

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

January 21, 2025

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2024-0340-D
on behalf of KENNETH M. ADKINS,	:	MSHA No. PINE-CD-2024-04
Complainant,	:	
	:	
v.	:	
	:	
GREENBRIER MINERALS, LLC, and its	:	Middle Fork Surface Mine
Successors,	:	Mine ID 46-09645
Respondent.	:	

ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION

This discrimination proceeding is before me pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2). On June 17, 2024, the Federal Mine Safety and Health Review Commission (“Commission”) received a complaint of discrimination filed by the Secretary of Labor (“Secretary”) on behalf of the complaining miner, Kenneth M. Adkins. Respondent, Greenbrier Minerals, LLC (“Greenbrier”), timely filed an answer to the complaint on July 16, 2024. Chief Administrative Law Judge Glynn F. Voisin then assigned me this case on October 8, 2024. I initially set a hearing for January 29–31, 2025. I continued this matter upon the Secretary’s request, and it will now be heard on February 12–14, 2025, in South Charleston, West Virginia. On January 4, 2024, Respondent filed its Motion for Summary Decision, including a memorandum in support along with attachments, whereafter the Secretary timely filed her Opposition on January 15, 2025.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Adkins’ Discrimination Complaint to MSHA

Adkins worked as a mobile equipment operator at Greenbrier’s surface coal mines in its Logan County (West Virginia) Division from December 12, 2022, until his termination on March 7, 2024.¹ (Compl. at 2; Resp’t Mot., Mem. at 2–3.) The Secretary alleges that during Adkins’ initial interview with Greenbrier, Superintendent Rick Hunter asked Adkins if he had any equipment preferences, and Adkins informed Superintendent Hunter that he preferred not to drive haul trucks, such as a rock truck. (Compl. at 2.) Thus, the Secretary alleges Adkins was

¹ Pursuant to Administrative Law Judge John T. Sullivan’s Order dated May 14, 2024, Adkins is temporarily reinstated at Greenbrier as of May 15, 2024. (Compl. at 2.)

primarily assigned to Co. No. 229, Caterpillar D10-R Dozer (“dozer”), and only drove a rock truck on occasions when the dozer was inoperable. (Compl. at 2.)

In September 2023, Adkins began noticing issues with his assigned dozer and started to log his concerns in the daily pre-shift safety inspection reports. (Compl. at 2; Resp’t Mot., Mem. at 3.) Adkins logged his issues for approximately two months, noting, among other things, a worn out hardbar, a hydraulic leak, defective lights, and defective fire suppression. (Compl. at 2; Resp’t Mot., Mem. at 3.) The Secretary alleges that although the pre-shift inspection reports were reviewed by Foreman Chris Bellomy, Greenbrier did not address Adkins’ concerns. (Compl. at 2–3.) Adkins discussed the issues surrounding the dozer with his wife, who in turn filed a complaint with MSHA on November 9, 2023. (Compl. at 3.)

Following Adkins’ wife’s complaint, MSHA Inspector Paul Milum investigated the North Fork Surface Mine on November 10, 2023. (Compl. at 3; Resp’t Mot., Mem. at 4.) Inspector Milum issued two citations related to the dozer and removed the dozer from service. (Compl. at 3; Resp’t Mot., Mem. at 4.) Inspector Milum noted that the conditions he witnessed had been reported on Greenbrier’s pre-shift inspection reports, that Foreman Bellomy collected the pre-shift inspection reports, and that Greenbrier failed to remedy the listed conditions. (Compl. at 3.)

The Secretary alleges that while the dozer was undergoing repairs, Superintendent Hunter assigned Adkins to a rock truck. (Compl. at 3.) The Secretary also alleges that on November 20, 2023, Greenbrier held a safety meeting during which Safety Supervisor Brandon Vance discouraged employees from calling MSHA with safety concerns without first notifying management. (Compl. at 3.) During the safety meeting, Adkins acknowledged filing the hazard complaint with MSHA. (Compl. at 3.)

The Secretary alleges that after the dozer was placed back in service, Adkins continued to be assigned to either a rock truck or a lizard truck,² while the drivers who originally drove the rock truck were assigned to the dozer. (Compl. at 4.) The Secretary further alleges that Adkins asked Superintendent Hunter for additional training to drive the rock truck, but his request was denied. (Compl. at 4.) The Secretary also claims that Adkins observed safety hazards on the rock truck but did not report his observations due to fear of reprisal. (Compl. at 4.)

The Secretary alleges that on March 1, 2024, Adkins was supposed to operate a grader but instead was assigned to operate a rock truck. (Compl. at 4; Resp’t Mot., Mem. at 4.) Adkins expressed his frustration about the rock truck over the company radio, which was used by all employees at the mine. (Compl. at 4; Resp’t Mot., Mem. at 4.) Adkins specifically stated over the radio that he felt he was being primarily assigned to operate rock trucks in retaliation for his complaint to MSHA. (Compl. at 4; Resp’t Mot., Mem. at 4.)

On the next working shift, March 4, 2024, Superintendent Hunter and Mine Manager Ben Collins spoke to Adkins about his use of the radio during the last shift. (Compl. at 4; Resp’t Mot., Mem. at 5.) Adkins informed Hunter and Collins that he felt Greenbrier was retaliating

² A lizard truck is an articulated truck similar to a rock truck. (Compl. at 4.)

against him for calling MSHA by always having him drive a rock truck. (Compl. at 4.) Hunter denied that Adkins was being retaliated for calling MSHA. (Compl. at 4.)

Following the meeting, Superintendent Hunter directed Adkins to confirm his daily assignment with Foreman Gordon Tomblin, who assigned him to a grader to grade haulage roads at the North Fork and Middle Fork surface mines. (Compl. at 4.) The Secretary alleges Adkins told Foreman Tomblin that he would switch with someone and instead drive a rock truck because he expected to be back on a rock truck sooner or later regardless. (Compl. at 4.) Adkins subsequently boarded a bus for the Middle Fork Surface Mine. (Compl. at 4.) Shortly after, Hunter radioed the bus to stop and he pulled Adkins off the bus and asked him to report to Wayne Cooper, the Human Resources Manager for Greenbrier's Logan County Division. (Compl. at 5; Resp't Mot., Mem. at 6.)

Adkins explained to HR Manager Cooper that he felt Greenbrier was retaliating against him. (Compl. at 5.) The Secretary alleges that HR Manager Cooper told Adkins he was suspended for three days and assured Adkins that he would be in touch. (Compl. at 5.) Adkins did not receive any written notice or paperwork regarding his suspension at that time. (Compl. at 5.) When Adkins returned to work three days later, on March 7, 2024, Mine Manager Collins asked him to report to Cooper's office. (Compl. at 5; Resp't Mot., Mem. at 7.) While in the waiting room at Cooper's office, Adkins received a call from Cooper, who informed Adkins that he was terminated. (Compl. at 5; Resp't Mot., Mem. at 7.) The Secretary alleges that Greenbrier failed to provide any paperwork or written explanation regarding the reason for Adkins' termination. (Compl. at 5.)

On March 11, 2024, Adkins timely filed a section 105(c) discrimination complaint with MSHA against Greenbrier. (Compl. at 5; Resp't Mot., Mem. at 9.) On June 17, 2024, the Secretary of Labor, on behalf of Kenneth Adkins, filed a complaint alleging Greenbrier engaged in discrimination against Adkins in violation of 105(c)(1) of the Mine Act. (Compl. at 1.)

B. Respondent's Motion for Summary Decision and the Secretary's Response

In its Motion for Summary Decision, Greenbrier does not dispute that Adkins engaged in certain protected activity and that he was subject to adverse employment actions in March 2024 when he was suspended and terminated. (Resp't Mot., Mem. at 11.) However, Greenbrier argues there is no record evidence that the adverse actions were motivated in any part by any protected activities.³ (Resp't Mot., Mem. at 11.) Greenbrier attaches several exhibits including excerpts from the transcript of Adkins' Temporary Reinstatement Hearing on May 7, 2024, and the depositions of Ricky Hunter, Gordon Tomblin, Ben Collins, and Wayne Cooper.

The Secretary in her Opposition to Respondent's Motion for Summary Decision argues a genuine issue exists regarding the credibility of Greenbrier's witnesses and the reliability of their

³ In Part IV of its memorandum in support of its motion for summary decision, Greenbrier provides several arguments to support its contention that the Secretary cannot establish a prima facie case of discrimination. (Resp't Mem. at 11–13.) However, I need not address Respondent's substantive arguments given that material facts are in dispute.

testimony. (Sec’y Opp’n at 2.) The Secretary further argues Greenbrier failed to establish that the adverse action was not motivated by retaliatory intent.⁴ (Sec’y Opp’n at 2.) The Secretary attaches several exhibits including excerpts from the transcript of Adkins’ Temporary Reinstatement Hearing on May 7, 2024, and the depositions of Ben Collins, Wayne Cooper, Ricky Hunter, and Gordon Tomblin.

II. PRINCIPLES OF LAW

A. Summary Decision

Commission Procedural 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); *see Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981).

The Commission has consistently held that summary decision is an “extraordinary procedure” and analogizes it to Rule 56 of the Federal Rules of Civil Procedure. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate “upon proper showings of the lack of a genuine, triable issue of material fact.” *Id.* at 2987–88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and “inferences to be drawn from the underlying facts” are viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Commission Judges should not grant motions for summary decision “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

B. Discrimination under Section 105(c) of the Mine Act

Section 105(c)(1) of the Mine Act states, in relevant part, that “[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by [the Mine Act].” 30 U.S.C. § 815(c)(1).

For discrimination claims, the Commission applies the *Pasula-Robinette* framework in which a complainant must establish a prima facie case showing the miner (1) engaged in protected activity, (2) suffered an adverse action, and (3) the adverse action was motivated in any part by the protected activity. *Driessen v. Nev. Goldfields*, 20 FMSHRC 324, 328 (Apr. 1998);

⁴ In Part III of its motion in opposition, the Secretary provides several arguments to support its contention that Adkins’ suspension and termination was motivated by his protected activity of reporting safety concerns to Greenbrier management and MSHA. However, I need not address these substantive arguments in this Order as there are material facts in dispute.

Sec’y of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817–18 (Apr. 1981); *Sec’y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev’d on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Robinette*, 3 FMSHRC at 818 n. 20. If the mine operator cannot rebut the *prima facie* case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner’s unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2800.

III. DISCUSSION AND ANALYSIS

A. Disputed Facts for Motivational Nexus Under Section 105(c)

The parties dispute material facts related to Adkins’ discrimination claim. In particular, the parties dispute facts related to the motivation behind Adkins’ suspension and termination of employment. Greenbrier asserts that on March 4, 2024, Adkins refused Foreman Tomblin’s directions and refused to perform the job assigned to him, telling Tomblin that he was going to drive a rock truck instead. (Resp’t Mot., Mem. at 5.) Specifically, Greenbrier claims Adkins told Tomblin that he could “put somebody else on that grader,” and he was “going to Middle Fork to drive a fucking rock truck.” (Resp’t Mot., Mem. at 2; Resp’t Ex. N: Tomblin Dep. at 20:20–21:7.) However, Adkins testified at the May 7, 2024, Temporary Reinstatement Hearing that he was going to trade the grader with someone else, which was common practice. (Sec’y Opp’n at 2–3; Sec’y Ex. 1: TR Hr’g 46:4–21.) Adkins also testified that Tomblin told him to get on the Middle Fork bus, which he did. (Sec’y Opp’n at 2–3; Sec’y Ex. 1: TR Hr’g 47:3–8.) Thus, the directions Tomblin gave Adkins on March 4, 2024, and Adkins’ response are genuine issues of material fact in dispute.

In its motion, Greenbrier asserts that Mine Manager Collins did not speak with HR Manager Cooper about Adkins or Adkins’ behavior after he and Superintendent Hunter called Cooper on March 4, 2024, other than days later to “find out . . . if he was coming back to work, if he had just been suspended three days or if he had been terminated.” (Resp’t Mot., Mem. at 6; Resp’t Ex. P Collins Dep. 34:8–14.) Yet, Collins also testified that Cooper asked him at a “later date” for a statement about the incident. (Sec’y Opp’n at 3–4; Sec’y Ex. 3: Collins Dep. 34:15–22.) Additionally, in his written statement about the incident, Collins wrote that Adkins described feeling “retaliated against and singled out due to the complaint called into MSHA.” (Sec’y Ex. 2: Collins Statement.) Thus, genuine issues of material facts surrounding discussions between Collins and Cooper about Adkins’ behavior are in dispute.

Greenbrier claims that HR Manager Cooper told Adkins that he was suspended for three days with intent to discharge for insubordination during their meeting on March 4, 2024. (Resp’t Mot., Mem. at 7.) However, at the Temporary Reinstatement Hearing, Cooper did not confirm that he communicated his intent to discharge Adkins to Adkins, rather he stated, “it was [a] pending investigation, so at that point, he had not been discharged.” (Sec’y Opp’n at 4; Sec’y Ex. 1: TR Hr’g 81:12–16.) Additionally, in his deposition, Cooper confirmed that he did not tell Adkins he would be terminated after his three-day suspension. (Sec’y Opp’n at 4–5; Sec’y Ex.

4: Cooper Dep. 54:19–55:21.) Moreover, in his notes about his meeting with Adkins on March 4, 2024, Cooper wrote, “I informed him that he is suspended for 3 days pending investigation for insubordination.” (Sec’y Opp’n at 5; Sec’y Ex. 5.) Thus, the timing of when Adkins learned he would be terminated is in dispute, which is a material fact in this case.

Greenbrier asserts that during HR Manager Cooper’s phone call with Superintendent Hunter and Mine Manager Collins, Cooper said Adkins would be suspended with intent to discharge based on insubordination. (Resp’t Mot., Mem. at 7; Resp’t Ex. R: TR Hr’g 78:14–20.) However, during his deposition, Hunter testified that Cooper did not communicate his intent to suspend Adkins during the March 4, 2024, phone call between Cooper, Hunter, and Collins. (Sec’y Opp’n at 6; Sec’y Ex. 6: Hunter Dep. 40:17–19.) Additionally, Collins testified that he did not learn that Adkins was going to be terminated until Adkins returned to work on March 7, 2024. (Sec’y Opp’n at 6; Sec’y Ex. 3: Collins Dep. 45:7–22.) Thus, Cooper’s discussion with Collins and Hunter about Adkin’s discipline puts in dispute an issue of material fact.

Greenbrier claims that prior to HR Manager Cooper’s decision to suspend and terminate Adkins’ employment, neither Superintendent Hunter nor Mine Manager Collins ever told Cooper that Adkins or Adkins’ spouse contacted MSHA in November 2023. (Resp’t Mot., Mem. at 8; Resp’t Ex. R: TR Hr’g 79:24–80:8.) However, as previously noted, Cooper requested Collins to write a statement about the incident. (Sec’y Opp’n 8–9; *see* Sec’y Ex. 2: Collins Statement.) In this statement, Collins wrote that Adkins described feeling “retaliated against and singled out due to the complaint called into MSHA.” (Sec’y Ex. 2.) Since Cooper requested this statement, it is reasonable to assume at this time that he read it. Thus, material facts surrounding the communications between Cooper and Collins about Adkins’ protected activity remain in dispute.

Lastly, Greenbrier argues that Cooper decided to suspend Adkins’ employment with intent to discharge before Adkins told him about the complaint made to MSHA in November 2023. (Resp’t Mot., Mem. at 9; Resp’t Ex. R: TR H’g 80:20–24.) Yet, as the Secretary points out (*see* Sec’y Opp’n at 9), Greenbrier also asserts that Cooper “wanted to talk to Adkins, however, before proceeding with the suspension because he wanted to make sure that Adkins’ refusal to operate the grader was not because of any safety-related issue or safety concern regarding the grader.” (Resp’t Mot., Mem. at 7.) Similarly, during his deposition, Cooper testified that he decided to suspend and terminate Adkins’ employment “pending [his] conversation with” Adkins. (Resp’t Ex. S: Cooper Dep. 45:12–14.) Thus, when Cooper made the decision to suspend Adkins’ employment with the intent to discharge is an issue of material fact in dispute.

B. Conclusion

As discussed above, I have determined that the Temporary Reinstatement Hearing testimony and witness deposition testimony the Secretary cites—specifically regarding Adkins’ behavior on March 4, 2024, and subsequent discipline—places the material facts regarding Greenbrier’s motivation in dispute. As a result, Respondent has failed to establish “[t]hat there is no genuine issue as to any material fact.” 29 C.F.R. § 2700.67(b). Consequently, Respondent Greenbrier is not entitled to summary decision as a matter of law under Commission Procedural Rule 67(b). 29 C.F.R. § 2700.67(b).

IV. ORDER

In light of the foregoing, it is hereby **ORDERED** that Respondent's Motion for Summary Decision is **DENIED**.

A handwritten signature in black ink that reads "Alan G. Paez". The signature is written in a cursive, flowing style.

Alan G. Paez
Administrative Law Judge

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