

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 29, 2016

SECRETARY OF LABOR, U.S.
DEPARTMENT OF LABOR, on behalf of
STEVE GLOSSON,

Complainant,

v.

LOPKE QUARRIES, INC.,
Respondents.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. SE 2016-299-DM
MSHA Case No. SE-MD-16-09

Mine: Dunn Construction
Mine ID: 01-03411

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Rae

I. STATEMENT OF THE CASE

This matter is before me upon an Application for Temporary Reinstatement filed by the Secretary of Labor (“the Secretary”) on behalf of Steve Glosson (“the Complainant”) pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”), 30 U.S.C. § 815(c)(2), and Commission Procedural Rule 45, 29 C.F.R. § 2700.45.

The application seeks reinstatement of the Complainant to his former position as a loader operator at the Dunn Construction limestone quarry (“the mine”) operated by Lopke Quarries, Inc. (“the Respondent”) pending final disposition of a discrimination complaint the Complainant has filed against the Respondent. Alternatively, the application requests that the Respondent provide temporary economic reinstatement to the Complainant.

The application was filed with the Commission on August 16, 2016. The Respondent has not submitted a response or requested a hearing. The Commission’s procedural rules provide that if a hearing is not requested within ten calendar days following receipt of a temporary reinstatement application, the presiding administrative law judge shall immediately review the application and issue a written order of temporary reinstatement if he or she determines that the miner’s underlying discrimination complaint “was not frivolously brought.” 29 C.F.R. § 2700.45(c). Accordingly, I now review the Secretary’s application pursuant to Rule 45(c).

II. FACTUAL BACKGROUND¹

¹ Because the Respondent has not responded to the application for temporary reinstatement, this section is premised entirely on the facts alleged in the Secretary’s application as well as in the

The Complainant began working for the Respondent as a loader operator at the Dunn Construction mine on February 15, 2016. He operated a Kawasaki loader and two Dresser loaders, which were used to move limestone from a stockpile to a hopper, under the supervision of plant supervisor Timmie Decker. During his time at the mine, the Complainant allegedly reported a number of safety-related problems with the loaders on pre-operation paperwork and lodged multiple safety complaints with Decker. The complaints concerned problems with the loaders' brakes, lights, windows, windshield wipers, and heating and air conditioning systems, as well as oil leaks. In addition, after Decker allegedly instructed the Complainant to allow the Dresser loaders to coast to a stop at the hopper rather than engaging the brakes, the Complainant complained to Decker that this procedure was unsafe.

The Respondent terminated the Complainant's employment on April 1, 2016. On April 22, 2016, the Complainant filed a discrimination complaint with MSHA under section 105(c) of the Mine Act claiming that he was terminated because he had reported safety hazards. MSHA investigated the complaint and interviewed Decker, who allegedly admitted telling the Complainant to coast to a stop when approaching the hopper and agreed that the Complainant had reported problems with the loaders. Decker also told the MSHA special investigator that the Complainant took 40 to 45 minutes to perform preshift examinations on the equipment. Based on the information gathered during the investigation, the Secretary concluded that the Complainant's discrimination complaint was not frivolously brought and initiated this temporary reinstatement proceeding.

III. LEGAL FRAMEWORK AND ANALYSIS

Section 105(c) of the Mine Act, 30 U.S.C. § 815(c), prohibits discrimination against miners for exercising any right that is protected under the Act. "[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." 30 U.S.C. § 815(c)(2). Thus, unlike a trial on the merits of a discrimination complaint, where the complainant bears the burden of proof by a preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute to the narrow question of whether the underlying discrimination complaint was "not frivolously brought." *Id.*; see 29 C.F.R. § 2700.45(d); *Sec'y of Labor o/b/o Deck v. FTS Int'l Proppants, LLC*, 34 FMSHRC 2388, 2390 (Sept. 2012); *Sec'y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). This standard reflects Congressional intent that "employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding." *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747-48 (11th Cir. 1990).

In accordance with the narrow scope of a temporary reinstatement proceeding, it is not the judge's duty at this stage to make credibility determinations or resolve conflicting evidence. *Deck*, 34 FMSHRC at 2390; *Sec'y of Labor o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009); *Sec'y of Labor o/b/o Albu v. Chicopee Coal Co.*, 21

Complainant's underlying discrimination complaint and the declaration of MSHA special investigator Robert Ashley, both of which are appended to the application.

FMSHRC 717, 719 (July 1999). The judge must decide only whether the complaint “appears to have merit.” *Deck*, 34 FMSHRC at 2390 (citing legislative history of Act). Although the complainant is not required to make out a prima facie case of discrimination, it is useful to analyze the complaint in terms of the elements of a prima facie case, which include: 1) that the miner engaged in protected activity, and 2) that he suffered an adverse employment action that was motivated at least in part by the protected activity. *Williamson*, 31 FMSHRC at 1088. Motivation can be established by showing the employer’s knowledge of the protected activity, hostility or animus towards the protected activity, and coincidence in time between the protected activity and the adverse action. *Sec’y of Labor o/b/o Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

Without making any credibility determinations, after reviewing the partial written statement of the Complainant² and the initial report from the MSHA special investigator, I find that the complaint appears to have merit. The Complainant alleges that he made multiple safety complaints to the operator between February 15 and April 1, 2016. This constitutes protected activity under section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). The Complainant suffered an adverse action when his employment was terminated on April 1. His supervisor allegedly admitted knowledge of the protected activity to the MSHA special investigator and further stated that the Complainant took 40 to 45 minutes to perform preshift examinations. This statement could be construed to show hostility toward the protected activity of checking equipment for safety defects. The coincidence in time between the adverse action and the alleged protected activities, which occurred over the six-week period immediately preceding the Complainant’s termination, could support a finding that the termination was motivated at least in part by intent to discriminate against the Complainant because of his protected activities. Accordingly, I find that his complaint was not frivolously brought and that he is entitled to temporary reinstatement.

ORDER

The Application for Temporary Reinstatement is hereby **GRANTED**. The Respondent is **ORDERED** to immediately begin providing the Complainant with economic reinstatement at his usual rate of pay and overtime³ plus any benefits to which the Complainant would be entitled if he retained his former position as a loader operator.



Priscilla M. Rae
Administrative Law Judge

² At least one page is missing from the complaint he filed with MSHA.

³ The complaint indicates that he worked 40 hours per week at the mine at a rate of \$17.50 per hour plus 20 to 30 hours of overtime each week at a rate of \$26.25 per hour.

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