FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 10, 2014

SECRETARY OF LABOR, MSHA, on behalf of DAVID S. WOOD, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. KENT 2014-257-D
	:	MADI CD 2014-08
v.	:	
	:	
HIGHLAND MINING CO., LLC., Respondent	:	Mine Mine No. 9
	:	Mine ID 15-02709

AMENDED DECISION[1] AND ORDER OF TEMPORARY REINSTATEMENT

Appearances:

Jennifer Booth Thomas, Esq., Malia Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;

Jeffrey K. Phillips, Esq., Candace B. Smith, Esq., Steptoe & Johnson, Lexington, Kentucky, for the Respondent

Before: Judge Moran

This case is before the Court on an application for temporary reinstatement filed on February 11, 2014, by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Highland Mining Co., LLC, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act ("Mine Act" or "Act") of 1977, 30 U.S.C. § 815(c)(2). The Application seeks an Order temporarily reinstating David S. Wood to his former position with the Respondent at its No. 9 Mine, pending the final hearing and disposition of the discrimination complaint. On February 13, 2014, Respondent filed a request for a hearing on the application. Thereafter, pursuant to 29 C.F.R. § 2700.45, a hearing was held in Henderson, Kentucky on March 5, 2014.

For the reasons which follow, for the purposes of temporary reinstatement, the Court finds that the Secretary presented sufficient evidence at the hearing to establish that Mr. Wood

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[1] When initially issued on March 7, 2014, the decision incorrectly stated at page 3 that Mr. Wood "appeared for work on October 1st for his shift that was to begin on October 2nd." This Amended Decision corrects those dates to reflect that Wood "appeared for work on November 1st for his shift that was to begin on November 2nd." In all other respects, the original decision remains unchanged, including the March 7, 2014 effective date of the decision.

engaged in protected activity. It is undisputed that he was thereafter terminated from his employment. Applying the applicable standard of review for such proceedings, the Court finds that a nexus between that activity and the alleged discrimination was established and upon review of the entire record, concludes that the complaint was not frivolously brought. Accordingly, the Court orders that, effective with the date of this decision, Mr. David S. Wood be reinstated to his former position with the Respondent at its No. 9 Mine, pending the final hearing and disposition of the discrimination complaint.

Applicable Law

The law pertaining to temporary reinstatement proceedings is well-established. As the Commission noted in *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC,* "Under section 105(c)(2) of the Mine Act, '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 immediate reinstatement of the miner pending final order on the complaint.' 30 U.S.C. § 815(c)(2). The Commission has recognized that the 'scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.' *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), aff'd, 920 F.2d 738 (11th Cir. 1990). The Mine Act's legislative history defines the 'not frivolously brought' standard as indicating that a miner's 'complaint appears to have merit.' S. Rep. 95-181, 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*, at 624 (1978). The 'not frivolously brought' standard reflects a 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, 748 (11th Cir. 1990) ("*JWR*"). . . . Courts and the Commission have likened the 'not frivolously brought' standard set forth in section 105(c)(2) with the 'reasonable cause to believe' standard applied in other statutes. Id. at 747 ("there is virtually no rational basis for distinguishing between the stringency of this standard and the 'reasonable cause to believe' standard"); *Sec'y of Labor on behalf of Markovich v. Minnesota Ore Operations, USX Corp.*, 18 FMSHRC 1349, 1350, 1352 (Aug. 1996). In the context of a petition for interim injunctive relief under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j), courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden. *See Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001) (citations omitted). Similarly, at a temporary reinstatement hearing, the Judge must determine 'whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.' *JWR*, 920 F.2d 744. As the Commission has recognized, 'it [is] not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings.' *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 164 (Feb. 2000) (Marks and Beatty, dissenting)." 34 FMSHRC 1875, 1877-1878 (Aug. 2012).

Findings and Analysis

At the March 5, 2014 hearing, the Complainant, David S. Wood was the sole witness. For the limited purpose of the temporary reinstatement proceeding,[2] the Court found Mr. Wood to be a credible witness. He testified that on October 14, 2013 he made a safety complaint to supervisor Darren Darnell, declining to ride with the supervisor on a mine golf cart, because Mr. Darnell was extremely angry with him over an apparent misunderstanding concerning the means by which he was to be transported to the Number 1 Unit that day. In the supervisor's agitated state, Mr. Wood testified that he did not feel safe riding in the cart with him. According to Mr. Wood, at one point during the angry outburst from Darnell, the supervisor threatened that he would have Wood fired if he did not get on the golf cart. The Complainant's work refusal, refusing to ride in the golf cart with the irate supervisor at the wheel, is the alleged protected activity invoked. Once Mr. Darnell calmed down, Mr. Wood then did ride with him. Tr. 15-25. Following the incident, Mr. Wood continued to work at the mine for the ensuing two weeks, through October 25, 2013. Thereafter, on October 28th, Mr. Wood had a family medical issue, involving an illness that was affecting his entire family. He called in to work, per the mine's policy for illness, one hour before his shift, leaving a voice mail message at the number. In connection with a visit to his doctor on October 31st, which was his second doctor's visit in connection with his own illness, Mr. Wood was advised that, if he felt sufficiently improved, he could return to work on November 2nd. Tr. 26-30, and GX 2.

When Mr. Wood appeared for work on November1st for his shift which was to begin on November 2nd, he was advised by the third shift foreman that he could not work and that he would have to speak with the mine's human resources director. Tr. 28, 32. He then called the mine and was advised that he was to come to the mine on November 5th for a meeting. He did so and was advised at that time that he was being "suspended with intent to discharge." Tr. 33. He was then told to appear for a second meeting at 9:00 a.m. on November 6th. He did so appear for the second meeting and saw supervisor Darnell that morning. Mr. Wood stated that Darnell "threw a slur" at him and asked if he was looking for a job. Tr. 35. The meeting then followed and the Complainant was told that he violated the mine's leave policy for illnesses and that he was being terminated for that failure. Tr. 40-41. Following his termination, Mr. Wood filed for unemployment compensation and was approved for those benefits. About a week after his termination, Mr. Wood learned that another employee had a similar issue related to the mine's illness policy and what constitutes a satisfactory excuse for such absences. The difference was that the other employee was not terminated. This prompted Mr. Woods to call MSHA, around December 21st or the 22nd, and then he presented his account of the events leading up to his termination, including the altercation with Darnell and the illness issue.

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[2] Conflicts in testimony, in this case, raised only putatively in the context of cross-examination of the Complainant as the sole witness at the hearing, are not to be resolved in a temporary reinstatement proceeding. To do otherwise would transform the proceeding into a hearing on the merits. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

Following Mr. Wood's testimony on direct, the Respondent was afforded a full opportunity to conduct a cross-examination of his account of the events. Tr. 60-112. The Court then heard and considered the parties' closing statements.[3] Tr. 114-119. Following that, the Court announced that it had made its determination and offered that it was willing to state it on the record or, if the parties preferred, it would defer its determination announcement until the issuance of its written decision. The parties opted for the Court to disclose its decision at the proceeding. This decision memorializes that determination.

Remembering that the temporary reinstatement proceeding is a very limited inquiry, the Court stated its finding that it was not a frivolously brought complaint. In the context of hearing testimony only from Mr. Wood, the Court finds that he was a forthright and credible witness in relating his telling of the events in issue. Having made that baseline determination, it is noted that no conflicting testimony was presented and that, in any event, credibility determinations, had there been conflicting accounts, would not be appropriate to resolve at this stage. The facts in the record support the conclusion that Mr. Wood engaged in protected activity when he made his work refusal. This is especially true, when considered in the full context of the testimony, regarding issues about the safety of the golf carts and how they were driven, together with the testimony about the very agitated state of Mr. Darnell.

The Court took note that, in essence, the Respondent was contending that the Complainant's discharge was for failure to follow its sick leave policy and, implicitly that Mr. Cook's safety complaint was invented after the fact. The Respondent has also noted that the Complainant continued to work for two weeks after the incident with Mr. Darnell. The former contention is not ripe for a determination in the context of a temporary reinstatement. As to the latter argument, in addition to the impropriety of finding whether that was the genuine basis for his dismissal or not, it is well-recognized that although an intervening period of time could form the basis to support a non-discriminatory ground for a dismissal, such a brief interval is sufficient to support a finding of an association between the protected activity and the adverse action. Put more succinctly, two weeks is an insufficient interval of time to separate the protected activity from the adverse action. *See, Sec. of Labor on behalf of Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1090 (Oct. 2009) and *Sec. of Labor on behalf of Norman Deck v. FTS Int'l Proppants, LLC,* 2012 WL 4753952 (Sept. 2012).

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[3] The Respondent cited the decision of a fellow administrative law judge for its persuasive value in the matter at hand, while acknowledging that it has no precedential effect. However, upon inquiry by the Court, Respondent could not state whether the cited decision, *Brannon v. Panther Mining,* 31 FMSHRC 1533 (Nov. 2009) (ALJ), was a temporary reinstatement proceeding or a full discrimination proceeding on the merits. The Court, in preparing this decision, found that it was not a temporary reinstatement matter, thus negating even the persuasive impact of it.

ORDER

Based on the foregoing, the Court having found that the Complainant's application for temporary reinstatement was not frivolously brought, the Court **ORDERS** that Mr. David S. Wood be reinstated 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 original date of the issuance of this decision on March 7, 2014.

William B. Moran

William B. Moran
Administrative Law Judge

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