FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 19, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JASON EBERT, Applicant v. THE MARSHALL COUNTY COAL COMPANY, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2020-0133-DM MSHA Case No. MORG-CD-2020-04 Mine: Marshall County Mine Mine ID: 46-01437

ORDER GRANTING TEMPORARY REINSTATEMENT

Appearances: Ryan Atkinson, U.S. Department of Labor, Office of the Regional Solicitor, Philadelphia, Pennsylvania for the Petitioner

Philip K. Kontul, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh, Pennsylvania, for the Respondent

Before: Judge William B. Moran

This matter concerns the Secretary of Labor's ("Secretary") Application for Temporary Reinstatement of miner Jason Ebert to his position at The Marshall County Coal Company ("Respondent"), filed pursuant to the Secretary's authority under section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). Application for Temporary Reinstatement, December 6, 2019, ("Application"). On December 11, 2019, Respondent, pursuant to its right under Commission Procedural Rule 45(c), 29 C.F.R. § 2700.45(c), requested a hearing on the Secretary's Application. A hearing convened on December 17, 2019 in Wheeling, West Virginia. The only issue considered at the hearing is whether the Secretary's application was frivolously brought.

For the reasons described herein, the Court, finding the Application not frivolously brought, **GRANTS** the Secretary's Application for temporary reinstatement of Jason Ebert, effective as of the date of this Order.

Statement of Facts

As noted, the Respondent requested a hearing on the Secretary's Application for temporary reinstatement. The Secretary called for its first witness Jason B. Adkins, who is the Supervisor of Human Resources for the Respondent mine. Tr. 26. Not long into Mr. Adkins' testimony an evidentiary issue arose. The Court directed that a recess occur for the purpose of having counsel for the Secretary and for the Respondent to confer regarding that issue. The Court excused itself, retiring to chambers while the parties' counsels privately conferred.

Subsequently, the parties' counsels informed the Court that they had completed their conferencing and the proceeding then resumed on the record. At that point, counsel for the Respondent stated that it was withdrawing its request for a hearing. Tr. 68. The Court responded that, pursuant to Respondent's withdrawal of the hearing request, it would treat the matter as effectively operating under 29 C.F.R. § 2700.45(c), titled "Request for hearing." That provision states, in relevant part, "If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement." The parties agreed to the Court's construction of the applicability of the subsection, effectively treating the matter as if no hearing had been requested. Tr. 69.

Principles of Law

In order for a miner to receive an order granting temporary reinstatement, the Secretary must prove that the miner's complaint was not frivolously brought. 30 U.S.C. § 815(c) ("[I]f 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." In drafting section 105(c) of the Mine Act, Congress indicated that a complaint is "not frivolously brought" when 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 Federal Mine Safety and Health Act of 1977, at 6240625 (1978). As part of a temporary reinstatement proceeding, the Commission has recognized that "[i]t [is] not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary state of the proceedings." *Sec'y of Labor on behalf of Deck v. FTS Int'l Proppants*, 34 FMSHRC 2388, 2390 (Sept. 2012).

While the Secretary is not obligated to make out a prima facie case of discrimination during a temporary reinstatement proceeding, evaluating the Application with regard to the elements of a discrimination claim is a useful method to assess whether an application is not frivolously brought. There are two elements to an act of discrimination: first, that the employee engaged in protected activity, and second, that the adverse action complained of was motivated in part by that activity. *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The determination of whether an application is frivolously brought is not limited to the four corners of the discrimination complaint. The statutory scheme provides to miners an administrative investigation and evaluation of an allegation of discrimination. *Hatfield v. Colquest Energy*, 13 FMSHRC 544 (Apr. 1991). In *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317 (June 2016), the Commission expounded upon its *Hatfield* decision, stating that "the miner's complaint establishes the contours for subsequent action." *Hopkins*, 38 FMSHRC at 1340. It noted in *Hopkins* that the complainant's original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint." *Id.* at 1341 (citing *Hatfield*, 13 FMSHRC at 546). The Commission held that the initial complaint formed the basis of MSHA's investigation. *Id*. The key element in these matters is that the determination of the scope of the complaint is not constrained entirely by the four corners of the miner's complaint, but is also informed by MSHA's ensuing investigation:

> The Commission has previously held that 'the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on the Secretary's investigation of the initiating complaint to [him], and not merely on the initiating complaint itself.' *Sec'y o/b/o Callahan v. Hubb Corp*., 20 FMSHRC 832, 837 (Aug. 1998); see *Sec'y o/b/o Dixon v. Pontiki Coal Corp*, 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint. [*Hopkins*], at 1326 n.15.

Mulford v. Robinson Nevada Mining, 39 FMSHRC 1957, 1959-60 (Oct. 2017)(ALJ). Accordingly, the Court need not limit itself strictly to considering the miner's initial discrimination complaint, so long as the additional evidence considered stems from the Secretary's investigation, its application for temporary reinstatement, and evidence evinced at hearing.

The Court's Determination

The Court has reviewed the Secretary's Application. The Application includes various jurisdictional prerequisites, which were also read into the record at the commencement of the hearing.[1] The Application also represents that:

[1] These stipulations were as follows:

> Stipulation 1. At all relevant times to this proceeding Respondent, The Marshall County Coal Company, was an operator of the Marshall County Mine, Mine ID 46-01437.
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> Stipulation 2. The Marshall County Mine is a mine. That term is defined in Section 3(d) of the act, 30 U.S.C. Section 802(d).

> Complainant Jason Ebert, was hired by Respondent to work at its Marshall County Mine operation to work as a laborer, and is a "miner" within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. § 802(g). [ ] Carl Ebert, Complainant's brother, is a miner employed by Respondent who has a long history of being a vocal safety advocate, and who has filed two § 105 (c) discrimination complaints. [ ] On or around January 30, 2019, Respondent became aware that Jason Ebert and Carl Ebert are brothers.[ ] On January 30, 2019, Respondent gave Jason Ebert a choice: resign, or be terminated. [ ] Respondent informed Complainant that, had Respondent been aware that he was Carl Ebert's brother, Respondent would not have hired him.[2] [ ] On January 30, 2019, Complainant resigned his employment

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> Stipulation 3. Respondent Marshall County Coal is engaged in the operation of a coal mine, is therefore an operator as defined in Section 3(d) of the act, 30 U.S.C. Section 802(d).
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> Stipulation 4. At all times relevant to this proceeding products of Marshall County Coal entered commerce or the operations or products thereof affected commerce within the means and scope of Section 4 of the Mine Act, 30 U.S.C. Section 803. Jason Ebert was previously employed by Marshall County Mine. Jason Ebert is a miner within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. Section 802(g). Marshall County Coal is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. The presiding administrative law judge has the authority to hear this case and issue a decision regarding this case.

Tr. 11-12. The stipulations are adopted by the Court as findings of fact for purposes of this temporary reinstatement proceeding.

[2] Administrative Law Judge Kenneth R. Andrews recently examined prior decisions regarding alleged discrimination against a miner for protected activity committed by a relative:

> "[t]here is decisional support for the proposition that a miner is protected under 105(c) from retaliation based on the protected activity of a relative." *Sec'y of Labor on behalf of Kizziah v. C&H Company, Inc*., 14 FMSHRC 1362, 1366 (Aug. 1992)(ALJ Melick) citing *Mackey and Clegg v. Consolidation Coal Co*., 7 FMSHRC 977 (Jun. 1985)(ALJ Broderick); See also *Sec'y of Labor on Behalf of Flener v. Armstrong Coal Co*., 34 FMSHRC 1658, 1665-1666 (Jul. 2012)(ALJ Simonton)(rejecting a strict reading and interpretation of 105(c) that would "require that the complaining miner be the only individual who is protected from reprisal for complaining about a health and safety concern.")
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> In one particularly well-reasoned instance, Judge Zielinski faced a substantially similar situation: "[t]he central issue raised… is whether a discrimination action can be maintained on behalf of Jimmy Caudill based upon his father's protected activity." *Sec'y of Labor on behalf of Jimmy Caudill and Jerry Michael Caudill v. Leeco, Inc. and Blue Diamond Coal Co*., 24 FMSHRC 589, 590 (May 2002).

> with Respondent.[3] He filed a discrimination complaint with MSHA. [ ] After receiving Jason Ebert's complaint, MSHA supervisory investigator J. Cajetan Stepanic conducted a discrimination investigation. [ ] Stepanic's investigation determined that Complainant's complaint that on or about January 30, 2019, Respondent discriminatorily forced him to resign from his employment as a laborer with Respondent because he was related to an individual who had repeatedly engaged in protected activities, was not frivolously brought. [ ] …

Application at 2-3.[4]

Based on the Court's review of the four corners of the contents of the Secretary's Application and upon application of the relevant case law for evaluating such temporary reinstatement applications, as set forth above, the Court has determined that the miner's complaint was not frivolously brought. Complainant's employment with Marshall Coal began on January 28, 2019 and he was terminated from employment on January 30, 2019. Application at 2; Tr. 47. Based on the Application, for purposes of the frivolously brought standard of review, Respondent discriminatorily forced the Complainant to resign from his employment as a laborer with Respondent because he was related to Carl Ebert, who had repeatedly engaged in protected activities. *Id*. There is a sufficient nexus between the protected activity and adverse action to support temporary reinstatement. *Sec'y of Labor on behalf of Shaffer v. Marion Cty. Coal*, 40 FMSHRC 39, 43 (Feb. 2018).

Kingston Mining, 37 FMSHRC 1282, 1294 (June 2015)(ALJ). Though not precedential, the Court finds these ALJ decisions to be well-reasoned and persuasive.

[3] That Ebert officially "resigned" does not cast the situation out of the realm of adverse action. *See, e.g.*, *Simpson v. FMSHRC*, 842 F.2d 453, 461 (D.C. Cir. 1988) ("[c]onstructive discharge doctrines simply extend liability to employers who indirectly effect a discharge that would have been forbidden by statute if done directly.").

[4] Government Ex. 1 was entered as an exhibit at the hearing. It is titled "Statement of Jason Barrett Adkins," but it is not signed by Mr. Adkins. The Court's determination in this matter did not rely upon the statement at all.

ORDER

Having determined the Application was not frivolously brought, it is hereby **ORDERED** that Respondent, The Marshall County Coal Company, reinstate Jason Ebert to his former position at the same rate of pay and with all other benefits that he enjoyed prior to his discharge, effective immediately upon issuance of this Order. This Order shall terminate by operation of law upon the Secretary's determination that a violation of section 105(c) did not occur, or upon resolution of a complaint of discrimination filed under section 105(c)(2) of the Mine Act, whichever occurs first.

William B. Moran

William B. Moran
Administrative Law Judge

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