FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 06 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of FRED MCKINSEY, Complainant v. PRETTY GOOD SAND COMPANY, INC., Respondent	DISCRIMINATION PROCEEDING Docket No. SE 2014-223 MSHA Case No.: SE MD 14-12 TR Mine: Great Pit Mine ID: 31-02014

DECISION AND ORDER REINSTATING FRED MCKINSEY

Appearances: Uche N. Egemonye, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, Representing the Secretary of Labor

Roger Sauerborn, President, Pretty Good Sand Company, Inc., Battleboro, NC, Representing Respondent

Before: Judge Lewis

On March 26, 2014, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Fred McKinsey ("McKinsey" or "Complainant") to his former position with Pretty Good Sand Company, Inc., ("Pretty Good Sand" or "Respondent") at the Great Pit Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint filed by McKinsey on February 18, 2014, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate McKinsey to his former position as a maintenance mechanic.

Respondent requested a hearing regarding this application on April 10, 2014 via conference call. A hearing was held in Rocky Mount, NC on April 30, 2014.[1] The Secretary

[1] Under Commission Rule 45, a Temporary Reinstatement hearing must be held within 10 calendar days of an operator's request. 29 C.F.R. §2700.45(c). During the April 10, 2014

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presented the testimony of the complainant. Respondent had the opportunity to cross-examine the Secretary's witnesses and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of McKinsey.

Discussion of Relevant Law

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).

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." 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 the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.[2] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if 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.,

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conference call, the parties agreed to waive this limitation to allow the hearing to be held on April 30, 2014.

[2] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

Legislative History of the Federal Mine Safety and Health Act of 1977, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *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, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of 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 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, the Secretary and McKinsey need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept.1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

It should be noted that at pre-trial conference and at the hearing, this court gave repeated instructions to Respondent regarding the narrow scope of a temporary reinstatement proceeding.[3] Respondent could not understand or was unwilling to accept that the Secretary and McKinsey were not required at the within temporary reinstatement proceeding to prove a *prima facie* case of discrimination with all for the elements required at the higher evidentiary standard.

[3] *See also* attachment sent to the Respondent with relevant case and statutory law regarding the lesser evidentiary burden imposed on the Secretary at a temporary reinstatement hearing.

Despite repeated sustained objections, Respondent mistakenly attempted to transmute the reinstatement hearing into full-scale credibility[4] and discovery inquiries that were far beyond the scope of a temporary reinstatement hearing.

Stipulations

The parties stipulated to the following legal and factual propositions:

1. Pretty Good Sand Company, Inc. is and was at all relevant times through this proceeding the operator of the Great Pit Mine, Mine ID number 31-02014.

2. Great Pit is a mine. The term mine is defined in Section 3(h) of the Mine Act, 30 U.S.C. Section 802(h).

3. At all times relevant to this proceeding, products of Great Pit Mine entered commerce, are the operations of products thereof affecting commerce, within the means and scope of Section 4 of the Mine Act, 30 U.S.C. Section 803.

4. Pretty Good Sand Company is an operator, as the term operator is defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 802(d).

5. Fred McKinsey was previously employed by Pretty Good Sand Company. Fred McKinsey is a miner within the meaning of Section 3(g). Mine Act, 30 U.S.C. Section 302(g).

6. Fred McKinsey was terminated from Pretty Good Sand Company on January 10, 2014.[5]

7. Pretty Good Sand Company is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. The presiding administrative law judge has authority to hear this case and issue a decision regarding this case, pursuant to Section 105 of the Act, 30 U.S.C. Section 815, as amended.

(Transcript at 6-8).[6]

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[4] *See also* Respondent's queries regarding credibility being "the heart" of a reinstatement proceeding (Transcript at 47) and this Court's specific instruction that it would not attempt to resolve alleged inaccuracies or conflicts in testimony prior to discovery and hearing on the merits.

[5] The parties stipulated that the termination occurred on January 10, 2014. However, all testimony and previously filed documents indicated that the date was January 13, 2014. No explanation was given for this discrepancy.

[6] Hereinafter references to the transcript will be cited "Tr." with the page number.

Contentions of the Parties

On January 20, 2014, McKinsey executed a Summary of Discriminatory Action. It was filed with his Discrimination Complaint on February 18, 2014. In this statement he alleged the following[7]:

> My employment with Pretty Good Sand Company began in July, 2013. During my interview [wi]th Roger Sauerborn, the owner of the company, I disclosed that I have [Asp]ergers Syndrome and explained the ways in which I am different from other people. [A] short time after hire, I was promoted to a supervisory position, where I remained [unt]il late December 2013. Pretty Good Sand Company (PGSC) was reported to MSHA for [vio]lations, resulting in an MSHA inspection of the facility on 11/26/13. Immediately [aft]erwards, I was treated differently by Roger. He intentionally created difficult interactions [bet]ween himself and I, using strategies that would exacerbate my Aspergers tendencies, [res]ulting in escalating confrontations. On 12/8/2013, I received an email from Roger [det]ailing specific tasks he felt I had handled incorrectly and discussing the MSHA [ins]pection. After reading that e-mail, I believed that he felt I was responsible for [rep]orting PGSC to MSHA. The workplace harassment and associated tension continued [to] build for the duration of the remainder of my employment with PGSC. I [rec]eived a mailed letter of reprimand on 12/20/2013, a hand written note attached to [a] time card a few days later, and a second reproach email on 12/30/2013. I [wa]s verbally demoted from my supervisory position without any explanation. My work [h]ours were cut by sending me home early multiple times, as well as reducing [m]y scheduled hours to work. On the morning of 01/13/14, I received a text [m]essage from Roger stating that I had been fired. After I requested to be [in]formed of the reason(s) for dismissal, Roger sent an email to me on the same [d]ay, explaining his reasons for termination. I believe Roger deliberately [fo]stered a trying work environment for me in an attempt to push me to resign, [a]nd when his repeated efforts were unsuccessful, he dismissed me.

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted the March 25, 2014 Declaration of Michael Larue, a Special Investigator employed by the Mine Safety and Health Administration with the Application. Larue wrote that he investigated McKinsey's discrimination claim against Respondent. Larue laid out the facts that he determined based on his investigation. *Id.* at Exhibit A, p. 1-3. He concluded:

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[7] The left-hand margin of the photocopied Discrimination Report filed by the Secretary was cut off. As a result, several words are either missing in whole or in part. These words have been recreated to the extent possible. Words and letters that are based on attempts to complete the document are included in brackets.

3. Based upon the information so far available as the result of the special investigation being conducted in these matters, I have concluded that Fred McKinsey's Claim that he was terminated from his employment with Respondent as a result of his lodging a safety hazard complaint with MSHA and participating in MSHA's investigation was not frivolously brought.

Id. at Exhibit A, p. 3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Id.* at 3.

Respondent disputes the Secretary's claim that McKinsey was terminated because he noted safety concerns in check sheets or because he was suspected of making safety complaints to MSHA. Instead it claims that he was terminated for failure to conduct work assignments properly and for unprofessional attitude at work.

Summary of Testimony

Fred McKinsey[8] was hired at the subject mine as an hourly employee by Roger Sauerborn[9] in July 2013 at $15.00 an hour and generally worked 45 to 50 hours per week. (Tr. 15, 65). Respondent's mine was a sand pit that produced sand for sale to the public. (Tr. 14-15). McKinsey's job included maintenance, general labor, operating an excavator, driving a dump truck, and operating a pull behind a scrapper pan. (Tr. 15).

On August 23, 2013, Sauerborn promoted McKinsey to supervisor and gave him a raise to $17.75 an hour. (Tr. 15-16, 65). McKinsey was not sure if the foreman preceding him was fired for unsafe conduct. (Tr. 29-30). As a supervisor, McKinsey continued to do all of his previous duties and work the same hours, but was also responsible for tasking three other employees (Alton "Low" Moses, Matthew Stanley, and, later, Joshua Lane) and ensuring safety. (Tr. 16-17). To do so, he reported safety issues to Sauerborn as they arose. (Tr. 16).

McKinsey took several safety precautions, including completing pre-work checks on equipment. (Tr. 18). Whoever operated equipment for a day would check out the equipment, fill out a pre-shift sheet, carry it to the office, place it in the appropriate folder, and discard the previous day's pre-shift sheet. (Tr. 52). These forms were designed to identify and maintain records of malfunctions and safety issues. (Tr. 19). As foreman, McKinsey looked at these sheets. (Tr. 63). At hearing, McKinsey reviewed several pre-shift examination forms (CX-9); he had completed three of the pages and someone else had completed the fourth. (Tr. 19-20). McKinsey did not recall filling out the form dated November 2, 2013 but he completed them as a part of his daily tasks. (Tr. 19-20). He was not positive that he worked that day. (Tr. 30).

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[8] Fred McKinsey was present at the hearing and testified for the Secretary. (Tr. 14). At the time of the hearing, he was unemployed, having last worked for Respondent. (Tr. 14).

[9] Roger E. Sauerborn was the owner of Respondent and represented Respondent at the hearing. (Tr. 64). He was also called as a witness by the Secretary and testified at the hearing. (Tr. 64).

As Supervisor, McKinsey reported several safety issues to Sauerborn. (CX-9)(Tr. 17-18). If McKinsey noticed a problem, he would report the issue to Sauerborn, they would discuss it, and Sauerborn would make a final decision. (Tr. 52, 56, 63). McKinsey would follow Sauerborn's instructions on whether to repair something or not. (Tr. 56). McKinsey would make minor repairs, but anything major had to be discussed with Sauerborn. (Tr. 63). If an issue was not immediately resolved, the machine was not moved to the "do not operate" line. (Tr. 52).

The safety issues raised by McKinsey included the fact that Respondent's Mack Truck needed new brakes and that it had suspension and bed issues. (Tr. 17). McKinsey also noted that the D-250B Caterpillar haul truck had a center pivot issue that needed to be repaired. (Tr. 17). He reported that highwalls with roads above them needed to be supported. (Tr. 17). In one pre-work sheet, McKinsey noted that the articulation joint of the baby loader was worn out. (Tr. 46-47). McKinsey told Sauerborn that this condition had to be repaired elsewhere because Respondent had neither the facilities nor the tools to do so on site. (Tr. 48). When McKinsey reported these conditions, Sauerborn would deflect the concerns and raise other jobs that needed to be completed. (Tr. 18). Sauerborn did not address the safety issues McKinsey raised. (Tr. 18).

On or around November 23, 2013, McKinsey filed a complaint with MSHA. (Tr. 21). He filed this complaint because he learned that as a supervisor at the mine he was responsible if anyone was hurt, even if a safety inspection was performed. (Tr. 21). He was the responsible party and did not want anyone to get hurt while he was working. (Tr. 21).

The next day, November 24, 2013, MSHA inspected the Great Pit mine as a result of this complaint. (Tr. 21, 65). Two citations were issued that day. (Tr. 66). One citation was for a failure to record new miner training. (Tr. 66). However, while preparing for hearing, Sauerborn found the record of the new-miner training; it had been misfiled. (Tr. 66). Sauerborn testified that the issues cited were not the ones complained of and that he hoped that the inspection would allow McKinsey to see that his safety complaints were unfounded so that they could then move forward as a company. (Tr. 70).

Sauerborn conceded that he told the inspector that the complaint could only come from one of the employees. (Tr. 65-66). In fact, he testified "what I said was it had to be someone from my company, and it's not a great big company, okay. So, you know... I'm not that stupid." (Tr. 66). However, at hearing he stated that he did not know who called MSHA. (Tr. 67). On the record, the ALJ accepted that Sauerborn's other witnesses would have testified that he was uncertain as to who actually made the stated complaints. (Tr. 76). Regardless, the number of complaints convinced him that it had to be someone from the company. (Tr. 66-67). On the day of the inspection, McKinsey stopped Sauerborn and said that maybe one of his (McKinsey's) girlfriends called or Lane's parents called. (Tr. 67).

McKinsey was not sure if the citations issued during that inspection were written near the berm area. (Tr. 53). He was not present when the citations were issued; he was working with the other employees elsewhere. (Tr. 53). When Sauerborn was nearby on the inspection, McKinsey was working on other tasks and was not paying attention. (Tr. 53-54).

Before this inspection, McKinsey had never received any verbal reprimands or discipline.[10] (Tr. 21, 29-30). After the MSHA inspection, the environment at work changed. (Tr. 21). Specifically, Sauerborn would belittle McKinsey and give him a hard time. (Tr. 22). Sauerborn would give McKinsey conflicting instructions that were impossible to follow. (Tr. 22). He also sent McKinsey several e-mails stating, incorrectly, that McKinsey had improperly repaired equipment or "messed up" a task. (Tr. 22-23).

On December 12, 2013 McKinsey was demoted, although his pay remained the same. (Tr. 24-25, 40, 49-50, 69-70). Sauerborn said Lane would become supervisor. (Tr. 40). When McKinsey asked why he was demoted, Sauerborn referred to several disciplinary emails he had sent previously. (Tr. 25, 50). McKinsey did not say anything except that he would quit rather than take a pay cut. (Tr. 40-41, 69-70). The harassment began before this demotion and continued afterwards. (Tr. 50).

According to McKinsey, on December 20, Sauerborn approached a vehicle where McKinsey and Lane were sitting. (Tr. 41). McKinsey rolled down the window and Sauerborn started to harass him, though he could not recall what was said. (Tr. 41-42). McKinsey's nerves began to bother him and he began to shake. (Tr. 41). McKinsey stepped out of the car in hopes that Sauerborn would see how badly he was affected and give him space. (Tr. 41). Sauerborn said that he was uncomfortable and McKinsey needed to clock out for an hour. (Tr. 41).

According to Sauerborn, the events of that day proceeded as follows: Sauerborn saw Lane and McKinsey in the Suburban. (Tr. 71). After he said "hello," McKinsey jumped out of the vehicle and yelled that Sauerborn was discriminating against him. (Tr. 71-72). McKinsey approached and Sauerborn raised his hands because his personal space was invaded. (Tr. 72). Sauerborn told McKinsey that he needed to clock out for an hour so that he could calm down before the Christmas party. (Tr. 72). McKinsey went to the office to clock out. (Tr. 72). While there McKinsey, who was within earshot of a truck driver, threatened to kill Sauerborn.[11] (Tr. 72).

Finally, on January 13, 2014 McKinsey was informed via text message from Sauerborn that he was fired. (Tr. 25). When McKinsey asked why, Sauerborn said that the issue was covered in an email. (Tr. 25). McKinsey then contacted MSHA because he believed he was fired for calling and reporting violations. (Tr. 25). McKinsey believed that the email marked

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[10] However, McKinsey conceded it was possible that he and Sauerborn had a conversation of September 16, 2013 about promptly ordering parts, but he could not recall specifically. (Tr. 30). He did not receive a written follow up the next day. (Tr. 30).

[11] There is clearly a conflict in the testimony regarding what occurred on December 20, 2013. However, at this time it would be improper to weigh this testimony. Instead, the miner's testimony will be considered in determining whether this claim was frivolously brought.

CX-5 showed that Sauerborn believed that he was the person who called MSHA.[12] (Tr. 26-27). McKinsey was still making $17.75 an hour at that time.[13] (Tr. 67-68).

Findings and conclusions

Protected Activity and Adverse Employment Action

The Mine Act contains security measures for miners engaged in protected activity. Specifically, §105(c)(1) states, in relevant part:

> No person shall discharge or in any manner discriminate against...or otherwise interfere with the exercise of the statutory rights of any miner...in any coal or other mine subject to this chapter because such miner...has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent...of an alleged danger or safety or health violation in a coal or other mine.

30 USC § 815(c)(1). As discussed *supra*, to support a temporary reinstatement there must be protected activity with a connection, or nexus, to an adverse employment action. The initial issue is whether McKinsey engaged in activity that triggered those protections.

Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See Sec'y of Labor on behalf of 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 (3rd Cir. 1981). In this

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[12] The subject paragraph stated, "An unknown person called MSHA with five allegations of wrong doing. While the inspector was on site, MSHA was contacted, a sixth allegation was made, then amplified. Most of the allegations were topics you and I discussed, and had disagreements. MSHA found the six allegations to be false. You volunteered that you did not call MSHA, and it may have been one of your girlfriends, or Josh's parent. I would like you to tell me later what you have learned from this incident." (CX-5)(Tr. 26-27).

[13] Respondent's Representative testified at length (and elicited testimony) regarding the miner's attitude and the quality of his work. Specifically, Respondent presented evidence regarding McKinsey's efforts to fix a mirror and windows on a truck (Tr. 31-34, 45-46); McKinsey's work on a truck that subsequently lost a wheel (Tr. 35); McKinsey's work in cleaning dirt out of a truck (Tr. 43-44); McKinsey's actions in accidentally striking a flashboard riser's supports in a piece of equipment (Tr. 33-34); and the length of time that McKinsey took in repairing a Suburban truck. (Tr. 34, 56-57). Further, Respondent presented evidence regarding the special accommodations Sauerborn made to help McKinsey succeed. (Tr. 68-70). As the purpose of this hearing is to determine whether McKinsey's claims "may have merit," this evidence is not relevant. However, all or some of this evidence may be appropriate for presentation during a hearing on the merits.

matter, McKinsey testified that he made safety complaints both to his employer, Sauerborn, and MSHA. (Tr. 17-18, 21). Those complaints dealt with the unsafe condition of mobile equipment and support for high walls. (Tr. 17-18, 46-48). These complaints resulted in an MSHA inspection of the Mine and the discovery of violations. (Tr. 21, 65-66). There is no question the sending a complaint to MSHA to discuss a safety concern is protected activity. In fact, this is precisely the interaction between miner and MSHA that §105(c) was drafted to protect. Therefore, McKinsey's claim that he was engaged in protected activity is not frivolous.

The next issue is whether McKinsey suffered an adverse action. According to the Act and well-settled Commission precedent, suffering a discharge or a demotion is an adverse employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), aff'd, 770 F.2d 168 (6th Cir. 1985). It is uncontested that on December 12, 2013, McKinsey was demoted from supervisor to maintenance mechanic. (Tr. 24-25, 40, 49-50, 69-70). Further, there is no question that a month later, on January 13, 2014, McKinsey was terminated from his position as maintenance mechanic. (Tr. 25). Therefore, McKinsey's claim that he suffered an adverse employment action is not frivolous.

Nexus between the protected activity and the alleged discrimination

Having concluded that McKinsey engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action, namely the January 13, 2013 termination. The Commission recognizes that direct proof of actual knowledge is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC,* 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC,* 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley, supra.* McKinsey testified that he made safety complaints to Respondent's owner, Sauerborn. (Tr. 17-18). Specifically, he discussed problems with equipment at the mine and inadequate support for a wall. (Tr. 17-18, 46-48). If McKinsey raised safety complaints directly to Sauerborn, clearly the owner would have knowledge. Further, McKinsey testified that when Sauerborn failed to take corrective action, he contacted MSHA. (Tr. 21). Saueborn conceded that during the resultant inspection, he stated that the

complaints could have only come from one of his employees. (Tr. 65-67). On December 7, 2013 Sauerborn sent a letter (CX-5) to McKinsey that implied that he suspected that McKinsey was the person who contacted MSHA. (Tr. 26-27). Finally, Sauerborn testified at hearing that he hoped the inspection would show McKinsey that his complaints were unfounded, showing that he was aware that McKinsey's complaints were the ones that prompted the inspection. (Tr. 70). Therefore, there is some evidence to suggest that Sauerborn was aware or at least suspected the McKinsey had engaged in protected activity. Thus, I find that Complainant and the Secretary have raised a non-frivolous issue as to whether Respondent had knowledge of the protected activity when the decision was made to fire McKinsey.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and adverse employment action. See e.g. *CAM Mining, LLC,* 31 FMSHRC at 1090 (three weeks) and *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the present matter, the time between the McKinsey's final protected activity (the call to MSHA) and the termination was approximately 51 days. McKinsey testified that he called MSHA on November 23, 2013 and he was terminated on January 13, 2014. (Tr. 21, 25). However, even before the termination, McKinsey alleged other adverse actions. For example, on December 12, 2013, just 19 days after the call to MSHA, McKinsey was demoted. (Tr. 21, 24-25, 40, 49-50, 69-70). Further, McKinsey reported being harassed and belittled from the time of the inspection until his termination, with one instance on December 20, 2013 discussed at length at hearing. (Tr. 21-23, 41, 50, 71-72). These time frames easily meet the Commission's requirements. Thus, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

McKinsey testified that before he contacted MSHA, he had never received a verbal or written warning regarding his conduct at work. (Tr. 21, 29-30). Following the protected

activity, McKinsey received several disciplinary notes. (Tr. 21-23). One of those warnings, a letter dated December 7, 2013 (CX-5) specifically addressed the call to MSHA. (Tr. 26-27). The fact that a discipline letter included reference to protected activity clearly implies animus toward that activity. McKinsey also experienced "harassment and belittlement" regularly from that time until his termination. (Tr. 21-23, 50). He described one instance in particular, on December 20, when he was so distraught from this harassment that he began to shake. (Tr. 41,71-72). After this harassment, he was forced to clock out of work, losing compensation. (Tr. 41, 72). McKinsey was also demoted from his position as supervisor, albeit without a corresponding reduction in pay. (Tr. 24-25, 49-50, 69-70). Finally, less than two months after the inspection and following a campaign in which McKinsey alleged Sauerborn was attempting to force him to resign, McKinsey was terminated. (Tr. 25)*(Application for Temporary Reinstatement* at Exhibit B, p. 2). I find that McKinsey's testimony regarding the negative change in his work environment following his safety complaints raises a non-frivolous issue as to hostility or animus towards protected activity.

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). In this case, McKinsey was allegedly fired for deficiencies in his work and attitude. There is no evidence on record of any other employees receiving less severe punishment for the same or similar misconduct. However, the Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

As has already been shown, there is sufficient evidence to conclude that this discrimination claim was not frivolously brought as it relates to animus, knowledge, and coincidence in time. Therefore, I find that the Secretary has established a nexus between McKinsey's protected activity and the Respondent's subsequent adverse action.

Conclusion

In concluding that McKinsey's complaint herein was not frivolously brought, I give weight to the evidence of record that he called to make complaints to MSHA. I also conclude that there were non-frivolous issues as to whether Respondent was aware of McKinsey's actions, that Respondent showed animus toward McKinsey's alleged protected activities, and that there was a close connection in time between his alleged protected activity and his demotion and discharge.

Respondent asserts that its discharge of Respondent was based on his unprotected activities, specifically failure to properly perform work tasks. I find that Respondent's evidence on this record is not sufficient to demonstrate that McKinsey's complaint of discrimination was

frivolously brought. To the contrary, since the allegations of discrimination have not been shown to be lacking in merit, I find they are not frivolous.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Respondent is **ORDERED** to provide immediate reinstatement to McKinsey, as a maintenance mechanic, at the same rate of pay, for the same number of hours worked, and with the same benefits, as at the time of his discharge.

John Kent Lewis
Administrative Law Judge

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/tjb