favorable to Alcoa by focusing on the surrounding circumstances of the emergency rather than by focusing on his language which the Commission felt could have been a threat to terminate McNary.

The Commission also noted that the ALJ erred by finding there were no subsequent events that constituted retaliation or adverse employment actions against McNary. On this point, the Commission majority reiterated that threats may constitute interference within the meaning of Section 105(c)(1) of the Mine Act even in the absence of a firing, suspension, transfer or other action directly impacting a miner's job status.

It is worth noting the Commission purposely acknowledged the public nature of the supervisor's threat to remove McNary as an MSHA representative, remove him from the department, and remove him from the plant. In view of that the majority remarked that if the miners, present at the time of the comments, understood the supervisor's statement as a threat it could chill their willingness to raise safety concerns in the future. Finally, citing Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), the Commission reminded the regulated community that coercive interrogation and harassment over the exercise of protected rights is prohibited under Section 105(c). And, Commission precedent has established that Section 105(c) does not only protect against tangible acts of reprisal it also protects threats of reprisal that chill a miner's exercise of protected rights.

Accordingly, the Commission vacated the ALJ's grant of summary decision and

remanded the matter for a full evidentiary hearing.

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1 Section 105(c)(1) of the Mine Act provides in relevant part that “no person shall discharge or in any manner discriminate against...or otherwise *interfere* with the exercise of statutory rights of any miner... because such miner...has filed or made a complaint under or related to this Act...or because of the exercise by such miner...of any statutory right afforded by this Act.”

2McNary first filed a complaint with MSHA pursuant to Section 105(c)(1) of the Mine Act. MSHA elected not to pursue the case and thus McNary filed his complaint pursuant to Section 105(c)(3) of the Mine Act.

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