

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
721 19th ST. SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

December 13, 2023

SECRETARY OF LABOR,
on behalf of JIMMY LEE HOOVER,
Complainant,

v.

MOSENECAMANUFACTURER
LIMITED LIABILITY COMPANY d/b/a
AMERICAN TRIPOLI,
Respondent.

TEMPORARY REINSTATEMENT

Docket No. CENT 2024-0024
MSHA No. MADI-CD-2023-05

Mine ID: 23-00504
Mine: MOSenecaMfr LLC dba American
Tr

ORDER GRANTING TEMPORARY REINSTATEMENT OF JIMMY LEE HOOVER

Before: Judge Simonton

I. INTRODUCTION

This case is before me on application for temporary reinstatement filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against MoSeneca Manufacturer LLC doing business as American Tripoli, pursuant to section 105(c) (2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2) (“Act” or “Mine Act”). On November 21, 2023, pursuant to 29 C.F.R. § 2700.45(c), Respondent requested a hearing on these matters. A virtual hearing was conducted on December 6, 2023, via the Zoom platform after the parties agreed to extend the required time period due to the Court’s hearing travel schedule.¹

II. ANALYSIS AND FINDINGS

Background

The parties stipulated to the following facts:

MoSeneca Manufacturer LLC doing business as American Tripoli (“Respondent”) is organized under the laws of the state of Missouri. The Respondent is an “operator” as defined in Section 3(d) of the Mine Act. The Respondent's operations affect interstate commerce. At all relevant times, the Complainant was employed by the Respondent. As such, the Respondent is

¹In this decision the transcript, Secretary’s (Government) exhibits and Respondent’s exhibits, are abbreviated as: “Tr.”, “GEX - #”, “REX - letters”, respectively.

subject to the jurisdiction of the Mine Act, and the presiding Administrative Law Judge has the authority to hear and issue a decision regarding this case.

Summary of Testimony

Each party offered two witnesses. A summary of each witness's testimony follows.

Jimmy Lee Hoover

At hearing, Jimmy Lee Hoover ("Complainant") testified that at the time he was terminated, he was employed by the Respondent as a mill operator/mill associate. Tr. 25. His job duties involved mill operations, including routine maintenance and loading trucks, and he worked forty hours per week. Tr. 25-26. His rate of pay was twenty dollars an hour. Tr. 27.

On September 13, 2023, the Complainant was beginning the process to start the mill when he discovered that machinery at the mill was not operating as it should. Tr. 27-29. He checked the breaker box located on the wall and found that the circuit breaker had tripped. Tr. 29. Attempts to reset the breaker box by pressing the external reset button were unsuccessful. *Id.*

This breaker box was known to previously cause this issue. Tr. 30. On those instances, the Complainant would request assistance from a maintenance worker to open the box to fix the issue because he was unqualified to do so. *Id.* On September 13, however, no maintenance workers were present at the site. Tr. 31. Instead, the Complainant notified his supervisor, Don Hale, that the breaker box needed to be reset manually. Tr. 32. The Complainant and Hale then discussed the issue with Operations Manager John Spears, who supervised both Hale and the Complainant. Tr. 32-33. According to the Complainant's testimony, Spears allegedly responded to this information by saying "We got to run, we got to make Russ money." Tr. 33. While there were no explicit instructions given to the Complainant to open the breaker box and insert his hand, the Complainant interpreted Spears' alleged statements as implied instructions to do those activities because that was the only way to get the mill running. Tr. 57, 81, 104. The Complainant testified that he stated that he did not want to open the breaker box or put his hand inside because he felt it was an unsafe act. Tr. 81, 91.

After discussing the issue with Spears, the Complainant took a longer lunch break than usual, for approximately forty-five minutes. Tr. 33-34. During his lunch, the Complainant contacted a former maintenance worker for guidance on how to fix the breaker box. Tr. 34-35. When he returned from lunch, Spears asked the Complainant to show him the breaker box. Tr. 35. The Complainant took Spears to the breaker box, where Spears opened it and inserted his finger into the box. Tr. 36. The Complainant did not remove the cover or put his hand in the box. Tr. 37, 55-56. The Complainant did not believe Spears would be the person to fix the breaker box. Tr. 103. His understanding of Spear's job at the mill was to direct maintenance, not that Spears would be the employee to act as a maintenance person in the absence of a dedicated maintenance worker. Tr. 95, 103.

The Complainant worked as normal for the rest of the day. Tr. 37. He was never notified that there might be any disciplinary issues regarding his conduct that day prior to his termination.

Id. The next day, September 14, 2023, the Complainant received a termination letter which was given to him by Spears. Tr. 38. At the time of his termination, the Complainant did not know exactly why he was being fired. Tr. 39, 77-78. Aside from the rationale provided in the letter, there was no further discussion surrounding the reasons for his termination and no one explained specifically why he was being terminated. Tr. 40, 78. The Complainant testified that it was his belief that his refusal to perform the maintenance tasks associated with resetting the breaker box led to his termination. Tr. 40-41.

Michael Dillingham

The special investigator who conducted the investigation into the Complainant's 105(c) discrimination complaint testified to his findings and conclusions. Through his investigation, Dillingham determined that it was "the norm for maintenance or anyone that worked in the mill" to go inside the box and hold the reset button internally when the external reset would not work. Tr. 124-26. As such, it was expected of the Complainant to stick his hand inside the breaker box because it was his job to get the mill running. Tr. 155. Accordingly, he concluded that the Complainant's refusal to put his hand into the breaker box constituted a withdrawal from an unsafe act. *Id.*

Dillingham further testified that Spears allegedly responded to the Complainant's withdrawal by saying, "Is this how you're going to play it, really?" Tr. 121, 152. As part of the investigation, Dillingham contacted Respondent to conduct an interview regarding the events leading to the Complainant's termination, to which the Respondent submitted a position statement in lieu of an interview. Tr. 129.

Based on the results of his investigation, Dillingham found that there was a nexus between the protected activity, the Complainant's withdrawal, and the adverse action, the termination. Tr. 130-31, 149. He concluded that the discrimination complaint was therefore legitimate, and that discrimination had occurred. *Id.*

Russell Tidaback

Russell Tidaback, the mill's owner, gave extensive testimony as to Complainant's employment history, which documented multiple instances of poor attitude, issues with other employees, absenteeism, and safety concerns. Tr. 185-96; REX G. Throughout the Complainant's employment, Tidaback spent significant time mentoring and counseling the Complainant to improve performance. Tr. 166-168; REX G. He also testified to the mill's termination policy, citing the employee handbook, which states that termination is a three-step process involving: (1) a verbal warning; (2) a written warning letter; and (3) a termination letter. Tr. 174; REX E. While Tidaback stated that these steps are not obligatory and serve more as a guide, this termination process was followed during the Complainant's termination and the Complainant had been warned numerous times regarding his performance, both verbal and written. Tr. 215-16.

Despite these numerous disciplinary incidents, however, the Complainant was not fired until September 14, 2023, the day after the incident involving the faulty breaker box. Tr. 216-17.

Tidaback testified that he was unaware of the breaker box issue when he ultimately made the decision to terminate the Complainant and the decision was motivated by the Complainant's tardy return from lunch and poor attitude the previous day. Tr 171-72, 217. While Tidaback is the final decision maker, other members of management, including supervisors, provide input and play a role in the decision to terminate an employee. Tr. 207-210.

In the termination letter provided to the Complainant, which was written by Tidaback, there was no explicit reference to a specific event triggering termination. Tr. 177; GEX 2. There was also no explicit statement contained within the letter that cited specific safety concerns or specific instances of absenteeism as reasons for termination. Tr 182; GEX 2. Tidaback explained its implied because this was a termination letter, not an improvement counseling letter. *Id.* He acknowledged that the exact reasons for termination would not be entirely clear to an outside reader based on the termination letter alone and additional information regarding the Complainant's employment history is necessary to fully understand the termination decision. Tr. 181-83.

Don Hale

During the time period at issue, Don Hale was employed as the assistant manager/mill lead and was Complainant's immediate supervisor. Tr. 226. On September 13, 2023, Hale was aware that the breaker box was not functioning properly, which had been a recurring problem at the mill. Tr. 220-21. The Complainant informed him that did not want to put his finger on the box's switch for fear of being shocked. *Id.* Hale and the Complainant then went to speak with John Spears about the faulty switch, after which the switch was eventually fixed. *Id.* Hale testified that Spears also knew that the Complainant did not wish to stick his hand in the breaker box. Tr. 230.

Concerning general practices at the mill, Hale stated that he would inform Spears about problems at the mill and that Spears would then instruct him what to do, including recruiting other employees to assist him. Tr. 224. He also stated that Spears's job duties included maintenance work, especially when there was not a designated maintenance person. Tr. 225. However, there was not always an expectation that Spears would be the person to perform maintenance work in the absence of a maintenance person. Tr. 229.

As part of his job duties, Hale was responsible for tracking employees' comings and goings, including lunch breaks. Tr. 227, 235. He stated that the mill does not have a clock-in clock-out system or other formal tracking system to monitor employees, and that he would make note of when employees left for lunch. *Id.* On September 13, 2023, the Complainant took a lunch break that exceeded the typical half-hour that is permitted. Tr. 219, 228, 235-36. Hale told Complainant he was gone for an hour. Tr. 219, 221, 235-36. Hale testified Complainant's response was, "I don't care, write me up." *Id.* After the conclusion of the workday, Hale contacted the mill's owner regarding the Complainant's conduct that day, including the Complainant's late return from lunch and his attitude, and that the Complainant allegedly told Hale to write him up. Tr. 221; REX H. Hale had encountered problems with the Complainant on the job before, including getting "lippy" and occasionally arriving late to work. Tr. 222-23.

However, he generally did not have a problem with the Complainant despite these issues. Tr. 223.

Standards Governing Temporary Reinstatement

Section 105(c)(1) of the Mine Act provides that no person shall discharge or otherwise discriminate against a miner for exercising rights under the Act.

It states in pertinent part:

No person shall discharge or in any manner discriminate against ... or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c)(1)(Emphasis provided by the *Commission in Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982)).

Pursuant to 105(c)(1), if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the reinstatement of the miner pending final order on the complaint. 30 U.S.C. § 815(c)(1). The Commission has noted that the parameters of a temporary reinstatement hearing are narrow, being limited to a determination with respect to whether a miner's discrimination complaint has been frivolously brought. *See Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd.*, 920 F. 2d 738 (11th Cir. 1990). Accordingly, it is only necessary to determine whether the Applicants' complaints *appear* to have merit. (Emphasis added). *See S. Rep. No. 181*, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th Cong., 2d Sess., at 624 (1978). In *Jim Walter Resources, Inc. v. FMSHRC*, the Eleventh Circuit found the “not frivolously brought” standard comparable to a “reasonable cause to believe” standard. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). The Eleventh Circuit concluded that the low burden imposed by the “not frivolously brought” standard reflects clear Congressional intent to make temporary reinstatement relatively easy to obtain. *Id.* at 748.

The Commission has consistently and historically found that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. *See Sec'y of Labor o/b/o Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997) *citing* *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (Feb. 1994) (“the anti-discrimination section should be construed ‘expansively to assure that miners will not be inhibited *in any way* in exercising any rights afforded by the legislation.”)(quoting S. Rep. No. 181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th Cong., 2d Sess., at 624 (1978) (emphasis added).

Although the Secretary is not required to present a prima facie case in a temporary reinstatement proceeding the Commission has determined it useful to review the elements of a discrimination

claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. *Sec'y of Labor o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009). In order to establish a prima facie case under Section 105(c), a miner must show: (1) that he engaged in a protected activity; and (2) that his termination was motivated, at least in part, by the protected activity. *See Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980).

The Commission has held that evidence of motivation may be shown by circumstantial evidence. *See, e.g., Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom., *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983) (holding that illegal motive may be established if the facts support a reasonable inference of discriminatory intent); *Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (Jan. 1984). Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include: (1) knowledge by the operator of the protected activity, (2) hostility toward the miner because of his protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complaining miner. *Jungers v. Borax*, 15 FMSHRC 300, 308 (Feb. 1993).

Disposition

The Secretary has sufficiently demonstrated that the Application for Temporary Reinstatement was not frivolously brought. As stated above, a miner must raise a nonfrivolous claim that he engaged in a protected activity that has an arguable connection to an adverse employment action. The facts presented by the Secretary in this matter are sufficient to establish that there was reasonable cause to believe that there was such a causal nexus.

I find that the Secretary has sufficiently demonstrated that the Complainant engaged in a protected activity. Even if there was no direct order from a supervisor to open the breaker box and insert a finger inside, there is circumstantial evidence that it is management's expectation that a miner do whatever is necessary, when maintenance is not available, to get the mill up and running. Thus, the Complainant's withdrawal from these actions constitutes a protected activity.

I also find that the Secretary has sufficiently demonstrated that the Complainant suffered an adverse employment action when he was terminated. It is well established precedent that termination is an adverse employment action. It is also undisputed that the Complainant was terminated the day after the protected activity occurred. As such, the Complainant has suffered an adverse employment action.

Although Respondent claims he had no knowledge of the protected activity when the decision to terminate was made, the Secretary does not need to prove that the operator has actual knowledge of a complainant's protected activity in a temporary reinstatement proceeding, only that there is a nonfrivolous issue as to knowledge. *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 718 (July 1999). The Complainant's termination letter contains only a vague explanation as to why he was discharged, citing his failure to "meet the standards and expectations set forth by the company" and concerns related to "conduct and performance" as reasoning for the decision. GEX 2. The termination letter also lists actions such as leaving the

workstation without authorization, leaving company property without notice, and neglecting planned maintenance tasks. *Id.* Notably, it does not explicitly reference other specific disciplinary measures that were taken against the Complainant previously to support the termination. No other justifications were provided to the Complainant as to why he was being terminated. The absence of specific events noted in the termination letter raise nonfrivolous issues regarding the Respondent's knowledge of Complainant's protected activity and the potential that it played a role, at least in part, in Complainant's termination.

“Hostility 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.” *Phelps Dodge Corporation*, 3 FMSHRC at 2511 (citations omitted). In this matter, there was undisputed testimony that Spears allegedly commented, “Is this how you want to play this, really?” in response to the Complainant's refusal to perform an activity that he viewed as unsafe. Tr. 152. Although Tidaback, the person who made the ultimate decision to terminate, presented evidence that he was unaware of the protected activity, he testified that he takes into consideration the opinions and observations of supervisors when making termination decisions. Because mine management, including supervisors such as Hale and Spears, are aware of their opportunity to provide input in termination decisions, Complainant's protected activity which they indisputably were aware of, could have influenced their recommendations to terminate the Complainant. This is sufficient to establish a nonfrivolous issue with regard to Respondent's knowledge of Complainant's protected activity as well as potential animus in this matter which may have influenced the input Tidaback received from his management officials, Hale and Spears on site.

The temporal proximity between the protected activity and the adverse employment action strongly supports the causal nexus. The Complainant engaged in the protected activity on September 13, 2023, and was then terminated on September 14, 2023. This is an extremely short period of time and easily meets the threshold to establish that the timing is sufficient to support the nexus.

A temporary reinstatement hearing must be a full evidentiary process that permits all relevant evidence relating to the adverse employment action. *Sec'y of Labor o/b/o Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157 165-66 (Apr. 2021). In response to the Complainant's discrimination complaint, the Respondent claimed that the Complainant was terminated for reasons “strictly related to safety and operational efficiency in the mine.” GEX 5. Accordingly, the Respondent was permitted to present evidence and testimony throughout the hearing in support of this position. “[R]esolving conflicts in the testimony, and ma[king] credibility determinations in evaluating the Secretary's prima facie case” are simply not appropriate “at this stage in the proceeding.” *CAM Mining, LLC*, 31 FMSHRC at 1089 (citing *Chicopee Coal Co.* at 719). While the Respondent's evidence may be relevant or dispositive in a later discrimination proceeding, the only purpose it serves in this proceeding is as an alternative theory as to why the Respondent discharged the Complainant. *See Sec'y of Labor o/b/o Billings v. Proppant Specialists, LLC*, 33 FMSHRC 2383, 2385 (Oct. 2011). There is no obligation to adopt this theory at this stage in the proceeding, and it does not demonstrate that the Complainant brought forth a frivolous complaint.

III. DECISION AND ORDER

For all of the reasons articulated above I find that the Complainant presented sufficient evidence at hearing to render his discrimination complaint non-frivolous. Accordingly, **IT IS ORDERED** that Respondent Moseneca Manufacturer LLC d/b/a American Tripoli, immediately reinstate Complainant Jimmy Lee Hoover to the position he held immediately prior to the September 14, 2023 termination or to a similar position at the same rate of pay and benefits and with the same or equivalent duties assigned.

The Court retains 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.

A handwritten signature in black ink, appearing to read "David P. Simonton". The signature is fluid and cursive, with a large, stylized initial "D" and "S".

David P. Simonton
Administrative Law Judge

Distribution: (Electronic and Certified mail)

Quinlan Moll, U.S. Department of Labor, Office of the Solicitor, 2300 Main Street, Suite 10100, Kansas City, MO 64108, moll.quinlan.b@dol.gov

Russell Tidaback, Managing Member, American Tripoli, 222 Oneida Street, Seneca, MO 64865, RTidaback@deedyco.com

Jimmy Lee Hoover, 1630 Cottage Lane, Seneca, MO 64865, hooverj9233@gmail.com