

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 18, 2021

SECRETARY OF LABOR,	:	APPLICATION FOR
MINE SAFETY AND HEALTH	:	TEMPORARY REINSTATEMENT
ADMINISTRATION (MSHA),	:	
on behalf of ALVARO SALDIVAR,	:	Docket No. WEST 2021-0178-DM
Complainant,	:	
	:	
v.	:	
	:	
GRIMES ROCK, INC.,	:	Mine: Grimes Rock, Inc.
Respondent.	:	Mine ID: 04-05432

DECISION AND ORDER OF REINSTATEMENT

Appearances: Karla Malagon, Jessica Flores, and Bruce Brown, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for the Complainant

Peter Goldenring and Mark Pachowicz, Pachowicz & Goldenring PLC, Ventura, California, for the Respondent

Before: Judge Miller

This case is before me upon an application for temporary reinstatement filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”), and 29 C.F.R. § 2700.45 et seq. On April 12, 2021, the Secretary filed the application on behalf of Alvaro Saldivar seeking his reinstatement as a lube and water truck/equipment operator at the Grimes Rock, Inc. Mine in Fillmore, California, pending the final disposition of Saldivar’s discrimination complaint.

This case was originally assigned to Judge Richard Manning on April 13, 2021. Two days later, the Respondent requested a hearing on the application for temporary reinstatement. The parties agreed that the hearing could be set beyond the ten calendar days provided for by Commission Rule 45, and Judge Manning set the hearing for May 11, 2021.

The case was reassigned to my docket on May 4, 2021. A hearing was held via Zoom for Government videoconference on May 11, 2021. The parties presented witnesses and exhibits and each filed a brief following the hearing. For the reasons set forth below, I grant the application for temporary reinstatement and retain jurisdiction until final disposition of the complaint on the merits.

I. SUMMARY OF THE EVIDENCE

Alvaro Saldivar, a miner under the Mine Act, testified that he worked for Grimes Rock on two separate occasions. He was first employed as a welder from May 2019 through July 2019. Tr. 16. After leaving, Saldivar was hired again as a service technician and an operator on October 5, 2020. Tr. 15-16. His employment was terminated on January 15, 2021.

Saldivar testified that, during his most recent stint of employment, he reported several safety issues to his direct supervisor as well as mine management. Many of the issues involved the water truck that he was tasked with operating. Saldivar was concerned with the condition of the tires on the truck, which he claims were “bad,” “balding,” and missing tread. Tr. 17. He stated that, as a result of the worn tires, he was involved in an accident on December 10, 2020 in which the truck lost traction as it drove uphill, ultimately sliding down the incline and hitting a cinder block. Tr. 19. Saldivar was also concerned about mechanical issues with the truck, including a long-term oil leak, leaking antifreeze, and a missing shock absorber. Tr. 20. According to Saldivar, he reported all of these issues to his direct supervisor Rene Garcia and general manager Ernie Melendez on multiple occasions. Tr. 18, 20. Saldivar testified his supervisors took no action to remedy these issues, and that he was required to continue using the truck in its poor condition. Tr. 18, 21.

Saldivar explained that he made reports regarding a variety of faulty equipment. He testified that he advised management of the bad brakes on an outdated motor grader, missing roll-over protection system (ROPS) labels on the DAL #1 and #2 dozers, and leaking diesel on service truck #40 at the mine. Tr. 22, 24, 26.

Saldivar also testified that he had complained about the lack of proper training received. While he signed documents stating that he received new miner training, Saldivar believed that he did not receive the required specific task training relating to the large equipment that he was required to operate. Tr. 21, 25-26, 28, 44; *see* Ex. R-C. He testified that he had continually asked for task training on the water truck, the motor grader, the dozers, and the service truck. Tr. 21, 25-26, 28. He said that he even made his requests in writing on his daily pre-shift reports. According to Saldivar, his requests for additional training went unaddressed. Tr. 22. On cross examination, Saldivar admitted that he received training from the Quinn Company, but asserted that the training did not relate to operation of the equipment but rather maintenance of certain equipment. Tr. 46-47, 74.

Grimes Rock issued five disciplinary warnings to Saldivar during his second tenure of employment at the mine. *See* Ex. K. For each warning, Saldivar testified that he did not commit the infraction as written on the discipline form, and that he signed the forms only to avoid losing his job. Tr. 49-50, 54-56, 59, 62-63, 64, 75. Saldivar also testified as to his belief that his supervisors were acting in a “malicious” manner towards him and that the discipline was being issued in retaliation for his frequent complaints about jobsite safety hazards. Tr. 28, 59.

On January 15, 2021, Saldivar was terminated by Grimes Rock. Tr. 27. He testified that his termination occurred just one day after he last reported a safety issue on January 14. Tr. 40.

II. DISCUSSION

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any protected right under the Act. The purpose of this protection is to encourage miners “to play an active part in the enforcement of the Act,” in recognition of the fact that “if miners are to be encouraged to be active in matters of safety and health they must be protected against . . . discrimination which they might suffer as a result of their participation.” S. Rep. No. 95–181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

A miner that lodges a complaint of discrimination under section 105(c) is entitled to “immediate reinstatement . . . pending final order on the complaint” as long as the complaint was “not frivolously brought.” 30 U.S.C. § 815(c)(2). The Commission has stated that the scope of a temporary reinstatement proceeding is therefore “narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738 (11th Cir. 1990). This standard reflects a 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, 748 (11th Cir. 1990).

In a temporary reinstatement hearing, a judge is tasked with evaluating the evidence of the Secretary’s case and determining whether the miner’s complaint appears to have merit. *Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Secretary must prove only a nonfrivolous issue of discrimination and need not make a full showing of its prima facie case of discrimination. *Id.* at 1088. Nevertheless, it may be “useful to review the elements of a discrimination claim” when gauging whether a claim is nonfrivolous. *Id.* Those elements include (1) that the complainant was engaged in a protected activity and (2) that the adverse action complained of was motivated in part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).¹ The Secretary may establish the motivational nexus

¹ The Ninth Circuit recently rejected the *Pasula-Robinette* framework in *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021). Specifically, the Court struck down the requirement that the adverse action was motivated “at least partially” by the protected activity in favor of a but-for causation standard. *Id.* at 1209-11. The Commission has not articulated a new standard in the wake of *Thomas*, but the case may require an examination of elements different than those set forth in current Commission case law. However, the standard for temporary reinstatement would not be affected. A miner shall be reinstated if the complaint was not frivolously brought, and the elements of a discrimination claim are merely “useful” guideposts under that standard. *Williamson*, 31 FMSHRC at 1088. Here I look to whether the alleged adverse action occurred “because [a] miner . . . filed or made a complaint . . . including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine . . . or because of the exercise by such miner . . . of any other statutory right afforded by this chapter.” 30 U.S.C. § 815(c)(1). If I were to use the but-for standard articulated in *Thomas*, the outcome does not change here.

between the protected activity and the adverse action with indirect or circumstantial evidence such as (i) the employer's knowledge of the protected activity, (ii) hostility or animus towards the protected activity, (iii) coincidence in time between the protected activity and the adverse action, and (iv) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981).

While it is true that a judge may consider these factors, a temporary reinstatement case remains "conceptually different" than the underlying case of discrimination. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d at 744. The Mine Act envisions an "expedited basis" for a temporary reinstatement proceeding that does not permit full discovery or complete resolution of conflicting testimony. 30 U.S.C. § 815(c)(2); *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1879 (Aug. 2012). In fact, Commission case law indicates that resolving credibility issues or conflicts in testimony is beyond the scope of a temporary reinstatement hearing. *Williamson*, 31 FMSHRC at 1089. Similarly, a judge is not permitted to weigh the operator's evidence against the Secretary's evidence when determining whether to grant temporary reinstatement. *Id.* at 1091.

Here, I find that Saldivar's complaint of discrimination was not frivolously brought. Saldivar testified that he made several safety complaints to both his immediate supervisor and the mine manager from October 2020 until the time he was terminated in January 2021. These complaints concerned the safety of several pieces of equipment that Saldivar was obliged to use on a daily basis, as well as the lack of task-specific training necessary to operate the equipment safely. Lodging these complaints constitutes a protected activity under section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). Saldivar also testified that he was fired by Grimes Rock on January 15, 2021, the day after he made a complaint about the safety of the truck he was told to drive. It is clear that Saldivar engaged in protected activity and that he suffered an adverse action.

There is also a sufficient motivational nexus between the protected activity and the adverse action to support Saldivar's temporary reinstatement. Saldivar testified that he made a final safety complaint on January 14, 2021 and that his employment was terminated the following day. The coincidence in time between the protected activity and the adverse action is evidence of a discriminatory motive. *Sec'y on behalf of Stahl v. A&K Earth Movers, Inc.*, 22 FMSHRC 323, 325 (Mar. 2000). Saldivar also testified that he had continuously made mine management aware of his safety complaints. The employer's knowledge of the protected activity is another factor that may establish a motivational nexus. *Chacon*, 3 FMSHRC at 2510. Additionally, Saldivar claimed that his supervisor treated him badly after he made complaints, and that he was ultimately fired in response to the number of complaints that he made, suggesting hostility towards the protected activity. *See id.* The Respondent, while disputing these points in its brief, did not introduce a witness to disprove Saldivar's claims or offer an alternative reasoning for his termination.² Regardless, it is not necessary to resolve conflicts between the parties' accounts at this stage in the proceedings. *Sec'y on behalf of Albu v. Chicopee Coal Company, Inc.*, 21

² The Respondent did file a list of witnesses to be called at hearing as well as a lengthy list of exhibits, but chose not to call any witnesses in the end. Instead, the Respondent filed a "Post Hearing Grieving" (*sic*) that was combative, inflammatory, and relied solely on Saldivar's testimony on cross-examination and on evidence not in the record.

FMSHRC 717, 719 (July 1999). The Secretary has therefore introduced sufficient evidence to show that Saldivar’s complaint was not frivolously brought. *See* 29 C.F.R. § 2700.45(d) (“[T]he Secretary may limit his presentation to the testimony of the complainant.”).

The Respondent argues that it was denied a full hearing on the issue of temporary reinstatement, relying heavily on the recent Commission decision in *Secretary of Labor on behalf of Cook v. Rockwell Mining, LLC*, 42 FMSHRC ___, slip op., No. WEVA 2021-0203 (Apr. 23, 2021). In *Rockwell*, the Commission determined that a judge must conduct a “full hearing” during the temporary reinstatement case, and that judges should admit any relevant evidence that is offered at hearing. *Id.* In this case, the Court issued an order that specifically approved two witnesses that the Respondent wished to call (one of whom was expected to be called to discuss animus) and repeatedly advised the Respondent at hearing that it was free to call witnesses to testify on relevant issues, such as the mine’s motivation for terminating Saldivar. *See, e.g.*, tr. 53, 81. The Respondent elected not to call any witnesses. Further, no evidence that the Respondent presented at hearing was excluded.³ There is therefore no indication that the Respondent was denied a full hearing.

The Respondent also contends in its brief that the exhibits showing disciplinary write-ups are enough to show that his claim is frivolous. I disagree. For one, the Respondent was asked at hearing whether the write-ups (Exhibit K) were being used to demonstrate that his employment was terminated based on those write-ups. The Respondent said no:

Judge Miller: So you have submitted a number of exhibits that are disciplinary – are write-ups. So is it your position – your client’s position that Mr. Saldivar was terminated based – because he received these write-ups? Is that your position?

Mr. Goldenring: So it wasn’t because he received the write-ups. He was terminated because he placed himself, others, and equipment at risk and damaged equipment and not for any animus or motivation about complaints about anything, Your Honor, and he has . . . no documents to substantiate that.


Tr. 51-52. In any event, Saldivar disputed what was written in those write-ups, and Grimes Rock presented no evidence to demonstrate that Saldivar was terminated for damaging equipment or

³ Respondent did provide a list of exhibits, some of which were rejected prior to hearing because they either contained personal identifying information such as social security numbers, or they included reference to a criminal record of Saldivar which I deemed prejudicial. In its brief, the Respondent contends, for the first time, that evidence of Saldivar’s criminal record should have been admitted under Federal Rule of Evidence 609. This rule allows the use of a felony record to impeach a witness for his character of truthfulness. The Federal Rules do not control evidentiary issues in front of the Commission, but they can be helpful when the policy supporting a rule is relevant. *See Leeco, Inc.*, 38 FMSHRC 1634, 1639 (July 2016). However, a rule about attacking a witness’s truthfulness is inapposite here because credibility is not at issue in a temporary reinstatement case. Since Respondent indicated that Saldivar was hired with full knowledge of his criminal background, there was no need to include such records and the inclusion would have been prejudicial.

that a certain number of disciplinary actions results in an employee's termination at its mine. The write-ups alone do not constitute proof that Saldivar's claim is frivolous.

III. ORDER

The application for temporary reinstatement is hereby **GRANTED**. Respondent is **ORDERED** to, immediately upon receipt of this decision, reinstate Mr. Saldivar to his former position at the mine effective as of the date of this decision. The employment of Mr. Saldivar shall be at the same rate of pay and with all benefits, including any raises, that he received prior to discharge, pending a final Commission order on the complaint of discrimination.

A handwritten signature in black ink that reads "Margaret Miller". The signature is written in a cursive, flowing style.

Margaret A. Miller
Administrative Law Judge

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