

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 18, 2014

SECRETARY OF LABOR, MSHA,
on behalf of **THOMAS A. SIMPKINS**,
Complainant,

v.

TK MINING SERVICES, LLC, and
THE MARSHALL COUNTY COAL
COMPANY, formerly known as
MCELROY COAL COMPANY,
Respondents.

SECRETARY OF LABOR, MSHA,
on behalf of **BUCKY THOMPSON**,
Complainant,

v.

TK MINING SERVICES, LLC, and
THE MARSHALL COUNTY COAL
COMPANY, formerly known as
MCELROY COAL COMPANY,
Respondents.

SECRETARY OF LABOR, MSHA,
on behalf of **MATTHEW G. TOTTEN**,
Complainant,

v.

TK MINING SERVICES, LLC, and
THE MARSHALL COUNTY COAL
COMPANY, formerly known as
MCELROY COAL COMPANY,
Respondents.

TEMPORARY REINSTATEMENT
PROCEEDINGS

Docket No. WEVA 2015-99-D
MORG-CD-2014-23

Mine ID: 46-01437
Contractor ID: K393
Mine: McElroy Mine

Docket No. WEVA 2015-100-D
MORG-CD-2014-24

Mine ID: 46-01437
Contractor ID: K393
Mine: McElroy Mine

Docket No. WEVA 2015-101-D
MORG-CD-2014-22

Mine ID: 46-01437
Contractor ID: K393
Mine: McElroy Mine

SECRETARY OF LABOR, MSHA,
on behalf of **JOSEPH A. WHIPKEY**,
Complainant,

v.

TK MINING SERVICES, LLC, and
THE MARSHALL COUNTY COAL
COMPANY, formerly known as
MCELROY COAL COMPANY,
Respondents.

Docket No. WEVA 2015-102-D
MORG-CD-2014-25

Mine ID: 46-01437
Contractor ID: K393
Mine: McElroy Mine

**DECISION AND ORDER OF TEMPORARY REINSTATEMENT
and ORDER DISMISSING DOCKETS NO. WEVA 2015-99-D & WEVA 2015-100-D**

Appearances: M. del Pilar Castillo, Esq. and John A. Nocito, Esq., Office of the
Solicitor, U.S. Department of Labor, Philadelphia, PA, for the
Complainants

Matthew M. Linton, Esq., Holland & Hart LLP, Denver, CO, for
Respondent TK Mining Services, LLC

Michael D. Glass, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,
Pittsburgh, PA, for Respondent The Marshall County Coal Company

Before: Judge Rae

DECISION

This matter is before me upon four Applications for Temporary Reinstatement filed by the Secretary of Labor on behalf of Thomas A. Simpkins, Bucky Thompson,¹ Matthew G. Totten, and Joseph A. Whipkey (“the Complainants”), respectively, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”), 30 U.S.C. § 815(c)(2), and Commission Rule 45, 29 C.F.R. § 2700.45.

A hearing on the four applications was held in Morgantown, West Virginia on November 14, 2014. At the hearing, the Secretary withdrew the Applications for Temporary Reinstatement filed on behalf of Simpkins and Thompson. The parties presented arguments and evidence with regard to the two remaining applications. For the reasons set forth below, I grant the two remaining applications and order the temporary reinstatement of Totten and Whipkey.

¹ The case caption formerly referred to Mr. Thompson as “Kenneth R. Thompson.” At the hearing, he informed the Court that his legal name is Bucky Kenneth Ronald Thompson, and he goes by his first name. Transcript at 12-13, 17. The case caption has been amended accordingly.

Agreed Facts

At the hearing, the parties entered into the following ten stipulations of fact:

1. At all times relevant to these proceedings, Respondent The Marshall County Coal Company (“Marshall County Coal”) was an operator of the Marshall County Mine, formerly known as the McElroy Mine, Mine ID No. 46-01437.
2. The Marshall County Mine is a mine as that term is defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
3. Respondent Marshall County Coal is engaged in the operation of a coal mine and is, therefore, an operator as that term is defined in section 3(d) of the Mine Act.
4. At all times relevant to this proceeding, products of the Marshall County Mine entered commerce, or the operation or products thereof affected commerce within the meaning and the scope of section 4 of the Mine Act, 30 U.S.C. § 803.
5. Respondent TK Mining Services, LLC (“TK Mining”) is an independent contractor performing services or construction at a coal mine and is, therefore, an operator as defined in section 3(d) of the Mine Act.
6. Thomas Simpkins was previously employed by TK Mining at the Marshall County Mine. Simpkins is a miner within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g).
7. Bucky Thompson was previously employed by TK Mining at the Marshall County Mine. Thompson is a miner within the meaning of section 3(g) of the Mine Act.
8. Matthew Totten was previously employed by TK Mining at the Marshall County Mine. Totten is a miner within the meaning of section 3(g) of the Mine Act.
9. Joseph Whipkey was previously employed by TK Mining at the Marshall County Mine. Whipkey is a miner within the meaning of section 3(g) of the Mine Act.
10. Marshall County Coal and TK Mining are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. The presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this matter.

Tr. 7-9.²

Summary of Evidence

The Complainants were hired in 2014 as general hourly laborers for TK Mining, which provides independent contracting services in underground mines. Tr. 18, 52, 78. In July 2014,

² The abbreviation “Tr.” refers to the transcript of the November 14, 2014 hearing.

Marshall County Coal, which is a subsidiary of Murray American Energy, Inc., hired TK Mining to provide necessary belt maintenance services at the Marshall County Mine (formerly McElroy Mine) in Marshall County, West Virginia. Tr. 11, 107-8. The four Complainants were assigned to work the day shift as a crew shoveling the 5 North #1 belt line at the mine. Tr. 79. The crew's task was to shovel rib rolls and debris on the tight side (or off-side) of the belt to clear a two-foot walking path for fire bosses. Tr. 19-20, 53, 79. They were instructed to start at the #7 crosscut and work their way inby. Tr. 43, 87. The crew leader was Thompson, who holds about two years of underground mining experience. Tr. 17-8, 20.

On August 13, 2014, the Complainants arrived at the mine to begin their shift around 8:00 AM, traveled to the #9 crosscut along the belt line where they would be shoveling that day, and began their work. Tr. 22-3, 54-5, 80-2. Around 11:00 AM, a thick haze of rock dust came wafting along the belt line from inby where the crew was working. Tr. 23-4, 43, 82. The crew donned paper masks and continued working for five to fifteen minutes, but the dust thickened and became too much for the masks to handle. Tr. 56-7, 83-4. Totten explained that at first it was a small amount of dust as if from a can or trickle duster, but several minutes later it became a "solid wall almost of just white" that he presumed was bulk dust from track dusting. Tr. 83-4. The Complainants stopped shoveling and walked outby to the nearby air split at the #8 crosscut, where fresh air was present, because they believed it was unsafe to continue working in the dusty conditions due to greatly impaired visibility and the health hazards associated with rock dust inhalation.³ Tr. 24, 31, 57-9, 84-6. Thompson testified that the crew waited 35 to 40 minutes for the dust to subside before returning to work, then took their lunch break shortly thereafter and began shoveling again around 12:30 PM. Tr. 25. Whipkey and Totten testified the crew took an early lunch then returned to work when the dust had settled. Tr. 59, 86-8.

Just after 1:00 PM (according to Thompson), or an hour and a half after the miners had resumed shoveling (according to Whipkey and Totten), the dust came up once more and the crew again retreated to the fresh air at the split. Tr. 25, 60, 88-9. While the crew was waiting for the dust to subside, a fire boss passed by, covered in white from the rock dust. Tr. 25-27, 61-3, 90-1. He was coming from the same direction as the dust. Tr. 26, 91. He stopped to clean his glasses and spoke with to the crew briefly, acknowledging the dusty conditions and informing the crew that rock dusting was taking place at the #32 crosscut. Tr. 26, 30, 61-3, 91-2.

Later, while the crew was still waiting at the air split, an unfamiliar man approached and looked at them from the other side of the belt. Tr. 27-30, 63-4, 92-4. Whipkey testified that the man stared directly at him but said nothing, although it was so loud on the belt line that it was difficult to hear. Tr. 63. It was the end of the shift, so the crew began walking out of the mine. Thompson testified that the unidentified man "looked under the belt, looked at me, smiled," and seemed to walk with the crew as they departed the air split, but when he looked back again the

³ Specifically, Totten, who has about four years of underground mining experience, testified that breathing such dust could cause silicosis. Tr. 84. He further felt that the dust exposed the crew to hazards in that visibility was reduced "to where you can't see what you're doing." Tr. 84-5. Whipkey also testified that the dust reduced visibility and caused coughing, a runny nose, and eye irritation. Tr. 57. Thompson testified that it burned the lungs and nostrils and explained that a miner could be seriously injured by tripping and falling under the moving belt due to impaired visibility. Tr. 24, 31.

man had disappeared. Tr. 28. Totten added that the crew had stopped and waited when they got to the head drive in case the unidentified man needed to talk to them, but the man exited through a man door without speaking to them. Tr. 93. When the crew returned to the surface Thompson prepared a daily shift report stating: “Shoveled 30 feet inby of 8¾ wall and under the rollers at 5 north belt. They started dusting at 11:30 and started back up at 1. Got dusted out.” Gov’t Ex. 1; Tr. 32-36. Thompson delivered copies of the report to various members of mine management, including Mine Superintendent Eric Lipinski (an employee of Marshall County Coal) and TK Mining’s Eastern Operations Manager, Jim Holthouser, who was the crew’s direct supervisor and had assigned the four of them to the Marshall County Mine job. Tr. 34, 43-4, 48-50.

Later that same day, Lipinski sent an email to Holthouser stating that the Complainants had been observing sitting and lying down on the job and were performing below standards, and he no longer needed their services at the mine. Tr. 98, 119. Lipinski testified he had sent engineer Paul McGee to investigate the crew. Tr. 116. McGee had reported that the Complainants were making insufficient progress at their assigned task and had walked away when he tried to talk to them. Tr. 116-9.

Holthouser met with the Complainants the evening of August 13 and told them they were suspended pending an investigation into the allegations contained in Lipinski’s email. Tr. 36, 66-8, 95-7. According to Totten, the Complainants explained to Holthouser that they had stopped working during their shift because of the dusty, unhealthful conditions; Holthouser assured the crew that he would check the mine records to verify that rock dusting had occurred on their shift, and if so they would keep their jobs. Tr. 97-9. The shift foreman’s report confirmed that rock dusting had taken place August 13. Tr. 126. However, Lipinski met with Holthouser and stated that he did not want the four men working at the mine anymore. Tr. 120. Holthouser called the Complainants to the mine and gave them termination letters on August 18, 2014. Tr. 37, 70-1. According to Totten and the MSHA investigator, Holthouser indicated the four men had been fired because of the email from Lipinski. Tr. 98.

Legal Framework and Analysis

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

Section 105(c)(2) of the Mine Act provides: “if the Secretary finds that [a discrimination] 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.” 30 U.S.C. § 815(c)(2). Thus, unlike a trial on the merits of a discrimination complaint, where the complainant bears the burden of proof by a preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute to the issue of whether the underlying discrimination complaints were “not frivolously brought.” *Sec’y of Labor on*

behalf of Deck v. FTS Int'l Proppants, LLC, 34 FMSHRC 2388, 2390 (Sept. 2012); *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990); *see also* Commission Rule 45(d), 29 C.F.R. § 2700.45(d).

A claim is not frivolously brought if it “appears to have merit.” *FTS Int'l Proppants*, 34 FMSHRC at 2390, *citing* S. Rep. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The Eleventh Circuit has explained that this standard is “strikingly similar to a reasonable cause standard” and reflects Congressional intent that “employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding.” *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747-8 (11th Cir. 1990).

While the Secretary is not required to present a prima facie case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of the underlying discrimination claim to determine if the evidence at this stage satisfies the “not frivolously brought” standard. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). As a general proposition, to demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in a safety-related activity protected by the Mine Act, and that the adverse employment action complained of was motivated, in some part, by that protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-8 (Apr. 1981). Although the judge may review the elements of the underlying discrimination claim, it is not the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses during the temporary reinstatement proceeding. *FTS Int'l Proppants*, 34 FMSHRC at 2390; *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). It is sufficient for the judge to find that the Complainant engaged in protected activity, the Respondent had knowledge of that activity, and there was a coincidence in time between the protected activity and the adverse action. *CAM Mining, LLC*, 31 FMSHRC 1085.

In this case, there is no dispute that an adverse employment action occurred when the Complainants were terminated on August 18, 2014. There is also reasonable cause to conclude the Complainants engaged in protected activity on August 13, 2014. The Complainants allege that they engaged in protected activity by refusing to work in conditions that they felt were unhealthful and unsafe when a dense cloud of airborne rock dust permeated their work area. Marshall County Coal's witness, Mine Superintendent Lipinski, confirmed that rock dusting took place in the mine on the day in question. Tr. 126. The Complainants testified that the rock dust was so thick it irritated their eyes, noses, and throats and also greatly reduced visibility in the belt area where they were working, giving rise to trip-and-fall hazards. Tr. 24, 31, 57, 84-5. Totten testified that inhalation of rock dust can cause silicosis. Tr. 84. Thus, the Complainants were aware that working in rock dust exposed them to health and safety hazards and they refused to work in that environment. Based on the hearing testimony, I find that the Secretary's claim that the Complainants engaged in a protected work refusal appears to hold merit.

Because the claims of protected activity and adverse employment action appear to hold merit, the sole remaining question is whether the Secretary had reasonable cause to claim that the adverse employment action was motivated at least in part by the protected activity – that is, the termination of the Complainants was motivated at least in part by discriminatory intent. The Commission has long recognized that direct evidence of motivation is rarely encountered, and more often the only available evidence of discriminatory intent is indirect. *CAM Mining, LLC*, 31 FMSHRC at 1089, citing *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence that can serve as indicia of discriminatory intent includes the operator’s hostility or animus toward the protected activity, the operator’s knowledge of the protected activity, and coincidence in time between the protected activity and adverse action. *Id.*

In this case, the alleged protected activity occurred on August 13, 2014 and the Complainants were fired five days later on August 18, 2014, showing a coincidence in time. The managers involved in the termination decision, Lipinski and Holthouser, apparently had knowledge of the alleged protected activity. Totten testified that the Complainants told Holthouser about the protected activity when he suspended them the evening of August 13. Tr. 97-9. Lipinski subsequently conferred with Holthouser about the incident, and he also had a copy of the Complainants’ daily shift report for August 13 stating they had been “dusted out” and was aware that rock dusting had taken place in the mine that day. These factors serve as circumstantial evidence that the Complainants’ discharge was motivated by the alleged protected activity.⁴ Accordingly, I find that the Secretary had reasonable cause to infer discriminatory intent. Under these circumstances, I find that the discrimination complaints appear to hold merit and were not frivolously brought.

Finally, I note that at the hearing Marshall County Coal questioned whether it could be held liable for temporary reinstatement because it did not directly employ the Complainants. Tr. 109. However, aside from prohibiting retaliatory discharge by an employer, section 105(c) of the Mine Act also allocates liability to anyone who discriminates against a miner or who *causes* a miner to be discharged or discriminated against due to protected activity. 30 U.S.C. § 815(c)(1). The Secretary theorizes that Marshall County Coal instructed TK Mining to discharge the Complainants and TK Mining carried out the discharge, so both entities can be held liable under

⁴ In fact, Lipinski’s testimony shows the Complainants’ discharge was directly linked to their alleged protected activity, namely, their refusal to work in an allegedly unhealthy and unsafe environment on August 13. Lipinski’s discovery that the four men had been sitting in the air split instead of doing work on August 13 was what spurred him to email Holthouser that their services were no longer needed in the mine. Tr. 117-9. Marshall County Coal attempted to elicit testimony from Lipinski that the Complainants’ work performance also factored into his decision that he did not want them working in the mine. However, such testimony goes to an affirmative defense, and as noted above, analysis of the operator’s rebuttal or affirmative defenses does not fall within the limited scope of this temporary reinstatement proceeding. *FTS Int’l Proppants*, 34 FMSHRC at 2390; *Chicopee Coal Co.*, 21 FMSHRC at 719. In addition, to the extent that the Complainants’ work performance was negatively affected by any protected activity in which they may have engaged, firing the Complainants for their work performance might have been tantamount to firing them for their protected activity.

the Mine Act. Tr. 110. Lipinski is an agent of Marshall County Coal, and considering his involvement in the termination decision, I find that it was not frivolous for the Secretary to initiate discrimination complaints against both Respondents even though Marshall County Coal was not the actual employer.

ORDER

Because the Secretary has withdrawn the Applications for Temporary Reinstatement filed on behalf of Simpkins in Docket No. WEVA 2015-99-D and Thompson in Docket No. WEVA 2015-100-D, those two dockets are hereby **DISMISSED**.

The Applications for Temporary Reinstatement filed on behalf of Totten in Docket No. WEVA 2015-101-D and Whipkey in Docket No. WEVA 2015-102-D are hereby **GRANTED**. The Respondents are **ORDERED** to immediately reinstate Totten and Whipkey to their positions as of the date of their termination, or to similar positions, at the same rate of pay and with all rights and benefits to which they are entitled. The Court retains jurisdiction over these temporary reinstatement proceedings.



Priscilla M. Rae
Administrative Law Judge

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