

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 24, 2021

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of RYAN S. LEMLEY,
Complainant,

v.

MONONGALIA COUNTY COAL
RESOURCES INC.,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. PENN 2021-0087
MSHA Case No.: MORG-CD-2021-05

Mine: Monongalia County Mine
Mine ID: 46-01968

ORDER GRANTING TEMPORARY REINSTATEMENT OF RYAN S. LEMLEY

Before: Judge Lewis

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor (“Secretary”) on June 8, 2021, filed an Application for Temporary Reinstatement of miner Ryan S. Lemley (“Complainant”) to his former position with Monongalia County Coal Resources Inc. (“Respondent”) at Respondent’s mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary’s application for temporary reinstatement. 29 C.F.R. § 2700.45(c). The Secretary’s certificate of service states that the Application for Temporary Reinstatement of Complainant was served on Respondent by electronic mail on June 8, 2021. The Respondent has not filed a timely Request for Hearing. The parties submitted on June 23, 2021, a Joint Motion to Approve Settlement, which I approve herein.

The Secretary has found that the Complaint was not frivolously brought and, as explained below, has provided evidence supporting that determination. Therefore, consistent with Section 105(c)(2) of the Act, the temporary reinstatement of Ryan S. Lemley is granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1-2). The plain language of the Act also provides that “if the Secretary finds that the complaint was not frivolously brought, the Commission, on an expedited basis upon application by the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2) (emphasis added).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought, that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(c). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof, the Judge determines that the miner's complaint was not frivolously brought,¹ shall issue immediately a written order of temporary reinstatement. *Id.*

If there is a hearing, the Judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."² *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). In the instant case, however, the Respondent has not timely filed a request for hearing. Thus, Commission Procedural Rule 45(c) compels me to review the Secretary's determination that the complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c).

Disposition

The Secretary has provided the evidentiary basis for his determination that the complaint in this matter has not been frivolously brought. The Act requires the Secretary to investigate the miner's complaint of discrimination. 30 U.S.C. § 815(c)(2). The Secretary's application includes the Complaint filed by Complainant (Exhibit "A" to the Application) and the Declaration of Special Investigator Clarence Moore indicating that this was done (Exhibit "B.")

Mr. Moore's Declaration provides facts in support of the Secretary's conclusion that the complaint was not frivolously brought, including:

1. At all relevant times, Monongalia County Coal Resources Inc. was a Corporation and is a "person" as defined in section 3(f) of the Mine Act.
2. Complainant was employed as a belt cleaner at MCCR's Monongalia County Mine (46-01968), and therefore, was a "miner" within the meaning of section 3(g) of the Mine Act.
3. Complainant was employed at the Mine for approximately seven years, from 2014 until MCCR discharged him from employment on April 19, 2021.

¹ The Act's legislative history suggests that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (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 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *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, 747 & n.9 (11th Cir. 1990).

² "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

4. On April 21, 2021, Complainant filed a discrimination complaint alleging that MCCR discharged him on April 19, 2021 in response to Complainant engaging in protected activity.
5. Complainant served on the Mine safety committee from June of 2016 through June of 2018, and for four months, Complainant held a belt examiner certification. During these and other times, and while conducting belt examinations, he discovered and reported safety issues. On several occasions, he filled out an entire page in an examination book with safety concerns and hazards. In several instances, he filed complaints with MSHA under section 103(g) of the Mine Act.
6. During his employment at the Mine, Complainant frequently accompanied federal and state mine inspectors as a Miners' Representative during their inspections. During one such examination by a state inspector, Complainant pointed out an area of inadequate roof support for which the inspector issued the Mine a citation. On another occasion, Complainant advised an MSHA inspector that an emergency sled was not in the required location with the required equipment, and the MSHA inspector issued a citation to the Mine.
7. Complainant observed a "hot trolley hanger" in the Mine to which someone had run a hose to spray water to keep it cool. If the water was turned off for more than 30 seconds, the hanger would start smoking and the plates in the top would turn red. Complainant noted that the Mine did not take any other steps to abate this obvious condition during the day shift and afternoon shift, and so he called the dispatcher to contact the UMWA and let them know of the situation. Following this report, the UMWA and MCCR worked out a suitable solution to address the hot hanger.
8. Complainant reported that MCCR engaged in a years-long pattern of harassing him due to his safety reporting and cooperation with government inspectors.
9. In an August 14, 2018 letter from the late Bob Murray to UMWA President, Murray identified Complainant as one of several out of control individuals at Murray Energy owned mines who used "constant safety allegations and 103(g) complaints" to "harass [the] company and its management."
10. Complainant was generally known by MCCR as a miner that would cooperate with government inspectors. Following a number of anonymous 103(g) complaints called in to MSHA, management began referring to Lemley as "'G' Lemley."
11. MCCR raised false allegations against Complainant for allegedly destroying a contractor's belt equipment while working underground at the mine. Complainant was subsequently written up for poor work performance and suspended on the grounds that he allegedly failed to report an area of unsupported roof for which the Mine was cited by a state inspector. Complainant maintains that he, in fact, reported the unsupported roof to the inspector. The suspension eventually proceeded to arbitration, and Complainant was restored to his position with back pay.
12. During a belt move in which Complainant reported several safety issues, a foreman encouraged Complainant to ignore the safety concerns. Complainant's work was impeded and slowed due to the safety concerns, but he was able to complete the

belt move. The following day, a foreman told Complainant that the Assistant Superintendent wanted to write Complainant up for poor work performance, impeding production, and not following safety protocols. However, the foreman purportedly refused to do so because Complainant's safety concerns were accurate.

13. After Complainant's report of the mis-located emergency sled to an MSHA inspector, a MCCR safety representative told him he would no longer be able to serve as a Miners' Representative on inspections with him if Complainant was going to continue to point out safety concerns to inspectors.
14. Following an anonymous 103(g) complaint about non-compliant hardhat liners that MSHA substantiated and MCCR believed Complainant called in, a member of the Safety Department approached him daily for the next two weeks to ensure he had the proper hard hat liner.
15. Complainant also reported that MCCR assigned him to an especially hostile foreman who repeatedly threatened him and attempted to write Complainant up for taking equipment out of service, purposefully making mistakes, and creating a hostile workplace. Complainant also complains of being assigned to several less desirable positions during that time.
16. On March 20, 2021, Complainant reported five 103(g) safety complaints to MSHA which MSHA investigated on March 22 and issued citations substantiating all five complaints. While underground, Complainant asked a foreman, "What's new?" to which the foreman responded, "Other than you calling in all these complaints?" The foreman informed Complainant that MCCR was not happy, and he showed Complainant the list of violations. Complainant stated that the complaints must have been legitimate because of the citations issued.
17. The Mine's attendance policy distinguishes between personal and sick days, and provides for multiple levels of discipline for violations.
18. On April 2, 2021, the UMWA and MCCR reached a local agreement to use the miners' second week of vacation this year as personal days, due to the mine ceasing operations and permanently closing late in 2021.
19. On April 9 and 10, 2021, Complainant missed work, apparently without management consent and without proving an illness with a doctor's note.
20. On April 16, 2021, Complainant suffered an adverse action when MCCR suspended him with the intent to discharge him under the attendance policy. Complainant received no warning before his suspension and discharge, and he was not afforded an opportunity to use personal days or a combination of a personal day and a sick day for his two absences.
21. On April 19, 2021, Complainant suffered an adverse action when MCCR discharged him from his employment at the Mine.
22. MCCR treated Complainant more harshly than another similarly situated miner who has never called in a 103(g) complaint and has never been accused of doing so. In March 2021, that miner missed work, and attempted to use a personal day, but he did not have any personal days left to use. The miner had previously received

a warning for missing work. As this was an additional unexcused absence within a 180 day time frame, MCCR issued a letter suspending the miner for two days. Subsequently, the miner was again absent from work without an excuse. Yet, although MCCR initially moved to discharge him, it did not do so. Instead, MCCR issued him a second suspension and allowed him miner to use a personal day for his March absence. In addition, the miner had previously violated the attendance policies more than once.

23. Based on my investigation to this date, I have concluded that there is reasonable cause to believe that MCCR discharged Ryan S. Lemley because he engaged in protected activities. MCCR had knowledge of Complainant's protected activities, it demonstrated animus towards Complainant regarding his protected activities, it disparately treated Complainant, and there was a short time between the latest protected activity and the adverse action. Thus, there is reason to believe that MCCR's decision to discharge Complainant was based, at least in part, upon his protected activity, and I have concluded that the complaint filed by Ryan S. Lemley is not frivolous.

Dec. of Clarence W. Moore, June 8, 2021 (Ex. "B" to App. For Temp. Reinst.)

The facts provided in support of the agency's decision, if true, would establish jurisdiction, a timely complaint of discrimination, and that Complainant engaged in protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus between his participation in an MSHA investigation and his termination.

Findings and Conclusion


At this stage, the facts alleged by the Secretary are undisputed. Therefore, I find that the complaint for discrimination has not been frivolously brought, and that Complainant Ryan S. Lemley is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Ryan S. Lemley** be **immediately TEMPORARILY REINSTATED** according to the terms submitted by the parties in their Joint Motion to Approve Settlement.

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.


John Kent Lewis
Administrative Law Judge

Distribution (Via Certified Mail & E-mail)

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