

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JUL 21 2017

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
and PHILLIP LOVELL,
Complainants,

v.

PENNYRILE ENERGY, LLC,

And

GMS MINE REPAIR,
Respondents

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. KENT 2017-0287

MSHA Case No. MADI-CD-2017-03
Mine: Riveredge Mine
Mine ID: 15-19424

MSHA Case No. MADI-CD-2017-04
Mine: Riveredge Mine
Mine ID: 15-19424 MVK

DECISION AND ORDER
REINSTATING PHILLIP LOVELL

Appearances: Christopher M. Smith, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, Representing the Secretary of Labor

Tony Opegard, Esq., Lexington, KY, Representing Complainant Phillip Lovell

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West
Virginia, Representing Pennyrile Energy, LLC

Andrew Ellis, Esq., GMS Corporate Compliance and HR Manager, Representing
GMS Mine Repair.

Before: Judge Andrews

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on June 27, 2017, filed an Application for Temporary Reinstatement of miner Phillip Lovell (“Lovell” or “Complainant”) to his former position with Respondents Pennyrile Energy LLC, (“Pennyrile”) and GMS Mine Repair (“GMS”) at the Riveredge Mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary's application for temporary reinstatement. 29 C.F.R. §2700.45(c). A timely request for hearing was filed on July 7, 2017, and a hearing was held on July 14, 2017, in Madisonville, Kentucky. The parties had the opportunity to present witnesses, documentary evidence, and arguments in support of their positions.

Discussion of Relevant Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine 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., 1 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).

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id.* at 624-25.

Temporary Reinstatement is a preliminary proceeding and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.¹ *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources*, 920 F.2d 738, 744 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (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 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and federal circuit courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *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, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

¹ "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that there was an adverse action, which was motivated in any 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 sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In the instant matter, the Secretary and Lovell need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary 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).

Evidence

Two Discrimination Complaints were filed with the Secretary's Application for Temporary Reinstatement. (see, Application for Temporary Reinstatement, Exhibits B and C). In each Summary of Discriminatory Action, Complainant stated, in pertinent part:

On Tuesday, May 9, 2017 I was assigned by GMS to work at Riveredge Mine pinning. I reported to my supervisor that the weld was broken on the ATRS I was working on. My supervisor told me that to continue pinning the cut was the only choice that I had. I was ultimately let go and was told that I did not have a position with Riveredge or GMS. I am requesting temporary reinstatement and any back pay, wages or bonus that I have missed because of the companies actions.

The Declaration of Special Investigator Charles Jones was also filed with the Application for Temporary Reinstatement (see, Exhibit A), and in pertinent part is as follows:

1. I am a special investigator employed by the Mine Safety and Health Administration, United States Department of Labor (MSHA). I am assigned to the District 10 Office in Madisonville, Kentucky.
2. As part of my responsibilities, I investigate claims of discrimination filed under section 105(c) of the Mine Act. In this capacity, I have reviewed and gathered information as part of an ongoing investigation arising from a complaint filed by Phillip Lovell. My investigation has revealed the following facts to date:

- a. At all relevant times, Respondents Pennyrile Energy LLC (Pennyrile) and GMS Mine Repair (GMS) engaged in the operation of a coal mine and are, therefore, “operators” within the meaning of Section 3(d) of the Act.
 - b. The Riveredge Mine located in McLean County, Kentucky, has products that enter commerce and is, therefore, a “mine” within the meaning of Sections 3(b), 3(h), and 4 of the Act.
 - c. Phillip Lovell was employed through contractor GMS as a roof bolter at Pennyrile’s Riveredge Mine from March of 2017 until on or about May 10, 2017. Lovell is a “miner” within the meaning of Section 3(g) of the Act. Lovell worked under the supervision of Pennyrile and GMS.
 - d. On or about May 8, 2017, Lovell reported a safety concern regarding a power cable to another miner while an MSHA inspector was present. A foreman verbally reprimanded Lovell and instructed Lovell to not point out safety hazards to MSHA.
 - e. On or about May 9, 2017, Lovell reported a safety concern regarding a roof bolter ATRS (Automated Temporary Roof Support) system to a foreman. Lovell stated his refusal to work with that roof bolter until it was repaired. The foreman made no effort to address Lovell’s safety concerns regarding the roof bolter. The foreman directed Lovell to use the roof bolter immediately, and watched to make sure Lovell did so.
 - f. On or about May 10, 2017, Lovell called the MSHA hotline to report the roof bolter safety hazard. After MSHA responded by sending out an investigator, an hourly miner instructed Lovell to lie to the MSHA inspector by saying that Pennyrile immediately removed the roof bolter from service after Lovell reported the ATRS safety hazard. The miner also told Lovell that “We know you called” and added, “We have something waiting for you...you’re in for a bad day.” Lovell interpreted these statements as a threat from miners on the unit, including the foreman, made in response to Lovell’s safety report to the MSHA hotline.
 - g. On or about May 10, 2017, Lovell discussed his concerns regarding his safety complaints and the threat made against him with Pennyrile management. Pennyrile management offered to move Lovell to another shift or another area of the mine. Lovell was interested in the possibility of GMS transferring him to work at another mine. Pennyrile management called GMS management to discuss Lovell. Directly after that conversation, Pennyrile management and GMS management informed Lovell that he was terminated from working at Pennyrile’s Riveredge Mine and terminated from working for GMS. GMS management told Lovell that Lovell should have thought of the consequences before Lovell called MSHA.
 - h. On or about May 12, 2017, Lovell filed a discrimination complaint against Pennyrile and GMS for their unlawful acts. Lovell has asserted that the actions of Pennyrile and GMS constitute discrimination under the Mine Act.
3. Based upon my investigation of these matters, I have concluded that Lovell’s complaint of discrimination was not frivolously brought.

At the hearing, a Statement of Interview taken by Special Investigator Charles Lee Jones on May 16, 2017, was admitted as Exhibit CX-1 and referred to during testimony of Complainant Lovell.

Summary of Testimony

Phillip Michael Lovell began working for GMS Mine Repair as a roof bolter at Pennyrile's Riveredge Mine in March 2017.² Tr. 18-19. GMS is a contract company that Pennyrile uses to supply employees.³ Tr. 99. The employees work for GMS, and receive their benefits from GMS. Tr. 99-100.

In this position, he operated a Roof Ranger 3 Low Profile Fletcher pinner which has a double boom with two operators.⁴ Tr. 35. On the dates in question, his foreman and direct supervisor at the mine was Matt Allen. Tr. 18-19. He was also supervised by Leslie Ashby, who worked for Human Resources at the contractor, GMS Mine Repair. Tr. 19. Lovell testified that he rarely spoke with Ashby, unless there was an emergency, or he had to miss work. Tr. 70-71.

On May 8, 2017, there were MSHA inspectors at the mine on Lovell's unit. Tr. 19-20. There was a problem with the roof bolter in that it lost power, and a mechanic came out to reset the power on the roof bolter. Tr. 20. Lovell then reported to the mechanic that there was a cut in the trailer cable of the roof bolter.⁵ Tr. 20-21, 36. The cable was energized and there were

² Lovell had worked as a roof bolter, or pinner, since 2011. Tr. 39.

³ Pennyrile underground superintendent, Kris Maddox, described the relationship in the following manner:

Q. Okay. Explain, if you would, how – the relationship between Pennyrile and GMS.

A. They are a contract company that we use to supply employees to us.

Q. Okay. But how -- how does it work?

A. Like if I'm needing a roof bolter, I'll call and say, I need a roof bolter. They'll send me a list of names. I may know some of the people. I may not. And a lot of times I'll bring them out to the mines and do a brief interview and talk to them. And sometimes, I mean, I need somebody pretty quick and I'll just have to pick me the best candidate for that position.

Q. And let's say you pick a candidate for that position. They come to work at your mine as a roof bolting machine operator. Are they employees of Pennyrile at that point or GMS?

A. They're GMS employees.

Q. What about benefits, who pays that?

A. We don't. GMS does.

Tr. 99.

⁴ The other operator was referred to as a "pin partner." Tr. 35-36.

⁵ The cut may have been a pulled splice. Tr. 45.

approximately 480 volts running through it. Tr. 21. With that many volts going through the cable, Lovell described the cut in the cable as presenting “a life-and-death situation” because it presented an electrocution hazard. Tr. 36-37. The MSHA inspector was standing behind Lovell when he reported the safety hazard, and his supervisor, Matt Allen, was standing on the other side of the bolter. Tr. 21.

Allen was shocked and acted surprised when Lovell pointed out the safety hazard while the MSHA inspector was present. Tr. 21-22. Allen pulled Lovell aside after the MSHA inspector left and told Lovell not to point out any cuts in the cable while MSHA was at the mine. Tr. 22. Lovell responded that he “was simply telling the guy not to grab on the cable that was still an energized cable.” Tr. 22.

The following day, on May 9, 2017, Lovell was working as a roof bolter at the Riveredge Mine, and Allen was once again his foreman. Tr. 23. Lovell reported that there was a broken ATRS weld, which placed his life in danger.⁶ Tr. 23. Lovell spoke to Allen about the issue, and Allen told him to set the ATRS. Tr. 23-24. Lovell set the ATRS and the pressure gauge went to 1,500 PSI. Tr. 24. It then dropped down to 1,000 PSI in a matter of seconds, which led Lovell to conclude that it was unsafe. Tr. 24. When the PSI drops, it indicates a warning that pressure is being lost. Tr. 39. This can lead to a piece of falling plate or a slip of heavy rock onto the miners beneath it. Tr. 39-40. Lovell told Allen that he was not going to pin it, and Allen responded that it was not a safety hazard and that Lovell did not have much of a choice. Tr. 24, 41. Allen stood over Lovell for approximately 45 minutes until he pinned the area.⁷ Tr. 24-25.

After Lovell bolted the entire area and he was in the last open crosscut, a mechanic arrived to perform the weld on the ATRS. Tr. 25. Lovell talked to the mechanic about there not being rock dust or a fire extinguisher present. Tr. 25. Lovell told the mechanic that they needed to take safety precautions seriously. Tr. 25. Allen and the mechanic chuckled, and the mechanic responded that they didn’t have time for that. Tr. 25.

The following day, on May 10, 2017, Lovell called the MSHA hotline to report a broken ATRS. Tr. 26. When Lovell arrived at Riveredge, people were panicking about MSHA’s arrival that day. Tr. 26. Allen was once again Lovell’s foreman that day, and he assigned him to shovel the belt on each side of the tail piece. Tr. 27. Lovell felt as if he was being punished by being assigned this task instead of roof bolting. Tr. 27.

After Lovell was finished shoveling, Allen ordered him to go to the left side to pin. Tr. 27-28. At one point, a guy on the unit told Lovell to come to the middle of the run and talk to the MSHA inspector and Allen. Tr. 28. On the way to speak to the inspector, Lovell’s pin partner,

⁶ ATRS stands for Automated Temporary Roof Support, and it supports the roof while miners are physically underneath it pinning. Tr. 23, 37. It consists of a long arm with two steel pads. One protrudes in the shape of a T and pressurizes the top in order to temporarily support the roof while the miners pin underneath. Tr. 38.

⁷ The terms “pinning” and “bolting” were used interchangeably to mean the act of roof bolting the top. Tr. 37.

Lucan Dugger, stopped Lovell and told him to lie to the inspector and tell him that when they found the broken ATRS they backed it out, fixed it, and put it back in the run the correct way. Tr. 28, 35-36. Dugger told Lovell that if he “didn’t do what he asked...they’ll have something waiting for [him].”⁸ Tr. 28-29. Lovell felt like his life was in danger, and did as he was ordered and told the inspector a false story. Tr. 29-30.

After Dugger walked away, Lovell pulled the two inspectors that were still standing near him and told them the truth. Tr. 29. He told them that he had called MSHA, about the roof bolter hazard from the day before, and about how he had been threatened and told to lie to them. Tr. 29-30. The MSHA inspectors did not feel comfortable leaving Lovell in the mine that day. Tr. 30.

Keith Whitehouse, who was the safety director, came underground and Lovell spoke with him. Tr. 30. Whitehouse agreed with MSHA about taking Lovell out of the mine. Tr. 31. Whitehouse felt that he should have a talk about harassment with the entire unit at the surface, with underground superintendent, Kris Maddox, present.⁹ Tr. 31.

Maddox did not go underground with the miners on May 10. Tr. 84. He arrived at the bolter when the inspectors were getting ready to leave and talked to them briefly. Tr. 84-85. He also talked “for just a second” to Lovell, and Lovell made allegations that an hourly employee had threatened him. Tr. 85. Lovell refused to identify the individual. Tr. 85.

Lovell had a conversation on the surface with Whitehouse and Maddox. Tr. 31. The MSHA inspectors, Wyatt Oates, as well as a miner’s representative named John Parker,¹⁰ were present for the beginning of the conversation.¹¹ Tr. 31, 57, 92. They asked Lovell what happened, and he explained the previous safety hazards and threat. Tr. 32. Whitehouse and Maddox tried to resolve the situation by saying that they could get him a different position if he kept his mouth shut. Tr. 32. Maddox offered to move Lovell to another crew and another roof bolter. Tr. 58. He said that Lovell could have any position that he wanted, and Lovell replied that

⁸ At the time, Lovell refused to reveal the identity of the miner who threatened him. Tr. 54-56.

⁹ Kristopher Steven Maddox was the underground superintendent at Pennyrile Energy. Tr. 81. He testified at hearing on behalf of Respondent, Pennyrile Energy. Maddox had over 19 years of mining experience. Tr. 81. He had worked as an hourly employee for several years, and in management for eight years. Tr. 81. He has run a roof bolter, a miner, a shuttle car, a ram car, and a scoop. Tr. 82. He has a Kentucky state mine foreman certification, as well as Kentucky state MAT certification. Tr. 82-83.

¹⁰ John Parker testified at hearing for Respondent, Pennyrile. He was an examiner and miner’s representative, which he described as representing the miners and the company. Tr. 103. He has a foreman’s card, but is an hourly employee. Tr. 104. Parker did not have authority to ask or offer Lovell another position at the mine. Tr. 104-105.

¹¹ This meeting is at times referred to as two meetings in the course of the transcript because it moved from one location to another and there were fewer people present after the move.

he wanted to explore his options.¹² Tr. 59, 89. Lovell wanted to contact GMS to find out what types of positions were available, but was told that Maddox and Whitehouse would contact GMS, and that he should not contact them. Tr. 32. They asked Lovell to step out of the office, and they called GMS. Tr. 33. Maddox then proceeded to call GMS and said that Lovell requested a transfer.¹³ Tr. 95. He told them that Lovell “didn’t want to be at our mines anymore, so therefore we don’t want him there anymore either.” Tr. 95. Maddox testified that he knew about Lovell calling MSHA, and that it was common knowledge at the mine. Tr. 101. However, he maintained that he did not make any comments to her about Lovell calling MSHA. Tr. 101. GMS told Maddox to tell Lovell “to get his things and to call when he left the mines.” Tr. 95.

A few minutes later, Lovell was told to contact Ashby at GMS. Tr. 33. Lovell called Ashby at GMS and asked her if she knew what was going on. Tr. 34. She replied that she had just talked with Maddox and Whitehouse by phone and knew the situation. Tr. 34. She then said that they don’t want Lovell at Riveredge any longer, and that he needs to clear his stuff out. Tr. 34. Lovell said that he should not be fired for his actions, and she replied that Lovell “should have thought of the consequences before [he] called MSHA.” Tr. 34. Lovell did not receive any further calls or offers of employment, and was told not to step foot on the property of either company. Tr. 34. Lovell understood the meaning of this conversation as him being fired. Tr. 34. Lovell came back to the office briefly and told Maddox that he had been fired. Tr. 96.

Contentions

The Complainant, through the Secretary and private counsel, argue that Lovell has met his burden of establishing that his complaints are non-frivolous, and as a result he should be temporarily reinstated. The Complainant highlights his protected activities of making safety complaints on May 8, 9, and 10, as well as his call to MSHA to report safety issues. It argues that his termination on May 10 constitutes an adverse action under the Act for which both GMS and Pennyrile are liable. Further, it argues that there was knowledge, animus, and a coincidence in time between the protected activity and the adverse action.

Respondent Pennyrile argues that management at Pennyrile offered Lovell transfers to other shifts and other positions at the mine, and that in refusing, Lovell quit his job at the mine. Pennyrile further argues that it was GMS who actually laid off Lovell. It argues that because Lovell quit his position at Pennyrile, it should not be liable for reinstatement.

Respondent GMS argues Lovell was not terminated, but was laid off.

Analysis

The scope of this proceeding is narrow. Credibility determinations are not made; conflicts in testimony are not resolved. It is well recognized by the Courts that the Secretary’s

¹² Lovell repeatedly testified that he did not accept any of the positions offered at the meeting because he first wanted to explore his options. Tr. 58-63. Maddox testified that Lovell refused each offer, but Lovell maintained that he never refused any of the offers. Tr. 32, 89.

¹³ Maddox testified that he does not have the right to fire GMS employees, but can have them removed from the mine. Tr. 100.

burden is “relatively insubstantial”. For example, beyond the scope of the hearing is testimony and/or documentary evidence that the adverse action was justified by unprotected activity alone or was also motivated by unprotected activity or other non-discriminatory grounds. For the reasons set forth below, I find that the record presents a reasonable cause to believe the instant Discrimination Complaints were not frivolously brought.

Lovell Engaged in Protected Activity

The record contains evidence of several actions over a short time period that constituted protected activities. First, on May 8, 2017, in the presence of MSHA inspectors and his supervisor, Lovell reported to a mechanic that there was a cut or pulled splice in the trailer cable of the roof bolter. Tr. 19-21, 36. This was a high-voltage cable that was energized, and Lovell viewed it as a safety hazard because it could lead to someone getting electrocuted. Tr. 21, 36-37.

On the following day, on May 9, 2017, Lovell reported to his supervisor, Allen, that there was a broken ATRS weld, which he believed placed his life in danger. Tr. 23. Allen ordered Lovell to set the ATRS, and when he tried to do so, the pressure dropped 500 PSI in a matter of seconds. Tr. 23-24. This indicated to Lovell that the pressure supporting the roof was being lost, and that as a result a piece of plate or heavy rock could fall on top of him. Tr. 24, 29-40. Lovell attempted to refuse to perform the work, but his supervisor told him that he did not have a choice, and stood over him for 45 minutes until he completed the task. Tr. 24-25, 41.

There was some testimony by others that they did not believe the broken weld presented a safety hazard. Tr. 41. However, whether the broken weld constituted a significant safety hazard is beyond the scope of this hearing. The Act does not require that a miner prove that a significant safety hazard existed, but only that he had a reasonable belief of a hazard underlying his complaint.

Following Lovell’s completion of his pinning tasks, a mechanic arrived to perform the weld on the ATRS. Tr. 25. Lovell reported to the mechanic and his supervisor that there was no fire extinguisher present, and the area was not properly rock dusted. Tr. 25. They laughed, and the mechanic responded that they didn’t have time for that. Tr. 25.

The next day, on May 10, Lovell called the MSHA hotline to report a broken ATRS. Tr. 26. After reporting such, another miner told Lovell to lie to MSHA and threatened him. Tr. 28-29. Lovell reported this threat to the MSHA inspectors, as well as Safety Director Whitehouse and Superintendent Maddox. Tr. 29, 32, 84-85. Each of these safety complaints, calls to MSHA, and reports of threats constituted protected activity under the Act. 30 U.S.C. §815(c)(1).

Lovell Suffered an Adverse Employment Action

On May 10, following Lovell’s report of a threat in retaliation to his MSHA call, Lovell had a meeting with, among others, Maddox and Whitehouse. Tr. 31, 57, 92. At this meeting, Lovell was offered other positions at Pennyryle Mine. Tr. 32, 58. Lovell testified that he neither accepted nor rejected any of these offers made in the meeting, because he wanted to first talk

with GMS and better understand his options.¹⁴ Tr. 32, 59, 89. Following this meeting, Maddox called GMS and told Ashby that Lovell “didn’t want to be at our mines anymore, so therefore we don’t want him there anymore either.” Tr. 95. When Lovell called Ashby a few minutes later, she told him that he was not wanted at Riveredge any longer, and he needs to clear his stuff from the mine. Tr. 34. Lovell responded that he should not be fired for his actions, and she responded that Lovell “should have thought of the consequences before [he] called MSHA.” Tr. 34.

Pennyrile’s argument that Lovell quit and therefore not entitled to reinstatement under *Dolan v. F&E Erection Co.*, 22 FMSHRC 171 (Feb. 2000), is misplaced. Though Respondent is correct that a miner who voluntarily quits his job is not entitled to temporary reinstatement, that is not what occurred here.¹⁵ In the instant case, Lovell was asked in a meeting whether he wanted to be transferred to other positions. Lovell did not respond by quitting, but rather simply did not accept the offers on the spot. It was reasonable for Lovell to want to discuss the matter with his employer, GMS, and to consider the matter further. There are no indications that when he left the meeting to call GMS, he believed that he had lost his employment. Tr. 96. Therefore, I find that Maddox’s calling GMS and stating that they did not want Lovell at the mine any longer constituted a “discharge...or cause to be discharged,” under the Act. 30 U.S.C. 815(c)(1).

GMS similarly discharged Lovell when Ashby told him to clear his stuff from the mine and did not give him any further offers of employment. Tr. 34. GMS’s counsel has conceded that Lovell was laid off, but insists that he was not terminated. Tr. 12. GMS is not alleging that there was a reduction in force or some other economic layoff that might be grounds for a tolling argument. Therefore their assertions that Lovell was laid off and not terminated is a distinction without a difference. A layoff is a “discharge” under the Act.

A Nexus Existed Between the Protected Activity and the Adverse Employment Action

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a non-frivolous claim that he engaged in protected activity with a connection, or nexus, to an adverse employment action. Having concluded that Lovell engaged in protected activities and suffered an adverse employment action, the examination now turns to whether those activities have a connection, or nexus, to the subsequent adverse action. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate

¹⁴ Maddox testified that Lovell refused the offers, however conflicts in testimony are not to be resolved in this limited proceeding. *Sec’y of Labor obo Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

¹⁵ It should be noted, however, that if a miner is essentially forced to resign, or constructively discharged, then that form of quitting is treated as an adverse employment action. *Dolan*, 22 FMSHRC at 175.

treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According to the Commission, “the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge.” *CAM Mining, LLC*, 31 FMSHRC at 1090, *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In the instant matter, there is sufficient evidence of knowledge by both Pennyryle and GMS management of the various protected activities to meet the evidentiary threshold.

Lovell reported the cut in the trailer cable on May 8 in the presence of MSHA inspectors and his supervisor, Matt Allen. Tr. 20-21. Lovell testified that Allen was shocked and surprised by the complaint, and pulled Lovell aside and told him not to point out cuts in the cable while MSHA was present. Tr. 21-22.

Allen similarly had knowledge of Lovell’s complaint concerning the ATRS weld on May 9 because the complaint was made to Allen. Tr. 23-24. Following the problem with the drop in pressure on the ATRS, Allen ordered Lovell to continue pinning in a manner that Lovell feared was unsafe. Tr. 24-25.

Allen was also aware of Lovell’s complaint concerning the lack of a fire extinguisher and rock dust because Lovell made the complaint in his presence. Tr. 25. Lovell testified that Allen and the mechanic laughed at the idea that they needed to take these safety precautions seriously. Tr. 25.

Further, there was knowledge by Pennyryle’s Maddox and Whitehead, as well as GMS’s Ashby, concerning Lovell’s call to MSHA and the threats made to him. The meeting with Maddox, Whitehead, and others occurred in part as a response to the threat Lovell received. Further, Maddox testified that he knew about Lovell calling MSHA because it was common knowledge at the mine. Tr. 101. Though Ashby had minimal contact with Lovell generally, she too was aware of his calling MSHA. Tr. 70-71. In the conversation where Ashby fired Lovell, she told him that he “should have thought of the consequences before [he] called MSHA.” Tr. 34.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and the adverse employment action. *See e.g. CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks) and *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated “We ‘appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.’” *All*

American Asphalt, 21 FMSHRC 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

In the instant matter, extremely close proximity in time between the protected activities and the adverse actions greatly favors a finding that a nexus existed between the protected activities and the adverse actions. The protected activities at issue here all occurred on May 8, 9, and 10, 2017. Lovell was discharged from Pennyrile and GMS on May 10, 2017, immediately after his final protected activity.

Hostility or animus towards the protected activity

The Commission has held, “[h]ostility towards protected activity-- sometimes referred to as ‘animus’--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

Although a single instance, even circumstantial in nature would suffice, here there are several indications of animus. Following Lovell’s complaint about the cut in the cable, Allen told him not to make such complaints in the presence of MSHA inspectors. Tr. 22. Following Lovell’s complaint concerning the broken ATRS weld and the drop in pressure, Allen ignored Lovell’s concerns and ordered him to use the machine. Tr. 24-25. Following Lovell’s complaint about the lack of rock dust and fire extinguisher, Allen laughed. Tr. 25. Then, on May 10, after Lovell called MSHA, Allen assigned him to shovel the belt, which Lovell felt was a form of punishment. Tr. 26-27.

Maddox’s statement to GMS that they didn’t want him at the mine any longer exhibited animus towards Lovell’s protected activity, as did GMS’s statement upon firing Lovell that he should have thought about the consequences of his actions when he called MSHA. Tr. 34, 95.

Disparate treatment

“Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

Whether there was disparate treatment of Lovell was not developed on this record, but the fact that he was fired by GMS after being threatened by a miner at the Pennyrile Mine raises the question of whether other GMS employees have been treated in the same way, or given the benefit of a personnel policy of a more graduated approach to employee discipline.

Conclusion

In concluding that Lovell’s complaint herein was not frivolously brought, I find that there is reason to believe he engaged in protected activities, and that there was a nexus between


the protected activities and his termination. Miner Phillip Lovell is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Phillip Lovell** be immediately **TEMPORARILY REINSTATED** to his former job with GMS at the Pennyrile mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e) (4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Respondents did not violate Section 105(c) of the Act.


Kenneth R. Andrews
Administrative Law Judge

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