FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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July 12, 2017

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of, STACEY WAYNE PUCKETT, Complainant	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2017-426
v.	
PANTHER CREEK MINING, LLC Respondent	Mine: American Eagle Mine Mine ID: 46-05437

SUMMARY DECISION
AND
ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: Kathleen F. Borschow, Esq., Robert S. Wilson, Esq., Office of the Regional Solicitor, U.S. Department of Labor, Arlington, Virginia for Complainant;
Melanie J. Kilpatrick, Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky for Respondent

Before: Judge Feldman

This matter is before me based on an application for temporary reinstatement filed by the Secretary of Labor ("Secretary"), on behalf of Stacey Wayne Puckett, against Panther Creek Mining, LLC, ("Panther Creek") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"). 30 U.S.C. § 815(c)(2). This statutory provision prohibits operators from discharging or otherwise discriminating against miners because they have engaged in safety related protected activity. Section 105(c)(2) of the Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner who has been terminated pending the full resolution of the merits of the underlying discrimination complaint. At the time of Puckett's termination on May 5, 2017, Puckett had been employed as a fireboss at Panther Creek's American Eagle Mine for approximately 18 months. App. for Temporary Reinstatement at 3.

The Secretary's application is supported by a sworn affidavit by Special Investigator Delbert Carroll, the official investigating the merits of Puckett's underlying discrimination complaint. In his application, the Secretary alleges, inter alia, that Puckett was terminated shortly after he spoke to MSHA Investigator Russell Richardson regarding a 110(c) investigation at the American Eagle Mine. *Id.* at 3-4.

The scope of a temporary reinstatement proceeding is very narrow. As discussed below, the issue to be decided is whether or not the miner's discrimination complaint has been frivolously brought. The Secretary's temporary reinstatement application is primarily based on Puckett's interviews with MSHA Special Investigator Richardson that occurred on April 13 and April 18, 2017, shortly prior to Puckett's May 5 termination.

The Secretary also relies on Puckett's reported series of complaints to mine management in February 2017 that he did not have adequate time to complete his fireboss duties. Sec'y Br. at 5 n.2. As discussed herein, since the Secretary is entitled to prevail as a matter of law in this reinstatement proceeding based on Puckett's interaction with Richardson, Puckett's alleged February 2017 complaints need not be addressed in this proceeding.

I. Procedural Background

A conference call was conducted on June 21, 2017, in order to clarify the issues. During the course of the conference call, counsel for Panther Creek represented that Panther Creek was not aware of Puckett's conversations with Richardson. Consequently, Panther Creek contended that Puckett's termination was in no way motivated by Puckett's participation in a 110(c) investigation. Significantly, however, the company did not deny that Puckett's interviews with Richardson occurred shortly prior to Puckett's May 5 termination.

Commission Rule 45(b) provides that the Secretary's assertion that a miner's discrimination complaint has not been frivolously brought shall be accompanied by a supporting affidavit setting forth the Secretary's preliminary investigative findings. 29 C.F.R. § 2700.45(b). As there appeared to be an undisputed coincidence in time between the 110(c) investigation interviews and Puckett's May 5 termination, I advised the parties that I would entertain a motion for summary decision by the Secretary supported by a sworn affidavit from MSHA Investigator Richardson. As time is of the essence, June 23 was established as the filing date for the Secretary's motion for summary decision, and June 28 was set for Panther Creek's opposition if Panther Creek believed that there were outstanding questions of material fact necessitating an evidentiary hearing.

On June 23, 2017, the Secretary filed a motion for summary decision with an accompanying brief ("Sec'y Br.") supported by a sworn affidavit from a relevant MSHA supervisory official. However, the affidavit provided was not that of Investigator Richardson, who was reportedly on vacation until June 27. Sec'y Br. at 2. In Richardson's stead, the affidavit was furnished by Supervisory Special Investigator Kelly Acord. *Id.* The sworn affidavit states that Acord is currently supervising the investigation of Puckett's discrimination complaint and Richardson's investigation of potential section 110(c) violations at Panther Creek's American Eagle Mine. Sec'y Ex. C at 1-2.

In support of the summary decision, the affidavit avers that Acord has personally confirmed with Richardson and Carroll that Puckett spoke to Richardson on two occasions – April 13 and April 18 – approximately two weeks prior to Puckett's May 5 termination. *Id.* As discussed below, not withstanding the fact that Panther Creek does not challenge Puckett's conversations with Richardson, the hearsay information provided in Acord's affidavit is

admissible in this administrative proceeding. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984) (citation omitted) (acknowledging that "[h]earsay evidence is admissible in [Commission] proceedings so long as it is material and relevant."). Acord's affidavit is worthy of consideration, as Acord is supervising the investigations concerning Puckett's discrimination complaint as well as Panther Creek management's possible 110(c) liability.

On June 29, 2017, Panther Creek filed its opposition ("Resp't Br."). Panther Creek argues that an operator's knowledge of protected activity is an essential element of a successful discrimination complaint. Resp't Br. at 6. As such, Panther Creek asserts that "[a]t the time of Mr. Puckett's discharge, the persons who made the decision to discharge Mr. Puckett had no knowledge of any 110(c) investigation, let alone that Mr. Puckett had been interviewed."[1] *Id.* Rather, the company contends, based on an affidavit by Panther Creek Operations Manager Michael Burke, that Puckett was terminated as a consequence of his repeated failures, in the face of multiple warnings, to properly carry out his pre-shift examination duties. *Id.* at 5-6. In this regard, Panther Creek alleges that it was issued a citation on May 1, 2017, as a result of Puckett's failure to note "Date, Times, and Initials" on three separate date boards located within his pre-shift examination area. *Id.*; Resp't Ex. 1. Panther Creek also argues it is entitled to a hearing based on fundamental principles of due process as well as the requirements of the Commission's procedural rules. Resp't Br. at 4.

II. Procedural Framework

Unlike a discrimination proceeding adjudicating the merits of a discrimination complaint, the scope of a temporary reinstatement proceeding is narrow and the evidentiary burden placed on the Secretary is very low. To prevail in a discrimination proceeding, the Secretary must demonstrate by a preponderance of the evidence that the complainant participated in protected activity and that the adverse action complained of, in this case Puckett's termination, was motivated, at least in part, by that protected activity. An operator may rebut the Secretary's prima facie case or affirmatively defend. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (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, 818 n.20 (Apr. 1981).

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[1] In its opposition, Panther Creek notes that Puckett did not rely on his participation in a 110(c) investigation in his original discrimination complaint. Rather, Puckett's complaint of discrimination related solely to his discharge based on his performance as a fireboss. Miners cannot be expected to always effectively articulate the basis for their claims of discrimination. Moreover, MSHA investigations may reveal that miners have been confronted with pretextual explanations by mine operators that seek to mask a discriminatory motive. Consequently, the Commission has held that "the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on *the Secretary's investigation* of the initiating complaint . . . and not merely on the initiating complaint itself." *Hopkins County Coal*, 38 FMSHRC 1317, 1326 n.15 (June 2016) (citation omitted).

In determining whether there was a discriminatory motive in a discrimination proceeding, the Commission has noted that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *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). Accordingly, the Commission considers whether there is circumstantial indicia of motive, such as: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Id.* In determining whether there is circumstantial evidence of motivation at a discrimination hearing, the judge will be required to make credibility determinations and resolve conflicts in testimony.

In contrast, a temporary reinstatement proceeding only requires that the underlying discrimination complaint is not frivolously brought. 30 U.S.C. § 815(c)(2). In this regard, in addressing the burden of proof required in a temporary reinstatement proceeding, the Eleventh Circuit Court of Appeal has 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. In a similar context involving the propriety of agency action seeking temporary relief, the former Fifth Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous.*'

Jim Walter Resources v. FMSHRC, 920 F.2d 738, 747 (11th Cir. 1990) (emphasis in original) (footnote omitted) (citations omitted).

As a temporary reinstatement proceeding only requires that the underlying discrimination complaint is not frivolously brought, resolving credibility issues or conflicts in testimony goes beyond the scope of this temporary reinstatement matter. *Sec'y of Labor on behalf of Williamson v. CAM Mining,* 31 FMSHRC 1085, 1091 (Oct. 2009); *Secretary on behalf of Earl Charles Albu v. Chicopee Coal Company, Inc.*, 21 FMSHRC 717, 719 (July 1999). In this regard, the Commission has recently articulated that "in practice, in order to prevail on this very low burden of proof, the Secretary need only establish [in support of his temporary reinstatement application] protected activity and one of the circumstantial indicatives of motive." *Hopkins County Coal, LLC*, 38 FMSHRC 1317, 1326 (June 2016) (citing *Comunidad Agricola Bianchi, Inc.*, 32 FMSHRC 206, 211 n.9 (Feb. 2010) (ALJ Barbour)).

III. Analysis

A fundamental issue is whether Panther Creek is entitled to a hearing on the Secretary's application for temporary reinstatement, or, whether the question of Puckett's reinstatement can be decided summarily. It is undisputed that Puckett's conversations with Richardson are protected activity. Panther Creek neither concedes nor disputes Puckett's participation in the 110(c) investigation. However, Panther Creek asserts that it was not aware of Puckett's interaction with 110(c) investigator Richardson. Resp't Br. at 6. Nevertheless, the Commission has articulated "that the Secretary need not prove that the operator has knowledge of the

complainant's protected activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *Williamson*, 31 FMSHRC at 1090 (citing *Albu*, 21 FMSHRC at 718). The coincidence in time between Puckett's 110(c) interviews and his termination, consisting of approximately two weeks, satisfies the "not frivolously brought" standard. *See Hopkins*, 38 FMSHRC at 1326.

Addressing the specifics of Panther Creek's opposition, it must be noted that resolution of this application for temporary reinstatement is limited to Puckett's unchallenged protected activity with respect to his participation in the 110(c) investigation. Panther Creek's assertion that Puckett's termination was motivated by Puckett's pattern of malfeasance that culminated in the citation issued on May 1 for an inadequate pre-shift examination cannot defeat Puckett's temporary reinstatement. *See Sec'y on behalf of Deck v. FTS International Propants, LLC*, 34 FMSHRC 2388, 2391 (Sept. 2012) (citing *Williamson,* 31 FMSHRC at 1090) (holding that "an intervening event that could have constituted a non-discriminatory reason for termination" is not sufficient to defeat a temporary reinstatement application when there is a coincidence in time of two weeks between the protected activity and adverse action); *see also Williamson*, 31 FMSHRC at 1091 (holding that an operator's rebuttal or affirmative defense goes beyond the scope of a temporary reinstatement proceeding). Consequently, Panther Creek's reliance on Title VII case law, rather than Commission case law, for the proposition that "[m]ere coincidence in time is not sufficient to create reasonable cause to believe that the discharge was based on protected activity," is misplaced. Resp't Br. at 7 (citing *Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1045 (8th Cir. 2000)).

The Eleventh Circuit has addressed the resultant equities in the event that Puckett's underlying discrimination complaint is ultimately withdrawn by the Secretary or denied. The Court stated:

> Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor.

Jim Walter Resources, 920 F.2d at 748 n.11 (emphasis in original).

Despite the fact that the coincidence in time between Puckett's protected activity and his termination remains unchallenged, Panther Creek, relying on Commission Rule 45(c) and the Commission's decision in *Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 999-1000 (May 2012), asserts that due process requires an evidentiary hearing. Resp't Br. at 4. Rule 45(c) is procedural rather than substantive in that it sets forth the guidelines for requesting and scheduling a temporary reinstatement hearing. Rule 45(d) sets forth the evidentiary parameters to be addressed in a temporary reinstatement hearing:

> 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) (emphasis added).

Obviously, Rule 45(d) contemplates affording a mine operator due process in a temporary reinstatement proceeding by providing an opportunity to be heard. Here, Panther Creek has been heard by virtue of its opposition to the Secretary's motion for summary decision. Significantly, consistent with the guidelines in Rule 45(d), Panther Creek's opposition contains sworn affidavits and documentary evidence in support of its assertions that it terminated Puckett for reasons unrelated to protected activity and had no knowledge of Puckett's participation in a 110(c) investigation. The rub is that the affidavits and documentation relied upon by Panther Creek pertain to its rebuttal and/or affirmative defense to Puckett's underlying discrimination complaint, as well as credibility issues as to knowledge, that must await resolution in a subsequent hearing on the merits. *See Williamson*, 31 FMSHRC at 1090-91 (holding that resolutions of credibility and rebuttal or affirmative defenses go beyond the scope of a temporary reinstatement proceeding).

With respect to Panther Creek's purported right to cross-examine the Secretary's witnesses, given Puckett's unchallenged protected activity, the company's opposition plainly reflects that it has no material cross-examination to conduct. If a hearing were held in this matter, it would be limited to the substance of the affidavit relied on in the Secretary's motion for summary decision detailing Puckett's participation in the 110(c) investigation. Panther Creek's assertion "that the persons who made the decision to discharge Mr. Puckett had no knowledge of any 110(c) investigation" does not challenge or rebut the substance of the Secretary's affidavit. Resp't Br. at 6. Significantly, as a matter of law, resolution of the question of Panther Creek's knowledge, or lack thereof, must await disposition in a hearing on the merits. In this temporary reinstatement proceeding, the coincidence in time between Puckett's protected activity and his discharge provides sufficient probative evidence to support the Secretary's application. Thus, there is no material cross-examination that could be conducted. Specifically, as already noted, Panther Creek does not dispute that Puckett's interactions with the investigator constitute protected activities and that there was a coincidence in time between these protected activities and the adverse action complained of. Moreover, summary decision provides the parties with a written judgment from an independent decision maker that can be appealed by an aggrieved party. That a summary decision can satisfy due process is codified by Rules 54 and 56 of the Rules of Civil Procedure.

That a hearing is not required based on the circumstances of this case is clearly evident based on application of Rule 56 of the Federal Rules of Civil Procedure. Rule 56(a) states that, "*The court shall grant summary judgment* if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). (emphasis added) The goal of adjudication is addressed in Rule 54(a) of the Federal Rules of Civil Procedure which mandates that a judgment must be a decree "from which an appeal lies." Fed. R. Civ. P. 54(a). The coincidence in time between Puckett's protected activities and his termination entitles the Secretary to a favorable judgment as a matter of law. Summary judgment provides Panther Creek, the aggrieved mine operator, with an appealable decision. Federal Civil Procedure Rules 54 and 56 are consonant with Commission Rule 67 concerning summary decision. 29 C.F.R. § 2700.67. Surely Commission Rule 45(d), when read in the context of the Rules of Civil Procedure and Commission Rule 67, mandates a hearing in a temporary reinstatement case only if it is necessary.

Finally, Panther Creek apparently relies on the Commission's reference to Commission Rule 45 in its *Shemwell* decision for the proposition that it is entitled to a hearing regardless of whether the Secretary has shown that Puckett is entitled to reinstatement as a matter of law. In *Shemwell*, the Commission stated:

> Rule 45 sets forth procedural protections that meet the "fundamental requirement of due process" because they give the operator the "opportunity to be heard '*at a meaningful time and in a meaningful manner.*'" *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990) (citations omitted). Among other things, the operator will have the opportunity to cross-examine any witnesses supporting the Application for Temporary Reinstatement. As part of those protections, a party is entitled to a hearing on an application for temporary reinstatement within 10 days of requesting one. 29 C.F.R. § 2700.45(c).

Shemwell, 34 FMSHRC at 999 (emphasis added). As previously discussed, the procedural protections identified in *Shemwell* have been satisfied by virtue of Panther Creek's supporting submissions consisting of documentary evidence and sworn affidavits in its opposition to the Secretary's motion for summary decision. The fact that Puckett is entitled to temporary reinstatement as a matter of law based on undisputed facts prevents Panther Creek from being able to present evidence in an evidentiary hearing "in a meaningful manner." Absent further direction from the Commission that outstanding material issues remain unresolved, I cannot construe *Shemwell* to stand for the proposition that a hearing is required in a temporary reinstatement proceeding even if it is unnecessary.[2]

[2] It is noteworthy that the rationale for the Commission's vacating of the summary decision in *Shemwell* included the necessity for a hearing to address "whether there was a layoff that would toll an operator's temporary reinstatement obligation," an issue that is not present in this case. *Shemwell*, 34 FMSHRC at 1000.

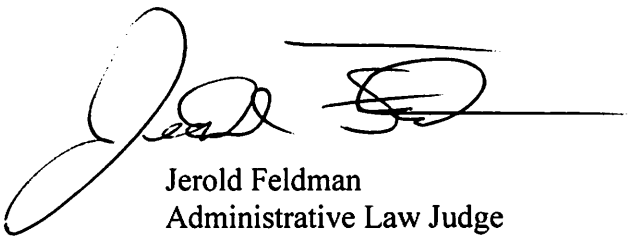
In resolving this matter summarily, I note that Commission Rule 67(b) provides that "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). When considering a motion for summary decision, the court looks at the record "'in the light most favorable to . . . the party opposing the motion,' and . . . 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) and *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Viewing the evidence in the light most favorable to Panther Creek, its assertion that it will ultimately prevail at a full hearing on the merits because Puckett's termination was not motivated by protected activity presents a question of credibility which goes beyond the scope of this proceeding. *Williamson*, 31 FMSHRC at 1090. Simply put, there is no issue of unresolved material fact. By way of summary, Panther Creek does not contest that Puckett engaged in protected activity or that he suffered adverse action. Nor does it challenge the coincidence in time between these events that constitutes adequate circumstantial evidence that supports a non-frivolous claim with respect to knowledge and motivation. Consequently, Puckett is entitled to reinstatement as a matter of law.

Although the Secretary has demonstrated that his application for Puckett's temporary reinstatement is not frivolous, nothing herein shall be construed as a reflection on the merits of Puckett's underlying discrimination complaint.

ORDER

In view of the above, **IT IS ORDERED** that Panther Creek immediately reinstate Stacey Wayne Puckett to his former position as a fireboss, or to an equivalent position, at the same rate of pay and benefits he received immediately prior to his discharge, and with the same or equivalent assigned duties.



Jerold Feldman
Administrative Law Judge

Distribution: (Electronic and Certified Mail)

Stacy Wayne Puckett, 1016 Hopkins Road, Danville, WV 25053

Kathleen F. Borschow, Esq., Robert S. Wilson, Esq., Office of the Regional Solicitor, U.S. Department of Labor, 201 12th Street South, Arlington, VA 22202-5450

Melanie J. Kilpatrick, Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513