FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 11, 2021

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of TRACY A. LEWIS, Complainant, v. TIP TOP MATERIALS, LLC, Respondent	TEMPORARY REINSTATEMENT Docket No. VA 2021-0008-D MSHA Case No.: NORT-CD 2021-03 Mine: Tip Top Materials, LLC Mine ID: 44-07399

ORDER GRANTING TEMPORARY REINSTATEMENT OF TRACY A. LEWIS

Before: Judge Young

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor ("Secretary") on February 26, 2021, filed an Application for Temporary Reinstatement of miner Tracy A. Lewis ("Complainant") to his former position with Tip Top Materials, LLC ("Respondent") at Respondent's mine pending final hearing and disposition of the case.

According to Commission Rule 45, a request for hearing must be filed within 10 days following receipt of the Secretary's application for temporary reinstatement. 29 C.F.R. § 2700.45(c). The Secretary's certificate of service states that the Application for Temporary Reinstatement of Complainant was served on Respondent by electronic mail on February 26. The Respondent has not filed a timely Request for Hearing.

The Secretary has found that the Complaint was not frivolously brought and, as explained below, has provided evidence supporting that determination. Therefore, consistent with Section 105(c)(2) of the Act, the temporary reinstatement of Tracy A. Lewis is granted.

Law and Regulations

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act and provides that a miner may file a complaint with the Secretary alleging discrimination. 30 U.S.C. § 815(c)(1-2). The plain language of the Act also provides that "if the Secretary finds that the complaint was not frivolously brought, the Commission, on an expedited basis upon application by the Secretary, *shall* order the immediate reinstatement of the miner pending final order on the Complaint." 30 U.S.C. § 815(c)(2) (emphasis added).

The Commission's regulations control the temporary reinstatement procedures. Once an application for temporary reinstatement is served on the person against whom relief is sought,

that person shall notify the Chief Administrative Law Judge or his designee within 10 calendar days whether a hearing on the application is requested. 29 C.F.R. § 2700.45(c). If no hearing is requested, the Judge assigned to the matter shall review immediately the Secretary's application and, if based on the contents thereof, the Judge determines that the miner's complaint was not frivolously brought,[1] shall issue immediately a written order of temporary reinstatement. *Id.*

If there is a hearing, the judge must determine whether the complaint of the miner "is supported by substantial evidence and is consistent with applicable law."[2] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.,* 15 FMSHRC 2425, 2426 (Dec. 1993). In the instant case, however, the Respondent has not timely filed a request for hearing. Thus, Commission Procedural Rule 45(c) compels me to review the Secretary's determination that the Complaint in this matter was not frivolously brought. *See* 29 C.F.R. § 2700.45(c).

Disposition

The Secretary has provided the evidentiary basis for his determination that the complaint in this matter has not been frivolously brought. The Act requires the Secretary to investigate the miner's complaint of discrimination. 30 U.S.C. § 815(c)(2). The Secretary's application includes the complaint filed by Complainant (Exhibit "A" to the Application) and the Declaration of Special Investigator Michael R. Hughes indicating that this was done (Exhibit "B.")

Mr. Hughes' Declaration provides facts in support of the Secretary's conclusion that the complaint was not frivolously brought, including:

1. Complainant was a "miner" employed as a foreman at a "mine" operated by a "person," as defined by the Act;
2. Complainant participated in an MSHA investigation into a discrimination complaint arising from the firing of his son, Matthew Lewis, allegedly for filing a safety complaint with MSHA;
3. Complainant had been ordered by the mine superintendent to fire his son for making a safety-related complaint to MSHA, and that he carried out the order;

[1] The Act's legislative history suggests that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (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 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *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, 747 & n.9 (11th Cir. 1990).

[2] "Substantial evidence" means "such relevant evidence as a reliable 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)).

4. Complainant was subsequently terminated from his employment under circumstances that Mr. Hughes found to provide "reasonable cause to believe that Tracy Lewis was discharged because he engaged in protected activities."

Dec. of Michael R. Hughes, Feb. 4, 2021 (Ex. "B" to App. For Temp. Reinst.)

The Complaint was timely filed, within a week after Complainant was terminated. It includes additional allegations relevant to MSHA's decision. Complainant stated that he was told by other employees at the mine that Complainant would be "gone in two weeks," and that he was told he was fired for approaching too quickly in his vehicle upon learning of a confrontation between his son and the mine superintendent and other employees.

The facts provided in support of the agency's decision, if true, would establish jurisdiction, a timely complaint of discrimination, and that Complainant engaged in protected activity and suffered an adverse action close in time to the protected activity, under circumstances that provide a reasonable cause to believe that there was a causal nexus between his participation in an MSHA investigation and his termination.

Findings and Conclusion

At this stage, the facts alleged by the Secretary are undisputed. Therefore, I find that the Complaint for discrimination has not been frivolously brought, and that Complainant Tracy A. Lewis is entitled to Temporary Reinstatement under the provisions of Section 105(c) of the Act.

ORDER

It is hereby **ORDERED** that **Tracy A. Lewis** be **immediately TEMPORARILY REINSTATED** to his former job as a foreman at the Tip Top Materials mine at his former rate of pay, overtime, and all benefits he was receiving at the time of his termination.

This Order **SHALL** remain in effect until such time as there is a final determination in this matter by hearing and decision, approval of settlement, or other order of this court or the Commission.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary **SHALL** also **immediately** notify my office of any settlement or of any determination that Tip Top Materials, LLC, did not violate Section 105(c) of the Act.

Michael G. Young
Administrative Law Judge

Distribution (Via Certified Mail & E-mail)

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