

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 18, 2020

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR ON
BEHALF OF JACOB HAMILTON,
Complainant,

v.

SMALL MINE DEVELOPMENT,
Respondent.

TEMPORARY REINSTATEMENT

Docket No. WEST 2021-0069

Mine: El Nino
Mine ID: 26-02830

**ORDER GRANTING IN PART AND DENYING IN PART
SECRETARY'S MOTION IN LIMINE**

Before: Judge Simonton

This case is before me upon an application for temporary reinstatement filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Small Mine Development (“Respondent”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On December 15, 2020, the Secretary filed a Motion in Limine to exclude Respondent’s evidence extending beyond the narrow scope of the temporary reinstatement determination. The Respondent filed a response in opposition to the Secretary’s motion on December 18, 2020. The temporary reinstatement hearing is scheduled for December 22, 2020 via Zoom.

Under Section 105(c)(2), if the Secretary finds that a miner’s complaint alleging discrimination under Section 105(c) 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.” 30 U.S.C. § 815(c)(2). At this juncture, the Secretary need not prove a prima facie case of discrimination by a preponderance of the evidence in order for the Complainant to receive temporary reinstatement—he must only prove that the complaint was “not frivolously brought.” The Secretary asserts that the “not frivolously brought standard” restricts the Judge’s ability to weigh credibility and testimonial conflicts during the temporary reinstatement hearing, and therefore should not include Respondent’s rebuttal or affirmative defense evidence.

Respondent argues that the Secretary’s motion should be denied because it is overly broad and precludes it the right to introduce nearly any evidence at the temporary reinstatement hearing. Respondent argues that it is permitted to cross-examine the Secretary’s witnesses and present testimony and documentary evidence to support its claim that the complaint was

frivolously brought. The Secretary's motion, framed to exclude any evidence presented "to create a testimonial conflict or credibility determination or to support an affirmative or rebuttal defense," would in its view effectively prevent Small Mine Development from introducing any contrary evidence to support its opinion that the complaint is frivolous.

The Commission has held that "the scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd* 920 F.2d 738 (11th Cir. 1990). The judge should not resolve conflicts in testimony at this preliminary stage of the proceeding, nor should the judge determine whether there is sufficient evidence to justify permanent reinstatement. *Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n*, 920 F.2d 738, 744 (11th Cir. 1990). However, such discretion should not interfere with the right of the respondent to present testimony and evidence that supports a finding that the Secretary's complaint was frivolously brought. *See* 29 C.F.R. § 2700.45(d).

The Secretary offers no case law holding that evidence creating testimonial conflicts or supporting affirmative or rebuttal defenses must be excluded from temporary reinstatement proceedings. The Secretary's reliance on the Commission's decision in *CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009), is misplaced. In *CAM Mining*, the Commission addressed whether the judge applied the proper burden of proof and refrained from weighing conflicts in testimony in determining whether the Secretary's discrimination claim was frivolous. *Id.* at 1088. The Commission did not hold that evidence creating testimonial conflicts was inadmissible, but limited what the judge may consider and determine in properly evaluating whether the discrimination case was frivolous. *Id.* at 1089–91. In fact, none of the Secretary's cited case law requires that such evidence must be excluded from temporary reinstatement proceedings, but rather holds that the judge must refrain from making findings on the merits of the discrimination claim.

Furthermore, the Secretary's motion is overbroad and may unduly preclude Respondent from presenting evidence relevant to the temporary reinstatement proceeding. Respondent has the right under section 2700.45(d) to present testimonial and documentary evidence to support its argument that the Secretary's claim is frivolous. Here, the Secretary's motion does not identify any specific testimony or documentary evidence to be excluded, but intends to exclude all evidence that creates a "testimonial conflict" or supports "affirmative or rebuttal defense." In temporary reinstatement cases, the testimony of the operator is highly likely to conflict with that of the Secretary and the complainant miner, and nearly all other evidence offered will speak in some way to the respondent's defense. Admissibility of such evidence should therefore be considered based on its specific relevance to whether the Secretary's claim is frivolous, and not based upon broad categorical exclusions. Granting the motion runs the unnecessary risk of excluding relevant evidence simply because it falls into one of those two categories, and would undoubtedly inhibit the respondent's ability to put on its defense.

However, the Secretary is right on one count. Any evidence of wrongdoing that the Respondent acquired after terminating Hamilton is irrelevant and inadmissible at this temporary reinstatement stage. The Mine Act directs the Commission to reinstate a miner during the

pendency of his discrimination complaint as long as his claim is not frivolously brought. The *sole* purpose of this hearing is to determine whether Hamilton's claim was frivolously brought. While after-acquired evidence may be relevant to the remedies available to Hamilton after a hearing on the merits, this evidence is not relevant to the narrow question before the court at this juncture. In its statement in opposition to the Secretary's motion in limine, Respondent has not cited any precedent where after-acquired evidence has been admitted in a temporary reinstatement context under the Mine Act, and I believe that it would be inappropriate to introduce such evidence here.

Accordingly, the Secretary's Motion in Limine is **GRANTED** to the extent that it seeks to exclude the admission of after-acquired evidence. The remainder of the Secretary's motion is hereby **DENIED**.



David P. Simonton
Administrative Law Judge

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