

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 29, 2014

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA), on behalf  
of REGALD ROBBINS,  
Complainant,

v.

ALDEN RESOURCES, LLC,  
Respondent.

TEMPORARY REINSTATEMENT  
PROCEEDING

Docket No. KENT 2014-594-D  
BARB-CD-2014-04

Mine ID: 15-17691  
Mine: Mine #3

**AMENDED ORDER ON TEMPORARY REINSTATEMENT**

Appearances: Angele Gregory, Esq., U.S. Department of Labor, Office of the Solicitor  
Nashville, Tennessee for the Complainant

Tony Opegard, Esq., Attorney-at-Law Lexington, Kentucky for Regald Robbins

Billy Shelton, Esq., Jones Walters Turner & Shelton, PLLC, Lexington, Kentucky  
for Respondent

Before: Judge James G. Gilbert

This case is before me upon an application for temporary reinstatement filed by the Secretary on behalf of the complainant under section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c) and 29 C.F.R. §2700.45.

On June 25, 2014, Respondent made a timely request for a hearing that was held on July 22, 2014, in Louisville, Kentucky.

**I. Facts Not in Dispute**

1. Respondent Alden Resources, LLC (“Alden Resources” or “Respondent”) is an “operator” as defined in section 3(d) of the Mine Act.
2. Mine #3, located in Knox County, Kentucky is a coal mine and is subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its designated Administrative Law Judge pursuant to sections 105 and 113 of the Mine Act.

4. Prior to his termination by Alden Resources, Regald Robbins was a “miner” as defined in section 3(g) of the Mine Act.

## **II. Summary of Relevant Evidence**

Regald Robbins was employed by Alden Resources at Mine #3. He began his employment with Alden Resources in 2011. Gov. Exh 1. Prior to his termination on April 26, 2014, Robbins was section foreman for the first shift (commencing at 7:00 a.m. and ending at 4:00 p.m.). Tr. 16-18.

On March 13, 2014, Robbins was working the continuous miner in section 007 of Mine #3. Tr. 44. On that day, he had a conversation with Mine Superintendent Ernie Miller. *Id.* Robbins testified that he expressed to Miller his concern about operation of the continuous miner with a faulty scrubber. Tr. 44-45. Robbins stated that Miller told him to continue the operation of the continuous miner because the MSHA Inspector had left for the day. *Id.* Robbins stated that operation of the continuous miner with the faulty scrubber would likely result in another citation from MSHA. *Id.* He was told by Miller to do so anyway. *Id.*

After that date, Robbins testified that his formally cordial relationship with Miller changed. Tr. 46. He stated that Miller was no longer willing to engage in “friendly chit-chat” and that he had become distant. Tr. 62.

On March 24, 2014, MSHA Inspector Wendill Fuson conducted an inspection of Mine #3, including the area of section 007 of the mine in which Robbins was section foreman. Tr. 19; Resp. Exhs. 5-8. As part of the inspection, the mine received four 104(d) citations for roof issues, including one citation for failure to conduct proper pre-shift examinations. Resp. Exhs. 5-8. At a safety meeting convened the following day, several members of Alden Resources management, including Ernie Miller, George Saylor, Frank Shannon, Ted Harrell, Sam Brashear, Shannon Jones, and Globe Specialty Metals Vice-President Jean Duplessis, met with the section foremen of the mine that received the citations, including Robbins, Hobart Teague, Bryan Lewis, and Lawrence Bray. Tr. 22. In the meeting, conducted by Duplessis, the attendees were asked if they had any concerns about the safety of the mine. Tr. 23. Robbins testified that, in response to this question, he stated that he intended to place five-foot bolts in the roof of section 007. “That’s when Fred said, do you all think this mine is hazardous or unsafe? That’s when I said, yes, I think we need to start putting up five-foot roof bolts because the top is busted up everywhere.” Tr. 23. No one else answered the question or offered any comments regarding the safety of the mine. Tr. 24.

At the meeting, Robbins was informed that he and the other foremen for that section were suspended for three days. Tr. 24. On March 27, 2014, the day before the termination of the three day suspension, Miller telephoned Robbins and told him he would be working the weekend shift. Tr. 27. Miller stated that Robbins was to work Fridays, Saturdays, and Sundays until he completed a course on pre-shift examinations. *Id.* Miller told Robbins that after the completion of the course, he would return to his regular shift. *Id.* Following those instructions, Robbins worked the weekend of March 28, 2014, and worked the weekend beginning on Friday, April 4, 2014. Tr. 28. Robbins attended the required training on Tuesday, April 8, 2014, and returned to

the mine for his regular shift on Wednesday, April 9, 2014, consistent with Miller's instructions. Tr. 30. However, when Robbins returned to work on April 9, 2014, he was informed by Miller that he was to remain on the weekend shift. *Id.* Robbins asked why, and Miller said that among other things, his men did not like him. Tr. 30-31. Miller did not alter Robbins' weekend work schedule at that time. Tr. 31. Robbins then had a conversation with Shannon in which he requested leave for the following weekend due to his wife's surgery. Tr. 33. Shannon approved the leave for the requested dates of Friday, April 18, 2014, through Sunday, April 20, 2014, to attend to his wife's scheduled surgery. *Id.*

Robbins returned for his shift on Friday, April 11, 2014, through Sunday, April 13, 2014. Tr. 32. As he had approved leave for the following weekend, Robbins did not return to work the weekend of April 18, 2014. On April 24, 2014, Robbins received a telephone call from Harrell in which Harrell informed Robbins he was terminated for unexcused absences. Tr. 36. Robbins requested to meet with Shannon and a meeting was held the following day with Shannon, Harrell, and Saylor. Tr. 36-37. Robbins protested his termination and explained that he had followed the schedule given to him by Miller. Tr. 38. As Miller was not at the meeting, Shannon stated they would meet after he discussed the matter with Miller. Tr. 38-39. The following day, April 26, 2014, Shannon met with Robbins and told him that Miller denied giving him the modified schedule and Robbins was terminated. Tr. 39.

Respondent presented several witnesses whose stories diverged from Robbins' testimony. Regarding the meeting on March 25, 2014, Duplessis stated that Robbins did make a comment about putting up five-foot roof bolts but that he did not consider the comment a safety complaint. Tr. 112. Shannon testified that Duplessis asked the question of safety concerns but that Robbins' comments were not in response to that question. Tr. 221. Saylor corroborated Shannon's testimony on this issue, though Saylor testified that Shannon asked the question. Tr. 136-37.

Saylor claimed to have explained to Robbins that his schedule for the weekend meant Thursday, Friday, Saturday, and Sunday and either Monday or Tuesday third shift. Tr. 140-41. Saylor testified that the conversation with Robbins regarding his schedule occurred on Sunday, April 13, 2014. *Id.* Saylor also testified that when Robbins failed to show for the Monday or Tuesday shift on April 14<sup>th</sup> and 15<sup>th</sup>, he reported the absence to Miller but did not write up Robbins for his absence. Tr. 157. Shannon testified that he took Saylor's statement as to the conversation with Robbins on April 13<sup>th</sup> as true, although Robbins denied that Saylor ever said anything to him regarding his schedule. Tr. 241-42. Respondent argues that Robbins' unexplained absences were the sole basis for the termination.

Complainant argues that Respondent's termination for unexcused absences was merely a pretext. Complainant's case theorizes that the termination was likely the result of either the protected activity that took place on March 13, 2014, when Robbins argued with Miller about the inoperable scrubber, or as the result of the comments he made at the safety meeting on March 25, 2014, or a combination of both. Complainant argues that Miller's attitude toward Robbins after the scrubber incident changed, and that it was also Miller, who now had a level of animus toward Robbins, who gave Robbins the apparent misinformation regarding the shift he was supposed to work. Thus, Complainant surmises that Miller set up Robbins for his termination by deliberately misleading him as to his proper schedule.

### III. Discussion

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” recognizing that “if miners are to be encouraged to be active in matters of safety and health they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong. 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. §2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been “frivolously brought.” Rule 45(d) provides:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner’s complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

29 C.F.R. § 2700.45(d).

In its decision in *Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court noted that the “frivolously brought” standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

The legislative history of the Act defines the ‘not frivolously brought standard’ as indicating whether a miner’s ‘complaint appears to have merit’—an interpretation that is strikingly similar to a reasonable cause standard. In a similar context involving the propriety of agency actions seeking temporary relief, the former fifth circuit construed the ‘reasonable cause to believe’ standard as meaning whether an agency’s ‘theories of law and fact are not insubstantial or frivolous.’

920 F.2d at 747 (citations omitted).

While the Secretary is not required to present a prima facie case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the “not frivolously brought” standard. As a general proposition, to demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in a safety related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

It is not the judge’s duty to resolve conflicts in testimony or to entertain the operator’s rebuttal or affirmative defenses at the preliminary stage of the proceedings. *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717 (July 1999). It is sufficient to find the Complainant engaged in protected activity, the respondent had knowledge of that activity, and there was a coincidence in time between the protected activity and adverse action. *Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009).

For its part, Respondent argues that there exists a lack of nexus between the alleged protected activity and the termination. However, Respondent views the case too narrowly. At this stage, Complainant need only make a non-frivolous allegation. Complainant’s theory of his case is a bit more nuanced than Respondent acknowledges. Complainant cites two protected activities; the first occurring on March 13, 2014, and the second occurring on March 25, 2014. Likewise, Respondent alleges two adverse actions. The first being placed on the weekend shift after completion of the mandatory training while presumably similarly situated individuals (namely Lawrence Bray) were not similarly punished after the completion of the training. Management testified that Bray returned to work as shift foreman on or about April 8, 2014. Tr. 238. Thus, the nexus is approximately three weeks. The second adverse action was the termination of his employment on June 26, 2014.

The first adverse action is clearly in a timeframe closely related to the date of Robbins statements in the safety meeting. The second adverse action, the termination on April 26, 2014, is about six weeks after the initial alleged protected activity. Intervening in that time period is the allegation that Miller deliberately misled Robbins regarding his schedule, the three-day suspension, and other factors relating to the discrimination claim. I cannot state as a matter of law that the adverse action in this case is not so close in time to the protected activities alleged to render the allegation frivolous. The Commission has found lengths as far as several months as being within the nexus to permit a finding of discrimination. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks); *Sec’y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners’ contact with MSHA and the operator’s failure to recall miners from a lay-off; however, only one month separated

MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). Thus, I cannot conclude that the allegations regarding the timing of the protected activity to the adverse action are frivolous under existing Commission precedent.

Respondent also argues that the statement made by Robbins at the safety meeting on March 25, 2014, does not constitute "protected activity" because it was not in response to the question posed to the group about the safety of the mine. This argument fails for several reasons. First, Robbins' statement is related to a safety issue that was serious enough to result in MSHA citations. Robbins' statement relates to a repair that could or should be done to protect miners from danger of roof collapse, which was the subject of the citation. Whether that is or is not the most appropriate repair or remedy for the situation is not an issue. Thus, the statement certainly is sufficient to render it a non-frivolous allegation of protected activity. Also, Respondent's argument requires me to accept Respondent's witnesses' testimony as more credible than Robbins' testimony that his statement indeed was in response to the query presented by management regarding safety of the plant. That calls for a credibility determination that is beyond the scope of this temporary reinstatement proceeding. Finally, the argument that the potential protected activity must be in response to a specific query from management in a meeting held to discuss safety issues seems to me to be quite a stretch.

While Respondent presented witnesses in this hearing to contradict facts testified to by Robbins, the temporary reinstatement hearing is not the forum to try Complainant's discrimination case or Respondent's defense. In the limited review that is the subject of a temporary reinstatement hearing, Complainant need only show that the allegations presented in the Complaint are not frivolously brought. The Complainant succeeded in doing so at this hearing. The evidence is sufficient to establish reasonable cause that Robbins did engage in protected activity, management was aware of the protected activity, and there was a sufficient nexus in time between the protected activity and the adverse actions, including his termination.

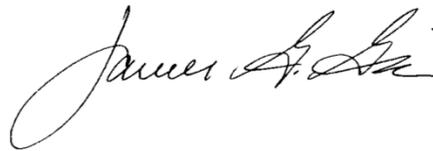
The Secretary seeks reinstatement to Robbins' former position as section foreman. Respondent argues that reinstatement should be to the position he occupied on the date of his termination, which was electrician troubleshooter on the weekend shift. Respondent offers that since the weekend shift has been eliminated, Robbins can return to his position as electrician troubleshooter on the first shift during the week.

The goal of the temporary reinstatement is to place the miner in the same financial position as though the alleged discrimination had not occurred. This requires that we turn back the clock to March 25, 2014, at which time Robbins was a section foreman at Mine #3, prior to his suspension, and prior to the decision to place him on the weekend shift, both of which are included as allegations of discrimination under the Complaint, and resulted in fewer hours, and therefore less pay than Robbins received prior to March 25, 2014.

**ORDER**

For the reasons set forth above, the Secretary's *Application for Temporary Reinstatement* is **GRANTED**.

Alden Resources, LLC is **ORDERED** to immediately reinstate Regald Robbins to his former position as section foreman in Mine #3 during the first shift (7:00 a.m. to 4:00 p.m.) with all rights and benefits to which he is entitled. This includes a forty-hour workweek at the rate of pay of \$28 per hour, as well as all overtime customarily available to similarly situated employees.



James G. Gilbert  
Administrative Law Judge

Distribution: (*Electronic and U.S. Mail*)

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