FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 22, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LAWRENCE D. HAGENE, Complainant	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2016-101-D
v.	
PRAIRIE STATE GENERATING CO. LLC, and GMS MINE REPAIR & MAINTENANCE, INC., Respondents	Lively Grove Mine Mine ID: 11-03193

DECISION DENYING TEMPORARY REINSTATEMENT

Appearances: Travis Gosselin, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, on behalf of the Complainant.
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of Respondent Prairie State Generating Co., LLC.
R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak & Stewart PC, St. Louis, Missouri, on behalf of Respondent GMS Mine Repair & Maint., Inc.

Before: Judge Feldman

This matter is before me based on an application for temporary reinstatement filed by the Secretary of Labor on December 8, 2015, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), as amended, 30 U.S.C. § 815(c)(2), against Prairie State Generating Co., LLC ("Prairie State") and GMS Mine Repair & Maintenance, Inc. ("GMS"), on behalf of Lawrence D. Hagene. Hagene was employed by GMS as a contract electrician. GMS is a contractor performing services at Prairie State's Lively Grove Mine. Section 105(c)(2) of the Mine Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner's employment pending the full resolution of the merits of his discrimination complaint. A hearing was held in St. Louis, Missouri, on February 9, 2016.[1] The parties' post-hearing briefs were filed on February 17, 2016.

[1] Commission Rule 45(c) provides that a temporary reinstatement hearing shall be held within ten calendar days following Prairie State's December 8, 2015, hearing request. 29 C.F.R. § 2700.45(c). The hearing in this matter was delayed due to the holidays, scheduling conflicts of counsel, and the significant January 23, 2015, snowstorm and resulting travel disruptions.

I. Statement of the Case

This temporary reinstatement proceeding is analogous to a preliminary hearing. Under section 105(c)(2) of the Mine Act, "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 reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2) (emphasis added). Courts and the Commission have concluded that the "not frivolously brought" standard in section 105(c)(2) is satisfied when there is a "reasonable cause to believe" that the discrimination complaint "appears to have merit." *Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000) (citations omitted). Thus, the Commission has repeatedly recognized 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." *See Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990).

Hagene last worked for GMS during the second shift from 3:00 pm to 11:00 pm on September 3, 2015. Tr. 66-67. Late in that shift, at approximately 10:30 pm, a roof fall significantly damaged a 995 volt trailing cable of a continuous miner. Tr. 67. While troubleshooting the damaged trailing cable, Hagene affixed an approved laminated warning tag and lock to the cathead of the damaged cable at the power center. Tr. 72, 75. However, in preparation to leave at the end of his shift, Hagene replaced his approved personal warning tag with a makeshift warning note on a discarded wax-like piece of white paper, and removed his personal lock from the cathead, thus enabling him to take his personal tag and lock with him when he departed the mine. Tr. 78-81; Resp. Ex. 2. Hagene was suspended the next day on September 4, 2015, and ultimately terminated on September 8, 2015, for his failure to ensure that the damaged trailing cable was continuously locked and tagged out of service. Tr. 99, 110. Hagene was terminated by GMS after Prairie State informed GMS that it would no longer allow Hagene to work at its Lively Grove Mine. Tr. 110-11.

At the hearing, the Secretary acknowledged that "the question in this proceeding is essentially whether or not putting the tag on [the damaged trailing cable] was a protected activity and whether the termination was motivated by that protected activity." Tr. 32. Similarly, in his brief, the Secretary asserts that Hagene was terminated as a consequence of his purported protected activity, identified by the Secretary as Hagene's "place[ment of] a tag on the cathead of the damaged cable warning [other miners] that the cable was a serious safety hazard." Sec'y Br., at 11-12. In other words, the Secretary contends that Hagene was terminated "for flagging the hazard." Tr. 168; 170. The Secretary further asserts in his brief that Hagene also engaged in protected activity when he "removed the continuous miner from service after discovering that its trailing cable was damaged" and when he "informed his Section Supervisor about the damaged cable." Sec'y Br., at 11. Finally, the Secretary contends that Hagene was the victim of disparate treatment because another contract electrician, who also plugged the damaged cable into the power center, was not disciplined. *See id.* at 17-18.

In contrast, the Respondents maintain that Hagene did not, in essence, "flag enough." In this regard, the Respondents contend that Hagene was terminated for failing to follow company policy, which requires that damaged equipment, such as a high-powered defective trailing cable, must be effectively locked and suitably tagged out of service without interruption. *See* Prairie State Br., at 6, 18-19.

With regard to the Secretary's assertion that Hagene's removal of the continuous miner from service was a motivating factor in his termination, it is significant that the Respondents did not object to Hagene's removal of the trailing cable's cathead from the power center because the damaged trailing cable rendered the continuous miner unusable. Tr. 30-32. In fact, energizing the damaged cable had tripped circuit breakers, causing a loss of power in a substantial portion of the mine. Tr. 45. Thus, although Hagene's removal of the continuous miner from service constitutes protected activity, any suggestion by the Secretary that Hagene's termination could have been motivated by its removal is indisputably frivolous. In addition, as discussed below, there is no evidence of disparate treatment as it was only Hagene who violated the company's lock out/tag out procedure.

The Secretary has the burden of demonstrating that his application for temporary reinstatement has not been frivolously brought. 29 C.F.R. § 2700.45(d). However, the Secretary has failed to identify any protected activity that can serve as a basis for Hagene's temporary reinstatement. To the contrary, as discussed below, the evidence reflects that Hagene was terminated for his failure, by his own admission, to protect miners from the significant hazards posed by an energized high-powered continuous miner trailing cable by insufficiently locking and tagging it out after it sustained damage. Accordingly, the Secretary's application for Hagene's temporary reinstatement must be denied.

II. Findings of Fact

As previously noted, Hagene was employed by GMS as a contract electrician at Prairie State's Lively Grove mine site. GMS is a contractor providing staffing and performing services at the Lively Grove Mine. There are three production shifts at the Lively Grove Mine: 7:00 am to 3:00 pm, 3:00 pm to 11:00 pm, and 11:00 pm to 7:00 am. Tr. 85. Hagene worked the second shift, 3:00 pm to 11:00 pm. Tr. 66-67. The Lively Grove Mine follows a "hot seat" procedure, whereby miners must remain in the mine until they are relieved by their replacement in the oncoming shift. Tr. 67. It is not uncommon for miners to wait past the end of their shift to be relieved by the oncoming miner. Under such circumstances, these miners are paid overtime. Tr. 85.

During Hagene's shift on September 3, 2015, at approximately 10:30 pm, the Joy Continuous Miner lost power when a rock fall occurred, damaging its trailing cable. At the time of the roof fall, the continuous miner was under unsupported roof. Soon thereafter, Hagene was summoned to the power center to troubleshoot the damaged cable by metering each phase of the cable to ground to determine the nature and location of the damage. Tr. 69. The power center was located four crosscuts from the continuous miner. Tr. 70.

Before work could be done on the damaged cable, the continuous miner had to either be moved out from under unsupported roof, or timbers had to be installed around the continuous miner's location. Tr. 144. In an attempt to move the continuous miner out from under unsupported roof, Hagene initially energized the continuous miner, at which time the operator was able to move the continuous miner approximately two feet before the breaker was tripped and power was lost. Tr. 75. After power was restored, the operator made a second attempt to move the miner, again causing a loss of power. Tr. 77.

Throughout the entire troubleshooting process, unless Hagene was plugging in the cable cathead in an attempt to enable the continuous miner to be moved, Hagene tagged and locked out the cable with his personal lock and tag. Tr. 72, 75. Hagene acknowledged that a failure to do so would expose him and other miners in proximity to the power center or cable to potential injury from shrapnel from an exploding breaker or burns from the damaged cable. Tr. 86. When the lock was affixed to the cathead, the miner could not be re-energized until Hagene removed his lock. Tr. 79-80, 93, 96.

At about 11:50 pm, after two attempts to move the continuous miner had failed, Hagene removed his personal lock and tag from the cable cathead in preparation to depart the mine to return home, despite the fact that he had not encountered his "hot seat" replacement, Caleb Bowsher, on the section. Tr. 136. Bowsher was also employed by GMS. Tr. 101. Hagene did not want to leave his personal tag and lock on the cathead after the end of his shift, as they could only be removed by him personally, or with his authorization. Tr. 87. Consequently, Hagene replaced his personal lock and tag with a makeshift tag made of discarded paper. Tr. 78-81; *see* Resp. Ex. 2. Hagene testified that he wrote with a black permanent marker "Danger, 2 phases grounded, do not plug up" on the piece of paper, and affixed the paper to the cathead with a piece of wire. Tr. 78. The makeshift tag attached to the cathead by wire could be easily removed and did not prevent the cathead from being plugged in. Tr. 79-80. Hagene testified that he then left the power center and walked to the tool sled to retrieve an approved company danger tag, which he intended to affix to the cable cathead. Tr. 82, 90. Hagene claims that he did not want to leave his personal lock and tag on the cathead while fetching an approved company danger tag in case he was called out of the mine in the interim. Tr. 86-87.

Before Hagene reached the tool sled, he received a radio call, summoning him back to the power center. Tr. 90-91. When he returned, Bowsher and Prairie State shift supervisor, Jeremy Coleman, were present at the power center. Tr. 91. Bowsher was in the process of plugging the cathead into the power center, which again tripped the breakers causing an interruption of power in the mine. Tr. 91. Coleman, holding the makeshift tag, told Hagene "This is unacceptable." Tr. 91. Hagene reportedly responded to Coleman, saying that he had left the makeshift tag on the cathead because no work was being performed on the cable, and because the mine's lock out/ tag out policy for shift changes only required miners "to take and put a tag on it [with] the description of the hazard." Tr. 90.

Both Hagene and the Respondents agree that miners had raised the issue of the mine's lock out/tag out policy during shift changes at an August 2015 safety meeting. Tr. 88-90; 201-02. Given the mine's "hot seat" procedure, miners raised concerns about the need for "community locks" that can be used to replace the personal locks and tags of miners departing at the end of their shift. Tr. 67; 87-90. Although the issue of community locks illustrates the

importance of the continuity of locking and tagging out damaged equipment, at the meeting, mine management opined that the current policy requiring miners who had installed locks and tags to wait for their "hot seat" replacement was not a problem that needed to be addressed. Tr. 90.

The following day, on September 4, 2015, Hagene was informed by mine management that he was suspended and under investigation for a violation of the mine's lock out/tag out policy. Tr. 100-01. On September 8, 2015, Hagene was informed by GMS management that he had been terminated from work at the Lively Grove Mine. Tr. 110.

III. Procedural Framework

As previously noted, unlike a trial on the merits, in a discrimination complaint brought by the Secretary, where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of a temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 45(d) provides:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

29 C.F.R. § 2700.45(d).

In its decision in *Jim Walter Res., Inc., v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the court noted the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the court stated:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' – an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are not insubstantial or frivolous.'

920 F.2d at 747 (emphasis in original) (citations omitted).

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 a discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. 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 safety related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Sec'y o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Thus, identification of a miner's protected safety related activity is *the essential element* of a successful discrimination complaint.

IV. Disposition

As a threshold matter, the evidence in this preliminary temporary reinstatement proceeding must be viewed in a light most favorable to Hagene because it is not the judge's duty to resolve conflicts in testimony at this preliminary stage of the proceedings. *Sec'y o/b/o Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). While resolution of credibility conflicts goes beyond the scope of this proceeding, Hagene's own testimony fails to demonstrate that he engaged in any relevant protected activity. In fact, his decision to leave the cable cathead unattended with merely a makeshift tag, in and of itself, was hazardous. By way of illustration, Hagene testified:

Counsel: Now, you also said that there are dangers with this cable being plugged in if there's a short in it?

Hagene: Yes.

Counsel: I believe your testimony was that the power center could blow up, or an employee could be burned, or there could be shrapnel if a breaker exploded and the shrapnel would fly?

Hagene: Correct.

Counsel: So despite those – and you said that you locked it out when you were first apprised of the problem with the continuous miner, you locked it out because you didn't know what was happening and you wanted to make sure that you didn't get injured?

Hagene: That is right.

Counsel: Yet, rather than waiting as you're supposed to for the next crew to come on and have that conversation with Caleb Bowsher, who himself could be subject to blowing up, shrapnel, or being burned, you chose to just write a note on the back of a piece of paper, a piece of garbage, that was left on the transformer? Is that correct?

Hagene: Yes.

Counsel: Because you wanted to go home?

Hagene: [inaudible]

Judge: Excuse me, that was a yes, Mr. Hagene?

Hagene: Yes it was, Your Honor.

Judge: Okay. Thank you.

Counsel: And that was because you wanted to go home?

Hagene: That was because I was not—he did not relieve me at the proper time.

Counsel: So rather than use a proper lock, rather than use a proper tag, rather than try and find [Bowsher] or radio him to tell him, hey, this is dangerous over here, you better be concerned about it, you wanted to go home?

Hagene: I put the note on there because of safety issues.

Tr. 145-47. Thus, the thrust of the above-quoted testimony is that Hagene conceded that the priority he gave to his desire to go home, rather than to his responsibility to await his replacement from the oncoming shift for the purpose of directly communicating the details of the hazard, exposed Bowsher, the oncoming electrician, to injury.

Hagene asserts that he believed that company safety policy permitted him to remove his lock at the end of his shift, as long as a danger tag was attached to the cathead, regardless of whether Hagene's replacement on the oncoming shift had arrived. Tr. 90. On the other hand, Prairie State maintains that its relevant policy was to both lock and tag out during shift changes. Tr. 202, 208. Prairie State's desire to see that its lock out procedure is followed is evidenced by its December 12, 2010, Lock Out/Tag Out Standard Operating Procedure (SOP) memo, which states "***WHEN IN DOUBT, LOCK IT OUT!!***" Gov. Ex. 3, at 2 (emphasis in original).

The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (citations omitted). Rather, Commission judges must "analyze the merits of a mine operator's alleged business justification for the challenged adverse action." *Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). A mine operator's interest in seeing that damaged high-powered cables are properly tagged and locked out is self-evident. Whether Hagene's apparent failure to properly tag and lock out warranted his termination is not an appropriate matter for the Commission to decide.

Thus, the extent to which Hagene violated company policy goes beyond the scope of this proceeding, unless it is being used by the Respondents to mask their discriminatory intent, an ulterior motive not demonstrated by the facts of this case.[2] In this regard, in determining whether or not a mine operator is attempting to mask discriminatory intent, the Commission looks to factors such as hostility or animus, or disparate treatment. *Chacon*, 3 FMSHRC at 2510.

With regard to animus, as previously noted, the Respondents did not object to Hagene's removal of the trailing cable's cathead from the power center because the damaged trailing cable rendered the continuous miner unusable, and energizing it caused a loss of power in a substantial portion of the mine. Tr. 30-32. With regard to disparate treatment, although both Hagene and Bowsher were initially under investigation, Bowsher was not disciplined because he did not violate the mine's lock out/tag out policy. Thus, there are no circumstantial indicia that can be relied upon by the Secretary to infer a discriminatory motive. In the final analysis, Hagene's failure to adequately lock and tag out a damaged 995 volt trailing cable cannot be reasonably construed to constitute protected activity under the Mine Act.

Additionally, it is noteworthy that the mandatory standard in 30 C.F.R. § 75.512 requires that "potentially dangerous . . . electrical equipment . . . shall be removed from service until such condition is corrected." Given the Secretary's failure to identify any relevant protected activity, I need not address whether Hagene's failure to ensure that the damaged trailing cable remained continuously locked and tagged out of service until it is repaired constitutes a violation of section 75.512, which may provide an additional basis for the disciplinary action taken by the Respondents in this matter. *See also* 30 C.F.R. § 75.511.

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[2] The Secretary apparently desires the Commission to determine whether Hagene's conduct was "adequate enough." On this point, the Secretary argues:

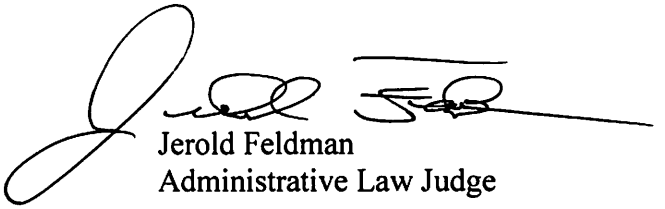
> Putting aside the question of whether Hagene's actions were the best means of addressing the hazard associated with the damaged cable, the evidence demonstrates that Hagene took affirmative steps to identify and flag a hazard.

Sec'y Br., at 18. Absent evidence of an underlying discriminatory motive, the determination of whether Hagene's "affirmative steps" adequately addressed the hazard is for the mine operator, not the Commission, to decide.

ORDER

In view of the above, considering the evidence in a light most favorably to the Secretary, the Secretary has failed to identify any protected activity that can serve as a basis for the grant of the application for Hagene's temporary reinstatement. Consequently, the Secretary's temporary reinstatement application must be deemed to have been frivolously brought.

Accordingly, **IT IS ORDERED** that the Secretary's application for temporary reinstatement of Lawrence D. Hagene **IS DENIED. IT IS FURTHER ORDERED** that the temporary reinstatement proceeding in Docket No. LAKE 2016-101 **IS DISMISSED.**



Jerold Feldman
Administrative Law Judge

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