FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 6 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JOSHUA D. BURKHART, Petitioner v. PEABODY MIDWEST MINING, LLC, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2014-342-D VINC-CD-2014-01 Mine ID: 12-02295 Mine: Francisco Underground Pit

ORDER ON TEMPORARY REINSTATEMENT

Appearances: Travis W. Gosselin, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, IL for Complainant

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, PA for Respondent

Before: Judge Rae

This case is before me upon an application for temporary reinstatement filed by the Secretary on behalf of the complainant under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) and 29 C.F.R. §2700.45.

Statement of the Case

On April 16, 2014, Respondent made a timely request for a hearing which was held on April 29, 2014 in Evansville, Indiana.

The parties submitted the following stipulations: 1) Peabody is an operator as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977 as amended (hereinafter "the Mine Act"); 2) Operations of Peabody at the Francisco Underground Pit mine in or around Francisco, Indiana are subject to the jurisdiction of the Mine Act; 3) This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act; and 4) Prior to his

termination by Peabody, Joshua D. Burkhart was a "miner" as defined in Section 3(g) of the Mine Act. Ex. J-1.

For the reasons set forth below, I find the complaint of discrimination was not frivolously brought and Burkhart is entitled to temporary reinstatement.

Summary of Evidence

Joshua Burkhart, previous to his recent termination, was employed by Peabody Midwest Mining at the Francisco mine as a ram car driver. He had been at the mine for approximately 3 years and was assigned to the third shift which commenced at 11 p.m. at the time of the incident at issue. Ex. R-4. His normal assignment was as a coal hauler, or ram car driver. His immediate supervisor was the face boss, Jamie Mincey. The mine manager was Clint Underhill, however, on the night in question, Chris Falls was filling in for Underhill. *Id.*

On the January 26-27 night shift, Burkhart was assisting another miner hanging cable overhead. Directly thereafter, he felt a burning pain in his right shoulder. He reported the injury to Mincey who in turn called out to Falls, informing him that Burkhart needed medical attention. Falls accompanied Burkhart to Gibson General Hospital, arriving at approximately 0410 hours. He was discharged that same morning at 0500 hours. The discharge summary indicates that he did not suffer a fracture or dislocation and it was recommended that he apply ice. He was given a sling for support of his right arm and was prescribed Norco and Norflex for pain and inflammation. The return to work portion of the discharge sheet indicates that he was restricted to limited duty for a few days. Ex. G-2. Burkhart testified that he was further told by the physician, in the presence of Falls, that he should not work underground. Tr. 21.

Upon discharge, Burkhart was taken back to the mine where he clocked out and went home. A copy of the discharge paperwork was given to Mike Workman, the safety director. Burkhart took the Norco, which he stated was a generic of Lortab, later that morning as prescribed for pain. The restrictions attendant with the medications was to avoid driving and operating machinery. They made him feel dizzy and tired. Tr. 23, 43. By the time he reported for work on the night of the 27th he had taken three doses of the pain medication, the last one being about 35 minutes before reporting in. Tr. 25.

Burkhart's statement as to what happened upon reporting to work the night of the 27th and what transpired thereafter differs from the Respondent's version. Burkhart testified that upon arrival at the mine that night his foreman, Underhill, asked repeatedly whether he could work underground. The third time he was asked this question he responded that he thought it would be unsafe for him to operate a ram car while on medication. Underhill continued to insist that he operate his ram car despite the light duty chit and the effects of medication. Ex. R-4; Tr. 28-29. After refusing to work underground, Burkhart was told to sweep the locker rooms. When he finished this task, Underhill told him to go home because there was nothing further he could do. Tr. 30-32. Later that evening, Burkhart received a telephone call from Mike Workman and Ben Greenwell in Human Relations and was told not to report in for a few days and that a follow-up medical appointment had been made for him on Thursday, January 30. He

was accompanied to this appointment by Workman, at which time he was again told to remain on light duty and not work underground. Tr. 34; Ex. R-4. Initially, Workman told him to report as usual that evening and his restrictions would be accommodated. Later, however, Workman called him and told him not to report for work but to report on Friday morning at 10 a.m. for a meeting. He met with Jon Dever and was terminated for insubordination based upon his refusal to work underground the night of the 27th. Ex. R-4; Tr. 36. Burkhart testified that it would have been unsafe to him to perform any other tasks underground besides operating the ram car because of the effects of the medication. Tr. 29.

Respondent presented the testimony of three witnesses, Underhill, Mincey and Greenwell. Their testimony was essentially that on the night of the 27th during the management meeting prior the beginning of the night shift, Underhill and Mincey had determined that there were jobs that Burkhart could do within his light duty restrictions. Tr. 47, 67. Before Underhill could tell Burkhart what jobs he would be doing, Burkhart showed up without his mining clothes, which precluded his performing any duties because they did not have tasks that could be done on the surface. Underhill testified that he found another miner who was willing to give him clothes to use underground. When Burkhart heard he would not be working on the surface, according to Underhill, he just decided to leave. Tr. 53.

Applicable Law and Conclusions

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that "if miners are to be encouraged to be active in matters of safety and health they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 45(d) provides:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

29 C.F.R. § 2700.45(d).

In its decision in *Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court noted that the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' - an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are not insubstantial or frivolous.'

920 F.2d at 747 (citations omitted).

While the Secretary is not required to present a prima facie case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. As a general proposition, to demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in safety related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. See *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980) rev'd on other grounds sub nom. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (Apr. 1981).

It is not the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses at the preliminary stage of the proceedings. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717 (July 1999). It is sufficient to find the Complainant engaged in protected activity, the respondent had knowledge of that activity, and there was a coincidence in time between the protected activity and adverse action. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009).

Respondent takes the position that first, the complainant has fabricated the facts and secondly, that the complainant did not have a good faith or reasonable basis upon which to refuse to work due to his injury. This is based upon the allegation of Underhill that they had intended to assign tasks to Burkhart that met the limited duty restrictions and were not unsafe, however, he elected to walk off the mine property before Underhill or Mincey had the opportunity to tell him what those tasks were. Responded asserts that the "quantitative" evidence proves these points and therefore, no issue of credibility is involved. I disagree.

In order for me to find that the complainant has fabricated the facts, I would necessarily have to make a credibility determination against Burkhart. The only "quantitative" evidence admitted at hearing was a computer generated time sheet which indicates that Burkhart did not clock in for work on the January 27/28 shift. This document was offered to impeach Burkhart's statement that he worked for several hours sweeping the locker room on the shift after his accident. Respondent urges that the information is irrefutable and therefore, proves Burkhart fabricated the facts. It serves only to create a conflict in testimony between Burkhart's and Underhill's as to whether he worked for several hours that night or not. It also raises the issue of whether the document itself is accurate. These issues are not within the scope of a temporary reinstatement hearing.

Respondent's second argument also calls for a credibility determination beyond the scope of this hearing. Respondent cited *Bush v. Union Carbide*, 5 FMSHRC 993 (June 1983) in support of its assertion that a work refusal must be made in good faith and be reasonable in order for it to be protected activity. This is an accurate statement of the law. The *Bush* matter involved a trial on the merits of the discrimination complaint; it was not a temporary reinstatement proceeding. The Commission upheld the ALJ's determination that the complainant's work refusal was not reasonable. It stated that the ALJ made his credibility determination against the complainant based upon substantial evidence produced at the hearing. At issue here is whether Burkhart's refusal to work underground on the January 27/28 shift was reasonable and in good faith. The resolution of that issue depends upon whether Burkhart's account of the facts is more credible than Underhill's. Burkhart maintained he was repeatedly asked by Underhill whether he could work underground on the coal hauler and that no other work was offered to him. He maintained that he specifically told Underhill that when he broke his collar bone he was allowed to perform light duty on the surface. Underhill told him they no longer allowed for light duty on the surface. Ex. R-4. Underhill testified that he had jobs identified that he intended to assign to Burkhart that did not involve driving the ram car or violate the work restrictions. He implicitly denied Burkhart's testimony.

Clearly, the two arguments Respondent makes in an attempt to establish that the complaint was frivolously brought involve divergent versions of material fact which requires the resolution of conflict in testimony. The law requires only that the miner's complaint appear to have merit in order to meet the not frivolously brought standard. I find this has been established. The evidence is sufficient to establish reasonable cause to believe that Burkhart did engage in protected activity, management was aware of it, and there was a nexus in time between that protected activity and his termination.[1]

ORDER

For the reasons set forth above, Peabody Midwest Mining is ORDERED to immediately reinstate Joshua Burkhart to his former position with all rights and benefits to which he is

[1] Respondent requested that should temporary reinstatement be ordered, he be restored to the same disciplinary level he was in at the time of his termination. This would include the insubordination charge at issue herein. I deny this request.

entitled. This includes a forty hour work week at the rate of pay of $27.50 and between 8 and 9 hours of overtime per week at $41.24 per hour as recorded on his 2013 leave and earnings statement at Ex. R-15.

Priscilla M. Rae
Administrative Law Judge

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