

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

September 9, 2022

SECRETARY OF LABOR
U.S. DEPARTMENT OF LABOR obo
GEORGE RICE,
Complainant

v.

NALLY & HAMILTON ENTERPRISES,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2022-0118
MSHA Case No. BARB-CD-2022-03

Mine: Meadow Branch Mine
Mine ID: 15-19890

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge McCarthy

This matter is before the undersigned on the Secretary of Labor’s Application for Temporary Reinstatement filed on behalf of miner George Rice pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., as amended (“Act”), and 29 C.F.R. § 2700.45. The Secretary seeks an order temporarily reinstating Rice to his former position with Nally & Hamilton Enterprises pending the investigation and disposition of a Discrimination Complaint under section 105(c) of the Act.

On July 18, 2022, Rice filed a Discrimination Complaint with MSHA. The Secretary found that the Complaint was not frivolously brought and filed an Application for Temporary Reinstatement (“Application”) on August 18, 2022.

On August 24, 2022, Respondent filed a Request for Hearing. The undersigned held a hearing via Zoom for government on September 2, 2022. Witnesses were not sequestered as credibility is not at issue in a temporary reinstatement proceeding. *See, e.g., Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089, 1091 (Oct. 2009).

Given the expedited nature of this proceeding, the undersigned did not allow post-hearing briefs in this matter. However, Rice sent an email clarifying his closing arguments and adding additional support after the hearing. The undersigned granted Respondent leave to submit—and Respondent submitted—a response.¹

¹ Complainant also filed a reply to Respondent’s reply. The undersigned did not consider this additional filing as the Commission’s procedural rules do not provide a basis for a reply to a reply, and no leave was given by the undersigned for such a filing.

I. Statement of the Case

The Application alleges that Respondent violated section 105(c) when it fired Rice on July 15, 2022 for reporting safety concerns at the mine. App. at 2.

Rice also alleges that he was fired for refusing to work in unsafe conditions in violation of section 105(c). Jt. Ex. 4 at 1; Tr. at 27. However, the Secretary's Application does not allege that Respondent fired Rice because of a refusal to work. Because the Secretary demonstrates that it did not frivolously bring the charge that Respondent fired Rice for reporting safety concerns—and this basis alone supports a grant of temporary reinstatement—the undersigned does not need to address this additional alleged protected activity by Rice.

As a remedy for firing Rice in violation of section 105(c), the Application requests that the undersigned issue an Order of Temporary Reinstatement to reinstate Rice to the position he held prior to his firing on July 15, 2022, or to a similar position at the same rate of pay, with the same benefits, and with the same or equivalent duties assigned to him. App. at 2.

II. Testimony at Hearing

At the hearing, the Secretary presented two witnesses: Rice and Freddie Fugate, the MSHA special investigator who investigated the Complaint. The Respondent presented one witness: Jake Napier. As explained more fully below, the undersigned does not make any credibility determinations in presenting this evidence. The facts as presented here are merely an evaluation of the evidence to determine if the miner's complaint was not frivolously brought.

Rice began working for Respondent as a rock-truck driver at Meadow Branch Mine in January 2022. Tr. at 20, 34, 59. Usually, Rice drove truck #1427. *Id.* at 35. Sometime during the spring of 2022, the air conditioning in truck #1427 began malfunctioning. *Id.* at 37. Rice repeatedly informed his foreman, Napier, that the air conditioning was not working. *Id.* A mechanic worked on the air conditioning in truck #1427, but, each time, it would break again. *Id.* at 40-43. Each time the air conditioning was not working, Rice would report the broken air conditioning. *Id.* at 41-42.

Even though Rice worked the night shift, the truck would get so hot without air conditioning that on at least one occasion Rice had to stop the truck because he was close to passing out. *Id.* at 38, 43. On another occasion, the truck was so hot that Rice became nauseated and vomited. *Id.* at 43. At one point in June 2022, Rice recorded a temperature of 110° in the truck. *Id.* at 44. Napier admitted that such a temperature would represent a health hazard. *Id.* at 137.

Rice testified that, at a certain point, Napier told Rice to tie open the door of truck #1427 to mitigate the rising temperature. Tr. at 45. Napier denied this but admitted that doing so would not be safe. *Id.* at 121.

On or around July 13, 2022, Rice asked someone to call into the MSHA hotline to report the broken air conditioning. *Id.* at 45-46. On July 14, 2022, MSHA inspected the mine and issued several citations. *Id.* at 94-96, 127. One citation was for the air conditioning in truck #1427. *Id.* at 95.

Thereafter, on the same day as the MSHA inspection, Rice showed up for the night shift and repeated his safety concerns about the air conditioning in truck #1427. *Id.* at 47. Napier assigned him to drive truck #235. *Id.* at 48. While driving truck #235, Rice experienced steering that would break free to the point that Rice was unable to steer it around curves, and brakes that did not completely stop the truck. *Id.* at 49-51; *id.* at 53-54 (Rice could not get up the hill in the truck and the brakes would not fully stop the truck as he backed down the hill.). When Rice reported these safety concerns to Napier over the CB radio, Napier responded in an unusual, mad tone and told Rice to “[j]ust go on and get off the hill.” *Id.* at 55-56. Based on his 11- to 12-years’ experience as a miner and knowledge of similar expressions in the mining industry, Rice interpreted Napier’s response as a statement that Napier had discharged him. *Id.* at 56-57, 83, 84-85.

In opposition to the Application, Respondent alleged that Rice had voluntarily quit and that there was no adverse action. Napier denied having told Rice to get off the hill and stated that he would not have fired Rice over the CB radio. Tr. at 116, 127. Napier also testified that an employee, whom Napier had hired, told him that Rice had quit. *Id.* at 123, 126. Napier waited a week before reporting that Rice was no longer working at the mine. *Id.* at 118-19.²

Respondent also noted that, after he was allegedly fired, Rice texted Napier about the truck. *Id.* at 86. However, Napier testified that he did receive that text message. *Id.* at 130.

III. Legal Principles and Analysis

Section 105(c)(2) of the Mine Act provides that, as to claims of discrimination, “if the Secretary finds that such complaint 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.” During a temporary reinstatement proceeding, a judge should not make credibility determinations, resolve testimonial conflicts, or weigh the operator’s evidence against the Secretary’s evidence. *Sec’y of Labor on behalf of Cook v. Rockwell Mining*, 43 FMSHRC 157, 162 (Apr. 2021) (citations omitted). Rather, a judge in a temporary reinstatement proceeding should simply evaluate the Secretary’s evidence and determine whether the miner’s complaint appears to have merit. *Id.* at 161 (quoting *Williamson*, 31 FMSHRC at 1089).

During a temporary reinstatement proceeding, the Secretary need not prove a prima facie case of discrimination but must simply prove a non-frivolous issue of discriminatory motivation for adverse action taken because of protected activity. *Rockwell Mining*, 43 FMSHRC at 161. The Commission has held that the Secretary can establish such a non-frivolous causal nexus by showing operator knowledge of the protected activity and temporal proximity between the protected activity and the adverse action. *Sec’y of Labor on behalf of Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000).

² Because of the standards for evaluating an application for temporary reinstatement, the undersigned does not need to address the merits of Respondent’s case in defense. *Rockwell Mining*, 43 FMSHRC at 162 (“[T]he Judge is not obligated to resolve testimonial conflicts In addition, the Judge should not weigh the operator’s evidence against the Secretary’s evidence when determining whether to grant temporary reinstatement.”).

Here, the Secretary has demonstrated that Rice's Complaint was not frivolously brought. For purposes of this temporary reinstatement proceeding, the Secretary has demonstrated a non-frivolous case of discriminatory discharge, that is, protected activity by Rice, adverse action taken against him by Respondent, and a casual nexus between the two. First, the Secretary has sufficiently demonstrated that Rice engaged in protected activity when he made safety and health complaints about the air conditioning in truck #1427 and safety complaints about the steering and brakes in truck #235. Tr. at 41-42, 49-51. Such complaints are protected under section 105(c)(1).

Second, the Secretary has sufficiently demonstrated that the Complaint was not frivolously brought as to the issue of adverse action. Based on his years of experience and knowledge of the mining industry, Rice testified that he interpreted Napier's intemperate directive to "[j]ust go on and get off the hill"—which was issued right after Rice complained about the steering and brakes in truck #235 and refused to drive that truck—as a pronouncement that he had been discharged. Tr. at 56-57, 83, 84-85. Similar phrases have been found sufficient for finding an adverse action in discrimination proceedings. *See e.g., Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982) (upholding judge's finding, as supported by complainant and supervisor testimony, that "go on to the house" was "commonly used in coal fields as a synonym for discharge"). Consequently, Rice's testimony that Foreman Napier told him in a mad and unusual tone to "[j]ust go on and get off the hill," immediately after Rice complained about safety issues with truck #235, is sufficient to demonstrate a non-frivolous claim of adverse action. *Pennypower Shopping News, Inc., v. N.L.R.B.*, 726 F.2d 626, 629 (10th Cir.1984) ("The test of whether an employee has been discharged depends on the reasonable inferences that the *employee* could draw from the statements or conduct of the employer.").

Finally, the Secretary has also established a non-frivolous causal nexus between Rice's protected activity and his discharge. Rice made repeated complaints about the air conditioning in truck #1427, including the complaint he made at the start of the shift during which he was allegedly fired. Tr. at 47. Rice also made complaints during that same shift about the steering and brakes in truck #235. *Id.* at 49-51. The Respondent was aware of Rice's repeated safety complaints, and the alleged adverse action occurred during the very same shift that Rice engaged in protected activity. Such knowledge of protected activity and close temporal proximity between the protected activity and alleged discharge are sufficient to establish a non-frivolous causal nexus that Rice was fired because of his protected activity. *Stahl*, 22 FMSHRC at 325-26.

The Secretary has demonstrated that the complaint was not frivolously brought.

IV. Order

For the foregoing reasons, Respondent Nally & Hamilton Enterprises is **ORDERED** to immediately reinstate George Rice to the position he held immediately prior to his termination on or about July 15, 2022, or, if that position is no longer available, to a substantially equivalent position at the same rate of pay, with the same benefits, and with the same or equivalent duties assigned to him.

This Order of Temporary Reinstatement is not open-ended. It will end upon final order on the underlying discrimination complaint as set forth in section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether he will file a complaint with the Commission under section 105(c)(2) of the Act and so advise Rice, the Respondent, and this administrative tribunal.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Thomas Hamilton
Nally & Hamilton Enterprises
Saltsman Willett Deton & Hamilton, PSC
212 E. Stephen Foster Avenue
Bardstown, KY 40004
sth@ky-atty.com

Tony Oppegard
P.O. Box 22446
Lexington, KY 40522
tonyoppegard@gmail.com

Wes Addington
Appalachian Citizens' Law Center
317 Main Street
Whitesburg, KY 41858
wes@aclc.org

Jennifer M. Tag
Office of the Solicitor
U. S. Department of Labor
618 Church Street
Suite 230
Nashville, Tennessee 37219
Tag.Jennifer.M@dol.gov