

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 3, 2015

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
o/b/o DALLAS BROOKS

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. WEVA 2015-432-D  
HOPE-CD 2015-03

v.

KINGSTON MINING, INC.,  
Respondent

Mine: Kingston No. 2 Mine

**DECISION AND ORDER OF REINSTATEMENT**

Appearances: J. Matthew McCracken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA for Complainant

Arthur Wolfson, Esq., and R. Henry Moore, Esq., Jackson & Kelly, PLLC, Pittsburgh, PA for Respondent

Before: Judge Rae

This case is before me upon an application for temporary reinstatement brought by the Secretary of Labor, on behalf of Dallas Brooks, under section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §815(c) and 29 C.F.R. §700.45. The application seeks reinstatement of Mr. Brooks as a roof bolter at the Kingston No. 2 mine pending final disposition of the discrimination complaint he filed on January 6, 2015 as a result of his suspension on September 24, 2014 and termination on October 1, 2014.

A hearing was held on February 25, 2015 in South Charleston, WV. For the reasons set forth below, I grant the application for temporary reinstatement and retain jurisdiction over this matter until final disposition of the complaint on the merits.

**Statement of Facts**

Brooks has been a roof bolter at the Respondent's Kingston No. 2 mine on the day shift for the past three years. In his position, he installs roof bolts using a two-man bolter which he operates with his partner Timothy Patterson. After the continuous miner makes the cut into the coal, the bolter comes in behind it in the return air course and installs the bolts. The approved mine ventilation plan restricts the miners to bolting only once per shift in the return air (or

downwind). Working downwind more than once per shift is a violation of state and federal law and poses a health risk to the miners.

Brooks testified that it was common practice to bolt downwind three or four times a shift at least three days per week. The frequency of this practice increased in 2014 when, according to Brooks, management cut down on the overtime that was authorized. Prior to that, the bolters would install the second set of bolts after the end of the regular shift four or five nights a week. According to Brooks, he felt pressured into bolting downwind several times per shift by his section foreman, Josh Bullard. Brooks testified that Bullard told him that if the bolting was not done during the shift, Brooks would be forced to work overtime or would be replaced. Brooks further testified he and Bullard commuted to and from work together and Bullard told Brooks that he didn't want to stay late so Brooks would have to get the bolting done during the shift. Repeated comments of this nature from Bullard made Brooks believe that if he didn't bolt downwind several times per shift to complete the bolting by the end of the shift, he would be fired. This prompted Brooks to make safety complaints. He testified that he made verbal complaints to Bullard at morning meetings. Bullard's response was that he reported it to his boss who said it had to be done because the miner could not be idled. Bullard said he had also spoken with Superintendent Daniel Helmondollar about it but nothing was done. Brooks testified that upper management was aware of the practice as he and other roof bolters had filled out the "Running Right" cards as well making anonymous complaints about working downwind. These cards are reviewed by upper management and are displayed on a television monitor stamped "addressed" although it was never corrected. The issue came to a head when Brooks' roof bolting partner, Patterson, walked into Helmondollar's office on September 23, 2014 and stated that he would not work in this manner any further. Helmondollar then contacted Shad West, Human Resources manager, and together they commenced an investigation the following day which led to the suspension and eventual termination of Bullard, Patterson, Brooks and the two other section roof bolters.

Both Helmondollar and West testified that they had no knowledge of Brooks making any safety complaints about working downwind. Bullard had never communicated any such complaints to them. If he had, the matter would have been addressed immediately. During the investigation of Patterson's complaint, West and Helmondollar interviewed Bullard and each of the roof bolters. Bullard said he told the bolters that if they did choose to operate in the dust more than once per shift, that he can't be held responsible for that if he's not around where they are or able to see them. He denied any complaints being made to him by Brooks. West testified that when he questioned Brooks, Brooks told him that he was never asked to do anything illegal and that he bolted downwind so he didn't have to stay late. Brooks did not allege that he made any complaints to anyone when questioned by West. West further testified that each of the bolters confirmed that they voluntarily bolted downwind several times per shift. At that point, the decision was made to suspend the four roof bolters and Bullard. The only miner not suspended was the scoop operator who filled in as a roof bolter on occasion. He told West that he had refused to bolt downwind and had never done so.

Helmondollar testified that he was aware of "Running Right" cards being submitted complaining of working downwind in violation of the ventilation plan in 2013. There were three or four of them and he immediately held safety talks with all foremen and miners and told them

the ventilation plan must be followed. No further complaints were received until Patterson came to his office on September 23<sup>rd</sup>. Although Brooks testified that he raised the issue with Helmondollar at a meeting in August 2014, Helmondollar denied this allegation. Helmondollar did state that when Brooks was questioned on September 25<sup>th</sup>, Brooks did mention that he had made safety complaints to Bullard. Brooks also stated he didn't want to work overtime as a reason for bolting more than once in return air.

#### Application of Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the 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. 181, 95th Cong. 1st Sess. 35 (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 623 (1978).

Unlike a trial on the merits of 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."

In its decision in *Jim Walters Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11<sup>th</sup> Cir. 1990), the Court noted that the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. The standard is whether a miner's complaint appears to have merit. The Commission has set forth the elements to be considered under this standard: 1) that the miner has engaged in some protected activity under the Act, and 2) that the adverse action complained of was at least in part motivated by the protected activity. *Sec'y of Labor o/b/o Baier v. Durango Gravel*, 21 FMSHRC 953 (Sept. 1999). The motivation can be established by showing knowledge of the protected activity, hostility or animus towards the protected activity, and coincidence in time between the activity and the adverse action. The last element alone may be sufficient to find improper motive. *Durango Gravel* at 957. A temporary reinstatement hearing is not the appropriate forum for a determination of credibility between competing versions of events in evaluating whether a complaint appears to have merit. *CAM Mining LLC*, 311 FMSHRC 1085 (Oct. 2009).

While there are several statements made by Brooks in his testimony and written statements that contradict each other, I find sufficient evidence under the "not frivolously brought" standard to find he engaged in protected activity. He testified that he made safety complaints to Bullard, a member of management, on several occasions most notably within the three month period before he was terminated. He also testified that he filled out complaint cards previously which Helmondollar acknowledged he was aware of a year or so earlier although he testified that he believed the issue had been resolved. Helmondollar testified that Brooks made

no safety complaints that he was aware of yet he admitted that Brooks did say to him that he had made such complaints to Bullard. Bullard stated to Brooks that he brought the complaints to the attention of upper management, including to Helmondollar, but nothing was done in response. Helmondollar denied that Bullard did so. Even though Helmondollar admitted that Brooks told him he had complained about working downwind, Helmondollar and West made the determination that Brooks did so voluntarily which caused him to be terminated.

Whether Helmondollar had knowledge of safety complaints made by Brooks requires an assessment of credibility not properly addressed in this forum. The same holds true as to whether Brooks actually made safety complaints to Bullard or whether he elected to bolt in return air in violation of the ventilation plan voluntarily. The fact that Brooks told Helmondollar when interviewed that he had made safety complaints to his supervisor as Helmondollar confirmed is sufficient at this juncture to find that Brooks engaged in protected activity by complaining about illegal bolting. That the miners bolted in return air more than once per shift has been established. His suspension and termination were directly related to this conduct. The nexus in time between the safety complaints Brooks testified to making and his termination is sufficient to establish motivation for the purposes of this hearing.

I find the complaint is not frivolously brought.

The Respondent made a motion to dismiss the complaint as untimely. Brooks was suspended on September 25, 2014 and ultimately discharged on October 1, 2014. He filed his complaint on January 9, 2015, 100 days later. While the statute provides that a complaint be filed with the Secretary within 60 days after the discriminatory action has occurred, Commission case law is clear that the filing period is not jurisdictional. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381 (Dec. 1999). Whether a complaint is untimely requires a factual determination on a case by case basis. A late filing may be excused on the basis of justifiable circumstances including ignorance, mistake, inadvertence, and excusable neglect. When a serious delay causes legal prejudice to the respondent, dismissal may be required. *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918 (Nov. 1996). Brooks testified that he was unaware of his right to file a complaint for being discharged. MSHA Investigator Humphrey testified that when he interviewed Brooks in relation to an anonymous complaint of a violation of the ventilation plan, it was obvious to him that Brooks had no idea of his rights. On the other hand, Kingston failed to present any evidence of prejudice suffered as a result of this insubstantial delay. It is highly unlikely that any could be found.

I deny Respondent's motion to dismiss.

Kingston Mining, Inc., is hereby **ORDERED** to immediately reinstate Dallas Brooks to his duties as a roof bolter as of the date of his suspension and termination at the same rate of pay and number of weekly hours with restoration of all other benefits to which he was then entitled.

Mr. Brooks' reinstatement will end upon a final order on the underlying discrimination complaint case in chief. 30 U.S.C. §815(c)(2).



Priscilla M. Rae  
Administrative Law Judge

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