FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

NOV 09 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEREMY JONES	:	
v.	:	Docket No. WEVA 2015-1007-D
KINGSTON MINING, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura and Althen, Commissioners

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 14, 2015, the Administrative Law Judge issued a decision denying an Application for Temporary Reinstatement filed by the Secretary of Labor on behalf of Jeremy Jones against Kingston Mining, Inc. ("Kingston Mining") pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).[1] 37 FMSHRC ___, slip op. at 12, No. WEVA 2015-1007-D (Oct. 14, 2015). The Secretary subsequently filed a timely petition for review of the Judge's denial of temporary reinstatement. For the reasons that follow, we vacate the Judge's decision, reverse it in part, and remand the matter in part to the Judge for further proceedings.

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> Any miner . . . 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. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and 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.

I.

Factual and Procedural Background

A. Factual Background

Kingston Mining operates the No. 2 Mine, an underground coal mine located in West Virginia. Tr. 95-96, 147. Jeremy Jones was an electrician on the midnight maintenance shift at the mine for two and one-half years. Tr. 34-35, 73, 89. Mr. Jones was laid off from his position on April 10, 2015.

On August 4, 2015, Jones filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") against Kingston Mining. App. for Temp. Reinstatement at 1-2. MSHA conducted a preliminary investigation of Jones' discrimination complaint and on September 14, 2015, the Secretary filed an Application for Temporary Reinstatement, requesting an order requiring Kingston Mining to temporarily reinstate Jones to his former position as an electrician. *Id.* at 4. The Secretary alleges that the layoff was motivated by the fact that Jones raised safety concerns regarding miners covering or painting over the lights on the roof bolting machines, failing to properly anchor trailing cables for the shuttle cars, and failing to properly dispose of dust bags and trash including boards on the roof bolting machines.

At a hearing held on October 7, 2015, Jones testified that he communicated his safety concerns in three ways. First, Jones regularly submitted "Running Right" cards—cards on which Kingston encouraged miners to handwrite their safety concerns in order to bring those concerns to management's attention. Tr. 37-38. Second, as an electrician, Jones' job duties included submitting maintenance checklists indicating whether he had completed various maintenance tasks. Tr. 47. Third, Jones testified that he also frequently communicated safety complaints orally to his immediate supervisor, Daniel Laverty. Tr. 46.

When Jones' concerns were not immediately addressed by Laverty, he pursued his concerns at the next level, orally communicating them to Laverty's supervisor, Greg Shrewsbury. Tr. 47-48, 57. According to Jones, Shrewsbury usually called the foreman or the mine superintendent, who, in turn, would instruct Laverty to view the area and address the problem. Tr. 47-48. Jones testified that Laverty did not like Jones going over his head and that, as a result, Laverty was "short" with him and repeatedly assigned him to work on less desirable projects that required only one miner, thus isolating Jones from the crew of electricians. Tr. 49-51, 113. Jones testified that previously Laverty had rotated such one-miner assignments among all members of his four-miner crew. Tr. 49-50. Jones testified that after Laverty began isolating him, Laverty did not isolate other electricians. Tr. 53-54. Jones also testified that other crew members told Jones they believed that Laverty was isolating him. Tr. 54. Jones also testified that other electricians reported the same types of concerns to the same supervisors. Tr. 39-40, 55, 58, 64, 115. Additionally, he testified that other electricians would go to Shrewsbury the "same as I did." Tr. 58.

Jones testified that, until the day before his temporary reinstatement hearing, he did not know about a January 30, 2015, written evaluation of his performance shown to him during the hearing. Tr. 69; Government Exhibit ("GX") C-1. The evaluation stated that Jones "[w]orks safe, [and is] [g]ood about letting me know if he spots potential problems." Tr. 71; GX C-1. However, the evaluation also contained 15 separate inquiries where a miner was rated on a 1-to-5 scale. Laverty gave Jones nine ratings of "2" ("needs development") and six ratings of "3" ("met expectations"), including a "3" for "demonstrates safety is a priority; practices safe behaviors." GX C-1.

On April 10, 2015, with rumors of an impending layoff circulating throughout the mine, Jones told a fellow miner that if Laverty had anything to do with it, Jones would be included in the layoff. Tr. 73-74, 107-08. Indeed, on April 10, 2015, Kingston laid off 23 miners, including Jones. Tr. 76.

Jones' immediate supervisor, Daniel Laverty, and Laverty's superior, Greg Shrewsbury, agreed that Jones raised safety concerns, and confirmed that the safety issues giving rise to the concerns were a recurring problem at the mine and needed repeated correction. Tr. 137-39, 143, 145-46, 149-50, 152, 158-59, 169, 171-73.

Laverty testified, however, that all the electricians in his crew noted safety concerns that they encountered in their work, and that Jones' activity in this regard was "about the same as anybody else." Tr. 137-39. Laverty further testified that noting safety violations was part of the electrician crew's job. Tr. 150-51. He said that Jones was not more persistent than other miners. Tr. 155.

Prior to the hearing, the Secretary filed a motion in limine urging the Judge to disallow testimony by Kingston's witnesses about their reasons for permanently laying off Jones. The Judge granted the motion at the hearing prior to the parties' opening statements, finding that such testimony was not relevant to the narrow issue before him in a temporary reinstatement hearing. Tr. 10-14.

During her opening statement, the Secretary's counsel stated that the evidence would show that the evaluation process for determining who would be laid off "lent itself to being manipulated by the evaluators to disguise their real motivation for firing miners like Mr. Jones who raise safety issues." Tr. 24. Further, the Secretary's counsel stated that the evidence would show that within a week or two of the layoff, Kingston began hiring new miners. Tr. 24. The Judge, however, ruled that the Secretary would not be permitted to submit such evidence. Tr. 25. The Judge explained that, in light of the Secretary's successful motion to exclude testimony about Kingston's reasons for laying off Jones, "the Secretary can't have it both ways." Tr. 25. Such evidence, the Judge stated, would be a "huge distraction" and "shouldn't be part of [the Secretary's] case." Tr. 26; *see also* slip op. at 10 ("a temporary reinstatement proceeding is not the forum to consider competing claims about the legitimacy of the layoff procedures").

B. The Judge's Decision

The Judge concluded in his decision that Jones' discrimination complaint was frivolously brought for two reasons. First, he concluded that Jones' late filing of his complaint was "unexcused." Slip op. at 11. Secondly, the Judge found that the substance of Jones' complaint was frivolous. The Judge found that Kingston "took no negative action, by words or deeds," in reaction to Jones' raising of safety concerns. *Id.* at 11-12. The Judge reasoned that Jones' fellow electricians raised the same safety concerns as Jones, that raising safety concerns was "part of [Jones'] job" and not a "genuine safety complaint[ ]," and that Kingston "encourage[d] the miners to bring such concerns to its attention." *Id.* at 11. The Judge further relied on the "high regard" Laverty expressed in his January 2015 evaluation of Jones, and found it "noteworthy" that Laverty's evaluation was written three months before Jones was laid off. *Id.* Finally, the Judge noted that although he found Jones to be a credible, intelligent witness who understood his rights, "that does not mean that the Court accepted Jones' unsupported visceral feelings that Laverty didn't like his raising safety matters." *Id.* at 11, n.12.

II.

Disposition

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) ("*JWR*"). 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. No. 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." *JWR*, 920 F.2d at 748, n.11.

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 at 744. As the Commission has recognized, "[i]t [is] not the Judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999).

We first address the Secretary's argument that the Judge erred by denying the Application for Temporary Reinstatement on the basis that Jones' complaint to MSHA was untimely. The 60-day period for filing a discrimination complaint under section 105(c)(2) is not jurisdictional. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). A Judge is

required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation," in order to determine whether a miner's late filing should be excused. *Id.*; *see also Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984). Jones testified that he did not know that section 105(c)(2) applies to layoffs. He had thought it applied only to individual discharges. Therefore, he had not filed his complaint until an MSHA special investigator advised that he could seek relief from a layoff. Tr. 105-06. The operator did not rebut Jones' assertion of a good faith misunderstanding of section 105(c) or demonstrate any prejudice from the delay in filing. We find that Jones' evidence is sufficient to excuse the late filing for purposes of a temporary reinstatement hearing. Therefore, we reverse the Judge's finding at this stage that Jones' filing was untimely.

We next address whether the Judge erred in finding Jones' complaint to be frivolously brought. The elements of a discrimination claim are that (1) the complainant engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817 (Apr. 1981). The Commission applies the substantial evidence standard in reviewing a Judge's factual determinations.[2]

Indisputable evidence supports a finding that Jones engaged in protected activity.[3] It is clear that Jones frequently raised safety issues. Furthermore, there is no dispute that the layoff of Jones constitutes "adverse action." Thus, the only remaining issue is whether substantial evidence supports the Judge's conclusion that Jones did not assert a non-frivolous "nexus" between the protected activity and the adverse action.

Among the indicia of discriminatory intent that establish a "nexus" between the protected activity and the adverse action are hostility or animus toward the protected activity and disparate

---

[2] *E.g.*, *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000). "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 *Consol. Edison Co. of New York, Inc. v. NLRB*, 305 U.S. 197, 229 (1938)).

[3] The Judge described Jones' frequent safety complaints as "non-viable protected activity in the context that they were made and [that] Kingston took no negative action, by words or deeds, in reaction to them." Slip op. at 11-12. We interpret the Judge's use of the term "non-viable protected activity" to mean that the Judge found that Jones engaged in protected activity, but that the other electricians also raised safety concerns. Raising safety concerns is, of course, paradigmatic "protected activity" within the meaning of section 105(c)(2). The right to raise safety concerns is protected by the Mine Act, and a miner's raising of such concerns is not, for purposes of section 105(c), less protected because other miners also raise them.

treatment of the complainant. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981)); *see also Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC1085, 1089 (Oct. 2009).

In this regard, the Judge's exclusion of evidence regarding the layoff and hiring of new miners constitutes reversible error.[4] The Secretary contended his evidence would show that the process for determining who would be laid off was susceptible to manipulation to achieve the layoff of miners who raised safety issues, and would show that within a week or two of the layoff Kingston began hiring new miners. Tr. 24. Such evidence could play a vital role in determining whether a non-frivolous claim of a nexus between Jones' protected activity and his layoff exists.[5] Therefore, we hold that the Judge abused his discretion by excluding evidence regarding the layoff and the hiring of miners.

Thus, we conclude that the Judge erred by failing to consider relevant evidence in determining whether Jones' complaint was frivolously brought. Accordingly, we vacate the Judge's decision and remand for further proceedings. On remand, the Judge shall permit the Secretary to submit evidence regarding the layoff and hiring of miners and shall permit the operator to submit relevant rebuttal evidence consistent with the recognition 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*, 9 FMSHRC at 1306.

Of course, after admission of such evidence, the Judge must carefully review the entire record in the case. This means that he must re-consider the totality of all the evidence including evidence submitted at the initial hearing related to safety complaints and animus such as the asserted isolation of Jones by Laverty[6] and any other evidence that, in conjunction with the newly introduced evidence, bears upon the Secretary's position that the claim is not frivolous.

---

[4] When reviewing a Judge's evidentiary rulings, the Commission applies an abuse of discretion standard. *Mark Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2356 (Aug. 2013) *citing Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Twentymile Coal Company*, 30 FMSHRC 736, 765 (Aug. 2008).

[5] The Secretary contends that the evidence regarding the layoff would show that the operator's layoff procedure was used to rid the mine of safety complainers. Tr. 24; Secy's Pet. For Discretionary Review at 17-18. Specifically, the Secretary asserts that he can prove that the operator began hiring new miners a week or two after its April 2015 layoff of 23 miners, including Jones. The Secretary also asserts that he can prove that, despite Kingston's public explanation that the layoff was necessitated by mining conditions, Kingston ultimately hired 21 new miners by August 2015. *Id.* Such evidence is relevant to a showing of hostility or animus to the protected activity.

[6] In this regard, the Judge's decision did not deal explicitly with Jones' key assertion that Laverty isolated him in response to Jones going over Laverty's head. We note Jones' testimony

III.

Conclusion

For the reasons stated above, we vacate the Judge's decision, reverse it in part, and remand the matter in part to the Judge for further proceedings consistent with this opinion.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

---

that after an occasion when he went to Shrewsbury over Laverty's head, Laverty began having him work in isolation and did not assign other electricians to work in isolation. Tr. 49-50, 53-54. The Judge should explain the role such testimony by Jones plays in his analysis.

Distribution:

Jeremy Jones
1667 Willis Branch Rd.
Victor, WV 25938

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
201 12th St. South, Suite 500
Arlington, VA 22202-5450

Lucy C. Chui Esq.
Associate Regional Solicitor
Office of the Solicitor
U.S. Department of Labor
201 12TH St., South, Suite 500
Arlington, VA 22202-5450

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St., South, Suite 500
Arlington, VA 22202-5450

Arthur M. Wolfson, Esq.
Jackson Kelly PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222
awolfson@jacksonkelly.com

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222
rhmoore@jacksonkelly.com

Administrative Law Judge William B. Moran
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004