

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 10, 2015

SECRETARY OF LABOR, MSHA,
on behalf of MATTHEW G. TOTTEN,
Complainant,

v.

TK MINING SERVICES, LLC, and
THE MARSHALL COUNTY COAL
COMPANY,

Respondents.

SECRETARY OF LABOR, MSHA,
on behalf of JOSEPH A. WHIPKEY,
Complainant,

v.

TK MINING SERVICES, LLC, and
THE MARSHALL COUNTY COAL
COMPANY,

Respondents.

TEMPORARY REINSTATEMENT
PROCEEDINGS

Docket No. WEVA 2015-101-D
MORG-CD-2014-22

Docket No. WEVA 2015-102-D
MORG-CD-2014-25

Mine ID: 46-01437
Contractor ID: K393
Mine: McElroy Mine

ORDER DENYING MOTION TO DISSOLVE

Before: Judge Rae

This matter is before me upon two applications for temporary reinstatement filed by the Secretary of Labor on behalf of Matthew G. Totten and Joseph A. Whipkey (“the Complainants”) 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).

Background

The Complainants were formerly employed by TK Mining Services, LLC (“TK”), a contractor that provided services to mine operator The Marshall County Coal Company (“Marshall”). The Complainants were discharged on August 18, 2014. They filed discrimination complaints against both Respondents under the Mine Act on October 28, 2014. On November 18, 2014, I determined that the Complainants’ underlying discrimination complaints were “not frivolously brought” and ordered the Respondents to temporarily reinstate the Complainants effective the date they were discharged. On December 17, 2014, I approved

the parties' agreements for economic reinstatement whereby Marshall agreed to provide payments to TK beginning November 18, 2014, and TK would then process the payments and distribute them to the Complainants. A hearing on the merits of the underlying discrimination claims is set to go forward in November 2015.

In March 2015, Marshall filed a motion requesting dissolution of the temporary reinstatement and settlement orders on the grounds that its parent company, Murray American Energy, had discontinued all business with TK as of December 5, 2014. Marshall submitted an affidavit from mine superintendent Eric Lipinski, who is alleged to have been involved in the Complainants' discharge, attesting that the decision to discontinue business with TK was unrelated to the discrimination complaints.

The Secretary opposed Marshall's motion and requested an opportunity to conduct discovery to address it. I granted that request. Marshall has now renewed its motion.

Parties' Positions

In support of the renewed motion to dissolve, Marshall has submitted an affidavit from another superintendent, Eric Koontz, attesting that the reason Murray American Energy decided to discontinue business with TK was because it wanted to switch to a less expensive contractor with whom it had a longstanding business relationship. Koontz attests that this decision affected more than one hundred contract workers at five different mines and was not based upon the Complainants' discrimination complaints. Accordingly, Marshall argues that its temporary reinstatement obligation should be tolled because irrespective of their discrimination complaints, the Complainants would have stopped receiving wages from work at Marshall's mine as of December 5, 2014.

The Secretary responds that Marshall's motion should be denied because Marshall's decision to terminate its contract with TK was potentially a discriminatory act. In support of this contention, the Secretary points to evidence that Marshall displayed hostility toward the protected activity alleged by the Complainants and asserts there is a coincidence in time between the filing of the temporary reinstatement complaints and Marshall's decision to terminate its contract with TK. Alternatively, the Secretary argues that more discovery is needed.

TK has not responded to Marshall's motion.

Discussion

The Commission has recognized that the occurrence of certain subsequent events, such as a layoff or similar event caused by a change in economic or business circumstances, may toll an operator's obligation to continue providing reinstatement under a temporary reinstatement order. *Sec'y of Labor o/b/o Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009), citing *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638 (Sept. 1989). The operator bears the burden of proving by a preponderance of the evidence that work is not available for the complainant due to the changed circumstances. *Id.* at 1054-55. However, if the operator's objectivity is called into question, the "not frivolously brought" standard must be applied,

meaning that the Secretary may prevent tolling by establishing facts which could support a claim that the changed circumstances may have been caused at least in part by the complainant's protected activity. *Sec'y of Labor o/b/o Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 1183 (May 2013); *Sec'y of Labor o/b/o Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394 (Feb. 2013), *appeal dismissed*, 742 F.3d 82 (4th Cir. 2012).

Although the Commission has not previously confronted a situation identical to the facts at hand, the Commission has indicated that the spirit of the Mine Act's discrimination provision is to make the miner whole until the case can be decided on the merits. *See Sec'y of Labor o/b/o Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 (July 1997) (discussing pertinent legislative history). At this stage in the proceedings, the case law is clear that the Secretary's burden of proof is only to demonstrate that the evidence as a whole supports a "non-frivolous" claim that the changed economic circumstance Marshall has identified – namely, its decision to terminate its contract with TK – may have been motivated in any way by the Complainants' alleged protected activity. The Secretary has pointed to evidence that could support this claim, including a coincidence in time between the temporary reinstatement claims, (which were filed on October 28, 2014 and granted on November 18, 2014), and Marshall's terminating its contract with TK effective December 5, 2014. Accordingly, tolling must be denied.

It is **ORDERED** that Marshall's motion to dissolve its temporary reinstatement obligation is **DENIED**.



Priscilla M. Rae
Administrative Law Judge

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