FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of **JEREMY JONES**, Applicant, v. KINGSTON MINING, INC., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2015-1007-D HOPE-CD 2015-12 Mine: Kingston No. 2 Mine ID: 46-08932

DECISION AND ORDER ON REMAND

Appearances: Lucy Chiu, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for Complainant

Robert Wilson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for Complainant

Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, PA, for Respondent

Before: Judge Moran

This case is before the Court upon an application for temporary reinstatement filed by the Secretary of Labor on behalf of Jeremy Jones ("Applicant") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012). On November 9, 2015, all five members of the Commission reversed this Court, finding that Applicant Jones' late filing was excused and that he made safety complaints. Further, the Commission found that it was reversible error for the Court to have excluded evidence regarding the layoff and hiring of new miners.[1]

[1] The Court did not reach the issue of the layoff because it did not accept the proffered reason for Jones' late filing and also because, in context, it did not find his safety complaints to be cognizable. The Commission did not accept either of the Court's bases.

The Commission directed that

> [o]n remand, the Judge shall permit the Secretary to submit evidence regarding the layoff and hiring of miners and shall permit the operator to submit relevant rebuttal evidence consistent with the recognition that the 'scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.'[2]

Sec'y of Labor on behalf of Jones v. Kingston Mining, Inc., 37 FMSHRC ___, slip op. at 6, No. WEVA 2015-1007-D (Nov. 9, 2015). The Commission further directed that the Court was to consider the evidence related to safety complaints "and animus such as the asserted isolation of Jones by Laverty."[3] *Id.*

After the conclusion of the additional evidence upon remand, the Secretary's closing argument noted that the only nexus which must be established is a connection between the protected activity and the adverse action and as to that, citing *Jim Walter Resources*, 920 F.2d 738 (11th Cir. 1990), the burden is only to show that the claim is non-frivolous, that is, to show that the assertions are not clearly without merit. Given Jones' claims about being isolated and as Laverty was involved in Jones' evaluation, the minimal non-frivolous burden was met. The Secretary also showed that the layoff procedure and evaluation had scoring issues, and that is sufficient to demonstrate that the procedure ostensibly had issues of fairness.[4]

For the most part, Respondent's closing strayed into areas that amounted to weighing conflicting presentations, a subject outside of this proceeding. Recognizing the impact of the Commission's remand decision, Respondent did request that this Court give effect to section 105(c)(3)'s requirement that the Secretary notify, within 90 days of receipt of the complaint, of his determination whether a violation has occurred. Jones filed his complaint on August 4, 2015, and therefore the 90 day period for the Secretary to make his determination arrived November 2nd. As of the December 8th, the Secretary's determination, non-jurisdictional though it is, will be 36 days overdue. The Court orders the Secretary, who represented at the December 1st hearing that MSHA has completed its investigation and that the Solicitor's office is reviewing it, and will have its final decision by December 31st, to make that determination no later than that last day of this year.

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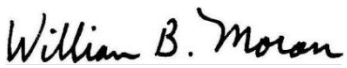
[2] Because there can be no weighing of conflicting accounts in the context of a temporary reinstatement proceeding, the Complainant will prevail if a minimal showing is made.

[3] Jones reasserted that he was "isolated" by Laverty but this term implies more than what occurred. Jones was at times given assignments that were a one-person task and he expressed that he received more than his fair share of such assignments. Laverty presented a different picture, but again because there is no weighing at this stage, the Complainant's version prevails.

[4] In addition, on June 22, 2015, Respondent did hire, among its post-layoff hires, an electrician. Tr. 292. Yet, inexplicably, that individual's name does not appear on the list of such hires. Ex. R-7.

In sum, this Court, consistent with the Commission's remand directions, heard additional testimony at the December 1st hearing. However, upon listening to, and forming opinions about, that further testimony, including that of Jones and Laverty, which opinions by the Court were in line with those made at the time of the October 7, 2015, temporary reinstatement hearing, this Court has concluded that it is appropriate to recuse itself from further involvement in this proceeding and therefore invokes 29 C.F.R. § 2700.81, requesting that the Chief Administrative Law Judge reassign this matter to another judge.

Accordingly, within the inherent constraints in a temporary reinstatement proceeding and the Commission's Decision of November 9, 2015, this Court ORDERS Respondent Kingston Mining, Inc., to reinstate Applicant Jeremy Jones to his former position, or a substantially similar position, as of the date of this decision.



William B. Moran
Administrative Law Judge

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