FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
WASHINGTON, D.C. 20004-1710
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

December 26, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DELBERT LEIMBACH, Applicant	CIVIL PENALTY PROCEEDING Docket No. LAKE 2019-0106-DM No. NC-MD-19-01
v.	
HUBER CARBONATES, LLC Respondent	Mine: Quincy Plant Mine ID: 11-02627

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge William B. Moran

Before the Court is the Secretary of Labor's ("Secretary") application for temporary reinstatement regarding Delbert Leimbach. The Secretary's application for temporary reinstatement of Mr. Leimbach is pursuant to the Secretary's authority under section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). Respondent, Huber Carbonates, LLC ("Respondent") contested the Secretary's Application. A hearing on the temporary reinstatement application was conducted on December 19, 2018. The parties agreed at the outset of the hearing that there were no jurisdictional issues and that the only issue before the Court is the determination as to whether the application was frivolously brought. Tr. 8.

For the reasons that follow, the Court, finding that the Application was not frivolously brought, **GRANTS** the Secretary's Application for temporary reinstatement of Delbert Leimbach, effective as of the date of this Order.

Testimony at the Temporary Reinstatement Hearing.

Complainant Delbert Leimbach was the sole witness at the hearing. Leimbach was an employee of Respondent, Huber Carbonates, LLC from early 2010 until his termination of employment in September 2018. Tr. 31. In 2015, Leimbach was hired as the Chief Engineer at Huber's Marble Hill, Georgia plant. Tr. 41-42. That plant has a limestone mine. Tr. 46. Leimbach was subject to annual performance reviews and in his eight years with Huber he never has had a negative review. Tr. 47.

Prior to filing his discrimination complaint, Complainant was involved in a 105(c) discrimination investigation. This occurred in 2018, around April. Tr. 48. It involved former

Huber employee Justin Hickman, who was the ball mill coordinator at the plant. Tr. 48. At that time Liembach met with Robert Hogan, who was then the production manager. Complainant stated that Hogan was upset over Hickman's termination. Tr. 49. In essence, it was Complainant's contention that the performance improvement plan ("PIP") for Hickman was misleading in that it asserted that Hickman failed to complete a project. Complainant asserted that a project plan was devised but unfunded and that was the reason the project was not completed. Tr. 51. Based on that unfairness, Leimbach contacted the MSHA special investigator for Hickman's 105(c) discrimination claim in April and May of 2018. *Id.*

In May 2018, Leimbach spoke with Huber management about Hickman's 105(c) case. At that time he spoke with Sharon Noble, the vice president of HR and Brian Williams, vice president of Environmental Health and Safety. These conversations occurred after Hickman had been fired and were part of Huber's internal investigation related to the Hickman matter. Tr. 56. At that meeting, Leimbach related that Huber asked him if he had "heard any Huber management saying that [Huber] should change work procedures to affect the dust samples. [Leimbach] responded in the affirmative. [Huber also] asked [Leimbach] if [he] had talked to MSHA. [Leimbach] responded in the affirmative." Tr. 57. Leimbach also told Noble and Williams about his conversations with MSHA, advising that he "told them [MSHA] the same information about Justin[] [Hickman's] PIP not being accurate." *Id.*

Leimbach also participated in a 105(c) investigation regarding a complaint of discrimination filed by Hickman. He spoke to investigators from the Mine Safety and Health Administration (MSHA) and he informed his [Huber] managers that he had discussed the investigation of that matter with MSHA, and repeated the information he had provided MSHA with regard to that 105(c) investigation. *Id.*

Leimbach testified that following that meeting with Huber things began to change in his employment. Prior to that meeting, Leimbach had been brought into meetings with MSHA involving dust issues, but after it, he was not brought into to any new MSHA items. Tr. 59. Further, he was called in for a subsequent Huber internal investigation – this one including Huber's legal counsel. That second meeting occurred about a month after the meeting with Noble and Williams. It covered the same topics as the initial meeting – inquiring if he had talked with MSHA, and if had he heard Huber management saying that they should change work procedures regarding dust. Tr. 59-60.

Subsequently, during the first week of August 2018, there was an MSHA inspection at Huber at which about five inspectors came to the mine. They arrived because a complaint had been called in to MSHA. On that day, Leimbach stated that several employees came to his office, asserting that he must have been the one who called MSHA. Tr. 60. Leimbach also heard that several members of management believed that he was the person who called MSHA. Tr. 60-61. Leimbach asserted that Mike Morris, the plant manager, Sean Eisenbeiss, the maintenance manager, and Kevin Garnett, the Environmental Health and Safety [EHS] coordinator, all told him that management believed he was the person who called MSHA. Tr. 60-61. Leimbach denied that he was the source to each person who made that claim about him. Tr. 61.

Thereafter, on August 22, 2018, Leimbach met with Huber management's Dave Daisy, the director of HR for ground calcium carbonate. Tr. 64-65. Their discussion included Leimbach's reasons for being unhappy with Huber and Leimbach's informing Daisy that Huber management wanted to modify work practices to make the dust sampling come out better. Leimbach expressed that it was hard to work in that environment, where things were not "on the up and up." Tr. 65. By that expression, Leimbach was clear – he meant doctoring of samples as a serious matter. *Id*. Daisy's reaction to their conversation was to present Leimbach with three options – move to another Huber business unit, receive a generous payout, or stay at his present job, with the last choice described by Daisy as the least desirable option. Tr. 66.

Following that, on September 17, 2018, Leimbach met again with Daisy and with Richard Lewis, the director of safety for ground calcium carbonate. Tr. 66-67. The upshot of that meeting was Leimbach was suspended pending an investigation. Three days later, on September 20th, Leimbach was terminated. [1] Following his testimony of direct, Leimbach was cross-examined.[2]

Standard of Review

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. 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).

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 (Sep. 1999); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

[1] The circumstances involving Leimbach's basis for Respondent's decision to terminate his employment are disputed by the Secretary and Respondent. The dispute involves two related issues: the grounds provided in Leimbach's complaint and the issue of whether an email from Huber's counsel to Huber can legitimately be considered in the discrimination claim. In view of this, at the outset of the hearing the Court announced that it would bifurcate the issues presented so as to compartmentalize mention of the disputed matter. It achieved this by directing the Secretary to first present its evidence supporting the application for temporary reinstatement apart from the disputed matter. Following that evidence, the Secretary elected to stand on that presentation and not to delve into the disputed matters. The Respondent did not raise the disputed matter either, except to maintain that the decision did not constitute a waiver of that issue in subsequent arguments. The Court reassured the Respondent that the issue was not waived.

[2] The cross-examination is referenced in the discussion section of this Order.

"Protected activity" includes filing or making complaints "under or related to" health and safety standards issued under the Mine Act, as well as initiating or participating in proceedings commenced under the Mine Act. 30 U.S.C. § 815(c). *See also 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 (3d. Cir. 1981); *Sec'y on behalf of Lester v. Know Crrek Coal Corp*., 35 FMSHRC 1916, 1928-1931 (June 2013) (ALJ).

As the Court stated at the hearing, 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 *Sec. v. Hopkins County 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* 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* 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, 1959-1960, (Oct. 2017)

Discussion

The Court, upon hearing and evaluating the testimony of Mr. Leimbach, concludes that his testimony was credible and, for purposes of this temporary reinstatement application, that his testimony was not diminished by the cross-examination. Although the cross-examination raised questions concerning the extent to which the Complainant's participation in prior safety matters was diminished, post raising his safety concerns, those questions did not demonstrate that the application was frivolous. As noted above, the temporary reinstatement proceeding is not the time to weigh such matters against the complainant's testimony: "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Chicopee*, 21 FMSHRC 717, 719 (July 1999).

As set forth above, again in the context of a temporary reinstatement proceeding, Leimbach's testimony, when considered together with his interview by MSHA in connection with his discrimination complaint,[3] established protected activity and a nexus to the adverse action, sufficient to demonstrate that the Application was not frivolously brought.

Employee's Protected Activity and Operator's Adverse Action

The Court concludes and finds that there is reasonable cause to believe that Complainant Delbert Leimbach engaged in protected activity and that there is reasonable cause to believe that the adverse action, his termination, was motivated in part by his engagement in the protected activity discussed above. A nexus has been established.[4]

ORDER

For the foregoing reasons, the Court finding that the Application was not frivolously brought, Respondent Huber Carbonates, LLC is hereby **ORDERED** to reinstate Delbert Leimbach to his former position at the same rate of pay and with all other benefits that he enjoyed prior to his discharge, as of the date of this decision.

William B. Moran

William B. Moran
Administrative Law Judge

[3] *See*, Declaration of MSHA Special Investigator David Schwab, Exhibit A, to Application for Temporary Reinstatement, Official File at 5-7.

[4] The Commission has established several indicia of discriminatory intent to establish a "nexus" between the employee's protected activity and the alleged adverse action. Those factors include (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Sec'y on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Secretary need not demonstrate each factor individually; rather, any combination of factors is sufficient so long as they support by substantial evidence a conclusion that there is reasonable cause to believe a complainant suffered adverse action for engagement in protected activity.

Distribution:

Jason Nutzman, Dinsmore & Shohl LLP, 707 Virginia Street East, Suite 1300, Charleston, WV 25301

R. Jason Patterson, Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, Rm. 844, Chicago, IL 60604

Delbert Ted Leimbach, 3208 Lindell Avenue, Quincy, IL 62301