

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 31, 2020

SECRETARY OF LABOR
U.S. DEPARTMENT OF LABOR obo
KENNETH R. HAWKINS,
Complainant

v.

NEW POINT STONE COMPANY,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. LAKE 2021-0036
MSHA Case No. VINC-CD-2021-01

Mine: St. Paul Stone
Mine ID: 12-00115

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge McCarthy

This matter is before the undersigned on the Secretary of Labor’s Application for Temporary Reinstatement filed on behalf of miner Kenneth R. Hawkins pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., as amended (“Mine Act”), and 29 C.F.R. § 2700.45. The Secretary seeks an order temporarily reinstating Hawkins to his former position with New Point Stone Company pending the investigation and disposition of a Discrimination Complaint under section 105(c) of the Act.

On October 19, 2020, Hawkins filed a Discrimination Complaint with MSHA. The Secretary found that the Complaint was not frivolously brought and filed an Application for Temporary Reinstatement (“Application”) on December 21, 2020.

In an email on December 30, 2020, the Respondent indicated that it was waiving its right to a temporary reinstatement hearing and its intention, following my order of temporary reinstatement, to file a motion to toll the temporary reinstatement order supported by documentation and affidavits.

I. Statement of the Case

The Application alleges the following facts. Hawkins was a miner working at the St. Paul Stone quarry mine for New Point Stone Company, a mine operator within the meaning of the Mine Act. Application at 1-2, ¶¶ 3-5. On September 15, 2020, Hawkins was involved in a haul truck accident at the mine. *Id.* at 2, ¶ 6. On October 8, 2020, Dan Wanstrath, the mine owner and plant manager, held a meeting where he read a site-specific, hazard-training document and then asked the miners, including Hawkins, to sign a training form. Hawkins refused, believing that signing the document “was not right” and that he should have received the training

prior to the accident. Wanstrath then informed Hawkins that he no longer had a job for Hawkins. *Id.*

Hawkins then started to leave the room and, when questioned by Wanstrath, stated that he was going to call MSHA. Wanstrath then put his hands on Hawkins and asked him to “[s]it down and we will talk about it.” *Id.* at 3, ¶ 6. After another miner told Hawkins that he had a right to call MSHA, Wanstrath backed away and Hawkins left the room. *Id.*

Hawkins returned to the room after calling MSHA. Wanstrath then told Hawkins that Hawkins had already received the required training. Wanstrath then produced a training document dated July 20, 2020. The training document was not initialed by Hawkins, and Hawkins insisted that he had never had that training. Wanstrath told Hawkins to get in the truck and he would drive Hawkins around mine property to explain the training and then Hawkins could sign the document dated July 20, 2020. Hawkins again refused, stating that he was not going to “cover [Wanstrath’s] ass” by falsifying a document. Wanstrath then fired Hawkins, stating, “[t]hen, like I said earlier, I have no work for you.” *Id.*

Based on the above allegations, the Application states that Hawkins engaged in protected activity when he refused to sign the training document, believing that Wanstrath was asking him to falsify a document, and when he called MSHA. *Id.* at 2, ¶ 6. As a remedy, the Application requests

that an Order of Temporary Reinstatement be issued directing the Respondent to reinstate [Hawkins] to the position he held immediately prior to his termination or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him.

Id. at 3, ¶ 7.

II. Legal Principles and Analysis

Section 105(c)(2) of the Mine Act provides that, as to claims of discrimination, “if the Secretary finds that such 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.” When no hearing is requested, the determination that the complaint is not frivolously brought is based on the contents of the Secretary’s application. 29 C.F.R. 2700.45(c) (2017).

The elements of a discrimination claim provide a useful framework to assess whether an allegation is frivolous. *Sec’y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). To establish a prima facie case of discrimination under section 105(c) of the Act, a complainant must establish (1) that he or she 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 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

For a temporary reinstatement proceeding, the Secretary need not prove a causal nexus exists between the protected activity and the adverse action; the Secretary need only demonstrate that there is a non-frivolous issue as to the causal nexus. As explained by Judge Manning, a Commission judge should determine the issue of causal nexus was not frivolously brought if “evidence was presented to show that the adverse actions could have been motivated at least in part by the protected activity.” *Sec’y of Labor on behalf of Bradley v. Climax Molybdenum Co.*, 34 FMSHRC 2808, 2821 (Oct. 2012) (ALJ). The Commission has recognized that direct evidence of motivation is rarely encountered and that the only available evidence is often indirect. *See, e.g., 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 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, and (3) coincidence in time between the protected activity and adverse action. *Id.*

The Secretary has sufficiently demonstrated that the Application was not frivolously brought as to the issue of protected activity. The Application alleges that Hawkins refused to falsify a training document and contacted MSHA. Application at 2, ¶ 6. Section 105(c) of the Act, protects miners against retaliation for refusing to violate the Act or any safety or health regulation promulgated under it, including the refusal to falsify training documents.

Additionally, the Application alleges that Hawkins engaged in protected activity when he contacted MSHA. 30 U.S.C. § 815(c)(1) (“[n]o person shall discharge or in any other manner discriminate against...because such miner...has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator’s agent...of an alleged danger or safety or health violation”).

The Secretary has sufficiently demonstrated that the Application was not frivolously brought as to the issue of adverse action. The Application alleges that New Point Stone Company terminated Hawkins on October 8, 2020. Application at 3, ¶ 6.

Furthermore, the Secretary has also sufficiently demonstrated that the Application was not frivolously brought as to the nexus between the protected activity and the adverse action. The termination occurred on the same date and amid Hawkins’s repeated refusals to falsify training documents—a protected activity that appears to be based on reasonable, good-faith belief.

III. Order

For the foregoing reasons, Respondent New Point Stone Company is **ORDERED** to immediately reinstate Kenneth R. Hawkins to the position he held immediately prior to his termination on or about October 8, 2020, or to a substantially equivalent position at the same rate of pay, with the same benefits, and with the same or equivalent duties assigned to him.

This Order of Temporary Reinstatement is not open-ended. It will end upon final order on the underlying discrimination complaint as set forth in section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not he will file a complaint with the Commission under section 105(c)(2) of the Act and so advise Hawkins, the Respondent, and this administrative tribunal.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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