

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 2, 2021

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR
on behalf of ROGER COOK,
Complainant,

v.

ROCKWELL MINING, LLC,
Respondent.

TEMPORARY REINSTATEMENT

Docket No. WEVA 2021-0203
MSHA Case No. HOPE CD 2021-02

Mine: Eagle #3 Mine
Mine ID: 46-09427

DECISION AND ORDER OF REINSTATEMENT

Appearances: LaShanta Harris, Esq., Office of the Solicitor, U.S. Department of Labor,
Arlington, Virginia, for the Petitioner

Christopher D. Pence, Esq. and James P. McHugh, Esq., Hardy Pence,
PLLC, Charleston, West Virginia, for the Respondent

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

This matter is before me upon an application for temporary reinstatement brought by the Secretary of Labor (“Secretary”), on behalf of Roger Cook, under section 105(c) of the Federal Mine Safety and Health Act of 1977, against Rockwell Mining, LLC (“Respondent”). 30 U.S.C. § 815(c); 29 C.F.R. § 700.45. The application seeks reinstatement of Cook as a fire boss at Respondent’s Eagle #3 Mine pending final disposition of Cook’s discrimination complaint. Ex. S-1.¹ Cook filed a discrimination complaint on February 1, 2021, after the Respondent suspended and terminated him in January 2021. Jt. Ex. 1.

A hearing was held via Zoom for Government videoconference on March 29, 2021. The Secretary gave a closing argument during the hearing, and the Respondent filed a post-hearing brief. Tr. at 138. For the reasons set forth below, I grant the application for temporary reinstatement and retain jurisdiction until final disposition of the complaint on the merits.

¹ In this decision, “Tr.” refers to the transcript from the hearing. The Secretary’s exhibits are numbered Ex. S-1 to S-3. The Respondent’s exhibit is numbered Ex. R-2. The parties’ joint stipulations are abbreviated “Jt. Ex. 1.”

B. Joint Stipulations

The parties have submitted the following stipulations:

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Federal Mine Safety and Health Act of 1977 (“the Act”). Accordingly, presiding Administrative Law Judge Priscilla Rae has the authority to hear this case and issue a decision regarding this matter.
2. Respondent is a Limited Liability Corporation and a “person” within the meaning of section 105(c) and within the definition of section 3(f) of the Act. 30 U.S.C. § 802(f).
3. Respondent is the operator of the Eagle #3 Mine, MSHA Mine ID #46-09427, located in Wyoming County, West Virginia.
4. The products or operations of the Eagle #3 Mine enter or affect commerce, within the meaning and scope of section 4 of the Act.
5. The Eagle #3 Mine is a “mine” as defined by the Act. 30 U.S.C. § 802(h).
6. Respondent is engaged in the operation of a coal mine. It is, therefore, an “operator” as defined in section 3(d) of the Act. 30 U.S.C. § 802(d).
7. On January 25, 2021, Complainant was terminated by Respondent.

Jt. Ex. 1.

II. STATEMENT OF FACTS

Roger Cook has worked in the mining industry since 1991 and has been employed by Respondent—or Respondent’s parent company, Blackhawk Mining—since approximately April 2016. Tr. at 18–19. At the time Respondent suspended and terminated Cook, Cook was serving as a fire boss at Respondent’s Eagle #3 Mine. Tr. at 17; Jt. Ex. 1. As a fire boss, Cook was generally responsible for identifying and recording unsafe conditions, and Cook was also responsible for examining the mine’s airways. Tr. at 17, 19.

Prior to Cook’s suspension and termination in January 2021, Cook informed management of several safety-related incidents. In August 2020, Cook filed an accident report alleging that he suffered respiratory problems resulting from spraying gunite on stoppings without a mask. Tr. 26–28. Additionally, between December 2020 and January 2021, Cook voiced concerns about: instructions to build new stoppings to route air around a roof fall; a flat car being pushed

with one motor; and an overloaded mantrip. Tr. at 30–31, 44–47. Cook also told management in January 2021 about a non-functioning panic bar on a scoop.² Tr. at 56–58, 60–61.

On January 20, 2021, Cook was involved in an incident concerning a “jumpered” ground monitor on a “cathead” cable plug for a return pump. Tr. at 19–20, 76. Cook testified that this condition created a shock hazard, and that he locked and tagged out the piece of equipment to prevent injury. Tr. at 20–22; Ex. S-2. Cook then left the area to continue his examination of the return airway. Tr. at 22. Shortly after Cook left the area, MSHA Inspector John Stone³ witnessed the locked and tagged-out equipment. Tr. at 76–77. After noticing Cook’s name on the tag, Inspector Stone requested that mine management summon Cook so that Inspector Stone could question Cook. Tr. at 77–80. Superintendent Travis Hartsog and foreman Brad Bunch found Cook and informed him that Inspector Stone wanted to speak with him. Tr. at 121–22. Cook then spoke with Inspector Stone about the cathead in front of Hartsog, Bunch, and other individuals who were standing nearby. Tr. at 23–25, 81, 123. Inspector Stone issued a section 104(d)(2) order with respect to the condition Cook identified. Tr. at 83–84; Ex. S-3.

The following day, Cook was suspended from his position at the mine. Tr. at 32. Respondent terminated Cook from his employment four days later on January 25, 2021. *Id.* Cook had never received any disciplinary action from Respondent prior to his suspension. *Id.*

III. APPLICATION OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the Act” and recognizes that “if miners are to be encouraged to be active in matters of safety and health they must be protected against . . . discrimination which they might suffer as a result of their participation.” S. Rep. No. 95–181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

Unlike a trial on the merits of a discrimination complaint brought by the Secretary—where the Secretary bears the burden of proof by the preponderance of the evidence—the scope

² Respondent sought to argue that it suspended and terminated Cook because he knew about the deactivated panic bar on the scoop but did not inform management. Regarding Respondent’s proposed exhibits and testimony concerning that incident, the Secretary filed a Motion in Limine and Objections to Respondent’s hearing exhibits. On March 26, 2021, I granted the Secretary’s Motion and Objections because the proposed evidence concerned an affirmative defense and raised issues of credibility—and was therefore beyond the limited scope of a temporary reinstatement hearing. Respondent filed a Motion to Reconsider my March 26, 2021 Order, which I denied. Respondent also made several proffers at hearing regarding the testimony and exhibits I excluded in my March 26, 2021 Order. Tr. at 127–29.

³ Inspector Stone has been employed by MSHA for approximately 14 years and is currently a coal mining inspector and electrical specialist. Tr. at 73. On the day in question, Inspector Stone was present at the mine to terminate outstanding citations and to perform his regular inspection of the mine. Tr. at 74–75.

of a temporary reinstatement proceeding is statutorily limited. Section 105(c) of the Mine Act and Commission Rule 45(d) limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint was “frivolously brought.” 30 U.S.C. § 815(c); 29 C.F.R. § 700.45(d).

The United States Court of Appeals for the Eleventh Circuit has noted that the “not frivolously brought” standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. *Jim Walters Res., Inc. v. FMSHRC*, 920 F.2d 738, 744 (11th Cir. 1990). The standard is whether a miner’s complaint appears to have merit. *Id.* at 747. The Commission has set forth the elements to be considered under this standard: 1) that the miner has engaged in some protected activity under the Act, and 2) that the adverse action identified in the complaint was at least in part motivated by the protected activity. *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The motivation can be established by showing knowledge of the protected activity, hostility or animus towards the protected activity, and coincidence in time between the activity and the adverse action. *Sec’y of Labor on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 326 (Mar. 2000). The nexus in time between the protected activity and the adverse action may be sufficient to find improper motive without a showing of animus or hostility. *Durango Gravel*, 21 FMSHRC at 957; *see also A&K Earth Movers, Inc.*, 22 FMSHRC at 325 n.2 (“[W]e have never held that hostility is a prerequisite to a finding that a complaint is not frivolous.”). A temporary reinstatement hearing is not the appropriate forum for a determination of credibility between competing versions of events in evaluating whether a complaint appears to have merit. *Sec’y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009).

In this matter, there is sufficient evidence under the “not frivolously brought” standard to find that Cook engaged in protected activity. Cook testified that he witnessed or complained about several safety incidents between August 2020 and January 2021. The most recent such incident occurred on January 20, 2021, when Cook locked and tagged out the cathead. Cook then cooperated with Inspector Stone’s inquiry regarding the condition. Cook’s actions—including cooperating with Inspector Stone—are protected activity under the Act. *See Thomas v. CalPortland Co.*, 42 FMSHRC 43, 51 (Jan. 2020) (cooperation with MSHA inspection was protected activity); *Sec’y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997).

The short amount of time between the January 20, 2021 incident and Cook’s suspension—in addition to the fact that management witnessed Cook’s discussion with Inspector Stone—sufficiently establishes a nexus in time and motivation for the purposes of this hearing. After Cook locked and tagged out the cathead, he talked to Inspector Stone about the condition in front of superintendent Hartsog and foreman Bunch—members of Respondent’s management. Because of this, I find that there is at least a non-frivolous issue that management was aware of the incident and that Respondent had knowledge of Cook’s protected activity. *CAM Mining LLC*, 31 FMSHRC at 1090 (“The Secretary need not prove that the operator has knowledge of the complainant’s protected activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge.”). Further, Respondent suspended and terminated Cook only days after speaking with Inspector Stone; this demonstrates a temporal nexus between the

protected activity and adverse action. *See Turner v. Nat'l Cement Co. of Calif.*, 33 FMSHRC 1059, 1071 (2011) (complainant's termination days after his most recent complaint could support inference of improper motivation for termination); *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal Co.*, 40 FMSHRC 39, 43 (Feb. 2018) (“[T]here is no dispute that . . . termination from employment was an adverse action.”). In light of this clear temporal nexus and management's knowledge, there is sufficient evidence that Cook's protected activity motivated, at least in part, his suspension and termination—the adverse actions identified in the complaint. In sum, I find that Cook's complaint is not frivolously brought.

ORDER

Respondent is hereby **ORDERED** to immediately reinstate Roger Cook to his duties as a fire boss or equivalent position as of the date of his suspension and termination at the same rate of pay and number of weekly hours with restoration of all other benefits to which he was then entitled.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this Court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint as soon as possible. Counsel for the Secretary **SHALL** also immediately notify my office of any settlement or of any determination that Respondent did not violate section 105(c) of the Act.



Priscilla M. Rae
Administrative Law Judge

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