FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 11, 2010

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RICKY LEE CAMPBELL, Complainant,	: : : : : :	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2010-1030-D HOPE-CD 2010-09
v.	:	
MARFORK COAL COMPANY, INC., Respondent	: :	Slip Ridge Cedar Grove Mine Mine ID 46-09048

DECISION AND ORDER REINSTATING RICKY LEE CAMPBELL

Appearances: Samuel Lord, Esq., U.S. Department of Labor, Arlington, Virginia, for Complainant and Secretary of Labor, Jonathan W. Price, Esq., The Bell Law Firm, PPLC of Charleston, West Virginia, for Complainant, Ricky Lee Campbell,

Thomas S. Kleeh, Esq. and J. A. Curia, Esq., Steptoe and Johnson, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge L. Zane Gill

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Ricky Lee Campbell, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). Campbell filed a complaint with the Secretary's Mine Safety and Health Administration (MSHA) alleging that his April 23, 2010 termination was motivated by his protected activity. The Secretary contends that Campbell's complaint was not frivolous, and seeks an order requiring the employing entity, Marfork Coal Company ("Marfork"), to reinstate Campbell to his former position as a general laborer at the Slip Ridge Cedar Grove Mine ("Slip Ridge"), pending the completion of an investigation and final decision on the merits of his discrimination complaint. [1] An expedited hearing on the

[1] The Secretary's original Application for Temporary Reinstatement of May 17, 2010, included an allegation in paragraph 10 that Campbell had provided information in a federal investigation while he was employed at Slip Ridge. The Secretary provisionally withdrew this allegation prior to the June 4, 2010 hearing.

application was held in Beckley, West Virginia, on June 4, 2010.[2]

For the reasons that follow, I grant the application and order Campbell's temporary reinstatement.

SUMMARY OF THE EVIDENCE

The parties stipulated that Campbell is a "miner" under the Mine Act and that this court has jurisdiction to hear this case. (Tr.8.)

Campbell worked at various times relevant to this case as a shuttle car operator and bolter for several mines operated by subsidiaries of Massey Energy Company ("Massey"), including Parker Peerless Mine ("Parker Peerless) and Slip Ridge, both operated by Marfork Coal Company ("Marfork"), and the Upper Big Branch-South Mine ("Upper Big Branch"), operated by Performance Coal Company. (Tr. 17-18.)

Campbell began working for Marfork at Parker Peerless, in November of 2009. (Tr. 17.) He worked there for approximately three months before he was transferred to Upper Big Branch, where he worked for approximately four months. (Tr. 18.) Campbell returned to Parker Peerless for three days before starting work at Slip Ridge. (*Id.*)

On April 5, 2010, Campbell started to work at Slip Ridge. (Tr. 8.) According to Campbell's testimony, he immediately voiced safety issues concerning the shuttles he was operating. (Tr. 19, 38-39.) Campbell stated that each of the three shuttles he operated had maintenance issues, including brakes and tram pedal malfunctions. (*Id.*) Campbell testified that he had to take his hand and pull the tram pedal so he could slow two of the shuttles down. (*Id.*) Campbell testified that he repeatedly reported the problem to employees of Slip Ridge, including his immediate supervisor, the chief electrician, the mine foreman, the superintendent, and others mentioned in his testimony without names. (Tr. 20.) In addition, Campbell stated that he shut down a shuttle due to safety issues, but was ordered by supervisors to continue operating the shuttle. (Tr. 43-44.)

On April 5, 2010, the day Campbell began working at Slip Ridge, the Upper Big Branch-South Mine exploded, killing 29 miners. The tragic incident has received extensive media coverage.

On April 7, 2010, Campbell returned to Upper Big Branch to pick up his last paycheck and was approached by a Pittsburgh reporter who was accompanied by a television camera. (Tr.

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[2] The only witness examined at the hearing was Ricky Lee Campbell, although counsel for the Respondent made an offer of proof of additional witness evidence that was excluded in response to objections made by counsel for the Secretary.

22.) The interview was printed in the *Pittsburgh Post-Gazette,* and the video was posted on the newspaper's website. (Ex. R.4.) A DVD copy and a transcript of the television interview were admitted into evidence. (Ex. G1 and G2.)

On April 8, 2010, Slip Ridge management gave Campbell a written warning. (Tr. 58, 92.) He was issued the warning after he severed a continuous miner power cable with a shuttle. (*Id.*) Campbell testified that this was the first time he ran the "left side buggy," and he did not know that the brakes were malfunctioning. (*Id.*) The continuous miner was out of operation for about an hour and a quarter while repairs were performed. (Tr. 59.)

Shortly before Campbell was terminated (date uncertain), he shut down the mine equipment he was working with because he believed it to be unsafe. Campbell testified that the mine foreman, Jeremy Hall, instructed him to continue to work with the equipment nonetheless. Campbell believed that the foreman's tone was loud and animated. The equipment in question was out of service for about 30 minutes. (Tr. 84.)

On April 14, 2010, Slip Ridge management suspended Campbell from his duties. On April 23, 2010, Campbell was terminated. (Tr. 8.) The Secretary alleges that Campbell's dismissal was motivated by the safety complaints he voiced while working at Slip Ridge and by his on-camera interview with a Pittsburgh media outlet, during which he criticized the safety conditions and practices at the Upper Big Branch Mine, where he worked prior to Slip Ridge. (Ex. R3 at 3; Ex. G1.)

During the April 14, 2010 meeting in which Campbell was notified of his suspension, mine superintendent Tim Shea used coarse and hostile language when speaking to Campbell. (Tr. 71.) Campbell did not ask for, nor did anyone else volunteer a reason for the suspension. (Tr. 73.)

During the termination meeting on April 23, 2010, the tone was neutral, not hostile. No one on the management side mentioned the media coverage. (Tr. 81.) No one told Campbell that his termination had anything to do with his complaints about equipment safety. (Tr. 77.)

On May 18, 2010, the Commission received the Application for Temporary Reinstatement brought by the Secretary of Labor on behalf of Campbell. On May 24, 2010 Respondent Marfork requested a hearing on the Application for Temporary Reinstatement. On May 27, 2010, I conducted a telephone conference call with the parties to discuss procedural issues and to set a hearing schedule. During the conference call Mr. Lord made an oral motion *in limine* on behalf of the Secretary to exclude certain evidence. On May 28, 2010, I issued an order denying the Secretary's oral motion for *in limine*. On June 3, 2010, the Secretary filed a motion for reconsideration of the aforementioned Motion in Limine. The motion for reconsideration was denied at the hearing on June 4, 2010, in Beckley, West Virginia.

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).

When a person covered by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) notifies the Secretary that he/she believes discrimination has occurred, the Secretary is obligated by Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2) to investigate, "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis [. . .], shall order the immediate reinstatement of the miner pending final order on the complaint."

The Commission has established a procedure for making the reinstatement decision. Commission Rule 45(d), 29 C.F.R. § 2700.45(d) states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the complaint was frivolously brought. The burden of proof is upon the Secretary to establish that the complaint was not frivolously brought. In support of [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant. The respondent shall have an opportunity to examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was not frivolously brought.

29 C.F.R. § 2700.45(d)

As the above makes clear, and as I noted at the hearing on June 4, 2010, the scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.,* 9 FMSHRC 1305, 1306 (August 1987); *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC,* 920 F.2d 738 (11th Cir. 1990). 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 Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge's temporary reinstatement order, the Commission has applied

he substantial evidence standard. [3] *See id.* at 719; *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The legislative history for section 105(c) reveals that Congress discussed the term "frivolous" with the understanding that a complaint is not frivolous 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 Federal Mine Safety and Health Act of 1977, at 6240625 (1978). The "not frivolously brought" standard has also been equated to the "reasonable cause to believe" standard applied in other contexts. *Jim Walter Resources, Inc.,* 920 F.2d at 747; *Sec'y of Laboron behalf of Bussanich v. Centralia Mining Co.,* 22 FMSHRC 153, 157 (February 2000).

Under section 105(c) of the Act, the Secretary bears the burden of establishing: (1) that the miner 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 Paula v. Consolidation Coal Co.,* 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom.; Consolidation Coal Co. v. Marshall,* 773 F.2d 1211 (3rd. Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.,* 6 FMSHRC 1842 (August 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom.; Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983).

Thus, an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination with the attendant requirement of proving all necessary elements at a higher evidentiary standard, as would be required in a trial on the merits. But the applicant must provide evidence of sufficient quality and quantity (substantial evidence) to allow the judge to find by application of the "reasonable cause to believe" standard that: (1) the applicant engaged in protected activity, and (2) that there is sufficient showing of a nexus between the protected activity and the alleged discrimination, to support a conclusion that the complaint of discrimination is not frivolous.

Regarding the nexus requirement, other judges and the Commission have adopted elements of the full *prima facie* case to create an analytical framework that comports with the strictures of the limited evidentiary scope of the temporary reinstatement process yet is useful in

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[3] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable 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*, 305U.S. 197, 229 (1938)).

bridging the sometimes difficult gap between alleged actions and the intentions behind them. In recognition of the fact that direct evidence of intent or motivation is rarely found, the Commission has identified several circumstantial indicia 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 adverse action. *Secretary of Labor, Mine Safety and Health Administration (MSHA) on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 2009 WL 3802726, (F.M.S.H.R.C.), October 22, 2009, KENT 2009-1428-D.

APPLICATION OF LAW TO THE EVIDENCE

The Secretary has established by the standards set out above that Campbell engaged in protected activity.[4] Campbell testified that he immediately and repeatedly brought what he believed to be complaints about faulty equipment to the attention of appropriate management individuals. He also shut down equipment he was working with due to his concern that it was unsafe. There is no question that Campbell's complaints about faulty mine equipment are enough to invoke the miner protections in section 105(c) of the Mine Act.[5]

The Secretary has also established by the standards set out above that there is sufficient nexus between Campbell's protected activity and the adverse action, i.e., his suspension and ultimate termination. The Secretary's evidence is sufficient to establish that mine management knew or should have known that Campbell was complaining about faulty equipment. Campbell expressed concern about the safety of the equipment he was operating clearly and frequently enough to bring it to the attention of his superiors. There is also sufficient evidence in the record to establish the temporal proximity between the protected activity and the adverse action. The short period of time between Campbell's transfer to the Slip Ridge facility, his safety complaints to management, and his ultimate termination underscore this point. The coincidence in time between the protected activity and Campbell's termination can be a basis on which to infer an illegal motive on CAB's part. *Durango Gravel,* 21 FMSHRC at 957.

The evidence of animus on the part of the employing mine is less clear though still sufficient. The evidence of the timing and tone of management actions is sufficient for a person reviewing these facts to reasonably believe that management's actions were, at least in part, a reaction to Campbell's safety complaints.[6] In addition to the short time periods discussed above,

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[4] It is not necessary to decide if Campbell's statements to the press constitute protected activity. His complaints to persons tasked with mine management about the safety of the equipment he operated satisfy that portion of section 105 (c) of the Act.

[5] Counsel for the mine operator conceded that Campbell's complaints about perceived equipment safety constitute protected activity. (Tr. 23)

[6] As mentioned above, the events related to the Upper Big Branch disaster and Campbell's involvement with media coverage are not taken into account in this decision.

the evidence of hostile, coarse, and abrupt tone on the part of management is sufficient to sustain a reasonable conclusion of animus. Accordingly, I conclude that this element of the nexus analysis is also satisfied to the level required by the law discussed above.

In summary, all elements of the analytical framework discussed above are satisfied to the level required by the relevant statutes, rules, and case law precedents. The Secretary has carried her burden of adducing substantial evidence to support a reasonable cause to believe that Campbell engaged in protected activity, and that there is a nexus between the protected activity and the adverse action of suspension and termination. I conclude that the complaint of discrimination was not frivolously brought.

ORDER

For these reasons, Marfork Coal is **ORDERED** to reinstate Campbell to the position he held on April 14, 2010, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled.

Campbell's reinstatement is not open-ended. It will end upon a final order on Campbell's complaint. 30 U.S.C. § 815 (c)(2). Therefore, it is incumbent on the Secretary to determine promptly whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act based on Campbell's May 4, 2010, complaint to MSHA. Accordingly, the Secretary is **ORDERED** to advise counsel for Marfork Coal and the court of her decision by **July 26, 2010**, and, if a decision has not been made by that date, I will entertain a motion to terminate the reinstatement.

L. Zane Gill
Administrative Law Judge

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