



timely petition for review of the Judge's grant of temporary reinstatement, directed at the tolling issue. For the reasons that follow, we grant the petition and affirm the Judge's decision.

## I.

### Factual and Procedural Background

#### A. Factual Background

A & G operates the Strip No. 12 Mine, a surface coal mine located in Virginia. Aaron Lee Anderson was employed at the mine, primarily as a truck driver hauling rock, for approximately three months. He was hired on August 26, 2016, and discharged from his position on November 21, 2016.

On November 29, 2016, Anderson filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") against A & G. App. for Temp. Reinstatement, Ex. B at 1-2. MSHA conducted a preliminary investigation of Anderson's discrimination complaint and on January 3, 2017, the Secretary filed an Application for Temporary Reinstatement, requesting an order requiring A & G to temporarily reinstate Anderson to his former position as haul truck driver or to a comparable position. *Id.* at 4. The Secretary alleges that the discharge was motivated by the fact that Anderson raised safety concerns regarding dusty conditions and compromised visibility in the pit area.

The Judge held a hearing on temporary reinstatement on January 12, 2017. At the hearing, Anderson testified<sup>2</sup> that on November 18, 2016, he was working night shift at the mine. Anderson testified that when he arrived at the mine pit at the start of the shift, he noticed a large amount of dust in the air. Using his truck's CB radio, Anderson communicated his safety concerns to his supervisor, Danny Orrick. He informed Orrick that the dust in the air was impairing his vision while he was operating his truck. Tr. 28-29. According to Anderson, Orrick stated that he would send a water truck to clear the air. Tr. 25, 27. After Anderson hauled his first load to the dump site, he saw that the water truck had not been brought in to control the dust. While hauling his second load of rock, Anderson repeated his concern about the dust impairing visibility over the CB radio. Orrick did not respond to the second complaint. Anderson heard two other truck drivers voice similar concerns about the dust impairing visibility. Tr. 28, 29, 31, 37. Anderson testified that he continued working for fear of losing his job. Tr. 27.

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<sup>2</sup> The Commission has noted that in temporary reinstatement proceedings, it is "not the [J]udge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (citation omitted). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Res., Inc.*, 920 F.2d 738, 744 (11th Cir. 1990). Thus, the Judge here correctly accepted Anderson's testimony as accurate.

The dust was still significantly impairing visibility when Anderson returned to the pit to receive a third load. Anderson saw one of the front-end loaders raise its shovel above the dust, and believed that the loader's operator was signaling to him to position his truck to be loaded. Anderson attempted to back his truck into position, but collided with another truck which was already being loaded. Anderson testified that he could not see the other truck because of the dust. The collision caused more than \$50,000 in damage to the other truck. Tr. 29-31, 51-55, 120. After the accident, A & G tested Anderson for drugs and sent him home. Tr. 31-33. The test results were negative. Tr. 33.

Prior to the November 18 accident, Anderson had raised other safety concerns. He had made three complaints to Orrick concerning berm heights, and how they needed to be raised. According to Anderson, Orrick would become agitated at these complaints, and in one instance Orrick responded that Anderson should do his job and Orrick would do his. Tr. 39. Anderson had also complained many times about the handrail on his truck being broken. Tr. 29, 55-56. A & G fixed the handrail, but never in a manner that prevented it being broken again. As of November 18, the handrail had remained unrepaired for approximately 10 days. Tr. 29, 56.

A & G terminated Anderson on November 21, asserting that the accident three days earlier was the reason. Anderson filed a complaint with MSHA pursuant to section 105(c) of the Mine Act eight days later. The Secretary subsequently investigated, and then filed his Application for Temporary Reinstatement.

While the Secretary was investigating Anderson's complaint, A & G idled operations at the Strip No. 12 Mine due to economic conditions. On December 28, 2016, the mine was placed in "nonproducing" status with MSHA. As a result of the idling of the mine, approximately 29 miners were laid off and approximately 19 were transferred to the Bishop Coal Mine, a mine two hours away which was owned by A & G's parent company. Eight miners either refused transfer or resigned. Tr. 90-91; PTR, Ex. A.

Shortly after the Secretary filed his request to have Anderson reinstated to his former position with A & G, the operator filed a motion with the Judge asking that any reinstatement order be tolled due to the layoff. A & G asserted that it would not have transferred Anderson to the Bishop Coal Mine because Anderson did not have enough seniority. In support of its tolling motion, A & G submitted a list of its employees at the Strip No. 12 Mine showing which ones had been offered and accepted a transfer to the Bishop Mine, which had been offered and declined a transfer, and which miners were laid off and not offered a transfer. PTR, Ex. A. According to the employee list, all employees who were offered transfers to the Bishop Mine had more seniority than Anderson.

The Secretary opposed tolling of Anderson's temporary reinstatement and challenged the system which A & G used to determine which employees would be laid off and which employees would be offered the opportunity to transfer.

On January 19, the Judge issued an order requiring temporary reinstatement of Anderson and denying A & G's tolling motion. A & G subsequently reinstated Anderson to a position that it created for him as a truck driver hauling rock at one of A & G's reclamation projects.

## **B. The Judge's Order**

The Judge found that the Secretary's section 105(c)(2) complaint was not frivolous. Specifically, the Judge found that the Secretary had made a non-frivolous claim that Anderson engaged in protected activity and suffered an adverse action. The Judge further found A & G had knowledge of Anderson's safety complaints made over the CB radio, and that Anderson's discharge closely followed his safety complaints. The Judge further found that A& G displayed animus toward Anderson's protected activity in that its responses to the safety complaints ranged "from inaction to outright hostility." Slip op. at 11. Accordingly, the Judge concluded that the Secretary had made a non-frivolous claim that a nexus existed between Anderson's protected activity and his subsequent discharge.

In denying the operator's tolling motion, the Judge reasoned that the operator had failed to demonstrate that Anderson would not have been transferred to Bishop Coal had he not been discharged following the accident. The Senior Vice President of A & G's corporate parent (Southern Coal Corporation), Patrick Graham, testified that three factors were used to determine whether a miner would be laid off or transferred to the Bishop Mine – seniority, skills, and willingness to travel to the Bishop Mine. However, the Judge found that each of those three factors was problematic with respect to Anderson:

- 1) The Judge observed that, according to the operator's own employee list, a miner who was hired the same month as Anderson had been transferred to the Bishop Mine, and another miner who had a decade more seniority than that miner was laid off.
- 2) The Judge further observed that the employee list did not list the skills or certifications of the miners, but only listed the hourly wages. He found that hourly wages were not a "suitable proxy" for determining skills, thus making it impossible to determine whether Anderson's skills would have qualified him for transfer.
- 3) Finally, the Judge found that because Anderson had already been terminated at the time the transfers were offered, his willingness to travel to the Bishop Mine was not considered.

As a result, the Judge found not frivolous Anderson's assertion that, had he been working at the mine at the time of the layoff, including him in the layoff rather than providing a transfer would have been at least in part because of his protected activities. Accordingly, the Judge denied the operator's tolling motion.

## II.

### Disposition

The operator does not challenge the Judge's conclusions regarding Anderson's underlying temporary reinstatement claim. Rather, the operator argues that the Judge erred in denying A & G's tolling motion. The operator asserts that it presented clear evidence that Anderson would have been included in the layoffs that resulted from the idling of the mine.<sup>3</sup>

The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee. *See Sec'y of Labor on behalf of Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054-56 (Oct. 2009); *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 397-99 (Feb. 2013); *Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 1183, 1187-88 (May 2013); *see also Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989) (holding that back pay is due to a discriminatee from the date of the unlawful discharge until the time of reinstatement or "the occurrence of an event tolling the reinstatement obligation"); *Wiggins v. E. Assoc. Coal Corp.*, 7 FMSHRC 1766, 1772-73 (Nov. 1985) (concluding that the back pay award ended upon the date of layoff).

Proof of a non-frivolous claim of discrimination in a discharge that precedes a subsequent partial layoff, standing alone, does not foreclose tolling due to the subsequent partial layoff. To prevail on such a tolling claim, however, the operator must prove that the layoff justifies tolling temporary reinstatement. *Gatlin*, 31 FMSHRC at 1055. If the Secretary challenges the objectivity of the layoff, the Commission applies the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act to the Secretary's challenge. Here, the operator discharged the miner prior to the layoff. Therefore, the Judge must evaluate the tolling claim as if the miner was employed at the time of the partial layoff and was laid off rather than transferred to the sister mine. In such circumstances, once the complainant establishes a non-frivolous basis for a claim of a violative discharge, temporary reinstatement should not be tolled by a partial

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<sup>3</sup> We reject the Secretary's argument that A & G's temporary reinstatement of Anderson as a truck driver hauling rock forecloses its tolling claim. The Judge ordered the operator to reinstate Anderson immediately. The operator complied with the Judge's order by creating a rock truck position for Anderson at an A & G reclamation site. We are not persuaded by the Secretary's argument that the creation of Anderson's new position somehow undermines the fact that the mine needed to lay off a certain number of miners for economic reasons. The Secretary's approach, in effect, would penalize an operator for complying with the Judge's order for temporary reinstatement. Such an outcome defies logic and runs counter to the goals of the Act by potentially resulting in delays of compliance with temporary reinstatement orders for miners. *See, e.g., Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1053, 1054 n.4 (Oct. 2009) (rejecting the Secretary's argument that the operator is estopped from asserting a tolling claim when it had economically reinstated the miner without receiving job services from him).

layoff unless the operator shows that the transfers were determined and carried out on terms that expose as frivolous the miner's claim that he would have been transferred to the sister mine, but for his improper discharge.

We find unavailing the operator's argument that, absent evidence that a miner with less seniority than Anderson was transferred, A & G had no burden to produce any further evidence in support of its tolling motion. Such a finding would eliminate the Judge's ability to review the totality of the evidence in determining whether the operator carried its burden of proving that the employee would have been included in the layoff for reasons wholly unrelated to protected activity. The Judge must examine the entire record to determine if the proof of the criteria for the layoff, at least insofar as it would have affected the complainant, makes application of the discrimination claim to the layoff frivolous.

We also reject the operator's argument that Graham's testimony and the employee list positively establish that the operator would not have transferred Anderson to the Bishop Mine. PTR at 3-5. The Judge carefully explained his reasons for finding that the testimony and list did not demonstrate that Anderson would not have been transferred to Bishop Coal had he not been discharged following the accident. In short, the Judge found that the operator did not show as frivolous the miner's claim that his inclusion in the layoff, had he been employed, would have resulted at least in part from protected activities.

The Judge found that the operator's assertion of seniority as the "primary factor" in its transfer decisions was not dispositive. A miner who was hired earlier in the same month as Anderson was transferred to the Bishop Mine, and another miner who had a decade more seniority than that miner was laid off. The record supports these findings. In fact, A & G's own employee list shows that 20 miners with more seniority than the miner who was hired in the same month as Anderson, and retained, were laid off, and one of those laid off miners had 13 years more seniority than the retained miner. The operator failed to adduce any evidence explaining why seniority, a factor the operator had asserted as the primary determinant for its decision, carried so little weight in the decisions not to offer transfer to so many miners who had been employed by the company for longer than the least-senior miner offered a transfer. Without further explanation, the evidence supports a conclusion that A & G may have relied upon subjective factors in determining which of the Strip No. 12 miners would be offered the opportunity to transfer to the sister mine. As a result, we conclude that substantial evidence supports the finding that A & G did not prove that it would have included Anderson in the subsequent layoff for reasons entirely unrelated to any protected activity.

III.

Conclusion

For the reasons stated above, we grant the petition, and affirm the Judge's decision.<sup>4</sup> We remand the matter to the Judge to determine the rate of pay due to the complainant and whether the operator may continue to employ the complainant at the A & G reclamation site or must transfer him to the Bishop Mine.<sup>5</sup>



William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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<sup>4</sup> Commissioner Young disagrees with the Judge's observation in footnote 17, which expressed concern about the operator's counsel noting that another, more senior miner named by the counsel might be laid off as a result of Anderson's temporary reinstatement. While naming a specific miner should be avoided in the future, it seems obvious that counsel was attempting to remind the Court that there is a human cost when a miner included in an economic layoff must be reinstated.

<sup>5</sup> While this appeal was pending, the parties submitted supplemental briefing requesting that the Judge clarify his Order of Temporary Reinstatement to specify whether the operator may continue to employ Anderson at the A & G mine or must transfer him to the Bishop Mine at a higher rate of pay. The Judge should address this issue on remand.

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