FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004-1710
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

April 8, 2014

SECRETARY OF LABOR, MSHA, on behalf of **CHARLES RIORDAN**, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. VA 2014-199-D
	:	NORT-CD 2014-02
v.	:	
KNOX CREEK COAL CORPORATION a subsidiary of ALPHA NATURAL RESOURCES, INC.,	:	Tiller No. 1
Respondent	:	Mine ID 44-06804

DECISION AND ORDER REINSTATING CHARLES RIORDAN

Appearances: Karen M. Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor.
Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Complainant.
Stephen M. Hodges, Esq., Penn Stuart, Abingdon, Virginia, for the Respondent Knox Creek Coal.

Before: Judge Moran

A temporary reinstatement hearing was held in this matter on April 2, 2014, in Pikeville, Kentucky. For the reasons which follow, the Court finds that the application was not frivolously brought and consequently it is ordered that Charles Riordan be reinstated to his former position with all attendant benefits, effective immediately.

Temporary Reinstatement Under the Mine Act

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).

Section 105(c)(2) of the Mine Act provides in relevant part that "Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . [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."

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., 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) ("*JWR*"). *Sec. obo Piper, Complainant, v. Kenamerican Resources, Inc.* (June 2013) (Judge Andrews), 2013 WL 3865343 at *2.

The Commission itself "has repeatedly 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.' [*JWR* supra] 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 on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard. *See, id.* at 719; *Sec'y on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). *Id.* at n. 2" *Sec. obo Rodriguez v. C.R. Meyer and Sons Co.* 2013 WL 2146640 at *5 (May 2013).

"Temporary Reinstatement is a preliminary proceeding, and narrow in scope. The plain language of the Act states that 'if 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). The judge must determine whether the complaint of the miner 'is supported substantial evidence and is consistent with applicable law.' *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). 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) ("*Chicopee Coal*"). 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 nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.' *Jim Walter Resources*, 920 F.2d at 744. 'Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered.' *Sec'y of Labor, on behalf of Curtis Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 233, 237 (ALJ)(Feb. 2000)." *Sec. obo Piper, Complainant, v. Kenamerican Resources, Inc.* (June 2013) (Judge Andrews), 2013 WL 3865343 at *2.

Findings of Fact and Conclusions of Law

At the hearing, the Complainant, Charles Riordan, testified. Mr. Riordan stated, quite credibly in the Court's estimation, that he made several safety complaints to members of Knox Creek management about recurring problems with the mine's ventilation. Complainant Riordan has been a coal miner for 32 years and a foreman for 25 of those. In 2013, until the date of his termination on December 13th of that year, he worked as an outby and as a fill-in foreman. During 2013 he made several safety complaints, most of which pertained to a lack of adequate ventilation. He voiced these complaints to Mark Jackson, the mine foreman and to the mine superintendent. Tr. 19-21. In September of 2013, while attending a company quarterly picnic held at the mine site, he again voiced his concern about the mine's inadequate ventilation on the sections to Ron Patrick, general manager of Knox Creek. The following day, Mr. Jackson, according to Mr. Riordan's account, told Riordan that he had "thr[own] him under the bus" by informing Patrick of the ventilation problems. Tr. 24-25. Though Complainant was told that his termination was due to market conditions, to the best of his knowledge, no one else was fired that day, nor was there a reduction in the workforce at the mine.[1] Tr. 26.

During cross-examination, counsel for Respondent inquired, among various areas of questioning, about Mr. Riordan's complaints concerning inadequate ventilation.[2] Complainant advised that he was essentially complaining about "inadequate ventilation going to the sections." Tr. 35. Riordan stated that during this period, 2013, he did note hazardous conditions and there

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[1] It should be noted that the Respondent presented no witnesses from Knox Creek Coal Corporation, nor its parent Alpha Natural Resources, Inc. to testify on the subject of terminations or workforce reductions. Even had there been witnesses testifying about such events, the temporary reinstatement application is not the time to sort out and resolve such conflicts regarding the reason for a miner's termination. Instead, the inquiry is whether there was credible testimony on the issue of protected activity and whether adverse action followed that activity within some reasonable period of time after it.

[2] Mr. Riordan stated that the mine's ventilation shortcomings were not limited to line curtain problems. Tr. 45. He elaborated that his biggest ventilation problem pertained to air going down the beltline and not exiting down the return. While he was able to address a given inadequacy, these fixes were more in the nature of band-aids as the steps he took then created air problems on the opposite side of the section. Tr. 46-49.

were occasions when he noted in pre or on-shift inspection books about ventilation problems. Tr. 37-38. Riordan, while maintaining that during this time period there was an occasion when there was inadequate airflow at the last open crosscut, never noted that in the inspection books. He also asserted that there were times when there was inadequate air at the face. For this issue too, he did not note this problem in his pre or on-shift reports. Tr. 42.

These answers suggested that Mr. Riordan was being remiss, however he advised that, when encountering these inadequacies, he would take the steps needed to fix the problem. Further, the Court would note that the focus must remain on whether the Complainant engaged in protected activity and the Court finds that the record establishes, through Mr. Riordan's credible testimony, that he did so engage in that activity and did so on more than one occasion. The record also establishes that there was animus expressed on the part of Mr. Jackson over his displeasure concerning the Complainant's safety complaints. To that, there was the undeniable adverse action of Mr. Riordan's termination. Certainly, the time frame of his termination was sufficiently close to his safety complaints for one to make an association between the two events. In the context of determining whether the application for reinstatement was non-frivolous, it is therefore reasonable to conclude that a nexus was established between the Mr. Riordan's complaints and his termination.

Following the testimony of Complainant Riordan, his representatives advised that they had no other witnesses to call, concluding their evidence for the application. Respondent then sought to call the MSHA Special Investigator for this case, David Smith. As Counsel Hodges expressed it, "[o]ur main purpose of calling [the special investigator] is to elicit more of his investigation than what he put in his affidavit." Tr. 69-70. Counsel asserted that this was "in some sense . . . part of the factual basis for the relief that's sought." Tr. 70. Counsel continued that he wanted to inquire about "other things [the special investigator] does; and they have to deal with these issues about the layoffs in the other mines . . ." Tr. 70. It will be recalled that Knox Creek's competing narrative is that the Complainant was "terminated" for business contraction reasons. Respondent's Counsel added that he wanted to inquire about aspects of his investigation which were *not* included in the special investigator's affidavit. In sum, it was the contention of Respondent's Counsel that part of the basis for the assertion that this application was not frivolously brought is the investigator's affidavit and from that premise, the Respondent then maintains that the affidavit was "incomplete in a very significant way." Tr. 71.

The Court noted two things about the Respondent's approach to establishing frivolousness. First, the Secretary's case, at hearing, was based on the testimony of Complainant Riordan. Second, *for the purposes of a temporary reinstatement proceeding*, the Court had misgivings about permitting cross-examination over what was *not* in the special investigator's affidavit. Tr. 72. As the Secretary's Counsel noted, the affidavit was based upon information gathered by the special investigator from the Complainant and Respondent had a full opportunity to cross-examine the Complainant in the proceeding. Tr. 73. In this regard the Court would note that 29 C.F.R. §2700.45(d) states that the "Secretary may limit his presentation to the testimony of the complainant," which is what occurred here. Although the same provision states that the

Respondent "may present testimony and documentary evidence in support of its position that the complaint was frivolously brought," this right is subject to appropriate objections and limitations. The Secretary contended that questions concerning what was *not* included in the affidavit fits within such objections. The Court agrees because, although permitting questions about what was *not* included in the affidavit could, potentially, present competing testimony about the reason for the Complainant's termination, such possible alternative contentions are not to be resolved in the temporary reinstatement proceeding. Instead, they must await the full discrimination proceeding which may ensue.[3] *Chicopee Coal*, 21 FMSHRC at 719.

The Court, upon hearing objections to Respondent's Counsel's intentions, ruled that questions could only be asked about what was within the four corners of the special investigator's affidavit. That affidavit was entered into the record as Exhibit 1. However, for the most part, the questions which ensued were attempts to inquire about matters not within the affidavit and objections to those questions were all sustained. Tr. 79, 80, 81.

In summary, the Court finds that the Respondent did not present evidence, either directly, or through cross-examination, to dispel the evidence establishing that this application was not frivolously brought. The Court does not buy into Respondent's claim that links in the evidentiary chain were missing. Respondent contended, in its closing statement, that evidence linking the protected activity with the person or persons who had to decide which people would be terminated was missing. Along this theme, it asserted that evidence was needed to establish the role of Mr. Jackson in the termination that affected the Complainant and that a showing of non-frivolousness requires showing "that the people who were complained to were the people who made the decision that resulted in the adverse activity." Tr. 86-87. In the Court's view, the Respondent is incorrect. The contentions it asserts have their place in a full discrimination proceeding, but not here in the temporary reinstatement context.

Conclusions

Having noted that the testimony on the subject of protected activity, and whether adverse action was motivated in any part by such activity, came solely from the Complainant, Mr. Riordan, and that he was a forthright and credible witness, it is accurate to observe that there really was no conflicting evidence on those elements, in determining whether the complaint appears to have merit. It is not an oversimplification to state that most of the Respondent's challenge to the application was, in truth, an attempt to present a competing narrative, through the Complainant, that he was not really fired but let go, that is, "terminated," to use the term

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[3] The Court believes that this conclusion would also be correct, even if, instead of trying to make its contention through what was *not* included in the special investigator's affidavit, the Respondent had marched up several Knox Creek management witnesses, each of whom testified that Riordan was terminated for economic contraction reasons. The reason for the Court's conclusion remains the same; competing narratives over the reason for an employee's termination are not to be resolved at the temporary reinstatement proceeding. Instead, the focus is upon whether the claim is non-frivolous.

employed by Respondent's Counsel, as part of a realignment with sister mines owned by Alpha Natural Resources, Inc. However, the fundamental problem with that approach, putting aside for the moment that the sole source for the competing narrative was derived solely through the Complainant, is that the temporary reinstatement application is not the proceeding for the resolution of such a competing narrative. Rather, the Court must focus upon whether there is credible substantial evidence presented to show that protected activity occurred, that adverse action resulted and that there was evidence of a nexus between those events. Here, as noted, the court finds that the record at the application proceeding provided substantial evidence of the Complainant's engaging in protected activity, voicing his concerns over ventilation problems, on several occasions, that the Complainant made these concerns to management and thus there was awareness of the concerns, that at least one member of management expressed hostility toward the Complainant over his voiced ventilation concerns, and that adverse action, in the form of termination occurred within a time frame thereafter which was sufficiently close in time to establish, on this record, and within the context of temporary reinstatement, that the application was not frivolously brought.

ORDER

On the basis of the foregoing, the Court finds that the Secretary and Complainant's private counsel presented sufficient evidence at the hearing to establish that this discrimination complaint is non-frivolous. Accordingly, it is **ORDERED** that the Respondent immediately re-instate the Complainant, Charles Riordan, as of the date of this ORDER, to his former position, or equivalence, at the same rate of pay and benefits that he was receiving at the time of his termination. The Secretary is directed to provide a status report of its discrimination investigation within 30 days of this decision.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Karen M. Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

Stephen M. Hodges, Esq., PENN STUART, 208 E. Main Street, Abingdon, VA 24210

Wes Addington, Esq., Tony Oppegard, Esq., P.O. Box 22446, Lexington, KY 40502