

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 19, 2024

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2024-0024
on behalf of JIMMY LEE HOOVER	:	
	:	
v.	:	
	:	
MOSENECA MANUFACTURER	:	
LIMITED LIABILITY COMPANY d/b/a/	:	
AMERICAN TRIPOLI	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, 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. (2018) (“Mine Act”). On November 16, 2023, the Secretary of Labor filed an Application for Temporary Reinstatement on behalf of Jimmy Lee Hoover (“Hoover”) against MoSeneca Manufacturer Limited Liability Company d/b/a/ American Tripoli (“MoSeneca”) pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).

On December 13, 2023, the Administrative Law Judge issued an Order Granting Temporary Reinstatement of Hoover. 45 FMSHRC __ (Docket No. CENT 2024-0024)(Dec. 13, 2023) (ALJ). On December 15, MoSeneca filed a Petition seeking review of the Judge’s order.¹ On December 21, the Judge issued an addendum to his December 13 Order. Subsequently, on December 22, the Commission issued an order stating that any response by the Secretary to the operator’s petition for review shall be filed by January 9, 2024. On January 9, the Secretary filed her response. For the reasons that follow, we hereby affirm the Judge’s Order Granting Temporary Reinstatement.

¹ MoSeneca filed what it termed a petition for discretionary review, which the Commission construed as a petition seeking review of the Judge’s reinstatement order pursuant to 29 C.F.R. § 2700.45.

I.

Factual and Procedural Background

This case involves a mill located at a mine in Newton, Missouri. The current owner, Russell Tidaback, has employed the miner, Jimmy Lee Hoover, at the mill since June 2021. While trying to start the mill on September 13, 2023, Hoover noticed that an airlock was not running properly because of a malfunctioning circuit breaker. Tr. 29. Hoover tried, but failed, to reset the circuit breaker using an external reset button on the outside of a breaker box. Sec. Ex. 3 at 2. Hoover testified that he did not attempt to manually reset the circuit breaker because this would have required him to remove the cover of the breaker box, insert his hand into the box, and switch on the internal manual reset. The manual reset would expose his hand to an energized 220 volt current. In the past, when the circuit breaker needed to be reset manually, Hoover had called maintenance staff for their assistance, but there was no maintenance staff present at that time. Sec. Ex. 3 at 3.

Hoover reported the malfunctioning circuit breaker to Don Hale, his immediate supervisor, and together with Hale, reported it to Operations Manager John Spears. Sec. Ex. 3 at 3. Hoover alleged that when he reported the malfunction to Spears, Spears responded that “we got to make Russ[ell Tidaback] money.” Tr. at 33. Hoover testified that he interpreted this statement as an instruction to do whatever was necessary to reset the circuit breaker, including an internal manual reset. Tr. 59. However, Hoover refused to perform the manual reset because of his fear that he might be electrocuted if he inserted his hand into the energized breaker box. Tr. 92. Hoover alleges Spears responded to Hoover’s work refusal by saying “is this how you’re going to play it, really?” Tr. at 121.

After this conversation with Spears, Hoover took his lunch break. Tr. 33. It is undisputed that Hoover was late in returning from his lunch break. Tr. 16, 228. Hale claims that when he informed Hoover of this delay, Hoover disrespectfully responded “I don’t care, go ahead and write me up.” Tr. 219. At around 8 p.m. that evening, Hale informed Russell Tidaback of Hoover’s delay in returning from lunch and Hoover’s alleged disrespectful response when Hale informed him of his late return. Resp’t Ex. H. Subsequently, Tidaback drafted a letter terminating Hoover. The following morning, when Hoover arrived at the mine to start his workday, Spears issued the termination letter to Hoover. Sec’s Ex. 2; Sec’s Ex. 3 at 3.

On September 25, 2023, Hoover filed a complaint with MSHA over his termination. Michael Dillingham, an MSHA investigator, investigated Hoover’s discrimination complaint, and concluded it had not been frivolously brought. Subsequently, on November 16, 2023, the Secretary filed an application for temporary reinstatement of Hoover. After a hearing in this matter, the Judge found that the Secretary had “demonstrated that the Application for Temporary Reinstatement was not frivolously brought.” ALJ Dec. at 7.

The Judge found that Hoover engaged in protected activity on September 13, 2023, when he refused to perform a manual internal reset of the malfunctioning circuit breaker. The Judge used circumstantial indicia of discriminatory intent to find that there was a non-frivolous issue as to a motivational nexus between Hoover’s protected work refusal and his termination. *Id.* at 7-9.

The Judge noted that the operator was “permitted to present evidence and testimony throughout the hearing in support of [its] position” that Hoover was terminated solely for unprotected activity. *Id.* at 8. However, the Judge found that while evidence of Hoover’s unprotected activity “may be relevant or dispositive in a later discrimination proceeding,” for purposes of temporary reinstatement, such evidence simply provided an alternative theory as to why Hoover was terminated and was insufficient to demonstrate “that the Complainant brought forth a frivolous complaint.” *Id.* at 8.

On December 15, 2023, the operator filed a petition seeking review of the Judge’s order. The operator claims that the Judge erroneously found protected activity because the “ALJ’s conclusion is based more on subjective interpretation than on objective factual evidence.” Pet. at 2. Moreover, the operator maintains that the protected activity played no role in Hoover’s termination, asserting that “this is not a case in which the complainant was . . . terminated due to . . . [a] protected act; rather, the termination was due to . . . legitimate non-discriminatory reasons.” *Id.* at 4.

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 “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 obo Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738 (11th Cir. 1990); *Sec’y obo Jones v. Kingston Mining, Inc.*, 37 FMSHRC 2519, 2522 (Nov. 2015). The Commission reviews a Judge’s temporary reinstatement order under the substantial evidence standard. *Sec’y obo Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). 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 the proceedings.” *Sec’y obo Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

“While an applicant for temporary reinstatement need not prove a prima facie case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a prima facie case of discrimination under section 105(c) of the Act, a complaining miner bears the burden of establishing (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 obo Williamson*, 31 FMSHRC at 1088.

Discriminatory motive may be shown by indirect evidence establishing a motivational nexus between the miner’s protected activity and the adverse action. *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981) (citing *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). The Commission has held that discriminatory motive can be established by circumstantial evidence of: (1) knowledge of the

protected activity, (2) hostility or animus towards the miner regarding the protected activity, (3) temporal proximity, *i.e.* coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complainant. *Id.* at 2510-12.

In his decision, the Judge found that the miner had engaged in protected activity by allegedly refusing unsafe work. ALJ Dec. at 7. Hoover testified he was aware of a miner receiving an electrical shock after touching an Allen wrench located in a breaker box which was supposed to have been de-energized. Tr. 91-92 (“Don grabbed a Allen wrench that was in a breaker box and said it was shut off and he grabbed that and it lit him up. And it was supposed to be dead. That was in my head, too, while I was looking at this breaker box.”). Additionally, Hoover’s testimony that Spears told him “we got to make Russ [Tidaback] money” (Tr. 33), while contested, could reasonably be construed as an instruction to Hoover.

The operator did not dispute that Hoover had a good faith reasonable belief that performing a manual internal reset of the circuit breaker would expose him to a perceived hazard. We note that the Commission has recognized a miner’s protected right to refuse work in the face of a perceived safety or health danger. *Dykhoff v. U.S. Borax*, 22 FMSHRC 1194, 1198 (Oct. 2000) (citing *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990)). In order to be protected, “work refusals must be based upon the miner’s good faith, reasonable belief in a hazardous condition.” *Dykhoff*, 22 FMSHRC at 1198. As a result, the Judge appropriately determined that Hoover’s alleged refusal to perform an alleged unsafe act – a manual internal reset of the circuit breaker – raised a non-frivolous claim that he engaged in protected activity. Therefore, we find that substantial evidence demonstrates a non-frivolous claim that Hoover, by refusing to perform the unsafe act, engaged in protected activity.

In its petition seeking review of the Judge’s order, the operator claims that the Judge’s determination that the miner engaged in protected activity was not based on any direct orders or explicit actions, but on circumstantial evidence. In support of this position, Respondent cited evidence that it submitted at hearing that no member of Respondent’s management ordered Hoover to place his hand inside the energized breaker box. However, the ALJ addressed this evidence, noting the existence of countervailing “circumstantial evidence that it is management’s expectation that a miner do whatever is necessary, when maintenance is not available, to get the mill up and running.” ALJ Dec. at 7. The Judge noted this conflict in the testimony, but appropriately did not resolve the conflict or make credibility determinations. *Id.* at 8 (citing *Sec’y of Labor obo Williamson*, 31 FMSHRC at 1089) (Resolving conflicts in the testimony, and making credibility determinations in evaluating the Secretary’s prima facie case are simply not appropriate “at this stage in the proceeding.”). Conflicts in the evidence should be resolved at the hearing on the merits.

In addition to finding protected activity, the Judge also found that it is undisputed that the miner suffered an adverse employment action, in that he was discharged. ALJ Dec. at 7. Substantial evidence supports this finding as well.

The Judge determined that the Secretary had raised a non-frivolous issue as to whether there was a motivational connection between the protected activity and the adverse employment action. The Judge found that it was undisputed that the miner suffered an adverse employment

action the day after he alleged to have engaged in protected activity. ALJ Dec. at 7. Finally, the Judge determined that Secretary raised non-frivolous issues as to whether Respondent had knowledge of Hoover's alleged protected activity and whether Respondent displayed animus towards that alleged protected activity. *Id.* at 7-8. On appeal, the operator does not challenge the Judge's findings regarding temporal proximity and knowledge. Pet. at 1-5. The Judge's undisputed findings "can be sufficient by themselves to establish a nexus between the protected activity and the adverse action." *Sec'y obo Roger Cook v. Rockwell Mining, LLC*, 43 FMSHRC 157, 163 (Apr. 2021) (citing *Sec'y of Labor on behalf of Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 323, 325-26 (Mar. 2000)).

In response to the Secretary's presentation regarding discrimination, Respondent asserted that it had terminated Hoover solely for unprotected activity – misconduct and poor performance. Pet. at 2. However, the Judge appropriately declined to rule on the operator's theory that Hoover was terminated solely for his unprotected activity. As noted previously, the Judge's role during temporary reinstatement proceedings is to simply determine whether substantial evidence established that the discrimination complaint was nonfrivolous. *Jim Walter*, 920 F.2d at 744. In this case, ruling on the operator's theory would have required the Judge to go beyond the nonfrivolous standard to impermissibly weigh evidence and/or render credibility determinations. *CAM Mining, LLC*, 31 FMSHRC at 1089. Therefore, the Judge appropriately declined to consider Respondent's argument at the temporary reinstatement stage.

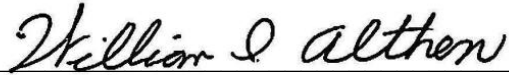
III.

Conclusion

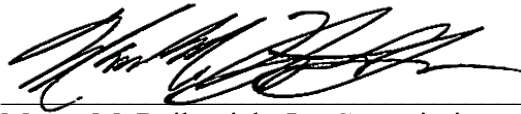
Substantial evidence supports the Judge's finding that the Secretary demonstrated that the Application for Temporary Reinstatement was not frivolously brought. Therefore, the Judge's order granting temporary reinstatement is affirmed.



Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner



Timothy J. Baker, Commissioner

Distribution:

Russell Tidaback
American Tripoli
222 Oneida Street
Seneca, MO 64865
RTidaback@deedyco.com

Jimmy Lee Hoover
1630 Cottage Ln.
Seneca, MO 64865
Hooverj9233@gmail.com

Alexandra J. Gilewicz, Esq.
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Gilewicz.alexandra.j@dol.gov

Emily Toler Scott, Esq.
Counsel for Appellate Litigation
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
scott.emily.t@dol.gov

April Nelson, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
Division of Mine Safety and Health
201 12th Street South, Suite 401
Arlington, VA 22202
Nelson.april@dol.gov

Melanie Garris
Civil Penalty Compliance Division Chief
U.S. Department of Labor
Office of Assessments
Mine Safety and Health Administration
201 12th Street South, Suite 401
Arlington, VA 22202
Garris.Melanie@dol.gov

Chief Administrative Law Judge Glynn F. Voisin
Federal Mine Safety & Health Review Commission
Office of the Chief Administrative Law Judge
1331 Pennsylvania Avenue, NW, Suite 520 N
Washington, DC 20004-1710
GVoisin@fmshrc.gov

Administrative Law Judge David Simonton
Federal Mine Safety and Health Review Commission
Office of the Chief Administrative Law Judge
721 19th St. Suite 443
Denver, CO 80202-2536
dsimonton@fmshrc.gov