

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

June 21, 2012

SECRETARY OF LABOR :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
on behalf of ROBERT NICKOSON :
v. : Docket No. WEVA 2012-1069-D
MAMMOTH COAL COMPANY :

Before: Jordan, Chairman; Duffy, Young, Cohen and Nakamura, 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” or “Act”). On June 5, 2012, the Commission received from Mammoth Coal Company (“Mammoth”) a petition for review of Administrative Law Judge Kenneth R. Andrews’ Decision and Order granting temporary economic reinstatement to miner Robert Nickoson pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). 33 FMSHRC ___, slip op. at 16, No. WEVA 2012-1069-D (May 25, 2012) (ALJ). On June 11, 2012, the Commission received the Secretary of Labor’s opposition to Mammoth’s petition. For the reasons that follow, we grant the petition and affirm the judge’s order temporarily reinstating Mr. Nickoson.

I.

Factual and Procedural Background

The factual background of this matter is set forth in detail in the judge’s decision. Slip op. at 4-13. Briefly, Mammoth Coal Company operates the Mammoth Coal Processing Plant and River Tipple. *Id.* at 1. Although it has changed ownership several times, miner Robert Nickoson has worked at the plant his entire career, beginning in 1975. Slip op. at 6; Tr. 12. As relevant here, in January 2010, Nickoson was designated as a miners’ representative. Slip op. at 7; Tr. 17. As a miners’ representative, Nickoson accompanied inspectors from the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Slip op. at 6. During one inspection,

Nickoson, who was also accompanied by Charles Hamilton, a Mammoth representative, pointed out several pieces of equipment in disrepair, which resulted in the issuance of citations to Mammoth. Slip op. at 7. Nickoson testified that he said to Hamilton “I hope you don’t get mad at me,” to which Hamilton replied “I hope you don’t get mad at me.” Slip op. at 7; Tr. 20-21. Nickoson believed this meant that Hamilton would report Nickoson’s conduct during the inspection to the Mine Superintendent Jon Adamson. Slip op. at 7; Tr. 21, 56.

Nickoson also testified that when the company asked for volunteers to form the “Running Right” safety committee, he volunteered but was denied. Slip op. at 7 n.4; Tr. 28-29. Mammoth allowed two other miners’ representatives, not known for making safety complaints, to join the committee. Slip op. at 7 n.4; Tr. 27-33.

In June 2011, Nickoson was denied the right as a miners’ representative to accompany an MSHA inspector during an inspection, allegedly due to deficiencies in his miners’ representative paperwork. Slip op. at 7; Tr. 22. Nickoson testified that Adamson was involved in the determination that he could not participate as a miners’ representative. *Id.* In order to regain his position as a miners’ representative, Nickoson was required to fill out paperwork, have it approved by MSHA, and then take the company’s “Running Right” safety class. Slip op. at 7; Tr. 23, 26. Nickoson subsequently filed a section 105(c) discrimination complaint with MSHA regarding this incident. Slip op. at 7; Humphrey Aff. at 2.¹ Nickoson filed additional paperwork with MSHA and was recognized as a miners’ representative by the end of June 2011. Tr. 53-54.

On the morning of January 12, 2012, Nickoson became ill and went to the emergency room. Slip op. at 8. Nickoson’s wife called Mammoth to say that Nickoson was being treated for kidney stones and that he would not make it into work that day. *Id.* Nickoson missed two days of work. *Id.* When he returned to work on January 16, Nickoson and other miners attended a safety meeting conducted by his foreman, Roger Powers. *Id.* At the end of the meeting, Nickoson asked Powers what type of days had been turned in for Nickoson’s absences, to which Powers replied that personal days had been turned in. Slip op. at 8; Tr. 37. Nickoson cursed and made heated statements, noting in part his displeasure that personal days had been used. Slip op. at 8; Tr. 37-38, 70. The next day, Nickoson was asked to sign a piece of paper notifying him that he was being suspended for five days with an “intent to discharge.” Slip op. at 9; Tr. 43. Nickoson refused to sign it because he did not believe that he had done what was described in the paper. *Id.*

On January 23, 2012, Nickoson went back to work for a “return-to-work” meeting with management. *Id.* Nickoson brought a union representative with him, but the representative was not allowed in the meeting. Slip op. at 9; Tr. 44. Nickoson testified that during the meeting he was questioned about the absentee policy. Slip op. at 9; Tr. 45. In addition, among other things, Nickoson asked about an incident in 2011, in which a boss brought uncertified men into a locked power substation that was restricted to entry by certified electricians only. *Id.* Nickoson testified

¹ This matter remains under investigation. Slip op. at 7; S. Br. at 3 n.1.

that he had previously reported the incident but that Mammoth had taken no action. Slip op. at 9; Tr. 44-46. Nickoson was eventually informed during the meeting that he was being terminated. Slip op. at 9. It is Mammoth's position that Nickoson was terminated due to his insubordinate and unprofessional conduct at the January 16 safety meeting. Pet. at 1; Slip op. at 12; Tr. 133.

Nickoson filed a section 105(c) complaint on February 3, 2012, alleging that his termination on January 23 was motivated by his protected activity while serving as a miners' representative. Slip op. at 1. On April 30, 2012, the Secretary filed an Application for Temporary Reinstatement. On May 8, 2012, Mammoth requested a hearing on the matter, and the hearing was held on May 21. *Id.* at 2.

The judge determined that Nickoson's complaint was not frivolously brought. *Id.* at 16. He determined that the record indicates that Nickoson engaged in protected activity when he became a miners' representative in January 2010 and began reporting equipment defects to management, when he accompanied inspectors during their inspections and when he identified a dangerous situation concerning the power substation. *Id.* at 13. The judge further concluded that there was sufficient evidence to allow one to have reasonable cause to believe that Nickoson's termination was motivated in part by that protected activity. *Id.* at 3, 13-16. The judge relied on evidence that could support an inference of discriminatory intent, such as Mammoth's knowledge of the protected activity, its hostility or animus toward that activity, a coincidence in time between the protected activity and the adverse action, and disparate treatment. *Id.* at 13-16.

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). In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009).

As recognized by the judge, slip op. at 3, 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. *Cam Mining*, 31 FMSHRC at 1088. 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. 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 (Apr. 1981). The Commission has identified the following indicia of discriminatory intent to establish a nexus between the protected activity and the alleged discrimination: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *CAM Mining*, 31 FMSHRC at 1089; *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)).

Mammoth does not take issue with the judge's application of law to this matter. Pet. at 3-4. Rather, the operator argues that Nickoson's testimony was not sufficiently credible to constitute "substantial evidence" that his discharge was motivated in part by his alleged protected activity. *Id.* Specifically, Mammoth points to alleged inconsistencies in Nickoson's testimony regarding the incident in which he was refused the ability to accompany an MSHA inspector as a miners' representative due to alleged problems in his paperwork and Adamson's involvement in this incident, as well as the extent and timing of Nickoson's heated comments during the January 16, 2012 safety meeting. Pet. at 4-9. Consequently, Mammoth contends that because the evidence the Secretary offered, and upon which the judge relied, consisted solely of inconsistent testimony by Nickoson, the judge's ruling must be reversed. Pet. at 3-4, 9-10.

Mammoth incorrectly frames the issue before us. The judge's responsibility at the temporary reinstatement phase is to determine if the Secretary has proven that a non-frivolous issue exists as to whether the adverse action was motivated in part by the miner's protected activity. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 718-19 (July 1999). A non-frivolous issue may be shown where there is both supporting and detracting evidence in the record. *Id.* Thus, the question posed in this case is whether substantial evidence supports the judge's finding that the complaint is not frivolous.

Contrary to Mammoth's assertion that the record consisted only of Nickoson's testimony, with her Application for Temporary Reinstatement, the Secretary also submitted the affidavit of MSHA Special Investigator James R. Humphrey (Ex. A), Nickoson's discrimination complaint (Ex. B), and Mammoth's disciplinary action form submitted at the hearing (Gov. Ex. 1). *See* Slip op. at 4-6; Tr. 3, 131. The judge included this evidence in his consideration. Slip op. at 4-6, 12.

Moreover, it is premature to address the operator's credibility challenge. Even if there are internal inconsistencies in Nickoson's testimony, such conflicts need not be resolved at this stage of the proceedings. *Cam Mining*, 31 FMSHRC at 1089-91; *see also Chicopee Coal Co.*, 21 FMSHRC at 719 (finding that 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"); *see generally Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988) (concluding that the "court need not

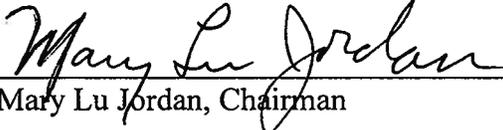
concern itself with resolving conflicting evidence if facts exist which could support the Board's theory of liability").

Considering the record as a whole, we conclude that substantial evidence supports the judge's determination that the complaint is not frivolous. Nickoson's testimony, his discrimination complaint, and Humphrey's affidavit support the judge's findings that Nickoson engaged in protected activity, and that a sufficient nexus existed between the protected activity and the alleged discrimination.² We intimate no view as to the ultimate merits of this case.

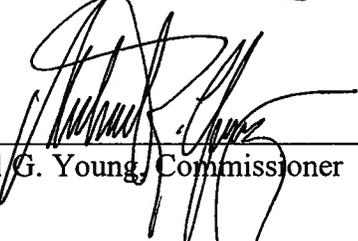
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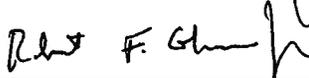
Conclusion

For the foregoing reasons, we affirm the judge's determination that Nickoson's discrimination complaint is not frivolous and that temporary reinstatement is appropriate.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

² Because Mammoth does not directly challenge any of these elements of the judge's analysis, we need not elaborate further.

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