FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, DC 20004-1710

July 28, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of VICTOR TORRES v. W.G. YATES & SONS CONSTRUCTION COMPANY	: : : : : : : : :	Docket No. WEST 2023-0256-DM

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" or "Act"). The Secretary of Labor filed an Application for Temporary Reinstatement on behalf of Victor Torres against W.G. Yates & Sons Construction Company ("Yates") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). On July 6, 2023, the Administrative Law Judge issued an Order Granting Application for Temporary Reinstatement and Order Tolling Temporary Reinstatement, in which he found that Torres's complaint was non-frivolous but the remedy of temporary reinstatement was not available due to layoffs at the facility. 45 FMSHRC __, No. WEST 2023-0256-DM (July 6, 2023) (ALJ). The Secretary subsequently filed a timely petition for review of the Judge's order, directed at the tolling issue. For the reasons that follow, we grant the petition, and vacate and remand the part of the Judge's order addressing tolling.

I.

Factual and Procedural Background

A. Factual Background

Victor Torres worked as a journeyman millwright and welder for W.G. Yates and Sons Construction Company, which had been contracted by MP Materials Corporation to build a rare earth minerals processing facility in Mountain Pass, CA. Due to the secretive nature of the project, unauthorized photos were prohibited on the mine site. Torres testified that on April 10, 2023, his crew was tasked with using a manlift to bring pipe down from an elevated track. Torres believed this was unsafe and requested the use of a crane instead. The crew was

instructed to proceed with the manlift. When Torres refused, he states that he was threatened with removal. The crew proceeded with the manlift, and Torres took photos to include in a report regarding the incident. Mine management informed Torres that taking photos was against policy, but he was not disciplined at that time. He was subsequently laid off on April 13, 2023. *See* 45 FMSHRC __, slip op. at 2-5 (summary of Torres's testimony).

Around this time (April 2023) construction began to slow and the operation began downsizing. By the time of the hearing (June 2023) construction was nearly complete and the number of employees had decreased significantly. Testimony from various witnesses indicates that the project employed over 100 millwrights at its peak, which decreased to approximately 14 millwrights by April 2023 and three to five millwrights (and no welders) by June 2023. *Id.* at 2, 6, 7, 9. Yates's witnesses testified that personnel decisions regarding the layoffs were based on the millwright superintendent's working knowledge of the employees rather than an objective formula or ranking system. They stated that Torres was included in the April 13 layoff because there was no more structural welding work, he did not have the qualifications for the remaining millwright work, and the other millwrights did not have his issues with absenteeism. *Id*. at 6-11.

Torres filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that he was discharged due to his safety complaint and work refusal. App. for Temp. Reinstatement, Ex. A. The Secretary determined that Torres's complaint was not frivolous, and on June 2, 2023, filed an application requesting that an Order of Temporary Reinstatement be issued directing Yates to reinstate Torres to the same or similar position he occupied prior to his discharge. App. for Temp. Reinstatement at 3. A hearing was subsequently scheduled for June 28, 2023.

On June 27, the day prior to the scheduled hearing, Yates filed a Hearing Brief stating that it would rely on the "affirmative defense of changed circumstances, such as layoffs . . . as part of the hearing on Applicant's Application for Temporary Reinstatement." Yates's Hr'g Br. at 1. The Secretary filed a Response in Opposition, arguing in part that affirmative defenses should not be weighed at temporary reinstatement hearings and that the brief was untimely because it did not provide the Secretary with adequate time to respond. Sec'y Opp. at 2.

The hearing was held on June 28, 2023. The Judge made a preliminary ruling allowing in evidence regarding layoffs. Tr. 13. Both parties addressed tolling in their closing arguments. Tr. 208-09, 212-14.

B. The Judge's Order and Arguments on Appeal

In a July 6, 2023 Order, the Judge granted the Secretary's application for temporary reinstatement. He found that Torres engaged in protected activity, that Yates's management knew of the protected activity on the day it occurred, and that Torres was discharged three days later. The Judge also found indications of animus toward Torres due to his protected activity. Given management's knowledge of the protected activity, the temporal proximity between the activity and Torres's discharge, and the evidence of animus, the Judge concluded that the Secretary's section 105(c)(2) complaint was not frivolously brought. Slip op. at 13.

However, the Judge also found that temporary reinstatement was not an immediately available remedy. Slip op. at 14. The Judge overruled the Secretary's objection to Yates's

evidence regarding layoffs. Slip op. at 13-14 n.27. He found that Yates's witnesses provided credible, undisputed testimony that Torres would not have been one of the remaining millwrights still working as of the date of the hearing, that one of the currently employed millwrights would have to be laid off to accommodate Torres's reemployment, and that there was no work for structural welders at the time of the hearing. Slip op. at 15-16. He concluded that the operator "demonstrated by a preponderance of the evidence, almost all of which was undisputed, that Torres would have been properly included in one of the many rounds of layoffs that occurred after April 13, 2023." Slip op. at 16. Accordingly, he ordered that Torres's temporary reinstatement be tolled.

On appeal, the Secretary seeks review of the part of the Judge's order tolling temporary reinstatement. The Secretary claims the Judge erred by considering Yates's tolling argument, both because tolling is outside the proper scope of a temporary reinstatement hearing and because the Secretary was prejudiced by the short time frame. Alternatively, the Secretary claims the Judge applied the wrong standard of review to the tolling argument. The Secretary requests that the Commission reverse and remand for further proceedings.

II.

<u>Disposition</u>

The Commission has long recognized that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), *cited in, e.g.*, *Scott, emp. By Mill Branch Coal Corp.*, 42 FMSHRC 481, 488-89 (Aug. 2020); *Jones v. D&R Contractors*, 8 FMSHRC 1045, 1051-52 (July 1986). For the reasons below, we find that the Secretary was denied a meaningful opportunity to respond to Yates's tolling argument.

Applications for temporary reinstatement are handled on an expedited schedule. *See* 29 C.F.R. § 2700.45. Here, the Secretary filed the application for temporary reinstatement on June 2, 2023, and Yates requested a hearing on June 12. The Judge informed the parties that the primary issue at the hearing would be "whether Mr. Torres's complaint of discrimination was frivolously brought," directed the parties to provide names of any witnesses by June 21, and scheduled the hearing for June 28. Unpublished Order dated June 14, 2023.

On June 27, Yates filed a brief stating that the Commission has recognized changed circumstances as a defense that can toll temporary reinstatement, and that it would rely on this affirmative defense to show at hearing that there was no job for Torres to return to because the construction project for which he was hired was largely complete.[1] Yates Hr'g Br. at 1-2.

[1] We note that the cited changed circumstance was not a particularly recent development. Yates's witnesses indicated that downsizing had been underway for months. If Yates had raised the tolling issue when it filed a hearing request on June 12, or even by the Judge's June 21 deadline, this could have been a different case. *See Sec'y on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 165, 169 (Jan. 2017) (ALJ), *aff'd* 39 FMSHRC 315 (Feb. 2017) (no issue of prejudice raised where the operator filed a motion to toll eight days before the hearing).

The Secretary filed a same-day objection, claiming in part that she did not have adequate time to respond to the tolling argument. Sec'y Opp. at 2. The hearing occurred the next day as scheduled. The Judge overruled the Secretary's objection to the introduction of evidence regarding Yates's defense (Tr. 11-14) and subsequently issued an order finding that Torres was entitled to temporary reinstatement, but that temporary reinstatement should be tolled because no work was available for Torres.

In summary, until Yates's filing on June 27, the Secretary reasonably expected the June 28 hearing to focus on whether Torres's underlying discrimination complaint was frivolously brought. By permitting Yates to address its affirmative defense at the hearing, the Judge gave the Secretary less than 24 hours to marshal arguments and evidence regarding a new issue.

Generally, to show a due process violation, a party must show that he or she has sustained prejudice, i.e., that the party would have litigated the matter differently if adequate notice had been received. *Brody Mining, LLC*, 37 FMSHRC 1914, 1927 (Sept. 2015); *Cumberland Coal Res., LP*, 32 FMSHRC 442, 447-49 (May 2010). Here, the Secretary identifies one area of the case that would have been litigated differently with adequate notice; she indicates that with more time, she could have introduced evidence to counter Yates's claim that a millwright would have to be laid off for Torres to be reinstated. Sec'y Pet. at 16. Beyond this, the Secretary is unable to identify specific witnesses or lines of argument. However, this seems to be an inevitable result of the specific harm caused by the lack of time. With less than 24 hours' notice, the Secretary simply did not have the time to locate witnesses or prepare a litigation strategy.[2] *See Sec'y on behalf of Overfield v. Highland Mining Co. LLC*, 36 FMSHRC 1659, 1675 (June 2014) (ALJ) (finding the Secretary had no reasonable time to call into question the objectivity of a layoff where Secretary's counsel did not receive copies of the layoff documentation until the hearing).

Significantly, the Judge's order tolling temporary reinstatement relies almost exclusively on the "undisputed" testimony of Yates's two witnesses, Jimmy Hayes and Bryan French. Slip op. at 15-16. We question whether testimony is truly "undisputed" when the Secretary had less than 24 hours to prepare for cross-examination on the relevant issue and no practical opportunity to locate additional witnesses who may have been able to provide contrary testimony. Yates's tolling evidence was undisputed essentially by default, because the Secretary had no meaningful opportunity to dispute it.[3]

The Commission stresses that it takes no position on what conclusions the Judge should reach regarding the evidence presented on remand. Instead, we simply note that this is a case where providing the Secretary with a meaningful opportunity to address the tolling issue *could* have impacted the weight of evidence sufficiently to change the outcome of the Judge's order.

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[2] We also note that the Secretary had only five business days to file her petition for review. 29 C.F.R. § 2700.45(f).

[3] As a comparison, there may have been no due process concerns if the Judge had based his tolling order on facts contained in joint stipulations.

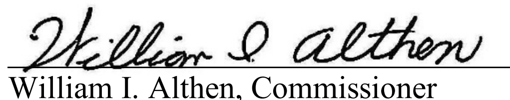
We find the Judge erred when he considered Yates's motion to toll at the initial temporary reinstatement hearing, prior to providing the Secretary a meaningful opportunity to investigate and respond to the tolling issue raised in Yates's June 27 Brief.[4] Accordingly, we vacate the Judge's order tolling temporary reinstatement and remand for further proceedings, where the Secretary will have the opportunity to present further argument and evidence on the tolling issue, including the proper standard of review. Yates shall also have the opportunity to present rebuttal evidence in the event of further development of the record.

III.

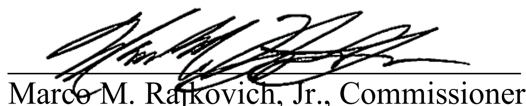
Conclusion

For the reasons discussed above, we vacate the Judge's order tolling Torres's temporary reinstatement and remand for further proceedings consistent with this decision.

Mary Lu Jordan, Chair



William I. Althen, Commissioner



Marco M. Rajkovich, Jr., Commissioner

Timothy J. Baker, Commissioner

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[4] The Secretary claims it is *always* inappropriate to consider tolling arguments at an initial temporary reinstatement hearing, because Procedural Rule 45(d) limits the scope of such hearings to whether the miner's complaint was frivolously brought. We note that we have previously rejected this argument. *Sec'y on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 397 (Feb 2013). Regardless, as we are remanding on different grounds, thus providing the parties with the opportunity to present evidence on tolling outside of the initial temporary reinstatement hearing as well as the opportunity to present further legal arguments regarding tolling in the temporary reinstatement context, we need not address this legal argument here. As a practical matter, however, we note that in this instance separating the tolling issue from the temporary reinstatement hearing would have provided the Secretary with a meaningful opportunity to respond.

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