

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX: 202 434-9949

December 6, 2023

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JORDAN KELSER
Complainant,

v.

PEABODY SOUTHEAST MINING LLC,
and COMPLIANCE STAFFING
AGENCY LLC d/b/a/ JENNMAR
SERVICES
Respondent.

TEMPORARY REINSTATEMENT

Docket No. SE 2024-0025
MSHA Case No.: SE-MD-2023-10

Mine: Shoal Creek Mine
Mine ID: 01-02901

ORDER GRANTING TEMPORARY REINSTATEMENT OF JORDAN KELSER

Before: Judge Young

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) seeks an order temporary reinstating miner Jordan Kelser (“Complainant”) to his former position with Respondents Peabody SE Mining, LLC (“Peabody”), and Compliance Staffing Agency LLC, d/b/a Jennmar Services (“Jennmar”), pending the final hearing and disposition of his Discrimination Complaint brought under section 105(c) of the Act.

On September 6, 2023, Kelser executed a Discrimination Complaint with MSHA. The Secretary has found that the Complaint was not frivolously brought and filed an Application for Temporary Reinstatement on November 7, 2023. The Application for Temporary Reinstatement alleges that the Respondents discharged Kelser or otherwise relieved him of his job duties in violation of section 105(c) of the Act because Kelser reported an accident in which he was injured.

On November 15, Peabody timely filed a Request for Hearing on the Secretary’s Application. On November 16, Jennmar also filed a timely Request for Hearing. The hearing was held via Zoom for Government on November 29, 2023. Consistent with Section 105(c)(2) of the Act, the Secretary’s Application for Temporary Reinstatement is granted.

Summary of Testimony

The witness testimony and evidence presented at hearing provides facts in support of the Secretary's conclusion that the Complaint was not frivolously brought.¹ Credibility determinations are not made as to facts presented below. The facts provided at the hearing include the following:

Kelser was employed in several mining positions contracted through Jennmar beginning in March 2023. Tr. at 21.² Jennmar is a staffing agency that hires and trains individuals to work as miners and then contracts with mine operators including Peabody to provide labor support on an as-needed basis. Tr. at 127-28.

From March to approximately June 2023, Jennmar assigned Kelser to work on special projects where he would be continually reassigned between multiple mines for temporary durations. Tr. at 22. Starting around June, Kelser started working for Peabody through his employment at Jennmar. Tr. at 22. For Peabody, Kelser performed work as part of a belt crew at Shoal Creek Mine. Tr. at 23.

Kelser testified that on September 1, 2023, he, Colton Harper (Peabody's belt foreman), Dakota House (an hourly Peabody miner), Demarcus Tucker (an employee of contractor GMS), Shawn Clements (Peabody's evening shift mine foreman), and Toby Howell (another Peabody hourly employee) were working together to repair a conveyor belt that had stopped tracking correctly. Tr. at 24-28. According to Kelser, Harper instructed Kelser or Tucker to get on top of the belt to tighten a J bolt. Tr. at 26-27.

Kelser climbed up a fence and onto the conveyor belt, which was 8 to 10 feet off the ground, to tighten the bolt. Tr. at 58. Harper and Clements watched Kelser climb the fence onto the belt and did not stop him. Tr. at 27, 30-32. While Kelser was on the conveyor belt, Howell started the belt motor, and the belt began to move. Tr. at 38. Kelser heard the conveyor belt start and Tucker told him to jump off. Tr. at 32. Kelser grabbed a chain to pull himself off the belt, injuring his ankle and lower back. Tr. at 32-33.

Proper lockout-tagout procedures were not followed to prevent the conveyor belt from being energized. Tr. at 36-37. Kelser said that he was not offered the opportunity to lock and tag the belt motor to prevent its operation while he was working on the belt. Tr. at 36-37. No

¹ At the hearing, the Secretary presented as a witness Jordan Kesler, the complainant. Respondents each presented one witness. Peabody presented Jamie Mincey, who is a continuous improvement manager for Shoal Creek Mine and Peabody, and Jennmar presented Greg Neil, who is a regional manager and regional safety manager for Jennmar. Additionally, the parties admitted documents into evidence.

² There was no evidence introduced to establish whether Kelser was an employee or an independent contractor, and the nature of that relationship is not relevant to these proceedings.

other mine worker or foreman took any steps to ensure that the belt was not energized while he was on top of it. Tr. at 59.

Other safety measures were also neglected that might have prevented the injury. Mincey testified that the J-bolt could be safely accessed from the ground by using a ladder or by standing on a bucket or concrete blocks. Tr. at 109-10. Kelser testified, however, that nobody told him to use a ladder, and there was not one readily available. Tr. at 65. Peabody also suggested that Kelser should have been aware of the need to use fall protection while he was working atop the belt, but Kelser said nobody provided him with fall protection, either. Tr. at 15, 98.

Kelser testified that, later during the same shift, he sought to make a report related to his injury. Tr. at 39. According to Kelser, Harper told him he should not tell anyone what really happened and that he should misrepresent how the injury occurred, because Harper and Clements would get in trouble. Tr. at 37, 38. Kelser informed Harper that he wanted to file a truthful accident report. Tr. at 42. Harper then told him that he would have to take a drug test and asked if he was sure if filing a report is what he wanted to do. Tr. at 41. Kelser proceeded to fill out an accident report. Tr. at 42.

Peabody then placed Harper, the belt foreman who had directed the work and then, according to Kelser, watched as it was performed unsafely, in charge of collecting statements from witnesses and conducting the accident report. Tr. at 86, 104-06. After the investigation, Peabody then told Jennmar it did not want Kelser to work at the mine and said it was because Complainant had acted unsafely and violated its safety policies. Tr. at 89.

On September 2, 2023, Kelser emailed a statement to Greg Neil describing the events that resulted in Kelser's accident and injury. Tr. at 45. On September 5, 2023, Neil informed Kelser not to go back to Peabody's mine. Tr. at 46. Neil also informed Kelser that no other work was available through Jennmar at the time, and that Greg Neil needed to finish investigating Kelser's accident. Tr. at 46. On September 11, 2023, Peabody informed Neil that Kelser would not be allowed back to the Shoal Creek Mine to work. Tr. at 142.

From the date of injury through the date of this hearing, Kelser has not been capable of returning to work, because his injuries prevented him from performing the tasks necessary to work as a miner. Tr. at 76. Kelser testified that he believes he is now physically able to work. Tr. at 53. Kelser subsequently submitted documentation of a physician clearing him medically to return to work without restrictions, as of December 2.³

³ At hearing, the record was left open for subsequent evidence pertaining to Kelser's medical examination scheduled for December 2, 2023.

Standards Governing Temporary Reinstatement

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. §815(c)(1-2). The plain language of the Act provides that “if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. §815(c)(2) (emphasis added).

The scope of temporary reinstatement proceedings is narrow and limited to determining whether the evidence establishes that the complaint is nonfrivolous, not whether the complainant can establish a prima facie case of discrimination. *Sec’y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 46 FMSHRC , slip op. at 4 No. WEST 21-178 (Nov. 28, 2023); *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987). The Commission has held that the Secretary can establish that the complaint is non-frivolous when the complainant’s evidence shows that the complainant engaged in activity protected by the Act and suffered adverse action as a result of the protected activity. *Sec’y of Labor on behalf of Cook v. Rockwell Mining*, 43 FMSHRC 157, 161 (Apr 2021). Protected activities include a miner’s reporting of injuries to an operator, even if there is no safety complaint associated with the report. *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 205 (Feb. 1994).

The causal nexus between the protected activity and the adverse action can be demonstrated by the operator’s knowledge of the protected activity and its temporal proximity to the adverse action. *Sec’y of Labor on behalf of Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000).

During a temporary reinstatement proceeding, a judge does not make credibility determinations, resolve testimonial conflicts, or weigh the operator’s evidence against the Secretary’s evidence. *Rockwell Mining*, 43 FMSHRC at 162. Rather, the judge simply evaluates the Secretary’s evidence and determine whether the miner’s complaint appears to have merit. *Id.* at 161 (citing *Sec’y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009)).

Disposition

The Secretary has provided sufficient evidence to show that the Complaint in this matter was not frivolously brought. The facts provided by the Secretary, if true, would establish that the Complainant engaged in a protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus.

First, the Secretary has sufficiently demonstrated that Kelser engaged in a protected activity. Kelser’s reporting the accident that injured him to the mine operator, by itself,

constitutes a protected activity, even if there is no safety complaint associated with the report. *Swift*, 16 FMSHRC at 205.

However, the protected activity goes further, as his report implicates other mine workers, supervisors, and the operator in safety violations at Shoal Creek Mine. As Kelser climbed onto the belt representatives of mine management and other miners observed him, without attempting to stop him. Further, he said that he was not offered the opportunity to lock and tag the belt motor to prevent its operation while he was working on the belt. Nor did anybody in mine management – representatives of which were at the scene – take any steps to ensure that the belt was not energized while he was on top of it.

This evidence must be taken as true under the law, but it was essentially un rebutted. Peabody produced no witness who was at the scene when Kelser was injured. The uncontradicted record evidence is that Kelser was assigned a task but was not provided with the tools or training to perform it safely.

Mr. Mincey testified that the J-bolt could be safely accessed from the ground by using a ladder or by standing on a bucket or concrete blocks. But nobody told Kelser to use a ladder, and there was not one readily available. Instead, the uncontradicted testimony of the only witness who was at the scene was that representatives of mine management and other miners then watched as he climbed on top of the belt without locking or tagging it out – an action all parties characterized as unsafe.

Peabody also suggested, on cross-examination, that Kelser should have been aware of the need to use fall protection while he was working atop the belt, but nobody provided him with fall protection, either.

Additionally, Kelser says his supervisor tried to dissuade him from filing a true report of the nature and cause of his injuries. Peabody then assigned the investigation of Kelser's incident to Harper, the belt foreman who had directed the work and then, according to Complainant, watched as it was performed unsafely. After the investigation, Peabody then told Jenmar that it did not want Kelser to work at the mine and said it was because Complainant had acted unsafely and violated its safety policies.

The causal nexus between Kelser's reporting his injury and his discharge is also supported by the temporary proximity. On September 5, four days after the reported incident, Jenmar's regional manager, Greg Neil, first told Kelser not to return to the Shoal Creek Mine. On September 11, Greg Neil told Kelser that he would not be allowed to return to work for Peabody at Shoal Creek Mine permanently. The justification that Respondent's provide for the discharge is closely tied to the incident which Kelser reported, although Respondent's contend that Kelser was discharged because of his own unsafe conduct.

At this stage of the proceedings, the evidence establishes none of this conclusively. In a full proceeding on the Complaint, Respondents will doubtless provide witnesses and other

evidence that could affect the outcome. But at this stage, the Secretary has provided facts, which must be accepted as true, and which establish a close causal nexus between the protected activity and the adverse action Kelser suffered.

I therefore find that a non-frivolous claim has been made that on September 11, Peabody discharged Kelser's from his work at the Shoal Creek Mine and the decision was based on the underlying incident which Kelser reported. Additionally, Jennmar is contemplating further adverse action against Kelser upon his return to work when he has medically recovered. This, too, is based entirely on the incident which resulted in the Complainant's injury and Peabody's response to it.

Respondents have argued that Kelser was not terminated. But there is no difference between a miner being discharged as a direct employee and a miner being told, through an employment agency, that the contract employer no longer wishes to have the miner work at the mine. On September 1, Kelser had regular employment of 48 hours per week at the Shoal Creek Mine. After Kelser was injured and reported his injury, that was no longer the case. Thus, there has been an adverse action, whether or not Kelser was "terminated" in any narrow sense of the term.

Prior to the hearing, Peabody and Jennmar moved to dismiss the application, claiming that there was no relief available because complainant's injury makes him unavailable for work, and claimed he was receiving workers' compensation benefits. The motions were denied because they rested on evidentiary matters that were not presented prior to the hearing. At hearing, Respondents did not renew the motions, and the evidence introduced showed that Complainant was receiving benefits to pay for his medical care, not compensation for lost wages, injury, or disability.

While the Commission has found that certain circumstances affecting the availability of work may justify tolling of temporary reinstatement, Kelser has been cleared by a physician to resume working without restrictions and therefore circumstances no longer are present that affect the availability of work. *Sec'y on behalf of Gatlin v. Ken American Res., Inc.*, 31 FMSHRC 1050, 1054-56 (Oct. 2009). In any event, Complainant is now available to return to work, and any such argument would be moot.

Conclusion

For the foregoing reasons, I find that the Complaint for discrimination has not been frivolously brought, and that Complainant Jordan Kelser is entitled to Temporary Reinstatement under Section 105(c)(2) of the Act.

Order

It is hereby **ORDERED** that **Jordan Kelser** be **immediately TEMPORARILY REINSTATED** to his former job at Peabody's Shoal Creek Mine at his former rate of pay,

overtime, and all benefits he was receiving at the time of his discharge.⁴ Thereby, Jennmar is **ORDERED** to place Kelser on available status and assign him to his former contracted position at the Shoal Creek Mine or to a substantially equivalent position. Peabody is **ORDERED** to reinstate Kelser to his former work at Shoal Creek Mine, unless or until Jennmar reassigns Kelser to a substantially equivalent position, providing him with the pay and benefits he would have received but for the termination of his employment relationship with Respondents.⁵

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 Peabody or Jennmar, did not violate Section 105(c) of the Act.



Michael G. Young
Administrative Law Judge

⁴ Kelser, according to Exhibit B to the Secretary's Application for Temporary Reinstatement, worked 48 hours per week on average, prior to his discharge, at \$25.00 an hour regular pay and \$37.50 for overtime. This calculates to \$1,300.00 per week.

⁵ Temporary reinstatement is designed to maintain the status quo while miners proceed with their discrimination claims. *Sec'y on behalf of Jeffrey Pappas c. Calportland Company*, 38 FMSHRC 137, 144 (Feb. 2016).

Distribution: (electronic mail)

Vanessa L. Kinney, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230 Nashville, TN 37219-2456, Kinney.vanessa.l@dol.gov

John R. Jacobs, Esq., Attorney for Jordan Kelsner, Maples, Tucker & Jacobs, LLC 2001 Park Place North, Suite 1325 Birmingham, Alabama 35203 jack@mtandj.com

D. Craig Allred, Esq., Hill Hill Carter Franco Cole & Black P.C. 425 S. Perry Street Montgomery, AL 36104, callred@hillhillcarter.com

Shawn Junkins Cole, Esq., Hill Hill Carter Franco Cole & Black P.C. 425 S. Perry Street Montgomery, AL 36104, scole@hillhillcarter.com

Arthur Wolfson, Esq. Fisher & Phillips LLP Six PPG Place, Suite 830 Pittsburgh, PA 15222, awolfson@fisherphillips.com

R. Henry Moore, Esq. Fisher & Phillips LLP Six PPG Place, Suite 830 Pittsburgh, PA 15222, hmoore@fisherphillips.com