

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

October 22, 2009

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of LIGE WILLIAMSON	:	
	:	Docket No. KENT 2009-1428-D
v.	:	
	:	
CAM MINING, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On September 30, 2009, Administrative Law Judge Jerold Feldman issued a decision denying temporary reinstatement to Lige Williamson with CAM Mining, LLC (“CAM Mining”) pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 31 FMSHRC ___, slip op. at 9, 10, No. KENT 2009-1428-D (Sept. 30, 2009) (“Slip op.”). On October 7, 2009, the Secretary of Labor filed a petition with the Commission seeking review of the judge’s decision. CAM Mining filed a response to the Secretary’s petition on October 15, 2009. For the reasons that follow, we grant the petition, reverse the judge’s decision, and order the immediate reinstatement of Lige Williamson effective as of September 30, 2009.

I.

Factual and Procedural Background

The facts of this case are set forth in detail in the judge’s September 30 decision and the parties’ pleadings. A summary of the most significant facts follows. Lige Williamson was employed at CAM Mining’s Mine #28 from August 2007 until the day of his termination on May 15, 2009. Slip op. at 2; Tr. 25. Williamson worked as a “floater” or utility man, performing tasks related to ventilation, until he was transferred to operate a shuttle car on or about April 27, 2009. Slip op. at 2, 3; Tr. 25, 39. Williamson began working on the 001 Section around the

middle of April 2009 under the supervision of McArthur Swiney, section foreman. Slip op. at 3. The 001 Section was a “walking supersection,” which meant that two continuous miners ran alternatively among the different entries on the face with a single split of air. Slip op. at 3; Tr. 26-27. Previously, Williamson worked on the 002 Section, a “supersection,” which had two continuous miners operating simultaneously with double splits of air. Slip op. at 3; Tr. 26.

On or about April 20 or 21, Williamson noticed that both left-side and right-side shuttle cars were returning from the face with loads of coal at the same time. Slip op. at 3. He believed that both continuous miners were cutting coal at the same time, which was not permissible with the section’s current ventilation. *Id.* He spoke with Swiney about the simultaneous operation of the miners, but Swiney did not respond. *Id.* Swiney later denied that Williamson made this complaint. *Id.* at 4. After this incident, Williamson alleges that Swiney began “dogging” him and assigning him more onerous tasks. *Id.* at 3-4. Williamson, who has a history of heart trouble, testified that he began suffering chest pain that he attributed to the stress caused by Swiney’s “dogging.” *Id.* at 3. Williamson also testified that he visited a doctor for his chest pain on April 23 and was off work until he returned on April 27, as per his doctor’s instructions. *Id.* When Williamson returned to work, he was transferred to operate the right-side shuttle car. *Id.* Williamson claims that Swiney began calling him “asshole” and gave him job assignments that were different from, and more difficult than, the assignments given to other shuttle car operators. *Id.* at 3-4; Tr. 39-40, 63-64, 67, 158, 160. Swiney testified that he never called Williamson “asshole” and denied dogging Williamson. Slip op. at 4.

On May 5, 2009, MSHA issued Citation No. 8227386 to CAM Mining for a violation of section 75.370(a)(1), 30 C.F.R. § 75.3701(a)(1), which requires a mine operator to follow an approved ventilation plan. *Id.* The citation was issued because the 001 Section was operating on a single, rather than two distinct splits of air, as provided in the existing approved ventilation plan. *Id.* The citation was terminated on May 7, 2009, after CAM Mining submitted an updated ventilation plan conforming with its single split of air operation. *Id.*

On May 13, 2009, Williamson was driving his shuttle car around a corner when he struck a dip in the floor and skidded across the intersection, hitting and cutting the water line and pinching the continuous miner power cable. *Id.* Williamson said that as he was attempting to reposition the shuttle car, Swiney approached him and began chastising him. *Id.* at 4-5. Williamson testified that Swiney had his finger in his face, swearing and calling me a “[g]oddamn dumbass.” *Id.* at 5. Williamson rose from his seat in the shuttle car, approached Swiney, and began swearing and yelling at him. *Id.* Swiney claimed that Williamson pushed him against the rib. *Id.* Williamson denied touching Swiney. *Id.* Swiney called Danny Conn, mine foreman, to “come get” Williamson. *Id.*; Tr. 279. Swiney drove Williamson on the mantrip to the end of the track and waited for Conn. Slip op. at 5; Tr. 97-99, 102. When Conn arrived, Swiney told him he wanted Williamson off his section, that he didn’t care what Conn did with him, and that Williamson had pushed him against the rib. Tr. 103, 279-80; CM Ex. 1. Conn drove Williamson outside and told him to come back to the mine the next day to speak with Frank Smith, mine superintendent. Slip op. at 5.

On May 14, Williamson met with Smith, who told him that he was being suspended for three days “with intent.” *Id.* at 6. Williamson next heard from the company in the form of a termination letter dated May 15, 2009, and delivered to his home via certified mail on May 16. *Id.* The letter stated that Williamson was discharged for insubordination. *Id.*

Williamson filed a section 105(c) complaint with MSHA on May 29, 2009. The Secretary filed an application for temporary reinstatement on August 12, 2009. A hearing was held on September 2, 2009.

In his decision, the judge found that Williamson’s complaint was frivolously brought. *Id.* at 2, 9. The judge assumed that Williamson engaged in protected activity when he complained to Swiney about the improper simultaneous operation of the continuous miners, and that Williamson was the subject of adverse action when he was discharged on May 15. *Id.* at 2, 7. However, the judge determined that there was “no reasonable cause to believe there is a nexus” between the two events. *Id.* at 2. The judge based his determination on his finding that the Secretary failed to present any evidence that the operator was discriminatorily motivated when it terminated Williamson. *Id.* at 7. The judge relied on Williamson’s admissions that he “cussed” Swiney on May 13 and believed that he would lose his job for doing so, to support the conclusion that there was no nexus between the protected activity and the adverse action. *Id.* at 8. Accordingly, the judge denied the Secretary’s application for temporary reinstatement. *Id.* at 2, 9.

In her petition, the Secretary argues that the judge committed a series of legal errors that misconstrue the nature of temporary reinstatement proceedings. Pet. at 1. The Secretary asserts that the judge erred in finding that there was no evidence of retaliatory action by CAM Mining in response to Williamson’s protected activity. *Id.* at 17-18. The Secretary explains that the judge’s analysis is erroneous for several reasons: (1) the judge ignored his own factual findings pertaining to the operator’s hostility or animus toward the protected activity; (2) the judge failed to find close proximity in time between the protected activity and the adverse action; (3) the judge placed improper weight on his finding that upper management had no knowledge of Williamson’s safety complaint; and (4) the judge improperly analyzed the May 13 incident as part of the Secretary’s prima facie case. *Id.* at 18, 20-29. The Secretary states that, under a correct application of the legal standard for temporary reinstatement, the record compels the conclusion that the miner’s complaint was not frivolous, and she requests that the Commission vacate the judge’s denial of temporary reinstatement and grant her application. *Id.* at 29-30.

CAM Mining responds that the judge correctly determined that the Secretary’s case was frivolously brought and that substantial evidence in the record supports the judge’s decision. Resp. at 1. CAM Mining agrees with the judge that Williamson’s complaint was too remote in time from his discharge. *Id.* at 26-29. CAM Mining asserts that the evidence supports the judge’s finding that Williamson’s discharge was a justified business decision. *Id.* at 29. CAM Mining argues that the final decision makers had no knowledge of Williamson’s alleged protected activity. *Id.* at 29-30. CAM Mining rejects the Secretary’s reliance on circumstantial

evidence to establish an unlawful motive in the face of direct substantial evidence establishing that Williamson was discharged for non-discriminatory reasons. *Id.* at 30-32. In sum, CAM Mining states that the judge correctly denied the Secretary's application for temporary reinstatement and asserts that the Commission should deny the Secretary's petition. *Id.* at 35.

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 reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). The Commission 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." *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). 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 the substantial evidence standard.¹ *See id.* at 719; *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

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 of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (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 (April 1981).

We conclude that the judge made a number of errors in determining that Williamson's complaint was frivolously brought. Although the judge correctly stated the legal standard to be applied in a temporary reinstatement proceeding, he applied an unduly restrictive standard in

¹ 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*, 305 U.S. 197, 229 (1938)).

reviewing evidence pertaining to the Secretary's application. Instead of limiting the scope of the proceeding to a determination of whether the miner's complaint was frivolously brought, the judge ignored relevant evidence, resolved conflicts in the testimony, and made credibility determinations in evaluating the Secretary's prima facie case, which he clearly should not have done at this stage in the proceeding. *Chicopee Coal Co.*, 21 FMSHRC at 719. Rather, the judge should have evaluated the evidence of the Secretary's prima facie case and determined whether the miner's complaint of discrimination "appear[ed] to have merit." *Jim Walter Res.*, 920 F.2d at 747.

We first address the issues of Williamson's alleged protected activity and adverse action. We conclude that substantial evidence supports the judge's findings that Williamson engaged in protected activity and suffered adverse action. Slip op. at 3, 6-7. As to protected activity, Williamson testified that he informed his supervisor, Swiney, of his concern about the simultaneous operation of the two continuous miners on the section. Tr. 35-36, 153. Swiney testified that Williamson never made a safety complaint to him. Tr. 285. Although there is a conflict in the testimony, it need not be resolved at this stage of the proceedings. *Chicopee Coal Co.*, 21 FMSHRC at 719. Rather, Williamson's testimony is sufficient evidence to support the judge's finding.² Substantial evidence also supports the finding that Williamson suffered adverse action when he was discharged on May 15, 2009.

The heart of the issue is the judge's finding that the Secretary failed to carry her burden in demonstrating a nexus between the protected activity and the adverse action. In so concluding, the judge erred.

The Commission has recognized that direct evidence of motivation is rarely encountered; more often, the only available evidence is indirect. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has identified several circumstantial indicia of discriminatory intent: (i) hostility or animus toward the protected activity; (ii) knowledge of the protected activity, and (iii) coincidence in time between the protected activity and adverse action. *Id.*

The judge ignored circumstantial evidence of motivation which the Secretary presented. The record contains evidence of Swiney's alleged hostility or animus towards Williamson and disparate treatment of Williamson as compared to the other shuttle car operators. Williamson testified that Swiney "dogged" him, swore at him, and assigned him more difficult and onerous tasks as compared to other shuttle car operators, and that all this occurred after Williamson made

² In its response to the Secretary's petition, CAM Mining makes much of Williamson's inconsistent testimony about the details of his safety complaint and the fact that Williamson never raised his complaint to other management officials prior to his discharge. Resp. at 3-21. We find these arguments to be of no avail as to whether Williamson engaged in protected activity. Whether Williamson was correct in his belief that the continuous miners were operating simultaneously is irrelevant to whether he made the safety complaint to his supervisor.

the alleged complaint regarding the two continuous miners to Swiney. Tr. 35, 39, 40-43, 63-64, 67-68, 158, 160. Although Swiney denied these allegations (Tr. 306, 310, 314-16),³ and despite Williamson's admission that the tasks in question were within his job description (Tr. 40), the judge need not resolve these disputes at this stage nor make credibility determinations. *Chicopee Coal Co.*, 21 FMSHRC at 719.

The judge also erroneously relied on upper management's lack of knowledge regarding Williamson's protected activity. First, Commission case law states that the Secretary need not prove that the operator has knowledge of the complainant's protected activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge. *Chicopee Coal Co.*, 21 FMSHRC at 718. Second, the operator's alleged basis for Williamson's discharge was Williamson's altercation with Swiney, the individual who allegedly showed Williamson hostility, animus, and disparate treatment. Swiney allegedly had knowledge of Williamson's protected activity because Williamson testified that he made the safety complaint to Swiney. Moreover, the decision to terminate Williamson was based on Swiney's allegations of Williamson's misconduct. Swiney's incident report and notes stated that Williamson struck him and that Swiney did not want Williamson on his section. Slip op. at 5; CM Ex. 1, 2. Thus, there may be a meritorious basis for imputing Swiney's knowledge to the operator. See *Wiggins v. Eastern Associated Coal Corp.*, 7 FMSHRC 1766, 1771 (Nov. 1985) (“[A]n operator cannot escape liability by pleading ignorance due to the division of company personnel functions.”) (quoting *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984)).

The judge also erred in failing to find proximity in time between the protected activity and adverse action, despite the span being a mere three weeks. Commission case law supports the position that the timing between the protected activity (Williamson's complaint to Swiney about the continuous miners on April 20 or 21) and the adverse action (Williamson's discharge on May 15) was sufficiently close. A three-week span can be sufficiently close in time given the evidence of intervening acts of hostility, animus, and disparate treatment. See *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 37-38, 43-44 (Jan. 1999) (finding temporal proximity despite 16-month gap between miners' contact with MSHA and the failure to recall miners from layoff where only a month had passed from MSHA's issuance of penalty as a result of the miners' notification of the violations). Moreover, the judge ignored the proximity in time between the alleged protected activity and the alleged disparate treatment and hostility by Swiney, which Williamson said began soon after he complained to Swiney about the ventilation plan issue. Slip op. at 3.

Finally, the judge erred in his consideration of the evidence regarding the May 13 incident. The judge based his conclusion that there was no nexus between Williamson's protected activity and the adverse action on his finding that Williamson was discharged for insubordination for the events of May 13. In doing so, the judge found no evidence of

³ Even so, Swiney testified that during the May 13 incident, Williamson stated to him that Swiney had been on his “case for 2 or 3 days.” Tr. 277.

intervening retaliation, which, as previously stated, was erroneous, and relied in part on Williamson's statement that he believed he could lose his job for "cussing" out his foreman. Slip op. at 8. Contrary to the judge's characterization, Williamson's statement of his own belief does not establish the operator's motivation. Moreover, as the Secretary argues, Williamson's testimony is consistent with a theory that Swiney would use the May 13 exchange as a pretext for Williamson's discharge. Pet. at 28 n.22.

Furthermore, we note that evidence that Williamson was discharged for unprotected activity relates to the operator's rebuttal or affirmative defense. In essence, the judge weighed the operator's rebuttal or affirmative defense evidence against the Secretary's evidence of a prima facie case. In doing so, the judge erred by assigning a greater burden of proof than is required. In a temporary reinstatement proceeding, the Secretary need not establish a prima facie case of discrimination by a preponderance of the evidence. Rather, the Secretary was required to prove only that a non-frivolous issue exists as to whether Williamson's discharge was motivated in part by his protected activity. *Chicopee Coal Co.*, 21 FMSHRC at 719. Given Williamson's testimony of the hostility and animus he was shown by Swiney, we conclude that there is clearly a non-frivolous issue as to motivation.

In sum, we thus conclude that substantial evidence supports that the Secretary's discrimination complaint is not frivolous. We intimate no view as to the ultimate merits of this case.

III.

Conclusion

For the foregoing reasons, we grant the Secretary's petition, reverse the judge's decision, and order the retroactive reinstatement of Lige Williamson effective as of September 30, the date of the judge's decision.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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